

[Cite as *State v. Washington*, 2006-Ohio-6027.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87688

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAISY WASHINGTON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART;
REVERSED IN PART AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-462467

BEFORE: Kilbane, P.J., McMonagle, J., and Corrigan, J.

RELEASED: November 16, 2006

JOURNALIZED:

[Cite as *State v. Washington*, 2006-Ohio-6027.]

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MARY EILEEN KILBANE, J.:

{¶1} Daisy Washington (“Washington”) appeals from her conviction and sentence rendered in the Cuyahoga County Court of Common Pleas. Washington argues that the trial court admitted improper evidence during the trial, the State of Ohio (“Ohio”) failed to present sufficient evidence to support her convictions, her convictions are against the manifest weight of the evidence, and the trial court erred when it ordered her to pay restitution. For the following reasons we affirm in part, reverse in part and remand.

{¶2} This case arose from a theft that occurred at the Pleasant View Nursing Home located at 7377 Ridge Road in Parma, Ohio. On the morning of January 22, 2004, charge nurse Karen Hinkle (“Hinkle”) noticed that during the delivery of breakfast to the residents of the nursing home, Sam Derrico (“Derrico”) started

yelling. Hinkle stated that Derrico was a resident of the nursing home, estimated him to be seventy-eight years old, and stated that he used a walker to move about. Hinkle spoke with Derrico, who was unusually upset, and Derrico told her that between seven and eight hundred dollars had been stolen from his room. When Hinkle asked who stole the money, Derrico told her that the woman who dropped off his breakfast tray stole the money.

{¶3} Tammy Sprouse (“Sprouse”) heard Derrico yelling and stated that he was very angry and she had never seen him like that before. Sprouse also stated that when Derrico began yelling, Washington was not present, but instead was in a nearby room with the door shut and locked. Sprouse told Hinkle, who knocked on the door and told Washington to come out. After Washington exited the room, Sprouse and Hinkle searched the room, but did not find the missing money.

{¶4} Hinkle asked the three working employees, which included Washington and Sprouse, who had dropped off Derrico’s breakfast tray. All three denied doing so and Washington stated that Derrico retrieved his own tray from the cart in the hallway. Hinkle told all three employees to empty their pockets; they complied, but none of the missing money was found. Hinkle told the employees that she was going to call the Parma Police Department to investigate the theft.

{¶5} Sprouse stated that Washington was very nervous and began pacing the floor. Sprouse heard Washington yell to another employee to get her coat. After that, Sprouse saw Washington run down the stairs and outside to the parking lot.

Sprouse told Hinkle and the two watched from the break room window as Washington opened the passenger side door of her vehicle, closed it, and returned to the nursing home. Hinkle stated that no member of the nursing staff is permitted to leave the floor. Additionally, all breaks and lunches are scheduled and no unauthorized breaks are permitted.

{¶6} When Washington returned to the floor, Sprouse heard her on the telephone telling someone to meet her at Subway right away. Sprouse told Hinkle, who prevented Washington from leaving the nursing home.

{¶7} Parma Police Officer Scott Brugge (“Officer Brugge”) arrived at the nursing home to investigate the theft. Officer Brugge spoke with Hinkle and then Derrico. Officer Brugge stated that Derrico was eighty-five years old, and reported \$780 missing in denominations of seven one-hundred-dollar bills, one fifty-dollar bill, one twenty-dollar bill, and one ten-dollar bill. Officer Brugge contacted his shift supervisor and requested the help of the detective bureau.

{¶8} Captain Robert DeSimone (“Captain DeSimone”) and Sergeant Mickey Adams (“Sergeant Adams”) responded to the nursing home. Officer Brugge and Hinkle told Captain DeSimone and Sergeant Adams about the theft, the amount of money, that no money had been recovered, and about Washington’s suspicious behavior as well as her brief exit from the building. Captain DeSimone brought Washington into the nursing supervisor’s office to conduct an interview. Sergeant Adams was present in the room and Officer Brugge was also present at times.

Before asking Washington any questions, Captain DeSimone read her the Miranda warnings off of a card that he kept in his wallet with his badge. Captain DeSimone stated that he always uses the card to read people their rights so that no person can later say that their rights were not read properly, or that parts were omitted. Washington stated that she understood her rights and agreed to speak with the police.

