[Cite as *State v. Brown*, 2019-Ohio-4663.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 19CA1083
	:	
vs.	:	
	:	DECISION AND
LASHAI BROWN,	:	JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	

APPEARANCES:

Timothy Young, Ohio Public Defender, and Addison M. Spriggs, Assistant State Public Defender, Columbus, Ohio, for Appellant.

David Kelley, Adams County Prosecutor, and Kris. D. Blanton, Assistant Adams County Prosecutor, West Union, Ohio, for Appellee.

Per Curiam

{¶1} Appellant, Lashai Brown, appeals her conviction and sentence for theft, a first-degree misdemeanor in violation of R.C. 2913.02(A)(1). On appeal, she contends 1) that her conviction for theft is not supported by sufficient evidence; and 2) that the trial court abused its discretion when it ordered her to pay restitution where no economic loss was suffered and without any evidence or hearing on the matter. Because we conclude Appellant's conviction was not supported by sufficient evidence, her first assignment of error is sustained.

Further, in light of our disposition of Appellant's first assignment of error, the argument raised under her second assignment of error has been rendered moot and we need not address it. Having determined Appellant's conviction for misdemeanor theft was not supported by sufficient evidence, the judgment of the trial court is reversed.

FACTS

{¶2} Appellant, Lashai Brown, appeals her conviction and sentence for theft, a first-degree misdemeanor in violation of R.C. 2913.02(A)(1). The record indicates Appellant was found guilty of a single count of theft by the trial court after a bench trial. The State indicates in its brief that it "adopts the statement of the case and facts as set forth in the brief of the Defendant/Appellant and submits the same for the brief of the State of Ohio/Appellee." The Statement of the Facts set forth by Appellant in her brief are as follows, verbatim, excluding citations to the record:

> On June 28, 2018, Lashai was at home with her children. Her son told her that a dog had wandered onto their property. Lashai, being an animal lover, went outside to investigate. She found a small, orange husky with a horrible flea infestation and dried blood in its hair. To ease the dog's suffering, Lashai gave the dog a bath before calling the dog warden. Lashai also posted on a missing dog website alerting the

> online community that she had found a lost dog and giving its approximate location. Lashai left her home shortly thereafter to attend a family event several hours away. She left the dog in the backyard with the gate unlocked assuming the dog warden would come to collect the dog. When Lashai returned home, the dog was gone. She did not see the dog after she left it at her home that day. Later, Lashai discovered that the lost dog belonged to neighbor, Joshua Pack, when she was contacted by Cheyenne Pack, Joshua's sister and fellow neighbor, on Facebook.

{¶3} However, despite the State's adoption of the facts as set forth by Appellant, in the body of its brief the State alludes to an alternative fact pattern which appears to have been its theory at trial. In particular, the State seems to suggest that pictures of Mr. Pack's dog that were posted by Appellant on a missing pet website demonstrate that the dog at issue, which is naturally black and white in color, had been bleached, giving the dog an orange appearance in the pictures. Additionally, the State seems to suggest that Appellant bleached the dog in an effort to disguise it so she could sell it for a profit.

{¶4} At the bench trial the State introduced the following witnesses: Joshua Pack, the owner of the dog at issue and victim herein; Cheyenne Pack, Joshua Pack's sister; Deputy Cottrell, who initially responded to the missing dog

complaint made by the victim; Dog Warden Donny Swayne; and Deputy William Newland, who conducted the follow-up investigation, search of Appellant's residence and interview of Appellant. Appellant testified on her own behalf and presented no other witnesses.

{¶5} Joshua Pack testified that he returned home from work on June 27, 2018, and let his dog, Cash, outside. He explained that the dog was wearing its wireless, shock collar. He testified that he then rode his four-wheeler to his sister's house, which was located on another side of the family property. When he returned fifteen to twenty minutes later his dog was gone. He testified that he checked all over his acreage and yelled for the dog but could not find him. He then asked his sister, Cheyenne Pack, to make a post about the missing dog on Facebook and he called law enforcement to make a report.

{¶6} Pack further testified that Appellant responded to a message sent by his sister and indicated she had the dog at one time. There was no explanation in his testimony as to how long Appellant had the dog. He testified he found a picture of his dog on Facebook which indicated the dog had been bleached and was sitting in Appellant's front yard. He explained the picture had been posted by Appellant as a "found dog" on Facebook. Pack testified that he never found the dog's collar, that his dog was still missing, and that he never gave anyone permission to take his dog. On cross-examination Pack denied ever bleaching the dog and also denied

ever seeing Appellant with the dog, with the exception of the picture he had referenced.

