[Cite as *State v. Butts*, 2009-Ohio-6561.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- ROSE ANN BUTTS Defendant-Appellant	JUDGES: Hon. Sheila G. Farmer, P. J. Hon. W. Scott Gwin, J. Hon. John W. wise, J. Case No. 2009 CA 00085 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Massillon Municipal Court, Case No. 2008 CRB 2275
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 7, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
ROBERT A. ZEDELL ASSISTANT PROSECUTOR Two James Duncan Plaza Massillon, Ohio 44646	GEORGE URBAN 111 Second Street, NW Suite 302 Canton, Ohio 44702

Wise, J.

{¶1} Defendant-Appellant Rose Ann Butts appeals her conviction and sentence entered by the Massillon Municipal Court, on one count of theft following a jury trial.

{¶2} Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶3} This case arose out of an incident that occurred on September 27, 2009, at approximately 11:00 A.M. at the Giant Eagle store located on The Strip in Jackson Township, Stark County, Ohio. On that day Defendant-Appellant Rose Ann Butts came into the store and proceeded to do some grocery shopping. After paying for her groceries, Appellant went to the customer service desk to inquire about certain items that she had previously claimed she failed to receive at her last visit.

{¶4} Elaine Eaves, the store manager, testified that she had spoken to Appellant by phone a "couple of days earlier" at which time Appellant claimed that she had purchased certain items, including a brush, some hair care items and a corsage, which were accidentally left at the store but that she was unable to locate her receipt for such purchases. (T. at 40, 47). In response to the phone call, Eaves searched the register for the time period Appellant said she was in the store but was unable to locate any sale of the items Appellant stated she purchased but did not receive. (T. at 41). Eaves informed Appellant that the items could not be located on the computer. (T. at 41). Appellant stated she would double check the time she was there and get back to Eaves. Instead, Appellant stopped at customer service as stated above. Id.

{¶5} Eaves testified that the person working at the service counter called her because there was a customer there claiming she did not get some items she said she

had purchased, but that she did have a receipt for such purchases. (T. at 41-42). Eaves stated that when she went out to the counter, she found Appellant there with two gift cards, hair products and a brush. (T. at 42). At that time she informed Appellant that they still had been unable to locate a receipt for the purchases Appellant was claiming she made and further advised Appellant that she had not previously mentioned that gift cards had been included in the previous purchase. Id. She informed Appellant that she could not replace these purchases without a receipt. Id. She stated that Appellant responded by stating that she was not going to pay for these items again, insisting that she had already paid for them. Id. At that time, Eaves sought the help of Nancy Beadell, the front end manager, who reiterated that the store could not replace missing items without a receipt. Id. Eaves stated that Appellant was informed that the store would contact their loss prevention department and have them search the video recordings in an effort to locate Appellant's previous purchase. Id.

{¶6} In a further effort to locate the record of the prior transaction, Eaves checked the receipt for Appellant's purchase on that day in order to find her advantage card number. Upon reviewing that day's transaction, the employee noticed that a bag of charcoal in Defendant-Appellant's cart for which she had not paid. (T. at 43).

{¶7} As Appellant was leaving the store, Eaves located the receipt for the purchases Appellant had just made in an effort to locate her advantage card number. (T. at 43). Eaves stated that at that time she noticed Appellant had charcoal in her cart, but that it was not on the receipt. (T. at 43).

{¶8} Nancy Beadell, front end manager at Giant Eagle testified that in addition to the charcoal, Appellant also failed to pay for lighter fluid, stockings and garbage bags, all of which were found at the bottom of Appellant's shopping cart. (T. at 62).

{¶9} Perry Whitt, general manager of Giant Eagle, followed Appellant from the store to inquire as to the items in the bottom of the cart. (T. at 70, 71). His testimony differed from Beadell's testimony in that he stated that some of the items were found in the bags containing the items for which Appellant paid. (T. at 76). Whitt testified that Appellant told him that if there was anything not on the receipt, he should take it back. (T. at 73). Appellant voluntarily followed Whitt back into the store. (T. at 73). Whitt noted that all of the food items were paid for by food stamps and only the non-food items were alleged to have been removed from the store without payment. (T. at 75).

{¶10} Appellant testified that on the date in question, she did some shopping and then went to Customer Service to inquire about a bag of items she forgot from a previous shopping trip the day before. (T. at 93-97). She stated that she was told to get the things she was missing and bring them to the customer service desk. (T. at 96). She stated that when she returned with the items she claimed she had not received on her prior trip, she was told by another person at customer service that the missing items could not be replaced without a receipt. (T. at 97). Appellant testified that she then exited the store and headed for the bus stop. (T. at 97-98).

{¶11} As a result of the above events, Defendant-Appellant was issued a summons to appear in court and was subsequently charged by the Jackson Township Police with one count of Theft (M-1), a violation of R.C. §2913.02(A)(1).

{¶12} Defendant-Appellant appeared in the Massillon Municipal Court and entered a plea of Not Guilty to the charge.

{¶13} On March 18, 2009, this matter was tried before a jury.

{¶14} At the conclusion of the trial, Defendant-Appellant was found guilty and was sentenced by the trial court to 180 days in jail, a $250.00 fine and court costs.

{¶15} It is from this conviction and sentence Appellant appeals, raising the following assignments of error:

ASSIGNMENTS OF ERROR

{¶16} "I. THE TRIAL COURT'S FINDING OF GUILT IS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

{¶17} "II. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE WHICH WAS UNFAIRLY PREJUDICIAL."