{¶9} Washington told the police that she had not gone into Derrico's room that morning and had left his tray in the hallway. She denied taking the money and also denied leaving the building. Washington continued to deny taking the money but, after repeated questioning by Captain DeSimone, admitted to the theft. She stated that she did not know exactly how much money she had stolen, and that she had placed the money in her car.

{¶10} Captain DeSimone requested to search Washington's car and she agreed. Washington signed a consent to search form but limited the officers' search to the missing money. Washington also stated that she would allow the search, but only if Sergeant Adams accompanied her to her car. Captain DeSimone agreed and he and Officer Brugge went to the break room window to watch the search.

{¶11} As they were walking to Washington's 1999 Kia Sportage, Sergeant Adams asked her exactly where the money was. Washington told him that it was between the seat cushions of the rear seat. Sergeant Adams opened the right, rear passenger door and watched as Washington leaned in and placed her left hand in

between the seat cushions. Washington suddenly moved her right hand into the rear cargo area of the car and began reaching for a bag. Sergeant Adams became concerned for his safety and demanded that she stop. Washington told him that the money was in the bag. Washington pulled the bag out of the car and set it on the ground. Sergeant Adams stated that the bag and Washington's right hand shielded her left hand, which was underneath the frame portion of the vehicle. Sergeant Adams opened the bag but did not recover the money. Washington then changed her story and stated that she did not take the money and that there was never any money in her car.

{¶12} From the break room window, Sprouse, who was watching the search with Hinkle and the officers, stated that she saw Washington kick money underneath the car. Sergeant Adams motioned for Captain DeSimone and Officer Brugge to come down to the parking lot. The officers placed Washington under arrest and called for a tow truck so that they could transport the vehicle to the impound lot.

{¶13} At that point, a passerby approached Officer Brugge and handed over a one-hundred dollar bill that was found blowing around the parking lot. The officers began searching the parking lot and eventually recovered \$420. Officers transported Washington to the Parma Police Station, where she refused to make a written statement and asked to speak with a lawyer.

{¶14} The Cuyahoga County Grand Jury returned an indictment, charging Washington with theft with an elderly specification and tampering with evidence.¹ Before trial, Washington's counsel moved to suppress her oral statements. The trial court conducted an evidentiary hearing and denied the motion. At the close of the State's case, Washington's counsel moved for a Crim.R. 29 judgment of acquittal. The trial court granted the motion as to the value of the money. The trial court reasoned that because police recovered only \$420 from the theft and there was no other evidence of the exact amount of money stolen, the value of the theft would have to be less than \$500. The indictment charged Washington with theft of more than \$500 but less than \$5,000.

{¶15} On November 18, 2005, the jury found Washington guilty of theft with an elderly specification and tampering with evidence. The trial court sentenced Washington to five years of community controlled sanctions and ordered her to pay \$360 in restitution. Washington appeals, raising the five assignments of error contained in the appendix to this opinion.

{¶16} In her first assignment of error, Washington argues that the trial court erred when it denied her motion to suppress. This assignment of error lacks merit.

{¶17} Our Ohio Supreme Court enunciated the standard of review of a motion to suppress in *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372.

¹The victim passed away before the trial began.

“Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court’s findings of fact if they are supported by competent, credible evidence.

Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. (Citations omitted.)”

{¶18} We therefore must consider whether the facts in the instant case demonstrate compliance with *Miranda v. Arizona* (1966), 384 U.S. 436 under a de novo review.

{¶19} Here, a review of the record demonstrates that competent, credible evidence supports the trial court’s finding that the police provided Washington with the warnings required by *Miranda*. At the suppression hearing Captain DeSimone testified that prior to asking any questions, he advised Washington of her constitutional rights. Washington stated that she understood her rights and agreed to speak with Captain DeSimone. Additionally, Sergeant Adams also testified that he was in the room and heard Captain DeSimone advise Washington of her constitutional rights.

{¶20} However, in spite of the foregoing testimony, Washington argues that the card Captain DeSimone used to advise Washington of her rights may have been inaccurate and therefore, her rights may not have been properly read. This argument is unpersuasive.

