



TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....	3
STATEMENT OF THE CASE AND FACTS .....	4
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW .....	4
<p style="padding-left: 40px;"><u>Proposition of Law No. I</u>: The lower courts erred in determining that the two counts in the indictment were not allied offenses of similar import.</p>	
CONCLUSION.....	8
PROOF OF SERVICE .....	9
APPENDIX	<u>Appx. Page</u>
<p style="padding-left: 40px;">Opinion of the Wood County Court of Appeals rendered January 18, 2008, in <i>State of Ohio v. Mark West</i> (2008), WD-07-002 .....</p>	

EXPLANATION OF WHY THIS FELONY MATTER IS A CASE OF PUBLIC  
OR GREAT GENERAL INTEREST AND INVOLVES A  
SUBSTANTIAL CONSTITUTIONAL QUESTION

In the lower courts, the relevant precedent was not in dispute. The facts were not in dispute. There was, however, a complete lack of convergence of the precedent to those facts when the sentence was imposed, for which Mark West received two-consecutive 17 month prison terms. As is discussed in greater detail below, there is an abundant body of statutory provisions and common law precedent which clearly stands for the proposition that, under the pertinent facts of this matter, Appellant could not have committed the offense of Telecommunications Fraud without committing Theft by Deception. Being allied offenses, constitutional, statutory, and state common law precedent prohibited the 34 month sentence imposed.

This felony matter could not be of greater public or great general interest involving a constitutional question for one important reason. While it may be an obvious proposition, this Court and the Ohio Legislature, by their very function, enact laws and render opinions which present and determine broad constitutional issues, which, in this matter, involve the right against successive punishments for the same conduct. The lower courts have an obligation to apply that law in a meaningful way to ensure that an individual's rights are protected and to maintain confidence and respect in the process as an institution. Counsel and Appellant respectfully submit that the record of the lower proceedings demonstrates a lack of meaningful attention given to the single issue presented in this appeal, and that upon due consideration, it becomes clear that Appellant was improperly sentenced in violation of his constitutional right against successive punishments for the same conduct.

## STATEMENT OF THE CASE AND FACTS

In reviewing the pleadings before the Sixth District Court of Appeals, there appears to have been some dispute not only with respect to the inferences drawn from the facts, but also with the facts themselves. The following facts were taken from the Sixth District's opinion in *State v. West*, and are as follows. In 2005, Appellant sold OSU/MICH tickets to approximately 399 persons, involving approximately 1,000 tickets. Of those sold, 150 customers received their purchased tickets. On November 30, 2005, appellant was indicted on one count of fraud by telecommunications in violation of R.C. 2913.05(A) and one count of grand theft by deception in violation of R.C. 2913.02(A)(3). Appellant entered pleas of not guilty to the charges and trial to a jury commenced on September 26, 2006. The jury found appellant guilty of both counts and the trial court sentenced appellant to consecutive prison terms of 17 months on each conviction. Appellant was ordered to pay restitution of \$162,909. *State v. West*, (2008) 2008 WL 302498 at 1-4.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The lower courts erred in finding that Theft by Deception and Telecommunications Fraud were not allied offenses of similar import.

There is an abundance of controlling statutory and common law precedent providing trial courts with specific guidelines to resolving claims that multiple offenses are allied. Revised Code Section 2941.25 reads in part,

Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one. RC 2941.25(A).

This Court in *Rance*, further refined this statutory precedent by resolving the recurring issue of whether to examine the statutory elements in the abstract, or as applied to the facts of a case. RC 2941.25(A).

But contrary to the approach taken by the court of appeals, we today clarify that under an R.C. 2941.25(A) analysis the statutorily defined elements of offenses that are claimed to be of similar import are compared *in the abstract*. *Newark v. Vazirani, supra*, and language in other opinions to the contrary, are overruled. Courts should assess, by aligning the elements of each crime in the abstract, whether the statutory elements of the crimes “correspond to such a degree that the commission of one crime will result in the commission of the other.” *Jones*, 78 Ohio St.3d at 14, 676 N.E.2d at 81. And if the elements do so correspond, the defendant may not be convicted of both unless the court finds \*639 that the defendant committed the crimes separately or with separate animus. R.C. 2941.25(B); *Jones*, 78 Ohio St.3d at 14, 676 N.E.2d at 81 (a defendant may be convicted of allied offenses of similar import if the defendant's conduct reveals that the crimes were committed separately or with separate animus). *Rance* at 705.

