[Cite as *State v. Seagraves*, 2010-Ohio-308.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09 CAA 04 0033
JOHNNY D. SEAGRAVES	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas Case No. 08 CRI 09 0463A
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	January 28, 2010

APPEARANCES:

For Plaintiff-Appellee:

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Delaney, J.

{¶1} Johnny D. Seagraves appeals from his conviction for theft. For the reasons set forth below, we affirm.

{¶2} On September 26, 2008, Seagraves and co-defendants Larry Amorine and George Ferri were indicted on one count of theft in violation of R.C 2913.02(A)(1), a felony of the fifth degree.

{¶3} On January 28, 2009, the State filed a bill of particulars indicating fuel was stolen from a Speedway gas station located at 5619 Columbus Pike, Lewis Center, Ohio on three separate occasions, specifically March 30, 2008; May 12, 2008 and June 3, 2008. All the thefts occurred during the early evening hours. The value of the diesel fuel stolen on any one of the occasions exceeded $500.00.

{¶4} The case against Seagraves and Amorine were tried together before a jury on February 3 and 4, 2009.

{¶5} For its main evidence against the defendants, the State presented the testimony of Deborah Brown, the Speedway store manager, as to the amount of fuel the store lost based upon its records and the price of diesel fuel each day, which had remained a constant $4.74 per gallon unlike gasoline prices which fluctuate frequently. She also testified she pulled the store surveillance videos for May 12, 2008, and June 3, 2008. The surveillance cameras record activity inside and outside the store, including the parking lot area and gasoline pumps, diesel cover, gasoline cover and vapor return. In addition, the camera that records the register also records purchases made at the register.

{¶6} The surveillance videos revealed a white van with “service vehicle” signs attached to the front doors of the van, which remained parked over the diesel tanks and remained there for a period of time on the relevant dates and times. The videos also showed that the van sat higher off the ground upon entering the store parking lot, but as it leaves it is considerably lower.

{¶7} Testimony also was presented at trial that three “service vehicle” magnetic signs were ordered and sold on or about March 6, 2008 to co-defendant Amorine, who had a prior conviction in 2006 in Franklin County, Ohio for theft of diesel fuel. Police were led to Amorine in this case based upon Crime Stoppers tips. The white van belonging to Amorine was subsequently found and impounded in Columbus, Ohio. The van was modified with additional wiring, batteries, a power inverter, and air shocks. A hole was cut in van’s floor.

{¶8} The State conducted an experiment with a pump and similar equipment found in the van, and it took approximately 2 minutes to fill a 55-gallon barrel with diesel fuel from a tank in the ground.

{¶9} Seagraves was implicated in this scheme based upon the video surveillance of May 12, 2008. During the investigation of the Speedway complaint, a detective of the Delaware County Sheriff’s Office reviewed the video and identified a Buick LeSabre that he determined to be a blocker for the van. This car also was owned by Amorine. A male resembling Seagraves also is present in the parking lot entering the store from the direction of the vehicles. The detective made still photographs from the video and sent the pictures and information to Crime Stoppers. A tip was made that Seagraves was the person entering the store. The video surveillance of June 3, 2008,

also shows a similar vehicle and individual. The recorded time on the video surveillances match the times of the reported fuel losses for the May and June incidents.

{¶10} Testimony also was adduced that Amorine and Seagraves are long time acquaintances and live about one mile apart in Columbus.

{¶11} Proceeding to the defense, Seagraves' spouse testified as an alibi witness and she recalled that Seagraves was home sick all day on June 3rd and that he went fishing in the evening of May 12th. Seagraves took the stand and testified that he was an owner/operator of a semi-truck. He stated he was home all day on June 3rd and 4th with the flu and denied being at the Speedway on June 3rd. On March 30th, Seagraves testified he watched a Nascar race and again denied being at the Speedway at Lewis Center, but may have been at a different Speedway. On May 12th, he testified he did stop at the Speedway in Lewis Center in the evening after a fishing trip to use the outside telephone. The telephone did not work, so he went inside and purchased cigarettes, and then left. He denied any participation with the missing fuel. Seagraves also testified he was not working at that time because diesel fuel was priced too high.

{¶12} The jury subsequently found defendants guilty as charged, and the trial court sentenced them accordingly.

{¶13} Seagraves timely appealed and raises two assignments of error:

{¶14} "I. THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S MOTION FOR ACQUITTAL MADE AT THE CLOSE OF THE STATES (SIC) EVIDENCE.

{¶15} "II. THE CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I.

