[Cite as *State v. Powers*, 2009-Ohio-2625.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-06-071
	:	O P I N I O N
- vs -		6/8/2009
	:	
DARLENE POWERS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 07CR24405

Rachel A. Hutzel, Warren County Prosecuting Attorney, Mel Planas, 500 Justice Drive, Lebanon, OH 45036, for plaintiff-appellee

James A. Whitaker, 226 Reading Road, Mason, OH 45040, for defendant-appellant

POWELL, P.J.

{¶1} Defendant-appellant, Darlene Powers, appeals her conviction in the Warren County Court of Common Pleas for grand theft and tampering with records. We affirm the decision of the trial court.

{¶2} In March of 2007, Kings Island, an amusement park located in Warren County, discovered it was missing $75,000 from its 2006 park receipts. After further investigation, appellant, then Kings Island Cash Control Supervisor, was arrested and charged with grand

theft and tampering with records. Following a five-day jury trial, appellant was found guilty on both charges. Appellant was then sentenced to 120 days in jail, five years of community control, ordered to pay restitution, and required to attend a class on theft.

{¶3} Appellant now appeals her conviction, raising three assignments of error. For ease of discussion, appellant's assignments of error will be addressed out of order, and her first and third assignments of error will be addressed together.

{¶4} Assignment of Error No. 2:

{¶5} "THE TRIAL COURT ERRED WHEN IT ALLOWED DETECTIVE DEIDESHEIMER TO TESTIFY AS AN EXPERT."

{¶6} In her second assignment of error, appellant essentially argues the trial court erred when it allowed Detective Jerome Deidesheimer, an 11-year veteran of the Mason Police Department, to testify as an expert regarding her "jewelry purchase records," documents he received from Roger's Jewelers during his investigation, because he was not properly qualified as an expert under Evid.R. 702. This argument lacks merit.

{¶7} At the outset, it should be noted that appellant did not raise this challenge to Detective Deidesheimer's testimony at trial. It is well-established that a defendant waives all but plain error with respect to errors arising during trial that are not brought to the attention of the trial court. *State v. Howland*, Fayette App. No. CA2006-08-035, 2008-Ohio-521, ¶14, citing *State v. McKee,* 91 Ohio St.3d 292, 294, 2001-Ohio-41. An alleged error does not constitute plain error unless, but for the error, the outcome of the trial clearly would have been different. *McKee;* Crim.R. 52(B). Plain error applies only in exceptional circumstances in order to avoid a miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 95.

{¶8} After reviewing the record, and contrary to appellant's claim, we find the state did not offer Detective Deidesheimer as an expert witness, and furthermore, that he never provided any expert testimony regarding the "jewelry purchase records." In fact, while

Detective Deidesheimer did testify that he had some accounting experience due to his previous employment as a financial analyst, he also explicitly stated that he was not an accounting expert,[1] and that the jewelry purchase records were "pretty simple" to read. Therefore, appellant's claim that Detective Deideshmeir testified as an expert, and that he provided expert testimony, is simply not supported by the record.

{¶9} In addition, although not particularly clear, appellant apparently argues the trial court erred by allowing Detective Deidesheimer to render an opinion as to the veracity and credibility of Todd Stevens, another state witness, and the Director of Loss Prevention at Rodgers Jewelers. Appellant, just as noted above, also failed to raise this challenge at trial. Regardless, after a careful review of the record, we find Detective Deidesheimer did not offer any testimony, material or otherwise, relating to his opinion of Stevens' veracity and credibility. Instead, Detective Deidesheimer testified that his investigation eventually led him to Rogers Jewelers where he made contact with Stevens, that they discussed the case on the telephone "approximately three or four times," and that they met "at the headquarters of Roger's Jewelers" to review appellant's purchase records. None of Detective Deidesheimer's testimony even remotely implicates his opinion, if any, regarding Stevens' veracity and credibility. Therefore, appellant's claim that Detective Deideshmeir rendered an opinion as to the veracity and credibility of Stevens is also not supported by the record.

{¶10} Accordingly, because Detective Deidesheimer did not testify as an expert, and because he did not render an opinion as to the veracity and credibility of Stevens, appellant's second assignment of error is overruled.

{¶11} Assignment of Error No. 1:

{¶12} "THE TRIAL COURT ERRED IN OVERRULING [APPELLANT'S] CRIMINAL RULE 29 MOTION TO ACQUIT [APPELLANT] OF GRAND THEFT BECAUSE THERE WAS

1. Specifically, Detective Deideseimer stated: "I'm familiar with numbers, but God, no, I'm not an accountant."

INSUFFICIENT EVIDENCE TO SUPPORT THE CHARGES."

{¶13} Assignment of Error No. 3:

{¶14} "THE TRIAL COURT ERRED IN OVERRULING [APPELLANT'S] CRIMINAL RULE 29 MOTION TO ACQUIT [APPELLANT] OF TAMPERING WITH RECORDS BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CHARGES."

{¶15} In her first and third assignments of error, appellant argues the trial court erred in denying her Crim.R. 29 motion for acquittal, that the state provided insufficient evidence to support her conviction for grand theft and tampering with evidence, both fourth-degree felonies, and that her convictions were against the manifest weight of the evidence. These arguments lack merit.

{¶16} Our review of a trial court's denial of a Crim.R. 29 motion for acquittal is governed by the same standard as that used for determining whether a verdict is supported by sufficient evidence. *State v. Haney,* Clermont App. No. CA2005-07-068, 2006-Ohio-3899, ¶14.

{¶17} Whether the evidence presented is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. An appellate court, in reviewing the sufficiency of the evidence supporting a criminal conviction, examines the evidence in order to determine whether such evidence, if believed, would support the conviction. *State v. Carroll*, Clermont App. Nos. CA2007-02-030, CA2007-03-041, 2007-Ohio-7075, ¶117. After examining the evidence in a light most favorable to the prosecution, the appellate court must determine if "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id. Proof beyond a reasonable doubt is "proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs." R.C. 2901.05(D).

{¶18} Unlike a sufficiency of the evidence challenge, a manifest weight challenge

concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other. *Carroll* at ¶118. An appellate court considering whether a conviction was against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses. *State v. Good*, Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25, citing *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, ¶39. Under a manifest weight challenge, the question is 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. *Good* at ¶25. When conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony. *State v. Hammerschmidt* (Mar. 8, 2000), Medina App. No. CA2987-M, 2000 WL 254902 at *4.

{¶19} "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." *State v. Wilson,* Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶35. As a result, a determination that a conviction is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency. Id.

Grand Theft: R.C. 2913.02(A)(2)

{¶20} Appellant, in regard to her grand theft charge, argues that her conviction was not supported by sufficient evidence, and was against the manifest weight of the evidence, because the state failed to establish that she "ever exerted control beyond the express or implied consent over the $75,000," and that, if any evidence was presented, it was purely circumstantial. According to appellant, because the evidence presented was circumstantial, it was not "credible enough to induce a rationale juror to believe that the state had proven all the elements of grand theft beyond a reasonable doubt." We disagree with this argument.

{¶21} Appellant was convicted of grand theft, in violation of R.C. 2913.02(A)(2), which states, in pertinent part:

{¶22} "(A) No person, with the 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: * * *

{¶23} "(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent; * * *."

{¶24} Initially, it should be noted that circumstantial evidence and direct evidence have the same probative value, and that, in some instances, certain facts can only be established by circumstantial evidence. *State v. Barnett*, Butler App. No. CA2008-03-069, 2009-Ohio-2196, ¶53. In turn, a conviction based on circumstantial evidence is no less sound than one based on direct evidence. *State v. Mobus,* Butler App. No. CA2005-01-004, 2005-Ohio-6164, ¶51.

{¶25} At trial, Jason McClure, the Director of Finance with Kings Island, testified that in March of 2007, Coca-Cola, a vendor doing business in the park, sent a statement to Kings Island indicating it had paid the amusement park $205,000 in 2006, the park's share of its earned commission during that year. However, after reviewing its own records, Kings Island concluded that it had only received checks from Coca-Cola totaling $130,000. Thereafter, Kings Island, unable to determine how this variance occurred, conducted an extensive investigation and audit, which ultimately led to the discovery of a $75,000 check from Coca-Cola dated June 9, 2006 "that [the park] had no records of in [their] books," and a "financial discrepancy" stemming from May of 2006.

{¶26} McClure, as well as George Fels, the state's expert witness, a "forensic accountant," testified regarding the alleged financial discrepancy as follows:

{¶27} On May 14, 2006, Kings Island received $159,403.61 in "park cash receipts," or

money that was spent inside the park. However, a portion of those park receipts, $75,000, was not sent to the bank, nor was it found within the vault. Instead, the "missing $75,000 cash" was apparently sent to the bank on July 7, nearly six weeks later, something that was described as "highly unusual."

{¶28} After further investigating the July 7 bank deposit, it was discovered that a portion of the park receipts deposit was, in fact, "miscellaneous receipts," or receipts not made from daily park operations, but from other "special relationships" that the park has with vendors and concert promoters, and which should not have been included within the park receipts total. The miscellaneous receipts found in the July 7 deposit, something "handled" solely by appellant, included a $50,000 check from Coca-Cola, and a $20,000 check from Concert Services, Inc. In addition, it was also discovered that a portion of the July 17 park receipts deposit included two miscellaneous receipts; a $4,890.55 check from Kentucky State University, and a $120 check from a girl's basketball association. These four checks, which were deposited as park receipts instead of the miscellaneous receipts, totaled $75,010.55.

{¶29} In explaining the significance of these four checks, all miscellaneous receipts, McClure testified that the placement of the checks into the park receipts deposit effectively covered up the missing $75,000 park receipts previously generated on May 14. McClure also testified that appellant, by depositing the four checks as parks receipts, essentially created a different $75,010.55 "hole in the miscellaneous receipts." In addition, McClure, further explaining this complex scheme, testified that the $75,000 check received from Coca-Cola in July of 2006, a check that was never recorded in Kings Island's general ledger, was used by appellant "to plug the majority" of the newly created miscellaneous receipts shortfall, and that the remaining $10.55 variance was covered by a July 2, 2006 check written by appellant. The July 2 check was also not recorded on the general ledger.