Perhaps most important to Appellant's argument that this Court should be *compelled* to accept jurisdiction in this matter, is that beneath the layers of statutory and common law precedent is one of the most important constitutional protections in the criminal process, the right to be protected against multiple punishments for the same conduct.

We discern the General Assembly's intent on this subject through review of Ohio's multiple-count statute, R.C. 2941.25. If the court's sentencing of *Rance* accords with the multiple-count statute, that harmony with the legislative intent precludes an “unconstitutional” label. See *Albernaz*, 450 U.S. at 344, 101 S.Ct. at 1145, 67 L.Ed.2d at 285; *Bickerstaff*, 10 Ohio St.3d at 65-66, 10 OBR at 355-356, 461 N.E.2d at 895-896. This court has stated that Ohio's multiple-count statute “is a clear indication of the General Assembly's intent to permit cumulative \*636 sentencing for the commission of certain offenses.” *Id.* at 66, 10 OBR at 356, 461 N.E.2d at 896, fn. 1. With its multiple-count statute Ohio intends to permit a defendant to be punished for multiple offenses of *dissimilar import*. R.C. 2941.25(B); *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816, 817. If, however, a defendant's actions “can be construed to constitute two or more allied offenses of *similar import*,” the defendant may be convicted (*i.e.*, found guilty and punished) of only one. R.C. 2941.25(A). But if a defendant commits offenses of similar import separately or with a separate animus, he may be punished for both pursuant to R.C. 2941.25(B). *State v. Jones* (1997), 78 Ohio St.3d 12, 13-14, 676 N.E.2d 80, 81. *Rance* at 703.

After an extensive Westlaw search, counsel has been unable to find a single case addressing whether Theft (by deception) and Telecommunications Fraud are allied offenses under either *Rance* or any previous standard of review. Not a single case addressing any allied offense analysis is cited in either the pleadings before the Sixth District Court of Appeals or the opinion itself. While it may be pure supposition, counsel submits that the apparent absence of case law on this issue (for a law which has been in effect for over nine years<sup>1</sup>), could be explained by the fact that case law would only be generated when the State and Court determine such an offense would not be allied with other similar counts in an indictment.

Despite this dearth of precedent, Appellant submits the analysis under *Rance* as follows.

The elements of Telecommunications Fraud, RC 2913.05(A) reads as follows,

No person, having devised a scheme to defraud, shall knowingly disseminate, transmit, or cause to be disseminated or transmitted by means of a wire, radio, satellite, telecommunication, telecommunications device, or telecommunications service any writing, data, sign, signal, picture, sound, or image with purpose to execute or otherwise further the scheme to defraud.

Most important to Appellant's argument is the definition of "defraud", which, under RC 2913.01, is defined as,

... to knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another. RC 2913.01(B).

Theft by Deception, RC 2913.02(A)(3) holds 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. RC 2913.02(A)(3).

Pertinent to this offense, "Deception" and "Deprive" are defined, respectively, as conduct which involves,

... 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 that 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. RC 2913.01(A);

... withhold property of another permanently, or for a period that appropriates a substantial portion of its value or use, or with purpose to restore it only upon payment of a reward or other consideration, dispose of property so as to make it unlikely that the owner will recover it, or, accept, use, or appropriate money, property, or services, with purpose not to give proper consideration in return for the money, property, or services, and without reasonable justification or excuse for not giving proper consideration. RC 2913.01(C).

Appellant's argument, quite simply, is that a scheme to defraud, as set forth in Telecommunications Fraud, involves, obtaining a benefit by deception. Theft by Deception involves depriving an owner of property by deception. Deprivation and obtaining are synonymous. Benefit and property are synonymous. Deception is similarly defined and referenced in both statutes. It is the same act and process described in each statute by which an offender takes property from another by deception. The possibility that "benefit" can encompass a multitude of items and objects, cannot diminish that "property" is in fact one of those subsets included generally as "benefits". Offering even greater support to Appellant's argument is that the State's theory, as presented and as they would argue stands in support of the convictions, involved money as both the "property" under RC 2913.02, Theft by Deception, and "benefit" under RC 2913.05, Telecommunications Fraud.<sup>2</sup> In a purely abstract comparison, Theft by Deception, as defined, is a specific subset of the conduct as defined in the "purpose to defraud" as set forth under Telecommunications Fraud, and as a consequence, are in fact allied offenses.

