

[Cite as *State v. Pugh*, 2010-Ohio-2741.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 24905

Appellee

v.

MANDIE L. PUGH

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 07 12 4233(F)

Appellant

DECISION AND JOURNAL ENTRY

Dated: June 16, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Mandie Pugh, appeals from the judgment of the Summit County Court of Common Pleas. This Court reverses.

I

{¶2} David Willan was the sole owner and managing member of several entities, namely Evergreen Homes, LLC (“Evergreen Homes”), Evergreen Investments, Inc. (“Evergreen Investments”), Evergreen Builders, LLC (“Evergreen Builders”) (collectively “Evergreen”), and Brittain Holdings, LLC (“Brittain Holdings”). Evergreen essentially either rehabilitated or built homes to sell to low-income and other high-risk buyers who ordinarily would have had difficulty obtaining financing to purchase a home. Evergreen then helped these buyers obtain mortgages from third-party lenders. Evergreen would allow buyers concessions at the time of sale to offset closing costs and, allegedly, also supplied some buyers with additional monies so that they could satisfy personal debts and qualify for loans. According to the State, Evergreen constructed or

repaired the homes using shoddy workmanship and then inflated the sales value of the homes by conspiring with certain appraisers and mortgage brokers. When lenders agreed to provide a mortgage loan, the result was that they loaned far more than the properties were actually worth to buyers who could not afford the payments on the mortgage. Evergreen profited from the sales of the homes and also received money from investors, but eventually filed for bankruptcy.

{¶3} Task force officials eventually executed search warrants to obtain copies of Evergreen's internal documents and bank filings due to their suspicion that Evergreen's employees were engaging in corrupt activity and laundering money. Pugh was one of the individuals who the task force came to suspect of wrongdoing. She was a bookkeeper for Willan's various entities and the sole signatory on checking accounts for Brittain Holdings and Brittain Entertainment, LLC, an entity owned and managed by Willan's girlfriend, Brianna Fullerton. Willan formed Brittain Holdings as a subsidiary of Evergreen to purchase an entertainment club. It was Pugh's understanding that Willan intended to use income from the entertainment club to pay Evergreen's investors because Evergreen had difficulty selling houses after the task force executed its warrants. At Willan's direction, Pugh repeatedly moved funds from Evergreen's accounts.

{¶4} On December 19, 2007, a grand jury issued a secret indictment, charging Pugh with the following counts: (1) engaging in a pattern of corrupt activity, pursuant to R.C. 2923.32(A)(1) and (B)(1); (2) aggravated theft, pursuant to R.C. 2913.02(A)(3); and (3) ten counts of money laundering, pursuant to R.C. 1315.55(A)(3). The matter proceeded to trial on April 13, 2009. The trial court granted Pugh's Crim.R. 29 motion as to her aggravated theft count, but allowed the remaining counts to go to the jury. The jury only found Pugh guilty of

one count of money laundering. The trial court sentenced Pugh to a fine and one year in prison, suspended upon the condition that she complete community control.

{¶5} Pugh now appeals from her conviction and raises two assignments of error for our review.

II

Assignment of Error Number One

“APPELLANT’S CONVICTION FOR MONEY LAUNDERING IN VIOLATION OF ORC §1315.55(A)(3) WAS BASED UPON INSUFFICIENT EVIDENCE AS A MATTER OF LAW.”

{¶6} In her first assignment of error, Pugh argues that her conviction for money laundering is based on insufficient evidence. Specifically, Pugh argues that the State failed to trace the funds at issue and prove that she transferred those funds for the purpose of engaging in a corrupt activity. We agree.

{¶7} In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 274. Furthermore:

“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.” *Id.* at paragraph two of the syllabus; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

“In essence, sufficiency is a test of adequacy.” *Thompkins*, 78 Ohio St.3d at 386.

{¶8} “No person shall conduct or attempt to conduct a transaction with the purpose to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of corrupt activity.” R.C. 1315.55(A)(3).

“A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.” R.C. 2901.22(A).

“‘Corrupt activity’ means ‘engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in’ any of a series of listed criminal offenses.” *State v. Brooks*, 9th Dist. No. 23950, 2008-Ohio-3104, at ¶7, citing R.C. 2923.31(I).

