[Cite as *State v. Homrighausen*, 2024-Ohio-6.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Andrew J. King, J.
-vs-	:	
	:	Case No. 2023AP020008
	:	
RICHARD P. HOMRIGHAUSEN	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Tuscarawas County Court of Common Pleas, Case No. 2022CR030072
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	January 2, 2024

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
SAMUEL J. KIRK III ROBERT F. SMITH OHIO AUDITOR Special Prosecutors for Tuscarawas Co. 88 East Broad St., 10th Floor Columbus, OH 43215	MARK R. DEVAN WILLIAM C. LIVINGSTON BERKMAN, GORDON, MURRAY, & DEVAN 55 Public Square, Suite 2200 Cleveland, OH 44113

Delaney, J.

{¶1} Appellant Richard P. Homrighausen appeals from the January 19, 2023 Judgment of Sentencing of the Tuscarawas County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} This case arose in 2021 when an investigation into the mayor of the City of Dover uncovered irregularities with fees paid to the mayor to perform weddings.[1] Appellee asserted appellant used City resources and charged a fee for the weddings, but pocketed the fees for himself instead of turning them over to the City treasury.

{¶3} Appellant was elected mayor in 1992. From 2014 through 2021, appellant officiated approximately 231 weddings as mayor. His executive assistants included Vickie Voorhees and Eva Newsome; the latter was hired and trained when Voorhees retired. Newsome's training included the procedure to follow when couples asked to be married by appellant in his capacity as mayor.

{¶4} When couples inquired about weddings by telephone or email, appellant forwarded the inquiries to his assistant to obtain further information. The assistant scheduled the wedding and prepared paperwork on City time, including vows on appellant's official letterhead and license paperwork for appellant's signature. The assistant charged couples pursuant to a sliding "fee schedule" posted in appellant's office. The amount of the fee depended on the timing and location of the ceremony; weekday weddings in the office had a lower fee than holiday or weekend weddings at an outside

[1] The City's investigation included additional matters which are not relevant to the instant appeal because appellant was acquitted on those counts. This appeal solely involves the "wedding fees."

location. Couples received a receipt for the fee paid; the receipts came from the City receipt book kept for City business. If the prospective married couple could not afford the fee, appellant did not perform the wedding.

{¶5} Documentation of the weddings was meticulously maintained; appellant's assistant was able to provide the receipts, vows, licenses, and any related paperwork for the weddings performed by appellant.

{¶6} Appellant officiated weddings in his office, throughout City Hall, in the public square, at churches, and at countless other locations throughout the City and Tuscarawas County.

{¶7} Appellant's assistant was required to charge a "wedding fee" to be paid by check made payable to appellant personally or by cash. A fee schedule was posted in appellant's office as follows:

a.	Weekdays at my office	$35
b.	Weekdays at other location	$50
c.	Friday night and Saturday night at my office	$50
d.	Friday night and Saturday night at other location	$65
e.	Sundays at my office	$75
f.	Sundays at other location	$90
g.	Holidays at my office	$150
h.	Holidays at other location	$175

{¶8} Appellant instructed his assistant to take down the posted wedding-fee schedule when State Auditors were present in the building conducting an audit of the City.

{¶9} Receipts for wedding fees were provided from the City's receipt book, the same receipt book used for other City services including civil service payments for police and fire exams and ambulance services.

{¶10} The payments received as "wedding fees" were personally given to appellant by the couples he married. Several persons married by appellant testified at trial; all were told of the applicable fee, to be paid by cash or check payable to appellant. Before the service, appellant provided the couples with manila envelopes containing the wedding vows, a wedding certificate, and a receipt for the fee. The vows were drafted on City letterhead containing the City's address and the Mayor's office contact information. Wedding vows and licenses identified appellant as the officiant in his official capacity as Mayor.

{¶11} Appellant received the cash and checks payable to himself, which he endorsed. He kept the fees for his personal use and did not deliver the fees to the City Auditor for deposit in City accounts. The City Auditor testified she was unaware of the collection of wedding fees until the investigation began in 2021. The Auditor acknowledged none of the "wedding fees" collected by appellant and his office were deposited into City accounts.