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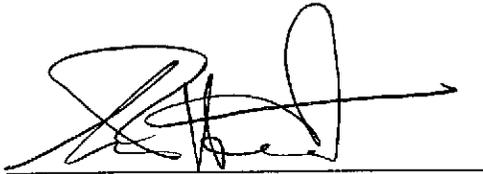
<sup>1</sup> 1998 H 565, eff. 3-30-99

The Appellant has a long recognized constitutional right against multiple punishments for the same conduct. The facts of this matter are not in dispute, the law is not in dispute, and the issue of allied offenses was more than adequately raised at both the trial and in the lower appellate court. Neither of the lower courts, however, gave this relatively simple, but extraordinarily important constitutional issue any meaningful analysis. Appellant submits that this matter presents the exact criteria supporting a grant of discretionary jurisdiction.

### CONCLUSION

For the aforementioned reasons, this felony case involves a matter of great and public general interest and presents a substantial constitutional question. The appellant requests that this Court grant jurisdiction to allow the merits of these issues to be presented and decided.

Respectfully submitted,

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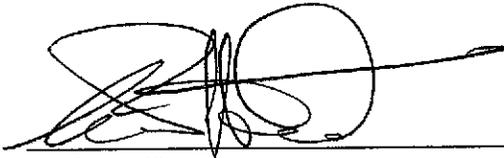
Andy P. Hart  
Counsel for Mark West

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<sup>2</sup> Although the trial court determined the offenses were not allied, and therefore did not proceed to the second part of the *Rance* test, there can be no dispute that there was but a single animus for the two offenses. *Rance* at 638.

Proof of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was hand-delivered to counsel for Appellee, Paul Dobson, Assistant Wood County Prosecuting Attorney, One Courthouse Square, Bowling Green, Ohio 43402, on the 27 day of February, 2008.

A handwritten signature in black ink, appearing to read 'Andy P. Hart', written over a horizontal line.

Andy P. Hart  
Counsel for Mark West

FILED  
WOOD COUNTY, OHIO

2008 JAN 18 A 10:44

SIXTH DISTRICT  
COURT OF APPEALS  
REBECCA E. BHAER, CLERK

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-07-002

Appellee

Trial Court No. 05 CR 596

v.

Mark West

**DECISION AND JUDGMENT ENTRY**

Appellant

Decided: JAN 18 2008

\* \* \* \* \*

Raymond C. Fischer, Wood County Prosecuting Attorney,  
Paul Dobson and Jacqueline M. Kirian, Assistant Prosecuting  
Attorneys, for appellee.

Wendell R. Jones, for appellant.

\* \* \* \* \*

**JOURNALIZED  
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JAN 18 2008

Vol. 29 Pg. 919

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas that found appellant guilty of one count of theft by deception and one count of telecommunications fraud and sentenced him to consecutive prison terms of 17 months for each offense. For the following reasons, the judgment of the trial court is affirmed.

1.

{¶ 2} Appellant sets forth the following assignments of error:

{¶ 3} "I. The Trial Court erred to the prejudice of Appellant by denying his Motions for Acquittal, as the evidence presented was insufficient to sustain a conviction of the offenses for which he was charged and the verdict of the jury should be overturned for this same insufficiency.

{¶ 4} "II. Appellant's conviction is against the manifest weight of the evidence in that the jury lost its way in resolving conflicts in the evidence and created a manifest miscarriage of justice.

{¶ 5} "III. The Trial Court erred to Appellant's prejudice and denied him due process and a constitutional right to a fair trial by denying his motion for Mistrial following jurors' observations of Appellant in shackles.

{¶ 6} "IV. The Trial Court erred in sentencing Appellant for the offenses of Telecommunication Fraud and Grand Theft by Deception where both charges were allied offenses of similar import and without a separate animus and thus not subject to a multiple sentence as proscribed by provisions of Ohio Revised Code § 2941.25."

