[Cite as *State v. Pruitt*, 2009-Ohio-6119.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- DONNIRAY ROBERT PRUITT Defendant-Appellant	JUDGES: Hon. Sheila G. Farmer, P.J. Hon. William B. Hoffman, J. Hon. Patricia A. Delaney, J. Case No. 2009 CA 00082 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2008 CR 2017
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 16, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO PROSECUTING ATTORNEY STARK COUNTY, OHIO By: RENEE M. WATSON Assistant Prosecuting Attorney Appellate Section 110 Central Plaza, South – Suite 510 Canton, Ohio 44702-1413	KELLY S. MURRAY 116 Cleveland Avenue NW Suite 303 Canton, Ohio 44702

Hoffman, J.

{¶1} Defendant-appellant Donniray Robert Pruitt appeals his convictions entered by the Stark County Court of Common Pleas on one count of robbery and one count of theft. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} This matter relates to several incidents of theft from the Speedway Store in Canton, Ohio, during which cases of beer were taken without payment.

{¶3} On October 6, 2008, at approximately 9:30 a.m., a male entered the Speedway store in Canton, Ohio. He walked directly to the cooler, removed two cases of beer and walked out of the store without paying. Daphne Maurer, a store clerk, did not witness the theft, but a store customer who did witness the theft described the individual to Maurer. The customer described the individual as a male wearing blue jeans and a red jersey with the number 7 on it.

{¶4} At approximately 4:30 p.m. the same day, a man entered the store wearing a red jersey with a number 7, walked to the cooler section, removed two cases of beer and walked out of the store without paying. Maurer witnessed the theft, and followed the individual out of the store. The man walked to a parked car on the side of the store, looked back at Maurer and threatened her stating, “Bitch, you better back up or your going to get stabbed.” Maurer observed a knife on the man’s person. The car used by the thief had no rear license plate.

{¶5} Two and one-half weeks later, a man entered the store, removed two cases of beer and walked out. Stacy Simon, a store employee, witnessed the theft,

yelled to her manager, and followed the man outside. The van the man was driving had no rear license plate. Simon called the police to report the incident.

{¶6} During a subsequent theft, the thief bumped another customer's car with a case of beer as he was leaving. The customer obtained a license plate number of the vehicle driven by the thief. The owner of the vehicle was later identified as Appellant's mother. Appellant was then identified as the male in the surveillance videos of the thefts. Both Simon and Maurer identified Appellant from a photo array provided by investigating officers.

{¶7} Appellant was indicted on one count of robbery and one count of petty theft for the October 6, 2008 incidents.

{¶8} Prior to trial, Appellant filed a motion in limine to exclude evidence of other thefts of alcohol committed during the same time period, but not charged in the indictment as the only incidents charged occurred on October 6, 2008. The Court denied Appellant's motion and permitted the evidence for the limited purpose of showing modus operandi, identification and the conduct of the store in handling such matters.

{¶9} Appellant was convicted on both counts charged in the indictment, and the trial court imposed a sentence of four years incarceration on the robbery charge and six months on the petty theft charge, to be served concurrently.

{¶10} Appellant now appeals, assigning as error:

{¶11} "I. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF AND ARGUMENT ABOUT 'OTHER ACTS' PROHIBITED BY EVIDENCE RULE 404.

{¶12} "II. THE TRIAL COURT'S FINDING OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

I.

{¶13} In the first assignment of error, Appellant maintains the trial court erred in denying his motion in limine, allowing other acts evidence in violation of Ohio Rule of Evidence 404.

{¶14} Initially, we note the admission or exclusion of evidence lies within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173.

{¶15} As a general rule, evidence of previous or subsequent acts, wholly independent of the charges for which the accused is on trial, is inadmissible. *State v. Hector* (1969), 19 Ohio St.2d 167. Such evidence cannot be admitted for the purpose of establishing the defendant acted in conformity with this bad behavior. *State v. Elliot* (1993), 91 Ohio App.3d 763.

