

Not Reported in N.E.2d

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CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Twelfth District, Preble
County.

STATE of Ohio, Plaintiff-Appellee,

v.

Karen FAULKNER, Defendant-Appellant.

No. CA89-04-007.

Aug. 20, 1990.

Augustus L. Ross III, Special Preble County Prosecuting
Attorney, West Alexandria, for plaintiff-appellee.

Konrad Kuczak, Dayton, for defendant-appellant.

MEMORANDUM DECISION AND JUDGMENT
ENTRY

PER CURIAM.

*I This cause came on to be heard upon an appeal, transcript of the docket, journal entries and original papers from the Preble County Court of Common Pleas, transcript of proceedings, and the briefs of counsel, oral argument having been waived.

Now, therefore, the assignments of error having been fully considered are passed upon in conformity with App.R. 12(A) as follows:

This is an appeal by defendant-appellant, Karen Faulkner, from a conviction in the Preble County Court of Common Pleas for eight counts of theft by deception.

Appellant was initially indicted for a single count of theft by deception pursuant to R.C. 2913.02(A)(3). Shortly thereafter, she filed a motion to dismiss the indictment due to the fact that the Preble County Prosecuting Attorney was a member of a law firm that was representing the estate of Clara Neal, the alleged victim. To avoid any appearance of a conflict of interest, the state voluntarily dismissed the indictment. Subsequently, the trial court appointed a special prosecutor to investigate the allegations against appellant and present his findings to a special grand jury.

On July 1, 1988, appellant was reindicted on eight counts of theft by deception pursuant to R.C. 2913.02(A)(3). She filed a motion to dismiss the indictment based on three

grounds: (1) the conflict of interest of the prosecutor in conducting the investigation that led to the indictment, (2) the delay in bringing the indictment, and (3) the use of evidence obtained in violation of attorney-client privilege. The trial court overruled the motion.

A jury trial was held on December 19-22, 1988. The evidence presented at trial showed that on October 29, 1979, appellant's great-aunt, Clara Neal, signed a power of attorney giving appellant broad authority to handle Neal's financial affairs. In December 1985, Neal had approximately \$125,000 in various bank accounts and certificates of deposit. She died on June 1, 1987 and appellant was appointed administratrix of her estate. The estate inventory filed by appellant showed \$45,000 remaining in Neal's bank accounts and three certificates of deposit payable upon death to appellant and appellant's brother and sister.

The state presented evidence that at various times in 1985, 1986 and 1987 appellant cashed in Neal's certificates of deposit, most prematurely, withdrew funds from her bank accounts, and diverted interest from her accounts. It also presented evidence that equivalent amounts were deposited in appellant's bank accounts, used to finance various purchases for appellant and her husband, and used to establish the three certificates of deposit payable upon death to appellant and her siblings. The state's evidence consisted primarily of bank statements, financial documents and testimony from various bank officials. The state contended that appellant accomplished these transactions through the withholding of information from Neal.

Appellant presented evidence that Neal was intelligent, competent and aware of her financial resources and that Neal had agreed to pay her \$10,000 per year for managing Neal's financial affairs, although there was no agreement as to the form of this compensation. She also presented evidence that Neal was aware of appellant's actions, primarily a notarized affidavit signed by Neal stating that for appellant's services Neal gave appellant "yearly a gift-salary of \$10,000." The affidavit was prepared to show that appellant had income so that she and her husband could obtain a loan to buy a house. The signature on the affidavit was identified as Neal's but the notary testified that she did not see Neal sign it. Additionally, a tape of appellant's statements to a police investigator was admitted into evidence in which she admitted that in at least one year, she took more from than the \$10,000 to which she said she was entitled.

*2 The jury found appellant guilty of all eight counts in the

indictment. Appellant subsequently filed a motion for a new trial and a motion for a judgment of acquittal, both of which were overruled by the trial court. This appeal followed.

Appellant presents ten assignments of error for review. In her fifth assignment of error, she states that the trial court erred by allowing the jury to consider the testimony of appellant's aunt, Donna Branson, who claimed that appellant's mother had told the alleged victim that appellant had been "stealing." She argues that the state was improperly permitted to impeach the testimony of its own witness using a prior inconsistent statement without a showing of surprise or affirmative damage. We find this assignment of error to be well-taken.