{¶ 7} The undisputed facts relevant to the issues raised on appeal are as follows. From March through September 2005, appellant sold on eBay 1,036 tickets to the Ohio State/University of Michigan football game to be played on November 19, 2005. Individuals who purchased the tickets through 399 separate transactions paid appellant a total of approximately \$248,000. Appellant told his customers they would receive their tickets two weeks before the game. Appellant commingled the money he received from

**JOURNALIZED  
COURT OF APPEALS**

JAN 18 2008

these tickets sales and from other eBay sales transactions with funds he used to pay for his own vacation travel, tickets to special events for himself and his wife, and personal expenses such as two automobiles.

{¶ 8} Eventually, 150 people received their tickets to the football game; another 250 people did not. The total amount paid to appellant for tickets that he never delivered was approximately \$160,000. By early November 2005, many individuals who had not received the tickets for which they had paid began to worry. Two men who had not received their tickets went to appellant's house on November 14, 2005, demanding the tickets or their money back. By that time, the situation had begun to attract media attention. The following day, appellant fled the area, leaving his wife behind without telling her where he was going. On November 30, 2005, appellant was indicted on one count of fraud by telecommunications in violation of R.C. 2913.05(A) and one count of grand theft by deception in violation of R.C. 2913.02(A)(3). A warrant was issued for appellant's arrest. On January 30, 2006, appellant was found by police in Florida and returned to Ohio.

{¶ 9} Appellant entered pleas of not guilty to the charges and trial to a jury commenced on September 26, 2006. Six individuals who purchased game tickets from appellant testified. Appellant stipulated at trial that he had sold more than 22 tickets to those individuals between April 30 and September 17, 2005, for a total of \$6,563.

{¶ 10} None of the witnesses received the tickets they purchased or a refund from appellant. Five of the ticket buyers testified that they had used Paypal to buy the tickets

**JOURNALIZED  
COURT OF APPEALS**

JAN 18 2008

from appellant on eBay; one testified he contacted appellant by e-mail and sent him a cashier's check for tickets that had not yet been posted on eBay. All were told they would receive their tickets by mail approximately two weeks before the game. Appellant did not indicate to any of the witnesses that he did not have the tickets in his possession. Several testified that they believed he had the tickets in hand because he was very specific about the location of the seats, referring to section and row numbers for the tickets they purchased. All of the witnesses testified they began to worry when they had not received their tickets a week or so before the game. At that point, each of the witnesses tried to contact appellant, by e-mail and by phone, to find out when they would receive their tickets. One reached appellant by telephone; appellant said he had the tickets and would call back the following day with the Federal Express tracking number. Another witness initially received an e-mail reply with a promise to send the tickets soon, but received no response to his later inquiries. The others received no responses to their e-mail inquiries.

{¶ 11} Stone Burke, a senior fraud investigator for eBay, testified that he investigated appellant's account after eBay started to receive complaints from customers who had not received the football tickets they purchased from appellant. He further testified that between February 24 and September 23, 2005, appellant entered 400 transactions selling tickets for the football game for total sales of \$250,330. His investigation further showed that appellant had entered only 22 transactions to buy tickets for the same game, paying a total of \$11,093.49 for them.

**JOURNALIZED  
COURT OF APPEALS**

JAN 18 2008

Vol. 29 Pg. 922

{¶ 12} Rex Russell, a special agent in the major crimes unit of the Ohio Bureau of Criminal Identification and Investigation, testified that he began to investigate appellant's ticket sales operation in response to a request for assistance from the Fostoria Police Department, which had been inundated with complaints about appellant. At the time Russell began to work on the case, over 100 complaints had been received by various agencies, including the Fostoria Police Department and the Ohio Attorney General's Office. After Russell learned that appellant's wife had filed a missing persons report with the Fostoria police, he requested help from the U.S. Secret Service in tracking appellant through the use of his credit cards. Russell closely examined appellant's financial records, looking for an influx of money or any large expenditures. Russell determined that a lot of appellant's income came from eBay Paypal direct deposits and that, contrary to what appellant had told his wife, appellant was not employed by a local facility as a counselor. After determining that appellant had used his ATM card several times in Orlando, Florida, and had made phone calls from that area, authorities located him in January 2006, and returned him to Ohio.

