

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. John F. Boggins, J.
	:	
-vs-	:	
	:	Case No. 2002CA306
CLAYTON B. SMITH	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Stark County Court of Common Pleas, Case No. 2002CR0125

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: April 21, 2003

APPEARANCES:

For Plaintiff-Appellee
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For Defendant-Appellant
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Gwin, P. J.,

{¶1} Defendant Clayton B. Smith appeals a judgment of the Court of Common Pleas of Stark County, Ohio, convicting and sentencing him for one count of passing bad checks in violation of R.C. 2913.11, after a jury verdict of guilty. Appellant assigns five errors to the trial:

{¶2} “THE TRIAL COURT HAD COMMITTED IRREVERSIBLE [SIC] ERROR IN HAVING ALLOWED EVIDENCE UNDER EVID. R. 404 (B) THAT HAD BEEN PREJUDICIAL, HAD CLOUDED THE ISSUES, AND MISLED THE JURY REGARDING UNCHARGED BAD ACTS REFLECTING MOTIVE, IDENTITY, LACK OF MISTAKE, INTENT, AND COMMON SCHEME OR PLAN.

{¶3} “THE TRIAL COURT HAD IMPROPERLY DISREGARDED R.C. 2711.01, IN HAVING NOT HONORED A VALID BINDING ARBITRATION CONTRACT CLAUSE, AND HAVING IMPROPERLY GRANTED SAL MORE THAN IT HAD BEEN ENTITLED TO IN ITS SEPTEMBER 30,2002 RESTITUTION ORDER.

{¶4} “THE TRIAL COURT HAD IMPROPERLY ORDERED RESTITUTION PAID TO SAL, WHEN SUCH RESTITUTION HAD BEEN UNCERTAIN.

{¶5} “THE JURY’S VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND IS CONTRARY TO LAW.

{¶6} “THE TRIAL COURT HAD ERRED AND ABUSED ITS DISCRETION IN HAVING DENIED APPELLANT’S MOTION FOR A NEW TRIAL BECAUSE THE JURY’S VERDICT HAD BEEN MANIFESTLY AGAINST THE EVIDENCE AND CONTRARY TO LAW, AND BECAUSE APPELLANT HAD PRODUCED EVIDENCE WHICH WOULD HAVE CHANGED THE OUTCOME AT TRIAL.”

{¶7} At trial, the State presented evidence appellant had engaged in a continuing course of conduct, in passing five bad checks during the course of two separate

transactions.

{¶8} The first two bad checks were allegedly written in late August and early September 2001, in connection with a brokerage account appellant had opened with American Investment Services. On August 23, 2001, appellant contacted Gale Stephanic, an independent agent and stock broker for American Investment. At the time, American Investment worked with SAL Financial Services, Inc., which provided bank clearing house services to American Investments. During appellant's dealings with American Investment, SAL absorbed American Investments into its company.

{¶9} Appellant filled out a new account application and client account agreement, which permitted appellant to purchase stocks on margin. Appellant testified he was a hot dog vendor, and on the account application with SAL, he indicated his annual income was between \$100,000 and \$250,000. Appellant began purchasing stocks immediately upon opening the account.

{¶10} At trial, Stephanic testified funds for the purchases were not due for three business days after the stock purchase. As the clearing house, SAL would transmit the money for the purchases and Stephanic would then assure payment within three days. Appellant continued to purchase securities through Stephanic for the next few days. On August 28, 2001, appellant tendered a check to Stephanic made payable to SAL for \$29,232.85, drawn on an Ohio Legacy Bank account.

{¶11} Appellant continued to purchase stocks, and wrote another check on September 4, 2001. The second check was made payable to SAL for \$52,363.75, and was drawn on a First Merit Bank checking account.

{¶12} Through September 10, 2001, appellant continued to buy more stock through Stephanic. However, the terrorist attacks of September 11, 2001, closed the American Stock Market for a week. Trading resumed on Monday, September 17, 2001, and

appellant resumed purchasing stock. Appellant's last purchase was on September 18, 2001. Appellant never sold any of the securities he purchased. By the time appellant had placed his last purchase order on September 18, 2001, appellant had purchased \$165,000 worth of stock.

