

[Cite as *State v. Colon*, 2010-Ohio-361.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92855

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DOTTIE COLON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-516989

BEFORE: Sweeney, J., Gallagher, A.J., and Jones, J.

RELEASED: February 4, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Dottie Colon (“defendant”), appeals from her convictions and sentence for two counts of theft. On appeal, defendant asserts that her convictions were based on insufficient evidence, were against the manifest weight of the evidence, and that the judgment of convictions erroneously indicates she was convicted under Count 4 of a felony of the first degree, rather than a felony of the fourth degree. The State concedes the error in the sentencing journal entry. For the reasons that follow, we affirm but remand with instructions to correct the error in the sentencing journal entry.

{¶ 2} Defendant was charged with multiple counts of identity fraud, theft, and forgery. Following a bench trial, she was found guilty of theft in violation of R.C. 2913.02(A)(3) in an amount between \$5,000 or more but less than \$100,000 (as charged in Count 4), and guilty of theft in violation of R.C. 2913.02(A)(3) in an amount between \$500 or more but less than \$5,000 (as charged in Count 5). Defendant was found not guilty of all other charges.

{¶ 3} At trial, an asset protection specialist (the “APS”) for the Highland Heights Home Depot testified first. According to her, on July 15, 2008, she noticed three expensive water heaters on a flatbed. This raised her suspicion because, she said, these are not commodities many people purchase. Each tank costs approximately \$500. She then noticed other carts with merchandise stacked in an area by the registers. She continued to observe the persons

around this merchandise and she identified the defendant as being one of those people.

{¶ 4} The APS observed defendant in the front of the store talking on the telephone near the carts of stacked merchandise. The APS found this unusual as contractors do not typically leave their carts for large purchases in the middle of the front-end checkout registers. As time progressed, more people appeared involved with the subject merchandise. Eventually, the people began scanning all the merchandise in the carts. She estimated there were four carts and six people involved with the cashier. They produced a temporary charge card pass¹ for payment. Defendant presented her photo identification to the cashier. The APS instructed the cashier to call the credit card company to verify, which was done.

{¶ 5} The people left the store with the merchandise and went to various vehicles. The APS obtained the license plate and the description of the vehicles. She recalled two trucks and a blue SUV. She also attempted to take photographs.

{¶ 6} The next day, the APS learned from the credit card company that the transaction was fraudulent and that the pass was obtained with stolen identification. She contacted the Highland Heights Police Department.

{¶ 7} The APS identified Exhibit 1, which was an image of defendant in the Home Depot store in July that was obtained from the closed circuit television

¹This is a slip of paper provided by Home Depot to consumers who have been approved for a charge card to make purchases with photo identification.

video. She also authenticated the receipt reflecting an amount of \$8,196.89 dated July 15, 2008.

{¶ 8} The APS observed defendant get into a vehicle with another woman. She confirmed that she saw defendant's face on July 15, 2008 and observed her for about one-half hour in the store.

{¶ 9} The State presented the testimony of three other Home Depot employees, who all testified that they observed defendant in the store using or attempting to use a temporary credit pass that was obtained with false identification. This occurred on July 15, 2008 and again on August 16, 2008. They all identified defendant as the person using the fraudulent credit pass.

{¶ 10} On July 15, 2008, a head cashier was alerted of a potentially fraudulent purchaser, who she identified in court as being defendant. On that date, defendant was with a group of individuals with several carts of merchandise. The purchase went through and the store later discovered the credit pass was obtained with false identification.

{¶ 11} In August 2008, the same head cashier again encountered defendant and recognized her from the previous fraudulent transaction. Defendant appeared to be with a group of people on this occasion as well. Management was alerted and she obtained the credit pass from defendant along with a California driver's license. The manager arrived and took the license and the credit pass. Then, the group split up and dispersed with one gentlemen going outside and defendant following the manager trying to regain the license. She identified Exhibit 4 as the California license presented to her by defendant in

August 2008. Exhibit 5 was the receipt from the attempted purchase on August 16, 2008, reflecting an amount of \$1,644.74.

{¶ 12} The Supervisor of Customer Service testified that on August 16, 2008 defendant applied for a credit card using a California driver's license. During this transaction, the supervisor was about two feet from defendant.