{¶16} Ohio Rule of Evidence 404(B) reads:

{¶17} "**(B) Other crimes, wrongs or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶18} Ohio Revised Code Section 2945.59 provides:

{¶19} "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system

in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

{¶20} Other acts evidence demonstrating a modus operandi, scheme, plan or system evincing a "behavioral fingerprint" is limited to the purpose of establishing the perpetrator's identity. See, *State v. Jamison* (1990), 49 Ohio Sst.3d 182, 183; *State v. Smith* (1990), 49 Ohio St.3d 137, 141; *State v. Coleman* (1988), 37 Ohio St. 3d 286.

{¶21} It must be remembered "because R.C. 2945.59 and Evid.R. 404(B) codify an exception to the common law with respect to other acts of wrongdoing, they must be construed against admissibility, and the standard for determining admissibility of such evidence is strict." *State v. Broom* (1988), 40 Ohio St.3d 277, paragraph on of the syllabus.[1] As cautioned by the Ohio Supreme Court in *State v. Lowe*(1994), 69 Ohio St.3d 527, "…we therefore must be careful to recognize the distinction between evidence which shows that a defendant is the type of person who might commit a particular crime and evidence which shows that a defendant is the person who committed a particular crime." Id. at 530. Evidence to prove the 'type' of person the defendant is to show he acted in conformity therewith is barred by Evid.R. 404(B)."

{¶22} In the case sub judice, following exchange took place on the record prior to the commencement of trial:

[1] The Ohio Supreme Court found Evid.R. 404(B) controls over R.C. 2945.49 since it was adopted subsequent to the statute in *State v. Jamison*, supra, at 185.

{¶23} "Secondly, it is my understanding that the State intends to make reference to other incidents at this same store at or about the time in question.

{¶24} "It is my understanding that the defense wishes through a motion in limine to get a ruling from the court prohibiting the State from mentioning those other incidences. Go ahead.

{¶25} "Mr. O'Byrne: Pretty much exactly that, Your Honor. As we discussed before going on the record, Donniray is charged with a theft and a robbery from October 6.

{¶26} "Subsequent to that there is [sic] three other occasions that he was charged with theft in the Massillon Municipal Court, but they are not in front of this Court today.

{¶27} "We would just simply ask this Court to ask the Prosecutor not to mention that through any witnesses or exhibits or videos or pictures that he may be showing at this time, Your Honor.

{¶28} "I believe that the matter that we are here for is the incident on the sixth. Anything that happened after that is not pertinent, relevant to our case today.

{¶29} "The Court: Mr. Scott?

{¶30} "Mr. Scott: Thank you, Judge. The crimes that the Defendant has been indicted for took place on October 6, 2008.

{¶31} "In the first offense on October 6, 2008, Defendant walked into Speedway, allegedly walked into Speedway at approximately 4:30, removed two Budweiser 24-can cases of beer and walked out of the store without paying.

{¶32} "At 9:30 he is alleged to have done the same thing, and this time alleged to have made threats via a knife to the clerk who followed him out of the store.

{¶33} "Beer continued to pop up missing from the Speedway store all the way through October 30.

{¶34} "In review of the records and in talking with employees and manager indicated that the same incident happened again on October 17, October 27, and October 30.

{¶35} "By the incident, I mean same pattern. Person matching Defendant's description from the video tape walked into the store, takes two cases of Budweiser, walked out of the store without paying and walked around to the side of the store where there is not security video camera.

{¶36} "In addition, the car that was used to leave the store with the missing license plate.

{¶37} "On the October 30 date, at that time a store clerk, by now the store clerks are on the lookout for somebody who matched the description; and they did notice the Defendant at this time, and they did notice the van that is a van that was used to get away and that subsequently led to the apprehension of the Defendant and then later an identification by the victim in the October 6 incident via the photo lineup.

{¶38} "So we have taken all these incidents are relevant to indicate why the store was doing what they were doing.

