[Cite as *State v. Straubhaar,* 2009-Ohio-4757.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	William B. Hoffman, P.J.
Plaintiff-Appellee	:	Julie A. Edwards, J.
	:	Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2008 CA 00106
KEVIN STRAUBHAAR	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal From Stark County Court Of Common Pleas Case No. 2007 CR 1505
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 31, 2009
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO Prosecuting Attorney Stark County, Ohio	LAWRENCE DELINO, JR. One Cascade Plaza, Ste. 1450 Akron, Ohio 44308
BY: KATHLEEN O. TATARSKY Assistant Prosecuting Attorney Appellate Section 110 Central Plaza, South, Ste. 510 Canton, Ohio 44702-1413	

Edwards, J.

{¶1} Defendant-appellant, Kevin Straubhaar, appeals his conviction and sentence from the Stark County Court of Common Pleas on one count of theft. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On October 15, 2007, the Stark County Grand Jury indicted appellant on one count of theft in violation of R.C. 2913.02(A)(2), a felony of the fifth degree. At his arraignment on November 2, 2007, appellant entered a plea of not guilty to the charge.

{¶3} Subsequently, a jury trial commenced on March 6, 2008. The following testimony was adduced at trial.

{¶4} Gerald Reaves is the general manager of the Detroit Diesel Division of Daimler Chrysler, which is located in Canton, Ohio. Appellant was employed at Detroit Diesel as a maintenance supervisor and Reaves was his direct supervisor.

{¶5} At trial, Reaves testified that one of appellant's duties was to make sure that the employees who appellant supervised picked up scrap metal from gondolas in the back of the plant and took the metal to a scrap yard. Reaves testified that there were several scrap yards in Canton and that it was appellant's decision where to take the scrap. When asked how the scrap yards paid for the scrap metal, Reaves testified that "[n]ormally reimbursement was a check to Detroit Diesel, and it would get mailed usually two or three weeks after the material was taken out." Trial Transcript at 103. Reaves further testified that he was not aware of any time other than December 15, 2006 when either appellant or any of his employees took cash in exchange for the scrap metal.

{¶6} Reaves testified that employees which appellant supervised brought to Reaves attention that there might be a problem with scrap metal that was going out of the facility. The following testimony was adduced when Reaves was asked whether anything caught his eye while he was watching scrap metal go out of the facility:

{¶7} "A. Yeah. What caught my attention was that they were having the scrap loaded on our afternoon shift by maintenance people and putting the scrap truck in our normal parking lot the next morning. So they were having, Kevin [appellant] was having it moved to the front lot.

{¶8} "Q. And what about that caught your attention?

{¶9} "A. Well, the fact that he wouldn't have to sign the truck out to leave the premises. The truck would already be signed out and sitting out in front of the building, which meant that there was no track of that vehicle or where it was going or what time it would leave.

{¶10} "Q. And was that the manner that it should be done?

{¶11} "A. No, it was not.

{¶12} "Q. So that came to your attention?

{¶13} "A. Yes.

{¶14} "Q. And raised your suspicions?

{¶15} "A. Right." Trial Transcript at 106-107.

{¶16} According to Reaves, a load of scrap metal left the plant on December 15, 2006. Reaves testified that appellant signed out the loaded truck on 12:20 p.m. for a "Massillon run" and returned the truck around 4:15 p.m. When asked, Reaves testified that doing the "Massillon run" was not part of appellant's job duties. He testified that he

watched for a check to arrive, but "[w]e never saw a check after two weeks." Trial Transcript at 108.

{¶17} Appellant left for a two week vacation. When appellant returned, Reaves asked him where the check was for the scrap that had been removed before Christmas. Reaves testified that appellant responded that he would contact All World Recycling, the scrap yard where the scrap metal had been taken, and find out where the check was. When Reaves questioned appellant again about the money a week later, appellant told him that All World had not returned his phone call and that he would contact All World again. After Reaves' third request was unsuccessful, Reaves, in an e-mail to appellant dated February 16, 2007, told appellant that he wanted an answer by Monday, February 19, 2007 at noon.

{¶18} Appellant was out sick on February 19, 2007. When he returned the next day, a meeting was held with Reaves, appellant, John Leidlein, who was the Quality Manager, and Kathy Bradshaw, who was the Human Resources Manager. Reaves testified that at the meeting, appellant changed his story and said that he had received a check from All World, cashed it and then put the money on John Leidlein's desk on December 15, 2006. Leidlein denied receiving the money. Reaves testified that he then told appellant that the plant was going to conduct an investigation. Appellant never returned to the plant. On or about March 7, 2007, the police were contacted and took a report about the missing money. Reaves testified that appellant never returned the $824.34 that he had received for the scrap from All World Recycling.

