

[Cite as *State v. Swaney*, 2019-Ohio-2611.]

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 18CA0056-M

Appellee

v.

LARRY L. SWANEY

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 17CR0940

Appellant

DECISION AND JOURNAL ENTRY

Dated: June 28, 2019

CARR, Judge.

{¶1} Defendant-Appellant Larry Swaney appeals from the judgment of the Medina County Court of Common Pleas. This Court reverses.

I.

{¶2} Swaney worked for Buckeye School District as a mechanic in the bus garage. He was a salaried employee who sometimes worked overtime. When he did work overtime, he had to complete timesheets to document his hours. The timesheets were signed by him and turned in to the transportation supervisor, who also signed them. After the transportation supervisor observed on one occasion that Swaney’s overtime hours listed on a timesheet did not match the time that the transportation supervisor observed Swaney’s vehicle being at the garage, the transportation supervisor began an investigation.

{¶3} In October 2017, Swaney was indicted on one count of theft in office and one count of forgery. The matter proceeded to a jury trial. Partway through the testimony of one of

the State's witnesses, Swaney moved for a mistrial. The trial court denied the motion. At the close of the State's case, Swaney moved for acquittal pursuant to Crim.R. 29. Swaney renewed his Crim.R. 29 motion at the close of his case and moved again under the rule after the jury's verdict was read in open court.

{¶4} Ultimately, the jury found Swaney not guilty of theft in office but guilty of forgery. The trial court sentenced him to community control for one year. Swaney has appealed, raising four assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

THE STATE OF OHIO PRESENTED INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION FOR FORGERY AND THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING THE DEFENDANT'S OHIO CRIMINAL RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL.

{¶5} Swaney argues in his first assignment of error that the evidence was insufficient to support a conviction for forgery and that the trial court erred in failing to grant his Crim.R. 29 motions. As we conclude that Swaney's sufficiency argument is determinative, we will limit our review accordingly.

{¶6} When reviewing the sufficiency of the evidence, this Court must review the evidence in a light most favorable to the prosecution to determine whether the evidence before the trial court was sufficient to sustain a conviction. *State v. Jenks*, 61 Ohio St.3d 259, 279 (1991).

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.

{¶7} Swaney was found guilty of violating R.C. 2913.31(A)(1). It provides that, “[n]o person, with purpose to defraud, or knowing that the person is facilitating a fraud, shall * * * [f]orge any writing of another without the other person’s authority[.]” “A person acts purposely when it is the person’s 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 the offender’s specific intention to engage in conduct of that nature.” “‘Defraud’ means to knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another.” R.C. 2913.01(B).

A person acts knowingly, regardless of purpose, when the person is aware that the person’s conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

R.C. 2901.22(B).

{¶8} “‘Forge’ means to fabricate or create, in whole or in part and by any means, any spurious writing, or to make, execute, alter, complete, reproduce, or otherwise purport to authenticate any writing, when the writing in fact is not authenticated by that conduct.” R.C. 2913.01(G). “‘Writing’ means any computer software, document, letter, memorandum, note, paper, plate, data, film, or other thing having in or upon it any written, typewritten, or printed matter, and any token, stamp, seal, credit card, badge, trademark, label, or other symbol of value, right, privilege, license, or identification.” R.C. 2913.01(F).

{¶9} In the fall of 2017, Swaney was employed as a bus mechanic in the bus garage for Buckeye School District. Swaney was a salaried employee who also sometimes worked

overtime. This overtime work would sometimes include work on the weekends. When Swaney worked overtime, he had to complete a timesheet, sign it, and turn it into his supervisor, the transportation supervisor, who also signed the timesheet. There was no set clock that Swaney was to use to record his hours for overtime. According to the transportation supervisor, he knew of one clock in the garage and testified that it reflected the correct time every time he had been in the garage. The transportation supervisor examined all of the timesheets at issue and confirmed that they contained his and Swaney's signatures. Those timesheets were also admitted into evidence. Swaney was paid overtime for the time on the sheets, which was time and a half. Employees were not permitted to include overtime hours that they did not actually work.