{¶12} Appellant's compensation was determined by City Council and was set by three City Ordinances for the period from January 1, 2014 to January 4, 2021. The Ordinances do not authorize wedding fees to be paid to appellant.

{¶13} The investigation into these matters began when City Council was alerted to issues in the mayor's office, including failure to address various administrative tasks. City Council requested an investigation which led to discovery of the wedding-fee issue, to wit: appellant collected fees to perform weddings and kept the fees for himself.

{¶14} Appellee's evidence at trial indicated appellant changed his practices during the investigation; in September 2021, he emailed a couple who enquired about a wedding

service as follows: "Harley I am sending you this email to inform you that I'm not accepting gratuity in cash, check, or goods for the performance of marriage ceremonies. Mayor Rick."

{¶15} The State Auditor's Special Investigations Unit conducted a special audit including a review of the City's duplicate receipt book and determined that during the period of January 1, 2014 through January 4, 2021, appellant received $9,295 for "wedding fees" and did not deposit any of that amount into City accounts.

{¶16} Appellant was charged by indictment as follows: one count of theft in office pursuant to R.C. 2921.41(A)(1) and R.C. 2921.41(B), a felony of the third degree [Count I]; one count of having an unlawful interest in a public contract pursuant to R.C. 2921.42(A)(1) and R.C. 2921.42(E), a felony of the fourth degree [Count II]; four counts of soliciting improper compensation pursuant to R.C. 2921.43(A)(1) and R.C. 2921.43(D), all misdemeanors of the first degree [Counts III through VI]; two counts of dereliction of duty pursuant to R.C. 2921.44(E) and R.C. 2921.44(F), both misdemeanors of the second degree [Counts VII and VIII]; six counts of filing incomplete, false and fraudulent returns pursuant to R.C. 5747.19, all felonies of the fifth degree [Counts IX through XIV]; and one count of representation by public official or employee pursuant to R.C. 0102.03(D), a misdemeanor of the first degree [Count XV].

{¶17} Appellant entered pleas of not guilty.

{¶18} On July 28, 2022, appellee dismissed each of the counts of filing incomplete, false, and fraudulent returns [Counts IX through XIV].

{¶19} The matter proceeded to trial by jury on the remaining counts. At the close of appellee's evidence, appellant moved for a judgment of acquittal pursuant to Crim.R.

29(A) and the trial court granted the motion as to one count of dereliction of duty and the single count of representation by public official or employee [Counts VIII and XV]. The trial proceeded with presentation of appellant's evidence. Appellant was found guilty of the single count of theft in office in an amount less than $1,000; of the four counts of soliciting improper compensation; and of the remaining count of dereliction of duty. Appellant was found not guilty of the single count of having an unlawful interest in a public contract.

{¶20} The trial court ordered preparation of a pre-sentence investigation (P.S.I.).

{¶21} On November 30, 2022, appellant filed a motion for judgment of acquittal as to the counts of theft in office and dereliction of duty. Appellee filed a memorandum in opposition and appellant replied. The trial court overruled the motion for acquittal by judgment entry dated January 12, 2023.

{¶22} Appellant appeared for sentencing on January 17, 2023, and was fined a total of $5,250. Appellant was also ordered to make restitution to the City in the amount of $9,295.

{¶23} Appellant now appeals from the trial court's judgment entry of conviction and sentence.

{¶24} Appellant raises five assignments of error:

ASSIGNMENTS OF ERROR

{¶25} "I. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTIONS FOR AN ACQUITTAL ON COUNTS ONE AND SEVEN, IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TRIAL BY JURY SECURED UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS

TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

{¶26} "II. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTIONS FOR AN ACQUITTAL AND MOTION FOR A NEW TRIAL WHERE THE VERDICTS ON COUNTS ONE AND SEVEN WERE MUTUALLY EXCLUSIVE OF THE VERDICTS ON COUNTS THREE THROUGH SIX, IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AND TRIAL BY JURY SECURED UNDER FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

{¶27} "III. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN PROHIBITING DEFENSE COUNSEL FROM QUESTIONING WITNESSES REGARDING A PUBLIC RECORD THAT INCLUDED A RECOMMENDATION THAT THE CITY OF DOVER ADOPT ORDINANCES GOVERNING A MAYOR RECEIVING MONEY FOR OFFICIATING WEDDINGS AND PROCEDURES TO DEPOSIT THOSE MONIES INTO THE TREASURY."

