

[Cite as *State v. Hanke*, 2009-Ohio-3023.]

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

STATE OF OHIO	:	
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Plaintiff-Appellee	:	C.A. CASE NO. 08CA0053
vs.	:	T.C. CASE NO. 08CR0044
	:	
DONALD HANKE	:	(Criminal Appeal from Common Pleas Court)
	:	
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 19th day of June, 2009.

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Stephen Schumaker, Pros. Attorney; Amy M. Smith, Atty. Reg. No.0081712, Asst. Pros. Attorney, 50 East Columbia Street, Springfield, OH 45502
Attorneys for Plaintiff-Appellee

Brett A. Rinehart, Atty. Reg. No.0081226, 31 E. High Street, Suite 300, Springfield, OH 45502
Attorney for Defendant-Appellant

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GRADY, J.:

{¶ 1} Defendant, Donald Hanke, appeals from his conviction and sentence for the offense of theft, R.C. 2913.02(A)(1), as a fifth degree felony.

{¶ 2} Evidence introduced at Hanke’s trial demonstrates that on October 24, 2007, he and an accomplice forcibly

removed the exhaust system, which included the vehicle's catalytic converter, from a 1997 Nissan Maxima automobile owned by Monte Tabb. The removal was without Tabb's consent.

{¶ 3} Hanke was convicted of theft as a fifth degree felony and was sentenced to a twelve month prison term. He appealed his conviction and sentence.

ASSIGNMENT OF ERROR

{¶ 4} "THE GUILTY VERDICT TO THEFT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND NOT SUPPORTED BY SUFFICIENT EVIDENCE."

{¶ 5} A sufficiency of the evidence argument disputes whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259:

{¶ 6} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction 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. 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.”

{¶ 7} A weight of the evidence argument challenges the believability of the evidence; which of the competing inferences suggested by the evidence is more believable or persuasive. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 8} “The court, 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 lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” Accord: *State v. Thompkins, supra*.

{¶ 9} R.C. 2913.02(A)(1) states: “No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over the property or services . . . [w]ithout the consent of the owner or person authorized to give consent.”

{¶ 10} R.C. 2913.02(A)(1) does not require proof of the value of the property or services stolen. R.C. 2913.02(B)(2) provides that a violation of (A)(1) is a first degree misdemeanor, but that if the value of the property or services stolen is more than five hundred but less than five thousand dollars, the violation is a fifth degree felony.

{¶ 11} R.C. 2913.61(D)(1)-(3) establishes alternative criteria to be used in determining the value of property or services involved in a theft offense. Equipment removed from an owner's automobile, including batteries and radiators, should be valued under the fair market value test set out in R.C. 2913.61(D)(3). *State v. Chaney* (1984), 11 Ohio St.3d 208. That section provides that "'fair market value' is the money consideration that a buyer would give and a seller would accept for property or services, assuming that the buyer is willing to buy and the seller is willing to sell, that both are fully informed as to all facts material to the transaction, and that neither is under any compulsion to act."

{¶ 12} Monte Tabb testified that as a result of the theft and the damage to his vehicle that it caused, his insurance company paid sixteen hundred dollars to replace the vehicle's catalytic converter, emissions box, and muffler. Six hundred dollars of that amount represented the cost of a new catalytic converter, an aftermarket unit being unavailable. In addition, Tabb paid a one hundred dollar insurance deductible, and he estimated that the value of his vehicle depreciated by a like amount. Detective Gregory Ashworth testified that on the street the "scrap value" of a catalytic converter can be as much as one hundred and fifty dollars.

{¶ 13} Tabb's testimony fails to establish the fair market value of the property that was stolen under the criteria in R.C. 2913.61(D)(3). The cost of replacing stolen property does not demonstrate what a willing buyer would give and a willing seller would take for it. Detective Ashworth's testimony that the scrap value on the street of a catalytic converter is up to one hundred and fifty dollars is probative of its fair market value for purposes of R.C. 2913.61(D)(3). However, that amount is less than the minimum value of five hundred dollars that R.C. 2913.02(B)(2) establishes as a basis to increase a misdemeanor theft offense to a fifth degree felony.

{¶ 14} Defendant's assignment of error is sustained, in part. Defendant's conviction and sentence for felony theft will be reversed and vacated and this cause remanded to the trial court for the sole purpose of entering a conviction for petty theft and resentencing Defendant accordingly.

DONOVAN, P.J. And FAIN, J., concur.

Copies mailed to:
Amy M. Smith, Esq.