{¶10} On September 16, 2017, the transportation supervisor observed a silver van that he knew Swaney drove leaving the bus garage area at 1:22 p.m. When the transportation supervisor later reviewed the timesheet he noticed that Swaney's listed departure time did not match the time the transportation supervisor saw Swaney's van leaving. Instead, the timesheet reflected that Swaney's time out was 2:30. After the transportation supervisor observed this inconsistency, he went to the superintendent and asked him to look at surveillance video to review the time.

{¶11} The superintendent examined the timesheet that the transportation supervisor brought to him and compared the reported times with footage from a video surveillance camera. The superintendent maintained that he could see Swaney entering and exiting his vehicle on the video and that he could see both Swaney and his van. The superintendent accessed the camera that was positioned at the bus garage right above the door near where Swaney would park and enter and exit the building. After viewing some footage, the superintendent asked for additional timesheets to review. With respect to September 2, 2017, the superintendent testified that the

timesheet reflected that Swaney reported a time in of 9 o'clock and a time out of 3:00 p.m. The superintendent averred that he "d[id] not believe" that Swaney worked until 3:00 p.m. on that date. The superintendent also testified that he also believed that the times reported for September 3, 2017 and September 9, 2017, were not accurate based upon the video he reviewed. The superintendent additionally reviewed another timesheet that had three dates, September 10th, 15th, and 16th. Based upon his review of the video, the superintendent indicated that Swaney's times out on that sheet were not accurate. The superintendent also averred that Swaney's start times did not always match the video either.

{¶12} The superintendent was not able to record the videos or change them in any way from his office. The video he viewed was not admitted into evidence or played for the jury. The superintendent asserted that, at the time he viewed the video, the camera did record; however, he also maintained that the video was on a "loop[.]" The camera was motion sensor activated so the rate at which it recorded over itself varied. The superintendent was told that it would probably begin to record over itself every 30 to 45 days.

{¶13} The superintendent also asked the school resource officer, Deputy John Girard to investigate. Deputy Girard testified that his office at the school has two computers, one of those computers is strictly used for the school district's security system. The cameras for the security system were installed over the summer of 2017. During the summer, Deputy Girard would get calls about the cameras; "[s]ome would be online, some would be recording already and then some weren't online yet."

{¶14} Once the cameras began working, Deputy Girard was asked to record and email short videos related to student incidents. In late September, the superintendent asked Deputy Girard to look at footage related to Swaney coming and going from work. The series of dates

and times of concern were emailed to Deputy Girard. Because the periods of time were hours long, Deputy Girard could not record the video on to the computer and had to ask the school district to purchase an external hard drive. After the hard drive was purchased, video was downloaded. Portions of that video were played for the jury and ultimately admitted into evidence.

{¶15} Deputy Girard testified that employees that work in the bus garage park in a fenced in area. Deputy Girard reviewed camera two, which he indicated was an external camera on the middle school building that was pointed in the direction of the bus garage. That camera “showed the front of the bus garage and the gate that has to be opened either by a garage door opener * * * or a pin to get in and [a person] can’t drive a vehicle through that gate without opening it, so it would show anyone that’s coming in to work back there, coming in through that gate, during nonbusiness hours, like, the weekends which these dates were normally weekends.” Deputy Girard testified that there was a camera on the bus garage but he did not review that footage because it was not “tied in to the hard drive to record yet.” Thus, it was not available to him at that time and he did not know whether the footage was still on the camera at the point he received the hard drive. He, later in his testimony, averred that, at the time he viewed the footage, the camera at the bus garage was not operational and stated that it was not “installed at the time.” Deputy Girard clarified that the bus garage camera was installed when he started investigating but he was unable to make a record of it at the time. He also testified that he did not believe the superintendent was lying about his testimony because the superintendent “specifically looked at September 22nd.” It was unclear from the testimony what precisely that meant.