{¶ 13} Appellant's wife, Teresa West, testified that it was her understanding appellant earned his income from employment as a drug abuse counselor and by selling special event tickets on eBay. Teresa learned of the complaints against her husband when she saw an article in the local paper on November 14, 2005. Later that day, appellant told her it was all a "big mistake" and that he would take care of it. The

**JOURNALIZED  
COURT OF APPEALS**

JAN 18 2008

Vol. 29 Pg. 923

following day, appellant stopped in to see Teresa at her work. She did not know where he went after that and did not see him again until the day of his trial.

{¶ 14} Appellant testified on his own behalf, explaining that he began selling tickets to special events on eBay in late 2002 or early 2003. He testified that most of the time he did not have possession of the items he was offering for sale when he posted them on eBay. This is known as a "pre-sale" and eBay requires the seller in that situation to post information as to when the buyer should expect to receive the merchandise. Appellant admitted that in November 2005, he failed to deliver all of the tickets he had sold to the football game. He also admitted that with respect to the 2005 Michigan/Ohio State game it was common practice for him to offer specific rows and section numbers for the seats even though he did not have the tickets in hand. He stated that he never represented in his postings on eBay that he had the tickets in his possession unless he actually did have them.

{¶ 15} Appellant testified that 399 individuals bought tickets from him for the 2005 Ohio State/Michigan football game. He estimated that 1,000 tickets were involved. Appellant ultimately failed to deliver between 600 and 700 tickets to approximately 250 of those customers. Appellant blamed his failure to acquire enough Ohio State/Michigan tickets on the unexpectedly high price of tickets he "pre-sold" for the September 10, 2005 Ohio State/Texas football game. He testified that because he miscalculated and had to pay substantially more than he had anticipated for the Ohio State/Texas tickets, he took a substantial loss and subsequently did not have enough money to purchase the Ohio

**JOURNALIZED  
COURT OF APPEALS**

JAN 18 2008

State/Michigan tickets which he had pre-sold. However, after the loss he experienced buying and selling tickets for the Ohio State/Texas game, appellant purchased two cars. Contrary to his earlier testimony that he stopped selling tickets after he realized that loss, appellant testified that he sold an additional \$15,403 in tickets to the Ohio State/Michigan game after September 10, 2005.

{¶ 16} Appellant testified that he had trouble acquiring tickets because individuals from whom he typically purchased them were holding onto theirs longer than they normally did and ticket brokers were charging more. Appellant further testified that he left Fostoria for Florida in order to purchase more tickets to satisfy some of his obligations.

{¶ 17} Appellant stated that if he did not have tickets in his possession at the time of a sale, he did not tell the buyer so unless the buyer asked. He further stated that "The buyer is responsible for what he's buying." It was his "history" when selling tickets on eBay to indicate that they were for certain sections and rows, "hoping" that he would later be able to purchase those specific tickets. The item descriptions on his eBay site indicated that the tickets were "guaranteed" even though he sold the tickets before arranging with a broker to acquire them. Appellant admitted that in 2005, he deposited into his bank account approximately \$225,000 which he had received from people who purchased the football tickets from him. He did not spend \$225,000 on acquiring Michigan/Ohio State tickets but spent the money on other things, including trips, tickets

**JOURNALIZED  
COURT OF APPEALS**

JAN 18 2008

Vol. 29 Pg. 925

for other events and two cars. Appellant described this turn of events as "a bad business deal."

{¶ 18} The jury found appellant guilty of both counts and the trial court sentenced appellant to consecutive prison terms of 17 months on each conviction. Appellant was ordered to pay restitution of \$162,909.

{¶ 19} In his first assignment of error, appellant asserts that the trial court erred by denying his Crim.R. 29 motions for judgment of acquittal. Appellant contends that the state failed to prove the essential elements of the crimes charged. He asserts that witness testimony revealed that his actions were legitimate and that he had no intent to defraud, his sole purpose being to sell tickets to his customers and build a profitable business for himself.

