

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 11AP-1084
 : (C.P.C. No. 10CR-3011)
 Charlotte R. Davidson, :
 : (REGULAR CALENDAR)
 Defendant-Appellant. :

D E C I S I O N

Rendered on June 29, 2012

Michael DeWine, Attorney General, *Maritsa A. Flaherty* and *Shawn P. Napier*, for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Charlotte R. Davidson is appealing after being found guilty of theft, in violation of R.C. 2913.02(A)(3). The finding of guilty was entered after Davidson changed her plea from "not guilty" to a plea of no contest. Two errors have been assigned:

[I.] The trial court erred in failing to discharge Appellant after the court improperly declared a mistrial, without manifest necessity. This violated Appellant's double jeopardy protections under the Fifth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution.

[II.] The trial court erred in awarding restitution in an amount that exceeded the loss suffered by the State of Ohio in violation of R.C. 2929.18.

{¶ 2} As can be determined from the words of the first assignment of error, a trial was conducted which resulted in the declaring of a mistrial. The trial court judge assigned to the case found a manifest necessity for terminating the trial because defense counsel had repeatedly failed to provide documents in discovery. The documents in question were pages of a log kept by a patient for whom Charlotte Davidson provided care. A theory of the theft was that Davidson billed the State of Ohio Medicaid Program for care she did not provide.

{¶ 3} The trial court judge, in overruling a defense motion asking that the charge be dismissed, prepared and filed a detailed entry explaining his ruling. He noted:

Trial in this matter began on May 23, 2011. The defendant was indicted for Theft By Deception under Ohio Revised Code Section 2913.02(A) (3) a felony of the fifth degree. The allegation was that the defendant had charged the Ohio Department of Job and Family Services for work she did not perform. A central piece of evidence relied upon by both parties at trial was a "daily" log which the Medicaid Recipient, Valerie Poulin, testified that she had maintained during relevant times within the indictment.

During the trial as part of cross examination of the recipient the defendant presented sheets from the log book to which the state objected indicating that it was not provided these pages during discovery. (transcript page 134) The court had the defendant provide the sheets to the State and cured the violation by allowing the State to cross examine the witness using the sheets and to recall a witness who had already testified. (transcript page 140). The State used these pages when it redirected the recipient. (transcript page 157)

Later in the trial the defendant again produce[d] a sheet from the log which had not been provided to the state. During argument the State pointed out it had requested the log from the recipient and the recipient did not provide the log to the

State but rather provided a copy of the log to the defendant's counsel who made copies and provided those to the State.

The contents of the log were mentioned throughout the trial by both parties in an effort to bolster or rebut evidence and to attack the credibility of witnesses. The recipient also testified and relied upon the log she had created.

The State's last witness, Frank Kopus, a Medicaid Special Agent with the Ohio Attorney General's Office testified how he compared the log book with the records received from the defendant and other care givers to reach certain conclusions regarding the defendant's culpability and the amount of money owed to the state.

The Defendant again produced sheets from the log books that had not been previously disclosed to the State. (transcript page 359) At this time the Court told the parties to review the pages from the log book in the defendant's possession with the pages that the defendant had provided the state during discovery to see if there were any additional discrepancies.

After reviewing all the pages in the defendant's possession it was determined that there were approximately 40 additional log book pages in the possession of the Defendant that had not been provided to the State during discovery. Discussion was conducted on the record in which defense counsel indicated she believed she pulled the missing pages out during her review of what was provided to her by Ms. Poulin and sent the remaining pages to the State. After a hearing on the issue the court declared a mistrial finding manifest necessity by concluding the discovery which was not provided was material to a fair adjudication of the merits in this case and there was no other adequate remedy or sanction since the state had essentially presented its entire case when the additional 40 pages of the log book were disclosed.

* * *

In this instance, defendant provides a litany of reasons as to why she was not required to turn the missing documents over to the State. Regardless, the simple facts remain that counsel for defendant represented to the State that all evidence had been produced pursuant to Crim.R. 16. Even on the record, counsel assured the State that she had, in fact, produced all of the documents she intended to use at trial, but for three,

which she attributed to an inadvertent copying error. (transcript page 135). However, despite her affirmative representation that she had complied with Crim.R. 16, counsel had not done so, producing some documents which the State argues contradicted the prior testimony of the recipient. The degree to which defendant failed to comply with Crim.R. 16 bears mention. Defendant did not neglect to disclose one document. She failed to disclose approximately 40.

The State prepared its case based upon the journal evidence which was disclosed. The trial prep, direct and cross examination of witnesses and its theory of the evidence was also based upon the information provided during discovery.

It is the magnitude of counsel's failure and the timing of its disclosure that removes this from an incident of "some error or irregularity" and triggers the doctrine of manifest necessity. Even if her failure to disclose more than 40 requested documents was mere oversight, it nevertheless obfuscates the clearly stated intent of Crim.R. 16 and prevents the State from obtaining a full and fair adjudication of the case.

Defendant's Motion to Dismiss is DENIED.

{¶ 4} The trial judge's entry clearly explains why a manifest necessity to declare a mistrial existed. We agree with his analysis.

{¶ 5} The first assignment of error is overruled.

{¶ 6} R.C. 2929.18 limits restitution to the economic loss suffered by the victim of a theft. The Ohio Department of Job and Family Services set the loss at \$3,905.76, the amount awarded as restitution by the trial court. The department offered exhibit K which itemized the portions of the loss. The exhibit was accepted by the trial court and found to be credible.

{¶ 7} Davidson and her counsel did not object to the exhibit or the restitution total awarded. Thus, the issue is subject to a plain error analysis. We cannot find plain error here. Charlotte Davis billed for funds before she was entitled to bill as a service

provider. She also billed for services she did not provide. The trial court had competent credible evidence to support the restitution order it journalized. The order was not journalized in error.

{¶ 8} The second assignment of error is overruled.

{¶ 9} Both assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and SADLER, JJ., concur.