{¶28} "IV. THE TRIAL COURT'S SENTENCE WAS CONTRARY TO LAW BECAUSE IT ERRED IN FAILING TO MERGE COUNTS AT SENTENCING."

{¶29} "V. THE TRIAL COURT ERRED IN ORDERING RESTITUTION IN THE AMOUNT OF $9,295 WHEN THE JURY FOUND APPELLANT GUILTY ON COUNT ONE IN AN AMOUNT LESS THAN $1,000."

ANALYSIS

I., II.

{¶30} Appellant's first and second assignments of error will be addressed together because both challenge his convictions upon Counts I and VII. Appellant argues the trial court should have granted his motion for acquittal upon Counts I and VII [theft in office and dereliction of duty]. We disagree.

A. Standard of Review

{¶31} Appellant argues that the trial court erred when it denied his Crim.R. 29 motion for acquittal. Pursuant to Crim.R. 29(A), a court "shall order the entry of the judgment of acquittal of one or more offenses * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." Because a Crim.R. 29 motion questions the sufficiency of the evidence, "[w]e apply the same standard of review to Crim.R. 29 motions as we use in reviewing the sufficiency of the evidence."

{¶32} "Whether the evidence is legally sufficient to sustain a verdict is a question of law." *Id.* at ¶ 38, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "Sufficiency is a test of adequacy." *Id.* "We construe the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt." *Id*., citing *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

B. The Offenses

Count I: Theft in office pursuant to R.C. 2921.41(A)(1) and (b)

{¶33} In Count I, appellant was charged with one count of theft in office pursuant to R.C. 2921.41(A)(1) and (B), a felony of the third degree. Those sections state the following:

> (A) No public official or party official shall commit any theft offense, as defined in division (K) of section 2913.01 of the Revised Code, when either of the following applies:
>
> (1) The offender uses the offender's office in aid of committing the offense or permits or assents to its use in aid of committing the offense[.]
>
> * * * *.
>
> (B) Whoever violates this section is guilty of theft in office. Except as otherwise provided in this division, theft in office is a felony of the fifth degree. If the value of property or services stolen is one thousand dollars or more and is less than seven thousand five hundred dollars, theft in office is a felony of the fourth degree. If the value of property or services stolen is seven thousand five hundred dollars or more and is less than one hundred fifty thousand dollars, theft in office is a felony of the third degree. If the value of property or services stolen is one hundred fifty thousand dollars or more and is less than seven hundred fifty thousand dollars, theft in office is a felony of the second degree. If the value of property or services

> stolen is seven hundred fifty thousand dollars or more, theft in office is a felony of the first degree.

{¶34} The indictment specifies appellant committed Count I "on or about January 1, 2014 to January 4, 2021, in Tuscarawas County * * *." Appellee's bill of particulars filed June 30, 2022, states in Count I, appellant is alleged to have committed theft over the period of the dates in the indictment, "[appellant] used his office in aid of committing the offense through his authority to perform weddings as mayor * * * pursuant to Ohio Revised Code section 3101.08. [Appellant] was required to remit to the City * * * the fees or emoluments for the weddings * * * [pursuant to R.C. 733.40 and 705.25]."

Count VII: Dereliction of duty pursuant to R.C. 2921.44(E) and (F)

{¶35} In Count VII, appellant was charged with one count of dereliction of duty pursuant to R.C. 2921.44(E) and (F). Those sections state:

> (E) No public servant shall recklessly fail to perform a duty expressly imposed by law with respect to the public servant's office, or recklessly do any act expressly forbidden by law with respect to the public servant's office.
>
> (F) Whoever violates this section is guilty of dereliction of duty, a misdemeanor of the second degree.

{¶36} The indictment states appellant failed to remit to the City fees collected by him, as Mayor of the City of Dover, on the first Monday of each month, as required by section 733.40 of the Revised Code. Appellee's bill of particulars notes as Mayor, appellant was charged with the duty of reporting all fees collected by him that come into his hands by any manner, and to pay those fees into the City treasury.

