[Cite as *State v. Shields*, 2009-Ohio-3545.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2008-CA-00279
TERESA R. SHIELDS	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Alliance Municipal Court, Case No. 2008CR00920
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 20, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
NED CASALE 470 East Market Street Alliance, OH 44601	AARON KOVALCHIK 111 Second Street N.W. Suite 302 Canton, OH 44702

Gwin, P.J.

{¶1} Appellant Teresa R. Shields appeals the judgment of the Alliance Municipal Court, Stark County, Ohio, convicting and sentencing her for one count of theft, a misdemeanor of the first degree, in violation of R.C. 2913.02. The appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} Tonya Tackett testified that on May 12, 2008 appellant came over to her house. Ms. Tackett and appellant were to retrieve a truck belonging to Ms. Tackett's sister from the impound lot. When appellant arrived, Ms. Tackett was on the telephone paying bills with her bankcard. When she finished, Ms. Tackett placed the bankcard in her purse. Ms. Tackett testified that she went to the bathroom and upon exiting, appellant stated that she had to leave. Approximately ten minutes later, appellant returned and asked Ms. Tackett for a cigarette and a lighter. Ms. Tackett pointed toward her purse. Appellant again left the residence with Ms. Tackett leaving a short time later.

{¶3} Ms. Tackett testified that she then used her bankcard in order to retrieve her sister's truck from impound and to get some food. Ms. Tackett stated she later attempted to withdraw money from an ATM, but she could not because she had insufficient funds. Upon inquiry, the bank informed her that there had been a non-bank ATM transaction in the amount of $201.75 earlier in the day. Ms. Tackett contacted appellant who denied withdrawing the money from the ATM. Ms. Tackett testified that appellant had asked her for money the day before this incident and she gave appellant

the PIN number for her bank card because appellant was driving and she was in the passenger seat. Ms. Tackett then filed a police report.

{¶4} Officer Seth Busche of the Alliance Police Department testified that on May 12, 2008 he made contact with Tonya Tackett regarding a stolen credit card. Officer Busche testified that he retrieved a surveillance video tape from a nearby convenience store for the date and time that the bank indicated Ms. Tackett's card had been used to withdraw the money. Officer Busche stated that the video tape showed appellant using the ATM.

{¶5} Appellant testified that on the day in question Tonya Tackett gave her the ATM card and PIN so that appellant could withdraw the money Ms. Tackett needed to help get her sister's truck out of impound. Appellant testified that she then went to the Get Go Station in question to get the money and she immediately returned to Tackett's home. Appellant testified that her abrupt departure from Tackett's home was due to a phone call she got from her son's school. Appellant denied Tackett accused her of stealing the money and stated that they did discuss appellant owing money to Ms. Tackett's daughter for babysitting.

{¶6} The jury found appellant guilty as charged. The trial court sentenced appellant to ten days in the Stark County Jail, a $100.00 fine and court costs. The trial court suspended seven days of the jail sentenced and further ordered appellant pay restitution.

{¶7} Appellant has timely appealed, raising as her sole assignment of error:

{¶8} "I. APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

I.

{¶9} In her sole assignment of error appellant maintains that her conviction is against the manifest weight of the evidence and was not supported by sufficient evidence. We disagree.

{¶10} When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. See *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541, 546 (stating, "sufficiency is the test of adequacy"); *State v. Jenks* (1991), 61 Ohio St.3d 259 at 273, 574 N.E.2d 492 at 503. The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781; *Jenks,* 61 Ohio St.3d at 273, 574 N.E.2d at 503.

{¶11} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Wilson,* 713 Ohio St.3d 382, 387-88, 2007-Ohio-2202 at ¶ 25-26; 865 N.E.2d 1264, 1269-1270. "In other words, a reviewing court asks whose evidence is more persuasive--the state's or the defendant's? Even though there may be sufficient evidence to support a conviction, a reviewing court can still reweigh the evidence and reverse a lower court's holdings." *State v. Wilson,* supra. However, an appellate court may not merely substitute its view for that of the jury, but must find that "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." *State v. Thompkins*, supra, 78 Ohio St.3d at 387.

(Quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721). Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins,* supra.

{¶12} Employing the above standard, we believe that the state presented sufficient evidence from which a jury could conclude, beyond a reasonable doubt, that appellant committed the offense of theft.

{¶13} A "theft offense" is defined in R.C. 2913.02 as follows:

{¶14} "(A) No person, with 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:

{¶15} "(1) Without the consent of the owner or person authorized to give consent;

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

{¶17} "(3) By deception;

{¶18} "(4) By threat;

{¶19} "(5) By intimidation.

{¶20} " * * *

{¶21} "(2) Except as otherwise provided in this division or division (B) (3), (4), (5), (6), (7), or (8) of this section, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars or if the property stolen is any of the

property listed in section 2913.71 of the Revised Code, a violation of this section is theft, a felony of the fifth degree. . . .”

{¶22} Whether a person acts knowingly can only be determined, absent a defendant's admission, from all the surrounding facts and circumstances, including the doing of the act itself.” *State v. Huff* (2001), 145 Ohio App.3d 555, 563, 763 N.E.2d 695. (Footnote omitted.) Thus, “[t]he test for whether a defendant acted knowingly is a subjective one, but it is decided on objective criteria.” *State v. McDaniel* (May 1, 1998), Montgomery App. No. 16221, (citing *State v. Elliott* (1995), 104 Ohio App.3d 812, 663 N.E.2d 412).

{¶23} If the State relies on circumstantial evidence to prove an essential element of an offense, it is not necessary for “‘such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction.” ’ *State v. Jenks* (1991), 61 Ohio St.3d 259, 272, 574 N.E.2d 492 at paragraph one of the syllabus. “‘Circumstantial evidence and direct evidence inherently possess the same probative value [.]” ’ *Jenks*, 61 Ohio St .3d at paragraph one of the syllabus. Furthermore, “‘[s]ince circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that i[t] weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt.” ’ *Jenks,* 61 Ohio St.3d at 272, 574 N.E.2d 492. While inferences cannot be based on inferences, a number of conclusions can result from the same set of facts. *State v. Lott* (1990), 51 Ohio St.3d 160, 168, 555 N.E.2d 293, citing *Hurt v. Charles J. Rogers Transp. Co.* (1955), 164 Ohio St. 329, 331, 130 N.E.2d 820. Moreover, a series of facts and circumstances can be employed by a jury as the basis for its ultimate

conclusions in a case. *Lott,* 51 Ohio St.3d at 168, 555 N.E.2d 293, citing *Hurt,* 164 Ohio St. at 331, 130 N.E.2d 820.

{¶24} In the case at bar, as noted above, Tonya Tackett testified that appellant had the opportunity to remove the bank card from Ms. Tackett's purse, withdraw funds from the ATM machine located at the Get Go Station, and return the card to Ms. Tackett's purse. Officer Seth Busche of the Alliance Police Department testified that he retrieved the video surveillance tape from the location, viewed it and identified appellant as making a withdrawal from the ATM on the date in question.

{¶25} Viewing the evidence in the case at bar in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that appellant had committed the crime of theft. We hold, therefore, that the state met its burden of production regarding each element of the crime and, accordingly, there was sufficient evidence to support appellant's conviction.

{¶26} As an appellate court, we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence, upon which the fact finder could base its judgment. *Cross Truck v. Jeffries* (February 10, 1982), Stark App. No. CA-5758. "A fundamental premise of our criminal trial system is that 'the *jury* is the lie detector.' *United States v. Barnard,* 490 F.2d 907, 912 (C.A.9 1973) (emphasis added), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' *Aetna Life Ins. Co. v. Ward,* 140 U.S.

76, 88, 11 S.Ct. 720, 724-725, 35 L.Ed. 371 (1891)". *United States v. Scheffer* (1997), 523 U.S. 303, 313, 118 S.Ct. 1261, 1266-1267.

{¶27} Although appellant cross-examined the witnesses and argued that the appellant had asked her to withdraw money from the ATM using Ms. Tackett's bankcard, the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881. The jury was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence". *State v. Craig* (Mar. 23, 2000), Franklin App. No. 99AP-739, citing *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09-1236 Indeed, the jurors need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver,* Franklin App. No. 02AP-604, 2003-Ohio-958, at ¶ 21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.; *State v. Burke,* Franklin App. No. 02AP-1238, 2003-Ohio-2889, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096. Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E. 2d 492.

{¶28} After reviewing the evidence, we cannot say that this is one of the exceptional cases where the evidence weighs heavily against the conviction. The jury did not create a manifest injustice by concluding that appellant was guilty of the crime of theft. We conclude the trier of fact, in resolving the conflicts in the evidence, did not

create a manifest injustice to require a new trial. The jury heard the witnesses, evaluated the evidence, and was convinced of appellant's guilt.

{¶29} Accordingly, appellant's conviction for theft was not against the sufficiency or manifest weight of the evidence.

{¶30} Appellant's first assignment of error is overruled.

{¶31} The judgment of the Alliance Municipal Court, Stark County, Ohio is hereby affirmed.

By Gwin, P.J.,

Hoffman, J., and

Wise, J., concur

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

_____

HON. JOHN W. WISE

WSG:clw 0707

[Cite as *State v. Shields*, 2009-Ohio-3545.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
TERESA R. SHIELDS	:	
Defendant-Appellant	:	CASE NO. 2008-CA-00279

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Alliance Municipal Court, Stark County, Ohio is hereby affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE