[Cite as *State v. Burton*, 2016-Ohio-5380.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 15CAA100083
	:	
JOSEPH A. BURTON	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas, Case No. 14 CR I 09 0414
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	August 1, 2016

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
CAROL HAMILTON O'BRIEN DELAWARE CO. PROSECUTOR ANDREW M. BIGLER 140 North Sandusky St., 3rd Fl. Delaware, OH 43015	SCOTT A. ANDERSON MANGO LAW LLC 46 North Sandusky St. Delaware, OH 43015

Delaney, J.

{¶1} Appellant Joseph A. Burton appeals from the September 17, 2015 Judgment Entry on Sentence of the Delaware County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} This case arose in May 2014 when appellant came to the Delaware home of Fred "Mike" Thompson in response to Thompson's request for an estimate to take down trees and perform other yard work. At the time of these events, Thompson was 71 years old; one tree in his yard had already fallen and he believed four additional trees to be immediately "hazardous." The yard also contained brush piles to be cleaned up. Thompson sought several estimates for the work, ranging from $300 to $2500. Thompson acknowledged the difference in the estimates was due in part to different expectations about the amount of work to be performed.

{¶3} Thompson had a business card of appellant's and found him in the yellow pages under "Burton's Tree Service and Snow Removal." Thompson knew appellant somewhat because appellant's father had once been a customer of Thompson's motorcycle shop. Appellant came to the house and Thompson described the work he wanted to be done. As they negotiated the price, appellant said he needed $800 in cash right away to make a child support payment or else he could be in jail over the Memorial Day weekend. Appellant told Thompson this would be a problem because he wanted to see his son play in a game and he provided care for his father who was suffering from Alzheimer's.

{¶4} Thompson agreed to give appellant $800 cash that day.

{¶5} Appellee's Exhibit 1 is a yellow carbon receipt of a customer invoice form. Handwritten on the form is the agreement between appellant and Thompson: "I Joe Burton am cleaning up brush piles and removing trees for $800 paid in cash now." The agreement is signed by appellant and Thompson. Thompson later dated the agreement "May 14, 2014."

{¶6} Appellant took the $800 cash but did not perform the work despite Thompson's expectations and repeated attempts to contact him. Thompson expected appellant to perform the work after the holiday weekend. He called appellant several times; at first appellant offered excuses why he could not immediately do the work, but eventually he stopped answering Thompson's calls.

{¶7} Ultimately Thompson was forced to hire someone else to complete the work.

{¶8} Appellant was charged by indictment with one count of theft from an elderly person in an amount less than one thousand dollars, a violation of R.C. 2013.02(A)(3) and a felony of the fifth degree. Appellant entered a plea of not guilty and the case proceeded to trial by jury. Appellant was found guilty as charged and sentenced to a term of community control including, e.g., thirty days in county jail and restitution to Mike Thompson.

{¶9} Appellant now appeals from the September 17, 2015 Judgment Entry on Sentence of the Delaware County Court of Common Pleas.

{¶10} Appellant raises three assignments of error:

ASSIGNMENTS OF ERROR

{¶11} "I. MR. BURTON'S CONVICTION FOR THEFT BY DECEPTION SHOULD BE OVERTURNED AS VIOLATING DUE PROCESS BECAUSE THE STATE PRODUCED INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT, ON MAY 23, 2014, MR. BURTON "OBTAINED OR EXERTED CONTROL OVER" MR. THOMPSON'S PROPERTY "BY DECEPTION."

{¶12} "II. MR. BURTON'S CONVICTION FOR THEFT BY DECEPTION SHOULD BE OVERTURNED AS VIOLATING DUE PROCESS BECAUSE THE TRIAL COURT'S JURY INSTRUCTIONS FAILED TO INFORM THE JURY THAT THE STATE MUST PROVE THAT, ON MAY 23, 2014, MR. BURTON "OBTAINED OR EXERTED CONTROL OVER" MR. THOMPSON'S PROPERTY "BY DECEPTION."