“There is no rigid rule requiring that the content of *Miranda* warnings given to an accused prior to police interrogations be a ‘virtual incantation of the precise language contained in the *Miranda* opinion.’ Rather, the requirements of *Miranda* are satisfied where, prior to the initiation of questioning, the police fully apprise the suspect of the State’s intention to use his statements to secure a conviction, and inform him of his rights to remain silent and to have counsel present if he so desires. (Citations omitted).” *State v. Williams*, Cuyahoga App. No. 82094, 2003-Ohio-4811.

{¶21} In the present case, two police officers testified that Washington was fully advised of her constitutional rights and that Captain DeSimone read these rights from a standard card containing the *Miranda* rights. Under the totality of the circumstances, we conclude that the testimony by the police officers constitutes competent, credible evidence to support the trial court’s finding that Captain DeSimone properly administered Washington’s *Miranda* rights. Having been properly advised of her rights, Washington knowingly, intelligently, and voluntarily waived them and willingly provided her statement to the police.

{¶22} Accordingly, Washington’s first assignment of error is overruled.

{¶23} In her second assignment of error, Washington argues that the State failed to present sufficient evidence to support her convictions for theft with an elderly specification and tampering with evidence. In her fourth assignment of error, Washington argues that her convictions are against the manifest weight of the evidence. Although these arguments involve different standards of review, we will consider them together because we find the evidence in the record applies equally to both.

{¶24} The standard of review with regard to the sufficiency of the evidence is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, as follows:

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

{¶25} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, in which the Ohio Supreme Court held:

“An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” (Citation omitted.)

{¶26} In evaluating a challenge to the verdict based on manifest weight of the evidence, a court sits as the thirteenth juror, and intrudes its judgment into

proceedings which it finds to be fatally flawed through misrepresentation or misapplication of the evidence by a jury which has “lost its way.” *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. As the Ohio Supreme Court declared:

“Weight of the evidence concerns ‘the inclination of the greater amount of credible evidence offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.’

***** ‘The court, reviewing the entire record, 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.’”**

Id. at 387. (Internal Citations Omitted.)

{¶27} However, this court should be mindful that the weight of the evidence and the credibility of witnesses are matters primarily for the trier of fact, and a reviewing court must not reverse a verdict where the trier of fact could reasonably conclude from substantial evidence that the State has proven the offense beyond a reasonable doubt. *State v. DeHass* (1967), 10 Ohio St.2d 230, at paragraphs one and two of the syllabus. The goal of the reviewing court is to determine whether a

new trial is mandated. A reviewing court should only grant a new trial in the “exceptional case in which the evidence weighs heavily against a conviction.” *State v. Lindsey*, 87 Ohio St.3d 479, 483, 2000-Ohio-465. (Internal citation omitted.)

{¶28} The jury found Washington guilty of theft, which pursuant to R.C. 2913.02 provides as follows:

“No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * without the consent of the owner or person authorized to give consent.”**

{¶29} The jury found Washington guilty of an elderly specification, which pursuant to R.C. 2913.01(CC) provides as follows:

“‘Elderly person’ means a person who is sixty-five years of age or older.”

{¶30} The jury also found Washington guilty of tampering with evidence, which pursuant to R.C. 2921.12 provides as follows:

“No person, knowing that an official proceeding or investigation is in process, or is about to be or likely be instituted, shall * alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation.”**

{¶31} In support of its case, the State presented the following evidence: staff members at the nursing home knew Derrico to possess large amounts of cash; Derrico told Hinkle that \$780 was taken from him by the woman who dropped off his breakfast tray; Derrico was at least seventy-eight years old; Washington took an

unauthorized break, left the building, and went to her car; Washington admitted to taking the money to Parma police officers; Washington was not free to go after she admitted to the theft; Washington consented to a search of her vehicle, Washington placed her left hand in between the seats of her vehicle, but then reached into the backseat with her right hand to remove a canvas bag; Washington used the bag to conceal her left hand, which she placed underneath the frame of her car; Sprouse observed Washington kick money underneath her car; police officers recovered four one-hundred dollar bills and one twenty-dollar bill scattered in the parking lot.

{¶32} In response, Washington argues that the State failed to prove Derrico was sixty-five years or older, and that the State used mere speculation to prove that she committed the crimes of theft and tampering with evidence. We disagree.

{¶33} Hinkle testified that Derrico was approximately seventy-eight years old and Officer Brugge stated that he was eighty-five years old. Even though the State did not provide Derrico's exact age, a reasonable trier of fact could conclude, based on this testimony, that he was over the age of sixty five.