{¶ 20} When reviewing the denial of a Crim.R. 29(A) motion, an appellate court evaluates whether the evidence is such that reasonable minds can differ as to whether each material element of the crime charged has been proven beyond a reasonable doubt. See *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 263. The standard is the same as that used to review a sufficiency of the evidence claim. *State v. Carter* (1995), 72 Ohio St.3d 545, 553, 1995 Ohio 104. The test is whether, viewing the evidence in a light most favorable to the state, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390, 1997-Ohio- 52.

**JOURNALIZED  
COURT OF APPEALS**

JAN 18 2008

Vol. 29 Pg. 926

{¶ 21} Appellant was convicted of one count of telecommunications fraud and one count of grand theft by deception. R.C. 2913.05(A), telecommunications fraud, states:

{¶ 22} "(A) No person, having devised a scheme to defraud, shall knowingly disseminate, transmit, or cause to be disseminated or transmitted by means of a wire, radio, satellite, telecommunication, telecommunications device, or telecommunications service any writing, data, sign, signal, picture, sound, or image with purpose to execute or otherwise further the scheme to defraud."

{¶ 23} R.C. 2901.22(B) states that "[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶ 24} The jury in this case found that the state presented evidence to show beyond a reasonable doubt that appellant knowingly transmitted via eBay offers to sell tickets for the November 19, 2005 football game. Appellant did not dispute that he posted the tickets for sale on eBay. It is also not disputed that his computer was a "telecommunications device." Further, appellant's postings on eBay satisfy the definition of "data" set forth in R.C. 2913.01(R).

{¶ 25} Appellant disputes that he devised a "scheme to defraud" and purposely acted to further the scheme. Pursuant to R.C. 2913.01(B), to "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(A) defines "deception" as

**JOURNALIZED  
COURT OF APPEALS**

JAN 18 2008

"knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information that 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." And finally, as defined in R.C. 2901.22(A), a person acts purposely "when it is his 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 his specific intention to engage in conduct of that nature."

{¶ 26} The jury found that appellant intended to deceive the ticket buyers and thereby benefit himself. Appellant did not tell his buyers that he did not have possession of the tickets he was offering, yet he described the seats in sufficient detail that the buyers believed he had the tickets in hand. The evidence showed that appellant: (1) accepted payment of tens of thousands of dollars for tickets several months before the tickets became available on the market, (2) used the money paid to him for various personal expenses rather than to purchase the tickets he "pre-sold," and (3) even after he knew he did not have sufficient funds to satisfy his obligations, told individuals who contacted him that he would mail their tickets right away.

{¶ 27} Finally, the state was required to show that the value of the benefit obtained by appellant or of the detriment to the victims of the fraud was more than \$5,000 or less than \$100,000. R.C. 2913.05(B). Testimony of five individuals who purchased tickets

**JOURNALIZED  
COURT OF APPEALS**

JAN 18 2008

from appellant through eBay showed that they paid appellant in excess of \$5,000.

Appellant stipulated to those figures.

{¶ 28} Based on the foregoing, viewing the evidence in a light most favorable to the prosecution, we conclude that a reasonable jury could have found beyond a reasonable doubt that appellant did knowingly transmit data with purpose to further a scheme to defraud.

{¶ 29} Next, we consider the evidence produced by the state in support of the charge of grand theft by deception. R.C. 2913.02(A)(3) states 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." Pursuant to R.C. 2913.01(C)(3), "deprive" means to accept, use or appropriate money with purpose not to give proper consideration in return for the money and without reasonable justification or excuse for failing to give proper consideration. If the value of the property stolen is greater than \$5,000 and less than \$100,000, a violation of R.C. 2913.02 is grand theft, a felony of the fourth degree. As explained above, five witnesses testified that they paid a total of over \$5,000 for tickets they did not receive.

{¶ 30} The jury found that appellant intended to accept his customers' money without giving proper consideration in return. Appellant testified that he used the buyers' money without first acquiring the tickets he had "pre-sold." The jury further found, after hearing appellant's extensive testimony, that appellant did not have reasonable justification for failing to provide the buyers with their tickets. Appellant testified that he

**JOURNALIZED  
COURT OF APPEALS**

JAN 13 2008

did not keep the buyers' money in a separate account but deposited it in his personal bank account and used it for such things as buying new cars, taking trips and customizing his pick-up truck.

