[Cite as *State v. Dalton*, 2009-Ohio-3149.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-P-0097**
- vs -	:	
JOHN A. DALTON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2007 CR 0544.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Stephen C. Lawson, 250 South Chestnut Street, #17, Ravenna, OH 44266 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, John A. Dalton, appeals the judgment of the Portage County Court of Common Pleas, finding him guilty of Theft. For the following reasons, we affirm the decision of the court below.

{¶2} On October 3, 2007, Dalton was indicted by the Portage County Grand Jury for one count of Theft, a felony of the fifth degree in violation of R.C. 2913.02.

{¶3} Dalton was tried before a jury between July 8 and July 10, 2008. The following testimony was given at trial.

{¶4} Betty Madison testified that she is a resident of Camelot Mobile Home Park in Streetsboro, Ohio. In the fall of 2006, she needed repair work done on her mobile home. Specifically, the flooring in her kitchen, hallway, and bathroom had been damaged by leaking water. Madison obtained a business card for Dalton & Sons Remodeling from the mobile home park's business office. She called the number on the card, spoke with Dalton, and arranged for an estimate.

{¶5} On November 1, 2006, Dalton came to Madison's home and gave her a written estimate of $3,122.43 to replace the flooring in the kitchen, hallway, and bathroom, to replace some wall panels, and to do some plumbing work. Madison testified that Dalton was alone during this visit.

{¶6} On November 13, 2006, Dalton returned to Madison's home and gave her a written estimate of $886 to replace her hot water tank. This time, Madison testified that Dalton was accompanied by his son, Joshua Lucas. According to Madison, Dalton said he would have the work done in four days and asked for payment in full as soon as possible.

{¶7} After securing the funds, Madison notified Dalton. Since Madison worked during the day, they agreed that she would leave a check for $4,008 in an envelope in her unlocked home and Dalton could pick up the check and begin the repairs.

{¶8} On December 7, 2006, Madison left the check in an envelope, made out to John A. Dalton, as agreed. When she returned home that evening, the check had been picked up and her bathroom was "a mess." According to a letter written subsequently to

Dalton, her toilet had been disconnected and set in her bathtub. "On December 8, 2006 you came and placed a white coating on my floor. A few days later your son came and moved the toilet from the shower into my bedroom. That was the last I saw or heard from you. At this time I still have a toilet in my bedroom, an unfinished bathroom floor, scrap wood laying here and there, and you have yet to even start on the kitchen repairs." Madison testified that on the day Joshua came to her home, the two of them went to Home Depot and looked at linoleum.[1]

{¶9} According to Madison, the last time she spoke with Dalton was prior to December 7, 2006, when she informed him the money was available to pay him in full for the repairs. The last time she saw Joshua was in December, when they had gone to Home Depot together. On December 29, 2006, Madison wrote a letter to Dalton threatening legal action if he did not finish the job or return her money. Thereafter, Madison continued calling Dalton & Sons but was only able to reach Joshua. He repeatedly told Madison that Dalton was not around, but that, when he returned, they would finish the repairs.

{¶10} After continuing to call for several months, Madison went to the Streetsboro Police Department to file a complaint.

{¶11} Patrolman James Wagner testified that, in August 2007, he met with Madison who explained her situation. Using the number for Dalton & Sons provided by Madison, Wagner was able to contact Dalton on the telephone. Wagner testified that Dalton claimed to have subcontracted the work on Madison's mobile home to his son,

1. The chronology of events described in the letter differed from the chronology given by Madison when testifying from memory, although the substance of the testimony was consistent. On cross-examination, Madison testified the letter provided the more accurate description of events.

Joshua. Wagner also testified that Dalton said he would repay the money by the following weekend, which he failed to do. Thereafter, Wagner filed the Theft charge.

{¶12} Dalton testified and admitted cashing the check for $4,008 left by Madison. Dalton explained that, in October 2006, he had been hired as a driver by McDougall Trucking Services and that, at the time the estimates were given to Madison, Dalton & Sons was under the exclusive management and direction of his son, Joshua. In the fall of 2006, Joshua was nineteen years old. According to Dalton, Joshua had been working with him since the age of sixteen. Although Dalton & Sons was Joshua's company, Dalton created the estimates and negotiated the contracts with Madison on his behalf. After cashing Madison's check, Dalton testified he turned all the money, in cash, over to Joshua.

