[Cite as *Westlake v. Mergo*, 2010-Ohio-1867.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93455

CITY OF WESTLAKE

PLAINTIFF-APPELLEE

vs.

MICHAEL M. MERGO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Rocky River Municipal Court
Case No. 09 CRB 0041

BEFORE: Blackmon, J., Kilbane, P.J., and Cooney, J.

RELEASED: April 29, 2010

JOURNALIZED:

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Michael M. Mergo appeals his conviction for falsification and assigns eight errors for our review.[1]

{¶ 2} Having reviewed the record and relevant law, we affirm Mergo's conviction. The apposite facts follow.

{¶ 3} Mergo was charged with one count of falsification under Westlake Codified Ordinances 525.02. He pled not guilty, and the matter proceeded to a jury trial.

Jury Trial

{¶ 4} On December 1, 2008, Mergo filed a report of fraud with the Westlake Police Department. Officer Jeff Laeng took the police report. Mergo claimed his ex-girlfriend, Jessica Cochran, opened a cellular phone account with Verizon in his name without his knowledge or consent. Mergo and Cochran had dated on and off for six years and had lived together for two years until October 5, 2008, when Cochran moved out.

{¶ 5} Mergo told Officer Laeng, orally and in writing, that he first learned of the account on October 1, 2008. He claimed he reported it to Verizon, and Verizon told him that he needed to file a police report in order for Verizon to resolve the outstanding charges on the phone. According to

[1]See appendix.

the officer, Mergo stated several times that he wanted Cochran to be prosecuted.

{¶ 6} Cochran testified that Mergo was with her when she opened the account on May 2, 2008 at a kiosk at the Strongsville mall. At the time, Cochran worked at a store in the mall that was located near the kiosk. Cochran was acquainted with Piotr Cieckiewicz, who worked at the kiosk. According to Cochran, and corroborated by Cieckiewicz, Mergo was present; his driver's license was swiped to check his credit; and his paycheck stub was presented so that Cochran could receive Mergo's employer discount. The contract showed that it was entered on May 2, 2008 at 7:07 p.m. Cochran said that it would have been impossible for her to obtain Mergo's driver's license without his knowledge because he kept it in his wallet. She also stated that he was secretive with his paycheck stubs because he did not want her to know how much he earned; therefore, she did not know where he kept them.

{¶ 7} The transaction consisted of moving Cochran's existing Verizon account to a newly opened account under Mergo's name. Mergo did not use Verizon for his cellphone at the time, but had a contract with AT&T. According to Cochran, Mergo planned on switching to Verizon when his AT&T contract expired. Cochran also claimed that they performed the transaction this way not only so that she could receive the discount, but to

help Mergo improve his credit. Cochran was a customer in good standing with Verizon. In fact, because Verizon's credit check revealed Mergo had bad credit, Cochran had to pay a $150 deposit on the account. She did not have to pay a deposit when she previously opened her own account with Verizon.

{¶ 8} Mergo testified that he was not with Cochran at the time she opened the account. He claimed he was working at Home Depot until 6:00 p.m. and then went to his parents' house to eat dinner. His father corroborated the fact that Mergo had dinner with the family that night and that he arrived between 6:30 and 7:00 p.m. Mergo stated that he had discovered the account on October 1, 2008, when he attempted to open a Verizon account and was told he already had an existing account. He claimed that he asked Cochran to move out of the house on October 5, 2008, because she opened the account without his knowledge and was also behind on her portion of the rent. He also stated that when he made the report to the police, he told them it was in order to comply with Verizon's request for a police report and that he did not want Cochran to be prosecuted.

{¶ 9} According to Cochran, she decided to move out on October 5, 2008 because she and Mergo argued, and he threw her onto the floor. She claimed that ten minutes after she moved out, Mergo canceled the Verizon account.

{¶ 10} The jury found Mergo guilty as charged. The trial court sentenced Mergo to 180 days in jail, which was suspended on the condition

that Mergo maintain good behavior for one year. He was also ordered to pay a fine of $250 and court costs. The sentence was stayed pending appeal.

Sufficiency of the Evidence

{¶ 11} In his first and second assigned errors, Mergo argues the trial court erred by denying his motion for acquittal because his conviction was not supported by sufficient evidence.

{¶ 12} The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus as follows:

> **"Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."**

{¶ 13} See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394; *State v. Davis* (1988), 49 Ohio App.3d 109, 113, 550 N.E.2d 966.

{¶ 14} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, in which the Ohio Supreme Court held:

> **"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal**

conviction is to examine the evidence submitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. (*Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)"

{¶ 15} Mergo contends the City failed to present sufficient evidence of each element of falsification. Pursuant to Westlake Codified Ordinances 525.02, the elements of falsification are: (1) no person shall knowingly make a false statement, or knowingly swear or affirm the truth of a false statement previously made, and (2) the statement is made with the purpose to incriminate another.