Evid.R. 607 provides:

"The credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage. This exception does not apply to statements admitted pursuant to Rules 801(D)(1)(a), 801(D)(2), or 803."

"Surprise can be shown if the testimony is materially inconsistent with the prior written or oral statement and counsel did not have reason to believe that the witness would recant when called to testify." *State v. Holmes* (1987), 30 Ohio St.3d 20, 23. "Affirmative damage is established when the witness testifies to facts which contradict, deny or harm the party's trial position." *Ferguson Realtors v. Butts* (1987), 37 Ohio App.3d 30, 33; *State v. Stearns* (1982), 7 Ohio App.3d 11, 15. "Requiring a showing of affirmative damage is intended to eliminate an 'I don't remember' answer or a neutral answer by the witness as a basis for impeachment by a prior inconsistent statement." Staff Note to Evid.R. 607; *Stearns*, supra, at 15.

The state called appellant's mother, Janet Zumbrun, as a hostile witness alleging that she would probably be testifying for the defense. There is no support for this claim in the record. Nevertheless, appellant did not object to this procedure.

Zumbrun testified that she had a conversation with Neal regarding appellant's handling of Neal's financial affairs after she discovered that Neal had changed her will. She stated that she had talked with Neal and that Neal had said that she didn't care, that it was her money and that she could do what she wanted. Following that discussion, Neal asked Zumbrun to call an attorney and Zumbrun complied with her request.

Subsequently, the state called as a witness Donna Branson, appellant's aunt and Neal's housekeeper, who testified that she was present during Zumbrun's conversation with Neal.

Branson testified that Zumbrun told Neal "Aunt Clara, do you know Karen is stealing from you?" and that Neal replied, "What can I do about it?" Appellant objected. The trial court sustained the objection as to what Neal said but overruled it as to what Zumbrun said "to the extent it contradicts what [Zumbrun] said."

*3 After trial, appellant filed a motion for a new trial in which she argued that Branson's testimony was inadmissible and justified a new trial. In response, the state argued that "the state notified the court that Mrs. Zumbrun was the mother of the defendant and was very supportive of defendant. The early questioning of this witness clearly indicated that at one time, she actively questioned defendant's activities with relation to Clara Neal's money * * * then, when her child is indicted by a grand jury, she abruptly changes her position and goes to the defense of her daughter." Again, we find no substantiation for this claim in the record. The trial court overruled appellant's motion, stating "Janet Zumbrun was properly questioned; and because of affirmative damage to the prosecution's case by the changing of her testimony * * *, she was properly impeached in accordance with the law. Evid.R. 611(C), Evid.R. 607 * * *."

The trial court erred in allowing Branson to testify as to what Zumbrun said and by overruling appellant's motion for a new trial. There was no surprise or affirmative damage as the prosecution clearly knew of Zumbrun's alleged change of heart long before trial and Zumbrun's testimony was not materially inconsistent with her prior statement. She never denied making the statement and she admitted that at the time she had been concerned about appellant's handling of Neal's financial affairs. When asked if there was anything else that prompted her to call Neal other than the fact that Neal had made a new will, she simply replied "I can't recall." Evid.R. 607 and the accompanying staff note indicate that it is improper for a party to impeach its own witness in this situation.

The state argues that it did not use Branson's testimony to impeach Zumbrun's testimony because Zumbrun's testimony was not inconsistent with her prior testimony. The flaw in this argument is that if Branson's testimony was not offered to impeach, then its only purpose was to prove the truth of the matter asserted, that appellant was indeed stealing from Neal. In that case, it is inadmissible hearsay. Evid.R. 801.

Branson's testimony relating to Zumbrun's prior statement was inadmissible. Additionally, it was highly prejudicial. It had little probative value as it was purely speculative on Zumbrun's part and it was highly inflammatory, particularly considering that the vast majority of the evidence was circumstantial and the statement came from appellant's own mother. Accordingly, appellant's fifth assignment of error is sustained and the matter is remanded for a new trial.