{¶39} "It is also relevant to describe why the matter was not reported until later because the evidence at the trial will show that unfortunately convenience stores, the

policy, prevailing policy is not to stop shoplifters in order to ensure the safety of those working.

{¶40} "They really had no technical knowledge of the difference between a theft and robbery.

{¶41} "So I believe the clerk, Miss Maurer, who is eighteen years old on October 6, did not know the technical difference between a theft and robbery nor did the assistant manager.

{¶42} "So they did not know the severity of the acts that took place that day. Thank you.

{¶43} "The Court: All right. Well, the Court will allow the testimony concerning the other instances as it relates for the limited purposed of modus operandi, the individual, and the conduct of the store in handling such cases and the identity of the Defendant, but for no other purposes, and the jury will be instructed that such other bad acts, if you will, are not to be considered as showing the Defendant's character, that he acted in conformity with that character on the date in question."

{¶44} Tr. at 7-11.

{¶45} Further, in instructing the jury, the trial court set forth the following:

{¶46} "Evidence was received of other thefts from the alleged victim. That evidence was received only for the limited purpose of proving identity and/or modus operandi. It can not [sic] be used for any other purpose or to show the character of the Defendant or that he acted in conformity with that character."

{¶47} Tr. at 315.

{¶48} Based upon the above, we find the trial court properly admitted the evidence relative to the subsequent theft during which a customer provided the license plate number of the vehicle ultimately leading to the identification of Appellant on the surveillance tapes and in the photo array. However, the other two acts of theft were not admissible as the acts do not establish the identity of Appellant as the perpetrator. Further, the evidence is not admissible for the purpose of establishing the corporate policy with regard to the handling of these matters as the same is not an exception set forth in the statute.

{¶49} Despite having found the trial court erred in admitting evidence as to the two subsequent, similar thefts, we find the error to be harmless in light of the additional evidence presented at trial establishing the identity of Appellant as the perpetrator of the theft and robbery charged.

{¶50} Accordingly, the first assignment of error is overruled.

II.

{¶51} In the second assignment of error, Appellant argues his convictions for robbery and petty theft were against the manifest weight of the evidence.

{¶52} Manifest weight of the evidence claims concern the amount of evidence offered in support of one side of the case and is a jury question. We must determine whether the jury, in interpreting the facts, so lost its way that its verdict results in a manifest miscarriage of justice. *State v. Thompkins* (1997), 78 Ohio St.3d 387, citations deleted.

{¶53} On review for manifest weight, a reviewing court is "to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the

witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment." *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

{¶54} Appellant was charged with petty theft, in violation of R.C. 2913.02(A)(1), which reads:

{¶55} "(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:

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

{¶57} Appellant was also charged with one count of robbery, in violation of R.C. 2911.01(A)(3), which reads:

{¶58} "(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶59} "(1) Have a deadly weapon on or about the offender's person or under the offender's control;

{¶60} "(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;

{¶61} "(3) Use or threaten the immediate use of force against another.

{¶62} The evidence introduced at trial demonstrates Appellant was identified in a photo array and on surveillance videos as the perpetrator of the thefts. Maurer testified at trial she witnessed Appellant leave the store without paying for two cases of beer, she followed him into the parking lot, and Appellant threatened her with a knife, stating, "Bitch, you better back up before you get stabbed."

{¶63} Based upon the evidence, we find Appellant's convictions were not against the manifest weight or sufficiency of the evidence. The trier of fact did not lose its way in finding the essential elements of the crimes charged proven beyond a reasonable doubt. Therefore, Appellant's second assignment of error is overruled.

{¶64} Based upon the foregoing, Appellant's convictions in the Stark County Court of Common Pleas on one count robbery and one count of theft are affirmed.

By: Hoffman, J.

Farmer, P.J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
DONNIRAY ROBERT PRUITT	:	
	:	
Defendant-Appellant	:	Case No. 2009 CA 00082

For the reasons stated in our accompanying Opinion, Appellant's convictions in the Stark County Court of Common Pleas on one count robbery and one count of petty theft are affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY