[Cite as *State v. Noble*, 2015-Ohio-652.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-06-080
	:	O P I N I O N
- vs -		2/23/2015
	:	
JUSTIN DYLAN NOBLE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 13CR29516

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Bryan Scott Hicks, P.O. Box 359, Lebanon, Ohio 45036, for defendant-appellant

PIPER, P.J.

{¶ 1} Defendant-appellant, Justin Dylan Noble, appeals from his conviction and sentence in the Warren County Court of Common Pleas for numerous counts of theft and receiving stolen property. For the reasons outlined below, we affirm in part and reverse in part the judgment of the trial court. We affirm Noble's conviction. We vacate Noble's sentence and remand the matter for resentencing.

{¶ 2} The facts in this case are generally undisputed. Between July 17 and 19, 2013,

Noble, along with Keenan Davidson, engaged in a series of thefts. Noble and Davidson broke into numerous vehicles and stole items such as electronics and medication. During the crime spree, three vehicles were also stolen. Two vehicles were allegedly stolen by Davidson and one vehicle was allegedly stolen by Noble.

{¶ 3} As a part of an investigation conducted by Detective Paul Barger from the Warren County Sheriff's Office, Noble accompanied Detective Barger in a police cruiser to visit the areas where the thefts occurred. During this ride along, Noble detailed the numerous thefts and explained both his and Davidson's levels of involvement.

{¶ 4} Noble was indicted on 16 total counts.[1] Relevant to this appeal, Noble was charged in Counts 3 and 6 with theft in violation of R.C. 2913.02(A)(1) where the value of the stolen items was equal to or greater than $1,000 and less than $7,500, elevating the thefts to felonies of the fifth degree. The bill of particulars specified that Noble stole laptop computers.

{¶ 5} At a two-day jury trial, 13 victims testified, including Darren Heath and Jonathan Lloyd. Detective Barger also testified. Heath testified that on the morning of July 18, 2013, he noticed a bag missing from his vehicle that contained numerous electronics he used in his business. Heath testified that two laptops were in the bag, with one laptop worth $1,000 and the other laptop worth $1,200. Lloyd testified that on the morning of July 18, 2013, he also noticed a bag containing his laptop he used within his employment missing from his vehicle. Lloyd testified that the laptop was worth $1,200. Detective Barger testified that Noble

1. Specifically, Noble was charged with two counts of receiving stolen property in violation of R.C. 2913.51(A), felonies of the fourth degree; two counts of theft in violation of R.C. 2913.02(A)(1) where the value of stolen items was equal to or greater than $1,000 and less than $7,500, felonies of the fifth degree; five counts of theft in violation of R.C. 2913.02(A)(1) where the stolen property involved was of the type listed in R.C. 2913.71, felonies of the fifth degree; five counts of theft in violation of R.C. 2913.02(A)(1), misdemeanors of the first degree; one count of theft of drugs in violation of R.C. 2913.02.(A)(1), a felony of the fourth degree; and one count of grand theft of a motor vehicle in violation of R.C. 2913.02(A)(1), a felony of the fourth degree. Eventually dismissed were two counts of theft in violation of R.C. 2913.02(A)(1) where the stolen property involved was of the type listed in R.C. 2913.71.

specifically admitted to removing a bag from a yellow Dodge identified as belonging to Heath. Detective Barger also testified that Noble specifically admitted to stealing a bag from a Hyundai identified as belonging to Lloyd.

{¶ 6} After hearing the evidence, the jury found Noble guilty of all counts. When sentencing Noble, the trial court stated:

> So, the sad but true tail [sic] is that you have learned nothing in your young life. The only positive thing that anybody can say about you is you did cooperate with the police here. But you wasted this jury's time with this trial. There was absolutely nothing your attorney could do for you. You had no defense whatsoever. You committed every one of these crimes as clearly as could be.
>
> The jury took every opportunity to look at it and scrutinize the evidence carefully, but this isn't a case where you had some legitimate defense to the claim, you just simply took a shot and hoped that the jury was dumb enough to buy some of these nonsensical arguments. So, this court will not give you any benefit of leniency.
>
> On the other hand, I don't accept the argument that maximum consecutive sentences are appropriate either. You did help the police officer, you do get some credit for that. You don't get the same kind of leniency you would have gotten if you had just fessed up, taken responsibility and said, okay, I got caught, I screwed up, now what's my prison sentence.
>
> You're going to prison for these crimes and there's no ifs, ands or butts [sic] about it. The harm is just extraordinary and the nature of the crime spree is overwhelming.

