

[Cite as *State v. Jeantine*, 2009-Ohio-6775.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 09AP-296
Plaintiff-Appellee,	:	(M.C. No. 2008 CR B 012031)
v.	:	
	:	(REGULAR CALENDAR)
Nixon Jeantine,	:	
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 22, 2009

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, City Prosecutor, and *Melanie R. Tobias*, for appellee.

Brehm & Associates, and *Eric W. Brehm*, for appellant.

APPEAL from the Franklin County Municipal Court

CONNOR, J.

{¶1} Defendant-appellant, Nixon Jeantine ("appellant"), appeals from the judgment of the Franklin County Municipal Court, entered upon a jury verdict convicting appellant of one count of misdemeanor theft. For the following reasons, we affirm that judgment.

{¶2} Appellant's conviction arises from a shoplifting incident that occurred on May 7, 2008, at a Walmart located on Morse Road, in Franklin County, Ohio. A complaint was filed against appellant on May 27, 2008, alleging appellant stole razors and clothing,

valued at \$35.69, from Walmart without its consent. On September 3, 2008, appellant entered a plea of not guilty. The case proceeded to jury trial on February 25, 2009.

{¶3} Prior to the start of opening statements, appellant's trial counsel moved to dismiss the complaint, arguing the affiant who authorized the complaint lacked the necessary personal knowledge. Appellant's motion was denied and the case proceeded to trial.

{¶4} During its case-in-chief, plaintiff-appellee, State of Ohio ("the State"), called Tiara Johnson ("Ms. Johnson"), a loss prevention officer for Walmart. She testified that Walmart's camera system was not working on the day of the shoplifting, so she was observing shoppers from the floor of the store, rather than via the camera system. Appellant attracted her attention because he was acting suspiciously, due to the way he was "fast selecting" items. She described "fast selecting" as grabbing an item off the shelf very quickly without really looking at the item.

{¶5} Ms. Johnson testified she observed appellant make a purchase in the electronics department. She then saw appellant walk over to the stationary department, where he placed a shirt and a pair of pants from the men's department inside the bag containing the paid merchandise from the electronics department. Next, Ms. Johnson testified she watched appellant enter the health and beauty department. Appellant selected some men's razors and added those to the bag containing the paid merchandise, the pants, and the shirt. Ms. Johnson testified that appellant did not pay for the razors, the shirt, or the pants before placing them into the bag. Appellant then exited the store, passing the last point of sale.

{¶6} Ms. Johnson testified she approached appellant after he had exited the store. She discovered that although his shopping bag contained a receipt for the items he purchased in the electronics department, the bag also contained the clothing and razors she saw appellant place into the bag while he was moving around the store. Appellant never paid for those items and did not have a receipt for those items. Ms. Johnson testified she did not give appellant permission to leave the store with the unpaid merchandise.

{¶7} After stopping appellant and searching his bag, Ms. Johnson testified she escorted appellant to the asset protection office, took down his personal information, and called the police. Afterwards, as appellant was leaving, he apologized to Ms. Johnson for shoplifting at the store.

{¶8} On cross-examination, Ms. Johnson admitted that the shoplifting had not been recorded and she did not have the benefit of that evidence to support her testimony, since the camera system was not working properly that day. She further admitted that she did not know exactly what appellant purchased or how much appellant had spent in the electronics department.

{¶9} Following the testimony of Ms. Johnson, the State rested its case. Appellant did not introduce any testimony or evidence.

{¶10} On February 26, 2009, the jury returned a guilty verdict, convicting appellant of theft. That same day, the trial court imposed a sentence of 180 days of incarceration, with 90 days suspended, provided there are no new theft convictions for three years. Appellant was ordered to serve the balance of the sentence forthwith and was given four days of jail-time credit. His request for a stay of that sentence was denied.

{¶11} Appellant filed a timely notice of appeal and raises the following assignment of error for our review:

THE TRIAL COURT DID ERR WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION AND WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶12} In his sole assignment of error, appellant argues his conviction is not supported by sufficient evidence. Additionally, he argues his conviction is not supported by the manifest weight of the evidence.