{¶13} Contrary to Madison's testimony, Dalton claimed Joshua was with him during both visits to Madison's home. Dalton also claimed that he explained to Madison that Joshua would be doing the work and told her to make the check out to Joshua. According to Dalton, Madison thought it was "fantastic" that Joshua was taking over the company.

{¶14} Dalton testified that he began driving locally for McDougall on November 7, 2006. Between November 5 and 13, 2006, he and Joshua purchased materials, such as lauan, flooring, and hangers, using their own funds in anticipation of doing the work on Madison's home. Receipts for approximately $1,600 worth of materials, purchased between November 5 and 13, 2006, were introduced into evidence.

{¶15} Dalton testified that, beginning in December, he began long-distance truck driving for McDougall. In support of his claim, Dalton introduced Driver's Daily Log

forms, completed during the period from December 11, 2006, through January 11, 2007.

{¶16} Once Dalton turned the company over to his son, Joshua had sole possession of the cell phone carrying the Dalton & Sons number. Joshua returned the phone in July 2007, at which time he told Dalton he did not want to continue the business. Dalton testified he was unaware of the situation regarding the Madison contract until contacted by the police in August 2007. Dalton denied telling Patrolman Wagner that he would return the money. According to Dalton, he offered to finish the work, but Madison refused the offer.

{¶17} Joshua testified and confirmed that he was in charge of Dalton & Sons at the time the estimates were given to Madison. Contrary to Dalton's testimony, Joshua testified that he had only been working for his father for about eight months when he took control of the company. Joshua claimed the work on Madison's home was essentially completed, except for the laying of linoleum. Joshua was unable to complete the work because he was not experienced in laying linoleum and was unable to hire a qualified workman. Joshua testified that the Madison contract was the only contract Dalton & Sons had during the time he was in charge of the company.

{¶18} As a rebuttal witness, the State introduced Dottie Willis, a resident of Ravenna, Ohio. Willis testified that in May 2007, her husband contacted Dalton & Sons to obtain an estimate on a deck. That same month, Dalton came to her home and provided an estimate. Dalton was written a check for $4,800, which he cashed without returning to build the deck.

{¶19} At the conclusion of the trial, the jury found Dalton guilty of Theft and that "the value of the property of services of which the victim was deprived was $500 or more but less than $5000."

{¶20} On September 15, 2008, the trial court held a sentencing hearing, at which it sentenced Dalton to nine months incarceration. The court journalized Dalton's sentence on September 18, 2008.

{¶21} On October 17, 2008, Dalton filed his Notice of Appeal. Dalton raises the following assignments of error:

{¶22} "[1.] The verdict of the trial court is against the manifest weight of the evidence and against the sufficiency of the evidence presented."

{¶23} "[2.] The trial court erred in not granting the defendant/appellant's motion for acquittal."

{¶24} "[3.] The trial court erred in not declaring a mistrial upon the showing of prosecutorial misconduct."

{¶25} Dalton's first two assignments of error question the weight and the sufficiency of the evidence, respectively, by which he was convicted.

{¶26} The Ohio Rules of Criminal Procedure provide that a defendant may move the trial court for a judgment of acquittal "if the evidence is insufficient to sustain a conviction." Crim.R. 29(A). "'[S]ufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury," i.e. "whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52, quoting Black's Law Dictionary (6 Ed. 1990), 1433. Essentially, "sufficiency is a test of adequacy," that challenges

whether the state's evidence has created an issue for the jury to decide regarding each element of the offense. Id.

{¶27} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the 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." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 319. In reviewing the sufficiency of the evidence to support a criminal conviction, "[t]he 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." *Jenks,* 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶28} Weight of the evidence, in contrast to its sufficiency, involves "the inclination of the *greater amount of credible evidence.*" *Thompkins,* 78 Ohio St.3d at 387 (emphasis sic) (citation omitted). Whereas the "sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support the 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, at ¶25 (citation omitted). "In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's?" Id.