{¶13} "III. MR. BURTON'S CONVICTION FOR THEFT BY DECEPTION SHOULD BE OVERTURNED ON GROUNDS OF UNCONSTITUTIONAL VAGUENESS BECAUSE AN OPEN-ENDED THEFT BY DECEPTION STATUTE PROVIDES NO NOTICE AS TO WHICH COMMERCIAL TRANSACTIONS MAY BE DEEMED CRIMINAL AND PERMITS ARBITRARY ENFORCEMENT BY POLICE."

ANALYSIS

I.

{¶14} In his first assignment of error, appellant argues appellee presented insufficient evidence to support his theft conviction. We disagree.

{¶15} The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at 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 admitted 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."

{¶16} In this case, appellant was found guilty of one count of theft from an elderly person pursuant to R.C. 2913.02(A)(3), which states, "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * * * [b]y deception[.]" Also relevant, R.C. 2913.02(B)(3) provides in pertinent part: "* * * [I]f the victim of the offense is an elderly person * * * a violation of this section is theft from a person in a protected class, and division (B)(3) of this section applies. Except as otherwise provided in this division, theft from a person in a protected class is a felony of the fifth degree. * * * *." R.C. 2913.01(CC) defines an "elderly person" as someone who is sixty-five years of age or older.

{¶17} Appellant argues appellee presented insufficient evidence that he obtained the $800 "by deception" because appellee did not disprove appellant's claim of needing the money to stay out of jail over unpaid child support. Appellant also contends appellee failed to establish his father does not have Alzheimer's, despite Thompson's observation that appellant's father appeared cogent and was driving a vehicle when he last spoke to him.

{¶18} We have reviewed the record and find appellant has misconstrued the meaning of "deception" in this case. The truth of appellant's explanation for needing immediate cash is irrelevant; the "deception" is appellant's promise to perform work for $800. Appellant took the money and didn't do the work.

{¶19} R.C. 2913.01(A) defines "deception" as "knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact." Appellee must prove the accused engaged in a deceptive act to deprive the owner of possession of property or services and that the accused's misrepresentation (or other conduct creating a false impression) actually caused the victim to transfer property to the accused. *State v. Edmondson*, 92 Ohio St.3d 393, 398, 2001-Ohio-210, 750 N.E.2d 587, citing *State v. Clifton,* 65 Ohio App.3d 117, 121-122, 583 N.E.2d 326 (12th Dist.1989).

{¶20} The instant theft case involves a contract for services. When proving a violation of R.C. 2913.02(A)(3), appellee must demonstrate that at the time the defendant took the money he had no intent to repay the money or perform under the contract in exchange. *State v. Coleman*, 2nd Dist. Champaign No. 2002CA17, 2003-Ohio-5724, ¶ 29, citing *State v. Bakies*, 71 Ohio App.3d 810, 595 N.E.2d 449 (8th Dist.1991). Performance of a significant amount of the work under the contract demonstrates an intent to perform the contract for purposes of R.C. 2913.02(A)(3). *State v. Kerr*, 6th Dist. Ottawa No. OT-13-036, 2015-Ohio-2228, ¶ 20, appeal not allowed*,* 143 Ohio St.3d 1480, 2015-Ohio-3958, 38 N.E.3d 901, citing *Coleman*, supra, 2003-Ohio-

5724 at ¶ 40. Conversely, minimal performance of a contract does not negate a finding of the required intent to support a conviction pursuant to R.C. 2913.02(A)(3). *Kerr*, supra, 2015-Ohio-2228 at ¶ 22, citing *State v. Dalton,* 11th Dist. Portage No. 2008–P–0097, 2009–Ohio–3149, ¶ 33; *State v. Smith,* 12th Dist. Butler No. CA2004–11–275, 2005–Ohio–6551, ¶ 17–18; *Coleman,* supra, 2003-Ohio-5724 at ¶ 31, 40.

