

[Cite as *State v. Sancho*, 2009-Ohio-5478.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91903

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOAN SANCHO

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-505720

BEFORE: Boyle, J., Rocco, P.J., and McMonagle, J.

RELEASED: October 15, 2009

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), is filed within ten (10) 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. II, Section 2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Joan Sancho, appeals her conviction of misdemeanor theft and misdemeanor tampering with records. She further appeals the trial court's restitution order. Finding no merit to the appeal, we affirm.

{¶ 2} The grand jury indicted Sancho for theft, a violation of R.C. 2913.02(A)(2), involving property valued at least \$5,000 but less than \$100,000 (fourth degree felony), and tampering with records, a violation of R.C. 2913.42(A)(1) (fifth degree felony). The allegations giving rise to the indictment were that Sancho, who was employed by Adecco (a staffing agency) but worked at Nestle, Inc. as a sensory panelist, repeatedly lied on her time sheets about the number of hours that she worked and collected payment for hours that she did not work. She pled not guilty, and the matter proceeded to a bench trial.

{¶ 3} The state called three witnesses at trial, two Nestle employees and an Adecco employee. The evidence at trial revealed that, according to Sancho's entrance and exit "gate swipes" for September 2006 through October 2007, a number of discrepancies existed between the hours that Sancho reported as working and the actual hours that she was on Nestle's premises. Adecco compiled a report of the discrepancies, discounting the days that Sancho may have been off-site as part of her job, and identified 177 hours as having been improperly submitted for payment by Sancho. The report included two days

where Sancho claimed a full day's pay but there was no evidence that she was at the facility, including Labor Day, when the facility was closed.

{¶ 4} While a contract sensory panelist at Nestle, Sancho was supervised by Susan Perry, a sensory specialist for Nestle. Perry testified that Sancho was a "very good worker," who she valued. As Sancho's Nestle supervisor, Perry was responsible for verifying the hours Sancho submitted to Adecco for payment. Perry explained that Sancho, who had some supervisory authority, was responsible for creating an Excel spreadsheet of all the hours worked by the sensory panelists, including her own, which she gave to Perry each week. Perry compared the spreadsheet with the hours the panelists entered on the Adecco web page, and, provided that they matched, she would approve them. Perry never found any discrepancies with the time reported.

{¶ 5} Perry further testified that, despite not having Nestle's approval, she would authorize Sancho to "put down a full day's – her normal working hours" when Sancho would have to leave early to attend to her mother or her son. She acknowledged being aware that Sancho had no benefits from Nestle as a contract employee and that she was sympathetic to that. Although Perry did not remember the exact number of times she authorized Sancho to leave early without subtracting her work hours, she testified that she was surprised to learn of the "magnitude" of the instances and that she did not authorize 177 hours.

{¶ 6} The state offered into evidence print-out sheets of the hours and compensation claimed electronically by Sancho each week. According to the

testimony at trial, Sancho created these time sheets by reporting her time online on the Adecco website and entering her personal identification number and the number of hours that she worked. As for the pay period of September 9, 2007, Sancho claimed a total of 17.75 hours for Labor Day (8 hours of holiday pay and 9.75 hours of regular pay).

{¶ 7} At the close of the state's case, Sancho moved for an acquittal of the charges under Crim.R. 29. Finding that the testimony regarding the value of the property taken, i.e., approximately \$2,200, was less than the \$5,000 stated in the indictment, the court reduced the first count of theft to a fifth degree felony. The court denied the motion as to the tampering with records counts.

{¶ 8} Sancho testified on her own behalf, stating that she entered her time for the hours she worked but that her supervisor [Perry] sometimes "added extra hours" when Sancho fell short of 40 hours. She further testified that her security badge was not an accurate indicator of her hours working at the facility because (1) she sometimes forgot her badge and had to use a visitor pass; (2) she sometimes entered the building with other people, never swiping her badge; and (3) there were several occasions when her badge did not work. As for the time she claimed and was paid for regarding September 3, 2007 (Labor Day), Sancho testified that she put in "32 hours for that week and Sue [Perry] went into the system and added another nine and one-half hours."

