[Cite as *State v. Fenske*, 2017-Ohio-7761.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 16 JE 0006
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
NICOLE FENSKE	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Jefferson County, Ohio Case No. 15 CR 71
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Jane M. Hanlin Prosecuting Attorney Atty. Edward L. Littlejohn, Jr. Assistant Prosecuting Attorney Jefferson County Justice Center 16001 State Route 7 Steubenville, Ohio 43952
For Defendant-Appellant:	Atty. Eric M. Reszke Suite 810, Sinclair Bldg. Steubenville, Ohio 43952
JUDGES:	
Hon. Cheryl L. Waite Hon. Gene Donofrio Hon. Carol Ann Robb	
	Dated: September 18, 2017

[Cite as *State v. Fenske*, 2017-Ohio-7761.]
WAITE, J.

{¶1} Appellant Nicole Fenske appeals her conviction and sentence entered in the Jefferson County Common Pleas Court after a jury found her guilty of theft. The victim was Appellant's 93 year-old step grandmother, Marjorie McHugh ("McHugh"). Two issues are presented in this appeal. First, Appellant contends that her conviction is against the manifest weight of the evidence. Second, Appellant contends her sentence is contrary to law. For the following reasons, Appellant's assignments of error are without merit and her conviction and sentence are affirmed.

Factual and Procedural History

{¶2} The following facts are derived from the record. On January 2, 2015, Appellant telephoned First National Bank in Wintersville, Ohio seeking information about an account owned by McHugh. The bank teller, Nancy Wachenschwanz, informed Appellant that without additional information, including McHugh's date of birth and social security number, no information could be given regarding the account. Later that day Appellant made a second call to the bank with the additional information. Appellant did not identify herself in either call, except to indicate that she was taking care of an elderly woman who had discovered an old check book. Appellant's mother, Kateria ("Kateria") Anderson, was married to McHugh's son, Kevin Anderson ("Kevin") and Appellant had known McHugh as her "step grandmother" since the age of seven. Appellant had assisted in taking McHugh to doctor appointments and various other errands and maintained a relationship with her even after Kevin and Kateria's divorce in 2007.

{¶3} Following the initial telephone inquiries, Appellant began accompanying McHugh to the Wintersville First National Bank on multiple occasions to make withdrawals from a money market checking account. The bank had deemed the account dormant because there had been no activity on the account for at least one year. The following withdrawals were made from this account: (1) January 13, 2015, $1,796.79; (2) January 17, 2015, $1,000; (3) January 20, 2015, $2,000; (4) January 28, 2015, $1,500; (5) February 4, 2015, $700; (6) February 6, 2015, $1,000; (7) February 13, 2015, $1,820.26; and (8) February 19, 2015, $950. Appellant accompanied McHugh to the bank for each withdrawal. After the February of 2015 withdrawal, the balance of the account was reduced to between $40 and $50. The transactions were handled by various tellers at the bank branch, two of whom testified at trial. The branch manager, Melony McBride, also testified at trial. She stated that the tellers learned from one another about McHugh's multiple transactions and began to get suspicious, as McHugh appeared confused during each transaction and Appellant would whisper information in McHugh's ear about the amount of each withdrawal. McBride informed the tellers that they were to contact McBride should McHugh return to make another withdrawal.

{¶4} Beginning in March of 2015, Appellant accompanied McHugh as she now began taking money from a certificate of deposit. On March 11, 2015 McHugh withdrew $4,992.95 from her CD. Two thousand dollars of this amount was taken in cash and $2,992.95 was deposited into the depleted money market account. On March 13, 2015, Appellant and McHugh returned and withdrew $2,900 from that

money market account. On March 17, 2015, Appellant and McHugh withdrew $9,986.30 from the CD, deposited it into the money market account and immediately wrote a check for cash, withdrawing $5,500. On March 23, 2015, $4,479.31 was withdrawn from the money market account. The total amount of funds withdrawn from McHugh's accounts totaled $25,686.36.

