[Cite as *State v. Gilbert,* 2010-Ohio-2859.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- BRANDON D. GILBERT Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P. J. Hon. John W. Wise, J. Hon. Patricia A. Delaney, J. Case No. 09 COA 26 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 09 CRI 18
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 18, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
RAMONA FRANCESCONI ROGERS PROSECUTING ATTORNEY PAUL T. LANGE ASSISTANT PROSECUTOR 307 Orange Street Ashland, Ohio 44805	DOUGLAS A. MILHOAN Post Office Box 347 Middlebranch, Ohio 44652

Wise, J.

{¶1} Appellant Brandon D. Gilbert appeals his conviction, in the Court of Common Pleas, Ashland County, for theft and misuse of a credit card. The relevant facts leading to this appeal are as follows.

{¶2} The victim in this case, Marybeth Ridgeway, is a child support obligee who utilizes the Ohio "E-Quick Pay" debit card to receive her support payments. Appellant is the ex-boyfriend of Ridgeway's sister. The State investigated and concluded that on or about December 21, 2008, appellant removed approximately $300.00 from Ridgeway's E-Quick Pay card without her consent.

{¶3} On February 27, 2009, appellant was indicted on one count of theft, a felony of the fifth degree, and one count of misuse of credit cards, a misdemeanor of the first degree. The matter was tried before a jury on June 23 and 24, 2009.

{¶4} After the State rested its case, counsel for appellant moved to dismiss pursuant to Crim.R. 29, arguing the card in question was a debit card and not a credit card based on the testimony presented. The trial court denied the motion.

{¶5} After hearing all the evidence, the jury found appellant guilty on both counts as alleged in the indictment.

{¶6} On June 26, 2009, the court held a sentencing hearing and thereafter sentenced appellant to a term of one year incarceration on the theft count and one-hundred and eighty days on the misuse of credit cards, to be served concurrently. A sentencing entry was issued on June 29, 2009.

{¶7} On July 28, 2009, appellant filed a notice of appeal. He herein raises the following two Assignments of Error:

{¶8} "I. THE CONVICTIONS OF APPELLANT FOR THEFT AND MISUSE OF CREDIT CARDS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶9} "II. THE IMPOSITION OF A PRISON SENTENCE IN THIS CASE IMPOSES AN UNNECESSARY BURDEN ON STATE RESOURCES."

I.

{¶10} In his First Assignment of Error, appellant contends his conviction for theft and misuse of a credit card is against the manifest weight of the evidence.

{¶11} The gist of appellant's argument is that the State failed to prove beyond a reasonable doubt that the E-Quick Pay card in question was a "credit card" under the Ohio Revised Code. Thus, as an initial matter, appellant appears to be raising a legal sufficiency argument, rather than a true "manifest weight" argument. In Ohio, the legal concepts of sufficiency of the evidence and manifest weight of the evidence are both quantitatively and qualitatively different. See *State v. Williams*, Scioto App.No. 00CA2731, 2001-Ohio-2579, citing *State v. Ricker* (Sept. 30, 1997), Franklin App. No. 97APC01-96, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. "The *Thompkins* Court defined sufficiency of the evidence as the 'legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the jury verdict.' " *Williams*, citing *Tompkins* at 387, quoting Black's Law Dictionary (6 Ed.1990) 1433.

{¶12} Accordingly, in the interest of justice, we will treat appellant's challenge to his conviction as a claim of insufficiency of the evidence. In reviewing such a claim, "[t]he 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.

{¶13} At the trial in this matter, appellant's trial counsel in opening statements stated that appellant did not deny taking the victim's E-Quick Pay card and removing the balance (approximately $300.00) without her consent. See Tr. at 8-9, 11. We are thus directed to R.C. 2913.01(U), which states:

{¶14} " 'Credit card' includes, but is not limited to, a card, code, device, or other means of access to a customer's account for the purpose of obtaining money, property, labor, or services on credit, or for initiating an electronic fund transfer at a point-of-sale terminal, an automated teller machine, or a cash dispensing machine. It also includes a county procurement card issued under section 301.29 of the Revised Code."

{¶15} In turn, R.C. 2913.01(V) states, via reference to federal law, as follows: "[T]he term 'electronic fund transfer' means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account.* * *" See, also, 92 Stat. 3728, 15 U.S.C.A. 1693a, as amended.

{¶16} In the case sub judice, the victim, Ms. Ridgeway, testified that the child support she receives for her children is placed into an account that she accesses using her E-Quick Pay debit card. Tr. at 15. The card's face includes Ridgeway's name, account number, and a MasterCard logo; the back of the card reveals a magnetic strip and signature box. Id. at 16. Ridgeway further testified that she can obtain cash from an ATM machine by using this card, and she detailed how a user can track the amount

of money in his or her account at any given time. Id. at 16, 21. Furthermore, the card may be used to purchase goods at stores or on the internet. Id. at 16-20. The card can also be taken to a bank where the user can receive cash from the account. Id. at 20. On cross-examination, Ridgeway stated that she could not use the card to withdraw more than the amount of her child support at an ATM and that she could not buy things on credit. Tr. at 37. Nonetheless, she stated that she knew appellant and did not give him permission to have or use the card. Tr. at 23. She also recalled that appellant later admitted to taking the card and apologized. Tr. at 34.

{¶17} The record reveals at the very least that the card at issue could be used to initiate an electronic fund transfer at a bank's automated teller machine. The jury could thus properly infer that as part of such a transaction, the bank would debit the funds appellant received from her child support account. The State also called Linda Urban of National City Bank, who testified that she retrieved the photos of appellant using one of the bank's ATM machines, corresponding to the ATM's transaction journal. Tr. at 47-50. In addition, Detective Dennis Evans of the Ashland Police Department testified that while investigating this case he contacted appellant, showed him the aforementioned ATM photos, and that appellant admitted taking the card and withdrawing $300.00 from the ATM machine. Tr. at 62-63.

{¶18} Accordingly, upon review, we find the card at issue meets the definition of a credit card as set forth in the Revised Code, and we hold appellant's conviction for theft and misuse of a credit card was supported by sufficient evidence.

{¶19} Appellant's First Assignment of Error is overruled.

II.

{¶20} In his Second Assignment of Error, appellant argues the imposition of a prison sentence in this case imposes an unnecessary burden on state resources. In *State v. Shull,* Ashland App. No. 2008-COA-036, 2009-Ohio-3105, we reviewed a similar claim. We found that although the burden on state resources may be a relevant sentencing criterion as set forth in R.C. 2929.13, Ohio law "does not require trial courts to elevate resource conservation above the seriousness and recidivism factors." *Shull* at ¶22, quoting *State v. Ober* (October 10, 1997), Greene App. No. 97CA0019.

{¶21} The State points out that appellant failed to reform himself after a previous felony burglary offense and incarceration. The record indicates appellant took advantage of a close relationship with the victim, and abused marihuana while the case was pending. See Sentencing Tr. at 2-3. His two sentences nonetheless were ordered served concurrently.

{¶22} Upon review, we find appellant has not demonstrated his sentence is an unnecessary burden on state resources. The Second Assignment of Error is overruled.

{¶23} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Ashland County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ PATRICIA A. DELANEY_____

JUDGES

JWW/d 519

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
BRANDON D. GILBERT	:	
	:	
Defendant-Appellant	:	Case No. 09 COA 26

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Ashland County, Ohio, is affirmed.

Costs assessed to appellant.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ PATRICIA A. DELANEY_____

JUDGES