{¶ 16} Mergo argues that the City failed to show that he knowingly made a false statement. He claims the evidence showed he did not know about the account until he called Verizon on October 1, 2008 to open an account.

{¶ 17} Cochran testified that Mergo was with her when she opened the account. Verizon employee, Piotr Cieckiewicz, corroborated Cochran's

testimony by stating that he was absolutely sure that Mergo was with Jessica Cochran when the account was opened. Viewing this evidence in the light most favorable to the City, sufficient evidence was presented that Mergo knowingly made a false statement to the Westlake Police Department.

{¶ 18} He also contends the City failed to present evidence that "the statement was made with the purpose to incriminate another." He claimed that he told Officer Laeng that he did not want Cochran to be prosecuted. In his written statement, he stated "I contacted Verizon Wireless Fraud Dept. about this account and was asked to fill out a police report for submittal [sic] to Verizon for their [sic] investigation." Mergo claims this shows that he only filed the report because Verizon needed it for its investigation. R.C. 2901.22(B), defines knowingly as follows:

> **"A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."**

{¶ 19} When a person files a police report, the obvious result is that the police will investigate the matter and seek prosecution of the offender. Officer Laeng also stated that if Mergo had told him he did not want to prosecute Cochran, but was simply filing the report pursuant to Verizon's

directive, he would have issued a "face complaint," which would merely document Mergo's side of the story without further investigation. The fact that a "face complaint" was not issued supports the officer's testimony that Mergo told him that he desired to pursue the prosecution of Cochran. Accordingly, construing this evidence in the light most favorable to the City, sufficient evidence was presented that Mergo wished to incriminate Cochran.

{¶ 20} Within this assigned error, Mergo also alleges the Westlake Police Department did not have jurisdiction to investigate because the alleged fraudulent contract was entered into in Strongsville, Ohio. However, Mergo, as a Westlake resident, was the person who chose to file the report with Westlake. Moreover, he failed to raise this objection to the trial court; therefore, he has waived any error as to this issue for purposes of appeal. *State v. Jones* (1991), 76 Ohio App.3d 604, 602 N.E.2d 751; *State v. Roskovich*, 7th Dist. No. 04 BE 37, 2005-Ohio-2719. Accordingly, Mergo's first and second assigned errors are overruled.

Manifest Weight of the Evidence

{¶ 21} In his third assigned error, Mergo argues his conviction was against the manifest weight of the evidence.

{¶ 22} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> **"The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the**

appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."

{¶ 23} However, an appellate court may not merely substitute its view for that of the jury, but must find that "in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541. Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." Id.

{¶ 24} Mergo argues the only evidence that supported Cochran's version of events over his was the testimony of Verizon employee, Piotr Cieckiewicz, who was Cochran's friend. Mergo also argues that the documentary evidence submitted indicated that Cochran was the only person to sign the contract. However, according to Cieckiewicz, he was absolutely sure Mergo was present and stated that he would not have been able to open the account without Mergo being present because he needed Mergo's driver's license to run a credit check, had to compare the photograph on the license with Mergo, and also needed Mergo's paycheck stub in order to apply the employer discount.

Cochran stated she would have been unable to obtain these items without Mergo being there because she did not have access to them.

{¶ 25} When there are two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one should be believed. *State v. Gore* (1999), 131 Ohio App.3d 197, 201, 722 N.E.2d 125. Rather, we defer to the jury who was best able to weigh the evidence and judge the credibility of witnesses by viewing the demeanor, voice inflections, and gestures of the witnesses testifying. See *Seasons Coal Co. v. Cleveland* (1994), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273; *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. Therefore, we defer to the jury regarding the credibility of the witnesses.

{¶ 26} Accordingly, Mergo's third assigned error is overruled.

Bill of Particulars

{¶ 27} In his fourth assigned error, Mergo contends that he was unaware which statement the City was alleging to be false because it never answered his demand for a bill of particulars.

{¶ 28} The record indicates that Mergo's attorney brought this issue to the trial court's attention prior to trial commencing. At that time, the prosecutor showed the court a handwritten note by his colleague in which she noted that Mergo's counsel was contacted via telephone regarding his demand for a bill of particulars. The note indicated that she identified the false

statement and that at the end of the conversation, defense counsel agreed that he had all of the information he had requested.

{¶ 29} Moreover, the City provided defense counsel with all relevant documentary evidence, including the police report and the witness statements. Mergo has failed to show how he was prejudiced when it appears he was supplied with the information he needed prior to trial. Additionally, the court offered to continue the trial for Mergo to obtain any information he believed he needed; Mergo's counsel declined. Thus, any error regarding the request for the bill of particulars has been waived. *State ex rel. Stern v. Butler*, 7th Dist. No. 98-JE-54, 2001-Ohio-3404; *State v. Barnett* (July 12, 1996), 2nd Dist. No. 15494. Accordingly, Mergo's fourth assigned error is overruled.

