[Cite as *State v. Smith*, 2013-Ohio-1873.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 12AP-939 (C.P.C. No. 08CR-09-6739) and
v.	:	No. 12AP-940 (C.P.C. No. 08CR-08-6038)
Charles W. Smith,	:	
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on May 7, 2013

Ron O'Brien, Prosecuting Attorney, and *Valerie Swanson*, for appellee.

Brian J. Rigg, for appellant.

APPEALS from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendant-appellant, Charles W. Smith ("appellant"), appeals from his convictions in the Franklin County Court of Common Pleas on charges arising out of two separate cases. In case No. 08CR-09-6739 (appellate case No. 12AP-939), appellant was convicted of two counts of theft. In case No. 08CR-08-6038 (appellate case No. 12AP-940), appellant was convicted of one count of possession of cocaine. For the following reasons, we affirm the judgments of both cases, which were consolidated on appeal.

{¶ 2} Regarding case No. 12AP-939, appellant does not dispute that, on August 26, 2008, he took Deborah Saylor's purse from a waiting room at Grant Hospital. Saylor had inadvertently left her purse unattended as her young son underwent very serious surgery. A video camera from hospital security showed that Saylor was sleeping on a couch in the waiting room when appellant picked up her purse. Appellant then placed it inside a bag on the lap of a family member, Stephanie Allmon, a patient whom he was transporting in a wheelchair. Hospital security officers searched Allmon's room and did

not find the purse. Columbus Police detectives subsequently searched appellant's vehicle and found nothing. Appellant was interviewed at police headquarters that same evening.

{¶ 3} Several weeks later, Saylor received a call from Stephanie Allmon informing her they had her purse. Saylor then received a call from a man who told her he wanted to return her purse. Saylor received the purse in the mail in a package with appellant's name on the return label. The same man called Saylor to see if she had received her purse. The purse contained most of its original contents, including her credit cards and checkbook. Saylor could not say for sure, however, if anyone had tried to use her credit cards or if some cash was missing. She cancelled her credit cards shortly after the purse went missing.

{¶ 4} Appellant was charged with two counts of theft, both felonies of the fifth degree, alleging theft of credit cards and checks. On September 26, 2012, a jury found him guilty of both counts. Prior to the jury verdict, the court had overruled a motion for acquittal at the close of the state's case.

{¶ 5} At trial, appellant testified that he only took the purse so that he could return it to the owner. However, there were nursing stations on every floor, and security was located at the main entrance to the hospital. Appellant testified he did not turn it in because he was worried that it would not be returned to the owner. He also testified that he put the purse in the bag because he could not carry it. Appellant testified that it was never his intention to steal from Saylor and that he did not return the purse sooner because the court told him not to contact Saylor.

{¶ 6} In case No. 12AP-939, appellant appealed his convictions and assigned the following error:

> THE VERDICT IS AGAINST THE SUFFICIENCY AND MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 7} "Because a Crim.R. 29 motion questions the sufficiency of the evidence, '[w]e apply the same standard of review to Crim.R. 29 motions as we use in reviewing the sufficiency of the evidence.' " *State v. Walburg*, 10th Dist. No. 10AP-1087, 2011-Ohio-4762, ¶ 11, quoting *State v. Hernandez*, 10th Dist. No. 09AP-125, 2009-Ohio-5128, ¶ 6. "Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict." *State v. Cassell*, 10th Dist. No. 08AP-1093, 2010-Ohio-1881, ¶ 36, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386

(1997). In reviewing a challenge to the sufficiency of the evidence, an appellate court must determine "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 (1991), paragraph two of the syllabus, superseded by constitutional amendment on other grounds as recognized in *State v. Smith*, 80 Ohio St.3d 89, 102 (1997).

{¶ 8} "While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief." *Cassell* at ¶ 38, citing *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 25, citing *Thompkins* at 386. "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Thompkins* at 387, citing *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). " 'The court, 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 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, 175 (1st Dist.1983). This discretionary authority " 'should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*

{¶ 9} R.C. 2913.02(A) states 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 in any of the following ways: (1) Without the consent of the owner or person authorized to give consent; * * * [or] [2] By Deception." "A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." R.C. 2901.22(A). A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist. R.C. 2901.22(B).

