[Cite as *State v. Clinkscale*, 2020-Ohio-4735.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DERREKA CLINKSCALE,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0037

Criminal Appeal from the
Mahoning County Court No. 2, Mahoning County, Ohio
Case No. 2018 CRB 1362

BEFORE:
David A. D'Apolito, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, and *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Jan Mostov, 1108 Ravine Drive, Youngstown, Ohio 44505, for Defendant-Appellant.

Dated: September 24, 2020

D'Apolito, J.

{¶1} Appellant, Derreka Clinkscale, appeals from the February 28, 2019 judgment of the Mahoning County Court No. 2 convicting her for theft following a bench trial and sentencing her to 180 days in jail, 150 days suspended, 12 months community control, plus a fine and costs. On appeal, Appellant argues there was insufficient evidence to support her conviction and that the court erred in denying her Crim.R. 29 motion for acquittal. Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

{¶2} On August 28, 2018, a criminal complaint was filed against Appellant charging her with theft, a misdemeanor of the first degree, in violation of R.C. 2913.02(A)(1). Appellant was appointed counsel, pleaded not guilty, and waived her right to a speedy trial.

{¶3} A bench trial was held on December 4, 2018.

{¶4} Appellee, the State of Ohio, presented one witness, Gina Chepak. Chepak was an employee at Dillard's, department store formerly located inside the Southern Park Mall, Store No. 374, Boardman Township, Mahoning County, Ohio. On August 11, 2018, Chepak was working in the children's department. Chepak observed Appellant shopping with an infant who was in a stroller. Chepak approached Appellant in the "big boys section" and asked her if she needed any assistance because she saw "a few items on top of [Appellant's] stroller." (12/4/2018 Bench Trial T.p. 9-10). According to Chepak, Appellant indicated she did not need any help.

{¶5} Chepak testified that Appellant had "[a]pproximately ten" items, sized 8 to 20, which would generally be for children in the age range of 10 to 12 years old. (*Id.* at 11). Chepak saw Appellant walk into a fitting room with all of the items. Chepak later saw Appellant exit the fitting room with "an item or two in her hand" and a back pack. (*Id.* at 12). Chepak noticed tags and about "ten" empty hangers on the floor of that fitting room after Appellant left. (*Id.* at 14).

{¶6} Chepak observed two store managers approach Appellant, who was

headed for the exit door. The managers had asked Appellant to turn around and speak with them. Chepak testified that Appellant did not respond, put down the items she was holding, and "walked out of the doors and refused to come back." (*Id.* at 13).

{¶7} On cross-examination, Chepak stated there are no video cameras in the fitting rooms. Chepak also stated that she had cleaned out the fitting rooms that day because her department had an event called "kids' day." (*Id.* at 17). Chepak said "[t]here was nothing in [the fitting room] prior to [Appellant] going in there." (*Id.*)

{¶8} On re-direct examination, the prosecutor asked Chepak, based on her experience working in retail, if the clothes that Appellant had taken into the fitting room would have fit her. Chepak replied, "No." (*Id.* at 19).

{¶9} At the close of the State's case, defense counsel moved for an acquittal pursuant to Crim.R. 29, which was overruled by the trial court.

{¶10} Appellant testified on her own behalf and admitted to being a "thief." (*Id.* at 27). Appellant stated she has "[p]lenty" and "can't even count the number" of previous theft charges to which she pled. (*Id.* at 22, 27). Appellant indicated she was in Dillard's on the date at issue. Appellant claimed, however, that she neither saw nor spoke with Chepak. Appellant testified that she was looking for an outfit for her two-year-old nephew and only took "one item" into the fitting room. (*Id.* at 25). Appellant said the fitting room was a "total mess" and that clothes and hangers were "everywhere." (*Id.* at 23). Appellant acknowledged that she was stopped by Dillard's associates on her way out. Appellant, however, refused to stop and allow anyone to search her bag. Appellant testified on cross-examination, "I don't have to stop for nobody." (*Id.* at 27).

{¶11} Kelsey Gatas, assistant manager at Dillard's, testified for the defense that one of her duties involves store security. Defense counsel introduced surveillance video from Dillard's. On cross-examination, Gatas testified that the video shows Appellant "after" she exited the fitting room but does not show her entering. (*Id.* at 42).

{¶12} On February 28, 2019, the trial court found Appellant guilty of theft as charged in the complaint. The court sentenced Appellant to 180 days in jail, 150 days suspended, 12 months community control, plus a fine and costs.

{¶13} Appellant filed a timely appeal and raises one assignment of error.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED, DEPRIVING MS. CLINKSCALE OF HER RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION, WHEN IT DENIED MS. CLINKSCALE'S CRIM.R. 29 MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT, WHEN THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT TO SUPPORT THE CONVICTION.

{¶14} Appellant argues there was insufficient evidence at trial to support her theft conviction and that the court erred in denying her Crim.R. 29 motion for acquittal.

> When a court reviews a record for sufficiency, '(t)he 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. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 146, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

State v. Holcomb, 7th Dist. Columbiana No. 18 CO 0039, 2020-Ohio-561, ¶ 14.

{¶15} "'(C)ircumstantial evidence and direct evidence inherently possess the same probative value.'" *State v. Biros*, 78 Ohio St.3d 426, 447 (1997), quoting *Jenks, supra*, paragraph one of the syllabus.

{¶16} Appellant takes issue with the guilty finding for theft, a misdemeanor of the first degree, in violation of R.C. 2913.02(A), which states:

> (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:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception;

(4) By threat;

(5) By intimidation.

R.C. 2913.02(A)(1)-(5).

{¶17} In this case, the State presented sufficient evidence that Appellant, with purpose to deprive Dillard's, knowingly obtained Dillard's property without its consent and also by deception. R.C. 2913.02(A)(1) and (3). Contrary to Appellant's position, Chepak's testimony does not constitute inadmissible hearsay because Chepak testified to her firsthand observation from the day of the incident. *See* Evid.R. 801(C); *State v. Sharpley*, 8th Dist. Cuyahoga No. 87393, 2006-Ohio-5246, ¶ 36.

{¶18} As stated, Chepak was working at Dillard's on August 11, 2018. Chepak observed Appellant shopping with an infant. Chepak approached Appellant in the "big boys section" and asked her if she needed any assistance because Chepak saw "a few items on top of [Appellant's] stroller." (12/4/2018 Bench Trial T.p. 9-10).

{¶19} Chepak testified that Appellant had "[a]pproximately ten" items, sized 8 to 20, which would generally be for children in the age range of 10 to 12 years old. (*Id.* at 11). Chepak saw Appellant walk into a fitting room with all of the items. Chepak later saw Appellant exit the fitting room with "an item or two in her hand" and a back pack. (*Id.* at 12). Chepak noticed tags and about "ten" empty hangers on the floor of that fitting room after Appellant left. (*Id.* at 14). Chepak also stated that she had cleaned out the fitting rooms that day because her department had an event called "kids' day." (*Id.* at 17). Chepak said "[t]here was nothing in [the fitting room] prior to [Appellant] going in there." (*Id.*)

{¶20} Chepak observed two store managers approach Appellant, who was headed for the exit door. The managers had asked Appellant to turn around and speak

with them. Chepak testified that Appellant did not respond, put down the items she was holding, and "walked out of the doors and refused to come back." (*Id.* at 13).

{¶21} Pursuant to *Jenks, supra*, there is sufficient evidence upon which the trier of fact could reasonably conclude beyond a reasonable doubt that the elements of theft were proven. Thus, the trial court did not err in overruling Appellant's Crim.R. 29 motion.

CONCLUSION

{¶22} For the foregoing reasons, Appellant's sole assignment of error is not well-taken. The February 28, 2019 judgment of the Mahoning County Court No. 2 convicting Appellant for theft following a bench trial and sentencing her to 180 days in jail, 150 days suspended, 12 months community control, plus a fine and costs, is affirmed.

Donofrio, J., concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Mahoning County Court No. 2, Mahoning County, Ohio, is affirmed. Costs to be waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.