{¶34} Additionally, the State relied on more than mere speculation when it presented its case against Washington. Not only did Washington admit to taking Derrico's money, Sprouse observed her kicking money underneath her car, money that the police officers later recovered scattered around the parking lot.

{¶35} Viewing this evidence in the light most favorable to the prosecution, we conclude that a reasonable trier of fact could have found all of the elements of theft

with an elderly specification and tampering with evidence. Accordingly, we find that the State presented sufficient evidence to support Washington's convictions.

{¶36} We further find that the trier of fact did not lose its way in convicting Washington. Though she argues that there was no evidence that she committed a theft or tampered with evidence, Washington disregards her own admission of guilt and the fact that Sprouse observed her kick money underneath her vehicle. As the reviewing court, we find that the trier of fact could reasonably conclude from the substantial evidence presented by the State, that the State proved the offenses beyond a reasonable doubt. Accordingly, we conclude that the trier of fact did not lose its way and create such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered.

{¶37} Based on the abovementioned reasons, we overrule Washington's second and fourth assignments of error.

{¶38} In her third assignment of error, Washington argues that the trial court erred when it admitted inadmissible hearsay evidence during trial. Washington does not specify which witnesses' testimony she finds error with, she merely claims that Derrico's statement that a theft occurred was improperly admitted through several State's witnesses. This assignment of error lacks merit.

{¶39} We apply an abuse of discretion standard to review questions regarding the admissibility or exclusion of evidence. *State v. Hamilton*, Cuyahoga App. No. 86520, 2006-Ohio-1949. "An abuse of discretion connotes more than an error of law

or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. Accordingly, absent an abuse of that discretion, the trial court's rulings will not be reversed. *Harmon v. Baldwin*, 107 Ohio St.3d 232, 2005-Ohio-6264.

{¶40} "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). In the present case, the testimony that a theft occurred was part of a long line of questioning in which the prosecutor elicited from witnesses information regarding the course of the investigation and why the witnesses chose to take the actions they did. The answers given in this type of questioning are not hearsay, because the witnesses did not give this information for the truth of the matter asserted, that is, to show that a theft occurred.

{¶41} In a similar case, the Ohio Supreme Court held that "[t]he testimony at issue was offered to explain the subsequent investigative activities of the witnesses. It was not offered to prove the truth of the matter asserted. It is well established that extrajudicial statements made by an out-of-court declarant are properly admissible to explain the actions of a witness to whom the statement was directed. *** The testimony was properly admitted for this purpose." (Citations omitted). *State v. Thomas* (1980), 61 Ohio St.2d 223; *State v. Byrd*, Cuyahoga App. No. 82145, 2003-Ohio-3958.

{¶42} We find that the witnesses' testimony did not constitute impermissible hearsay. We therefore overrule Washington's third assignment of error.

{¶43} In her fifth and final assignment of error, Washington argues that the trial court erred and abused its discretion when it ordered restitution. In this assigned error, Washington argues that the trial court granted her Crim.R. 29 judgment of acquittal valuing the theft at less than \$500. Additionally, the police officers recovered \$420 from the Pleasant View Nursing Home parking lot. Therefore, the trial court's order of \$360 is above the value of the theft for which she was convicted. We agree.

{¶44} A sentence of restitution must be limited to the actual economic loss caused by the illegal conduct for which the defendant was convicted. *State v. Warner* (1990), 55 Ohio St.3d. 31; *State v. Rivera*, Cuyahoga App. No. 84379, 2004-Ohio-6648. "Thus, restitution can be ordered only for those acts that constitute the crime for which the defendant was convicted and sentenced." *Rivera*, supra. Accordingly, a trial court abuses its discretion when it orders restitution in an amount that has not been determined to bear a reasonable relationship to the actual loss suffered as a result of the defendant's offense for which she was convicted. *State v. Williams* (1986), 34 Ohio App.3d 33; *Rivera*, supra.

{¶45} The trial court submitted the theft charge to the jury with a value of less than \$500. Accordingly, because the Parma Police Officers previously recovered \$420, the trial court erred when it ordered Washington to pay \$360. By doing so, the

trial court effectively set the amount of the theft at \$780, an amount for which Washington was not convicted.