{¶13} After appellant had made his final stock purchase on September 18, 2001, SAL contacted Stephanic to report appellant's two checks had been returned for insufficient funds. When Stephanic contacted appellant, appellant told him he hoped to sell some securities in another brokerage account to cover his checks.

{¶14} Stephanic testified over the next few days, he made several telephone calls to appellant. At one point, appellant told Stephanic he planned to get a home equity loan to cover the checks. Appellant did not come forward with any money, and on Friday, September 21, 2001, Stephanic notified appellant under his agreement with SAL, his account would be liquidated that afternoon.

{¶15} When appellant's account with SAL was liquidated, the value of the securities had dropped, and SAL only realized \$117,868.29. This created a balance due of \$47,820.96. Appellant did not repay this amount, and Stephanic turned the matter over to police.

{¶16} At trial, appellant testified he did not intend to defraud anyone in connection with the checks written for the stock purchases. Appellant admitted in his testimony that at the time he wrote the checks to SAL, he knew he did not have sufficient funds in either account to cover the checks. Appellant testified he had planned to sell a stock from another account to cover the balance, but the price of that stock also had dropped.

{¶17} Appellant also testified he did intend to get a home equity loan to cover the balance, but was told he could not use his home equity loan to cover securities. On cross-examination, appellant admitted he did not own the residence in question, but rather it

belonged to his mother.

{¶18} A criminal investigator from First Merit Bank, Scott Bollinger, and a vice president from Ohio Legacy Bank, Cindy Pfaus, testified regarding the accounts against which appellant had written the checks. The First Merit August statement had a negative \$539.32 opening balance. On August 10, 2001, appellant deposited \$1,500 to the First Merit account with a check drawn on his Ohio Legacy Account. The \$1,500 check bounced. Appellant also wrote a check to Waterhouse Investment Services for \$5,800, which was also returned NSF. On August 15, 2001, appellant wrote a check to Continental Brokers for \$31,000, even though at that time the account had a negative balance of \$816.40. First Merit returned this check NSF.

{¶19} Bollinger also testified the First Merit statement indicated several inquiries from ATM machines. The ATM machines had printed five account balance statements during August.

{¶20} In September, the First Merit statement had a negative balance of \$6,718.53, reflecting a bad SAL check. Appellant made no deposits in September. The statement also indicated electronic checks to CSC Clearing Corporation and Capital One Collections, both of which were returned NSF. The CSC Clearing Corporation check was \$50,000. First Merit closed the account on September 24, 2001, and wrote off the negative balance of \$1,267. Bollinger testified it is standard bank procedure to notify the appellant for each returned check.

{¶21} Pfaus testified regarding the Ohio Legacy account. In August, the opening balance on the account was negative \$124.37. Appellant made no deposits during the month of August, and ended with a \$299.97 negative balance. The statement reflected the \$1500 check written to First Merit, which had been returned NSF. The statement also reflected a \$32,000 check to Continental Brokers, which Ohio Legacy had returned NSF.

Appellant made no deposits on the Ohio Legacy account during September, and ended with a negative \$434.47 balance. Besides the bad SAL check, the bank statement reflected an electronic check for \$3,639.20, made out to City Bank, which was returned to City Bank NSF.

{¶22} The second set of transactions resulting in the bad check charge involved appellant's repayment of a loan to David Shira. Shira testified he was a friend of appellant, whom appellant approached in December of 2001, because appellant needed \$10,000 quickly.

{¶23} Shira testified appellant met him at a Dairy Mart on January 3, 2002, and gave appellant \$10,000 in cash. In return, appellant gave Shira three checks, totaling \$10,000, written against appellant's First Merit checking account that had been closed in September 2001, some three months previously. Shira testified appellant told him not to cash the checks for a few days. Appellant testified the checks were post-dated one year, and appellant had only given Shira the checks because Shira is a loan shark, and appellant feared for his life. Appellant admitted he borrowed \$10,000 from Shira because there was a margin call against one of his accounts. Shira attempted to cash the checks in mid-January, but they were returned NSF. After Shira talked with appellant several times, he turned the checks over to the police in February in 2002.