{¶ 10} There is no dispute that appellant took Saylor's purse and that the purse contained her credit cards and checkbook. The issue here is whether appellant had a purpose to knowingly deprive Saylor of her credit cards and checkbook. The taking of the purse while Saylor was sleeping nearby, the concealment of the purse, the decision to not turn the purse into hospital personnel, and the delay in returning the purse are all evidence of appellant's purpose to knowingly deprive Saylor of her property. Therefore, we cannot say that there was insufficient evidence to convict appellant of the two theft offenses. Nor can we say that the jury's verdict was against the manifest weight of the evidence. Therefore, we overrule the sole assignment of error in case No. 12AP-939.

{¶ 11} Regarding case No. 12AP-940, on May 10, 2008, Columbus Police Officer Gregory Sanderson observed appellant changing lanes without using his turn signal. He stopped appellant, ran a LEADs (law enforcement automated data system) check and determined that appellant was driving under suspension of license. Officer Sanderson then handcuffed appellant and informed him that he was under arrest. While conducting a search prior to placing appellant in the cruiser, Officer Sanderson found a rock of crack cocaine in the left-side pocket of appellant's coat. Officer Sanderson read appellant his Miranda rights. Although appellant did not sign the rights-waiver form, he verbally acknowledged that he understood his rights and that he was willing to talk. Appellant then told the officer that he "got the crack for driving somebody around." (08CR-08-6038 Tr. 68.) Thereafter, Officer Sanderson decided to release appellant, cited appellant for the signal violation, charged appellant with driving under suspension, and pursued a direct indictment on a drug charge. Officer Sanderson testified that he wanted to have the rock tested to determine if it was cocaine before charging appellant with a drug offense.

{¶ 12} Appellant was subsequently charged with one count of possession of cocaine, a felony of the fifth degree, in violation of R.C. 2925.11. A hearing was held on appellant's motion to suppress both the evidence of crack cocaine and the statement made by appellant. The court overruled the motion, and a jury trial commenced. On October 3, 2012, the jury found appellant guilty of one count of possession of cocaine. Appellant was sentenced to one year in prison and given 460 days of jail-time credit.

{¶ 13} In case No. 12AP-940, appellant appeals his conviction and sets forth the following two assignments of error:

> [1.] TRIAL COURT ERRED BY FAILING TO SUPPRESS THE SEARCH OF THE DEFENDANT'S PERSON AND THE ALLEGED STATEMENTS MADE WHILE IN CUSTODY THEREBY DENYING THE APPELLANT'S RIGHT TO A FAIR TRIAL IN VIOLATION OF THE UNITED STATES AND OHIO CONSTITUTIONS.
>
> [2.] THE VERDICT IS AGAINST THE SUFFICIENCY AND MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 14} The entirety of appellant's argument that the drug evidence and his statements should have been suppressed is that: (1) there was no good reason to detain him in the officer's cruiser for a minor offense; and (2) appellant did not sign the rights waiver.

{¶ 15} When presented with a motion to suppress, the trial court assumes the role of the trier of fact. *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). Thus, the trial court is in the best position to resolve questions of fact and evaluate witness credibility. *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, ¶ 41, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. On review, we must accept the trial court's factual findings if they are supported by competent, credible evidence. *State v. Stokes*, 10th Dist. No. 07AP-960, 2008-Ohio-5222, ¶ 7. Accepting those facts as true, we must then independently determine, as a matter of law and without deference to the trial court's conclusion, whether the court applied the correct law and whether the facts meet the applicable legal standard. *State v. Luke*, 10th Dist. No. 05AP-371, 2006-Ohio-2306, ¶ 12-13.

{¶ 16} The Fourth Amendment to the U.S. Constitution prohibits unreasonable searches. Warrantless searches are unreasonable unless an exception applies. *State v. Jones*, 188 Ohio App.3d 628, 2010-Ohio-2854, ¶ 11 (10th Dist.). The state bears the burden of proving the validity of a warrantless search. *Id.* at ¶ 10. The state argues that Officer Sanderson found crack cocaine on appellant pursuant to an exception to the warrant requirement for searches incident to arrest. *See Chimel v. California*, 395 U.S. 752, 762-63 (1969). We will now determine whether that exception applied.

