[Cite as *State v. Graham*, 2010-Ohio-2907.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-896 (C.P.C. No. 08CR06-4657)
Amber Graham,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 24, 2010

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Steven A. Larson, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Amber Graham, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

{¶2} The Ohio Board of Nursing received a complaint alleging that appellant, a nurse working at Riverside Hospital in Columbus, Ohio, was stealing drugs from the hospital. Bette Jo Horst, an investigator for the board, and Eric Russell, an investigator for Ohio Health/Riverside, investigated the allegations.

{¶3} The investigation focused on records from a dispensing machine known as a Pyxis machine that is located on each floor of Riverside Hospital. The Pyxis machine is used to dispense drugs to nurses, who in turn, administer the drugs to patients. To obtain a drug from the Pyxis machine, the nurse must present photo identification or a Pyxis access card to log onto the Pyxis machine. The nurses's fingerprint serves as a password. The Pyxis machine creates a record of the drug dispensed, which includes a record of the drug withdrawn, who withdrew the drug, when the drug was withdrawn, and the identity of the patient to whom the drug is to be administered. If a nurse does not administer a drug withdrawn from the Pyxis machine for any reason, the nurse must properly dispose of the drug (i.e. "waste" the drug). Drugs that are properly wasted are also recorded on Pyxis. The Pyxis machine is capable of producing a report reflecting the recorded data.

{¶4} Horst and Russell reviewed reports produced by the Pyxis machine on the hospital floor where appellant worked. Horst and Russell compared the Pyxis reports with the Medication Administration Record ("MAR") for patients on appellant's floor. A patient's MAR lists the drugs prescribed for the patient and includes when and how much of each drug the patient received. The MAR also indicates the name of the nurse that administered the drug to the patient. During the time frame in question, nurses at Riverside Hospital were required to manually note each drug administered on a patient's MAR.

{¶5} Horst and Russell's investigation discovered discrepancies between the drug withdrawals listed on certain Pyxis reports and the drugs that appellant administered to patients as indicated on the MARs. For example, a Pyxis report indicated that

appellant withdrew Hydromorpone Ampules, a pain medication commonly known as Dilaudin, five times for a patient on June 22, 2007. There was no indication on the patient's MAR that the patient received the drug on that date. The Pyxis report also did not indicate that the drugs had been properly "wasted." Similarly, a Pyxis report for a different patient indicated that appellant twice withdrew Dilaudin for that patient on July 6, 2007. There was no indication on the patient's MAR for that day that appellant gave the patient those doses of Dialudin. Nor did the Pyxis report indicate that the drugs had been wasted.

{¶6} As a result of these discrepancies, Russell contacted Columbus Police Detective, Christopher Cain, and told him that he had information that suggested appellant was stealing drugs from Riverside. Russell forwarded that information to Cain, who in turn sent the information to the prosecutor's office. Subsequently, a Franklin County Grand Jury indicted appellant with ten counts of theft in violation of R.C. 2913.02(A)(2). Appellant entered a not guilty plea to the charges and proceeded to a jury trial.

{¶7} At trial, Horst and Russell testified about the multiple discrepancies they discovered between the Pyxis reports and MAR documents. These records indicated that some of the drugs dispensed from the Pyxis machine by appellant were not administered to patients and not wasted. Appellant denied stealing drugs and attempted to explain the reporting discrepancies. She contended that at times, she would allow other nurses to withdraw drugs from the Pyxis machine even though she was logged into the machine. She also testified that it was not uncommon for nurses to forget to note every drug administered on a patient's MAR.

{¶8} The jury found appellant guilty of four counts of theft and acquitted her of the remaining six counts of theft. As a result, the trial court placed appellant on community control for five years.

{¶9} Appellant appeals and assigns the following errors:

> I. THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S RULE 29 MOTION AS THERE WAS NOT SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT.
>
> II. THE TRIAL COURT VIOLATED AMBER GRAHAM'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT ENTERED A JUDGMENT OF CONVICTION FOR THEFT, WHICH WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUITION.

{¶10} Appellant contends in her first and second assignments of error that her theft convictions are not supported by sufficient evidence[1] and are against the manifest weight of the evidence. We disagree.

{¶11} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins* (1997), 78 Ohio St.3d 380, paragraph two of the syllabus. Therefore, we will separately discuss appellant's sufficiency of the evidence and weight of the evidence arguments.

