[Cite as *State v. Morgan*, 2009-Ohio-6050.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLINTON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-08-035
	:	O P I N I O N
- vs -		11/16/2009
	:	
RUBEN MORGAN,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CRI2008-5139

Richard W. Moyer, Clinton County Prosecuting Attorney, Andrew McCoy, 103 East Main Street, Wilmington, OH 45177, for plaintiff-appellee

Nicholas A. Adkins, 67 East High Street, London, OH 43140, for defendant-appellant

YOUNG, J.

{¶1} Defendant-appellant, Ruben Morgan, appeals his conviction in the Clinton County Court of Common Pleas for theft.

{¶2} Appellant was indicted in May 2008 on one count of theft in violation of R.C. 2913.02(A)(1). The state alleged that on May 14, 2008, appellant entered the Wilmington Wal-Mart in Clinton County, Ohio; put a Sanyo 42-inch HD LCD television

valued at $988.68 onto a shopping cart; walked past the store's cash registers without paying for the television; triggered the store's electronic alert surveillance (EAS) system; after talking to the greeter, proceeded toward the exit doors where he was confronted by the assistant store manager; ultimately abandoned the television and the cart in the store; left the store, quickly walked to a getaway car, and fled the parking lot. On August 13, 2008, a jury found appellant guilty as charged.

{¶3} Appellant timely appeals, raising four assignments of error.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT ERRED IN THAT THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶6} Assignment of Error No. 2:

{¶7} "THE COURT ERRED WHEN IT ENTERED A JUDGMENT OF CONVICTION THAT WAS AGAINST THE SUFFICIENCY OF THE EVIDENCE."

{¶8} Appellant argues his conviction was supported by insufficient evidence and was against the manifest weight of the evidence because the state failed to prove (1) appellant acted without the consent of Wal-Mart when he placed the television into his shopping cart and proceeded to the front of the store, and (2) appellant intended to deprive Wal-Mart of the television. Appellant asserts that the testimony presented by the state is nothing more than a description of appellant's shopping manner, that is, the behavior of a customer who placed an item in a shopping cart, proceeded to the front of the store, then decided not to purchase the item and exited the store, leaving the item and the cart inside the store.

{¶9} "In reviewing a claim of insufficient evidence, '[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.'" *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, ¶70, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. A reviewing court must not substitute its evaluation of the witnesses' credibility for that of the jury. See *State v. Holdbrook*, Butler App. No. CA2005-11-482, 2006-Ohio-5841.

{¶10} When reviewing whether a conviction is against the manifest weight of the evidence, "[t]he 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. 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." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. When reviewing the evidence, an appellate court must be mindful that the original trier of fact was in the best position to judge the credibility of witnesses and the weight to be given the evidence. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶11} Appellant was convicted of theft in violation of R.C. 2913.02(A)(1), which states: "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services *** without the consent of the owner or person authorized to give consent."

{¶12} At trial, the state presented the testimony of three witnesses, two employees of the Wilmington Wal-Mart and a Wilmington police officer. A surveillance videotape of appellant's conduct in parts of the store was also shown to

the jury. Appellant did not testify or present evidence on his behalf. Testimony at trial revealed the following:

{¶13} Diane Fox is one of the store's asset protection employees; Rocky Patterson is an assistant store manager. On May 14, 2008, Fox noticed appellant and another man push an empty shopping cart in the electronics department, place a Sanyo 42-inch HD LCD television in the cart, and leave the department. Appellant's failure to ask for customer service, to look at the price of the television, or to compare prices and televisions triggered her suspicion. Fox continued to observe appellant after the other man left (the individual left once the television was put in the cart). Appellant proceeded down the store's main aisle, passed the store's cash registers without paying for the television, and headed toward the exit doors. Appellant triggered the store's EAS system and was stopped by a store greeter. After telling the greeter his wife had the receipt, appellant proceeded to the exit doors with the television in the cart and attempted to leave the store.

{¶14} At this point in time, appellant was in the store's vestibule, an area past the store's EAS system and ending with the exit doors. Fox followed appellant into the vestibule. Patterson, whom she had alerted, was outside the store, outside of the exit doors waiting for appellant. As the exit doors opened, Patterson approached appellant and put his hand on the cart. At that point in time, the cart was partly in the vestibule and partly past the exit doors. Patterson and Fox asked appellant to come back inside. Appellant took a few steps back into the store without the cart, subsequently abandoned the television and the cart, left through the exit doors and quickly walked to a car, all the while ignoring Patterson and Fox, and got into the passenger seat. The car then left the parking lot at a high rate of speed. Appellant

never talked to Patterson or Fox. Patterson called the police and provided them with a description of the car, appellant, and the driver.

{¶15} Appellant was subsequently apprehended and returned to the Wilmington Wal-Mart where he was identified by Fox and Patterson as the person who tried to leave the store with the Sanyo 42-inch HD LCD television. Fox testified that appellant was not authorized to leave the store with the television without paying for it. The Wilmington police officer who took appellant back to the store testified that appellant did not have any identification on him and that he verbally identified himself as Benjamin Jenkins III. The officer faxed appellant's fingerprints to the FBI to verify that appellant was who he said he was. According to the FBI search, appellant had multiple aliases, including the name Ruben Morgan which was in fact his real name. While being transported, appellant told the officer that "it was simply just theft, and it was better than being [ ] out selling drugs or robbing people."

{¶16} Upon thoroughly reviewing the record, we find that appellant's theft conviction was supported by sufficient evidence and was not against the manifest weight of the evidence. Had he not been prevented from leaving the store with the television by Patterson, appellant would have left the store with a television he did not pay for. Appellant was not authorized to leave the store with the television without paying for it. Appellant ignored requests by Fox and Patterson to come back in the store and never offered an explanation for his behavior, such as his wife had the receipt for the television or he had changed his mind about purchasing the television. Based on his behavior from the time he put the television in the cart to his attempt to go through the exit doors with the television, as well as his comment to the police officer, we find that appellant acted without the consent of Wal-Mart when he

placed the television into his shopping cart and proceeded to the exit doors with the television, and that appellant intended to deprive Wal-Mart of the television without paying for it.

{¶17} Appellant's first and second assignments of error are accordingly overruled.

{¶18} Assignment of Error No. 3:

{¶19} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT FAILED TO COMPLY WITH OHIO RULE OF CRIMINAL PROCEDURE 16."

{¶20} Appellant argues the trial court violated Crim.R. 16(B)(1)(c) when it failed to order the state to provide appellant with the entire Wal-Mart surveillance videotape of the incident as requested by appellant. The record shows that the original 12-hour videotape of the day of the incident was edited by the Wilmington Wal-Mart asset protection coordinator, and the edited version was provided to the state. The state, in turn, provided it to appellant, and appellant's attorney viewed the edited videotape.

{¶21} Crim.R. 16(B)(1) governs what information must be disclosed to the defense prior to trial and states in relevant part:

{¶22} "Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody, or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belonging to

the defendant." Crim.R. 16(B)(1)(c).

{¶23} As Crim.R. 16(B)(1)(c) indicates, the state must have possession, custody, or control of documents and tangible items before they are subject to disclosure. The state is not required to provide to a defendant evidence which is not in its possession but which is instead in the possession of a third party. See *State v. Eskridge* (Sept. 10, 1991), Franklin App. No. 91AP-182.

{¶24} The record shows that on July 24, 2008, appellant moved the trial court to compel discovery of the original unedited surveillance videotape of the theft. As an entry filed on July 29, 2008 indicates, "By entry filed July 25, 2008, the Court set the Motion for expedited hearing this date. Defendant was transported from jail to participate in the hearing. No one from the state of Ohio or the public defender's office appeared. The hearing is canceled." At trial, before opening arguments, the trial court addressed the issue of the videotape with the state and appellant's attorney.

{¶25} Appellant's attorney stated he asked the state for a copy of the videotape the state intended to use at trial and the state provided the edited videotape. Upon reviewing the edited videotape, appellant's attorney wanted to view the original, unedited videotape of the theft; unfortunately, the state was unable to provide the unedited videotape. The edited videotape had been provided to the state by Wal-Mart, but the state was technologically unable to play the 12-hour videotape or transfer it to a VHS tape. The state did not prevent appellant's attorney from viewing the 12-hour videotape. Neither the state nor appellant's attorney viewed the 12-hour videotape. Appellant's attorney ultimately withdrew his motion to compel discovery of the unedited videotape and stated he had no objection to the

introduction of the edited videotape.

