[Cite as *State v. White*, 2010-Ohio-2865.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. RAYMOND R. WHITE Appellant	C. A. No. 24960 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 07 12 4330

DECISION AND JOURNAL ENTRY

Dated: June 23, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Jody Blaney invested $84,000 in a custom motorcycle business that Raymond White claimed to operate, but Mr. White did not use the money for any such business. Instead, he wrote checks to his stepfather and then forged his stepfather's signature on the endorsement line. After the police began investigating, he allegedly made his stepfather sign a document authorizing the endorsements. A jury convicted Mr. White of theft from a disabled adult, intimidation of a crime witness, and forgery. Mr. White has appealed, arguing that the trial court improperly excused a juror for cause, that the jury's verdict was not consistent, that the court incorrectly denied his motion for acquittal as to the theft from a disabled adult and intimidation of a crime witness charges, and that his theft from a disabled adult and intimidation of a crime witness convictions are against the manifest weight of the evidence. This Court affirms his conviction for theft from a disabled adult because the trial court exercised proper discretion when

it excused the juror for financial hardship, the court correctly denied his motion for acquittal, and his conviction is not against the manifest weight of the evidence. This Court vacates his conviction for intimidation of a crime witness because the jury's verdict was inconsistent regarding that charge.

FACTS

{¶2} Ms. Blaney hired Mr. White to do some electrical work at her house after reading his handyman ad in the newspaper. While he was doing the work, he told Ms. Blaney about a side-business he claimed to have building custom motorcycles. After learning that she was on disability, he offered to let her invest in his claimed business. Ms. Blaney gave him a total of $84,000 from her home equity line of credit. In exchange, Mr. White promised that his business would make the payments on her equity line for her.

{¶3} When Mr. White only made one payment on the equity line, Ms. Blaney contacted the police. The sergeant who investigated her complaint could not find any evidence that Mr. White was in the business of building motorcycles. He learned that, soon after Ms. Blaney gave Mr. White the $84,000, Mr. White wrote checks to his stepfather totaling $72,000. The sergeant obtained copies of the checks, which appeared to have been endorsed by the stepfather. The stepfather, however, told the sergeant that he had not signed the checks.

{¶4} Sometime after the sergeant spoke to the stepfather, the stepfather called the sergeant sounding panicked. He said that Mr. White had pressured him to sign a document that gave Mr. White permission to endorse the stepfather's checks. According to the stepfather, Mr. White told him that he needed him to sign the document "to get him off the hook." He said he signed the document under duress because he got the impression from Mr. White that, if he did not sign it, Mr. White would attack him.

{¶5} The Grand Jury indicted Mr. White for one count of theft from a disabled adult, one count of intimidation of a crime witness, and seven counts of forgery. A jury convicted him on each count. Regarding the intimidation count, it found that the intimidation was not committed "by force or the threat of force." The trial court sentenced him to three years in prison. Mr. White has appealed, assigning seven errors.

JUROR REMOVAL

{¶6} Mr. White's first assignment of error is that the trial court incorrectly excused a juror for cause. His second assignment of error is that the court used the incorrect standard when determining the juror's suitability. Because these assignments of error raise related issues, we will consider them together.

{¶7} "A person called as a juror in a criminal case may be challenged" for a number of reasons, including "[t]hat he otherwise is unsuitable for any other cause to serve as a juror." R.C. 2945.25(O); see also Crim. R. 24(C)(14). "The validity of each challenge . . . shall be determined by the court." R.C. 2945.25; see also Crim. R. 24(C). "A trial court's ruling on a challenge for cause will not be disturbed on appeal unless it is manifestly arbitrary and unsupported by substantial testimony, so as to constitute an abuse of discretion." *State v. Williams*, 79 Ohio St. 3d 1, 8 (1997).

{¶8} During voir dire, one of the prospective jurors told the court that he had a "work problem." According to the juror, he was out of town when he received his jury duty notice and did not have time to reply that he would not get paid for his service. He also said that, because someone at his workplace had recently quit, he was scheduled to work 40 hours that week. He said that he was trying to move up in the company and was concerned about his situation because his manager got upset when he told him about his jury duty obligation.

{¶9} Mr. White's lawyer argued that the juror should not be excused because he was in the same circumstance as everyone else who had taken off from their jobs to be there. He argued that the juror had received a notice just like everyone else and should have notified the court if it was going to be a problem. The trial court stated, however, that it was "permitted to excuse jurors because of hardships, and he indicates he has a hardship and none of the other jurors indicated that." It, therefore, excused the juror.

{¶10} Mr. White has argued that the court applied the wrong test in determining whether to excuse the juror. Citing *State v. Moss*, 9th Dist. No. 24511, 2009-Ohio-3866, he has argued that the court should have considered whether the juror could "be fair and impartial and follow the law as instructed."