{¶ 31} Accordingly, we find that, when viewing the evidence in a light most favorable to the prosecution, a reasonable jury could have found beyond a reasonable doubt that appellant, with purpose to deprive his customers of their property, knowingly obtained their property by deception.

{¶ 32} Based on the foregoing, we find that there was sufficient evidence to sustain the convictions of telecommunications fraud and grand theft by deception, and that the trial court did not err by denying the Crim.R. 29 motions for acquittal. Appellant's first assignment of error is not well-taken.

{¶ 33} In his second assignment of error, appellant argues that his convictions were not supported by the manifest weight of the evidence. In support, appellant correctly notes that this claim requires consideration of the same evidence as that reviewed under his first assignment of error.

{¶ 34} In determining whether a verdict is against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and "\* \* \* weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, supra, at 387.

**JOURNALIZED  
COURT OF APPEALS**

JAN 18 2008

Vol. 29 Pg. 930

{¶ 35} In considering appellant's first assignment of error, we thoroughly reviewed the evidence presented at trial as well as the elements of the two offenses of which appellant was convicted. Determinations of credibility and the weight given to testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. We cannot say that the trier of fact in this case lost its way. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 36} In his third assignment of error, appellant asserts that the trial court erred by denying his motion for a mistrial made after some of the jurors saw him being escorted to the elevator in shackles during a recess on the second day of trial.

{¶ 37} The record reflects that during lunch recess, a deputy sheriff made the following statement to the court: "Judge, I got a problem. I was working on the impression that members of the jury had all gone, so I went to the elevator with my prisoner. Three or four members of the jury just came around the corner, and I was standing right there with the guy in shackles." The judge met with counsel in chambers before trial resumed and at that time the defense moved for a mistrial. After a discussion of case law on the subject, the trial court denied the motion. The court offered to provide a curative instruction, but defense counsel expressed concern that an instruction to all 13 jurors would compound the problem since only three or four had been involved. The record reflects that at the close of evidence, the court instructed the jurors that "anything you've seen or heard outside the courtroom or in the news media report is not evidence and should be disregarded by you entirely in your decision in this case."

**JOURNALIZED  
COURT OF APPEALS**

JAN 18 2008

Vol. 29 Pg. 931

{¶ 38} Generally, the granting or denying of a mistrial rests within the sound discretion of the trial court. *State v. Graham* (Feb. 4, 1994), 6th Dist. No. S-93-13, citing *State v. Sage* (1987), 31 Ohio St.3d 173. An appellate court will not disturb this exercise of discretion "absent a showing that the accused has suffered material prejudice." *Id.* The granting of a mistrial is only necessary where a fair trial is no longer possible. *Id.*, citing *State v. Franklin* (1991), 62 Ohio St.3d 118, 127.

{¶ 39} In *State v. Kidder* (1987), 32 Ohio St.3d 279, a juror observed the criminal defendant wearing shackles in the hallway outside the courtroom. Defense counsel requested a voir dire of the juror but the trial court refused, instead giving a general instruction to all of the jurors similar to that given in the case before us. In *Kidder*, the Ohio Supreme Court found that any error in refusing to voir dire the juror was harmless, given the brevity of the juror's observation and the trial court's corrective instruction. *Id.* at 285. In federal appeals cases involving jurors' fleeting view of defendants in handcuffs and shackles, courts have recognized that a juror's brief, inadvertent view of a defendant in shackles will not violate due process in the absence of a showing of actual prejudice. See *United States v. Halliburton* (C.A.9, 1989), 870 F.2d 557, 560-61; *Ghent v. Woodford* (C.A.9, 2002), 279 F.3d 1121, 1133 fn. 11. Federal courts also have recognized that it is a normal and necessary practice for prisoners to be handcuffed while they are being transported from one place to another and jurors are aware of that. See *United States v. Leach* (C.A.8, 1970), 429 F.2d 956, 962.

**JOURNALIZED  
COURT OF APPEALS**

JAN 18 2008

Vol. 29 Pg. 932

{¶ 40} In accordance with the cases cited above, we find that the jurors' brief view on one occasion of appellant in restraints when he was being transported did not violate his due process rights. Appellant has not shown how he was prejudiced by the incident and, accordingly, his third assignment of error is not well-taken.