{¶13} Specifically, appellant asserts the State failed to introduce evidence proving one of the elements of the offense of theft. Although Ms. Johnson testified that she did not give appellant permission to leave the store with the merchandise, appellant argues the State failed to introduce any evidence that Walmart granted Ms. Johnson the authority to determine who could or could not leave the store with merchandise. Therefore, appellant argues the State failed to provide evidence demonstrating appellant acted without the consent of the owner or the person authorized to give consent. Appellant also argues the State failed to prove that Walmart actually owned the items in question.

{¶14} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved, beyond a reasonable doubt, all of the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v.*

Yarbrough, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78; *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396.

{¶15} In determining whether a conviction is based on sufficient evidence, an appellate court does not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See *Jenks*, paragraph two of the syllabus; *Thompkins* at 390 (Cook, J., concurring); *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim). We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4; *Jenks* at 273. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386.

{¶16} While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶25, citing *Thompkins* at 386. Under the manifest weight of the evidence standard, a reviewing court must ask the following question: whose evidence is more persuasive - the state's or the defendant's? *Id.* at ¶25. Although there may be legally sufficient evidence to support a judgment, it may nevertheless be against the manifest weight of the evidence. *Thompkins* at 387; See also *State v. Robinson* (1955), 162 Ohio St. 486 (although there is sufficient evidence to sustain a guilty verdict, a court of appeals has the authority to determine that such a verdict is against the weight of the evidence); *State v. Johnson*, 88 Ohio St.3d 95, 2000-Ohio-276.

{¶17} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Wilson* at ¶25, quoting *Thompkins* at 387. In determining whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving any conflicts in the evidence, the jury clearly lost its way and thereby created such a manifest miscarriage of justice that the conviction must be reversed and a new trial must be ordered. *Thompkins* at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶18} A conviction should be reversed on manifest weight grounds only in the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶19} Appellant argues the evidence regarding ownership and lack of authorized consent is subject to challenge under both a sufficiency of the evidence and a manifest weight review. We disagree.

{¶20} Appellant was charged with a theft offense, which is set forth in R.C. 2913.02. That statute reads, in relevant part, as follows:

(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:

(1) Without the consent of the owner or person authorized to give consent[.]

{¶21} Owner is defined in R.C. 2913.01(D) as "unless the context requires a different meaning, any person, other than the actor, who is the owner of, who has possession or control of, or who has any license or interest in property or services, even though the ownership, possession, control, license, or interest is unlawful."

{¶22} Here, the State is not required to prove ownership, other than to show that appellant did not have a lawful right to possession. Establishing ownership in another person is not an element of a theft offense under R.C. 2913.02. *State v. Shaw* (Aug. 10, 1995), 10th Dist. No. 94APA12-1778. Under R.C. 2913.02, the prosecution only needs to prove that someone who had possession or control or an interest in the property was deprived of that property by the accused. *Id.* See also *State v. Mason* (July 14, 1992), 10th Dist. No. 91AP-1012.

{¶23} In proving a theft offense, the relevant inquiry is not whether the person from whom the property was stolen was the actual owner. Instead, the focus is on whether the accused had any lawful right to possess the property. *State v. Rhodes* (1982), 2 Ohio St.3d 74, 77. Thus, it is the appellant's relationship to the property that is controlling. *Id.* The gist of a theft offense is not the particular ownership of the property, but instead the "wrongful taking." *State v. Shoemaker* (1917), 96 Ohio St. 570, 572. If the taking is wrongful, it does not matter who owns the property at issue. *Id.* See also *State v. Higgs* (Jan. 12, 1990), 6th Dist. No. WD-89-6 (it is sufficient that the thief knows the property is not his to take).