{¶7} The victim's sister, Cheyenne Pack, also testified at trial. Much of her testimony was centered around exhibits consisting of photos, Facebook posts and messages that were ultimately either excluded from evidence or not admitted as evidence. However, she testified that she posted on Facebook regarding the missing dog and sent a message to Appellant to ask if she had seen the dog. She testified that Appellant responded that the dog warden or Sheriff had the dog.

{¶8} Deputy Cottrell also testified on behalf of the State. She testified that she responded to a report of a missing dog and was led to Appellant. She testified that she went to Appellant's residence to investigate and that Appellant told her she did not have the dog. Appellant told Deputy Cottrell the dog wandered into her yard, that she left him in her fenced yard and called the dog catcher. Cottrell further testified that Appellant told her that as far as she knew, the dog catcher had come to get him. Appellant would not allow the deputy to search her residence and the deputy described her as uncooperative. Adams County Dog Warden, Donny Swayne, also testified at trial. He testified that he did not receive a call or a message from Appellant regarding the dog at issue and that he did not pick up a dog from her on June 27, 2018.

{¶9} Finally, Deputy William Newland also testified for the State. He testified that he conducted the follow-up investigation and went to Appellant's house the day after Deputy Cottrell went. He testified that Appellant allowed him to search but he did not find the dog. He conducted a formal interview of Appellant the following day. He testified that Appellant informed him that the dog followed her to her residence, she gave the dog a bath because it was flea infested and had dried blood on it, she contacted the dog warden and left the dog in her fenced backyard because she was going to a retirement party. She further informed him that when she returned home the dog was no longer there and she believed the dog warden had picked him up. She also told him that the dog had already been dyed prior to her finding him. In sum, in her statement she admitted to having the dog for a short period of time during the day. Deputy Newland testified that she was cooperative and on cross-examination he agreed that she seemed to be doing a good deed.

{¶10} The State concluded its case at this point and Appellant then testified on her own behalf. She testified that her son alerted her to an orange dog in the yard on the day in question. She testified that she could tell something was wrong with its fur, that it was covered in fleas and had dried blood on it. She testified that as she is an animal lover and she wanted to help the dog so she gave it a bath with flea and tick shampoo. She testified that she took the dog out on a leash with her

other dogs and then left the dog in her fenced backyard with the gate unlocked because she had to leave for a party. She testified that she took photos of the dog while in the bath and in the yard and posted them to a missing pets website, not Facebook, during the trip to the party. She testified she also left a message for the dog warden, stating that the answering machine said "Adams County Dog Warden." She testified that the dog was gone when she returned home at almost midnight and that she never saw the dog again. She denied dying the dog, hiding the dog or selling the dog. She further testified that she refused to allow Deputy Cottrell to search because she was home alone with her kids, including a four-month-old baby who was sleeping, and that she had a broken foot and was on crutches. She explained that it was dark outside when the deputy arrived and that she actually could not let him onto her property until her husband came home because there was a gate with a padlock she could not open due to her husband having the keys with him.

{¶11} After a trial to the bench, Appellant was found guilty as charged of a single count of theft. After raising the issue of restitution at the sentencing hearing and accepting the victim's testimony that the dog likely cost about $500.00 as a puppy, the trial court sentenced Appellant to a suspended sentence of sixty days in jail, one year of probation, $282.30 in costs, and ordered $500.00 in restitution be

paid to the victim. It is from this judgment that Appellant now brings her timely appeal, setting forth two assignments of error for our review.

ASSIGNMENTS OF ERROR

I. "LASHAI BROWN'S CONVICTION FOR THEFT IS NOT SUPPORTED BY SUFFICIENT EVIDENCE. FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND OHIO CONSTITUTION, ARTICLE I, SECTION 10. (R.C. 2913.02)."

II. "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED LASHAI BROWN TO PAY RESTITUTION WHERE NO ECONOMIC LOSS WAS SUFFERED AND WITHOUT ANY EVIDENCE OR HEARING ON THE MATTER. R.C. 2929.18."