In her first assignment of error, appellant states that the

prosecution violated her constitutional rights to a speedy trial, to compel the attendance of witnesses and to confront her accusers. She argues that the delay in bringing the indictment until long after the death of Neal prevented her from presenting the testimony of the alleged victim, and prevented her from confronting the principal witness against her. We find this assignment of error is not well-taken.

*4 The speedy trial guarantees of the United States and Ohio Constitutions are not applicable to delays prior to indictment or arrest. *United States v. Marion* (1971), 404 U.S. 307, 92 S.Ct. 455; *State v. Luck* (1984), 15 Ohio St.3d 150, 152-53, certiorari denied (1985), 470 U.S. 1084, 105 S.Ct. 1845. Therefore, the preindictment delay in this case did not violate appellant's right to a speedy trial.

However, "[a]n unjustifiable delay between commission of an offense and a defendant's indictment therefor, which results in actual prejudice to the defendant, is a violation of the right to due process of law" under the United States and Ohio Constitutions. *Luck*, supra, paragraph two of the syllabus; *Marion*, supra, at 324, 92 S.Ct. at 465. Proof of prejudice alone is not sufficient to support a due process claim; the prejudice suffered by the defendant must be viewed in light of the state's reason for the delay. *United States v. Lovasco* (1977), 431 U.S. 783, 789-91, 97 S.Ct. 2044, 2048- 49; *Luck*, supra, at 153-54.

We believe that appellant suffered actual prejudice from the preindictment delay because of Neal's death. However, the delay was not caused by the state. Neal died on June 1, 1987 and her estate inventory was not filed until September 11, 1987. It was only after the inventory was filed that the beneficiaries of Neal's will discovered the diminution of her assets and alerted the proper authorities. There is no evidence that the state was aware prior to Neal's death that appellant may have committed any offense. This is not a situation where the state caused the delay solely to "gain a tactical advantage over the accused", *Lovasco*, supra, at 795, 97 S.Ct. at 2051, or where the state "through negligence or error in judgment effectively ceases the active investigation of a case * * *." *Luck*, supra, at 158. The delay in this case was justifiable and we find no violation of appellant's due process rights. Accordingly, her first assignment of error is overruled.

In her second assignment of error, appellant states that the institution of the prosecution in this case violated her right to due process of law. She argues that her motion to dismiss the indictment should have been granted because the second indictment was based upon evidence identical to that used to obtain the first indictment. She also argues that her due process rights were violated because of the increase in the number of counts in the second indictment after she exercised her legal right to question the ethical propriety of the first indictment. We find this assignment of error is not well-taken.

* * * The United States Supreme Court has held that: 'The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence * * *.' *United States v. Calandra* (1974), 414 U.S. 338, 344-345."

*5 *State v. Davis* (1988), 38 Ohio St.3d 361, 365, certiorari denied (1989), 488 U.S. 1034, 109 S.Ct. 849.

The second indictment is valid on its face. It provided appellant with adequate notice of the charges against her and an opportunity to defend. See *State v. Sellards* (1985), 17 Ohio St.3d 169, 170. Accordingly, it is not subject to challenge and the trial court properly overruled her motion to dismiss the indictment.

Further, we find no indication that the proceedings before the grand jury issuing the second indictment were tainted. The first indictment was obtained through an investigation made by the office of Wilfrid Dues, the elected Preble County Prosecuting Attorney. Dues was a partner in a law firm with James Frantz, the attorney handling Neal's estate.

Frantz testified that he and Dues did not discuss the investigation into appellant's activities at any time pertinent to this case. Dues was not present before the grand jury that issued the first indictment; an assistant prosecutor presented the evidence. The state voluntarily dismissed the first indictment solely to avoid any appearance of impropriety. All matters pertinent to the second indictment were handled by the special prosecutor who had no conflict of interest.

Appellant relies on *State v. Cooper* (1980), 63 Ohio Misc. I, in which an attorney was appointed as junior counsel to represent an indigent defendant indicted by the Hancock County Grand Jury. Subsequently, the attorney accepted an offer to become an assistant prosecuting attorney in the same county and resigned as the defendant's attorney. The defendant then filed a motion for an order disqualifying the Hancock County Prosecuting Attorney and all his attorneys and associates. In ruling on the motion, the Hancock County Court of Common Pleas noted that the attorney did not communicate any information regarding the defendant to any member of the prosecutor's staff. However, to avoid any appearance of impropriety, the court granted the defendant's motion and appointed a special prosecutor. It did not dismiss the indictment. Virtually the same procedure was followed in the present case. Thus, *Cooper* does not support appellant's position.

