[Cite as *State v. Peak*, 2005-Ohio-6422.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2004-L-124**
- vs -	:	
TANISHA R. PEAK,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 03 CR 000577.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Gerald R. Walton, 2800 Euclid Avenue, #320, Cleveland, OH 44115 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Tanisha Peak ("Peak"), appeals from the judgment of the Lake County Common Pleas Court, denying her motion to suppress and motion for acquittal.

{¶2} On September 7, 2003, Peak went shopping at the Wal-Mart Store in Eastlake, Ohio. Accompanying her were her brother, Tyrone Peak ("Tyrone"), and her brother's girlfriend, Toreia Smith ("Smith"). Peak's child was also in her company. Subsequently, Peak came under the surveillance of Bret Young ("Young"), and Scott Chambers ("Chambers"), loss prevention officers with Wal-Mart. Chambers and Young

testified that they noticed that Peak's behavior became suspicious. Young testified that he observed Peak and Smith placing items in the shopping cart, while Tyrone was looking around, over his shoulder, and down the aisle. Young testified this sort of behavior was typical of someone acting as a "lookout." Young and Chambers watched as Peak transferred merchandise from the cart into two backpack/duffle bags. Young testified that as Peak and her companions began to move to the front of the store, he called the Eastlake Police. When Eastlake Patrolman Marc Christian ("Christian") arrived on the scene, Chambers informed Christian of the events he observed involving Peak, Smith, and Tyrone. At that same time, Tyrone was exiting the store. Chambers approached Tyrone and began to question him.

{¶3} During this same time, Young was inside the store continuing his observation of Peak and Smith. Young testified that they moved slowly to the front of the store. Peak was pushing the cart with the duffle bags. They proceeded to walk past the checkout point to the store's exit doors. They turned around and began walking at a fast pace to the shoe department. Chambers and Young both testified that, at that same time, the police were interviewing Tyrone outside the store's exit doors. Young and Chambers testified that they both observed Peak dumping merchandise from the bags in the cart onto the floor of the shoe department. Then, Young followed Peak and Smith as they walked to the front of the store. Christian entered the store looking for Young. Young informed Christian about the pile of merchandise, and alerted him that Peak and Smith were about to exit the store. Just outside the doors, Christian stopped Peak and Smith. Christian testified that before questioning Peak and Smith, Young identified them. Christian testified that he saw no criminal activity himself and based his stop of Peak on the information provided to him by Young and Chambers.

{¶4} At the time of the stop, Smith and Tyrone both identified themselves. Peak, however, told police that her name was "Tasha Smith," and she gave her birth date, but refused to give the year of her birth or social security number, and stopped talking to the officer. Christian then placed Peak under arrest for shoplifting, and released Smith and Tyrone.

{¶5} At the police station, Christian again asked Peak for her name. Peak told him that her name was "Fatima Williams." Christian then initiated the booking process, which involves completion of a property inventory form, medical evaluation sheet, and a fingerprint card. Peak signed all three documents in the name of "Fatima Williams." After the Eastlake police department received several phone calls from family and friends wanting to post bond for a "Tanisha Peak," Christian realized that the "Fatima Williams" in custody, may indeed actually be Tanisha Peak. Upon further police inquiry, Peak admitted her legal name was Tanisha Peak.

{¶6} On September 26, 2003, Peak was indicted on one count of theft, a felony of the fifth degree, in violation of R.C. 2913.02(A)(1); and three counts of forgery, for signing the name "Fatima Williams" to the booking documents, also felonies of the fifth degree, in violation of R.C. 2913.31(A)(2). On December 19, 2003, Peak pleaded not guilty.

{¶7} On February 26, 2004, Peak filed a pretrial motion to suppress evidence, alleging an unlawful stop by the Eastlake Police. The court denied the motion by judgment entry on April 27, 2004, and the case proceeded to a jury trial. At the close of the state's case, Peak filed a motion for acquittal, which was denied by the court.

