

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-02-061
- vs -	:	<u>OPINION</u> 12/21/2009
BRYANT BENSON,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM HAMILTON MUNICIPAL COURT
Case No. 08 CRB 06169

Mary K. Dudley, Hamilton City Prosecutor, 345 High Street, 7th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Patrick E. McKnight, 6 South Second Street, Suite 513, Hamilton, Ohio 45011, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Bryant Benson, appeals his conviction in Hamilton Municipal Court for theft. We affirm.

{¶2} Appellant was arrested on October 29, 2008 for allegedly committing theft in violation of R.C. 2913.02 and menacing in violation of R.C. 2903.21. Appellant entered a plea of not guilty and a bench trial was held.

{¶3} According to Pamela Wells, appellant knocked on the door to her home around 10:30 p.m. on September 21, 2008. Appellant asked her for a cigarette as he

had done on a number of past occasions. Ms. Wells directed appellant to go to the kitchen since the cigarettes were on the counter. Ms. Wells testified that appellant was taking longer than expected to return, so she walked to the kitchen. Ms. Wells observed appellant with his hand in her purse. Thereafter, Ms. Wells checked her purse and determined that \$265 to \$285 was missing. Ms. Wells demanded that appellant return the money and blocked the front door so that he could not leave. She also indicated that she called her daughter, who knew appellant, on the telephone, requesting that she and her boyfriend help her. According to Ms. Wells, appellant shoved her away from the door and fled the apartment. Ms. Wells then called the police and filed a report.

{¶14} Ms. Wells' daughter testified about the phone call. The daughter testified that Ms. Wells told her that "he stole my money out of my purse" and that she could hear appellant and Ms. Wells arguing. She stated that she recognized appellant by the sound of his voice.

{¶15} Appellant denied that he went to Ms. Wells' residence on the night in question and, as a result, never stole money from Ms. Wells. Appellant testified that he was at his girlfriend's home that evening where they ate dinner, watched movies, and went to bed. Further, appellant claimed that he did not smoke, so there was no reason to request a cigarette from Ms. Wells. At trial, appellant's girlfriend corroborated appellant's testimony.

{¶16} According to appellant, Ms. Wells knows the mother of his child and appellant had been in Ms. Wells' residence in the past when visiting his child. Prior to the night in question, appellant had been having problems with the mother of his child. Appellant believed that Ms. Wells' daughter had assisted the mother of his child in causing damage to his girlfriend's vehicle. Appellant and his girlfriend were attempting to file charges against the women and he believes Ms. Wells concocted the instant

complaint against him as a result.

{¶7} After hearing the evidence, the trial court found appellant guilty of theft, but not guilty on the menacing charge. Appellant was sentenced to 90 days in jail with all 90 days stayed under the remaining conditions of his sentence. Appellant was placed on two years nonreporting probation, required to complete 40 hours of community service, fined \$250, and ordered to pay restitution in the amount of \$265. Appellant timely appeals, raising a single assignment of error:

{¶8} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY FINDING APPELLANT GUILTY OF THEFT."

{¶9} In his sole assignment of error, appellant argues that his conviction is against the manifest weight of the evidence. Appellant argues that Ms. Wells' testimony was wholly refuted by his evidence. Appellant cites his alibi evidence, he had no reason to go to Ms. Wells' residence to request a cigarette because he is a nonsmoker, and that Ms. Wells' testimony is not credible due to her and her daughter's relationship with the mother of his child.

{¶10} 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; weight is not a question of mathematics, but depends on its effect in inducing belief. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. A court considering whether a conviction was against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶39. The question is "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." *Id.*; *State v. Blanton*, Madison App. No. CA2005-04-016, 2006-Ohio-1785,

¶7.

{¶11} R.C. 2913.02 provides, in pertinent part, "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * * * [w]ithout the consent of the owner or person authorized to give consent."

{¶12} The sole issue in this case is credibility; specifically, which individual's version of events should be believed. At the conclusion of trial, the trial court stated, "[w]hen we have cases like this, I have to make a decision about who I believe. I make it based on what I hear from their testimony. The way - - the way they look when they're testifying. And sometimes I can't tell uh - - I think one person is telling the truth and the other one isn't. Sometimes I think they're both lying. Sometimes I think they're both telling the truth. But in this case I think the state has proved it's [sic] case beyond a reasonable doubt because I believe what she was saying. I believe she was telling me the truth about what happened. And so I make a finding that you are Guilty of theft."

{¶13} Although we review credibility when considering the manifest weight of the evidence, the credibility of witnesses is primarily a determination for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph 1 of the syllabus. The trial judge is best able "to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶24, citing *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81.

{¶14} The trial court in this case was faced with completely conflicting accounts. Appellant claimed that he never went to Ms. Wells' residence that night, while Ms. Wells testified that he came to her residence around 10:30 asking for a cigarette and stole money from her purse. The trial court found the victim's version of the events credible.

After review of the record, we find no indication that appellant's conviction is against the manifest weight of the evidence or that the trier of fact clearly lost its way in believing Ms. Wells. Accordingly, we will not disturb the lower court's decision.¹

{¶15} Appellant's assignment of error is overruled.

{¶16} Judgment affirmed.

YOUNG, P.J., and HENDRICKSON, JJ., concur.

1. We additionally mention that the prosecution failed to file a brief in this matter. We do not condone this practice. See *State v. Myers*, Clark App. No. 2002-CA-73, 2003-Ohio-915, ¶3.