Additionally, we find that appellant's due process rights were not violated by the increase in the number of counts in the second indictment. There is no presumption of prosecutorial vindictiveness in the pretrial context whenever the prosecutor "ups the ante" following a defendant's exercise of a legal right. *United States v. Meyer*

(C.A.D.C.1987), 810 F.2d 1242, 1246, certiorari denied (1988), 485 U.S. 940, 108 S.Ct. 1121. "A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct." *United States v. Goodwin* (1982), 457 U.S. 368, 382, 102 S.Ct. 2485, 2493. A due process claim will lie only if a defendant can "prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something the law plainly allows him to do." *Id.* at 384, 102 S.Ct. at 2494; see also, *Meyer*, supra, at 1246. There has been no such showing in the present case. Accordingly, appellant's second assignment of error is overruled.

*6 In her third assignment of error, appellant states that the indictment and conviction were procured through the use of evidence obtained in violation of R.C. 2317.02(A). She argues that her personal check register and diary were used against her during the grand jury proceedings and during trial in violation of the attorney-client privilege. We find this assignment of error is not well-taken.

R.C. 2317.02 provides:

"The following persons shall not testify in certain respects:

"(A) An attorney, concerning a communication made to him by his client in that relation or his advice to his client, except that the attorney may testify by express consent of the client * * * and except that, if the client voluntarily testifies * * *, the attorney may be compelled to testify on the same subject[.]"

The burden of proving that testimony or documents should be excluded under the doctrine of attorney-client privilege rests with the party seeking to exclude them. *Pecko v. Frederick* (1986), 25 Ohio St.3d 164, 166; *In re Martin* (1943), 141 Ohio St. 87, 103. A communication which is not intended to be confidential is not privileged. *Walsh v. Barcelona Assoc., Inc.* (1984), 16 Ohio App.3d 470, 472.

At trial, the state presented two exhibits, a check register prepared by appellant listing the checks written on Neal's accounts and a journal containing a record of Neal's income and expenses and payments made by appellant while acting as Neal's attorney in fact. Both of these exhibits were also presented to the grand jury. Appellant gave these exhibits to James Frantz, who represented her as executrix of Neal's estate. In a hearing outside the presence of the jury, Frantz testified that appellant did not prepare them at his request. When the beneficiaries of Neal's will became aware of the diminution of her assets, they retained an attorney, Herd Bennett. Frantz testified that he was trying to negotiate with Bennett to resolve any dispute with the beneficiaries and it was his understanding that the documents appellant provided, including the check register and journal, were to be released to Bennett to negotiate a settlement. Bennett

then made copies of all documents that he thought were pertinent. Frantz further testified that appellant only requested that he keep the originals and that he returned the originals to appellant. He testified to the grand jury on general matters but did not discuss these specific documents and he did not know how they came into the possession of the grand jury. The trial judge ruled that the documents could be admitted into evidence but that Frantz was incompetent to testify regarding the two exhibits. We find no error in this ruling. Appellant has failed to meet her burden of proving that the exhibits were intended to be confidential and therefore privileged. Accordingly, her third assignment of error is overruled.

In her fourth assignment of error, appellant states that the trial court erred in overruling her motion in limine and objection to the presentation of her prior statements. She argues that the trial court should not have allowed a transcript of her testimony before the grand jury to be read to the jury and that the trial court should not have permitted the jury to hear a tape recording of an interview with appellant conducted by a police investigator. We find this assignment of error is not well-taken.

*7 Appellant first argues that both statements were procured prior to the first indictment by the staff of the elected prosecuting attorney, who was suffering a conflict of interest. Therefore, the use of these statements violates her right to due process of law.