{¶21} Appellee presented the uncontroverted testimony of Thompson and Exhibit 1, which establish appellant agreed to clean up trees and brush piles in exchange for $800 paid in full in cash. Thompson testified appellant did not do any of the work. The jury could infer from this circumstantial evidence appellant had no intention of ever performing the work. Circumstantial evidence is defined as "proof of facts or circumstances by direct evidence from which [the factfinder] may reasonably infer other related or connected facts that naturally and logically follow according to the common experience of people." *State v. Shabazz*, __Ohio St.3d__, 2016-Ohio-1055, __N.E.3d__, ¶ 18, reconsideration denied*,* 145 Ohio St.3d 1473, 2016-Ohio-3028, 49 N.E.3d 1315, citing *Ohio Jury Instructions,* CR Section 409.01(4) (Rev. Aug. 17, 2011). "Circumstantial evidence and direct evidence inherently possess the same probative value," *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph one of the syllabus, and it is within the province of the factfinder to draw reasonable inferences from the evidence presented. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The Ohio Supreme Court has "'long held that circumstantial evidence is sufficient to sustain a conviction if that evidence would convince the average mind of the defendant's guilt beyond a reasonable doubt.'" Id., citing *State v. McKnight,* 107 Ohio St.3d 101, 2005-

Ohio-6046, 837 N.E.2d 315, ¶ 75, and *State v. Heinish,* 50 Ohio St.3d 231, 238, 553 N.E.2d 1026 (1990).

{¶22} The jury could reasonably infer had no intent to repay the money or perform under the contract. The jury could reasonably find appellant engaged in a deceptive act to deprive Thompson of possession of $800 cash, i.e., promising to do the work, and that appellant's misrepresentation actually caused Thompson to transfer property to the accused. Appellant's theft conviction is thus supported by sufficient evidence.

{¶23} Appellant's first assignment of error is overruled.

II.

{¶24} In his second assignment of error, appellant argues the trial court's instructions to the jury were improper and deprived him of due process. We disagree.

{¶25} Appellant argues the trial court should not have instructed the jury that the time of the offense was "during the period of May 23, 2014 through August 8, 2014" because the offense occurred on only one day: the day of the transaction itself. Appellant argues the lengthier time period created a prejudicial inference for the jury that appellant maintained control over Thompson's property for a long period of time.

{¶26} Jury instructions are within the sound discretion of the trial court, and the court's decision will not be disturbed on appeal absent an abuse of discretion. *State v. DeMastry*, 155 Ohio App.3d 110, 2003-Ohio-5588, 799 N.E.2d 229 (5th Dist.), ¶ 54, citing *State v. Musgrave*, 5th Dist. Knox No. 98CA10, 2000 WL 502688 (April 24, 2000), and *State v. Martens*, 90 Ohio App.3d 338, 629 N.E.2d 462 (3rd Dist.1993). Jury instructions must be reviewed as a whole. *State v. Coleman*, 37 Ohio St.3d 286, 525 N.E.2d 792 (1988). We find the trial court did not abuse its discretion because the description of the

time period of the offense is identical to the language used in the indictment. The purpose of jury instructions is "'to clarify the issues and the jury's position in the case.'" *State v. DeMastry*, supra, 2003-Ohio-5588 at ¶ 66, citing *State v. Smith*, 4th Dist. Lawrence No. 94CA37, unreported, 1996 WL 107430, *9 (March 6, 1996). Jury instructions are to be tailored to the facts of each case. *State v. Giles*, 5th Dist. Ashland No. CA-1011, 1993 WL 49015, *5 (Feb. 24, 1993), citing *City of Avon Lake v. Anderson*, 10 Ohio App.3d 297, 298, 462 N.E.2d 188 (9th Dist.1983). Accordingly, we find no demonstration of error prejudicial to appellant concerning the jury instructions for the time period in which the offense occurred.

{¶27} Although appellant did not raise this assignment of error as a defect in the indictment, his jury-instruction argument is premised upon the theory appellee could not state the time of the offense as occurring over a period of time. This assumption ignores the axiom that "[i]n a criminal charge the exact date and time are immaterial unless in the nature of the offense exactness of time is essential. It is sufficient to prove the alleged offense at or about the time charged." *State v. Sellards*, 17 Ohio St.3d 169, 171, 478 N.E.2d 781 (1985), citing *Tesca v. State*, 108 Ohio St. 287, 140 N.E. 629 (1923), paragraph one of the syllabus.

{¶28} Appellant's second assignment of error is overruled.

III.

{¶29} In his third assignment of error, appellant argues the theft by deception statute is unconstitutionally vague because it permitted arbitrary enforcement in his case. We disagree.

{¶30} Appellant argues R.C. 2913.02(A)(3) is void for vagueness because it encourages arbitrary enforcement as applied to him. "Under the vagueness doctrine, statutes which do not fairly inform a person of what is prohibited will be found unconstitutional as violative of due process." *State v. Carrick*, 131 Ohio St.3d 340, 2012-Ohio-608, 965 N.E.2d 264, ¶ 14, citing *State v. Reeder,* 18 Ohio St.3d 25, 26, 479 N.E.2d 280 (1985) and *Connally v. Gen. Constr. Co.,* 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926); *Columbus v. Thompson,* 25 Ohio St.2d 26, 266 N.E.2d 571 (1971). However, "'[i]mpossible standards of specificity are not required. * * * The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" Id. at ¶ 14, quoting *Jordan v. De George,* 341 U.S. 223, 231–232, 71 S.Ct. 703, 95 L.Ed. 886 (1951).

{¶31} A facial challenge requires that "the challenging party * * * show that the statute is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'" *Carrick*, supra, 2012-Ohio-608, at ¶ 15, citing *State v. Anderson,* 57 Ohio St.3d 168, 171, 566 N.E.2d 1224 (1991), quoting *Coates v. Cincinnati,* 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971). Stated another way, "the challenger must show that upon examining the statute, an individual of ordinary intelligence would not understand what he is required to do under the law." Id. Appellant "must prove, beyond a reasonable doubt, that the statute was so unclear that he could not reasonably understand that it prohibited the acts in which he engaged." Id., citing *United States v. Harriss,* 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989 (1954); 25 Ohio Jurisprudence 3d, Criminal Law, Section 8, at 106 (1981).

{¶32} Appellant does not argue that R.C. 2913.02(A)(3) is unclear or not susceptible to being easily understood; in fact, he concedes its terms "are not vague." (Brief, 17.) Instead he argues the statute is unconstitutional as applied to him. "In an as-applied challenge, the challenger 'contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, [is] unconstitutional.'" *Carrick*, supra, 2012-Ohio-608 at ¶ 16, citing *State v. Lowe,* 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 17, quoting *Ada v. Guam Soc. of Obstetricians & Gynecologists,* 506 U.S. 1011, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992) (Scalia, J., dissenting). Thus, an as-applied challenge focuses on the particular application of the statute.

{¶33} Appellant's as-applied challenge is premised upon the fact that a former law-enforcement officer told Thompson the matter was "civil" and could not be pursued as a theft offense, but later a different officer pursued the case as a criminal charge. We have already discussed in the first assignment of error that appellant's conviction is supported by sufficient evidence; implicitly, probable cause existed for the second officer to file a criminal charge. Appellant has presented us with no authority establishing why application of the theft statute to him is unconstitutionally void for vagueness. The statute is not so unclear appellant could not reasonably understand that it prohibited the act in which he engaged, nor is it unconstitutional as applied to his conduct.

{¶34} Appellant's third assignment of error is overruled.

CONCLUSION

{¶35} Appellant's three assignments of error are overruled and the judgment of the Delaware County Court of Common Pleas is affirmed.

By: Delaney, J. and

Farmer, P.J.

Wise, J., concur.