C. Appellant's arguments regarding "fees"

{¶37} Appellant first argues his convictions upon Counts I and VII must be reversed because the wedding fees collected by appellant and at his direction are not "fees" within the purview of R.C. 733.40.[2] That section states in pertinent part:

> * * * *[A]ll fines, forfeitures, and costs in ordinance cases and **all fees that are collected by the mayor, that in any manner come into the mayor's hands,** or that are due the mayor or a marshal, chief of police, or other officer of the municipal corporation, any other fees and expenses that have been advanced out of the treasury of the municipal corporation, and all money received by the mayor for the use of the municipal corporation **shall be paid by the mayor into the treasury of the municipal corporation on the first Monday of each month.** * * * *. (Emphasis added).

{¶38} Appellant argues, "* * * [Appellee] could only make its case on Counts One and Seven, if [appellant] accepted 'fees,' as set forth in R.C. 733.40, which belonged to the City, and that he failed to deposit them." Brief, 13. Appellant then argues that the term "fees" as used in R.C. 733.40 does not apply to the "wedding fees" appellant collected. First, appellant argues he had no power to collect "fees" as such because control of the City's finances is solely within the control of the municipal legislature pursuant to R.C. 731.47. This argument is misplaced because regardless of terminology, the uncontroverted evidence established appellant solicited and accepted a "fee" or

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[2] The trial court dismissed Count VIII, dereliction of duty, because that Count relied upon appellant's failure to deposit "emoluments" as required by R.C. 705.25, but that section applies only to officials of charter cities and Dover is a non-chartered City.

"gratuity" or "payment" or any other term describing an amount of money charged by appellant in his capacity as mayor of the City of Dover to perform weddings, and appellant kept those fees or gratuities or payments, i.e. the money, for himself.

{¶39} Nor are we persuaded by appellant's assertion that R.C. 733.40 applies only to "money related to local court cases." Our reading of the plain language of the statute, *supra*, does not lend to any such restriction.

D. Appellant's arguments regarding mens rea

{¶40} Appellant next argues there is no evidence to prove he acted "with purpose to deprive [the City] of property" in Count I, theft in office. Appellant fully acknowledges he personally determined the amount to charge to officiate a wedding and the money was paid to him personally; he performed the weddings "sometimes with great fanfare" and kept meticulous receipts. Brief, 21. Appellant's implication that somehow he failed to realize it was unlawful to accept money in his capacity as Mayor, to perform a function under full color of his office as Mayor, supported by his office as Mayor both literally and metaphorically, is disingenuous. The evidence at trial established appellant removed the "fee schedule" when State Auditors were in the building and was careful to change his wedding procedure after the investigation was launched, supporting the inevitable conclusion appellant knew full well he was not entitled to keep money accepted as "wedding fees" for officiating ceremonies as Mayor of the City of Dover.

E. Appellant's arguments regarding "mutually exclusive verdicts"

{¶41} Appellant further argues that the jury's guilty verdicts upon Counts I and VII are inconsistent with verdicts upon Counts III through VI, soliciting improper

compensation, because the "wedding fees" cannot simultaneously function as "fees" for Counts I and VII and "compensation" for Counts III through VI.

{¶42} Appellant argues his convictions upon Counts I and VII are mutually exclusive of his convictions upon Counts III through VI. "Mutually exclusive" verdicts are a subset of inconsistent verdicts. Inconsistent verdicts in a criminal case generally are not reviewable. *United States v. Smith,* 749 F.3d 465, 498 (6th Cir.2014). There are two exceptions. *United States v. Randolph*, 794 F.3d 602, 610. First, where jury verdicts "are marked by such inconsistency as to indicate arbitrariness or irrationality," we have opined that "relief may be warranted." *Id., citing United States v. Lawrence,* 555 F.3d 254, 263 (6th Cir.2009). Second, in a situation "where a guilty verdict on one count necessarily excludes a finding of guilt on another," i.e. a "mutually exclusive" verdict, [an appellate court] can review the defendant's challenge to the verdict. *United States v. Ruiz,* 386 Fed.Appx. 530, 533 (6th Cir.2010) (citing *Powell,* 469 U.S. at 69, n. 8, 105 S.Ct. 471); *see also United States v. Ashraf,* 628 F.3d 813, 823–24 (6th Cir.2011) (recognizing two exceptions to general rule that inconsistent verdicts are not reviewable).

{¶43} Appellant's premise is that Counts I and VII depend upon the payments he collected being "fees" and Counts III through VI depend upon the payments he collected being compensation. Again, we find appellant's semantics to create a distinction without a difference. The verdicts in the instant case are not mutually exclusive: appellant committed theft in office when he deprived the City of the wedding fees; he committed dereliction of duty when he failed to deposit the fees into the treasury as required; and he committed solicitation of improper compensation in asking couples to pay him to perform a duty under color of his public office.

{¶44} The verdicts in the instant case are not mutually exclusive.

{¶45} Construing the evidence in a light most favorable to appellee, the jury could have found the essential elements of the charged offenses proven beyond a reasonable doubt; therefore, the trial court did not err in overruling appellant's motion for acquittal. Appellant's first and second assignments of error are overruled.

III.

{¶46} In his third assignment of error, appellant argues defense trial counsel should have been permitted to question two witnesses about a "management letter" provided to the City. We disagree.

{¶47} "A trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake Cty*., 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991). An abuse of discretion is more than a mere error in judgment; it is a "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* 66 Ohio St.3d 619, 621, 614 N.E.2d 748 (1993). When applying an abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Id.* Absent an abuse of discretion resulting in material prejudice to the defendant, a reviewing court should be reluctant to interfere with a trial court's decision in this regard. *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967).

{¶48} Appellant's counsel attempted to question two witnesses about a management letter prepared by an independent auditor that recommended the City develop a formal procedure for dealing with wedding fees. Appellant argued the document was a public record which established there were no City policies regarding

wedding fees; appellee objected and argued the letter was an opinion by someone not identified as an expert and not called as a trial witness. The trial court sustained appellee's objection but allowed appellant's counsel to ask the witnesses whether the City had policies or ordinances regarding wedding fees.

{¶49} We fail to perceive, and appellant does not point out, how he was prejudiced by the trial court's decision disallowing the letter. We find no abuse of discretion and the third assignment of error is overruled.

IV.

{¶50} In his fourth assignment of error, appellant argues Counts I and VII should have merged for purposes of sentencing. We disagree.

{¶51} Appellate review of an allied-offense question is de novo. *State v. Miku,* 5th Dist. No. 2017 CA 00057, 2018-Ohio-1584, ¶ 70, appeal not allowed, 154 Ohio St.3d 1479, 2019-Ohio-173, 114 N.E.3d 1207 (2019), quoting *State v. Williams,* 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 12.

{¶52} R.C. 2941.25 states:

> 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.
>
> 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.

{¶53} The application of R.C. 2941.25 requires a review of the subjective facts of the case in addition to the elements of the offenses charged. *State v. Hughes*, 5th Dist. Coshocton No. 15CA0008, 2016-Ohio-880, ¶ 21. In a plurality opinion, the Ohio Supreme Court modified the test for determining whether offenses are allied offenses of similar import. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. The Court directed us to look at the elements of the offenses in question and determine "whether it is possible to commit one offense *and* commit the other with the same conduct." (Emphasis sic). *Id.* at ¶ 48. If the answer to such question is in the affirmative, the court must then determine whether or not the offenses were committed by the same conduct. *Id.* at ¶ 49. If the answer to the above two questions is yes, then the offenses are allied offenses of similar import and will be merged. *Id.* at ¶ 50. If, however, the court determines that commission of one offense will never result in the commission of the other, or if there is a separate animus for each offense, then the offenses will not merge. *Id.* at ¶ 51.

{¶54} *Johnson's* rationale has been described by the Court as "incomplete." *State v. Earley,* 145 Ohio St.3d 281, 2015-Ohio-4615, 49 N.E.3d 266, ¶ 11. The Supreme Court of Ohio has further instructed us to ask three questions when a defendant's conduct supports multiple offenses: "(1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions.

