

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-080122
		C-080123
Plaintiff-Appellee,	:	TRIAL NOS. 07CRB-45136
		07CRB-45138
vs.	:	
		<i>JUDGMENT ENTRY.</i>
TERRY BELL,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

In three assignments of error, defendant-appellant Terry Bell contests his convictions for two counts of theft by deception.² We affirm.

According to the victims, Bell agreed to buy a car from Emmanuel Rolley and gave him a check from an account in the name of Lakisha Gilbert. According to Rolley, Bell told him that Gilbert was his girlfriend. Rolley deposited the check into his account. Prior to the check clearing, Bell told Rolley that he had changed his mind and wanted his money back. Rolley obliged by withdrawing money from his account through an ATM. The check to Rolley bounced. A copy of the check, stamped “INSUFFICIENT FUNDS,” was admitted into evidence.

After Bell had agreed to purchase the car, he asked Elnathan Rosewood (Rolley’s brother) to install a new sound system in the vehicle. Bell gave Rolley a check from the

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² R.C. 2913.02(A)(3).

same account to give to Rosewood. Rosewood deposited the check in his account. Again, Bell soon thereafter indicated that he wanted his money back because he could get the parts cheaper somewhere else. Rosewood withdrew \$1500 from his account and gave the money to Rolley, and Rolley then gave the money to Bell. The second check also bounced. A copy of the check, stamped “RETURN REASON – A / NOT SUFFICIENT FUNDS,” was admitted into evidence.

Lakisha Gilbert testified that she had opened the bank account at issue, but that she had never received the checks for the account. She identified the two checks as ones from her account. She canceled the account when she was informed that the account had been overdrawn because of the checks. She denied knowing Bell.

Bell testified on his own behalf. He said that he had not written either check, had never agreed to buy a car, and had never agreed to have the car upgraded. He testified that Rolley and Rosewood had concocted a scheme to punish him because he had refused to assist the brothers in robbing the Walgreens where Rolley worked. Bell conceded that he had been to prison previously for “riding a four-wheeler.”

Bell was convicted after a bench trial of two counts of theft by deception. He was sentenced to 180 days in the Hamilton County Justice Center for each offense, to be served consecutively, with credit for time served. He was also ordered to pay restitution. Bell has appealed, raising three assignments of error, which we address out of order.

In his first assignment of error, Bell argues that it was improper for the victims to testify about what the banks had told them about the status of their accounts. He claims that such testimony was hearsay and that it violated his right to confront his accusers, as interpreted by *Crawford v. Washington*.³

³ (2004), 541 U.S. 36, 124 S.Ct. 1354.

The erroneous admission of inadmissible hearsay that is cumulative to properly admitted testimony constitutes harmless error.⁴ Accordingly, even if we were to conclude, as Bell contends, that an account owner cannot testify about the status of his own account on the grounds of hearsay, the testimony was duplicative in this case. The actual checks, marked as having been returned due to insufficient funds, were admitted into evidence without objection.

Regardless, any statements made by the bank employees to the account holders did not violate Bell's right to confront his accusers. Such statements cannot be said to have been made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."⁵ For this reason, they were not testimonial and *Crawford* did not apply.

In his third assignment of error, Bell contends that his convictions were based upon insufficient evidence and were against the weight of the evidence. We disagree. The state's witnesses testified that Bell had given checks to Rolley to pay Rolley for a car and to pay Rosewood to work on the car. Bell convinced Rolley that he had permission to use the account because he told Rolley that it was his girlfriend's account. Soon thereafter, he rescinded each transaction and got cash from the victims. The checks were dishonored, and the victims were left with worthless paper. Bells convictions for theft by deception, which required a showing that "no person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * * * by deception,"⁶ were based upon sufficient evidence⁷ and were not against the weight of the evidence.⁸

⁴ *State v. Williams* (1988), 38 Ohio St.3d 346, 352, 528 N.E.2d 910.

⁵ *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, paragraph one of the syllabus.

⁶ R.C. 2913.02(A)(3).

⁷ See *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

⁸ See *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

In his second assignment of error, Bell argues that his sentence was improper. First, he contends that the trial court did not consider the proper statutory factors under R.C. 2929.22(B). Second, he claims that the sentence “imposes an unnecessary burden on local government resources,” in violation of R.C. 2929.22(A). We reject both propositions.