{¶16} In the first assignment of error, Seagraves asserts the State failed to prove an essential element of the theft charge because "there was absolutely no direct evidence that no consent was given for the missing diesel fuel." Appellant's Brief, p. 9. Seagraves contends the trial court erred by overruling the Crim. R. 29 motion for acquittal because the lack of consent cannot be inferred by circumstantial evidence. Seagraves cites no case law to support this proposition.

{¶17} Crim.R. 29(A) provides that a trial court "shall order the entry of a judgment of acquittal * * * if the evidence is insufficient to sustain a conviction of such offense or offenses."

{¶18} In order to convict of theft, the State had to prove beyond a reasonable doubt that Seagraves, with purpose to deprive the owner of property, did knowingly obtain or exert control over the property without the consent of the owner or person authorized to give consent. R.C. 2913.02(A)(1).

{¶19} The State agrees that consent must be proven beyond a reasonable doubt, however, the proof may be by direct and circumstantial evidence, as both are of equal weight, citing *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492.

{¶20} In *Jenks*, the Supreme Court of Ohio held, at paragraph one of the syllabus:

{¶21} "Circumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof. When

the state relies on circumstantial evidence to prove an essential element of the offense charged, there is no need for such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction. * * *".

{¶22} Also, in *Jenks,* the Court delineated the role of an appellate court presented with a sufficiency of the evidence argument, stating at paragraph two of the syllabus:

{¶23} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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. * * *".

{¶24} Because circumstantial evidence is intrinsically no different from testimonial evidence, we find the evidence presented by the State establishes Speedway did not consent to the removal of diesel fuel on the identified dates. The State's evidence showed that store manager Brown became aware the store was experiencing diesel fuel losses based upon alarm reports from the store's computer or "veeter root" readings on the identified dates. For example, on June 3, 2008, she testified the alarm went off at 9:44 pm, but found no matching large sale of fuel at that time. Next, Brown checked the store's surveillance cameras on that date and time, and saw a white van parked over the top the diesel tank in the parking lot. She subsequently reported the losses to the sheriff's office. In total, the losses ranged from

160 to 185 gallons of diesel fuel on each occasion. Although the State could easily have satisfied this element by having Brown testify that she did not give consent for the removal of the missing fuel, the State properly established that Seagraves acted "without consent" through circumstantial evidence, and the trial court did not err in overruling Seagraves' motion for acquittal.

II.

{¶25} In the second assignment of error, Seagraves contends the jury convicted him based upon his friendship with Amorine and because of his presence at the Speedway on May 12, 2008. Seagraves also contends the State failed to establish that the store computer or "veeter root" was properly maintained and calibrated; therefore evidence of the fuel loss was suspect.

{¶26} To reverse a conviction on the manifest weight of the evidence, a reviewing court must review the entire record, weigh the evidence, and conclude that in resolving conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice. *State v. Thompkins*, 78 Ohio St.3d 380, 387,1997-Ohio-52, 678 N.E.2d 541. An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most "'exceptional case in which the evidence weighs heavily against the conviction'". Id. at 387.

{¶27} The State submits it must only show that Seagraves was involved in at least one of the thefts, and not necessarily all three, because the value of any one theft exceeded the statutory threshold of $500 for a felony theft. The State concedes there is no video surveillance of the March 30 incident; yet the May 12 video confirms and Seagraves admits, his presence at the Speedway at the time of that fuel loss.

{¶28} In addition, the jury was presented with evidence that Seagraves was not working during this time due to high diesel fuel costs, as well as the June 3rd video surveillance which shows an individual resembling Seagraves at the store. Although Seagraves and the alibi witness testified as to his whereabouts on those days, the jury apparently did not find their testimony credible. The jury is in the best position to determine credibility. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶29} Lastly, we find Seagraves' argument regarding the functioning of the store's computer to be meritless. No objection was raised at trial to the admissibility of the store's alarm history report, nor was any testimony presented that the store's computer were not functioning properly on the relevant dates.

{¶30} Upon review of the record, we cannot find that the jury clearly lost its way in resolving any conflicting evidence in the prosecution's favor. Accordingly, Seagraves' conviction is not against the manifest weight of the evidence.

{¶31} The second assignment of error is overruled.

{¶32} Having overruled Appellant's two assignments of error, we affirm the judgment of the Delaware County Court of Common Pleas.

By: Delaney, J.

Hoffman, P.J. and

Edwards, J. concur.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. JULIE A. EDWARDS

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IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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-vs-	:	JUDGMENT ENTRY
	:	
JOHNNY D. SEAGRAVES	:	
	:	
Defendant-Appellant	:	Case No. 09 CAA 04 0033
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Delaware County Court of Common Pleas is affirmed. Costs assessed to Appellant.

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HON. PATRICIA A. DELANEY

_____
HON. WILLIAM B. HOFFMAN

_____
HON. JULIE A. EDWARDS