{¶9} The jury found Pugh guilty of one count of money laundering, which was embodied in Count 48 of the indictment. In the Bill of Particulars, the State described Count 48 as follows:

“On or about March 26, 2007, in the County of Summit, David B. Willan and/or Mandie Pugh did, aid and/or abet another, conduct or attempt to conduct a transaction with the purpose to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of corrupt activity, in violation of Section 1315.55(A)(3). This transaction is related to the Mid Atlantic Trust check. Check #013610746 from KeyBank to David Willan or Brianna Fullerton for \$25,000.00, dated 3/26/07. On this same day a \$3,000 deposit was made to account 350421004143, and \$27,000.00 was cashed out.”

Although the jury did not convict Pugh on any other counts, several of the other counts in her indictment also stemmed from the “Mid Atlantic Trust check” referenced in Count 48. The following evidence emerged at trial with regard to Count 48 and the surrounding counts involving the “Mid Atlantic Trust check.”

{¶10} Dennis Balogh testified that he was an investigator for the Summit County Prosecutor’s Office and a member of the task force assigned to investigate Evergreen. Balogh examined Evergreen’s financial records as well as the personal financial records of Evergreen’s employees. Balogh testified that Pugh opened a checking account at Key Bank on January 25, 2007. Pugh deposited \$1,644.51 into the account when she opened it. On February 21, 2007, Pugh deposited \$45,334 into her account. Balogh specified that the \$45,334 “came from [a] Mid

Atlantic Trust Company” check made payable to Willan and endorsed over to Pugh. On February 23, 2007, Pugh wrote a check from her personal account for \$8,000 made payable to cash and cashed the check the same day. There is no evidence in the record as to what Pugh did with the \$8,000 in cash. On February 27, 2007, Pugh wrote a check from her personal account for \$37,334 made payable to Key Bank and received a cashier’s check from Key Bank for the same amount. The cashier’s check was made payable to Willan or Fullerton. Balogh testified that Willan negotiated the check on March 22, 2007. Once again, he did not explain what happened to the \$37,334 once Willan negotiated the check.

{¶11} Balogh next testified regarding an official check from Key Bank for \$30,000 made payable to Willan or Fullerton. The check was created on March 22, 2007. Balogh never identified the source of the \$30,000, its relation (if, indeed, there was one) to the \$37,334 check that Willan had negotiated, or the person responsible for the creation of the \$30,000 official check. Balogh simply testified that the \$30,000 check was negotiated on March 26, 2007. It is unclear from the record whether Willan or Fullerton negotiated the check and whether the \$30,000 was then deposited elsewhere. Balogh only specified that after the check was negotiated, “[a] \$3,000.00 deposit was made into [the account for] Evergreen Homes” the same day. He did not specify who deposited the \$3,000. Because \$3,000 of the original \$30,000 check was deposited after the check was negotiated, presumably \$27,000 remained. Balogh attempted to describe the flow of the remaining money as follows:

“[PROSECUTOR]: Did you receive any documents from Key Bank regarding the flow of this money from that point?

“[BALOGH]: Yes, I did.

“[PROSECUTOR]: And what did you receive?

“[BALOGH]: I received a Key Bank credit cashout ticket and a copy of another Key Bank official bank check in the amount of \$25,000.

“[PROSECUTOR]: What was the amount of the cashout ticket?”

“[BALOGH]: \$27,000.

“[PROSECUTOR]: And the official bank check, what is the amount of that check?”

“[BALOGH]: The official bank check ending in 746 is in the amount of \$25,000.”

Presumably, someone requested that Key Bank issue an official bank check for \$25,000, and this \$25,000 was a part of the \$27,000 that was “cashed out.” Balogh, however, never testified to this effect. Nor did he identify the account from which the \$27,000 was “cashed out.” Further, it is unclear from Balogh’s testimony what happened to the \$2,000 difference between the \$27,000 amount “cashed out” and the \$25,000 check. Balogh only testified that the official check for \$25,000 was made payable to Willan or Fullerton, endorsed by Willan, made payable to the order of Pugh, and endorsed by Pugh. The check was negotiated on March 26, 2007. The jury convicted Pugh of money laundering with regard to the official check for \$25,000. As previously noted, the Bill of Particulars specified “[t]his transaction is related to the Mid Atlantic Trust check.”

{¶12} Upon cross-examination, Balogh testified that Willan’s initial check from the Mid Atlantic Trust Company for \$45,334 represented funds from Willan’s 401(k) account. When asked about the source of Willan’s 401(k) funds, Balogh only testified that Willan paid into the 401(k) account. He did not specify what monies Willan used to pay into the account or when he paid that money into the account. Further, Balogh stated that Count 48 (the money laundering count for which the jury convicted Pugh) related to the Key Bank official check for \$25,000. Balogh did not tie the \$25,000 check back to the Mid Atlantic Trust check as set forth in the Bill of Particulars.

{¶13} The State’s theory of Pugh’s case, both in the trial court and on appeal, seems to be that because Pugh repeatedly transferred funds for Willan she committed money laundering. The act of transacting money alone does not amount to money laundering. Instead, one must transact with the “purpose to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of corrupt activity.” R.C. 1315.55(A)(3). There is no evidence in the record that connects Pugh’s repeated transactions, much less the March 26, 2007 transaction, with a corrupt activity. The State presented evidence that Evergreen sold homes to several buyers who then experienced problems with the homes, such as leaky roofs and basements, and who sometimes lost their homes because they could not afford their mortgages. It also presented evidence that Evergreen accepted money from investors and eventually filed for bankruptcy such that its investors lost their investments. The State did not, however, connect the transfer of the \$25,000 with any particular wrongdoing on Pugh’s part that would constitute a corrupt activity. Without such evidence, the State could not prove that Pugh transacted money for the purpose of promoting, managing, establishing, carrying on, or facilitating the promotion, management, establishment, or carrying on of corrupt activity. R.C. 1315.55(A)(3).

{¶14} Neither Pugh’s indictment, nor the Bill of Particulars sets forth the crime the State sought to prove in order to satisfy the corrupt activity element of Pugh’s conviction. Pugh made a Crim.R. 29 motion in the court below, arguing that the State had not presented evidence of a corrupt activity with regard to Count 48. The State responded to Pugh’s Crim.R. 29 motion as follows:

“Please the court, the corrupt activity is taking the money, moving the money out of Evergreen Investment and moving it into Brittain Holdings and then writing those checks and laundering that money through those accounts. The three specific checks -- the three counts that involve the Mid Atlantic Trust check in the amount of \$45,334, the money laundering occurred there is when Mandie Pugh put that check in her own personal account thus hiding its true ownership and

source from the investors and creditors of David Willan and the Evergreen entities.

“***

“The crime committed there was when those funds again were disguised as being [Pugh’s] funds and she *** used the funds to buy a check, and then she gave that check to David Willan; and he completed two more transactions before it came around to her again when the \$25,000 check was endorsed back over to her.

“And she further laundered those funds by cashing that check and buying [more checks.] *** So the money laundering is there.”

The State seemed to argue that Pugh engaged in corrupt activity by taking money from Evergreen Investments and funneling it through other accounts to disguise its source. Pugh’s conviction for money laundering does not stem from money taken from Evergreen Investments. Per the Bill of Particulars, it stemmed from money taken from Willan’s 401(k) account via a check issued by Mid Atlantic Trust Company. The State did not link Willan’s 401(k) funds with any funds from Evergreen. Moreover, the State never charged Pugh with conducting transactions in order to disguise the source of funds. See, e.g., R.C. 1315.55(A)(2). It charged her under the portion of the statute requiring proof of a corrupt activity. See R.C. 1315.55(A)(3).

{¶15} On appeal, the State argues that “[t]he record shows that the State presented sufficient evidence to prove that Pugh conducted a transaction with the purpose to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of corrupt activity, to wit: money laundering.” That is, the State presents this Court with the cyclical argument that it proved Pugh laundered money by proving that she laundered money. R.C. 1315.55(A)(3), the money laundering statute, requires that the State prove a corrupt activity. Admittedly, the Revised Code defines money laundering (a violation of R.C. 1315.55) as a form of corrupt activity. R.C. 2923.31(I). This Court is not convinced, however, that the State may rely upon money laundering as the basis for a corrupt activity with regard to a single

transaction or the first of multiple transactions. It is nonsensical that an element of a crime be the crime itself.

{¶16} It is unclear why the jury chose to convict Pugh on one count of money laundering, but acquit her on the preceding and succeeding counts of money laundering. Regardless, the State did not present any evidence of an independent corrupt activity to support Pugh's conviction for money laundering. The record reflects that the State failed to satisfy its burden of proof with regard to Count 48, the sole count of money laundering at issue on appeal. As such, Pugh's sufficiency argument has merit.

Assignment of Error Number Two

“APPELLANT’S CONVICTION FOR MONEY LAUNDERING PURSUANT TO ORC §1315.55(A)(3) WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶17} In her second assignment of error, Pugh argues that her money laundering conviction is against the manifest weight of the evidence. Based on this Court's resolution of Pugh's first assignment of error, Pugh's second assignment of error is moot. App.R. 12(A)(1)(c).

III

{¶18} Pugh's first assignment of error is sustained, and her conviction for money laundering is vacated pursuant to that determination. Pugh's second assignment of error is moot. The judgment of the Summit County Court of Common Pleas is reversed.

Judgment reversed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

BETH WHITMORE
FOR THE COURT

BELFANCE, P. J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶19} I respectfully dissent.

{¶20} The majority’s conclusion that the State failed to present sufficient evidence that Pugh committed a violation of R.C. 1315.55(A)(3) is premised on the following statement in paragraph 16: “[T]he State did not present any evidence of an independent corrupt activity to support Pugh’s conviction for money laundering.” The majority reasons that “money laundering” cannot support a charge of “money laundering,” as though the “corrupt activity” element is analogous to a predicate offense. I believe that this conclusion goes beyond the scope of the issues properly before this Court for review. Moreover, I believe that the majority’s reasoning is unsound.

{¶21} Pugh argues in her first assignment of error that the State failed to present sufficient evidence to support her conviction. The issue before this Court, therefore, 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.” *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. What Pugh challenges, however, and what the majority analyzes, is the sufficiency of the indictment and/or statute. The majority, therefore, has engaged in a “sufficiency of the charge” analysis rather than a “sufficiency of the evidence” analysis. Such an analysis is beyond the scope of permissible appellate review in this case.

{¶22} An appellant’s captioned assignment of error “provides this Court with a roadmap on appeal and directs this Court’s analysis.” *State v. Marzolf*, 9th Dist. No. 24459, 2009-Ohio-3001, at ¶16. App.R. 16(A)(7) and Loc.R. 7(B)(7) provide that the argument shall contain the appellant’s contentions with respect to each assignment of error. Loc.R. 7(B)(4) requires an appellant to include in his brief a statement of the issues which “shall be a succinct, clear, and accurate statement of the arguments made in the body of the brief.” The issue of the sufficiency of the charge is beyond the scope of this captioned assignment of error. Furthermore, Pugh failed to enunciate a statement of the issues presented. Accordingly, this Court need not address this argument and I, in fact, would decline to do so. See *Ulrich v. Mercedes-Benz USA, L.L.C.*, 9th Dist. No. 24740, 2010-Ohio-348, at ¶24; *Rusov v. Ansley*, 9th Dist. No. 23748, 2007-Ohio-7022, at ¶7.

{¶23} The trial court instructed the jury that the corrupt activity alleged in counts alleging violations of R.C. 1315.55(A)(3) was money laundering. Pugh failed to object to that

instruction. Even in the absence of any objection, she could have alleged plain error on appeal. She failed, however, to properly raise this issue for appellate review.

{¶24} Moreover, I disagree with the majority’s conclusion that the conviction was not supported by sufficient evidence on substantive grounds.

{¶25} As a preliminary matter, I would note that Pugh refers to a violation of R.C. 1315.55 as “money laundering.” While that term may be the colloquial recitation of the offense, no where does the statute use the phrase “money laundering.” Rather, the statute describes criminal conduct arising out of a transaction (or attempted transaction) under certain circumstances. In the case of an R.C. 1315.55(A)(3) violation, it is a transaction done with purpose to promote, facilitate, or carry on a corrupt activity. To describe the charge as “money laundering by money laundering” is a simplistic recitation used by Pugh in an attempt to validate her circular reasoning to negate the validity of an R.C. 1315.55(A)(3) violation. The fact is, the legislature created a criminal offense pursuant to R.C. 1315.55(A)(3), that provision has not been held to be unconstitutional or otherwise invalid, the State prosecuted Pugh under that subsection, and Pugh did not object to the charge or question the constitutionality of the statute in the trial court.