While Bell argues that the trial court did not properly consider R.C. 2929.22(B), this court has held that “a reviewing court will presume that the trial court considered the sentencing criteria if the sentence imposed is within statutory limits, unless the defendant demonstrates the contrary.”⁹ A silent record raises the presumption that the trial court considered all the factors listed in R.C. 2929.22(B).¹⁰

Bell has not demonstrated that the trial court failed to consider the factors. He notes that “the crimes were both nonviolent” and that his “record was not noted.” But the fact that a crime was nonviolent is not a factor under R.C. 2929.22(B). Further, the transcript in this case indicates that the trial court delayed the sentencing hearing, stating that “we’ll recall the case because I don’t have information from Pretrial Services.”

We also reject Bell’s argument that the sentence violated R.C. 2922.22(A). Any time a criminal defendant is punished, whether through a period of community control or incarceration, there is a burden on local government resources. The question is whether that burden is unnecessary.

While there is little authority interpreting R.C. 2929.22(A), there is a wealth of authority addressing its felony counterpart, R.C. 2929.13(A). That provision states that the “sentence shall not impose an unnecessary burden on state or local government resources.”

As the Fifth Appellate District has noted, “[t]he very language of the cited statute grants trial courts discretion to impose sentences. Nowhere within the statute is there any

⁹ *State v. Black*, 1st Dist. No. C-060861, 2007-Ohio-5871, ¶20, citing *State v. Johnson*, 164 Ohio App.3d 792, 2005-Ohio-6826, 844 N.E.2d 372, at ¶9.

¹⁰ *State v. Cole* (1982), 8 Ohio App.3d 416, 457 N.E.2d 873.

guideline for what an ‘unnecessary burden’ is.”¹¹ The court has more recently held that “the plain language suggests that the costs, both economic and societal, should not outweigh the benefit that the people of the state derive from an offender’s incarceration.”¹²

There is nothing in the record to indicate the level of burden that Bell’s incarceration places on local government resources. While Bell asks this court to take judicial notice of “the current jail situation,” it is not within our power to do so. A court can only take judicial notice of a fact “not subject to reasonable dispute that is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”¹³

Even if “the current jail situation” could qualify under this rule, which is doubtful, Bell cannot supplement the record by asking this court to add facts to it by judicial notice. Such a request must be made to the trial court prior to appeal. “When a trial court fails to take judicial notice of a factual matter because a party did not raise the issue, an appellate court will not consider the fact in reviewing the appealed judgment.”¹⁴ A reviewing court cannot decide an appeal based upon factual matters that were not before the trial court.¹⁵

The trial court’s imposition of a jail term was appropriate in this case. Bell had at least one prior felony conviction for which he had been to prison. When he testified at trial, not only did he deny his involvement with the checks, but he concocted an elaborate scheme in which he claimed that the victims had tried to involve him in a criminal enterprise and had only brought these charges in retaliation for his refusal to participate.

¹¹ *State v. Armstead*, 5th Dist. No. 06COA041, 2007-Ohio-4426, at ¶8, quoting *State v. Ferenbaugh*, 5th Dist. No. 03COA038, 2007-Ohio-977.

¹² *State v. Hines*, 5th Dist. No. 07-COA-027, 2008-Ohio-1699, at ¶9, quoting *State v. Vlahopoulos*, 154 Ohio App.3d 450, 2003-Ohio-5070, 797 N.E.2d 580, at ¶5.

¹³ Evid.R. 201(B).

¹⁴ *Hubbard v. Luchansky* (1995), 102 Ohio App.3d 410, 413, 657 N.E.2d 352, citing 5 American Jurisprudence 2d (1962) 184, Appeal and Error, Section 739.

¹⁵ See *State v. Ishmail* (1978), 54 Ohio St.2d 402, 377 N.E.2d 500, paragraph one of the syllabus.

Bell stole \$4300 from two victims, and the manner in which he stole the money caused them, and Gilbert, additional harm arising from their overdrawn accounts. While the trial court may not have properly considered the statements about the overdrawn accounts on hearsay grounds at trial, it is well established that the trial court could consider hearsay at sentencing.¹⁶

Therefore, we affirm the trial court's judgments.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., CUNNINGHAM and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on December 10, 2008

per order of the Court _____
Presiding Judge

¹⁶ See Evid.R. 101(C)(3) (The Ohio Rules of Evidence “[other than with respect to privileges] do not apply to * * * sentencing * * *.”).