{¶8} Subsequently, Peak was found guilty of one count of theft in violation of R.C. 2913.02(A)(1), a misdemeanor in the first degree, and three counts of forgery in

violation of R.C. 2913.31(A)(2), felonies of the fifth degree. At a sentencing hearing on June 28, 2004, the court sentenced Peak to three years of community control, subject to specific sanctions and conditions, including thirty days in the Lake County Jail, with credit for five days served. Peak filed a motion to suspend execution of sentence pending appeal, which was denied by the court on July 7, 2004.

{¶9} On July 28, 2004, Peak filed a timely notice of appeal with this court and raises two assignments of error for our review:

{¶10} "[1.] The trial court erred to the prejudice of defendant-appellant in denying her motion to suppress all evidence obtained after her stop and arrest.

{¶11} "[2.] The trial court erred to the prejudice of defendant-appellant in denying her motion for acquittal."

{¶12} In her first assignment of error, Peak argues that the state did not satisfy its burden of proof regarding whether Chambers had reasonable suspicion based upon specific and articulable facts, sufficient to justify the stop.

{¶13} This court has stated that "at a hearing on a motion to suppress, the trial court assumes the role of the trier of facts and, therefore, is in the best position to resolve questions of fact and evaluate the credibility of witnesses." *State v. Mills* (1992), 62 Ohio St.3d 357, 366. When reviewing a motion to suppress, an appellate court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. ***. Accepting these findings of facts as true, a reviewing court must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the appropriate legal standard. *State v. Curry* (1994), 95 Ohio App.3d 93, 96. ***." *State v.*

Jones, 11th Dist. No. 2003-T-0107, 2004-Ohio-6177, at ¶11, quoting *State v. Jones*, 11th Dist. No. 2001-A-0041, 2002-Ohio-6569, at 16.

{¶14} In order to determine whether an investigative stop was constitutional, we must determine whether the officer had reasonable suspicion, based on articulable facts, that criminal behavior has occurred or is about to occur. *Terry v. Ohio* (1968), 392 U.S. 1, 30, 20. To justify an investigative stop, an officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry at* 21. Reasonable suspicion must be viewed in light of the totality of the circumstances. *State v. Bobo* (1988), 37 Ohio St.3d 177, paragraph one of the syllabus. "An inarticulate hunch or suspicion is not enough. The officer must have a reasonable belief and specific facts upon which a reasonable suspicion could be based that appellant was violating or about to violate the law." (Citations omitted.) *State v. Dickinson* (Mar. 12, 1993), 11th Dist. No. 92-L-086, 1993 Ohio App. LEXIS 1428, at 4. The propriety of an investigative stop must be viewed in light of the totality of the circumstances as viewed through the eyes of a reasonable and prudent police officer. *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88.

{¶15} In the case sub judice, Peak contends that the arresting officer lacked reasonable suspicion to "stop" Peak because he did not personally observe any conduct other than innocent behavior, relying instead on the statements of the store's loss prevention employees, Chambers and Young.

{¶16} It is well-settled that reasonable suspicion to initiate an investigatory stop may be provided by information from outside the officer's own observations. *Adams v. Williams* (1972), 407 U.S. 143, 146. Reasonable suspicion has also been established where a security guard, or store detective, conveys information to the police. *State v.*

First (Dec. 27, 1995), 9th Dist. No. 17293, 1995 Ohio App. LEXIS. 5784. *State v. Wilks* (Sept. 30, 1993), 2d Dist. No. 13654, 1993 Ohio App. LEXIS 4693; *State v. Garrison* (Aug. 14, 1998), 6th Dist. No. L-97-1309, 1998 Ohio App. LEXIS 3685. In this case, the trial court clearly found that the testimony from the store's two loss prevention employees was competent and credible.