Compulsory Process

{¶ 30} In his fifth assigned error, Mergo contends that the trial court erred by refusing to compel Verizon to provide defense counsel with the requested policies and procedures manual for opening an account and the documented payment history of the account.

{¶ 31} The trial court could not compel Verizon to provide these documents because Mergo's attorney failed to identify a person in the subpoena upon whom the court could issue the compel order. The court asked counsel if he would like to continue the trial so that he could find out

the individual at Verizon that should be named on the subpoena. Counsel refused the court's offer. Therefore, any perceived error has been waived.

{¶ 32} Additionally, the absence of this documentary evidence did not prejudice Mergo's case. There was no dispute as to Verizon's policies and procedures regarding the opening of an account. The issue was whether Mergo was present as required by Verizon. Documents regarding the payment history on the account also would not be relevant because the falsification concerned the opening of the account. Both parties admitted that Mergo did not have a Verizon account at the time the contract was opened. Therefore, evidence that Cochran made the monthly payments was not relevant to the issue of falsification. Accordingly, Mergo's fifth assigned error is overruled.

Other Bad Acts

{¶ 33} In his sixth assigned error, Mergo argues that the trial court erred by allowing testimony regarding the physical altercation that took place between Cochran and Mergo the night before she moved out of the house.

{¶ 34} The trial court had granted Mergo's motion in limine to preclude evidence that Mergo was charged with domestic violence. The court stated that the prosecution could question the witnesses regarding the altercation, but could not use the words "domestic violence" or any mention that a crime occurred. At trial, the prosecution questioned Mergo, Cochran, and Cochran's

sister regarding the altercation. Although Cochran's and her sister's testimony indicated that Mergo threw Cochran from the bed onto the ground, pursuant to the court order, no mention of the domestic violence charge was mentioned.

{¶ 35} Moreover, testimony as to the altercation was relevant because Mergo maintained he asked Cochran to move out of the house on October 5, 2008 after he discovered she opened the account without his permission. According to Cochran, she decided to move out because of the physical altercation. Because Mergo linked Cochran's moving out to bolster his defense that he had no knowledge of the account, the court properly allowed testimony as to the physical altercation. The evidence also showed the possibility that Mergo closed the account because Cochran moved out, not because she opened the account without his permission. Accordingly, Mergo's sixth assigned error is overruled.

Unauthenticated Document

{¶ 36} In his seventh assigned error, Mergo contends the trial court improperly permitted Cieckiewicz to testify concerning a Verizon document that showed that Mergo allegedly called Verizon on June 16, 2008 to ask if he could add a line to the account. Cieckiewicz did not have any personal knowledge as to this conversation and could not authenticate the document.

{¶ 37} Although Mergo contends the court permitted Cieckiewicz to testify as to the documentation of the phone call, our review of the record indicates that the trial court did not permit the prosecution to elicit testimony as to the document. When the City attempted to question Cieckiewicz about the document, defense counsel objected, and a sidebar was conducted. The court stated that in spite of the fact that Verizon's legal department gave the document to Cieckiewicz in response to the City's subpoena, Cieckiewicz could not authenticate the document because he had no personal knowledge of the documented conversation. When the City again attempted to present the document during Mergo's cross-examination, the court again called a sidebar and determined the document still could not be admitted into evidence. Accordingly, Mergo's seventh assigned error is overruled.

Motion for New Trial

{¶ 38} In his eighth assigned error, Mergo argues the trial court erred by denying his motion for a new trial based on the above cumulative errors.

{¶ 39} Pursuant to the doctrine of cumulative error, a judgment may be reversed where the cumulative effect of errors deprives a defendant of his constitutional rights, even though the errors individually do not rise to the level of prejudicial error. *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168, 656 N.E.2d 623, certiorari denied (1996), 517 U.S. 1147, 116 S.Ct. 1444, 134 L.Ed.2d 564; *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509

N.E.2d 1256, paragraph two of the syllabus. Because we have not found any instances of error in this case, the doctrine of cumulative error is inapplicable. Accordingly, Mergo's eighth assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR

APPENDIX

Assignments of Error

"I. The evidence in this action was insufficient to sustain a conviction."

"II. The court erred when it denied appellant's motions for acquittal."

"III. The verdict was against the manifest weight of the evidence."

"IV. The court erred when it failed to compel the prosecution to supply appellant with a Bill of Particulars."

"V. The court erred when it denied appellant compulsory process and failed to compel the attendance of a Verizon representative and production of Verizon documents."

"VI. The court erred when it admitted evidence of other bad acts that had been precluded by its order in limine."

"VII. The court erred when it admitted testimony surrounding unauthenticated documents."

"VIII. The court erred when it denied appellant's motion for new trial."