{¶26} R.C. 1315.51(L) defines “transaction” as “a purchase, sale, trade, loan, pledge, investment, gift, transfer, transmission, delivery, deposit, withdrawal, payment, transfer between accounts, exchange of currency, extension of credit, purchase or sale of a payment instrument, use of a safe deposit box, or any other acquisition or disposition of property.” “Corrupt activity” is defined as a violation of any one of many enumerated offenses, including R.C. 1315.55.

{¶27} In its recitation of the evidence, the majority states that Pugh opened a Key Bank account with a modest sum and deposited a check for \$45,334.00 from Mid Atlantic Trust

Company less than a month later. The evidence demonstrates that the check was originally made payable to Willan who endorsed it over to Pugh, and that the check represented funds from Willan's 401(k) account. Pugh then deposited the check in her Key Bank account, wrote an \$8000.00 check made payable to cash, and purchased a cashier's check for the difference (\$37,334.00) made payable to Willan. These events fit squarely within the definition of "transaction." The majority asserts, and I agree, that the mere transmission, depositing, withdrawal, and transfer of money do not constitute criminal activity. If those transactions are done with the purpose of facilitating corrupt activity, however, they implicate criminal conduct.

{¶28} In this case, the State's theory of the case was that Pugh engaged in transactions in furtherance of money laundering, one of the enumerated definitions of "corrupt activity." Pugh complains that the State presented evidence in an attempt to prove that she engaged in transactions with the intent to disguise the nature or source of the money, elements relevant to a violation of R.C. 1315.55(A)(2), rather than subsection (A)(3). R.C. 1315.55(A)(3), however, clearly provides that a violation of that subsection may be proven by showing that the defendant engaged in a transaction for the purpose of furthering the types of conduct described in any other subsection of R.C. 1315.55.

{¶29} The evidence, viewed in the light most favorable to the prosecution, demonstrates that Pugh engaged in transactions with the intent to disguise the source of the proceeds, and that she knew that the money involved was the proceeds of unlawful activity. Pugh worked for Willan. Willan endorsed a check to her from his 401(k) account, by definition a retirement account funded with an employee's income. The State presented evidence that Willan derived his income from businesses created to defraud homebuyers. It is, therefore, reasonable for a trier of fact to infer considering the evidence in the light most favorable to the State, that the

\$45,334.00 check written from his 401(k) account contained proceeds of unlawful activity. Moreover, there is sufficient evidence to show that Pugh, as his employee, who received those proceeds and converted them into other forms of property, knew of the source and nature of the original proceeds. That the State was unable to prove what ultimately happened to the entire amount of the \$45,334.00 is immaterial to proving the elements of the offense. The trier of fact could reasonably infer that Pugh took a portion of the proceeds (\$8000.00) as payment for her role in laundering the money. Once the unlawful proceeds were “laundered,” the crime was complete, and what Pugh or Willan later did with that “laundered” money was immaterial to prove a violation of R.C. 1315.55(A)(3).

{¶30} The State presented evidence that a \$30,000.00 official check from Key Bank, where Pugh had opened an account, was purchased and made payable to Willan or Fullerton. That check was negotiated and a portion of it was deposited into Willan’s business account. The remaining amount was deposited at Key Bank where someone cashed out the full amount, purchasing an official check for \$25,000.00 and taking the remaining \$2000.00 in cash. The State presented evidence that Pugh repeatedly transferred funds for Willan. Given that these transactions were conducted through the bank where Pugh had opened an account with a modest sum, yet quickly began conducting numerous transactions involving large sums of money, the trier of fact could reasonably infer that she was aiding Willan in furtherance of laundering his unlawful business proceeds. Reviewing the evidence in a light most favorable to the prosecution, I believe that the State presented sufficient evidence to allow the trier of fact to find beyond a reasonable doubt that Pugh committed a violation of R.C. 1315.55(A)(3). Accordingly, I respectfully dissent.

APPEARANCES:

BRIAN M. PIERCE, Attorney at Law, for Appellant.

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