{¶5} In April, Appellant again called the bank branch. McBride answered her call. Appellant began inquiring about another certificate of deposit held by McHugh at the bank. Appellant again had no identifying information for McHugh and was informed this was needed in order to access account information. McBride was familiar with McHugh and knew she was not speaking to her during the call. McHugh called back later that day and a bank teller answered the phone. As instructed, the teller gave the call to McBride, who began asking McHugh questions about why she was making so many withdrawals and what she was doing with the money. McBride said that McHugh "didn't really have an answer." (2/11/16 Tr., p. 88.) McBride also inquired about McHugh's sons. McHugh's son Kevin was named along with his mother on the money market account. McHugh's other son, Kenneth Anderson, was named on a certificate of deposit. McBride inquired whether there was a phone number where the bank could reach her sons. At this point, McHugh began whispering to someone else in the background. McBride could hear McHugh asking that person what she should do. McBride heard the other person tell McHugh to hang up, which she did. McBride waited a few hours and called McHugh. McHugh

appeared to now be alone and gave information more freely, including her sons' phone numbers.

{¶6} McBride telephoned McHugh's sons. Kevin requested that the bank contact him if Appellant and McHugh returned to make any additional withdrawals. When Appellant and McHugh returned to the bank on April 6, 2015, the teller informed McBride. Appellant and McHugh were kept at the teller window while Kevin was contacted.

{¶7} Kevin subsequently contacted Michael Maguschak, police chief with the Cross Creek Township police department, and requested an investigation into the withdrawals of funds. Maguschak and police captain John DiBacco went to McHugh's home to interview her on April 8, 2015. Maguschak testified that McHugh knew her birth date, where she was born, where she resided and who the current U.S. president was. She was confused about the day and date. Maguschak raised the issue of the last three transactions on her First National accounts. McHugh did not recognize her signatures and could not recall any of the amounts of the withdrawals or where the money had gone. Maguschak testified that he did not believe McHugh was aware of what had transpired.

{¶8} Appellant agreed to speak with the police as long as her mother could be present, and was interviewed by Maguschak. She did not request counsel or ask at any time for the interview to be terminated. During the recorded interview, which was played for the jury and submitted into evidence, Appellant stated that she was present for all thirteen withdrawals. She also said that between leaving her car and

reaching the teller's counter, McHugh frequently forgot how much money she wanted to withdraw. Because of this, Appellant would whisper the amount in her ear. Appellant never told Kevin she was taking McHugh to the bank because he had a bad temper and he would be angry. Appellant also admitted she phoned the bank on January 2, 2015, for information about the money market account and again on April 2, 2015, to inquire about closing out a second CD. Appellant said McHugh was making these withdrawals because she was unhappy with First National Bank and wanted to remove her funds. Since she did not feel comfortable making one large withdrawal of funds, McHugh instead opted for multiple, smaller withdrawals. Appellant stated that she received approximately $800 from McHugh. Appellant also admitted that approximately two years earlier, she had taken McHugh to PNC Bank to make some withdrawals. When the funds were discovered to be missing, she was told not to take McHugh to the bank again.

{¶9} Maguschak made arrangements with the Steubenville Police Department's canine unit to search the home where McHugh resided with her son, Kevin. A search was conducted, but no evidence of the missing funds was found. Appellant's trailer was not searched because she had moved in with her sister shortly after the investigation began. There were no additional withdrawals from any First National accounts after the investigation began.

{¶10} On May 13, 2015, Appellant was indicted on one count of theft in violation of R.C. 2913.02(A)(3) and (B)(3), a felony of the third degree, with specifications that the victim was over 65 years of age and the amount was more

than $7,500. Discovery was conducted and, after several continuations by both parties, a jury trial proceeded on February 11, 2016. The jury found Appellant guilty of theft pursuant to the indictment. On February 18, 2016, the trial court sentenced Appellant to nine months of incarceration. On February 23, 2016, Appellant filed a motion for stay of execution with the trial court which was denied. On February 24, 2016, Appellant filed a notice of appeal. Appellant sought a stay of execution with this Court on February 24, 2016, which was granted. Appellant raises two assignments of error on appeal.

