

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	CASE NO. 2009-T-0105
- vs -	:	
JAMES F. PIZZULO, III,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 872.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} James F. Pizzulo, III, appeals from the judgment of the Trumbull County Court of Common Pleas, entered on a jury verdict, finding him guilty of theft, and sentencing him to twelve months imprisonment. We affirm.

{¶2} About 7:30 p.m., November 20, 2008, Chief Charles Sayers of the Bazetta Township Police arrived in his pickup truck at the Wal-Mart located at 2016 Millenium Boulevard in Bazetta, with his stepson, Adam Tenney. Chief Sayers was off duty: he was picking up his wife, Justine, who works as a pharmacy technician at the Wal-Mart. He met Mrs. Sayers at the pharmacy, and they were walking out, when she recalled she had forgotten something. She returned to get it, while Chief Sayers went to bring his truck around front.

{¶3} When Mrs. Sayers stepped out in front of the store, her husband had not yet arrived with the truck. While she waited, a car pulled up near the fire exit, and parked at an odd angle. Mrs. Sayers saw Mr. Pizzulo driving it. A moment later, a young man, later identified as Mitchell Adkins, pushing a cart burst out the fire exit of the Wal-Mart. A large box, containing a valuable flat screen television set, was in the cart. Mr. Adkins tried the trunk of the parked car; finding it locked, he opened the passenger side door, and attempted to stuff the box in the rear seat of the car. Mrs. Sayers heard the driver urging Mr. Adkins to hurry up.

{¶4} Chief Sayers arrived in his pickup truck. Mrs. Sayers yelled to him that he needed to stop the car into which Mr. Adkins was trying to load the television. That car moved off through the parking lot, with the television still sticking out the side door. Chief Sayers followed; lost sight of it momentarily, then found it, lights on, engine running, with the doors open. Nobody was in the car, but the television was still stuffed in the back seat.

{¶5} Joseph Liguori manages the Bazetta Wal-Mart. Around 7:30 p.m., November 20, 2008, he heard the emergency page, and rushed outside, banging on the

door of the security office as he passed. He found Mrs. Sayers standing in the parking lot, directing her husband where to chase the getaway car. Mr. Liguori followed her directions, and got to the car first, spotting Mr. Adkins trying to get the television fully inside. Mr. Liguori did not spot a driver.

{¶6} Michael Kehler is an associate at the Bazetta Wal-Mart. At the time of this incident, he worked in asset protection. When he heard Mr. Liguori bang on the door, he followed. He caught up to him in the parking lot. Mr. Kehler testified that when he did so, Mr. Liguori was questioning Mr. Adkins about whether he had a receipt for the television. Mr. Kehler stated he recognized Mr. Adkins as an habitual shoplifter, and called out his name, at which Mr. Adkins ran away. Mr. Kehler called 911, and followed Mr. Adkins briefly, before returning to the getaway car.

{¶7} Chief Sayers, Mr. Liguori, and Mr. Kehler all testified they did not see Mr. Pizzulo while the incident was ongoing. However, a few minutes later, while Chief Sayers was trying to inventory the car, Mr. Pizzulo walked up, identified the car as his, and asked what was occurring. Mrs. Sayers told her husband that Mr. Pizzulo was the driver of the car. After brief questioning, Chief Sayers placed Mr. Pizzulo under arrest.

{¶8} January 9, 2009, the Trumbull County Grand Jury indicted Mr. Pizzulo for theft, a fifth degree felony. He pleaded not guilty. Jury trial commenced August 10, 2009, and concluded the following day. The jury returned a verdict of guilty. Sentencing hearing was held August 25, 2009; and, the trial court filed its judgment entry sentencing Mr. Pizzulo to twelve months imprisonment September 10, 2009. Mr. Pizzulo timely noticed this appeal, assigning one error:

{¶9} “APPELLANT’S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶10} When reviewing a claim that a judgment was against the manifest weight of the evidence, an appellate court must review the entire record, weigh both the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that a new trial must be ordered. *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶11} “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.” *Martin* at 175. The role of the appellate court is to engage in a limited weighing of the evidence introduced at trial in order to determine whether the state appropriately carried its burden of persuasion. *Thompkins* at 390 (Cook, J., concurring). The reviewing court must defer to the factual findings of the trier of fact as to the weight to be given the evidence and the credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, at paragraph one of the syllabus.

{¶12} When assessing witness credibility, “[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact.” *State v. Awan* (1986), 22 Ohio St.3d 120, 123. “Indeed, the factfinder is free to believe all, part, or none of the testimony of each witness appearing before it.” *Warren v. Simpson* (Mar. 17, 2000), 11th Dist. No. 98-T-0183, 2000 Ohio App. LEXIS 1073, at 8.

Furthermore, if the evidence is susceptible to more than one interpretation, a reviewing court must interpret it in a manner consistent with the verdict. *Id.*

{¶13} In support of his assignment of error, Mr. Pizzulo points to various discrepancies in the testimony of the witnesses. These particularly concern whether the car involved was a two door, or a four door, model; whether one, or two, doors were open when Chief Sayers caught up to it in the parking lot; and where, exactly, Mr. Adkins tried to force the television into the car. We agree that the testimony on these subjects is somewhat confused. However, we note that it is not unusual for memories to fade over a period of time, and the trial in this matter occurred more than eight months following the incident.

{¶14} More importantly, there is one consistency in the evidence adduced: Mrs. Sayers firmly maintained, at all times, that she saw Mr. Pizzulo driving the car when it pulled up to the Wal-Mart, and Mr. Adkins tried to put the television into it. She was unwavering on this point; and, the jury could choose to believe her, as it obviously did.

{¶15} The assignment of error lacks merit.

{¶16} The judgment of the Trumbull County Court of Common Pleas is affirmed.

{¶17} The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.