{¶16} In his investigation, Deputy Girard looked at the list of days and times he was given and then looked at the video from the point in time before Swaney was to have started until the time that he was supposed to have left. Swaney's timesheet for September 2, 2017 listed his time in as 9 o'clock and his time out as 3 o'clock. Deputy Girard testified that the video from that day showed a van that Deputy Girard knew to be Swaney's, based both upon the registration and license plate number and his familiarity with the vehicle, turn towards the garage around 9:12 a.m. and leave around 2:07 p.m. Between that time and 3:00 p.m., Deputy Girard did not see Swaney's van return to the garage. To Deputy Girard's knowledge, there was not another employee who drove a silver van like Swaney's.

{¶17} Deputy Girard also reviewed video from September 3, 2017. Swaney's timesheet for that day listed his time in as 10 o'clock and his time out as 3:30. On the video, Deputy Girard observed Swaney's van arriving at 10:40 and it leaving at 2:27. The van was not seen returning between 2:27 and 3:30.

{¶18} With respect to September 9, 2017, Swaney's timesheet listed his time in at 7 o'clock and time out as 3 o'clock. Deputy Girard observed video from that day which reflected that Swaney's van arrived at 8:34 a.m. and departed at 2:06 p.m. Deputy Girard did not see Swaney's van in the video after 2:06 p.m.

{¶19} Deputy Girard also reviewed Swaney's hours for September 16, 2017. Swaney's timesheet listed his time in as 9 o'clock and his time out as 2:30. The video Deputy Girard observed showed Swaney's van arriving at 10:23 and leaving at 1:25.

{¶20} With respect to the defense case, Swaney, Swaney's son, and a retired employee testified.

{¶21} Swaney's son testified that on November 6, 2017, he visited the bus garage with his mother. He testified that he saw three clocks there and that each of the clocks displayed different times. However, Swaney's son also acknowledged that he was not in the bus garage on September 2, 3, 9, or 16th of 2017.

{¶22} The retired employee, James, testified that he retired from the school district in March 2017 and was in charge of maintenance. James did not work in the bus garage but did nonetheless see Swaney every day. James testified that before March 2017, he saw Swaney working beyond his regular hours as Swaney was often there before James and James got there early. James, however, did not know whether Swaney was paid for that extra time.

{¶23} Swaney testified and denied the charges against him. He admitted to putting the hours on the timesheet and signing the timesheets. Swaney asserted that there were three clocks in the garage, that they were not always accurate, and that they did not all match. He also acknowledged that the video depicted his van going in and out of the garage area but would not admit that it was him in the van. He testified his son and wife also drive the silver van and that if he was not driving the van he would probably be driving an '84 Mustang. He did not know of any other employee in the garage that drove a silver van. He averred that he would be the only one working on the buses.

{¶24} Swaney nonetheless maintained that he worked the hours listed. He also testified that he created notes that he asserted documented the hours he worked. Despite the fact that he listed his hours on his timesheet for September 2, 2017 as 9:00 to 3:00, Swaney maintained that he actually worked from 7:45 to 3:25 based upon his notes. With respect to September 3, 2017, Swaney testified that he actually worked from 9:05 to 3:50, even though his timesheet listed his hours as 10:00 to 3:30. Swaney asserted that on September 9, 2017, he worked from 7:05 to

3:55, despite the fact that the timesheet he completed listed his hours as 7:00 to 3:00. With respect to September 16, 2017, Swaney testified that he actually worked from 8:15 to 3:45, even though his timesheet listed his hours as 9:00 to 2:30. Swaney did not explain why his van was seen arriving and departing outside of those hours on the dates in question. He also claimed that there was also at least one time during the four days at issue that he had to leave the garage to get paint, even though the video does not support such a claim.

{¶25} Swaney asserted that the extra hours that he worked that were not on his timesheet were volunteer hours for which he did not get paid. He also testified that his notes documented when he started and finished for the day and the timesheet just documented his time for his work on a particular bus.