{¶46} Washington's fifth assignment of error is sustained. We reverse the trial court's restitution order and remand for a new hearing to determine the new amount of restitution.

{¶47} We affirm the judgment of conviction but reverse the trial court's restitution order. This case is remanded for further proceedings.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

MICHAEL J. CORRIGAN, J., CONCURS
CHRISTINE T. McMONAGLE J., DISSENTS

CHRISTINE T. MCMONAGLE, J., DISSENTING:

{¶48} Respectfully, I dissent from the majority's holding that the evidence was sufficient to support appellant's conviction of theft with an elderly specification. Specifically, I find the evidence insufficient to prove, beyond a reasonable doubt, that the victim was 65 years of age or older.

{¶49} There are two pieces of evidence in the record relevant to proof of the age of the victim. The first is the testimony of Ms. Hinkle. The relevant testimony is as follows:

{¶50} "Q. [The Prosecutor] Did you know his age?

{¶51} "MR. FRIEDMAN: Objection.

{¶52} "THE COURT: Well, we have to have the firsthand knowledge basis for her knowing his age.

{¶53} "Q. You have been around this particular person for three years?

{¶54} "A. Oh, no.

{¶55} "Q. How long?

{¶56} "A. At that time only a year.

{¶57} "Q. So you have known him for a year?

{¶58} "A. I don't know if I exactly known (sic) him a year, but I was at Pleasant View for a year.

{¶59} "Q. And based on his appearance, could you estimate what his age was?

{¶60} “MR. FRIEDMAN: Objection.

{¶61} “THE COURT: Overruled.

{¶62} “A. Older than 78.

{¶63} “Q. Fair enough. ***.”

{¶64} The only other even passing reference to age came from Officer Brugge, as follows:

{¶65} “THE COURT: Did you see the victim of this theft that day?

{¶66} “THE WITNESS: Yes, I did.

{¶67} “THE COURT: How did he seem to you relative to being alert, and everything, a sound mind, and so forth?

{¶68} “THE WITNESS: He would be what you would the (sic) expect an 85-year-old male to be.

{¶69} “MR. FRIEDMAN: Objection to age, your Honor.

{¶70} “THE WITNESS: What you would expect an 85-year-old male to be in a nursing home. He could explain his name, and so forth. I was able to obtain information from him for the report.

{¶71} “THE COURT: So follow-up questions, Mr. Johnson?

{¶72} “MR. JOHNSON: No, your Honor.”

{¶73} No other testimony, save the above, was admitted into evidence to prove that the victim in this case was 65 years of age or older.

{¶74} Not surprisingly, since proof of the age of a victim is so readily obtained, there is a dearth of case law on this issue. However, in *State v. Perry*, 11th Dist. No. 2002-T-0035, 2003-Ohio-7204, the Eleventh District Court of Appeals addressed the issue of what evidence is sufficient to prove that a victim is 65 years of age or older. In *Perry*, the State conceded that there was no direct evidence of the victim's age at the time of the theft, but argued that because he "suffered from poor eyesight and hearing," and "his speech 'betrayeth his generation,'" there was sufficient circumstantial evidence from which one could infer that he was older than 65. The Eleventh District rejected this argument, however, and found that the defendant's conviction for theft from an elderly person was not supported by sufficient evidence.

{¶75} Here, too, there was no direct evidence of the victim's age at the time of the theft. The only evidence of the age of the victim was an estimate, based on his appearance alone, that he was "older than 78," (from someone who did not claim to know him), and testimony in response to a question concerning the victim's competency that he seemed to be as alert as one would expect from an 85-year-old male. When the only evidence of age, however, is how old someone *appears* to be or how coherent they *seem*, such evidence is insufficient to prove the specific element of "sixty-five years or older" as required by the statute.

{¶76} Because the trial court ruled that the value of the theft was less than \$500, I would find that appellant was properly convicted of a misdemeanor of the first degree and remand for sentencing thereon.

Appendix

Assignments of Error:

“I. The trial court erred when it denied appellant’s motion to suppress oral statements.

II. The evidence was insufficient to support the convictions.

III. The trial court erred in admitting inadmissible hearsay as a purported excited utterance.

IV. The convictions were against the manifest weight of the evidence.

V. The trial court erred and abused its discretion when it ordered restitution.”