{¶24} Appellant testified he had filed a stop-payment on the three checks he had given Shira.

{¶25} After his conviction, appellant moved the trial court for a new trial, urging he had located new evidence which would exonerate him. The trial court overruled the motion for new trial.

I

{¶26} In his first assignment of error, appellant argues the court permitted the State

to introduce evidence in violation of the Ohio Rule of Evidence 404 (B). Appellant argues the evidence was prejudicial, had clouded the issues, and had mislead the jury.

{¶27} Evid. R. 404 sets forth an exception to the general rule that evidence of other bad acts is inadmissible. The evidence of other acts is admissible if there is substantial proof the defendant committed the other alleged acts, and the evidence tends to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In *State v. Shederick* (1991), 61 Ohio St. 3d 331, 574 N.E. 2d 1065, the Supreme Court held the other acts need not be similar to the acts at issue, but must tend to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

{¶28} R.C. 2913.11 states:

{¶29} 2913.11 PASSING BAD CHECKS

{¶30} “(A) No person, with purpose to defraud, shall issue or transfer or cause to be issued or transferred a check or other negotiable instrument, knowing that it will be dishonored.

{¶31} “(B) For purposes of this section, a person who issues or transfers a check or other negotiable instrument is presumed to know that it will be dishonored if either of the following occurs:

{¶32} “(1) The drawer had no account with the drawee at the time of issue or the stated date, whichever is later;

{¶33} “(2) The check or other negotiable instrument was properly refused payment for insufficient funds upon presentment within thirty days after issue or the stated date, whichever is later, and the liability of the drawer, endorser, or any party who may be liable thereon is not discharged by payment or satisfaction within ten days after receiving notice of dishonor.”

{¶34} The evidence appellant challenges is the evidence adduced from representatives of First Merit and Ohio Legacy Banks regarding appellant's account activities during August and September, 2001. Appellant argues it was improper for the court to permit the State to introduce evidence of NSF checks for which he was not indicted. The State argues appellant's defense was that although he knew he could not cover the checks at the time he wrote them, he intended to do so. The State argues the challenged evidence indicated appellant had not been depositing money into the accounts, but he continued writing bad checks against the accounts. The State points out there were several other checks written for large amounts, besides the SAL check. As the evidence relates to Shira, the testimony the First Merit account was closed in September 2001, was relevant, to show appellant wrote checks in December 2001, or January 2002 against a closed account. The State argues the other bad check evidence was relevant to show appellant's true intent, and lack of mistake.

{¶35} We find the evidence of other bad checks was relevant to the issue of motive, intent, knowledge, or absence of mistake. Accordingly, we find the evidence was admissible.

II & III

{¶36} In his second and third assignments of error, appellant challenges the court's imposition of restitution as a condition of community control. The account agreement between appellant and SAL contains an arbitration clause, and appellant argues the trial court should have honored the binding arbitration contract clause, and could not order restitution until the arbitration was completed and the amount of the restitution was set.

{¶37} The State of Ohio has broad power to proscribe crimes and fix penalties, including the power to order monetary restitution to victims of crime. The State points out the arbitration clause applies in a dispute between SAL and appellant in the civil domain,

whereas prosecution for a criminal offense lies between the people of the State of Ohio and appellant.

{¶38} We find the trial court appropriately designated restitution in the amount of \$57,820.96, as the amount outstanding to SAL, as a condition of appellant's community control.

{¶39} The second and third assignments of error are overruled.

IV

{¶40} In his fourth assignment of error, appellant argues the jury's verdict is against the manifest weight of the evidence and contrary to law.

{¶41} In *State v. Thompkins*, 78 Ohio St. 3d 380, 1997-Ohio-52, 678 N.E. 2d 541, the Ohio Supreme Court explained the difference between sufficiency and weight of evidence. The term sufficiency is a term of art which refers to the legal standard a trial court applies in determining whether the State had produced sufficient evidence on each element of the crime charged that the court should submit the matter to the jury. On review, we must determine whether the evidence, if believed, could convince a reasonable person of the defendant's guilt beyond a reasonable doubt.

