[Cite as *State v. Hager*, 2019-Ohio-4544.]

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- JESSICA J. HAGER Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P. J. Hon. John W. Wise, J. Hon. Earle E. Wise, Jr., J. Case No. 19CA006 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Municipal Court, Case No. 18CRB322
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 17, 2019

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
ROBERT K. HENDRIX ASSISTANT PROSECUTOR 164 East Jackson Street Millersburg, Ohio 44654	DAVID M. HUNTER 244 West Main Street Loudonville, Ohio 44842

Wise, John, J.

{¶1} Defendant-Appellant Jessica J. Hager appeals her conviction on one count of theft following a bench trial in the Holmes County Municipal Court.

{¶2} Plaintiff-Appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} This case arose from Appellant Jessica J. Hager being charged with theft following an incident which occurred on September 18, 2018, at the Dollar General Store in Millersburg, Ohio. The relevant facts and procedural history are as follows:

{¶4} On September 18, 2018, Defendant entered the Dollar General Store in Millersburg, Holmes County, Ohio. She was accompanied by a second individual who she later identified as "Dottie," her boyfriend's aunt. (T. at 38). She shopped for a while, and the manager, Caleb Verhovec, observed her to have a pink tee shirt in her cart. (T. at 7). The shirt was on a hanger. (T. at 8). Appellant eventually paid for the items in her cart, using her EBT card. The manager noticed that she did not pay for the pink tee shirt, and he did not see it in her cart at that point. (T. at 9).

{¶5} Appellant exited the store, unloaded her cart into her car and then came back into the store to return the shopping cart. (T. at 11). At that point, the manager confronted her about the pink tee shirt, asking her where it was. (T. at 11). Appellant stated that she left the shirt hanging on a shelf. *Id*. Appellant gave several locations where the shirt was hanging, but it could not be found. (T. at 12).

{¶6} The manager then informed Appellant that she could either give back the shirt or he would call law enforcement. Appellant declined to give back the shirt. (T. at 13). The manager then called for law enforcement. After waiting a short while, Appellant

stated, "it's not worth it," and pulled the shirt out of her purse. (T. at 13). She handed the shirt to the manager and walked out of the store. *Id*. The shirt had a tag on it and a price of $10.00. (T. at 14).

{¶7} Upon questioning, the manager stated that it appeared to him that Appellant knew the shirt was in her purse when she pulled it out. (T. at 14). There was no hanger on the shirt when she pulled it out of her purse. (T. at 15). The hanger was found near the register by the candy. (T. at 27).

{¶8} Detective Jeff Lay of the Millersburg Police Department was assigned to investigate the case. He called Appellant on the phone and in the recorded phone call, Appellant claimed that somehow the shirt fell in to her purse without her knowledge.

{¶9} As a result of the investigation, Appellant was charged with one count of Theft, in violation of R.C. §2913.02(A)(1), a misdemeanor of the First Degree.

{¶10} On January 24, 2019, the matter proceeded to a Bench Trial. At trial, the court heard testimony from Caleb Verhovec and Officer Jeff Lay for the State and Jessica Hager for the defense.

{¶11} Following the trial, Appellant was found guilty of the Theft.

{¶12} On February 27, 2019, the trial court sentenced Appellant to 180 days in jail with 120 days suspended, 2 years probation and a $250.00 fine.

{¶13} Appellant now appeals, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶14} "I. THE APPELLANT'S CONVICTION FOR THEFT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE? [SIC].

{¶15} "II. THERE WAS MISCONDUCT OF THE PROSECUTOR THAT VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL? [SIC].

{¶16} "III. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS UNDER CRIM. R 29(A) AT THE CLOSE OF THE STATE'S CASE? [SIC].

{¶17} "IV. THE DEFENDANT-APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL."

I.

{¶18} In Appellant's first assignment of error she argues her conviction was against the manifest weight of the evidence. We disagree.

{¶19} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in 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.' " *State v. Thompkins*, 78 Ohio St. 3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, *quoting State v. Martin*, 20 Ohio App. 3d 172, 175, 485 N.E.2d 717 (1983).

{¶20} Appellant herein was charged and convicted of theft, in violation of R.C. §2913.02(A)(1), which 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:
>
> (1) Without the consent of the owner or person authorized to give consent.

{¶21} Appellant herein argues that the State failed to produce evidence that she had any purpose to deprive Dollar General of the shirt.

{¶22} Based on the observations made by the store manager with regard to Appellant placing the shirt on the hanger in her cart, noticing that she did not pay for the shirt, and that the shirt was no longer in the cart, Appellant's failure to give a credible explanation as to what she did with the shirt and the statement made to him by Appellant that "this isn't worth it" before pulling the shirt out of her purse, we find that her conviction is not against the manifest weight of the evidence.

{¶23} Appellant's first assignment of error is overruled.

II.

{¶24} In his second assignment of error, Appellant argues that the prosecutorial misconduct denied her the right to a fair trial. We disagree.

{¶25} Appellant did not object to these comments at trial, thus waiving all but plain error. *State v. White*, 82 Ohio St.3d 16, 22, 1998–Ohio–363, 693 N.E.2d 772, quoting *State v. Slagle*, 65 Ohio St.3d 597, 604, 605 N.E.2d 916 (1992). We therefore review Appellant's allegations under the plain-error standard.

{¶26} "For plain error to apply, the trial court must have deviated from a legal rule, the error must have been an obvious defect in the proceeding, and the error must have affected a substantial right. *E.g., State v. Barnes,* 94 Ohio St.3d 21, 27, 2002 Ohio 68, 759 N.E.2d 1240 (2002).

{¶27} We note that Appellant has also failed to make a plain error argument in this matter.