{¶ 17} For the search-incident-to-arrest exception to apply, there must be a lawful arrest based on probable cause. *State v. Coger*, 10th Dist. No. 10AP-320 (Jan. 11, 2011), citing *State v. Dingess*, 10th Dist. No. 01AP-1232, 2002-Ohio-2775, ¶ 9-10. " 'Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in

believing that the offense has been committed.' " *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶ 73, quoting *Henry v. U.S.*, 361 U.S. 98, 102 (1959). " 'Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction.' " *Perez* at ¶ 73, quoting *Adams v. Williams*, 407 U.S. 143, 149 (1972). The standard for probable cause requires only a showing that a probability of criminal activity exists, not a prima facie showing of criminal activity. *State v. George*, 45 Ohio St.3d 325, 329 (1989). In determining whether probable cause exists, courts examine the totality of facts and circumstances surrounding the arrest. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶ 39.

{¶ 18} Although appellant was initially stopped for a minor traffic offense, he was arrested for driving under suspension, a misdemeanor of the first degree. We note that appellant makes no argument that Officer Sanderson lacked probable cause to arrest appellant for driving under suspension and does not dispute the state's assertion that it was a lawful arrest. Furthermore, appellant does not challenge the scope of the search incident to arrest. With this in mind, we find no error with the trial court's denial of appellant's motion to suppress the crack cocaine evidence.

{¶ 19} Under the Fifth Amendment to the U.S. Constitution, no person "shall be compelled in any criminal case to be a witness against himself." To protect this right, a criminal suspect in a custodial interrogation must be informed of his constitutional rights to remain silent and to have defense counsel. *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966); *State v. Watkins*, 10th Dist. No. 12AP-345, 2013-Ohio-804. Appellant claims his statement to Officer Sanderson should have been suppressed because he did not sign the rights waiver when it was read to him or when he was released at the scene. The essence of appellant's argument is that the state failed to meet its burden of proving that appellant voluntarily waived his right to remain silent.

{¶ 20} A written waiver is not necessary to establish proof of waiver. *State v. Thomas*, 10th Dist. No. 01AP-730 (Feb. 12, 2002), citing *State v. Scott*, 61 Ohio St.2d 155 (1980). The trial court was in the best position to assess the credibility of this testimony, and it found that appellant voluntarily and verbally waived his right to remain silent. *See State v. Curry*, 95 Ohio App.3d 93, 96 (8th Dist.1994) ("[i]n a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate witness credibility"). There was competent, credible evidence to

support the trial court's findings. Accordingly, we find no error with the trial court's denial of the motion to suppress statements of appellant. Therefore, we overrule appellant's first assignment of error in case No. 12AP-940.

{¶ 21} We have outlined above the standards to apply when considering whether a conviction is supported by the sufficiency of the evidence and the manifest weight of the evidence. With these standards in mind, we will consider appellant's second assignment of error in case No. 12AP-940.

{¶ 22} R.C. 2925.11(A) states that "[n]o person shall knowingly obtain, possess, or use a controlled substance." The state presented evidence that Officer Sanderson found the cocaine on appellant's person, in his coat jacket, and that appellant told him that he got the cocaine because he "[drove] somebody around." Furthermore, there was evidence that the rock found was crack cocaine, a Schedule II substance. With this evidence, there was sufficient evidence to find appellant guilty of possession of cocaine. Furthermore, considering this evidence, it does not appear that the jury lost its way in finding appellant guilty. Therefore, we overrule his second assignment of error in case No. 12AP-940.

{¶ 23} For the foregoing reasons, appellant's single assignment of error in case No. 12AP-939 and both assignments of error in case No. 12AP-940 are overruled, and the judgments of the Franklin County Court of Common Pleas are affirmed.

Judgments affirmed.

TYACK and McCORMAC, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of the Ohio Constitution, Article IV, Section 6(C).