ASSIGNMENT OF ERROR NO. 1

THE JURY VERDICT OF GUILTY TO THE OFFENSE OF THEFT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶11} Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." (Emphasis deleted.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). "Weight is not a question of mathematics, but depends on its effect in inducing belief." (Emphasis deleted.) *Id.*

{¶12} When reviewing a manifest weight of the evidence argument, a reviewing court must examine the entire record, consider the credibility of the witnesses and determine 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 and a new trial ordered. *Id.* at 387, 389. Only in exceptional circumstances will a conviction be reversed as against the manifest

weight of the evidence. *Id.* This strict test for manifest weight acknowledges that credibility is generally the province of the factfinder, who sits in the best position to accurately assess the credibility of the witnesses. *State v. Hill*, 75 Ohio St.3d 195, 204, 661 N.E.2d 1068 (1996); *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967).

{¶13} The jury convicted Appellant of theft in violation of R.C. 2913.02(A)(3) and (B)(3). This statute provides:

> (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:
>
> * * *
>
> (3) By deception;
>
> * * *
>
> (B)(3) Except as otherwise provided in division (B)(4), (5), (6), (7), (8), or (9) of this section, if the victim of the offense is an elderly person, disabled adult, active duty service member, or spouse of an active duty service member, a violation of this section is theft from a person in a protected class, and division (B)(3) of this section applies. Except as otherwise provided in this division, theft from a person in a protected class is a felony of the fifth degree. If the value of the property or services stolen is one thousand dollars or more and is less than seven

> thousand five hundred dollars, theft from a person in a protected class is a felony of the fourth degree. If the value of the property or services stolen is seven thousand five hundred dollars or more and is less than thirty-seven thousand five hundred dollars, theft from a person in a protected class is a felony of the third degree. If the value of the property or services stolen is thirty-seven thousand five hundred dollars or more and is less than one hundred fifty thousand dollars, theft from a person in a protected class is a felony of the second degree. If the value of the property or services stolen is one hundred fifty thousand dollars or more, theft from a person in a protected class is a felony of the first degree.

{¶14} It is undisputed here that the victim, McHugh, was 93 years of age, placing her in a protected class under the statute. Moreover, the amount of the funds at issue, also not in dispute, is $25,686.36. Therefore, the only contested element is whether Appellant used deception in order to commit a theft of the funds from McHugh.

{¶15} The state presented testimony of two First National Bank tellers, Nancy Wachenschwanz and Joy Jones. Each were involved in some of the multiple withdrawals in question. Wachenschwanz had also spoken with Appellant during her initial phone call to the bank to inquire about the accounts. She identified Appellant in the courtroom and testified that Appellant had called looking for account information but that she lacked any identification information such as date of birth,

account numbers or a social security number for either McHugh or Kevin, the account holders. She also testified that Appellant did not identify herself as McHugh's granddaughter, but rather, her caretaker. She testified that Appellant accompanied McHugh to the bank and that McHugh seemed confused and unaware of the details of the transactions. Further, Wachenschwanz testified that it was Appellant who told both her and McHugh what the amounts of the withdrawals should be.

{¶16} A second bank teller, Joy Jones, testified that she had conducted several withdrawals where Appellant accompanied McHugh to the bank. She witnessed Appellant coaching McHugh, who always seemed unsure and confused about the amounts of the withdrawals. During one transaction, in March, she explained to McHugh that if she made a withdrawal from her CD she would receive a penalty and she would lose money, because it had not matured. She said Appellant "seemed like she was more in control of the situation because Mrs. McHugh would get confused." (2/11/16 Tr., p. 111.) In fact, McHugh was so confused that she did not seem to understand what was transpiring during the transaction.