{¶24} Furthermore, in *City of Columbus v. Simmons* (July 26, 1979), 10th Dist. No. 79AP-135, which involved the theft of a bicycle from Woolco, we determined that Woolco had possession and control of the items in its own store. In *State v. Anderson* (Dec. 10, 1979), 11th Dist. No. 7-129, the court of appeals held that merchandise in a store is in the possession of that store until someone has paid for the merchandise.

{¶25} Based upon the testimony as set forth below, the same reasoning is applicable to the instant case to demonstrate that Walmart possessed or controlled the property in question. Therefore, appellant's argument fails under a sufficiency of the evidence review, as the evidence on this issue, if believed, is sufficient to support a conviction. In addition, appellant fails under a manifest weight review as well, since, in reviewing the record, weighing the evidence, and considering the credibility of the sole witness, we cannot say the jury clearly lost its way.

{¶26} Appellant also contends the evidence fails to establish that he lacked authorization or consent to remove items from the store, despite Ms. Johnson's testimony that she did not authorize him to leave without paying for the merchandise. Appellant argues the record does not establish that the authority to grant such authorization was within the scope of Ms. Johnson's duties. However, we reject this argument.

{¶27} In *City of Fairfield v. Jones* (Sept. 21, 1992), 12th Dist. No. CA91-11-199, the court rejected the defendant's contention that the state failed to prove the elements of a theft where it did not present the testimony of the owner of the property or any other direct evidence indicating a lack of consent. Relying on *State v. Cornelius* (June 22, 1992), 12th Dist. No. CA91-12-213, the *Jones* court found the testimony of the security officer established that the defendant had wrongfully exerted control over the property

without the store's consent, and the conviction was not improper based upon an asserted lack of direct evidence regarding ownership and consent.

{¶28} Furthermore, in *Simmons*, we found it was sufficient for the prosecution to demonstrate circumstances from which it could be inferred, beyond a reasonable doubt, that the accused had obtained control of the property without the consent of the owner or anyone authorized to give consent. Such circumstances exist here, based upon the testimony of Ms. Johnson.

{¶29} The testimony indicates that Walmart had possession and control of the items in its store and that appellant was not given consent to take these items without paying for them. Ms. Johnson testified that she was a loss prevention officer at Walmart who had received training to assist her in catching shoplifters who attempted to steal merchandise from the store. She followed appellant through the store as he placed merchandise in his bag without paying for it. Ms. Johnson specifically testified that she did not give appellant permission to exit the store without paying for the clothing and the razors. Given her testimony, and the nature of a loss prevention officer's job, it is reasonable to infer that she is a person who is authorized to give consent to shoppers to leave the store with merchandise.

{¶30} In addition, the State is not required to introduce the testimony of every Walmart employee who might be authorized to give consent. In *Simmons*, we determined the prosecution was not required to prove that anyone who could have possibly given consent did not do so. Also, appellant offered absolutely no evidence or testimony which would suggest even the possibility that his control over the unpaid merchandise was consensual. See generally, *Simmons*. In fact, according to Ms.

Johnson's testimony, appellant apologized for shoplifting as he was being released from the asset protection office.

{¶31} Although appellant attempts to distinguish the facts of his case from the principals of law and the facts set forth in the cases of *Simmons* and *Higgs*, he is unable to do so. These cases are still good law, despite appellant's contention that said cases are "aged" and therefore essentially lacking in authority or persuasiveness.

{¶32} The testimony of Ms. Johnson, if believed, is sufficient to establish all the essential elements of the crime, including the element that appellant lacked authorization or consent to take the items from the store. We cannot find that reasonable minds could not have arrived at the conclusion that appellant lacked authorization to leave the store with the unpaid merchandise. Additionally, we cannot say that a reasonable juror could not find Ms. Johnson's testimony to be credible or that the jury clearly lost its way in reaching its determination on the issue of authorization.

{¶33} Based upon the reasoning set forth above, we reject appellant's challenges and find his conviction is supported by sufficient evidence and is not against the manifest weight of the evidence. Therefore, we overrule appellant's sole assignment of error. The judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

BROWN and SADLER, JJ., concur.