{¶26} In light of the foregoing, we find there has been no Crim.R. 16 violation. See *Eskridge*, Franklin App. No. 91AP-182. Appellant's third assignment of error is overruled.

{¶27} Assignment of Error No. 4:

{¶28} "PROSECUTORIAL MISCONDUCT RENDERED DEFENDANT-APPELLANT'S TRIAL FUNDAMENTALLY UNFAIR IN VIOLATION OF THE CONSTITUTIONS OF OHIO AND THE UNITED STATES."

{¶29} Appellant argues the state committed prosecutorial misconduct throughout the trial by improperly referring to appellant's aliases during voir dire, the testimony of the state's witnesses, and closing arguments.

{¶30} The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶62. In reviewing allegations of prosecutorial misconduct, it is the duty of this court to consider the complained of conduct in the context of the entire trial. *State v. Waters*, Butler App. No. CA2002-11-266, 2003-Ohio-5871, ¶23. The touchstone of the analysis is the fairness of the trial, not the culpability of the prosecutor. *State v. Lott* (1990), 51 Ohio St.3d 160, 166. The Ohio Supreme Court has held that prosecutorial misconduct is not ground for error unless the defendant has been denied a fair trial. *State v. Maurer* (1984), 15 Ohio St.3d 239, 266; *State v. Ghee*, Madison App. No. CA2008-08-017, 2009-Ohio-2630, ¶42.

{¶31} The prosecutor's references to appellant's aliases started after statements made by both the trial court and appellant's attorney. On the first morning

of the trial, while addressing the prospective jurors and the indictment against appellant, the trial court referred to appellant as "Ruben Morgan." Subsequently, when introducing himself to the prospective jurors, appellant's attorney identified himself as "being trial counsel for Mr. Benjamin Jenkins." The following colloquy ensued:

{¶32} "THE COURT: Okay. Just so there's no confusion, you're identifying this gentleman as Benjamin Jenkins. The State has identified Defendant as Ruben Morgan. So, we'll just call him the Defendant at this time, okay."

{¶33} "[APPELLANT'S ATTORNEY]: That's fine, your Honor. He's never identified himself to me as anything other than Benjamin Jenkins, although I do understand there's an identity issue."

{¶34} During voir dire, the prosecutor mentioned the fact appellant was referred to by two different names, and asked the prospective jurors whether they knew what an alias was and whether it was a problem if "somebody goes by two different names." Appellant's attorney told the prospective jurors that while appellant had two different names, the issue was not which name he went by. Appellant's attorney reiterated that his client always introduced himself to him as "Mr. Jenkins." The trial court told the prospective jurors that the issue of which name appellant went by was irrelevant; appellant's use of different names was not an element of the theft offense; and the prosecutor was required to prove that Ruben Morgan committed a theft offense. During voir dire, two prospective jurors were excused because of their stance on appellant's use of two different names.

{¶35} While asking questions during the direct examination of Fox and Patterson, the two Wal-Mart employees, the prosecutor referred to appellant a few

times as "Ruben Morgan also known as (or a.k.a.) Benjamin Jenkins." Appellant did not object.

{¶36} During the police officer's direct examination, the prosecutor asked if on May 14, 2008, the officer came in contact "with an individual who you would later identif[y] as Ruben Morgan, a.k.a. Benjamin Jenkins, a.k.a. Monte Carlo Catrell, a.k.a. Benjamin Jenkins III, a.k.a. Boo Wilson, a.k.a. Vatino Harris, a.k.a. Benjamin Jenkins, Jr., a.k.a. Benjamin N. Jenkins, a.k.a. Hazell Wilson." Appellant's attorney objected on the ground he had never heard any of these names before. The objection was overruled. Later on, the prosecutor asked whether the officer had discovered any aliases for appellant. The officer explained that when arrested, appellant did not have any identification on him; as a result, she faxed appellant's fingerprints to the FBI to verify that appellant was who he said he was. According to the FBI search, appellant had multiple aliases.

{¶37} On cross-examination, the officer further explained that when apprehended, appellant introduced himself as Benjamin Jenkins III; the FBI search uncovered multiple aliases, including the name Ruben Morgan which was in fact his real name; and when asked about his numerous aliases, appellant told the officer 'he ha[d] used multiple aliases [in the past], and ha[d] *** used so many false names that he got tired of lying, so he started telling his real name, which was Benjamin Jenkins III."

{¶38} During closing arguments, the prosecutor once referred to appellant as "Mr. Morgan, a.k.a. Mr. Jenkins, a.k.a. Monte Carlo. It's no wonder that it is so difficult for the Defendant to keep all his names straight;" and once referred to appellant as "the Defendant, Ruben Morgan, a.k.a. Benjamin Jenkins." During

rebuttal, the prosecutor stated "Mr. Jenkins, Mr. Morgan, and all of his other aliases, this Defendant, takes a TV in a cart and goes right to the front door with it[.]" Appellant did not object during closing argument or rebuttal.

{¶39} Except once during the officer's direct examination, appellant's attorney did not object to the alleged prosecutorial misconduct. As such, any perceived error which was not brought to the attention of the trial court is waived unless it rises to the level of plain error. Crim.R. 52; *State v. VanLoan*, Butler App. No. CA2008-10-259, 2009-Ohio-4461, ¶33. Prosecutorial misconduct rises to the level of plain error if it is clear the defendant would not have been convicted in the absence of the improper comments. Id.

{¶40} Upon reviewing the record, we find no grounds to reverse appellant's conviction based upon prosecutorial misconduct. The prosecutor's comments during voir dire were initially triggered by the fact the trial court and appellant's attorney had referred to appellant by two different names. It is proper for a prosecutor during voir dire to determine prospective jurors' views on issues they may be considering if seated as juror. The trial court told the prospective jurors that the issue of which name appellant went by was irrelevant; appellant's use of different names was not an element of the theft offense; and the prosecutor was required to prove that Ruben Morgan committed a theft offense. The only two prospective jurors who expressed concern about appellant's use of two different names were excused. We find that the comments were not improper.

{¶41} The prosecutor's references to appellant as "Ruben Morgan also known as (or a.k.a.) Benjamin Jenkins" during the direct examination of Fox and Patterson were likewise not improper. Given that appellant was known by two different names

by the prosecutor and appellant's attorney, we cannot say the remarks denied appellant a fair trial.

{¶42} With regard to the prosecutor's recitation of the multiple aliases used by appellant during the police officer's direct examination, we find no plain error. First, we find that the recitation by the prosecutor was not necessarily improper. Further, given the evidence against appellant, we find that even in the absence of the recitation, he would have been convicted of theft.

{¶43} Finally, we find that the prosecutor's comments during closing arguments were not improper. Prosecutors are "normally entitled to a certain degree of latitude in [their] concluding remarks." *State v. Smith* (1984), 14 Ohio St.3d 13, 13-14. However, prosecutors must avoid insinuations and assertions calculated to mislead, and cannot go beyond the evidence which is before the jury when arguing for a conviction. Id. at 14. The prosecutor did neither. The prosecutor's references to "Ruben Morgan, a.k.a. Benjamin Jenkins," "Mr. Jenkins, Mr. Morgan, and all of his other aliases," and "Mr. Morgan, a.k.a. Mr. Jenkins, a.k.a. Monte Carlo," followed by the comment "It's no wonder that it is so difficult for the Defendant to keep all his names straight" were not assertions calculated to mislead and did not go beyond the evidence before the jury. Rather, the remarks were simply comments upon the testimony of the state's witnesses, in particular the police officer. According to the officer, when asked about his numerous aliases, appellant told the officer 'he ha[d] used multiple aliases [in the past], and ha[d] *** used so many false names that he got tired of lying, so he started telling his real name."

{¶44} In light of the foregoing, we find that the state did not commit prosecutorial misconduct throughout the trial. Appellant's fourth assignment of error

is overruled.

{¶45} Judgment affirmed.

BRESSLER, P.J., and RINGLAND, J., concur.