{¶17} The bank branch manager, Melony McBride, also testified. She stated that with the growing number and frequency of the withdrawals her tellers communicated to her that they were concerned, particularly because McHugh seemed confused and Appellant was always present and frequently appeared to be in control of the transactions. McBride testified regarding her decision to monitor the situation by having the tellers contact her immediately if Appellant and McHugh came to the bank for additional transactions. She relayed her own telephone conversation

with Appellant when Appellant called the bank seeking information on a certificate of deposit, again without any identifying information of the account holders. McBride testified McHugh was unable to answer questions regarding the basis for any of the withdrawals or where the money was being spent, and that she heard a voice in the background speaking to McHugh when she failed to answer McBride's questions. McHugh abruptly hung up on McBride when she was unable to answer McBride's questions. When she phoned McHugh later that day, McHugh appeared to be alone and spoke with McBride more freely. When McBride obtained contact information for McHugh's sons, she called Kevin to inform him about the questionable transactions. McBride also testified regarding the bank records admitted into evidence, which contained the frequency and dollar amount of each of the transactions on McHugh's accounts.

{¶18} The state presented testimony from police chief Maguschak regarding efforts undertaken to investigate the theft, including his interviews with McHugh and Appellant. While McHugh seemed oriented as to where she was and her own identifying information such as date of birth and place of residence, she seemed confused about the last three bank transactions when Maguschak presented her with copies of the three checks written on the account. She could not identify her own signature on two of the checks and did not remember making any of the transactions or what the funds had been used for. Not only was she unaware of the whereabouts of the funds, she asked whether she had any money left, and indicated that Appellant must have the funds.

{¶19} Maguschak also testified about his interview of Appellant at the police station. Appellant admitted she was present for all of the transactions. Appellant said McHugh knew how much she wanted to withdraw but would forget when she got to the teller, so Appellant whispered a reminder. She did not tell her stepfather about the transactions because he would be angry. Appellant told Maguschak that she received only $800 from McHugh, which she used for bills and to pay a $100 traffic ticket. Appellant told him McHugh wanted to withdraw her funds in small increments rather than to make a large withdrawal because she was unhappy with the bank. Appellant admitted that approximately two years earlier there was a similar incident where she had been taking McHugh to PNC Bank to withdraw funds. When these funds were discovered to be missing, she was instructed by Kevin not to again take McHugh to the bank. The videotaped interview, which lasted approximately one and a half hours, was played for the jury. Finally, Maguschak testified that McHugh had passed away on May 15, 2015, after suffering a heart attack while convalescing in a local nursing home.

{¶20} The state presented testimony of Rob Cook, sergeant and canine officer with the Steubenville Police Department. He testified regarding the use of canines to search for large sums of money. Cook testified that, due to the fact that money tends to have drug residue on it, large sums of money may be detected by canine search sniffing for drug residue.

{¶21} Kevin Anderson, McHugh's son, testified. Kevin was named on the accounts in question. Kevin testified that he lived with his mother subsequent to his

divorce from Appellant's mother. Appellant had helped him by taking McHugh to doctor's visits and appointments while he was at work. While he had been paying Appellant's rent and other expenses for approximately five years, he informed her at the end of 2014 that he would no longer be paying her rent. He testified that he told Appellant not to take McHugh to the bank because she was involved in an incident at PNC Bank approximately two years earlier where approximately $11,000 of McHugh's money went missing. Kevin also testified that at some point during the investigation he was approached by Appellant's mother, who asked him to put $25,000 in cash in his house so that it could be found to avoid getting Appellant into trouble.

{¶22} Whether Appellant committed theft by deception is the only element in question in this appeal. Appellant contends that evidence was presented that Kevin had purchased a motorcycle and that Kevin did not immediately respond to the police's request to search the house. Presumably, Appellant seeks to implicate Kevin in the disappearance of the funds in question. However, Kevin was named on the accounts. The jury was aware that as an owner of these funds he had the right to simply withdraw the money.

{¶23} The state presented testimony from multiple witnesses that McHugh seemed confused and unaware of the details of the transactions, including the amount of the withdrawals, the reason for the withdrawals, and the location of any of the funds after withdrawal. All of the witnesses to the actual transactions testified it was Appellant who seemed in control and it was Appellant who whispered the

amounts of the withdrawals and other information into McHugh's ear during the transactions. Appellant herself testified at trial that McHugh would become confused about the amount of the withdrawals and she had to "remind" her on entering the bank. Bank photos and videos and Maguschak's videotaped interview with Appellant were also presented to the jury and these appear to show Appellant controlled the thirteen withdrawal transactions at issue. The jury could judge credibility from viewing Appellant during the transactions and hearing her testimony both during the police interview and at trial. The jury, as trier of fact, found the testimony of the state's witnesses credible and found Appellant's testimony incredible. We cannot say, based on this record, that the jury lost its way and created a manifest miscarriage of justice in finding Appellant guilty of theft by deception. Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN SENTENCING THE DEFENDANT TO NINE (9) MONTHS IN PRISON.

