

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

BRANDI N. MOORE

Defendant-Appellant

: JUDGES:

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Hon. John W. Wise, P.J.

Hon. Patricia A. Delaney, J.

Hon. Craig R. Baldwin, J.

Case No. 15 CAA 04 0037

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Delaware County Court
of Common Pleas, Case No. 14 CR I 12
0548 B

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

March 10, 2016

APPEARANCES:

For Plaintiff-Appellee:

CAROL HAMILTON O'BRIEN
DELAWARE COUNTY PROSECUTOR

MARK C. SLEEPER
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For Defendant-Appellant:

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Delaney, J.

{¶1} Defendant-Appellant Brandi N. Moore appeals her conviction and sentence by the Delaware County Court of Common Pleas for Robbery, in violation of R.C. 2911.02(A)(1) and Theft, in violation of R.C. 2913.02(A)(1). Plaintiff-Appellee is the State of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} Defendant-Appellant Brandi N. Moore was indicted by the Delaware County Grand Jury for aggravated robbery with a firearm specification, robbery, and misdemeanor theft. Prior to trial, Plaintiff-Appellee State of Ohio dismissed the aggravated robbery charge. The matter proceed to a jury trial on February 24, 2015. The following evidence was adduced at trial.

{¶3} On December 2, 2014, Amber Young was working the closing shift as a cashier at the Dollar General located in Delaware, Ohio. Young was standing behind a counter at the cash register near the front glass door of the store. The front of the store is a wall of large windows. A few minutes before the store closed at 10:00 p.m., a woman identified as Defendant-Appellant Brandi N. Moore entered the store. Moore lived across the street from the Dollar General. Moore at one time worked at that Dollar General. Moore spoke with Young about purchasing candy and went to the counter to purchase a candy bar. At the time of her purchase, Moore was under the influence of crack cocaine. The only people in the store were Young, Moore, and the shift manager, Evangela Morrison.

{¶4} At trial, the State played for the jury and admitted as State's Exhibit 1 the surveillance video of the events in the store the evening of December 2, 2014. In the

video, Moore is seen walking to the counter and turning her head to look toward the windows in the front of the store. An undefined figure can be observed outside the store near the windows.

{¶5} Next, Moore is seen standing at the counter and speaking to Young. Young is ringing up Moore's purchase. Moore nods her head toward the door. As Young is ringing up the purchase, Moore raises her left arm and moves her index figure at least twice in a back and forth motion. A few seconds after Moore makes the motion with her index finger, a man enters the store. He has a white shirt covering the lower half of his face. Young testified the man was yelling and telling her to open the register. Moore is seen slowly backing up as the man enters the store and raising her hands to her shoulders.

{¶6} Young could not open the register and called to her manager, Morrison. Morrison came to the counter and laughed because she recognized the man as someone who lived across the street from the store. She knew that Moore and the man hung out together. Morrison told the man she could not believe he was robbing her because she knew him. Morrison testified the man showed her a gun and she understood that he was robbing the store. She opened the cash register and the man grabbed some money. He fled the store.

{¶7} In the video, Moore is seen walking back up to the counter after the man left the store and speaking with Morrison or Young. Morrison testified that Moore asked her how she knew the man. Morrison stated she knew the man hung around with Moore across the street at Moore's home. Morrison did not know if the man was Moore's

boyfriend, but Moore said it could not have been her boyfriend because he was out of town.

{¶8} The man who robbed the Dollar General, later identified as John Rohn, was apprehended by the Delaware Police Department that night. Rohn was arrested and questioned by Detective Sergeant John Radabaugh. Rohn first stated he had been at his parent's home in Galion all day. Rohn eventually confessed to his involvement in the robbery. Rohn is Moore's boyfriend and father of her two children. He and Moore live together across the street from the Dollar General. He testified that on December 2, 2014, he told Moore to go to Dollar General and buy a candy bar. After she went in, he waited a few minutes, and he went in after her. He testified that earlier he had told her that he thought about robbing the Dollar General, but she told him not to do it.

{¶9} Rohn testified at trial that Moore had no involvement in the robbery. Rohn testified he saw Moore make a hand motion but he did not know what the motion meant. The State asked if Rohn recalled making a statement to Det. Sgt. Radabaugh about Moore's involvement. Rohn could not recall any statements as to Moore because he was suffering from drug withdrawal at that time. Over objection, Det. Sgt. Radabaugh testified Rohn stated to him that he and Moore agreed that Moore would go into the store ahead of him and she was to signal to him.