{¶11} In *Moss*, the prosecutor moved the trial court to remove a juror who said that he had known the defendant for a long time. Although the prosecutor moved to excuse the juror "for cause," the court told the parties that it was excusing him under *Batson v. Kentucky*, 476 U.S. 79 (1986). *State v. Moss*, 9th Dist. No. 24511, 2009-Ohio-3866, at ¶7. *Batson* involved preemptory challenges, not removal for cause. *Batson*, 476 U.S. at 83. This Court noted in its opinion in *Moss* that it is appropriate for a trial court to excuse a juror for cause under Section 2945.25(B), if he "is possessed of a state of mind evincing enmity or bias toward the defendant or the state," but that "no person summoned as a juror shall be disqualified . . . , if the court is satisfied, from examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial." *Moss*, 2009-Ohio-3866, at ¶10 (quoting R.C. 2945.25(B)). It also wrote that, "[a]s long as a trial court is satisfied, following additional questioning of the prospective juror, that the juror can be fair and

impartial and follow the law as instructed, the court need not remove that juror for cause." *Id*. at ¶11.

{¶12} In *Moss*, this Court identified the test a trial court should apply when determining whether to excuse a juror for bias under Section 2945.25(B). *State v. Moss*, 9th Dist. No. 24511, 2009-Ohio-3866, at ¶11. The problem in that case was that, although the State had moved to excuse the juror who knew the defendant "for cause," the court said that it was excusing him under the test for preemptory challenges set forth in *Batson*. *Id*. at ¶12. *Moss* is distinguishable because, in this case, the court excused the juror because he had a "hardship." Accordingly, the test used to determine whether a juror should be excused for bias is not applicable. The question is whether the juror was "unsuitable for any other cause to serve as a juror." R.C. 2945.25(O).

{¶13} Under Section 2313.16(A)(5) of the Ohio Revised Code, a juror may be excused from jury duty for "financial hardship." To be excused under that section, however, the juror must "take all actions necessary to obtain a ruling on that request" before the date he is scheduled to appear for jury duty. R.C. 2313.16(B)(1). While the juror in this case did not do that, Section 2313.16(A)(5) is a recognition that financial hardship is a valid reason to excuse a juror. This Court, therefore, concludes that financial hardship can make a juror "unsuitable for any other cause to serve as a juror" under Section 2945.25(O). The trial court applied the correct standard in determining whether the juror should be removed.

{¶14} Mr. White has also argued that there was insufficient evidence to support the trial court's finding that jury duty would cause a hardship to the juror. The juror, however, told the court that he was scheduled to work 40 hours that week and that he would not be paid for the hours he missed. Accordingly, the trial court exercised proper discretion when it excused the juror. See *State v. Howell*, 4th Dist. No. 97CA824, 1998 WL 807800 at *14 (Nov. 17, 1998)

(concluding court exercised proper discretion when it excused juror for financial hardship who had said that he would have to shut down his business each day that he spent in court). Mr. White's first and second assignments of error are overruled.

INTIMIDATION OF A CRIME WITNESS

{¶15} Mr. White has argued his third, fourth, and fifth assignments of error together. His third assignment of error is that the trial court incorrectly denied his motion for judgment of acquittal on the charge of intimidation of a crime witness. His fourth assignment of error is that his intimidation of a crime witness conviction is against the manifest weight of the evidence. His fifth assignment of error is that the court incorrectly sentenced him under Section 2921.04(B) of the Ohio Revised Code because the jury did not find that he had violated that section and because the jury's verdict was inconsistent.

{¶16} This Court will start with Mr. White's argument that the jury's verdict form was inconsistent regarding his conviction for intimidation of a crime witness. Under Section 2921.04(A), "[n]o person shall knowingly attempt to intimidate or hinder . . . a witness involved in a criminal action . . . in the discharge of the duties of the witness." Under Section 2921.04(B), "[n]o person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder . . . [a] witness involved in a criminal action . . . in the discharge of the duties of the . . . witness." A violation of Section 2921.04(A) is a misdemeanor of the first degree. R.C. 2921.04(D). A violation of Section 2921.04(B) is a felony of the third degree. *Id*.

{¶17} The trial court instructed the jury that, before it could find Mr. White guilty of intimidation of a crime witness, it had had to find beyond a reasonable doubt that he "did knowingly, and by force, or unlawful threat of harm to any person or property, attempt to

influence or intimidate" his stepfather. The instruction, therefore, charged a violation of Section 2921.04(B). On its verdict form, the jury wrote that Mr. White was "guilty of the offense of Intimidation of Crime Witness in violation of 2921.04(B) . . . ." It also wrote, however, that "the intimidation was not committed by force or the threat of force."

{¶18} The State has not argued that there is a substantive difference between the "force or the threat of force" language on the verdict form and the "force or by unlawful threat of harm" language in Section 2921.04(B). Instead, it has argued that, by finding that the intimidation was not by force or the threat of force, it actually convicted Mr. White of violating Section 2921.04(A), which, it has argued, is a lesser included offense.