{¶17} Chambers and Young were both trained by Wal-Mart as loss prevention employees to conduct shoplifting surveillance. Chambers informed Christian of specific observations of Peak occurring on the store premises. Chambers told Christian that he suspected Peak of shoplifting, that a male and a female were "lookouts", and that Young was inside the store maintaining surveillance of the two females.

{¶18} Christian located Young inside the store. Young informed Christian that Peak and Smith were in electronics and had "grabbed a bunch of DVD's, put them in a cart, went to the toys section, began putting the merchandise in bags, plastic bags and duffle bags." Young then alerted Christian that Smith and Peak were exiting the store. Christian followed Peak and Smith outside, and asked Young to confirm that these were the same two females he had seen stuffing merchandise into the duffel bags. Christian testified that he then stopped Peak and Smith and asked them for identification. Smith complied, but Peak refused. Peak gave her name as "Tasha Smith." Thereafter, Peak was arrested.

{¶19} The evidence presented supports a finding that, in light of the totality of the circumstances, Christian had specific and articulable facts, which taken together with rationale inferences therefrom, reasonably warranted an investigative stop of Peak.

{¶20} Peak contends that her behavior was innocent and relies upon the rationale of this court as expressed in *State v. Bird* (1988), 49 Ohio App.3d 156, and the

Fourth Appellate District in *State v. Klein* (1991), 73 Ohio App.3d 486.

{¶21} Unlike the case sub judice, the suppression of evidence in *Bird* and *Klein*, was based upon the fact that the state presented no competent, credible evidence establishing that the defendants' actions before or during the preliminary questioning indicated that the defendants were engaged in any criminal activity. In this case, information of a criminal activity, i.e., shoplifting, was gathered from the observations of two loss prevention employees, trained to identify shoplifters, and this information was communicated to Christian prior to his stop of Peak. Peak's reliance on *Bird* and *Klein* is, therefore, misplaced.

{¶22} Further, we note that in this case, the state decided to prosecute only Peak and not Smith or Tyrone, on the theft charge. Peak was the only one of the three shoplifting suspects who was reluctant to provide her legal name to the Eastlake Police. While such action may adversely contribute to the public perception towards law enforcement, it was within the discretion of the state to elect to proceed with the prosecution of Peak in this case.

{¶23} For the foregoing reasons, the trial court did not err when it denied Peak's motion to suppress. Peak's first assignment of error is without merit.

{¶24} In her second assignment of error, Peak argues that the trial court erred by denying her motion for acquittal of the theft and forgery charges. Initially, we note that this court has held that in order to preserve a sufficiency of the evidence challenge upon appeal, a defendant must renew his Crim.R. 29 motion at the close of his own case. *State v. Brown* (1993), 90 Ohio App.3d 674, 685, citing *Helmick v. Republic-Franklin Ins. Co*. (1988), 39 Ohio St.3d 71, at paragraph one of the syllabus. See, also, *State v. Hurd*, 11th Dist. No. 2001-T-0086, 2002-Ohio-7163, at ¶13; *State v. Rhodes*,

11th Dist. No. 2000-L-089, 2001-Ohio-8693, 2001 Ohio App. LEXIS 5650, at 26; *State v. Lindsey* (Sept. 23, 1994), 11th Dist. No. 93-P-0050, 1994 Ohio App. LEXIS 4266, at 3-4.

{¶25} A review of the record reveals that at the close of the state's case, Peak moved for an acquittal pursuant to Crim.R. 29. When the trial court overruled her motion, Peak elected to present a defense. At the close of all the evidence, Peak failed to renew her Crim.R. 29 motion. However, this issue was not raised on appeal. Pursuant to App.R. 12(A), the court of appeals is not required to consider issues not argued in the briefs. Thus in the interest of justice, we shall consider the issue of sufficiency under this assignment of error.