{¶ 41} In his fourth assignment of error, appellant asserts that the trial court was prohibited by R.C. 2941.25 from sentencing him on both convictions because the charges were allied offenses of similar import. This argument is without merit.

{¶ 42} R.C. 2941.25 provides:

{¶ 43} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶ 44} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 45} As the Supreme Court of Ohio explained in *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291:

{¶ 46} "If the elements of the crimes 'correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import.' If the elements do not so correspond, the offenses are of

**JOURNALIZED  
COURT OF APPEALS**

JAN 18 2008

dissimilar import and the court's inquiry ends – the multiple convictions are permitted." (Citations omitted.)

{¶ 47} *Rance* further explained that "[u]nder an R.C. 2941.25(A) analysis, the statutorily defined elements of the offenses that are claimed to be of similar import are considered in the abstract." *Rance*, supra, at paragraph one of the syllabus.

{¶ 48} In comparing the elements of R.C. 2913.02(A)(3), grand theft by deception, with those of R.C. 2913.05(A), telecommunications fraud, we conclude that the commission of one of these offenses does not necessarily include the commission of the other offense. The elements of the two offenses were clearly set forth under our analysis of appellant's first assignment of error and we will not belabor this issue by repeating the language. Upon our careful review of the elements of the offenses, we find that the elements do not correspond. The only similarity between the two offenses is that each is required to be committed knowingly. Consequently, they are not allied offenses of similar import and the trial court was not required to merge them for purposes of sentencing. Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 49} On consideration whereof, this court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the cost of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Wood County.

**JOURNALIZED  
COURT OF APPEALS**

JUDGMENT AFFIRMED.

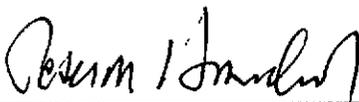
JAN 18 2008

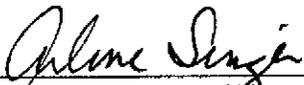
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.  
See, also, 6th Dist.Loc.App.R. 4.

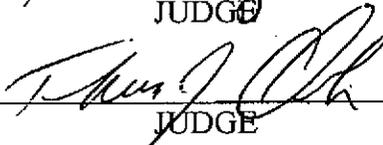
Peter M. Handwork, J.

Arlene Singer, J.

Thomas J. Osowik, J.  
CONCUR.

  
\_\_\_\_\_  
JUDGE

  
\_\_\_\_\_  
JUDGE

  
\_\_\_\_\_  
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

**JOURNALIZED  
COURT OF APPEALS**

JAN 18 2008

Vol. 29 Pg. 935

FILED  
WOOD COUNTY, OHIO  
2008 JAN 18 A 10 44  
COURT OF APPEALS  
REBECCA E BHACKER CLERK

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
WOOD COUNTY

State of Ohio Court of Appeals No. WD-07-002  
Appellee Trial Court No 05 CR 596  
v.  
Mark West DECISION AND JUDGMENT ENTRY  
Appellant Decided: JAN 18 2008

\*\*\*\*\*

Raymond C. Fischer, Wood County Prosecuting Attorney,  
Paul Dobson and Jacqueline M. Kirian, Assistant Prosecuting  
Attorneys, for appellee.

Wendell R. Jones, for appellant.

JOURNALIZED  
COURT OF APPEALS

JAN 18 2008

\*\*\*\*\*

OSOWIK, J

Vol. 29 Pg. 919

{¶} 1} This is an appeal from a judgment of the Wood County Court of Common  
Pleas that found appellant guilty of one count of theft by deception and one count of  
telecommunications fraud and sentenced him to consecutive prison terms of 17 months  
for each offense. For the following reasons, the judgment of the trial court is affirmed.

1.

\*\*\*\*\* UF-8000 V2 \*\*\*\*\* -WOOD CTY CLK CLS - \*\*\*\*\* - 419 354 9241- \*\*\*\*\*

-WOOD CTY CLERK OF COURTS -

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\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE JAN-18-2008 \*\*\*\*\* TIME 10:43 \*\*\*\*\*