The trial court then sentenced Noble to a total of eight years in prison to be served consecutively to Noble's sentence in two other cases.

{¶ 7} Noble now appeals his conviction and sentence, asserting two assignments of error for review.

{¶ 8} Assignment of Error No. 1:

{¶ 9} [NOBLE] WAS PENALIZED FOR EXERCISING HIS CONSTITUTIONAL RIGHT TO A TRIAL.

{¶ 10} Noble argues that the trial court penalized him for exercising his right to a jury trial. Specifically, Noble asserts that the trial court statements indicating that the trial was a waste of time and that Noble would not be granted the same leniency he otherwise would have been afforded if he had pled guilty created an appearance that the trial court punished him for pursuing a jury trial.

{¶ 11} It is axiomatic that "a defendant is guaranteed the right to a trial and should never be punished for exercising that right." *State v. O'Dell*, 45 Ohio St.3d 140 (1989), at paragraph two of the syllabus. "[T]he augmentation of sentence based upon a defendant's decision to stand on his right to put the government to its proof rather than plead guilty is improper." *State v. Scalf*, 126 Ohio App.3d 614, 620-21 (8th Dist.1998). "Accordingly, a trial court may not impose an increased sentence in retaliation for the defendant choosing to exercise his right to trial, regardless of whether the evidence of his guilt is said to be overwhelming." *State v. Mayles*, 7th Dist. Carroll No. 04 CA 808, 2005-Ohio-1346, ¶ 45.

{¶ 12} Moreover, it is improper for a trial court to create the mere appearance that it has augmented a defendant's sentence because he has elected to put the government to its proof. *State v. Howard*, 5th Dist. Stark No. 2012CA00061, 2013-Ohio-2884, ¶ 82; *United States v. Hutchings*, 757 F.2d 11, 14 (2d Cir.1985). A court may not make statements from which someone may infer that a defendant may have been punished for pursuing a jury trial. *State v. Morris*, 159 Ohio App.3d 775, 2005-Ohio-962, ¶ 13 (4th Dist.). Statements made by the trial court that create such an inference cause a chilling effect on requesting a trial. *See United States v. Stockwell*, 472 F.2d 1186, 1187 (9th Cir.1973), citing *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969). When an appearance of an augmented sentence is created, even when a defendant may not in fact have been punished for electing to go to trial, a defendant's sentence must be vacated. *Morris* at ¶ 13; *United States v. Medina-Cervantes*, 690 F.2d 715, 717 (9th Cir.1982). Nevertheless, vacating a defendant's

sentence is not necessary if the court unequivocally dispels any such inference by clearly stating the defendant's decision to go to trial was not considered in imposing the sentence. *Morris* at ¶ 13; *Scalf* at 621; *Hutchings* at 14. The appearance of a trial tax is impermissible as it creates a chilling effect on one's constitutional right to trial. *See Stockwell* at 1187.

{¶ 13} While we do not believe that the experienced trial judge actually punished Noble for pursuing a jury trial, the record evidences statements from which a person could infer precisely such a prejudice. At sentencing, the trial judge stated: "But you wasted this jury's time with this trial." The judge continued: "[T]his isn't a case where you had some legitimate defense to the claim, you just simply took a shot and hoped that the jury was dumb enough to buy some of these nonsensical arguments. So, this court will not give you any benefit of leniency." Upon hearing these statements, the inference could easily be made that the trial court imposed a different sentence upon Noble simply because he exercised his right to a jury trial. The trial court further stated that imposing maximum consecutive sentences was not appropriate, but that Noble would not be afforded the same leniency he would have received had he pled guilty.

{¶ 14} We acknowledge that the trial court continued: "The harm is just extraordinary and the nature of the crime spree is overwhelming." While this last statement may indicate that the trial court sentenced Noble to eight years in prison based upon appropriate considerations, the trial court did not unequivocally state that Noble's pursuit of a jury trial was not a factor in imposing his sentence.