For the reasons enumerated in the second assignment of error, we find that these statements were not tainted by the conflict of interest. Further, the record indicates that appellant was represented by counsel at the time that she testified before the grand jury. Upon questioning by the assistant prosecuting attorney, appellant indicated that she had been apprised of her constitutional rights. The record indicates that she voluntarily appeared and testified before the grand jury with the advice of counsel. The record also indicates that appellant was advised of her constitutional rights before giving a pre-indictment statement to the police investigator and that she voluntarily appeared for the interview. We find no violation of appellant's due process rights through the use of these statements at trial.

Appellant also argues that the trial court erred in admitting the statements because the corpus delicti of the crime had not been established by the preceding evidence. "The corpus delicti of a crime is the body or substance of the crime, included in which are usually two elements: (1) the act and (2) the criminal agency of the act." (Emphasis in original.) *State v. Edwards* (1976), 49 Ohio St.2d 31, paragraph one of the syllabus, vacated as to death penalty (1978), 438 U.S. 911, 98 S.Ct. 3147. There must be some evidence outside of a confession tending to establish the corpus delicti before a confession is admissible. "The quantum or weight of such outside or extraneous evidence is not of itself to be equal to proof beyond a reasonable doubt, nor even enough to make it a prima facie case. It is

sufficient if there is some evidence outside of the confession that tends to prove some material element of the crime charged." (Emphasis in original.) *State v. Ralston* (1979), 67 Ohio App.2d 81, 83, quoting *State v. Maranda* (1916), 94 Ohio St. 364, paragraph two of the syllabus. The purpose of the corpus delicti rule is simply to establish that the crime occurred. It does not require that the evidence exclude all other reasonable theories. *State v. VonHook* (1988), 39 Ohio St.3d 256, 262, certiorari denied (1989), 489 U.S. 1100, 109 S.Ct. 1578. Circumstantial evidence will suffice to establish the corpus delicti. See *State v. Nicely* (1988), 39 Ohio St.3d 147, 151-54.

Prior to the admission of appellant's statements, the state introduced evidence that: (1) appellant had written checks from Neal's accounts for work done on her own residence and for various other personal items; (2) Neal did not receive her bank statements and that she paid all bills in cash; and (3) Neal was frugal, never giving large gifts and that all gifts she gave to family members were equal. Further, even if Neal had agreed to give appellant \$10,000 per year, there was evidence of deception in that appellant diverted over \$10,000 from Neal's accounts in at least one year. Thus, there was evidence introduced prior to appellant's statements supporting the inference that appellant by acts or omissions deceived Neal. We find no error by the trial court in admitting appellant's statements into evidence. Accordingly, her fourth assignment of error is overruled.

*8 In her sixth assignment of error, appellant states that the trial court erred by instructing the jury contrary to law. She argues that the court should not have instructed the jury that appellant could have deceived the victim by "withholding information" because that instruction was contrary to the plain language of the indictment and the bill of particulars. She also argues that the trial court erred in instructing the jury contrary to the law as expressed by this court in *State v. Helferich* (Apr. 20, 1987), Clermont App. No. CA85-12-110, unreported. We find this assignment of error is not well-taken.

The trial judge instructed the jury as follows:

"To prove theft by deception in the [s]tate of Ohio, * * * must prove beyond a reasonable doubt that on or between the dates alleged in each count of the indictment and in Preble County, Ohio, the [d]efendant, Karen Faulkner, did, with purpose to deprive the owner of property, knowingly obtained or exerted control over such property by deception.

"Deception means that the [d]efendant knowingly deceived Mrs. Neal or caused her to be deceived by any false or misleading representation, by withholding information, by preventing her from acquiring information, or by any other conduct, act or omission which created, confirmed or perpetuated a false impression as to law, value, state or mind or any other objective or subjective fact."

Appellant requested virtually the same instruction with the deletion of the words "withholding information." She also objected to the use of those words at trial. The generally accepted rule is that special instructions which correctly state the law pertinent to the case must be included, at least in substance, in the general charge. *State v. Mahoney* (1986), 34 Ohio App.3d 114, 119. However, appellant's proposed instruction was not a correct statement of law, since "withholding information" is included in the statutory definition of deception. R.C. 2913.01(A) provides:

" 'Deception' means 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 which 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." (Emphasis added.)

