

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

State of Ohio

Court of Appeals No. L-07-1395

Appellee

Trial Court No. CR200702590

v.

Edward Daniel Martinez

DECISION AND JUDGMENT

Appellant

Decided: June 30, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Ian B. English, Assistant Prosecuting Attorney, for appellee.

Nicole I. Khoury, for appellant; Edward Martinez, pro se.

* * * * *

SINGER, J.

{¶ 1} This appeal comes to us from the Lucas County Court of Common Pleas wherein a jury found appellant, Edward Martinez, guilty of robbery and petty theft.

{¶ 2} Counsel appointed to pursue appellant's appeal has filed a brief and motion requesting withdrawal as appellate counsel, pursuant to the guidelines established in *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. Counsel

states that, after careful review of the record and legal research, she cannot discern any "arguable, non-frivolous issue for appeal." *Anders*, supra, at 744. Counsel further states that she has advised appellant of his right to file a brief on his own behalf, and that a copy of both the brief and motion to withdraw have been served upon appellant. Appellant has filed a brief on his own behalf.

{¶ 3} We are required, pursuant to *Anders*, supra, to thoroughly and independently review the record to determine that counsel has made a diligent effort and that the proceedings below were free from prejudicial error and conducted without infringement of appellant's constitutional rights.

{¶ 4} Upon consideration, we conclude that counsel's brief is consistent with the requirements set forth in *Anders*, supra, and *Penson v. Ohio* (1988), 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300.

{¶ 5} The facts giving rise to this appeal are as follows. On July 31, 2007, appellant was indicted for robbery, a third degree felony and a violation of R.C. 2911.02(A)(3) and petty theft, a first degree misdemeanor and a violation of R.C. 2913.02(A)(1) and (B)(2). A jury trial commenced on October 23, 2007.

{¶ 6} Jarrid Moore testified that he was working as a security guard on July 11, 2007, at a drugstore called the Pharm. He watched a man, who he identified as appellant, knock a row of deodorant to the floor. He watched as appellant picked some of the deodorant up and placed it in his pocket. Moore watched as appellant, accompanied by a female, began heading towards the door. After they passed the cash registers without

paying for the deodorant, Moore stopped the couple and asked them to accompany him to the back of the store. Moore testified that appellant then pulled out all of the items he had taken and dropped them on the floor. He asked Moore if he could leave since he had just given back the stolen items. Moore told him that he needed to accompany him to the back of the store so Moore could get some information from him. Appellant then told Moore that he had a gun. Moore decided to let appellant leave but he did follow him out and get his license plate number. Moore testified that he allowed appellant to leave because he did not want "to get shot over toothpaste and deodorant."

{¶ 7} Store employee, Joseph Damelio, testified he heard appellant announce that he had a gun and he saw appellant reach for his waistband before Moore allowed him to exit the store. Store employee, Michael Gillespie, testified that he felt threatened when he heard appellant announce that he had a gun.

{¶ 8} Toledo Police Officer Kelly Sturm responded to the shoplifting call at the Pharm on July 11, 2007. She interviewed the female who had been with appellant at the store. The female identified appellant and gave Sturm appellant's state identification card she had been carrying in her purse.

{¶ 9} On October 23, 2007, the jury found appellant guilty on both counts. He was sentenced to three years in prison. Counsel for appellant has set forth a potential assignment of error arguing that the evidence was insufficient to convict appellant and that his convictions are against the manifest weight of the evidence.

{¶ 10} The elements of robbery, a violation of R.C. 2911.02(A)(3), are as follows:

{¶ 11} "No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶ 12} "* * *

{¶ 13} "(3) Use or threaten the immediate use of force against another."

{¶ 14} The elements of petty theft, a violation of R.C. 2913.02(A)(1) and (B)(2) are as follows:

{¶ 15} "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:

{¶ 16} "Without the consent of the owner or person authorized to give consent;

{¶ 17} "* * *

{¶ 18} "Whoever violates this section is guilty of theft.

{¶ 19} "Except as otherwise provided in this division or division (B)(3), (4), (5), (6), (7), or (8) of this section, a violation of this section is petty theft, a misdemeanor of the first degree."

{¶ 20} The Ohio Supreme Court has ruled that "[t]he legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. "Sufficiency" pertains to a question of law as to whether the evidence is legally adequate, as to all the elements of the crime, to support a jury verdict. *Id.* Reviewing the

sufficiency of the evidence to support a criminal conviction, an appellate court must 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. However, under a manifest weight standard, an appellate court sits as the "thirteenth juror" and may disagree with the factfinder's resolution of the conflicting testimony. *Thompkins* at 387, 678 N.E.2d 541. The appellate 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." *Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717. While an appellate court may determine that a judgment is sustained by sufficient evidence, it may still conclude that the judgment is against the weight of the evidence. *Id.* (Citations omitted.)

{¶ 21} Because sufficiency is required to take a case to a jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. Thus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency. *Lakewood v. Dorton*, 8th

Dist. No. 81043, 2003-Ohio-1719, ¶ 32, citing *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96CA006462.

{¶ 22} In this case, the testimony at trial, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. Moreover, the trier of the facts, in this case the jury, chose to believe the witnesses who testified that appellant threatened them with a gun while shoplifting. This is a matter of credibility within the province of the trier of facts, not for this court upon appeal. On review, we cannot say that the jury clearly lost its way or perpetrated a manifest miscarriage of justice. Appellate counsel's potential assignment of error is found not well-taken.

{¶ 23} Next, we will consider appellant's pro se assignment of error wherein he claims the court erred in denying his Crim.R. 29 motion for acquittal. An appellate court reviews a denial of a Crim.R. 29 motion for judgment of acquittal using the same standard that is used to review a sufficiency of the evidence claim. *State v. Carter* (1995), 72 Ohio St.3d 545, 553.

{¶ 24} Having already determined that the testimony in this trial, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt, we find appellant's pro se assignment of error not well-taken.

{¶ 25} Accordingly, upon our own independent review of the record, we find no grounds for a meritorious appeal. The appeal is found to be without merit. Appellant's counsel's motion to withdraw is found well-taken and is granted.

{¶ 26} The judgment of the Lucas County Court of Common Pleas is affirmed.

Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT AFFIRMED.

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

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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