[Cite as *Cleveland v. Flynn*, 2018-Ohio-3585.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106247

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

JOANNE FLYNN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2017 CRB 009599

BEFORE: E.T. Gallagher, P.J., Boyle, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: August 30, 2018

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EILEEN T. GALLAGHER, P.J.:

{¶1} Defendant-appellant, Joanne Flynn, appeals her petty theft conviction and claims the following three errors:

> 1. The trial court erred as a matter of law and abused its discretion in allowing impeachment by evidence of a prior conviction that was beyond the ten-year limitation for such evidence under Evid.R. 609(B).
>
> 2. Appellant's conviction for theft is not supported by sufficient evidence.
>
> 3. Appellant's conviction for theft is against the manifest weight of the evidence.

{¶2} We find no merit to the appeal and affirm.

I. Facts and Procedural History

{¶3} Flynn was charged with petty theft in violation of Cleveland Codified Ordinance ("C.C.O.") 625.05 for allegedly stealing video games from a Walmart store located at 3400 Steelyard Drive in Cleveland. At a bench trial, Kenneth Wilson, who works in asset protection at the Walmart store, testified that his daily job duties require him to watch surveillance video of customers shopping on a closed-circuit screen. In January 2017, Wilson observed Flynn hide four video games under a coat in her shopping cart in the electronics department. Although customers generally pay for merchandise in the electronics department, Flynn left the department without paying for the video games, and Wilson continued to monitor her movements in the store.

{¶4} Flynn, who was accompanied by five children between the ages of 3 and 12, loaded her cart with several items. Wilson watched as she paid for some items at the

cash register and noticed that she passed through the point of sale without paying for the video games, which remained hidden under her coat. Wilson stopped Flynn in the vestibule and confronted her about the video games as she was exiting the store. (Tr. 30.)

{¶5} Flynn admitted at trial that she hid the video games under her coat, but claimed she intended to buy them and give them to her daughter for her birthday. She also admitted that she did not remember offering to buy the video games when Wilson stopped her and that her daughter's birthday was seven months away. Wilson testified that she never offered to pay for the video games.

{¶6} Wilson has caught over 802 customers stealing merchandise from the store. According to Wilson, nine out of ten customers who hide merchandise attempt to leave the store without paying for it. When these individuals are confronted about unpaid merchandise in their possession, they generally respond by claiming that they forgot to pay for the items. (Tr. 18.)

{¶7} During Flynn's testimony, the prosecutor introduced evidence of Flynn's prior robbery conviction from 2006 for impeachment purposes. Flynn's trial counsel objected to the evidence on grounds that the conviction was outside the ten-year limitations period provided in Evid.R. 609(B). The trial court did not expressly rule on the objection, but stated: "Well, there's no jury, I heard it" and "it's not gonna affect anything." (Tr. 43.)

{¶8} The trial court found Flynn guilty of petty theft. The court sentenced Flynn to 180 days in jail, a fine of $1,000, one year of active probation, and 25 hours of community work service. The fine and 177 days of the jail term were suspended. Flynn now appeals her conviction.

II. Law and Analysis

A. Evidence of Prior Conviction

{¶9} In the first assignment of error, Flynn argues the trial court erred in allowing the prosecutor to introduce evidence of her prior robbery conviction. She contends the evidence was inadmissible under Evid.R. 609(B) because the conviction was older than ten years old.

{¶10} Under Evid.R. 609(A), evidence of a prior felony conviction is admissible for impeachment purposes "if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." However, Evid.R. 609(B) places a time limitation on the use of such evidence and states, in relevant part:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement, or the termination of community control sanctions, post-release control, or probation, shock probation, parole, or shock parole imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Evid.R. 609(B).

{¶11} Flynn's trial was heard on August 8, 2017. Therefore, convictions incurred before August 8, 2007, were outside the rule unless Flynn's sentence was completed after that date. On cross-examination, the prosecutor asked Flynn about the robbery conviction she received in 2006, but there was no evidence regarding the length of Flynn's sentence for the robbery conviction. Therefore, the evidence was introduced in error because the trial court had no way of determining when Flynn completed her sentence and thus could not have made an accurate determination regarding the admissibility of Flynn's prior robbery conviction.

{¶12} We nevertheless find the error harmless. Error in the admission of evidence is harmless if there is no reasonable possibility that the evidence contributed to the accused's conviction. *State v. Weakley*, 8th Dist. Cuyahoga No. 105293, 2017-Ohio-8404, ¶ 58. Although the trial court never sustained counsel's objection to the evidence, the court, who was the trier of fact in this case, indicated that the evidence would not make a difference to the outcome of the trial. (Tr. 43.) In a bench trial, there is a presumption that the court considered only relevant, material, and competent evidence. *State v. Bays*, 87 Ohio St.3d 15, 27,716 N.E.2d 1126 (1999). Furthermore, there is nothing in the record to suggest that the trial court erroneously relied on evidence of Flynn's prior robbery conviction.