The trial court's instruction, including the words "withholding information" followed the statutory definition. It was a "plain, distinct and unambiguous statement of the law as applicable to the case made before the jury by the proof adduced." *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12. Accordingly, we find no error by the trial court.

There is no merit to appellant's argument that the trial court incorrectly instructed the jury with respect to an issue not framed in the pleadings. She places false reliance upon the fact that the bill of particulars did not use the term "withholding information."

*9 The purpose of an indictment is to afford the accused with adequate notice of the charge against her and opportunity to defend. An indictment is generally sufficient if it contains, in substance, a statement that the accused has committed some offense. *Sellards, supra*, at 170. See also, *State v. Lewis* (1970), 21 Ohio St.2d 203, 208. Likewise, the purpose of a bill of particulars is to "elucidate or particularize the conduct of the accused alleged to constitute the charged offense." *Sellards, supra*, at 171. A defendant, upon proper request is entitled to a bill of particulars setting forth the ultimate facts upon which the state expects to rely in establishing its case, and the state should be restricted in its proof to the indictment and the particulars set forth in the bill. *State v. Miller* (June 30, 1989), Warren App. No. CA88-09-071, unreported, at 10. See also, *Lewis, supra*, at 210-11. However, a bill of particulars is not designed to provide the accused with specifications of evidence or to serve as a substitute for discovery. *Sellards, supra*, at 171.

Each count of the indictment contained the word "deception." Likewise, the bill of particulars used the word "deception" in describing the conduct involved in each count in the indictment. It also stated that "Karen Faulkner was [a]ttorney in [f]act for Clara Neal and by

conduct, acts, or omission, created, confirmed or perpetuated a false impression that Karen Faulkner was acting as a fiduciary and protecting the monetary interests of Clara Neal." The indictment and the bill of particulars through the use of the words "deception" and "conducts, acts, or omission" provided the accused with sufficient notice of the nature of the acts constituting the alleged offenses and gave her an opportunity to defend. The evidence presented at trial conformed to the acts set forth in the indictment and the bill of particulars and was sufficient to support the instruction given by the trial court.

Appellant also places false reliance upon Helferich, supra, decided by this court. In Helferich, the defendant was president of Now Rentals, Inc., a company that owned three stores from which consumers could rent or buy electronic equipment. One of these stores was burglarized and the defendant conducted an inventory to determine the extent of the store's loss. The inventory was complicated because all three stores rented or received each other's equipment from time to time and because the inventory system was not always current or well-maintained. Based upon his inventory, the defendant concluded that one stereo and nine VCR's were missing and made a claim with Now Rental's insurance company. The insurance company subsequently paid the claim by a draft payable to Now Rentals, not to the defendant.

Three months after the insurance claims were settled, the defendant was removed from his position. The new president began a thorough inventory. She discovered that seven of the nine VCR's that defendant had reported stolen were still being rented. However, she never located the other two VCR's or the stereo that the defendant had reported stolen and she could not account for an additional eighteen VCR's.

*10 The defendant was subsequently convicted of theft by deception in connection with the insurance claim arising out of the burglary. On appeal, he argued that the trial court erred in refusing to grant his motion for a judgment of acquittal because the state of Ohio failed to establish the essential elements of theft by deception. This court agreed stating that there were four distinct defects in proof: (1) no proof of any specific false or misleading representations made by the defendant to the victim of the offense; (2) no proof that the defendant knew any specific representations that he made to the victim were false or misleading; (3) no proof that the victim relied upon any of the defendant's specific representations to its detriment; and (4) no proof that the defendant received any property of value from the victim as a result of any false or misleading representations that he made. *Id.* at 5-6. We noted that the evidence was reconcilable with a reasonable theory of innocence--that the defendant was prosecuted merely because he was the store manager and had conducted the inventory negligently.

Appellant claims that Helferich stands for the proposition that there must be evidence of specific false or misleading

representations and that the trial court should have so instructed the jury. However, this is a misreading of our decision. According to R.C. 2913.01(A), deception can be accomplished in four ways: (1) a false or misleading representation; (2) withholding information; (3) preventing another from acquiring information; and (4) conduct, acts or omissions which create, confirm, or perpetuate a false impression in another. The defendant in Helferich was accused of active fraud, making a false or misleading representation to the insurance company. Helferich did not involve any of the other three means of deception. Thus, the state had the burden of proving that the defendant made a false or misleading representation, a burden which the state failed to meet. Likewise, the state failed to prove any of the other elements of theft by deception.