{¶ 15} We find that the statements made by the trial court created the appearance from which an inference could be made that it may have augmented Noble's sentence because he exercised his right to a jury trial. Moreover, there is no evidence in the record that the trial court made an unequivocal statement that Noble's sentence was not more severe because he exercised his constitutional right. Such a sentence delivered unclearly

does not shine brightly upon the fair and even administration of justice required by law. While the sentence may have been diligently and appropriately rendered in all other respects, the impression inadvertently created by the trial court requires Noble's sentence to be vacated. Accordingly, we vacate Noble's sentence, and remand the matter for resentencing. Noble's first assignment of error is sustained.

{¶ 16} Assignment of Error No. 2:

{¶ 17} THE VERDICT WAS AGAINST THE SUFFICIENCY OF THE EVIDENCE.

{¶ 18} Noble argues that Counts 3 and 6 pertaining to theft were not supported by sufficient evidence because the value of the stolen property was not established to exceed $1,000 in order for the thefts to constitute fifth-degree felonies. Specifically, Noble asserts that there was insufficient evidence of the items' fair market value because the only evidence presented was the testimony of the victims.

{¶ 19} Whether the evidence presented at trial is legally sufficient to sustain a verdict is a question of law. *State v. Grinstead*, 194 Ohio App.3d 755, 2011-Ohio-3018, ¶ 10 (12th Dist.); *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). When reviewing the sufficiency of the evidence claim, this court examines the evidence in order to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Paul*, 12th Dist. Fayette No. CA2011-10-026, 2012-Ohio-3205, ¶ 9. "The 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. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶ 37, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. 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(E). When evaluating the sufficiency of the evidence, this court defers to the trier of fact regarding

questions of credibility. *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, ¶132.

{¶ 20} Noble does not contest the sufficiency of the evidence regarding the actual theft of the items outlined in the bill of particulars for Counts 3 and 6. Rather, Noble challenges the sufficiency of the evidence supporting his conviction for the thefts as fifth-degree felonies. R.C. 2913.02(B)(2) elevates theft from a misdemeanor to a fifth-degree felony when the "value of the property * * * stolen is one thousand dollars or more and is less than seven thousand five hundred dollars." R.C. 2913.61(A) states: "When a person is charged with a theft offense * * * the jury or court trying the accused shall determine the value of the property or services as of the time of the offense and, if a guilty verdict is returned, shall return the finding of value as part of the verdict." R.C. 2913.61(D)(2) provides guidance on how to value the stolen property, and states:

> The value of personal effects and household goods, and of materials, supplies, equipment, and fixtures used in the profession, business, trade, occupation, or avocation of its owner, * * * which retains substantial utility for its purpose regardless of its age or condition, is the cost of replacing the property with new property of like kind and quality.

{¶ 21} In the case at bar, two victims testified as to the value of property stolen from each of their respective vehicles. Heath testified that a bag was stolen from his vehicle that contained several electronic items used in his employment as a computer IT manager. Heath testified that two laptops were stolen with one laptop worth $1,000 and the other laptop worth $1,800. A second victim, Lloyd, testified that a laptop he used within his employment was stolen from his vehicle that was worth $1,200.

{¶ 22} In each instance, the value of the property stolen exceeded $1,000 as testified to by the victims. This testimony sufficiently supports a finding that elevates the thefts from misdemeanors to fifth-degree felonies, and we defer to the jury regarding issues of credibility. *See State v. Penwell*, 12th Dist. Fayette No. CA2010-08-019, 2011-Ohio-2100, ¶ 67-69

(where victim testified as to the purchase price of stolen computer and television there was sufficient evidence to convict defendant of a higher degree theft offense); *State v. Palmer*, 8th Dist. Cuyahoga No. 89957, 2008-Ohio-2937, ¶ 15 (where victim testified that the total value of items stolen exceeded a certain amount, there was sufficient evidence to convict defendant of felony theft). When viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found that the value of the stolen items exceeded $1,000 in each instance beyond a reasonable doubt. Noble's second assignment of error is overruled.

{¶ 23} Judgment affirmed in part and reversed in part. Noble's conviction is affirmed, and this opinion in no way affects the guilty verdicts issued by the jury. Noble's sentence is vacated, and the matter is remanded for resentencing.

HENDRICKSON and M. POWELL, JJ., concur.