{¶ 9} Upon being confronted with some weekly submissions of over 40 hours, which conflicted with gate swipe times for the same week, Sancho testified

on cross-examination that Perry would also sometimes give her overtime hours that she did not work. She further testified that the weeks that Perry had not adjusted her time to 40 hours was because Perry's manager knew that Sancho had not worked an entire 40 hours.

{¶ 10} Sancho also admitted on cross-examination that she was currently on probation related to a fraud conviction involving her former employer, a bank. Although Sancho denied any wrongdoing, she acknowledged that she accepted responsibility related to a "money issue" that arose between her and the tellers because she was the supervisor at the time.

{¶ 11} The trial court found that the evidence failed to support a fifth degree felony because the value of the property was not proven beyond a reasonable doubt and the state's method for proving the value, i.e., inconsistencies between the gate swipes and hours reported, was problematic. The court, however, found that the claimed time for Labor Day alone supported misdemeanor convictions of theft and tampering with records and found Sancho guilty.

{¶ 12} Following the court's rendering of the verdict, the trial court immediately proceeded to sentencing after Sancho waived a presentence investigation report and a hearing on restitution. Sancho also agreed to a restitution amount of \$2,242.56. The court then imposed a jail sentence of three months, suspended it, and placed Sancho on probation for one year. The court also ordered Sancho to pay restitution to Nestle, as stipulated by the parties, in the amount of \$2,242.56.

{¶ 13} Sancho now appeals, raising the following two assignments of error:

{¶ 14} “[I.] The trial court erred in overruling the defense Crim.R. 29 motion for acquittal and finding the defendant guilty against the manifest weight of the evidence.

{¶ 15} “[II.] The trial court erred in ordering restitution of an amount greater than the economic loss proven.”

The Convictions

{¶ 16} Sancho was convicted of theft, a violation of R.C. 2913.02(A)(2), which provides that “[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over *** the property *** [b]eyond the scope of the express or implied consent of the owner or person authorized to give consent.”

{¶ 17} She was also convicted of tampering with records, a violation of R.C. 2913.42(A)(1), which provides that “[n]o person, knowing the person has no privilege to do so, and with purpose to defraud or knowing that the person is facilitating a fraud, shall *** [f]alsify, destroy, remove, conceal, alter, deface, or mutilate any writing, computer software, data, or record.”

{¶ 18} Sancho challenges her convictions based on two main arguments: (1) that the state failed to prove that she created an “official” record; and (2) she cannot be convicted of theft when her Nestle supervisor approved, and sometimes altered, her submitted time each week. Her first argument involves

an attack of the state's evidence; therefore, we will review under a sufficiency challenge.

Sufficiency of the Evidence Regarding Tampering with Records

{¶ 19} A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the state has met its burden of production at trial. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Id.* 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, paragraph two of the syllabus.

{¶ 20} Sancho argues that the only "official" record at issue was created by Perry, a Nestle supervisor. Although she concedes that she submitted her time online and through a spreadsheet, she contends that these submissions are not "records" under the statute. Instead, Sancho argues that the only "official record" was created by Perry, whose approval of the electronic time sheets resulted in an invoice generated by Adecco to Nestle. Her argument, however, is flawed.

{¶ 21} Contrary to Sancho’s assertion, the evidence at trial reveals that Sancho’s submission of her time online at the Adecco website is the “official” record of her hours.

{¶ 22} Further, Sancho improperly focuses on what she perceives as an “official” document – the final invoice. The statute, however, makes no distinction. Here, the state need only prove that Sancho knowingly, with the purpose to defraud, falsified any writing. See R.C. 2913.42(A)(1). Although the statute distinguishes a governmental record from other records and imposes a greater penalty for tampering with the former, the state need not prove that the document was a final invoice or other “official” company record to sustain a misdemeanor conviction under the statute. Compare R.C. 2913.42(B)(4) with 2913.42(B)(3)(a). Here, the state established that Sancho submitted her time each week on an online database and compiled a spreadsheet with her time recorded for Perry to authorize. The state further presented evidence that Sancho claimed more hours than she actually worked to recover additional money. Based on this evidence, the state satisfied its burden to sustain a conviction for tampering with records.