ASSIGNMENT OF ERROR I

{¶12} In her first assignment of error, Appellant contends that her conviction for theft is not supported by sufficient evidence. She primarily argues that the State failed to prove the "purpose to deprive" element of the offense of theft. Thus, Appellant essentially contends there was no evidence of criminal intent on her part during the time the dog was in her possession. The State argues the fact the dog appeared to have been bleached in the pictures, which were admittedly taken by Appellant, demonstrated an attempt to alter the dog's appearance and thus a purpose to deprive the victim of his dog. We begin with a look at the proper standard of review when considering a challenge to the sufficiency of the evidence.

{¶13} When reviewing the sufficiency of the evidence, an appellate court's inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997) (stating that "sufficiency is a test of adequacy"); *State v. Jenks*, 61 Ohio St.3d 259, 274, 574 N.E.2d 492 (1991) (superseded by statute and constitutional amendment on other grounds). "The standard when testing the sufficiency of the evidence ' "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." ' " *State v. Beverly*, 143 Ohio St.3d 258, 2015–Ohio–219, 37 N.E.3d 1116, ¶ 15, quoting *State v. McKnight*, 107 Ohio St.3d 101, 2005–Ohio–6046, 837 N.E.2d 315, ¶ 70, quoting *State v. Jenks* at paragraph two of the syllabus. Furthermore, a reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *Thompkins* at 390 (Cook, J., concurring). A reviewing court will not overturn a conviction on a sufficiency-of-the-evidence claim unless reasonable minds could not reach the conclusion that the trier of fact did. *State v. Tibbetts*, 92 Ohio St.3d 146, 162, 749 N.E.2d 226 (2001); *State v. Treesh*, 90 Ohio St.3d 460, 484, 739 N.E.2d 749 (2001).

{¶14} As set forth above, Appellant was convicted of a single count of misdemeanor theft in violation of R.C. 2913.02(A)(1), which provides 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[.]

R.C. 2913.01 provides that "deprive" means to do any of the following:

> (1) Withhold property of another permanently, or for a period that appropriates a substantial portion of its value or use, or with purpose to restore it only upon payment of a reward or other consideration;
>
> (2) Dispose of property so as to make it unlikely that the owner will recover it;
>
> (3) Accept, use, or appropriate money, property, or services, with purpose not to give proper consideration in return for the money, property, or services, and without reasonable justification or excuse for not giving proper consideration.

Further, with regard to the "purpose to deprive" element of the offense, this Court has held that "[a] defendant need not actually permanently withhold or dispose of the property." *State v. Mick*, 4th Dist. Ross. No. 14CA3433,

2015-Ohio-408, ¶ 25, citing *State v. Jordan*, 9th Dist. Summit No. 26598, 2013–Ohio–4172, ¶ 28.

{¶15} By challenging the "purpose to deprive" element of the offense Appellant essentially contends the record fails to demonstrate that she possessed any criminal intent. While she admits to having the dog for a short period of time–a few hours at most–she argues she had no purpose to deprive the victim of his dog. She further argues that evidence and testimony indicating that she posted pictures of the dog to a missing pet website and also called the dog warden demonstrated her intent to return the dog to its owner. In support of her argument, she points to the fact that Joshua Pack's own testimony demonstrated she posted pictures of the dog as a "found dog." She argues that the evidence shows she took affirmative steps to return the dog to its owner rather than demonstrating that she bleached the dog to keep it from being found.

{¶16} The State, however, argues that because Appellant admitted to having the dog without permission and pictures of the dog taken by Appellant indicate the dog had been bleached or discolored to alter its appearance, the "purpose to deprive" element of the offense of theft was proven beyond a reasonable doubt. The State also cites Appellant's refusal to allow Deputy Cottrell to search her residence, coupled with the fact that the dog warden testified he never received a

message from Appellant, as facts demonstrating Appellant intended to deprive the victim of the dog.

{¶17} We cannot conclude that the foregoing evidence, if believed, could reasonably support a finding of guilt beyond a reasonable doubt. Evidence introduced at trial by the State demonstrated that the victim's dog disappeared and was never returned to him. The State's evidence further demonstrated that within a day after the dog's disappearance Appellant posted pictures of the dog depicting the dog wet in the bathtub, on a leash in her yard, and playing with her other dogs. Although it is clear the dog's appearance had been altered, there is simply no evidence in the record before us indicating Appellant is the person who bleached the dog.