The present case is distinguishable. Appellant was not accused of making a false representation, but of suppressing or concealing information when there was a duty to disclose. Helferich is inapplicable to the present case and the trial court committed no error in its instructions. Accordingly, appellant's sixth assignment of error is overruled.

In her seventh assignment of error, appellant states that the trial court erred in giving a special instruction as to counts two, seven and eight of the indictment. She argues that the trial court's instruction as to the amount of the theft was contrary to the evidence. We find this assignment of error is not well-taken.

Counts two, seven and eight related to the registration of the three certificates of deposit in the amount of \$10,000 each payable upon death in the name of appellant, her sister and her brother. The trial court instructed the jury that it could find appellant guilty of theft in excess of \$5,000, or in the alternative, of theft in an amount more than \$300 but less than \$5,000, or in the alternative, less than \$300. Appellant claims that the evidence only supports the fact that appellant registered the three certificates of deposit and that the instruction caused the jury to produce a verdict totally inconsistent with the evidence. We disagree.

*11 The three certificates of deposit were obtained by appellant through the use of Neal's funds. The state presented evidence that some of the interest on these certificates was diverted into appellant's own accounts. Thus, the jury could find that appellant committed the offense by registering the certificates of deposit, by diverting the interest, or both. The jury was to determine the amount of Neal's funds over which appellant exerted control. Accordingly, the instruction was proper and appellant's seventh assignment of error is overruled.

In her eighth assignment of error, appellant states that the trial court erred by allowing the state to present evidence that appellant cashed in the certificate of deposit registered in the name of Clara Neal in 1988 and payable upon death

to appellant. She argues that the indictment and the bill of particulars alleged that the registration of the certificates of deposit in January 1986 was the criminal conduct with which appellant was charged. She contends that the evidence regarding appellant's conduct two and one-half years later was irrelevant to prove any of the facts contained in the indictment and was only presented with the intention of inflaming the jury. We find this assignment of error is not well-taken.

"The admission or exclusion of relevant evidence rests within the discretion of the trial court." *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. An appellate court will not disturb a decision of the trial court to admit or exclude evidence absent an abuse of discretion and a showing that the accused has suffered material prejudice. *State v. Martin* (1985), 19 Ohio St.3d 122, 129, certiorari denied (1986), 474 U.S. 1073, 106 S.Ct. 837.

The state presented the testimony of Kathleen Anspaugh, a bank officer. Anspaugh testified that when appellant cashed in the certificate of deposit in 1988, she claimed that the certificate was lost and that she signed an affidavit to that effect in order to receive the funds. The state had previously presented evidence indicating that appellant knew the location of the certificate. Anspaugh's testimony was relevant circumstantial evidence tending to prove that appellant had knowingly exerted control over Neal's funds with the purpose to deprive her of those funds, by deception. We do not find that the trial court's decision to allow the bank officer's testimony to be so arbitrary, unreasonable or unconscionable as to connote an abuse of discretion. *State v. Adams* (1980), 62 Ohio St.2d 151, 157. Accordingly, appellant's eighth assignment of error is overruled.

In her ninth assignment of error, appellant states that the trial court erred in overruling her motions for judgment of acquittal. We find this assignment of error is not well-taken.

"Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

*12 *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus.

In support of this assignment of error, appellant relies on *State v. Baumgarden* (1988), 49 Ohio App.3d 24, in which the defendant was convicted of theft by deception. The conviction was based upon the claim that during the thirty-one month period that he was general manager of Cedar City Motors, Inc., he had improperly written himself thirty-five checks from company funds. This court held that his motion for judgment of acquittal should have been granted

by the trial court. We stated:

"The record before us does not convince us a reasonable trier of fact could have reasonably concluded that all the elements of theft by deception were proven beyond a reasonable doubt in this case. The trial transcript shows that during a thirty-one month period appellant wrote himself thirty-five checks which were always recorded on the company's books. Consequently, the amount appellant allegedly stole was clearly carried on the company balance sheet either as a prepaid expense or as an account receivable throughout the period in which the deception allegedly occurred. These checks as well as the company's books and records created an accounting and auditing trail anyone might follow. Melissa Knoop, Cedar City's owner, and the state contend appellant stole the money the thirty-five checks represented because Knoop trusted appellant to run Cedar City and did not discover the checks until appellant was no longer with the company. However, the fact that the checks and company records showing appellant received the money were always available to anyone who wished to examine them, including Knoop, convinces us no reasonable trier of fact could conclude beyond a reasonable doubt the Knoop was deceived by appellant because his check writing was evident in Cedar City's records. Knoop's testimony that she trusted appellant and did not closely oversee his management of Cedar City does not prove appellant deceived her but merely shows that she was unaware of and did not approve his actions."

Id. at 25.

Relying on *Baumgarden*, appellant argues that Neal's bank statements were always available to anyone who wished to examine them, including Neal herself, preventing any reasonable trier of fact from concluding beyond a reasonable doubt that Neal was deceived. She claims that evidence that Neal trusted her did not prove that Neal was deceived. Thus, appellant argues, the evidence supports a reasonable theory of innocence, and pursuant to *State v. Kulig* (1974), 37 Ohio St.2d 157, syllabus, appellant was entitled to judgment of acquittal.

We find no merit in this argument, as we find the present case distinguishable. In this case, there was no "accounting and auditing trail that anyone might follow." Moreover, there was evidence beyond the fact that Neal trusted appellant and simply did not examine her bank statements. The evidence showed that appellant was a fiduciary and owed a duty to disclose material information to Neal. Neal paid all her employees and all her bills in cash and appellant always made sure that Neal had sufficient cash to pay bills and buy gifts. The bank statements were sent to appellant's address and not to Neal. Many checks in the check register were made out to cash and yet not all of this cash reached Neal. Reasonable minds could conclude that appellant created a false impression that Neal's assets were safe. The evidence is circumstantial but it is sufficient to support the conviction. See *State v. Apanovitch* (1987), 33

Ohio St.3d 19, 27, 28.

*13 Appellant's relationship with Neal was regulated by the fiduciary obligations imposed by a power of attorney. Given the amount of money acquired by appellant from Neal in a very short period of time coupled with the way it was secreted into appellant's bank accounts, the circumstantial evidence is consistent with the state's theory of guilt and irreconcilable with appellant's theory of innocence. See Kulig, supra. We find that reasonable minds could differ as to whether each element of the offense had been proven beyond a reasonable doubt and the issues were properly submitted to the jury. Accordingly, appellant's ninth assignment of error is overruled.

In her tenth assignment of error, appellant states that the jury verdicts were contrary to the manifest weight of the evidence. We find this assignment of error is not well-taken.

"A reviewing court will not reverse a jury verdict where there is substantial evidence upon which a jury could reasonably conclude that all elements of an offense have been prove beyond a reasonable doubt." State v. Eley (1978), 56 Ohio St.2d 169, syllabus.

Appellant's arguments under this assignment of error generally relate to the credibility of the evidence, not the sufficiency. However, matters as to the credibility of the evidence are for the trier of fact to decide. State v. Walker (1978), 55 Ohio St.2d 208, 212, certiorari denied (1979), 441 U.S. 924, 99 S.Ct. 2033. Appellant's theory of innocence was supported only by her own testimony. The jury did not find her testimony credible and as a reviewing court, we will not substitute our judgment for that of the trier of fact. If the jury finds there is no reasonable theory of innocence "based upon the facts as it finds them to be, and the facts which it finds are irreconcilable with any reasonable hypothesis other than guilt, it is its duty to convict." (Emphasis in original.) State v. Graven (1978), 54 Ohio St.2d 114, 119. We find that there was substantial evidence from which the jury could conclude that all of the elements of the offense had been proven beyond a reasonable doubt. Accordingly, appellant's tenth assignment of error is overruled.

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed in part and reversed in part and this cause is remanded for further proceedings according to law and not inconsistent with this decision.

Not Reported in N.E.2d, 1990 WL 120111 (Ohio App. 12 Dist.)

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