The conduct, the animus, and the import must all be considered." *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 31.

{¶55} We need not engage in lengthy analysis as it is clear that these offenses are separate and do not merge. *State v. Lipkins*, 5th Dist. Stark No. 2022CA00053, 2023-Ohio-1192, ¶ 86, *appeal not allowed,* 170 Ohio St.3d 1508, 2023-Ohio-2664, 213 N.E.3d 713. In the instant case, appellant argues Count I, theft in office, should merge with Count VII, dereliction of duty, because the harm was the same: the City did not receive the wedding fees. Appellant also argues the four counts of soliciting improper compensation should have merged.

{¶56} The evidence established appellant solicited wedding fees from four separate individuals; the act of solicitation was complete when appellant requested the compensation for his official acts. We agree with appellee that the separate crime of theft in office was not complete until appellant kept the money for his own personal use. Moreover, the failure to deposit the money into the City treasury was a separate offense, dereliction of duty.

{¶57} The offenses constituted separate offenses of dissimilar import and appellant was properly sentenced upon each count.

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

V.

{¶59} In the fifth assignment of error, appellant argues the trial court could not order restitution in the amount of $9,295 when appellant was convicted in Count I, theft in office, of theft in an amount less than $1,000. We disagree.

{¶60} An order of restitution must be supported by competent, credible evidence in the record. *State v. Charles*, 11th Dist. Ashtabula No. 98-A-0043, 1999 WL 1073674, *3, citing *State v. Warner*, 55 Ohio St.3d 31, 51-53, 564 N.E.2d 18 (1990) [restitution order for conviction of dereliction of duty must be supported by competent, credible evidence in the record]. Moreover, restitution can be ordered only for those acts that constitute the crime for which the defendant was convicted and sentenced. *Id.,* citing *State v. Friend*, 68 Ohio App.3d 241, 243, 587 N.E.2d 975 (10th Dist.1990).

{¶61} R.C. 2929.18(A) governs a sentencing court's authority to order restitution and provides that a trial court imposing a sentence for a felony conviction may sentence the offender to any financial sanction or combination of financial sanctions authorized by law. R.C. 2929.18(A)(1) further provides in pertinent part: “Financial sanctions that may be imposed pursuant to this section include, but are not limited to * * * [r]estitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss. * * * *.”

{¶62} Under these provisions, restitution is limited to the economic loss caused by the defendant's illegal conduct for which he was convicted. *State v. Kenily*, 5th Dist. Muskingum No. CT 2007 0040, 2008-Ohio-4096, ¶ 24, citing *State v. Brumback*, 109 Ohio App.3d 65, 82, 671 N.E.2d 1064 (9th Dist.1996). Thus, restitution can be ordered only for those acts that constitute the crime for which the defendant was convicted and sentenced. *Id*., citing *State v. Friend*, 68 Ohio App.3d 241, 243, 587 N.E.2d 975 (10th Dist. 1990). Moreover, there must be sufficient evidence in the record from which the court can ascertain the amount of restitution to a reasonable degree of certainty. *Brumback* at 83. We have previously held that when a defendant is convicted of dereliction of duty, the trial

court may only order restitution in an amount representing the loss from the conduct constituting the offense. *Kenily,* supra, 2008-Ohio-4096, ¶ 27. In the instant case, appellant was convicted of one count of dereliction of duty for his failure to deposit the $9,295 collected from wedding fees into the City treasury. The trial court ordered restitution in the amount of $9,295, an amount which is exhaustively documented throughout the record of the case.

{¶63} The trial court's restitution order is supported by competent, credible evidence and is not an abuse of discretion. Appellant's fifth assignment of error is overruled.

CONCLUSION

{¶64} Appellant's five assignments of error are overruled and the judgment of the Tuscarawas County Court of Common Pleas is affirmed.

By: Delaney, J.,

Wise, P.J. concur and

King, J., concurs in part and dissents in part.

King, J. concurs in part and dissents in part,

{¶ 65} I agree with the majority and concur in much of its reasoning. Where I dissent is regarding the first assignment of error, which relates to the theft in office charge. I do not dispute that the former mayor misused his office by soliciting and receiving improper compensation and was convicted of the same. Moreover, it may well be true that the former mayor was uncooperative and combative with the investigators from the State Auditor's office. Although the former mayor's conduct was illicit and condemnable, it was not a theft in office.

