NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
	:	
TONY RYAN LEASURE,	:	
	:	
Appellant	:	No. 920 WDA 2012

Appeal from the Judgment of Sentence May 23, 2012
In the Court of Common Pleas of Fayette County
Criminal Division No(s).: CP-26-CR-0002187-2011

BEFORE: STEVENS, P.J., MUNDY, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: Filed: February 5, 2013

Appellant, Tony Ryan Leasure, appeals from the judgment of sentence entered in Fayette County Court of Common Pleas, following his conviction of theft by unlawful taking or disposition.[1] Appellant contends that the circumstantial evidence presented at trial was insufficient to establish beyond a reasonable doubt that he committed the offense. We affirm.

We summarize the evidence adduced at trial. On March 31, 2011, Desiree Pease was at an ATM machine in a convenience store, with

* Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S. § 3921(a). The trial court dismissed an additional charge of receiving stolen property, 18 Pa.C.S. § 3925.

approximately fifteen other patrons in the store. N.T. Trial, 5/9/12, at 14–15. At trial, Ms. Pease testified:

> I put my card in, I put my pin in, I punched in that I wanted [$60], and then as the machine was, you can hear it, you know, it is going to give your money, and [Appellant] walked by me really, really close, close enough to brush[.] . . . [Like, we brushed shoulders closely.] . . . I smiled at him in the face and I looked down and my money was gone.

Id. at 15–16. Ms. Pease further testified, "I heard the wheels going and then—you can hear the door open, so the money pops out and when I looked there was no money, just the receipt." ***Id.*** at 25–26. Ms. Pease announced that she called the police, followed Appellant out of the store, and recorded the license plate number of his car. ***Id.*** at 16–17. Ms. Pease testified, "He ran. He ran to the door and ran to the car when I said I was calling the police. I mean, ran, like full bolt run." ***Id.*** at 17.

Appellant was charged with theft by unlawful taking or disposition. A jury trial was held on May 9, 2012. Ms. Pease testified as summarized above. Although there was a camera inside the store, surveillance video was not presented at trial. ***Id.*** at 24–25. The Commonwealth presented testimony that Appellant had a prior conviction for false identification to a law enforcement officer in 2009. ***Id.*** at 53–54. Appellant testified that although he was in the convenience store, he did not see Ms. Pease. ***Id.*** at 49.

The jury found Appellant guilty of one count of theft by unlawful taking. On May 23, 2012, the court imposed a sentence of one year of probation and fines, costs and fees. Appellant did not file a post-sentence motion, but filed a timely notice of appeal on June 6, 2012. He complied with the court's order to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b).

Appellant's single issue on appeal is a challenge to the sufficiency of the evidence for theft by unlawful taking or disposition.[2] He argues that "[a]t no time [did Ms. Pease] ever see the money be dispersed by the machine[,]" and that the Commonwealth did not "produce any evidence from the banking institution [to] show money was deducted from Pease's account." Appellant's Brief at 10. Thus, he argues, the Commonwealth improperly expected the jury to base its decision on "mere speculation." ***Id.*** at 11. We disagree.

This Court has stated:

> When reviewing a sufficiency of the evidence claim, this Court must review the evidence and all reasonable inferences in the light most favorable to the Commonwealth as the verdict winner, and we must determine if the evidence, thus viewed, is sufficient to enable the fact-finder to find every element of the offense beyond a reasonable doubt. The fact-finder is free to believe all, part, or none of the evidence presented. . . . [I]f the record contains support for the verdict, we may not disturb the verdict.

[2] Appellant's statement of the case erroneously states that he "was charged with Drug Violations." ***See*** Appellant's Brief at 8.

Commonwealth v. Goins, 867 A.2d 526, 527–28 (Pa. Super. 2004) (citations omitted). "An appellate court cannot substitute its judgment for that of the jury on issues of credibility." ***Commonwealth v. Palo***, 24 A.3d 1050, 1055 (Pa. Super. 2011) *appeal denied*, 34 A.3d 828 (Pa. 2011).

> This standard is equally applicable to cases where the evidence is circumstantial rather than direct so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt. Although a conviction must be based on "more than mere suspicion or conjecture, the Commonwealth need not establish guilt to a mathematical certainty."

Commonwealth v. McCollum, 926 A.2d 527, 530 (Pa. Super. 2007) (citations omitted). Finally, "[i]t is permissible to infer that a defendant knows he is wanted for a crime from the circumstances attendant to his flight." ***Commonwealth v. Rios***, 684 A.2d 1025, 1035 (Pa. 1996).

In Pennsylvania, an individual commits theft by unlawful taking or disposition when he "unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof." 18 Pa.C.S. § 3921(a). Movable property is defined, in pertinent part, as "[p]roperty the location of which can be changed . . . ." 18 Pa.C.S. § 3901. The term "deprive" is defined as: "(1) To withhold property of another permanently . . . or (2) to dispose of the property so as to make it unlikely that the owner will recover it." ***Id.***

In the instant matter, the trial court's instructions permitted the jury to reach a guilty verdict based on the circumstantial evidence. ***See*** Trial Ct.

Statement in Lieu of Opinion, 8/7/12, at 2; N.T., 5/9/12, at 63–64. We agree with the trial court that, in addition to Ms. Pease's testimony, the jury was free to consider Appellant's flight as circumstantial evidence of consciousness of guilt, and the jury was free to find Appellant an incredible witness based on his prior conviction for false identification. ***See*** Trial Ct. Statement in Lieu of Opinion, at 2; N.T., at 61–62, 64.

Ms. Pease's testimony established that Appellant brushed by her, close enough to bump shoulders, at the moment her money was being expelled by the ATM machine, and when she looked down, her money was gone. Although Appellant testified he did not see Ms. Pease, the jury was entitled to believe the testimony of Ms. Pease, and this Court may not substitute its judgment for that of the jury. ***See Palo***, 24 A.3d at 1055. Moreover, the jury was allowed to consider Appellant's flight as evidence of consciousness of guilt. ***See Rios***, 684 A.2d at 1035. Where the record provides support for the jury's verdict, this Court may not substitute its judgment for that of the fact-finder. ***See Goins***, 867 A.2d at 527.

In conclusion, we agree with the trial court that the circumstantial evidence was sufficient to establish theft by unlawful taking or disposition.

Judgment of sentence affirmed.