{¶28} The test for prosecutorial misconduct is whether the prosecutor's remarks and comments were improper and if so, whether those remarks and comments prejudicially affected the substantial rights of the accused. *State v. Lott*, 51 Ohio St.3d 160, 555 N.E.2d 293 (1990), cert. denied, 498 U.S. 1017, 111 S.Ct. 591, 112 L.Ed.2d 596 (1990). In reviewing allegations of prosecutorial misconduct, we must review the complained-of conduct in the context of the entire trial. *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

{¶29} During cross-examination, the Prosecutor had the following exchange with Appellant:

Q. Okay. Why would the Judge believe anything that you have to say?

A. I'm not saying that he has to, I'm just stating the way I recall the incident happening.

Q. So you're saying that you're not being truthful?

A. No I am being a hundred percent (100%) truthful.

Q. Are you always truthful?

A. Yes I am.

Q. Okay so were you not convicted (of) unauthorized use of property in this court last year?

A. Yes I was.

***

Q. You've already been violated once in that probation haven't you?

A. For not …

Atty. Baserman: Object your honor.

The Court: I'll sustain that objection.

Q. You don't want this conviction to cause you to be violated on your probation do you? (T. at 41).

{¶30} At the end of the State's case, Appellant's counsel moves the Court for "Rule 29 Acquittal" which was denied by the Court. (T. at 35).

{¶31} During closing argument, the Prosecution stated, "You can't believe the Defendant's testimony that this was all an accident because she was convicted of unauthorized use of property in 2018 from this Court." (T. at 44).

{¶32} Initially, we note Evid.R. 609 (A)(3) provides:

{¶33} "For the purpose of attacking the credibility of a witness: Notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that any witness, including an accused, has been convicted of a crime is admissible if the crime involved dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance." In *State v. Johnson* (1983), 10 Ohio App. 3d 14, the court determined that theft offenses are crimes of dishonesty.

{¶34} We therefore find no error in the State's inquiry into Appellant's prior conviction for Unauthorized Use of Property.

{¶35} Upon review, we find that while the comments of the prosecutor in the case at bar may have raised objection, we cannot conclude that they were so outside the latitude generally granted the prosecution such that they comprise plain error. Further, Appellant's trial counsel's decision to not object to these comments and thus bring more

attention to them can be viewed as a reasonable trial strategy, which cannot serve as the basis for error.

{¶36} Based on the foregoing, we find no plain error and hereby overrule Appellant's second assignment of error.

III.

{¶37} In her third assignment of error, Appellant argues that the trial court erred in denying her Crim.R. 29 motion for acquittal. We disagree.

{¶38} Appellant failed to renew his Crim.R. 29(A) motion at the close of all of the evidence. An appellant must renew the Crim.R. 29 motion for acquittal at the close of appellee's evidence to preserve the right to appeal on the basis of the sufficiency of the evidence. *State v. Faggs,* 5th Dist. Richland No. 08–CA–35, 2009–Ohio–1758 at ¶ 22; *see also*, *State v. Barcharowski,* 5th Dist. Stark No. 2002CA00119, 2003–Ohio–4281. Otherwise he has waived all but plain error regarding a sufficiency argument. In order to find plain error, Crim.R. 52(B) requires that there be a divergence from a legal rule, that the error be an "obvious" defect in the trial proceedings, and that the error affect a defendant's "substantial rights." *Faggs, supra*, 2009–Ohio–1758 at ¶ 22, citing *State v. Barnes,* 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). Reversal on grounds of plain error is to be granted "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage" of justice. *Id.*

{¶39} Upon review, we find that based upon the facts as set forth above, the State presented sufficient evidence to support a theft conviction in this matter and no plain error exists.

{¶40} Appellant's third assignment of error is overruled.

IV.

{¶41} In her fourth assignment of error, Appellant argues that she was denied the effective assistance of counsel.

{¶42} To prevail on a claim of ineffective assistance of counsel, a defendant "must satisfy a two-prong test." *State v. Kennard*, 10th Dist. No. 15AP-766, 2016-Ohio-2811, ¶ 14, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under the first prong, a defendant must "demonstrate that his trial counsel's performance was deficient." *Id.* If a defendant "can show deficient performance, he must next demonstrate that he was prejudiced by the deficient performance." *Id.* A defendant's "failure to make either showing defeats a claim of ineffective assistance of counsel." *Id.*, citing *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989), quoting *Strickland* at 697, 104 S.Ct. 2052.

{¶43} In order to demonstrate deficient performance by counsel, a defendant "must show that his counsel committed errors which were so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at ¶15 (Quotations omitted). Further, a defendant "must overcome the strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance." *Id.*, citing *Strickland* at 689. In order to show prejudice, a defendant "must establish there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the trial would have been different." *Id.*, citing *Strickland* at 689.

{¶44} Appellant herein argues that his counsel was ineffective because he failed to object to the testimony of the store manager wherein he stated that it was his opinion

that Appellant lied to him in the store when she said she did not steal the shirt. Appellant also challenges the prosecutor's cross-examination as set forth above.

{¶45} Upon review, we find no prejudice to Appellant with regard to the trial court's allowance of said testimony. The store manager testified to his belief that Appellant was lying to him about stealing the shirt based on his observations and was therefore admissible.

{¶46} Likewise, as set forth above, the questioning by the prosecutor with regard to Appellant's prior conviction was also admissible.

{¶47} We therefore find defense counsel was not deficient in failing to object to said testimony and questioning.

{¶48} Appellant's fourth assignment of error is overruled.

{¶49} The judgment of the Municipal Court, Holmes County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Wise, Earle, J., concur.

JWW/d 1008