{¶19} At trial, John Leidlen testified that, as Quality Manager, he handled finances and was in charge of checks that came into the plant. He testified that he

would record any checks that came in and then forward them to the corporate offices in Detroit to be processed. Leidlein testified that all of the reimbursement from the scrap yards for scrap metal came in the form of a check made out to Detroit Diesel and that they never received cash in exchange for the scrap. He further testified that, in 2007, he received quite a few checks from All World Recycling. When asked, Leidlein testified that he had never seen a check dated December 15, 2006 from All World made out to appellant in the amount of $824.34. The following is an excerpt from Leidlein's testimony at trial:

{¶20} "Q. At any point did [appellant] Kevin tell you that this check had been written out to him personally in exchange for the scrap from Detroit Diesel?

{¶21} "A. The only conversation we had about it was sometime later where myself, Mr. Reaves and our HR manager, Kathy Bradshaw, were in the room together, and Kevin stated that he had given me cash for those; at which point I responded that I did not receive cash, but nothing prior to that.

{¶22} "Q. Okay. So between December 15th of 2006 and February 20th of '07, when you had this meeting with the four of you, you had not heard anything about this check being written personally to Kevin or any cash received from that?

{¶23} "A. No, I did not.

{¶24} "Q. And again, you said right here that Kevin stated at this meeting that he had given you the cash; is that correct, that he did, in fact, give you this cash of $824.34?

{¶25} "A. He stated that he had given me cash but I did not receive cash.

{¶26} "Q. Did he put it in a drawer, tell you he was putting it in a drawer?

{¶27} "A. No." Trial Transcript at 156-157.

{¶28} Leidlein testified that, as of the date of the trial, the company had not received any kind of compensation for the load of scrap that was taken by appellant to All World Recycling on December 15, 2006.

{¶29} At trial, Stephanie Valentine, the owner and President of All World Recycling, testified that she had been doing business with Detroit Diesel for five or six years and that she dealt with appellant. She testified that her company would mail a check made out to Detroit Diesel in payment for the scrap. Valentine testified that appellant, at some point, asked if he could be paid in cash because "[h]e needed money for a petty cash account." Trial Transcript at 182. After such time, appellant received cash in exchange for the scrap as long as the amount was under $500.00. When asked how many times appellant was paid cash, Valentine testified that "maybe five." Trial Transcript at 183.

{¶30} Valentine further testified that a load was brought in on December 15, 2006 and that a check was made out to appellant in the amount of $824.34 for the scrap. Angel Burnett, Valentine's office manager, wrote out the check. Burnett testified that, although she had given appellant cash for scrap metal several times throughout 2006, she wrote a check that day because the amount was more than $500.00. She further testified that the check was written out to appellant rather than Detroit Diesel at appellant's request because he wanted it for petty cash.

{¶31} Appellant cashed the check at a Charter Bank branch in Louisville, Ohio at 5:15 p.m. on December 15, 2006. The branch is located on the way to appellant's home.

{¶32} Appellant testified at trial in his own defense. He testified that when he delivered the scrap to All World Recycling on December 15, 2006, Angel Burnett asked him how he wanted the check to be made out. Appellant testified that he told her that she could not make the check out to him. Appellant testified that he returned to Detroit Diesel at 4:15 p.m. on December 15, 2006, and that when he went upstairs to give the check to John Leidlein, he learned that his own name was on the check. According to appellant, Leidlein told him to cash the check and then return with the cash. Appellant testified that after cashing the check, he returned to Detroit Diesel the same evening and found that Leidlein was gone. Appellant testified that he then locked the cash in his credenza drawer and, on the following Monday morning, gave Leidlein the money before he left on his two week vacation.

{¶33} At the conclusion of the evidence and the end of deliberations, the jury, on March 7, 2008, found appellant guilty of theft. As memorialized in a Judgment Entry filed on April 24, 2008, appellant was placed on community control for a period of three years and was ordered to perform 200 hours of community service. Appellant also was ordered to pay restitution in the amount of $824.34 to Detroit Diesel.

{¶34} Appellant now raises the following assignments of error on appeal:

{¶35} "I. THE TRIAL COURT ERRED IN OVERRULING APPELLANTS'SS [SIC] CRIMINAL RULE 29 MOTION TO DISMISS AT THE CONCLUSION OF THE STATE'S CASE IN CHIEF AS THE PROSECUTION FAILED TO OFFER SUFFICIENT EVIDENCE TO SUSTAIN A GUILTY VERDICT.

{¶36} "II. THE JURY'S FINDING OF GUILT WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶37} "III. APPELLANT'S SIXTH AMENDMENT RIGHT OF EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHERE TRIAL COUNSEL FAILED TO OBJECT TO HEARSAY TESTIMONY WHICH WAS *PER SE* PREJUDICIAL."

I, II

{¶38} Appellant, in his first assignment of error, argues that the trial court erred in overruling appellant's Crim.R. 29 motion at the conclusion of the State's case in chief because the State failed to offer sufficient evidence to sustain a guilty verdict. Appellant, in his second assignment of error, argues that his conviction for theft is against the manifest weight of the evidence.

{¶39} As an initial matter, we note that appellee argues that, in order to preserve his challenge to sufficiency of the evidence, appellant was required to renew his Rule 29 Motion at the close of all the evidence. Appellant had moved for a Crim.R. 29 judgment of acquittal at the close of the State's case, but such motion was denied by the trial court. Appellant never renewed his motion.

{¶40} The Ninth District Court of Appeals, in *State v. Thornton,* Summit App. No. 231417, 2007-Ohio-3743, cited to this Court's decision in *State v. Brown,* Licking App. No.2006-CA-53, 2007-Ohio-2205, in holding that the appellant, who did not renew her Crim.R. 29 motion at the close of the evidence, did not waive her right to argue sufficiency on appeal. In *Brown,*[1] this Court held, in relevant part, as follows: "In two apparently little-recognized cases, however, the Ohio Supreme Court stated that a failure to timely file a Crim.R. 29(A) motion during a jury trial does not waive an argument on appeal concerning the sufficiency of the evidence. See *State v. Jones*

[1] We note that, in *Brown*, the appellant never moved for a Crim.R. 29(A) judgment of acquittal at any point.

(2001), 91 Ohio St.3d 335, 346, 744 N.E.2d 1163, *State v. Carter* (1992), 64 Ohio St.3d 218, 223, 594 N.E.2d 595. In both *Jones* and *Carter,* the Ohio Supreme Court stated that the defendant's 'not guilty' plea preserves his right to object to the alleged insufficiency of the evidence. *Id.* Moreover, because 'a conviction based on legally insufficient evidence constitutes a denial of due process,' *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541, a conviction based upon insufficient evidence would almost always amount to plain error.' *State v. Barringer,* 11th Dist. No.2004-P-0083, 2006-Ohio-2649, at ¶ 59; *State v. Coe* (2003), 153 Ohio App.3d 44, 48-49, 2003-Ohio-2732, at ¶ 19, 790 N.E.2d 1222, 1225-26." *Id.* at paragraph 35.

{¶41} Based on the foregoing, we find that appellant did not waive his right to argue sufficiency on appeal.

{¶42} As is stated above, appellant argues that the trial court erred in overruling his Crim.R. 29 motion for judgment of acquittal. Crim. R. 29(A) requires a trial court, upon motion of the defendant, to enter a judgment of acquittal of one or more offenses charged in an indictment if the evidence is insufficient to sustain a conviction of the offense or offenses. However, a trial court may not grant an acquittal by authority of Crim. R. 29(A) if the record demonstrates that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt. On appeal of the denial of a Crim. R. 29(A) motion, 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. Williams,* 74 Ohio St.3d 569, 576,

1996-Ohio-91, 660 N.E.2d 724, citing *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶43} In the case sub judice, appellant was convicted of theft in violation of R.C. 2913.02(A)(2), such section states as follows:

{¶44} "(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:…(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent."

{¶45} Appellant now contends that his conviction for theft is not supported by sufficient evidence because appellee failed to prove venue beyond a reasonable doubt. Appellant notes that the Bill of Particulars states that the theft occurred in Canton, Ohio, whereas appellant was not in possession of the $824.34 in cash until he negotiated the check at a bank in Louisville, Ohio.

{¶46} R.C. 2901.12(A) provides as follows: "The trial of a criminal case in this state shall be held in a court having jurisdiction of the subject matter, and in the territory of which the offense or any element of the offense was committed." Proper venue is also guaranteed by Section 10, Article I of the Ohio Constitution. Although venue is not a material element of the crime, it still is a fact that must be proved at trial unless waived. *State v. Headley* (1983), 6 Ohio St.3d 475, 477, 453 N.E.2d 716. While it is not necessary that the venue of the crime be stated in express terms, it is essential that it be proven by all the facts and circumstances, beyond a reasonable doubt, that the crime was in fact committed in the county and state alleged. *State v. Dickerson* (1907), 77 Ohio St. 34, 82 N.E. 969, paragraph one of the syllabus.