{¶12} The Supreme Court of Ohio delineated the role of an appellate court presented with a sufficiency of the evidence argument in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the

[1] Although appellant couches her first assignment of error as a challenge to the trial court's denial of her Crim.R. 29 motion, the standard to review for that decision is the same as our review of the sufficiency of the evidence. *State v. Johnson*, 10th Dist. No. 08AP-652, 2009-Ohio-3383, fn.1.

> 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. 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. * * *

{¶13} Whether the evidence is legally sufficient is a question of law, not fact. *Thompkins* at 386. Indeed, in determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. A verdict will not be disturbed unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484; *Jenks* at 273.

{¶14} Appellant was found guilty of four counts of theft. Specifically, the jury found appellant guilty of count 3 of the indictment, which alleged that she knowingly obtained or exerted control over Percocet tablets on or about June 14, 2007, beyond the scope of the express or implied consent of Ohio Health/Riverside with the purpose to deprive Ohio Health/Riverside of the drugs. In support of that count, the state presented a Pyxis report and MAR from that date indicating that appellant twice withdrew Percocet tablets for a patient and that the drugs were not administered to the patient or properly wasted.

{¶15} The jury also found appellant guilty of count 6, which alleged that she knowingly obtained or exerted control over Dilaudin on or about June 23, 2007, beyond the scope of the express or implied consent of Ohio Health/Riverside with the purpose to deprive Ohio Health/Riverside of the drugs. In support of that count, the state presented a Pyxis report and MAR from that date indicating that appellant withdrew Dilaudin for a patient at approximately 10:15 a.m. and that the drugs were not administered to the patient or properly wasted. In fact, the MAR indicates that the patient received a dose of Dilaudin 45 minutes earlier from another nurse.

{¶16} The jury also found appellant guilty of count 7, which alleged that she knowingly obtained or exerted control over Percocet tablets, on or about June 29, 2007, beyond the scope of the express or implied consent of Ohio Health/Riverside, with the purpose to deprive Ohio Health/Riverside of the drugs. In support of that count, the state presented a Pyxis report and MAR from that date indicating that appellant withdrew Percocet tablets at 9:39 a.m and 10:42 a.m. for a patient and that the drugs were not administered to the patient or properly wasted. The patient's MAR indicates that appellant provided Percocet tablets to the patient only once that day, at 2:01 p.m.

{¶17} Lastly, the jury found appellant guilty of count 10, which alleged that she knowingly obtained or exerted control over Dilaudin on or about July 6, 2007, beyond the scope of the express or implied consent of Ohio Health/Riverside with the purpose to deprive Ohio Health/Riverside of the drugs. In support of that count, the state presented a Pyxis report and MAR from that date indicating that appellant twice withdrew Dilaudin for a patient and that the drugs were not administered to the patient or properly wasted.

{¶18} Appellant claims the state only proved a few isolated incidents of improper documentation. She argues that the state failed to prove she purposefully deprived the hospital of the drugs, or that the drugs were not properly administered or wasted. We find appellant's arguments unavailing.

{¶19} In order to convict appellant of theft in this case, the state had to prove beyond a reasonable doubt that appellant, with purpose to deprive the owner of property, knowingly obtained or exerted control over property beyond the scope of the express or implied consent of the owner of the property. R.C. 2913.02(A)(2). The state need not establish what happened to the missing drugs, just that appellant exerted control over the drugs beyond her scope of consent. See *State v. Hammerschmidt* (Mar. 8, 2000), 9th Dist. No. CA2987-M (affirming theft of drugs conviction where nurse exerted control over drugs beyond the scope of her consent by failing to administer drugs that she took out of the Pyxis machine to give to a patient).

{¶20} The state presented sufficient evidence that appellant did not administer or properly waste the drugs that are the subject of counts 3, 6, 7, and 10, and, therefore, knowingly exerted control over those drugs beyond her scope of consent. The Pyxis reports, in conjunction with the MAR for each patient, indicate that appellant withdrew drugs from the Pyxis machine and did not administer the drugs to the intended patient or properly waste the drugs. Although the Pyxis reports and patient MARs are only circumstantial evidence that the drugs were not administered to the patient or properly wasted, a conviction can be sustained based on circumstantial evidence alone. *State v. Franklin* (1991), 62 Ohio St.3d 118, 124 (citing *State v. Nicely* (1988), 39 Ohio St.3d 147, 154-155). Indeed, circumstantial evidence may be as persuasive as direct evidence, or

more so. *State v. Ballew* (1996), 76 Ohio St.3d 244, 249 (citing *State v. Lott* (1990), 51 Ohio St.3d 160, 167).