{¶42} Manifest weight of the evidence, on the other hand, is a question of fact for the jury. Manifest weight of the evidence refers to the jury's weighing of the evidence presented in support of one side of an issue. The Supreme Court has directed us to review the entire record on a claim of manifest weight of the evidence, and determine whether the jury lost its way such that its verdict results in a manifest miscarriage of justice.

The Supreme Court directed us to grant a new trial only in an exceptional case where the evidence weighs heavily against the conviction, *Id.*, citing *State v. Martin* (1983), 20 Ohio App. 3d 172, 485 N.E. 2d 717.

{¶43} When we review a claim a jury's verdict is against the manifest weight of the

evidence, we must give deference to factual decisions the jury has made, *State v. DeHass* (1967), 10 Ohio St. 2d 230, 227 N.E. 2d 212.

{¶44} Regarding the first set of bad checks, the State presented evidence appellant knew the checks were not good when he wrote them, but intended to cover them by selling stock from another account.

{¶45} Likewise, regarding the checks written to Shira, the State presented evidence the checks were written against an account that had been closed for three months.

{¶46} We note in *State v. Dubin* (1992), 83 Ohio App. 3d 156, 614 N.E. 2d 799, the Court of Appeals for Lucas County held a check given for an antecedent or pre-existing debt can be the basis for a bad check conviction. The *Dubin* court cited *State v. Lowenstein* (1924), 109 Ohio St. 3d 393, 142 N.E. 897, and *State v. Doan* (1990), 69 Ohio App. 3d 638, 591 N.E. 2d 735.

{¶47} In *Doan*, the defendant argued that R.C. 2913.11 requires the passing of bad checks must occur simultaneously with the receipt of some benefit by the drawer. When a check is used to cover pre-existing debt, the statute does not apply because the issuance of the check does not affect the underlying relationship between the parties and the drawer is still liable for the debt, while the payee gives up nothing for the check. The *Doan* court rejected this argument, finding the Supreme Court in *Lowenstein*, supra, found financial damage is not a pre-requisite for the finding of fraud, but rather it is sufficient if the person issuing the bad check gains some type of advantage because of his action. The *Lowenstein* court found when a person gives a bad check in payment of past consideration, it can only be to gain advantage by convincing the payee the debtor had paid the old debt.

{¶48} We have reviewed the record, and we find there was sufficient, competent and credible evidence presented on each element of the crime charged that a reasonable

jury could find appellant was guilty beyond a reasonable doubt.

{¶49} The fourth assignment of error is overruled.

V

{¶50} In his fifth assignment of error, appellant urges the trial court should have granted his motion for a new trial based on newly discovered evidence. Crim. R. 33 provides a court may grant a new trial for various reasons, including newly discovered evidence that could not with reasonable diligence have been discovered and produced at the trial. Our standard of review is the abuse of discretion standard, see *State v. Schiebel* (1990), 55 Ohio St. 3d 71, 564 N.E. 2d 54.

{¶51} The evidence upon which appellant based his motion for new trial was a report from First Merit indicating appellant had stopped payment on the checks written to Shira in January 2001. We find the evidence is not sufficient grounds for a new trial, because appellant has not demonstrated he could not have, with reasonable diligence, discovered the evidence in time to produce it at trial.

{¶52} Appellant also argues at the new trial, he would introduce evidence in form of transcripts of interviews conducted by the Jackson Township Police Department during their investigation. The trial court received the transcripts into evidence in appellant's first trial, although the court placed them under seal.

{¶53} Finally, appellant offered an unauthenticated letter from SAL, indicating SAL and appellant had agreed to a repayment plan whereby appellant would make payments over eight months totaling \$40,000. As we note II and II, supra, the trial court had the ability to mandate restitution, and any request to reduce the restitution must be directed to the trial court.

{¶54} The fifth assignment of error is overruled.

{¶55} For the foregoing reasons, the judgment of the Court of Common Pleas of

Stark County, Ohio, is affirmed, and the cause is remanded to that court for execution of sentence.

By Gwin, P.J.,

Wise, J., and

Boggins, J., concur

Topic: Criminal law - passing bad checks