{¶29} Generally, the weight to be given to the evidence and the credibility of the witnesses is primarily for the trier of fact to determine. *State v. Thomas* (1982), 70 Ohio St.2d 79, at the syllabus. When reviewing a manifest weight challenge, however, the

appellate court sits as the "thirteenth juror." *Thompkins,* 78 Ohio St.3d at 387 (citation omitted). 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶30} In order to convict Dalton of Theft, the State had to prove, beyond a reasonable doubt, that Dalton "with purpose to deprive, Betty Madison, the owner, of property ***, to wit: $4,008, the value of said property being more than $500 but less than $5,000, knowingly obtain or exert control over said property *** without the consent of the owner or person authorized to give consent, beyond the scope of the express or implied consent of Betty Madison, the owner or person authorized to give consent, or by deception." Cf. R.C. 2913.02(A)(2) and (3).

{¶31} To prove "a violation of R.C. 2913.02(A)(3), the State must demonstrate that at the time the defendant took the money he had no intent to repay the money or perform under the contract in exchange." *State v. Coleman*, 2nd Dist. No. 2002 CA 17, 2003-Ohio-5724, at ¶29 (citation omitted). "[F]or a violation of R.C. 2913.02(A)(2), the State must prove that at the time the defendant exceeded the scope of consent of the owner of the money, he had the intent to deprive the owner of the money." Id. (citation omitted). "The law recognizes that intent can be determined from the surrounding facts and circumstances, and persons are presumed to have intended the natural,

reasonable and probable consequences of their voluntary acts." *State v. Garner*, 74 Ohio St.3d 49, 60, 1995-Ohio-168.

{¶32} Dalton claims the evidence presented by the State, at most, subjects him to civil liability for breach of contract, rather than criminal liability for Theft. He notes that the parties met, at Madison's request, and negotiated a contract for remodeling. Madison expressly wrote out a check to Dalton which was used in furtherance of the contract, although the work was not ultimately completed.

{¶33} With respect to the sufficiency of the evidence, the trier of fact, construing the evidence in a light most favorable to the State, could have reasonably found the essential elements of the crime proven beyond a reasonable doubt. According to the two written contracts, Dalton was supposed to install new, linoleum floors in Madison's kitchen, hallway, and bathroom, replace wall panels containing mold, and intall a new hot water tank. No part of the contract was performed with regard to the wall panels, the kitchen, and the hot water tank. On the day payment to Dalton was made in full, the floor in the bathroom was torn out. Thereafter, no substantive work on the home occurred and Madison was unable to contact Dalton. By accepting payment in full, performing minimally on the contract, and avoiding contact with Madison, it is reasonable to infer that Dalton intended to deprive her of her money by deception and/or beyond the scope of her consent.

{¶34} Numerous appellate courts have so held under factually similar circumstances. *State v. Wells*, 2nd Dist. No. 2008 CA 6, 2009-Ohio-908, at ¶49; *State v. Smith*, 12th Dist. No. CA2004-11-275, 2005-Ohio-6551, at ¶17; *State v. Wright*, 6th Dist. No. E-03-054, 2004-Ohio-5228, at ¶38.

{¶35} The Second Appellate District, in *Coleman*, demonstrates several situations in which the court found the evidence sufficient to support some Theft counts, but not others, in the context of roofing contracts. In situations where a "significant amount" of work was performed and materials purchased to complete the work, the court concluded the evidence was insufficient to support the inference that the defendant intended to deprive the victims of their money. 2003-Ohio-5724, at ¶31 and ¶40. Where the defendant had failed to perform any of the work and had not purchased materials, the court held a reasonable trier of fact could reasonably infer the intent to deprive the victims of their money. 2003-Ohio-5724, at ¶43.