I.

{¶18} In her first assignment of error, Appellant challenges her conviction as against the sufficiency and manifest weight of the evidence. We disagree.

{¶19} Our standard of reviewing a claim the verdict was not supported by sufficient evidence is to examine the evidence presented at trial to determine whether the evidence, if believed, would convince the average mind of the accused's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in the 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.

{¶20} The Supreme Court has explained the distinction between claims of sufficiency of the evidence and manifest weight. Sufficiency of the evidence is a question for the trial court to determine whether the State has met its burden to produce evidence on each element of the crime charged, sufficient for the matter to be submitted to the jury.

{¶21} Manifest weight of the evidence claims concern the amount of evidence offered in support of one side of the case, and is a jury question. We must determine whether the jury, in interpreting the facts, so lost its way that its verdict results in a manifest miscarriage of justice, *State v. Thompkins* (1997), 78 Ohio St. 3d 387, citations deleted. 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, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. 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, syllabus 1.

{¶22} In *State v. Thompkins* (1997), 78 Ohio St.3d 380, the Ohio Supreme Court held "[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of

appeals reviewing the judgment is necessary." Id. at paragraph three of the syllabus. However, to "reverse a judgment of a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required." Id. at paragraph four of the syllabus; *State v. Miller* (2002), 96 Ohio St.3d 384, 2002-Ohio-4931 at ¶38, 775 N.E.2d 498.

{¶23} Appellant was convicted of theft, a first degree misdemeanor, in violation of R.C. §2913.02(A)(1), which provides in relevant part:

{¶24} "(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:

{¶25} "(1) Without the consent of the owner or person authorized to give consent;"

{¶26} Appellant argues that in the case sub judice, the State failed to prove the element of knowingly. Knowingly is defined as:

{¶27} "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶28} Appellant argues that her actions of leaving the store with unpaid items after attracting attention to herself by stopping at the customer service desk and providing her name and identification are not the actions of someone knowingly committing a theft.

{¶29} We disagree. Upon review, we find that in addition to the testimony of Appellant wherein she does not deny that she left the store with such items, but instead claims that she was not aware that she had such items in her cart, the jury also had before it the testimony of three Giant Eagle store managers: Elaine Eaves, Nancy Beadell and Perry Whitt to consider. Each testified as to the chronology of events which occurred on September 27, 2009, as set forth in detail above, which resulted in Appellant leaving the store with items for which she had not paid. As Appellant had just made an issue of requesting that she be given many of these additional items for which she had not paid, it seems unlikely that she could immediately forget that she had them in her cart.

{¶30} As 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.

{¶31} Viewing this evidence in a light most favorable to the prosecution, this Court finds that any rational trier of fact could have found that Appellant knowingly committed the theft in the instant case.

{¶32} Based upon the foregoing and the entire record in this matter, we find Appellant's conviction was neither against the manifest weight nor the sufficiency of the evidence.

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

II.

{¶34} In her second assignment of error, Appellant contends that it was error for the trial court to allow the presentation of evidence of Appellant's prior criminal history and Appellant's status as a recipient of welfare benefits. We disagree.

{¶35} Initially, we note that the admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶36} Appellant challenges the State's cross-examination questions concerning her previous arrests.

{¶37} As a general rule, evidence of previous or subsequent acts, wholly independent of the charges for which the accused is on trial, is inadmissible. *State v. Hector* (1969), 19 Ohio St.2d 167. Such evidence cannot be admitted for the purpose of establishing the defendant acted in conformity with this bad behavior. *State v. Elliot* (1993), 91 Ohio App.3d 763.

{¶38} Ohio Rule of Evidence 404(B) reads:

{¶39} "(B) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶40} Upon review, we find that the trial court allowed the State to question Appellant about her prior convictions in response to Appellant's testimony that she was embarrassed and humiliated by the process of being arrested, handcuffed and fingerprinted.

{¶41} While we find the fact that Appellant had previously been convicted of other crimes does not necessarily mean her statements that she was embarrassed and humiliated by being arrested in this instance were not credible, we do not find that the allowance of such line of questioning was an abuse of discretion. Even assuming arguendo that such was error, we find the error to be harmless in light of the additional evidence presented at trial establishing Appellant committed the theft in this case.

{¶42} Appellant also assigns error to the trial court allowing testimony that Appellant paid for her food purchases with a Direction Card, which replaced paper food stamps in Ohio.

{¶43} Upon review, we find that the method of payment for Appellant's actual purchases was relevant in the instant case. Appellant explained in her testimony that she could not use self-checkout but had to go through a regular check out line when making purchases with a Direction Card. Also, the State highlighted the fact that all of the unpaid purchases were non-food items which could not be paid for with a Direction Card. We therefore find such evidence to be relevant to the State of Ohio's theory of the case.

{¶44} Appellant's second assignment of error is not well-taken and hereby overruled same.

{¶45} For the foregoing reasons, the judgment of the Massillon Municipal Court, Stark County, Ohio, is affirmed.

By: Wise, J.

Farmer, P. J., and

Gwin, J., concur.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ W. SCOTT GWIN_____

JUDGES

JWW/d 1201

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ROSE ANN BUTTS	:	
Defendant-Appellant	:	Case No. 2009 CA 00085

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Massillon Municipal Court, Stark County, Ohio, is affirmed.

Costs assessed to Appellant.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ W. SCOTT GWIN_____

JUDGES