{¶21} Finally, a jury may infer purpose from the surrounding circumstances. *State v. Buelow*, 10th Dist. No. 07AP-317, 2007-Ohio-5929, ¶25. The discrepancies between the Pyxis reports and the MAR for each patient are sufficient to allow a juror to infer that appellant acted with the purpose to deprive Ohio Health/Riverside of the drugs. Again, this evidence is circumstantial, but necessarily so. " 'Because, aside from an admission of guilt, no direct evidence of a defendant's purpose can exist, the state must rely upon inferences from "the surrounding facts and circumstances" to prove purpose.' " Id. (quoting *State v. King* (July 18, 1989), 10th Dist. No. 88AP-665, quoting *State v. Huffman* (1936), 131 Ohio St. 27, paragraph four of the syllabus). The state presented sufficient evidence to prove that appellant acted with purpose.

{¶22} Viewing the totality of the evidence in a light most favorable to the state, the state presented sufficient evidence that would allow a reasonable juror to conclude that appellant, with purpose to deprive Ohio Health/Riverside of drugs, did knowingly obtain or exert control over the hospital's drugs beyond her scope of consent by removing drugs from the Pyxis machine and not properly administering them to the intended patient or properly wasting them. *Hammerschmidt*. Accordingly, appellant's theft convictions are supported by sufficient evidence.

{¶23} Appellant's manifest weight of the evidence claim requires a different review. The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *State v. Brindley,* 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16. When presented with a

challenge to the manifest weight of the evidence, an appellate court, after " 'reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [trier of fact] 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* (1983), 20 Ohio App.3d 172, 175). An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " Id.

{¶24} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. Neither is a conviction against the manifest weight of the evidence because the trier of fact believed the state's version of events over the appellant's version. *State v. Gale,* 10th Dist. No. 05AP-708, 2006-Ohio-1523, ¶19; *State v. Williams,* 10th Dist. No. 08AP-719, 2009-Ohio-3237, ¶17. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson* (Mar. 19, 2002), 10th Dist. No. 01AP-973; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. The trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams,* 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. Consequently, an appellate court must ordinarily give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington,* 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶28; *State v. Hairston,* 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶74.

{¶25} Appellant first argues that her convictions are against the manifest weight of the evidence because the Pyxis reports and the MARs were not reliable. We disagree. The jury was aware of the possible deficiencies in these documents. Appellant testified how she allowed other nurses to withdraw drugs from the Pyxis machine under her name. She further testified that nurses would forget to properly note a drug administered to a patient on the patient's MAR. The jury was free to believe or disbelieve all or any of her testimony. *Jackson*. Moreover, a conviction is not against the manifest weight of the evidence merely because the jury believed the state's evidence and not the defendant's evidence. *Gale*. For counts 3, 6, 7, and 10, the jury obviously rejected appellant's explanations for the recording discrepancies and concluded that the Pyxis reports and attendant patient MARs accurately documented drugs that appellant withdrew from the Pyxis machine yet did not properly administer or waste. We cannot say the jury clearly lost its way so as to create a manifest miscarriage of justice by arriving at this conclusion.

{¶26} Second, appellant argues that because the jury acquitted her of some counts, her convictions are against the manifest weight of the evidence. Again, we disagree. Simply because the jury acquitted her of some of the charges against her does not mean her convictions were against the manifest weight of the evidence. The jury is free to accept or reject evidence offered to support each charge. *State v. Stewart*, 10th Dist. No. 08AP-33, 2009-Ohio-1547, ¶23.

{¶27} The jury did not clearly lose its way by finding appellant guilty of four counts of theft. Accordingly, her convictions are not against the manifest weight of the evidence.

{¶28} Appellant's convictions are supported by sufficient evidence and are not against the manifest weight of the evidence. Consequently, we overrule appellant's first

and second assignments of error. Having overruled appellant's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and BROWN, JJ., concur.