{¶36} In the present case, Madison left Dalton the full amount due for labor and materials under two contracts. Dalton admitted preparing the estimates for the work and negotiating the check. Madison claims she never spoke with or saw Dalton after he received the check, until she went to the police. Dalton essentially confirms this testimony by claiming that he had given Dalton & Sons to Joshua and that he was then working as a truck driver. Finally, only an insignificant amount of the preparation work was performed: the flooring in the bathroom was removed and the toilet disconnected. Thus, our decision is consistent with the holdings in *Coleman*. Cf. *Smith*, 2005-Ohio-6551, at ¶16 ("there was sufficient evidence for the trial court to find that appellant committed a theft by deception when he failed to build a garage for Green after receiving half of the agreed price under the contract and leaving her with concrete piers and dirt for $4,000").

{¶37} With respect to the weight of the evidence, Dalton notes that there was credible evidence that over $1,500 worth of materials were purchased for Madison's

home, that Madison knew Joshua would be performing the work, and that he was no longer involved with the business of Dalton & Sons. We disagree.

{¶38} While there was testimony to support these claims, this testimony was less than credible. It is uncontroverted that Dalton, not Joshua, wrote the estimates, negotiated the contracts, and received payment therefor. Dalton's claim that over $1,500 of his own money was spent for materials is suspect, given the testimony that the only work completed was the removal of the bathroom floor. The claim that Dalton entrusted his business to a nineteen-year-old boy with insufficient experience to write estimates or install linoleum is dubious. Finally, Dalton's claim that he was not engaged in home construction after October 2006 was flatly contradicted by the testimony of Willis. Accordingly, the jury's determination that the State's evidence was more credible does not constitute a manifest miscarriage of justice.

{¶39} The first two assignments of error are without merit.

{¶40} In his third assignment of error, Dalton asserts the trial court erred by not declaring a mistrial following prosecutorial misconduct. The misconduct occurred during the cross-examination of Dalton.

{¶41} "Prosecutor: Did you walk in and tell this woman, 'My son, who is 18, has no clue what he's doing and I'm going to hand this whole thing off to him and he's going to fix your house up'?"

{¶42} "Dalton: I simply told her that he was not experienced that much in estimate writing."

{¶43} "Prosecutor: And you said she was ecstatic about that, didn't you?"

{¶44} "Defense Counsel: Objection, Judge. Mr. Michniak has a tendency to interrupt and not allow answers."

{¶45} "Trial Court: Overruled. Go ahead."

{¶46} "Prosecutor: I'm sorry, I get a little upset when I believe people are not being truthful. I'll try to slow down."

{¶47} "Defense Counsel: Oh, I --"

{¶48} "Trial Court: The jury is instructed to disregard that."

{¶49} At this point, a side bar was held at which defense counsel moved for a mistrial. The trial court denied the motion, instead issuing a curative instruction to the jury.

{¶50} "Trial Court: Ladies and gentlemen, the Court does want to caution you that any statements made by either counsel are not evidence and you're instructed to disregard any statements made by counsel during the trial that are not either questions or stipulations that they agreed to."

{¶51} "[T]he granting or denial of a motion for mistrial rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *State v. Iacona*, 93 Ohio St.3d 83, 100, 2001-Ohio-1292, citing *State v. Sage* (1987), 31 Ohio St.3d 173, 182.

{¶52} "The test for prosecutorial misconduct is whether remarks are improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Lott* (1990), 51 Ohio St.3d 160, 166 (citation omitted).

{¶53} As a general rule, "[i]t is improper for an attorney to express his personal belief or opinion as to the credibility of a witness or as to the guilt of the accused." *State*

v. Smith (1984), 14 Ohio St.3d 13, 14 (citation omitted). "[I]t is generally held to be error for the prosecuting attorney *** to declare his individual opinion or belief that defendant is guilty, in such a manner that the jury may understand such opinion or belief to be based upon something which the prosecutor knows outside the evidence." *State v. Thayer* (1931), 124 Ohio St. 1, 6 (citation omitted). However, the prosecutor is entitled to comment upon the testimony of defense witnesses, "including the defendant," where "the evidence supports the conclusion that the defendant is not telling the truth, is scheming, or has ulterior motives for not telling the truth." *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, at ¶116 (citation omitted); *State v. Keene*, 81 Ohio St.3d 646, 666, 1998-Ohio-342, (the prosecutor's comment on the witness' credibility was proper where "it neither implied knowledge of facts outside the record nor placed the prosecutor's personal credibility in issue").