{¶ 66} By benefit of his office as a mayor, Homrighausen was entitled to solemnize marriages. R.C. 3101.08. The state agrees that he was allowed to charge and receive a fee for performing this service. The state argues that the theft occurred when he failed to pay those fees over to the city's treasury under R.C. 733.40. This is because, the state argues, Homrighausen was charging these fees under the color of his office. The state points to the fact he used the city website, offices, and employees while providing this service. While that is necessary under R.C. 2921.41(A)(1), it does not automatically mean this conduct sufficiently proves all the elements of a theft offense.

{¶ 67} Consider either of the following. If Homrighausen had used all the same resources to solemnize marriages but had not charged a fee, then it appears the state would have not charged him with theft in office. Similarly, if he had established a clearer fire wall between his official duties discharged on behalf of the city and his use of his powers incident of his office to perform marriage ceremonies, then there would be no theft in office because the state concedes he was allowed to charge a fee for this service.

{¶ 68} Beyond proving the elements in R.C. 2921.41(A)(1), the state was required to prove that a theft offense occurred under R.C. 2913.02. The statute states the following:

"No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways * * *."

{¶ 69} R.C. 2913.01(D) defines owner this way: " 'Owner' means, unless the context requires a different meaning, any person, other than the actor, who is the owner of, who has possession or control of, or who has any license or interest in property or services, even though the ownership, possession, control, license, or interest is unlawful."

{¶ 70} With regard to the state's argument that the fees properly belonged to the city, I conclude that because the city was not the "owner" of those fees, thus there was no theft from the city. In my view, the former mayor retained discretion on what amount, if any to charge for the fee, and the power he exercised was never on behalf of the city.

{¶ 71} The power to solemnize marriages is incident to the office of mayor under R.C. Title 31—it is not a power inherent in or belonging to municipal government under R.C. Title 7. So, as a general proposition, solemnizing marriages is not a power the mayor is discharging as an agent for the municipality. In contrast, there are numerous instances in local government where an executive official is required to assess and collect a fee related to the receipt of a government permit or license, such as a sheriff collecting a concealed handgun permit, a zoning official collecting a fee for a zoning permit, or a transient vendor receiving a vendor permit. In these cases, the local government which these officers serve is the ultimate source of the grant of privilege arising from the permit. It then follows that for purposes of R.C. 2913.01, the local government issuing a permit related to governmental services is the "owner" of that fee charged.

{¶ 72} Certainly, mayors do have statutory obligations under R.C. 733.40 to ensure that "all fees that are collected by the mayor, that in any manner come into the mayor's hands * * * for the use of the municipal corporation shall be paid by the mayor into the treasury of the municipal corporation on the first Monday of each month." But, as explained above, the city must have some authority for charging the fees and actually assess the fee in exchange for a municipal service for any mayor to be obligated to make such a deposit.

{¶ 73} This conclusion is bolstered by how R.C. 733.30 sets forth the mayor's duties: "The major [sic] shall perform all the duties prescribed by the bylaws and ordinances of the municipal corporation. * * * He shall sign all commissions, licenses, and permits granted by such legislative authority, or authorized by Title VII of the Revised Code, and such other instruments as by law or ordinances require his certificate." There is no dispute there was no municipal ordinance on how a mayor must solemnize marriages or what fees to charge. And, as noted above, the mayor's power here does not arise from R.C. Title 7, which further diminishes the argument they were fees owed to the city.

{¶ 74} To be sure, the evidence at trial supports the state's argument that by using city resources in the manner and to the extent Homrighausen did, it arguably created an appearance this was a municipal service being offered. And to that end, the state argues he used his apparent authority to collect these fees, and he should, in essence, be estopped from disclaiming that authority here. Despite whatever appeal that argument may have, there is no authority for reinterpreting the statutory offense and its definitions that way.