{¶47} In the case sub judice, all of the events relating to the alleged theft, including the negotiation of the check, occurred in Stark County, Ohio. As is stated above, there was testimony adduced at trial that appellant took the scrap metal from the plant in Canton, Ohio, which is located in Stark County, and took the same to All World Recycling, which is also located in the City of Canton. Testimony was adduced that appellant obtained a check at All World Recycling and then took the same to a bank located in Louisville, Ohio, which is also located in Stark County, and cashed the check. We further find that, based on the facts set forth in detail above, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found that appellant, with purpose to deprive Detroit Diesel of the cash, knowingly obtained or exerted control over the same beyond the scope of Detroit Diesel's consent. We find, therefore that the trial court did not err in overruling appellant's Crim.R. 29 motion. We find that appellant's conviction for theft was supported by sufficient evidence.

{¶48} As is stated above, appellant also argues that his conviction for theft was against the manifest weight of the evidence.

{¶49} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the

judgment." *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶50} Appellant argues that the witnesses who testified for the State were not credible and that his version of events should be believed. However, because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, syllabus 1. Clearly, the jury did not find appellant credible. In short, we cannot say that trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed.

{¶51} Appellant's first and second assignments of error are, therefore, overruled.

III

{¶52} Appellant, in his third assignment of error, argues that he received ineffective assistance of trial counsel.

{¶53} Our standard of review is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and whether counsel violated any of his or her essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial

is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.* Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie,* 81 Ohio St.3d 673, 675, 1998-Ohio-343, 693 N.E.2d 267.

{¶54} Appellant specifically argues that trial counsel was ineffective in failing to object to "inadmissible testimony from the State's witnesses." Appellant specifically points to the following testimony from Gerald Reaves:

{¶55} "Q. When you became the manager of the plant here in Canton, did it come to your attention that there might be some problems regarding Mr. Straubhaar and the scrap metal that was going out of the facility?

{¶56} "A. Yes.

{¶57} "Q. And how did that come to your attention?

{¶58} "A. Actually it was his employees that brought it to my attention.

{¶59} "Q. All right. They brought that to your attention. What did you do?

{¶60} "A. At that time I kind of, I listened to it but disregarded it. He was not very well liked by his employees, and I thought it was just something that they were contriving. So what I did is I just started to kind of watch the scrap going out of the facility." Trial Transcript at 105-106.

{¶61} Appellant further points to John Leidlein's testimony that some people had approached Reaves "saying some scrap had left and they were concerned as to whether or not payments were being brought in for that,.." Trial Transcript at 155. According to appellant, the above testimony suggests to the jury that a 'sting' type

operation was in place and enumerates a hearsay basis for portraying [a]ppellant as a 'suspect even going so far as to question his character ('his employees didn't like him')."

{¶62} The Ohio Supreme Court has recognized that the failure to object is not a per se indicator of ineffective assistance of counsel, because counsel may refuse to object for tactical reasons. *State v. Gumm* (1995), 73 Ohio St.3d 413, 428, 653 N.E.2d 253. Assuming, arguendo, that the above testimony was based on impermissible hearsay, appellant's trial counsel may have been attempting to show that the company wanted to get rid of appellant not due to theft, but because appellant was not liked. We are unpersuaded that counsel's performance in this regard constituted unreasonable representation. Moreover, we find that appellant was not prejudiced by such testimony based on the overwhelming evidence in the record of guilt.

{¶63} Appellant also argues that his trial counsel was ineffective in failing to subpoena records and/or witnesses that would establish that appellant was at the plant on Monday, December 18, 2006. As is stated above, appellant testified that after he discovered that John Leidlein was not at the plant on Friday, December 15, 2006, he returned on Monday, December 18, 2006, and gave the cash to Leidlein. However, we cannot say that counsel was ineffective in failing to subpoena such records or witnesses because there is no evidence that the same exist**.** A defendant must demonstrate more than vague speculations of prejudice to show counsel was ineffective. *State v. Otte* 74 Ohio St.3d 555, 566, 1996-Ohio-108, 660 N.E.2d 711.

{¶64} Appellant's third assignment of error is, therefore, overruled.

{¶65} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Edwards, J.

Hoffman, P.J. and

Delaney, J. concur

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JUDGES

JAE/d0428

[Cite as *State v. Straubhaar,* 2009-Ohio-4757.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
KEVIN STRAUBHAAR	:	
Defendant-Appellant	:	CASE NO. 2008 CA 00106

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to appellant.

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JUDGES