Manifest Weight of the Evidence Regarding Theft

{¶ 23} As part of her first assignment of error, Sancho also argues that her theft conviction cannot stand because Nestle had knowledge of the actual number of hours she worked and nonetheless approved her compensation. She further claims that Perry’s authorization and alteration of her hours negates any

theft offense. Because Sancho's argument relies on her own testimony at trial, it appears that she is attacking her conviction based on the weight of the evidence; thus, we apply a different standard of review.

{¶ 24} A challenge to the manifest weight of the evidence attacks the credibility of the evidence presented. *Thompkins*, supra, at 387. Because it is a broader review, a reviewing court may determine that a judgment of a trial court is sustained by sufficient evidence, but nevertheless conclude that the judgment is against the weight of the evidence. *Id.*, citing *State v. Robinson* (1955), 162 Ohio St. 486, 487.

{¶ 25} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as a "thirteenth juror," and, after "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." *Thompkins*, supra, at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶ 26} Relying specifically on the hours that Sancho reported for Labor Day when the facility was closed, the trial court found Sancho guilty of a misdemeanor theft offense. Sancho argues, however, that Perry, her supervisor, altered her time submission, and therefore her conviction cannot stand. But the only evidence to support this claim is Sancho's own self-serving testimony. The trial judge was free to disbelieve Sancho. We cannot say the trial judge lost his way simply because he found Sancho not credible. Indeed, Sancho's credibility was questionable based on her former fraud conviction and her own interest in avoiding a conviction in this case.

{¶ 27} And although the evidence demonstrates that Perry approved Sancho's time each week, we find it very unlikely that Perry added hours to the time reported by Sancho. Instead, it is apparent that Perry was not closely monitoring Sancho's hours – she believed the hours that Sancho reported to her because she valued her as an employee. Here, the state proved that Sancho knowingly reported more hours for payment than she was actually working. To the extent that Perry signed off on Sancho's time sheets each week, we cannot say that Sancho is shielded from criminal liability, especially since Perry testified that she had not given approval for all the hours that Sancho did not actually work but claimed. Notably, Perry was a credible witness: Perry admitted, despite the consequences she may now face, that she would tell Sancho to report a full day's pay on those occasions when Sancho had to leave early to take care of her

family. (Labor Day, obviously, would not be an occasion when Sancho would need to leave early because the facility was closed.)

{¶ 28} Accordingly, based on the evidence of Sancho collecting payment for those hours that she neither worked nor Perry authorized for her to take paid leave, we find that the conviction is supported by the weight of the evidence. The first assignment of error is overruled.

Restitution

{¶ 29} In her second assignment of error, Sancho argues that the trial court erred in ordering her to pay \$2,242.56 in restitution to Nestle when she was only convicted of a theft offense involving less than \$500. Sancho, however, stipulated to the order of restitution and expressly waived a hearing. It is well-settled that stipulations by an accused in the course of a criminal trial are binding and enforceable. *State v. Folk* (1991), 74 Ohio App.3d 468, 471, citing *State ex rel. Warner v. Baer* (1921), 103 Ohio St. 585. The parties' stipulation to the amount of restitution served as sufficient basis to support the trial court's order and precludes Sancho from complaining about it now on appeal. See, e.g., *State v. Silbaugh*, 11th Dist. No. 2008-P-0059, 2009-Ohio-1489, ¶¶21-23; *State v. Stewart*, 3d Dist. No. 16-08-11, 2008-Ohio-5823, ¶¶13-15; *State v. Champion*, 10th Dist. No. 05AP-1276, 2006-Ohio-4228, ¶8; *State v. Brewer*, 12th Dist. No. CA2002-03-025, 2003-Ohio-1064, ¶13.

{¶ 30} Accordingly, Sancho's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant 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. Case remanded to the trial court for execution of sentence.

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

MARY J. BOYLE, JUDGE

KENNETH A. ROCCO, P.J., and
CHRISTINE T. McMONAGLE, J., CONCUR