{¶ 75} When reviewing statutory interpretations, this court does so de novo. *State v. Hollingshead*, 5th Dist. Muskingum No. CT2022-0031, 2023-Ohio-1714, 214 N.E.3d 1233, ¶ 10. Our obligation is to apply the ordinary meaning of the statute and apply it faithfully. *Look Ahead America v. Stark County Board of Elections*, 5th Dist. Stark No. 2022-CA-00152, 2023-Ohio-249, 221 N.E.3d 896, ¶ 21. Whenever doing so, we must be mindful to consider the entire statute in context, rather than selectively parsing the text and thereby overriding the legislature's intent. *See Hollingshead*, ¶ 15.

{¶ 76} Accepting the state's argument would redefine theft offenses in such a way to impute ownership into people and entities that had no apparent expectation of ownership. So, they would not only be surprised to discover that they were the victim of theft, but also the owner of the stolen property in the first instance. What would otherwise be a tragedy is turned into a windfall for the imputed owner. Such a change must come from the General Assembly—not the courts, if it were to come at all. Thus, I conclude that to interpose judicially created rules of apparent authority and estoppel is inconsistent with both the ordinary meaning of the words and phrases used and the legislative intent of this offense.

{¶ 77} Aside from that, applying the doctrine of "apparent authority" without clear boundaries is likely to ensnare borderline but otherwise not illegal conduct. For example, Homrighausen was entitled to use his title of mayor and use areas owned by the city open to the public when performing his ceremonies. Would conducting ceremonies under these circumstances be sufficient to give rise to apparent authority, requiring any similarly situated mayors to deposit fees into the municipal treasury? The state's theory would suggest the answer would be yes. Another prosecuting attorney may reasonably

conclude otherwise, because in borderline cases, individuals can reasonably differ about which side of the line the borderline case falls into. The line drawing necessary here should be left to policymaking through the legislature; therefore, I would reject the apparent authority argument used to sustain the conviction.

{¶ 78} In its brief, the state also argued that it was possible to sustain the conviction here because the couples seeking marriage services were the victims of theft. Although at oral argument the state wished to focus on other arguments, it did not withdraw this argument. So, it is appropriate and necessary to address it.

{¶ 79} Here too this theory encounters difficulty with the statutory definitions, but this time with "deprive." R.C. 2913.01(C) sets forth this definition:

> (A) "Deprive" means to do any of the following:
>
> (1) 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;
>
> (2) Dispose of property so as to make it unlikely that the owner will recover it;
>
> (3) 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.

{¶ 80} Neither of the first two situations apply to the state's alternative theory of the newlyweds as victims of theft. But so too does the third aspect of this definition run into difficulty. Plainly the couples were seeking services from the former mayor, and Homrighausen performed those services in return for the money he collected. Based on the facts below, I do not see how the state proved it was the former mayor's "purpose not to give proper consideration in return for the money" the couples paid him.

{¶ 81} At oral argument, the state suggested there was possibly a coercive effect in the mayor requesting any fee in a seemingly official way. The implication was that the couples would not feel free to bargain or reject the fee sought for services. First, there is scant evidence, if any, to support that in the record. Second, unlike a permit required under municipal authority, the couples were free to find another officiant. In that circumstance here, we should not conclude or infer that the money exchanged for services was not "proper consideration."

{¶ 82} Finally, also at oral argument, the state raised the possibility that it could have proceeded on the theory that the theft against the city was due to the misappropriation of its employees, equipment, and property by the former mayor to further his wedding services. The facts below suggest that the manner in which the former mayor provided the services was open and tacitly accepted for years by city officials. In such a case, there may well be additional arguments Homrighausen could have made in response to that theory. But because this argument was raised for the first time during oral argument, the proper thing to do is to decline to address it. *Andreyko v. Cincinnati*, 153 Ohio App.3d 108, 2003-Ohio-2759, 791 N.E.2d 1025, ¶ 20 (1st Dist.).

{¶ 83} Although Homrighausen's conduct resulted in convictions related to soliciting improper compensation, his conduct is not also a theft in office. In my view, the city was not the "owner" of the fees he collected. I also conclude that the newlyweds appeared to receive proper consideration for their fees and were not unlawfully deprived of their property. For these reasons, I dissent from my colleagues regarding the first assignment of error.