{¶13} Accordingly, the first assignment of error is overruled.

B. Sufficiency and Manifest Weight of the Evidence

{¶14} In the second assignment of error, Flynn argues there was insufficient evidence to support her petty theft conviction because there was no evidence of the requisite mens rea. In the third assignment of error, Flynn argues her theft conviction was against the manifest weight of the evidence because there was no credible evidence of deception since Flynn testified that she never intended to steal the video games.

{¶15} Although the terms "sufficiency" and "weight" of the evidence are "quantitatively and qualitatively different," we address these issues together because they are closely related, while applying the distinct standards of review. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).

{¶16} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 12. The relevant inquiry 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. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶17} In contrast to sufficiency, "weight of the evidence involves the inclination of the greater amount of credible evidence." *Thompkins* at 387. While "sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, * * * weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *Thompkins* at 386-387. "In other words, a reviewing court asks whose

evidence is more persuasive — the state's or the defendant's?" *Id*. The reviewing court must consider all the evidence in the record, the reasonable inferences, and the credibility of the witnesses to determine "'whether in resolving conflicts in the 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.'" *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983).

{¶18} Flynn was convicted of petty theft in violation of C.C.O. 625.05, which states, in relevant part, that "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * * * [b]y deception." The language of C.C.O. 625.05 is identical to R.C. 2913.02(A)(3), which also prohibits petty theft.

{¶19} R.C. 2913.01(A) defines "deception" as:

> Knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.

{¶20} Flynn denied that she knowingly deceived Walmart employees by hiding the video games under her coat. However, she admitted she concealed the video games and walked to the exit of the store without paying for them. The act of concealment is circumstantial evidence that she was knowingly deceiving Walmart employees. This circumstantial evidence was bolstered by Wilson's testimony that the vast majority of

shoplifters hide merchandise they intend to steal and claim they forgot about the hidden items when they get caught.

{¶21} Flynn claimed she simply forgot to pay for the video games, but the trial court did not believe her. Although we review credibility when considering the manifest weight of the evidence, we are cognizant that determinations regarding the credibility of witnesses and the weight of the testimony are primarily for the trier of fact. *State v. Bradley*, 8th Dist. Cuyahoga No. 97333, 2012-Ohio-2765, ¶ 14, citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). The trier of fact is best able "to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 24. We, therefore, defer to the trial court's assessment of credibility unless the record weighs heavily against the trial court's findings. *Mentor v. Schivitz*, 11th Dist. Lake No. 96-L-062, 1997 Ohio App. LEXIS 238, at 5 (Jan. 24, 1997).

{¶22} This is not a case where the record weighs heavily against the trial court's assessment of Flynn's credibility since she failed to offer a reasonable explanation as to why she failed to pay for the video games. Flynn claimed she intended to buy the games for her daughter's birthday, but admitted her daughter's birthday was seven months away. Moreover, she never offered to pay for the games when Wilson confronted her about them. Offering to pay for the items would have been a normal reaction for someone who truly intended to buy the items and forgot.

{¶23} Flynn nevertheless argues there was no evidence that Flynn deceived Walmart personnel because she had not yet exited the store at the time she was stopped. However, this court has previously held that "the * * * removing of an item with intent to deprive the owner constitutes a sufficient asportation to establish a theft offense, even when the property is not removed from the premises of the owner or retained in the possession of defendant." *State v. Allen*, 8th Dist. Cuyahoga No. 62275, 1993 Ohio App. LEXIS 4392 (Sept. 9, 1993), citing *State v. Davis*, 56 Ohio St.2d 51, 381 N.E.2d 641 (1978); *Eckels v. State*, 20 Ohio St. 508 (1870); *see also State v. Csillag*, 10th Dist. Franklin No. 13AP-192, 2013-Ohio-4608.

{¶24} Thus, property need not be removed from the premises of the owner in order to constitute theft. *State v. Randazzo*, 8th Dist. Cuyahoga No. 79667, 2002-Ohio-2250, ¶ 51. In order to prove theft, the prosecutor need only prove that the defendant moved the item with the intent to deprive the owner of his property. *Id*. The evidence at trial demonstrated that Flynn removed the video games from the electronics department, hid them under her coat, and walked past the point of sale without paying for them. As previously stated, her concealment of the video games demonstrated an intent to knowingly deceive Walmart personnel by taking them without paying for them. Therefore, Flynn's theft conviction is supported by sufficient evidence and by the weight of the evidence.

{¶25} The second and third assignments of error are overruled.

{¶26} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the municipal 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.

EILEEN T. GALLAGHER, PRESIDING JUDGE

MARY J. BOYLE, J., and
ANITA LASTER MAYS, J., CONCUR