{¶26} Even when the evidence is viewed in a light most favorable to the prosecution, we conclude that the State failed to present sufficient evidence to support a conviction for forgery in violation of R.C. 2913.31(A)(1). While there was sufficient evidence presented with respect to most of the elements, we conclude that there was not sufficient evidence that Swaney “forge[d] any writing of another * * *.” R.C. 2913.31(A)(1).

{¶27} There was no evidence that Swaney signed someone else’s name on his timesheet. Had there been, it would be clear that the statute was satisfied. *See State v. Sprinkle*, 2d Dist. Montgomery No. 20780, 2005-Ohio-5240, ¶ 16 (concluding that “[f]orge any writing of another without the other person’s authority’ encompasses situations in which a person signs the name of another, without the other’s consent and with the purpose to defraud, to a document prepared by a third party, such as the police”); *see also State v. Agostini*, 12th Dist. Warren Nos. CA2016-02-013, CA2016-02-014, 2017-Ohio-4042, ¶ 52. In fact, the evidence only supports that Swaney’s signature on the timesheet was authentic. Instead, there was evidence that Swaney filled in

blanks on form documents with information that arguably was inaccurate. As a matter of law, we cannot say that the foregoing conduct satisfies the requirement that an individual must “forge any writing of another * * *.” R.C. 2913.31(A)(1). Thus, although there may have been sufficient evidence whereby a jury could find Swaney guilty of some other crime, perhaps even some other form of forgery, we cannot say that there was sufficient evidence that Swaney forged the writing of another as required by R.C. 2913.31(A)(1), the provision at issue.

{¶28} As Swaney’s conviction was based upon insufficient evidence, his first assignment of error is sustained.

ASSIGNMENT OF ERROR II

THE DEFENDANT’S CONVICTION FOR FORGERY IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR III

THE STATE OF OHIO PRODUCED TESTIMONIAL EVIDENCE AT TRIAL AVERRING EVIDENCE OF DEFENDANT’S GUILT WAS OBSERVED ON VIDEO CAMERA RECORDING EQUIPMENT AND THIS EVIDENCE WAS INTENTIONALLY NOT PRESERVED, NOR ITS EXISTENCE AND NON-PRESERVATION DISCLOSED TO THE DEFENDANT PRIOR TO TRIAL WHICH DEPRIVED THE DEFENDANT OF A MEANINGFUL CHANCE TO CONFRONT A WITNESS AGAINST HIM IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

ASSIGNMENT OF ERROR IV

THE COURT REVERSIBLY ERRED AND PREJUDICED THE DEFENDANT’S RIGHT TO A FAIR TRIAL BY NOT GRANTING HIS MOTION FOR MISTRIAL BASED UPON THE PROSECUTION’S *BRADY* VIOLATION RELATED TO ITS INTENTIONAL FAILURE TO PRESERVE VIDEO EVIDENCE.

{¶29} Swaney asserts in his second assignment of error that his conviction for forgery was against the manifest weight of the evidence. Swaney argues in his third assignment of error that he was deprived of his rights under the Confrontation Clause when the superintendent was permitted to testify about video evidence he viewed, but which was not preserved and was

therefore not available to the defense. Swaney argues in his fourth assignment of error that the trial court erred in denying his motion for a mistrial based upon the State's alleged violation of the standard in *Brady v. Maryland*, 373 U.S. 83 (1963).

{¶30} In light of the resolution of Swaney's first assignment of error, his remaining assignments of error are moot and we decline to address them. *See* App.R. 12(A)(1)(c).

III.

{¶31} Swaney's first assignment of error is sustained. His remaining assignments of error have been rendered moot. The judgment of the Medina County Court of Common Pleas is reversed and the matter is remanded for proceedings consistent with the opinion.

Judgment reversed,
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 Medina, 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(C). 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.

DONNA J. CARR
FOR THE COURT

TEODOSIO, P. J.
CALLAHAN, J.
CONCUR.

APPEARANCES:

MICHAEL T. CONWAY, Attorney at Law, for Appellant.

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