{¶ 13} One of the Home Depot employees identified defendant from a photo line-up as being the person who possessed a driver's license of another individual on August 16, 2008. The parties stipulated to J.C. Penney receipts totaling \$630.55 purchased using fraudulent credit opened in that individual's name on August 16, 2008.

{¶ 14} A detective from the Highland Heights Police Department testified about his investigation of defendant. Home Depot's loss prevention department filed a police report concerning fraudulent credit card activity. He obtained documentation generated by the APS of Home Depot, including video surveillance, photographs, and the subject credit card applications. He contacted the various individuals, who purportedly applied for credit at the Highland Heights Home Depot on July 15, 2008 and August 16, 2008. Both individuals denied making the applications and stated they had not authorized anyone else to make the applications. The detective checked the license plate of one of the suspect's vehicles, which was owned by defendant.

{¶ 15} The parties stipulated that fraudulent credit applications were made to Home Depot and J.C. Penney in the name of three identified individuals.

{¶ 16} The trial court entered judgment as previously stated and sentenced defendant to an 18-month prison term on Count 4 and consecutive to a 12- month term on Count 5. Defendant now appeals raising three assignments of error for our review.

{¶ 17} “1. The State failed to present sufficient evidence to sustain a conviction.”

{¶ 18} “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.” *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 19} Defendant was convicted of two counts of theft in violation of R.C. 2913.02(A)(3). In one instance in an amount between \$5,000 and \$100,000 and, in the other, in an amount between \$500 and \$5,000.

{¶ 20} R.C. 2913.02(A)(3) provides:

{¶ 21} “(A) 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:

{¶ 22} “* * *

{¶ 23} “(3) By deception; * * *”

{¶ 24} Contrary to defendant's contention there was sufficient evidence to convict her of these counts.

{¶ 25} There was ample testimony that defendant utilized false identification to obtain credit in other people's names on various occasions and without these individual's consent. Several Home Depot employees identified defendant and had observed her in the store using the subject credit passes on July 15, 2008 and August 16, 2008. The amount of the purchases using the fraudulent credit on these days was \$8,196.89 and \$1,644.74, respectively. Both individuals whose identities were on the credit passes denied making or authorizing the credit applications and purchases. Employees saw defendant and others leave the store with merchandise. Accordingly, this assignment of error is overruled.

{¶ 26} "II. Appellant's conviction is against the manifest weight of the evidence."

{¶ 27} To warrant reversal from a verdict under a manifest weight of the evidence claim, this Court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, N.E.2d 541.

{¶ 28} Defendant generally argues that there was no credible evidence linking her to any thefts. She contends that the multiple identifications of her were but a "scintilla of evidence" that lead to a manifest miscarriage of justice in

the court's guilty verdicts. To the contrary, the record reflects detailed testimony by numerous eyewitnesses to the fraudulent credit scheme employed by defendant on July 15 and August 16, 2008. Although the video surveillance did not capture defendant's face, the person who took the footage testified with certainty that the person on the tapes was defendant. Likewise, more than one cashier was positive that defendant was the person who used the fraudulent credit passes to make and attempt purchases at the store. And, another employee clearly recalled defendant as being the person who made application for a credit card on August 16, 2008 using a California driver's license in another woman's name.

{¶ 29} Based on the evidence in the record, this assignment of error lacks merit and is overruled.

{¶ 30} "III. The trial court erred when it indicated in the sentencing journal entry that appellant was convicted of a felony of the first degree when it was clearly a felony of the fourth degree."

{¶ 31} The State concedes that the trial court's sentencing journal entry is in error to the extent it reflects that defendant was convicted of a first degree felony theft rather than a felony of the fourth degree under Count 4. R.C. 2913.02(B)(2) provides in relevant part that "If the value of the property or services stolen is five thousand dollars or more and is less than one hundred thousand dollars, a violation of this section is grand theft, a felony of the fourth degree." Accordingly, this assignment of error is sustained and the matter is remanded to the trial court

with instructions to correct the error to properly reflect defendant's conviction for a fourth degree felony theft under Count 4.

Judgment affirmed; cause remanded with instructions.

It is ordered that appellant and appellee share equally the 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 Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for further proceedings.

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

JAMES J. SWEENEY, JUDGE

SEAN C. GALLAGHER, A.J., and
LARRY A. JONES, J., CONCUR