[Cite as *State v. Thompson*, 2010-Ohio-5331.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09CA00030
VIRGINIA E. THOMPSON	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Cambridge Municipal Court Case No. 09CRB00179
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	October 21, 2010

APPEARANCES:

For Plaintiff-Appellee:

WILLIAM H. FERGUSON 0030826
Cambridge Law Director
134 Southgate Parkway
Cambridge, Ohio 43725

For Defendant-Appellant:

MELISSA M. WILSON 0076455
1009 Steubenville Avenue
Cambridge, Ohio 43725

Delaney, J.

{¶1} Defendant-Appellant, Virginia Thompson, appeals the judgment of the Cambridge Municipal Court, convicting her of one count of theft, a misdemeanor of the first degree, in violation of R.C. 2913.02.

{¶2} On February 11, 2009, Wal-Mart asset protection associate, Maria Eltringham, was watching Appellant as she was shopping in the Wal-Mart in Cambridge, Ohio.

{¶3} Ms. Eltringham received information from a Wal-Mart manager to watch Appellant because she was acting suspiciously by picking up and putting down DVDs in the electronics area. When Ms. Eltringham began observing Appellant, Appellant was in the self-serve photo area, printing off pictures from her digital camera.

{¶4} Appellant finished printing her pictures and went to the restroom. When she came out of the restroom, she walked to the craft area and Ms. Eltringham observed her conceal the photographs by placing them inside her purse. Ms. Eltringham then watched Appellant attempt to exit through the general merchandise door of the Wal-Mart, where she was apprehended and asked to return to the loss prevention office with Ms. Eltringham.

{¶5} The photographs were removed from Appellant's purse and the Cambridge Police Department charged Appellant with theft, approximating the cost of the photographs at $28.64.

{¶6} On February 17, 2009, Appellant entered a not guilty plea at her arraignment. The case proceeded to a bench trial on June 3, 2009. The court convicted Appellant and sentenced her to 10 days incarceration with 10 days

suspended. Appellant was also fined $50.00, which was suspended provided that Appellant paid the civil discovery demand. Appellant was also placed on one year of unsupervised probation and was ordered to pay all fines and costs and was further ordered to stay away from all Wal-Mart stores.

{¶7} Appellant now challenges the judgment of the trial court and raises two Assignments of Error:

{¶8} "I. APPELLANT WAS DEPREIVED [SIC] OF HER RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

{¶9} "II. THE JUDGMENT OF THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN THAT THE STATE OF OHIO/APPELLEE FAILED TO PRODUCE SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION."

I.

{¶10} In Appellant's first assignment of error, she alleges that she was denied the effective assistance of trial counsel.

{¶11} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that trial counsel acted incompetently. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. In assessing such claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164.

{¶12} "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." Id. at 690.

{¶13} Even if a defendant shows that counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

{¶14} When counsel's alleged ineffectiveness involves the failure to pursue a motion or legal defense, the "actual prejudice" prong of *Strickland* breaks down into two components. First, the defendant must show that the motion or defense "is meritorious," and, second, the defendant must show that there is a reasonable probability that the outcome would have been different if the motion had been granted or the defense pursued. See *Kimmelman v. Morrison* (1986), 477 U.S. 365, 375, 106 S.Ct. 2574, 2583; see, also, *State v. Santana* (2001), 90 Ohio St.3d 513, 739 N.E.2d 798 citing *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293.

{¶15} Appellant argues that her trial counsel's performance was deficient in several ways. Appellant complains about (1) counsel's decision not to call Appellant to the stand to testify during trial; (2) that counsel called no witnesses on Appellant's behalf; and (3) that counsel did not get a continuance to prepare a defense and present testimony based on a discrepancy in the complaint versus the evidence presented at trial. Regarding Appellant's third claim, it appears that Appellant is arguing that counsel

was ineffective for failing to file a motion to dismiss the complaint prior to trial based on a faulty complaint.

{¶16} We reject Appellant's first two arguments outright. Appellant argues that she was prejudiced when her trial counsel advised her not to testify at trial and lists several reasons why she should have testified at trial. She also argues that it was ineffective not to call witnesses on her behalf. The decision whether to call a defendant as a witness and to call witnesses in general falls within the purview of trial strategy. *State v. Adkins* (2001), 144 Ohio App.3d 633, 646, 761 N.E.2d 94; *City of Lakewood v. Town* (1995), 106 Ohio App.3d 521, 527, 666 N.E.2d 599.

{¶17} Regarding Appellant's third claim, that counsel should have filed a motion to dismiss the complaint prior to trial based on a procedural defect, that being that the complaint stated that the theft was of DVDs and not pictures, assuming that the claim is meritorious; we find that Appellant suffered no prejudice based on counsel's actions.

{¶18} Even though the trial court told counsel that he would have been inclined to grant a motion to dismiss the faulty complaint prior to trial, the court noted that it would have been a procedural matter rather than a substantive or Constitutional matter, so the result would have been a re-filing of the complaint, putting the parties back in the same scenario that they were in. The trial court offered to provide counsel with a continuance based on the discrepancy between the complaint and the evidence, and counsel declined the continuance. We do not believe that the outcome of the trial would have been different had counsel requested the dismissal in a timely manner. Counsel was aware that the stolen property at issue was the pictures and not DVDs, as counsel

was provided the police report in discovery, which indicated that the property at issue was pictures.

{¶19} Appellant suffered no prejudice. Her first assignment of error is overruled.

II.

{¶20} In her second assignment of error, Appellant argues that her conviction was not supported by sufficient evidence and was against the manifest weight of the evidence.

{¶21} When reviewing a claim of sufficiency of the evidence, an appellate court's role is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. Contrary to a manifest weight argument, a sufficiency analysis raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. 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. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶22} Conversely, when analyzing a manifest weight claim, this court sits as a "thirteenth juror" and in 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." *State v.*

Thompkins (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 548, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶23} In the present case, the State had to prove that Appellant knowingly deprived Wal-Mart of the pictures without their consent.

{¶24} The evidence, as set forth in the statement of facts above, provide sufficient evidence that Appellant knowingly deprived Wal-Mart of the photographs that she printed in their photo department and then placed in her purse without paying for them.

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

{¶26} The judgment of the Cambridge Municipal Court is affirmed.

By: Delaney, J.

Farmer, P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. WILLIAM B. HOFFMAN

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FIFTH APPELLATE DISTRICT

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-vs-	:	JUDGMENT ENTRY
	:	
VIRGINIA THOMPSON	:	
	:	
Defendant-Appellant	:	Case No. 09CA00030
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Cambridge Municipal Court is affirmed. Costs assessed to Appellant.

_____
HON. PATRICIA A. DELANEY

_____
HON. SHEILA G. FARMER

_____
HON. WILLIAM B. HOFFMAN