{¶24} In her second assignment of error Appellant contends the trial court erred in sentencing her to nine months of imprisonment, incorrectly citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. Appellant contends the trial court abused its discretion in sentencing.

{¶25} An appellate court is permitted to review a felony sentence to determine if it is contrary to law. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231.

{¶26} Pursuant to *Marcum*, "an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence." *Id.* at ¶ 23. When determining a sentence, a trial court must consider the purposes and principles of sentencing in accordance with R.C. 2929.11, the seriousness and recidivism factors within R.C. 2929.12, and the proper statutory ranges set forth within R.C. 2929.14.

{¶27} While the trial court expressly stated that it had considered the principles of R.C. 2929.11 and the seriousness and recidivism factors of R.C. 2929.12 within its sentencing entry, it did not do so at the sentencing hearing. However, this does not necessarily amount to reversible error.

> [R]eversal is not automatic where the sentencing court fails to provide reasons for its sentence or fails to state at sentencing or in a form judgment entry, "after considering R.C. 2929.11 and 2929.12". We return to the Adams rule that a silent record raises the rebuttable presumption that the sentencing court considered the proper factors. We hereby adopt the Second District's statement that where the trial court's sentence falls within the statutory limits, "it will be presumed that the trial court considered the relevant factors in the absence of an affirmative showing that it failed to do so" unless the sentence is "strikingly inconsistent" with the applicable factors. (Emphasis deleted.)

State v. Grillon, 7th Dist. No. 10 CO 30, 2012-Ohio-893, ¶ 131 citing *State v. James,* 7th Dist. No. 07 CO 47, 2009-Ohio-4392, ¶ 50.

{¶28} Accordingly, we begin with a presumption that the trial court considered R.C. 2929.11 and R.C. 2929.12, even in the absence of specific language. Although there is no reference to either statute in the transcript of the sentencing hearing, there is nothing to suggest that the court failed to consider these statutes. In fact, at the sentencing hearing, the trial court stated:

> I do find, as the State has said, that Defendant used her position to her advantage. It was a very vulnerable victim. It was an account that no one knew she had which made the odds of getting caught very unlikely. The -- with the 93 year old victim and an account she didn't even know she had, getting away with it seems to have been a likelihood.

(2/17/16 Sent. Hrg. Tr., p. 6.)

{¶29} The trial court also noted:

> The Defendant presents this as a -- which I think, quote, one time slip in judgment. It was actually a multiple slip in judgment. It was done over and over, kept going back for more.
>
> I think a prison term is -- is appropriate. This is a third degree felony. She is a first-time offender and under the code is entitled to the minimums unless we can show some other factor that would mitigate toward higher than the minimums. I really don't see that here.

> So, what we are going to do is nine months in prison because I think that's what the law would require for this first time offense.

Id. at pp. 6-7.

{¶30} It is evident from this statement that the trial court considered the appropriate statutes. As to the statutory guidelines, the penalty for a felony of the third degree is nine, twelve, eighteen, twenty-four, thirty, or thirty-six months of incarceration. Appellant was sentenced to nine months of incarceration, so the trial court's sentence is within the permissible statutory range.

{¶31} There is nothing in this record to provide clear and convincing evidence that the record does not support the sentence. As such, the trial court did not err in sentencing Appellant to nine months of imprisonment. Appellant's second assignment of error is without merit and is overruled.

{¶32} Based on the foregoing, Appellant's conviction was not against the manifest weight of the evidence and Appellant's sentence is not contrary to law. Therefore, the judgment and sentence of the trial court is affirmed.

Donofrio, J., concurs.

Robb, P.J., concurs.