{¶54} In the present case, the prosecutor's comment that he believed Dalton was lying did not prejudicially affect Dalton's substantial rights. Taken in context, the prosecutor's belief that Dalton was lying did not rest on evidence outside the record or the prosecutor's own credibility, rather is stemmed from the substance of Dalton's testimony, i.e. the improbability of Dalton entrusting the work to his unqualified teenage son.

{¶55} Assuming the comment to be improper, it was an isolated instance of prosecutorial commentary on Dalton's credibility. The trial court immediately ordered the jury to disregard the comment and subsequently issued a second curative instruction. The court's actions were sufficient to render the purported error harmless.

Garner, 74 Ohio St.3d at 59, ("a jury is presumed to follow the instructions, including curative instructions, given it by a trial judge").

{¶56} The third assignment of error is without merit.

{¶57} For the foregoing reasons, the judgment of the Portage County Court of Common Pleas, finding Dalton guilty of Theft, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

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{¶58} Believing the state failed to introduce sufficient evidence to convict Mr. Dalton of theft, and that his conviction is, consequently, against the manifest weight of the evidence, I would reverse his conviction on the basis of his first and second assignments of error.

{¶59} I agree with what is implied in the majority's opinion: that R.C. 2913.02(A)(1) is inapplicable to the facts in this case, as that requires the defendant have no consent to exercise control over the property in question. In this case, Mr. Dalton and/or his son had a contract with Ms. Madison to fix her house for $4,008: thus, they had her consent to take the check. R.C. 2913.02(A)(2) is also inapplicable: Mr. Dalton and/or his son never exceeded the scope of Ms. Madison's consent. Rather,

they failed to perform to the level of the consent she had given: i.e., they failed to fix her trailer. Thus, the question is whether the evidence presented by the state was sufficient to prove theft under R.C. 2913.02(A)(3) – by deception – and, if it was legally sufficient, whether the conviction obtained was against the manifest weight of the evidence.

{¶60} I would follow the decision of the Second Appellate District in *Coleman*, supra. The *Coleman* decision involved a roofer convicted for theft both for exceeding the scope of consent of his clients, and by deception. Id. at ¶30, 35, 39, 42. Mr. Coleman challenged his convictions as being against the manifest weight of the evidence. Id. at ¶22. The *Coleman* court reversed his convictions under both R.C. 2913.02(A)(2) and (3) in three of four instances. Id. at ¶34, 38, 41. In each case, the *Coleman* court found that the state had failed to prove that Mr. Coleman had the requisite intent to prove theft under the statute. This was based on the fact that he had at least partially performed – as, for instance, by trying to order shingles for one job. Id. at ¶33, 36, 40. Thus, he could neither be held accountable for theft pursuant to R.C. 2913.02(A)(2), since it could not be shown that, at the time he exceeded the scope of his consent, he intended to deprive the client of his money; nor could he be held liable for theft by deception, as there was no showing that he did not intend to perform at the time he took the money. Cf. id., at ¶31, 36-38, 40.

{¶61} In this case, even if the testimony of Mr. Dalton and Mr. Lucas is entirely ignored, along with their receipts for materials purchased for the Madison job, the state failed to prove any intention to not perform, at the time Ms. Madison's check was cashed in December 2006. Indeed, Ms. Madison's own testimony indicates otherwise. Her linoleum was torn up, and her toilet removed to allow work to proceed, that very

day. Later, she went to pick linoleum with Mr. Lucas, and he purchased Drano to unclog one of her pipes.

{¶62} As the state failed to present evidence on an element of the crimes charged, the evidence used to convict Mr. Dalton was insufficient. His Crim.R. 29(A) motion should have been granted. Obviously, when the state fails to even present evidence on an element of a crime, and a jury returns a verdict of guilty, that jury has lost its way, and the conviction is against the manifest weight of the evidence.

{¶63} I respectfully dissent.