{¶18} There is also a lack of evidence that Appellant's purpose in possessing the dog was to deprive the owner of his property. Appellant testified that the dog wandered onto her property, was flea infested and bloody and was already orange in appearance at the time she found it. The State altogether failed to prove that Appellant actually bleached the dog or did anything with it other than try to locate its owner. Evidence introduced at trial by the State demonstrates that Appellant photographed the dog, clearly sitting in her front yard, and posted pictures of the dog on the internet, describing it as a "found dog." Mr. Pack testified to this fact himself.

{¶19} Further, although the dog warden testified he did not receive a message from Appellant regarding the dog, Appellant testified that she made the call from the car while en route to Miamisburg driving from Adams County. There are a number of reasons that might explain why Appellant may have thought she reached the right number and left a message and why the dog warden may not have received that message. Failing to confirm that the dog warden received Appellant's message does not render her a thief. Appellant's refusal to allow law enforcement to search her residence does not render her a thief either. Appellant testified as to the reasons why she could not allow the deputy onto her property when she was first contacted during the investigation. Further, she allowed a different deputy to conduct a search the very next morning.

{¶20} There was a great deal of evidence that was attempted to be admitted that was ultimately excluded at trial. Further, because the trial was to the bench, the judge heard quite a lot of information that was ultimately determined to be inadmissible and, thus, is not part of the record before us. Additionally, from an appellate review standpoint, the record before us and especially the trial transcript is a bit convoluted. It appears a lot of time was spent during trial logging in to various electronic devices and pulling up several different Facebook accounts, none of which is reviewable by this Court. Once all of the evidence and exhibits

that were excluded are taken away, we are left with scant evidence of guilt on Appellant's part.

{¶21} When all was said and done at trial, the remaining evidence consisted of the following testimony from the victim: 1) the victim's dog disappeared after he let him out and he never found his dog; 2) Appellant posted pictures of a bleached dog that looked like the victim's dog on a "found dog" website; and 3) when the victim's sister inquired as to whether Appellant had seen the dog, Appellant responded she had had him at one time. Further, the portion of Appellant's sister's testimony that wasn't excluded only established that she made a Facebook post about the missing dog and sent a Facebook message to Appellant asking if she had seen the dog, to which Appellant responded that the Sheriff had the dog. The only evidence that negatively portrayed Appellant was testimony by Deputy Cottrell which characterized Appellant as "uncooperative," essentially because she would not permit a search, and testimony by the dog warden that he did not receive a message from Appellant regarding the dog.

{¶22} We simply cannot conclude that the State met its burden based upon the record before us. Further, the victim's own testimony indicates Appellant did take at least one affirmative step in trying to locate the dog's owner by posting pictures of the dog on the internet with a description of the location where the dog was found. In *State v. Sova*, 4th Dist. Highland No. 02CA17, 2004-Ohio-604, this

Court affirmed a conviction for misdemeanor theft involving Sova's neighbor's dog. In *Sova*, we noted that the trial court made a specific finding that Sova "did not attempt to locate the owner of the puppy and that he did not call the police or the animal shelter to report that he had found a puppy." *Id.* at ¶ 13. Unlike Sova, Appellant posted pictures of the dog online indicating it had been found and where it had been found. The victim herein affirmed this fact in his testimony. Thus, this case is factually distinguishable from *Sova*. Overall, there is no evidence in the record before us indicating Appellant tried to alter the dog's appearance before posting the pictures, or that she posted the pictures in an attempt to sell the dog, thus further depriving the owner. Although this was obviously the State's theory at trial, it was not sufficiently proven. Accordingly, Appellant's first assignment of error is sustained and her theft conviction is reversed.

ASSIGNMENT OF ERROR II

{¶23} In her second assignment of error, Appellant contends the trial court abused its discretion when it ordered her to pay restitution where no economic loss was suffered and without any evidence or hearing on the matter. However, in light of our disposition of Appellant's first assignment of error, which reversed Appellant's theft conviction, this assignment of error has been rendered moot. Accordingly, we do not reach it.

JUDGMENT REVERSED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED and costs be assessed to Appellee.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

For the Court,

_____
Jason P. Smith, Presiding Judge

_____
Peter B. Abele, Judge

_____
Michael D. Hess, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.