

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2011-08-150
 :
 - vs - : OPINION
 : 7/2/2012
 TRAVIS COTTEY, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM HAMILTON MUNICIPAL COURT
Case No. 11CRB01207

Michael D. Hon, City of Hamilton Prosecutor, 345 High Street, Hamilton, Ohio 45011, for plaintiff-appellee

Ched Peck, 304 North Second Street, Hamilton, Ohio 45011, for defendant-appellant

HENDRICKSON, P.J.

{¶ 1} Defendant-appellant, Travis Cottey, appeals his conviction in Hamilton Municipal Court for receiving stolen property.

{¶ 2} In the early morning hours of January 18, 2011, Debra Jones went outside her residence on Carmen Avenue to start her husband's vehicle. At this time, Jones observed a person standing in her neighbor's driveway. As it was dark outside, and the individual was 50 or more feet away, Jones was unable to see the individual's face. She returned to her

residence and continued to observe the individual, who walked down Carmen Avenue in the opposite direction of her home. Eventually, the individual was joined by another person, and both continued down Carmen Avenue. Jones observed one of the individuals attempting to open doors of parked cars.

{¶ 3} Concerned that the individuals were involved in illegal activity, Jones called 911, and Hamilton Police Lieutenant Marc McManus responded to the Carmen Avenue area. Upon exiting his police cruiser, McManus overheard two individuals talking, but could only see appellant. McManus requested appellant to stop and approach the lieutenant, and appellant complied. After observing that appellant was standing strangely, McManus moved appellant's foot and discovered appellant was standing on a cell phone.

{¶ 4} Later that same morning, the Hamilton Police Department contacted the owner of the cell phone, Jennifer Patterson of 244 Carmen Avenue, and informed her that they were in possession of her cell phone. Patterson told the police that she had left her cell phone in her vehicle overnight, which she had parked in her driveway along Carmen Avenue. It was determined that the cell phone found under appellant's foot was Patterson's cell phone.

{¶ 5} Appellant was charged with receiving stolen property for possessing Patterson's cell phone. He was found guilty by a jury and sentenced to 180 days in the county jail and ordered to pay a \$500.00 fine. On appeal, appellant raises the following two assignments of error:

{¶ 6} Assignment of Error No. 1:

{¶ 7} THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT APPELLANT OF RECEIVING STOLEN PROPERTY IN VIOLATION OF ORC 2913.51.

{¶ 8} Assignment of Error No. 2:

{¶ 9} APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF

THE EVIDENCE.

{¶ 10} In his first assignment of error, appellant argues that the evidence was insufficient to support a conviction for receiving stolen property. Specifically, appellant contends that no testimony was presented that identified appellant as one of the individuals seen by Jones. He also argues that there was no evidence that he was observed anywhere in the vicinity of Patterson's vehicle, or that he was in possession of Patterson's cell phone.

{¶ 11} When reviewing the sufficiency of the evidence underlying a criminal conviction, the function of an appellate court 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*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact would have found the essential elements of the crime proven beyond a reasonable doubt." *Id.*

{¶ 12} Appellant was convicted of receiving stolen property in violation of R.C. 2913.51(A), which provides that no person shall receive or retain the property of another knowing or having reasonable cause to believe that the property was obtained through the commission of a theft offense. Possession of stolen property for purposes of R.C. 2913.51 may be constructive as well as actual. *State v. Hankerson*, 70 Ohio St.2d 87 (1982). Constructive possession exists when the individual knowingly exercises dominion or control over an object even though that object may not be within his immediate physical possession. *Id.* "Furthermore, an individual's unexplained possession of stolen property may give rise to the permissive inference that the defendant is guilty of a theft offense or that the individual knew or should have known that the property in question has been stolen." *Hamilton v. Johnson*, 12th Dist. No. CA2001-05-114, 2002-Ohio-1599, ¶ 8.

{¶ 13} In this case, McManus found appellant on Carmen Avenue, the same street

where Patterson's vehicle was parked. Patterson's cell phone was discovered underneath appellant's foot after McManus observed appellant standing strangely. Appellant acknowledged that the cell phone on the ground was not his and his own cell phone was in his pocket. By knowingly stepping on the cell phone, appellant either had actual possession or, at the very minimum, constructive possession of it. One could draw a permissive inference of appellant's guilt of receiving stolen property from appellant's attempt to conceal the cell phone from the police officer. We find the record contains sufficient evidence that appellant knowingly possessed stolen property. Therefore, the first assignment of error is overruled.

{¶ 14} In his second assignment of error, appellant argues that his conviction for receiving stolen property was against the manifest weight of the evidence. Specifically, appellant argues that the state failed to prove beyond a reasonable doubt that appellant committed the act of receiving stolen property.

{¶ 15} "An appellate court considering whether a conviction was against the manifest weight of the evidence must weigh the evidence and all reasonable inferences from it, consider the credibility of the witnesses and determine whether in resolving conflicts, 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." *State v. Coldiron*, 12th Dist. Nos. CA2003-09-078, CA2003-09-079, 2004-Ohio-5651, ¶ 24; *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. "This discretionary power should be exercised only in the exceptional case where the evidence weighs heavily against conviction." *Id.*

{¶ 16} "An appellate court will not reverse a judgment as being against the manifest weight of the evidence in a jury trial unless it unanimously disagrees with the jury's resolution of any conflicting testimony." *Id.* at ¶ 25; *Thompkins* at 389. When reviewing the evidence, an appellate court must be mindful that the original trier of fact was in the best position to

judge the credibility of witnesses and the weight to be given the evidence. See *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus.

{¶ 17} In this case, we find appellant's conviction for receiving stolen property was not against the manifest weight of the evidence. A witness testified that two individuals were walking down Carmen Avenue and one was attempting to open the doors of parked cars. McManus, who encountered appellant on Carmen Avenue, found a cell phone, later identified as missing from a parked car on Carmen Avenue, under appellant's foot. Based upon the record, the jury's decision did not create a manifest miscarriage of justice requiring reversal. Therefore, appellant's second assignment of error is overruled.

{¶ 18} Judgment affirmed.

RINGLAND and PIPER, JJ., concur.