{¶30} In addition to McClure's and Fels' testimony, Jerry Niederhelman, the Kings Island Operations Director, testified that the security cameras located in the money room where appellant worked, did not "cover every inch" of that room and that there were a number of "blind spots." Niederhelman also testified that on May 16, just two days after the missing $75,000 was generated and transported to the money room, appellant was the only person to go through the "man trap," a security feature restricting access to the money room. Niederhelman also testified that one does not need a duffle bag, briefcase, or anything to that effect, to make off with $75,000. When asked if that sum of money could fit into a purse, Niederhelman replied, "[a]bsolutely."

{¶31} Stevens, the Director of Loss Prevention with Rodgers Jewelers, testified that appellant made numerous jewelry purchases in 2006, totaling nearly $40,000, of which $21,000 was made solely in cash transactions. In addition, there was evidence indicating that between May of 2006 and October of 2007, appellant had deposited nearly $27,000 in cash into her bank account, money that was separate and apart from her and her husband's payroll checks.

{¶32} In her defense, appellant presented her aunt, Ruth Newell, who testified that any extra cash that her niece received was due, at least in part, to the sale of jewelry at various flea markets. However, Newell was unable to provide any receipts for these purported sales.

{¶33} Appellant also presented numerous money room employees who testified that the $75,000 was never missing from the money room, but instead, was misplaced within the money room vault. Appellant, testifying on her own behalf, reiterated that there was never any missing money, but that the money generated on May 14, which she identifies as "extra money from Math and Science Day," was merely located in the vault on the "special deposit shelf." Specifically, appellant testified as follows:

{¶34} "Q. And how did you find the money?

{¶35} "A. What do you mean, how did I find the money?

{¶36} "Q. The $75,000.

{¶37} "A. Oh, it was on the special deposit shelf.

{¶38} "Q. And what led you to that location?

{¶39} "A. Well, that's where it was. I mean that's where it had been. While I was, * * * trying to hunt down what groups it went to for Math and Science Day tickets, sales, that's where it was."

{¶40} Appellant, in attempting to explain how she was unable to locate the $75,000 for a period of six weeks, stated that her "other job duties" distracted her. Appellant also testified that the check she wrote for $10.55, the exact difference needed to cover the variance found in the miscellaneous receipts, "could have been part of * * * like a box of hamburgers or something like that * * * because we grilled out," but that she did not remember specifically.

{¶41} In this case, while much of the evidence against appellant is circumstantial, viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could find the elements of grand theft were proven beyond a reasonable doubt. As noted above, when conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony. *Hammerschmidt*, 2000 WL 254902 at *4. Therefore, we cannot say that the jury clearly lost its way in finding the evidence presented by the state supported appellant's grand theft conviction. Accordingly, because we cannot say appellant's conviction created such a manifest miscarriage of justice, we find no reason to disturb the jury's finding of guilt.

Tampering With Records: R.C. 2913.42(A)(1)

{¶42} In regard to her tampering with records charge, appellant essentially argues her

conviction was not supported by sufficient evidence, and was against the manifest weight of the evidence, because the state failed to provide any evidence that "would give rise to any reasonable inference that [a]ppellant acted with any purpose to defraud." This argument lacks merit.

{¶43} Appellant was convicted of tampering with records, in violation of R.C. 2913.42(A)(1), which states in pertinent part:

{¶44} "(A) No person, knowing the person has no privilege to do so, and with purpose to defraud or knowing that the person is facilitating a fraud, shall do any of the following:

{¶45} "(1) Falsify, destroy, remove, conceal, alter, deface, or mutilate any writing, computer software, data, or record; * * *."

{¶46} At trial, there was evidence indicating appellant documented the $75,000 generated on May 14 as being picked up and transported to the bank on May 17, 2006. However, there was never a pick up on that date. In addition, there was evidence indicating appellant failed to document the receipt and deposit of the $75,000 Coca-Cola check, and her own $10.55 check on the miscellaneous receipts log, which effectively concealed the missing funds for approximately eight months.

{¶47} Again, while much of the evidence against appellant was circumstantial, viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could find the elements of tampering with records were proven beyond a reasonable doubt. As a result, we cannot say that the jury clearly lost its way in finding the evidence supported appellant's tampering with records conviction, and therefore, because we cannot say appellant's conviction created such a manifest miscarriage of justice, we find no reason to disturb the jury's finding of guilt.

{¶48} As we have already determined appellant's convictions for grand theft and tampering with records was not against the manifest weight of the evidence, we necessarily

conclude that there was sufficient evidence to support the guilty verdicts in this case, and that the trial court did not err in denying her Crim.R. 29 motion for acquittal. Accordingly, appellant's first and third assignments of error are overruled.

{¶49} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.

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