{¶26} Further, we cannot say Peak has waived a right to challenge the sufficiency on appeal when she failed to object at the close of all of the evidence. In *State v. Shadoan,* 4th Dist. No. 03CA764, 2004-Ohio-1756, at ¶16, the Fourth Appellate District held that the failure to renew a motion for acquittal at the close of all the evidence *does not* waive the argument for appellate purposes. (The court also noted that the Supreme Court of Ohio has held that a not guilty plea preserves an argument relating to the sufficiency of the evidence for appeal.)[1] See, also, *Mayfield Hts. v. Molk,* 8th Dist. No. 84703, 2005-Ohio-1176.

{¶27} Based upon the foregoing, we now address the merits of Peak's assigned error. A trial court shall grant a motion for acquittal when there is insufficient evidence to sustain a conviction. As this court stated in *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at 13-14:

1. *State v. Jones*, 91 Ohio St.3d 335, 346, 2001-Ohio-57; *State v. Carter* (1992), 64 Ohio St.3d 218, 223, 1992-Ohio-127.

{¶28} "'Sufficiency' challenges whether the prosecution has presented evidence on each element of the offense to allow the matter to go to the jury, while 'manifest weight' contests the believability of the evidence presented.

{¶29} ""(***) The test (for sufficiency of the evidence) is whether after viewing the probative evidence and the inferences drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence. ***""

{¶30} "In other words, the standard to be applied on a question concerning sufficiency is: when viewing the evidence 'in a light most favorable to the prosecution,' *** '(a) reviewing court (should) not reverse a jury verdict where there is substantial evidence upon which the jury could reasonably conclude that all of the elements of an offense have been proven beyond a reasonable doubt.' ***" (Citations omitted.)

{¶31} "*** [A] reviewing court must look to the evidence presented *** to assess whether the state offered evidence on each statutory element of the offense, so that a rational trier of fact may infer that the offense was committed beyond a reasonable doubt." *State v. March* (July 16, 1999), 11th Dist. No. 98-L-065, 1999 Ohio App. LEXIS 3333, at 8. The evidence is to be viewed in a light most favorable to the prosecution when conducting this inquiry. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Further, the verdict will not be disturbed on appeal unless the reviewing court finds that reasonable minds could not have arrived at the conclusion reached by the trier of fact. *State v. Dennis* (1997), 79 Ohio St.3d 421, 430, 1997-Ohio-372.

{¶32} Peak was convicted of one count of petty theft, a first degree misdemeanor, in violation of R. C. 2913.02(A)(1), and three counts of forgery, a fifth degree misdemeanor, in violation of R.C. 2913.31(A)(2). R.C. 2913.02(A)(1), 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: *** [w]ithout the consent of the owner or person authorized to give consent; *** ."

{¶33} Here, Peak argues that she did not conceal any items on her person, or remove any merchandise from the store premises. Thus, Peak claims that the state failed to prove that she exerted control over the merchandise with the intent to deprive Wal-Mart.

{¶34} The law does not require the store to wait until a defendant leaves the premises with merchandise to apprehend a suspect for shoplifting. *State v. Arthur*, 4th Dist. No. 01CA2818, 2002-Ohio-3764, at ¶17; *State v. Williams*, 16 Ohio App.3d 232, 234. In *Williams*, the Second Appellate District held that the least removing of an article with the intent to deprive the owner thereof is a sufficient asportation of the item, even though the property is not removed from the owner's premises nor retained in the possession of the defendant. Id. at 234. The court reasoned that to require that the defendant has left the premises with the merchandise may jeopardize the apprehension of the suspect. Thus, the state must only prove that the defendant moved the merchandise with the intent to deprive the owner of it. Id.

{¶35} At trial, the state presented evidence that Peak, along with Smith and Tyrone, entered the Wal-Mart Store, in the city of Eastlake. Two of the store's loss prevention employees, Chambers and Young, observed Peak hurriedly placing

merchandise into her cart. Shortly thereafter, they noticed Peak stuffing duffle bags with merchandise. Peak was also observed, pushing the cart with the duffle bags past the check out points, toward the exit doorway. At that same time, Tyrone was being questioned by Eastlake Police, just outside the same doorway. Peak then turned the cart around and walked back to the shoe department where she began unloading merchandise from the bags onto the floor. The merchandise from the floor area was verified as the same merchandise that the store employees observed Peak placing into the bags earlier. Further testimony indicated that price tags had been torn off from some of the merchandise.