{¶19} We reject the State's argument that, by finding that the intimidation was not committed by force or threat of force, the jury convicted Mr. White of violating Section 2921.04(A) instead. Even assuming that intimidation of a crime witness under Section 2921.04(A) is a lesser-included offense of intimidation of a crime witness under Section 2921.04(B), the trial court did not give the jury an instruction on the lesser-included offense. The court only gave an instruction regarding Section 2921.04(B), which required a finding that the intimidation had been committed by force or threat of force. The court also told the jury that it was its "sworn duty to accept [its] instructions and apply the law as it is given to you." A jury is presumed to follow the instructions given to it by the court. *Beckett v. Warren*, 124 Ohio St. 3d 256, 2010-Ohio-4, at ¶18. Accordingly, because there was no instruction on Section 2921.04(A), the jury could not have convicted Mr. White of violating it.

{¶20} The verdict form is inconsistent. While the jury purported to find Mr. White guilty of violating Section 2921.04(B), it found that he had not committed one of the essential elements of that offense. See *State v. Lovejoy*, 79 Ohio St. 3d 440, paragraph one of the syllabus

(1997) ("[I]nconsistency in a verdict . . . arises out of inconsistent responses to the same count."). Mr. White's conviction, therefore, must be reversed. *State v. Bosley*, 9th Dist. No. 15547, 1992 WL 281344 at *3 (Oct. 7, 1992) ("[A]n inconsistent response to the same count requires reversal."). His fifth assignment of error is sustained. His third and fourth assignments of error are moot, and are overruled on that basis.

THEFT FROM A DISABLED PERSON

{¶21} Mr. White's sixth assignment of error is that the trial court incorrectly denied his motion for judgment of acquittal on the theft from a disabled person charge. Under Section 2913.02(A) of the Ohio Revised Code, "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways: . . . [b]eyond the scope of the express or implied consent of the owner or person authorized to give consent; [or] . . . [b]y deception." R.C. 2913.02(A)(2), (3). If the victim is a disabled adult and the value of the property stolen is between $25,000 and $100,000, the offense is a felony of the second degree. R.C. 2913.02(B)(3).

{¶22} Ms. Blaney testified that she gave Mr. White $84,000 from her home equity line of credit to invest in his motorcycle company, Vicious Cycles. She said Mr. White promised that his company would make the payments on her equity line, but that the company only made the first payment. The sergeant who investigated what happened to Ms. Blaney's money discovered that the name "Vicious Cycles" was registered to a company in Cincinnati. Mr. White lived in Ravenna. The sergeant was unable to find any evidence that Mr. White was in the business of building custom motorcycles. Instead, he learned that, soon after Ms. Blaney gave Mr. White the $84,000, Mr. White wrote checks to his stepfather in the amount of $72,000. He learned from the stepfather that the stepfather is not in the business of building motorcycles and that the

stepfather did not receive or endorse the checks that Mr. White wrote. A handwriting expert determined that it was "probable" that it was Mr. White's handwriting on the endorsement line of the checks.

{¶23} The record contains evidence that Ms. Blaney gave Mr. White $84,000 to build motorcycles, but that he used the funds for a different purpose, beyond the scope of her express or implied consent. There is also evidence that Mr. White obtained the $84,000 by deceiving Ms. Blaney about whether he had a motorcycle building business. Viewing the evidence in a light most favorable to the prosecution, it was sufficient to prove that Mr. White purposely deprived Ms. Blaney, a disabled adult, of $84,000 by deception or by using her money beyond the scope of her consent. Mr. White's sixth assignment of error is overruled.

{¶24} Mr. White's seventh assignment of error is that his conviction for theft from a disabled adult is against the manifest weight of the evidence. A former state patrol officer testified that he had known Mr. White for ten years and had spoken with him about Vicious Cycles. He said he had been to Mr. White's shop three to five times and had seen motorcycles in various stages of production. He said that, to his knowledge, Mr. White produced motorcycles. He also said that he had recently seen evidence of Mr. White's business at Mr. White's house, including a van with Vicious Cycles' logo on it.

{¶25} At best, Mr. White's friend established that Mr. White had a motorcycle business at one time and that he was in the process of building a new garage at his home. The witness did not know whether Mr. White's company had gone out of business or whether it was operating at the time Mr. White convinced Ms. Blaney to invest in it. Even if the business was in operation at the time Ms. Blaney made her investment, it was reasonable for the jury to conclude that Mr. White misappropriated her investment by forging checks to his stepfather instead of using them

toward the business. The jury did not lose its way when it convicted Mr. White of theft from a disabled adult. His seventh assignment of error is overruled.

CONCLUSION

{¶26} The trial court applied the correct standard and exercised proper discretion when it excused a juror for financial hardship. The jury's verdict was inconsistent regarding whether Mr. White violated Section 2921.04(B) of the Ohio Revised Code. His conviction of theft from a disabled person is supported by sufficient evidence and is not against the manifest weight of the evidence. The judgment of the Summit County Common Pleas Court is affirmed in part, reversed in part, and this matter is remanded for further proceedings consistent with this decision.

Judgment affirmed in part,
reversed in part,
and cause remanded.

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 both parties equally.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
BELFANCE, J.
CONCUR

APPEARANCES:

NEIL P. AGARWAL, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN R. DIMARTINO, assistant prosecuting attorney, for appellee.