{¶36} This evidence was sufficient for a jury to find that Peak exerted control over the merchandise with the intent to deprive Wal-Mart, and that Peak was guilty, beyond a reasonable doubt, of theft, pursuant to R.C. 2913.02(A)(1). Thus, Peak's argument is not well-taken.

{¶37} Next, Peak contends that her three forgery convictions were based upon insufficient evidence because the state failed to show that she had a "purpose to defraud" when she signed the name "Fatima Williams" to booking documents at the Eastlake Police Department. We disagree.

{¶38} R.C. 2913.31(A)(2), states that "[n]o person, with purpose to defraud, or knowing that the person is facilitating a fraud, shall *** [f]orge any writing so that it purports to be genuine when it actually is spurious, or to be the act of another who did not authorize that act, or to have been executed at a time or place or with terms different from what in fact was the case, or to be a copy of an original when no such original existed ***."

{¶39} Defraud means to "knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another." R.C. 2913.01(B). Purpose requires an intention to cause a certain result or to engage in conduct that will cause that result. R.C. 2901.22(A). Purpose or intent can be established by circumstantial evidence from the surrounding facts and circumstances in the case. *Jenks*, supra; see, also, *State v. Seiber* (1990), 56 Ohio St.3d 4, 13-14.

{¶40} At trial, the state was required to show that Peak had a purpose or intention, to defraud, i.e., to benefit herself, or cause a detriment to another. *H & W Door Co.* v. *Stemple* (Mar. 31, 1994), 11th Dist. No. 93-P-0031, 1994 Ohio App. LEXIS 1408, at 4-5.; State *v. Tiger,* 148 Ohio App.3d 61, 66, 2002-Ohio-320.

{¶41} The intent and traditional use of the forgery statute is long standing. Intent to defraud has been found to be present in a number of scenarios: when a victim incurred additional interest on a draw, and the defendant received payment for work not done, *State v. Murray* (Feb. 6, 1989), 12th Dist. No. CA88-05-038, 1989 Ohio App. LEXIS 371; when a phony hospital computer list was submitted to an insurance company as authentic, *State v. Shanely* (Feb. 9, 1994), 2d Dist No. 92-CA-68, 1994 Ohio App. LEXIS 491; when a bank account was opened using a false name and fake license, *Tiger*. Case law in Ohio demonstrates that an actual benefit or detriment need not be proven, rather, the intention to benefit oneself, based upon circumstantial evidence, is sufficient of a purpose to defraud. *Tiger* at 66.

{¶42} In the case sub judice, there were three documents that Peak signed in the name of "Fatima Williams" for which she was convicted of three counts of forgery. Testimony from the Eastlake Police indicated that these documents were "booking

documents," incidental to the theft arrest of Peak, and included the following: a personal property inventory sheet; a medical information form; and a fingerprint card.

{¶43} Peak testified that she signed the name "Fatima Williams" on the documents because there was a warrant out for her arrest and she did not want to give her real name. Thus, it is reasonable to conclude that Peak intended to receive a benefit by signing a false name, because Peak was hoping that her true identity would not have been discovered, and she would have been released from jail under a false name.

{¶44} After reviewing the record in a light most favorable to the prosecution, it is clear that the state presented sufficient circumstantial evidence from which a rational trier of fact could have found beyond a reasonable doubt that Peak had a "purpose to defraud," by signing the name "Fatima Williams" to the "booking" documents. Thus, Peak's second assignment of error is without merit.

{¶45} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas is affirmed.

DONALD R. FORD, P.J.,

WILLIAM M. O'NEILL, J.,

concur.