{¶10} After the robbery, Det. Sgt. Radabaugh spoke with Moore. Det. Sgt. Radabaugh viewed the surveillance video before speaking with Moore. Moore was asked whether she signaled Rohn to come into the store. Moore said she saw someone standing outside the store and her hand motions were directed to Young to let her know that someone was standing outside of the store. When asked, Moore told Det. Sgt.

Radabaugh that it could not have been Rohn whom robbed the Dollar General because Rohn was in Galion that day.

{¶11} At trial, Moore testified she thought she saw Rohn standing outside the Dollar General while she was purchasing her candy bar. She nodded to him because she could see him moving his mouth. Moore stated she motioned to him to come inside the store because Rohn motioned to her to come outside. When Rohn came into the store, Moore knew it was Rohn. Moore admitted to lying to the police officers but she did not want the father of her children to go to jail.

{¶12} At the close of the State's case, the trial court gave the jury a limiting instruction regarding the testimony of Det. Sgt. Radabaugh.

{¶13} The jury found Moore guilty of robbery, a felony of the second degree in violation of R.C. 2911.02(A)(1), and theft, a first-degree misdemeanor in violation of R.C. 2913.02(A)(1). The trial court sentenced Moore to two years in prison.

{¶14} It is from this conviction and sentence Moore now appeals.

ASSIGNMENTS OF ERROR

{¶15} Moore raises two Assignments of Error:

{¶16} "I. THE TRIAL COURT ERRED WHEN IT PERMITTED AN INVESTIGATING OFFICER TO TESTIFY ABOUT A WITNESS'S PRIOR HEARSAY STATEMENTS AFTER THE WITNESS TESTIFIES THAT HE NEVER MADE THOSE STATEMENTS, AND AFTER THAT SAME WITNESS HAS BEEN EXCUSED AS A WITNESS BY THE TRIAL COURT.

{¶17} “II. THE CONVICTION OF ROBBERY AND THEFT AGAINST DEFENDANT IS NOT SUSTAINED BY THE EVIDENCE AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

ANALYSIS

I.

{¶18} Moore argues in her first Assignment of Error that the trial court erred in allowing the testimony of Det. Sgt. Radabaugh pursuant to Evid.R. 613 as to what Rohn said during his interview about Moore’s involvement in the robbery. We disagree.

{¶19} Moore argues the statements of Det. Sgt. Radabaugh were inadmissible hearsay. The admission or exclusion of evidence at trial falls within the sound discretion of the trial court. Evid.R. 104; *State v. Heinish*, 50 Ohio St.3d 231, 553 N.E.2d 1026 (1990). A trial court abuses its discretion when its decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Hearsay is an out-of-court statement offered for the truth of the matter asserted. Evid.R. 801(C). Generally, hearsay statements are inadmissible at trial unless the statement comes in under a recognized exception. *State v. Grant*, 5th Dist. Richland No. 2015 CA 0010, 2015-Ohio-5197, ¶ 21.

{¶20} Evid.R. 613(B) provides:

Extrinsic evidence of a prior inconsistent statement by a witness is admissible if both of the following apply:

(1) If the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the

statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require;

(2) The subject matter of the statement is one of the following:

(a) A fact that is of consequence to the determination of the action other than the credibility of a witness;

(b) A fact that may be shown by extrinsic evidence under Evid.R. 608(A), 609, 616(A), or 616(B);

(c) A fact that may be shown by extrinsic evidence under the common law of impeachment if not in conflict with the Rules of Evidence.

{¶21} Rohn appeared at trial as a court's witness pursuant to Evid.R. 614. Rohn testified he was interviewed by Det. Sgt. Radabaugh. During cross-examination by the State, Rohn was asked if he had any recollection of talking to Det. Sgt. Radabaugh about Moore's involvement in the robbery. (T. 152). Rohn testified Det. Sgt. Radabaugh said something about having a search warrant and Moore, but it went blurry from there. (T. 152). Rohn was asked:

Q. If Detective Sergeant Radabaugh were to say that you told him that she had gone in first and then signaled to you when to enter, you have a reason to say that he's lying?

A. I can't – I'm not gonna say, yeah, I'm not gonna say, no, because I can't remember. I don't remember.

Q. So it's possible that that's what you said to Detective Sergeant Radabaugh?

A. It can be possible, but I'm not gonna say, yeah, I'm not gonna say, no. I'm not gonna lie. Like I said, it's all a big blur.

Q. But today your testimony is that she had nothing to do with it?

A. Yes.

* * *

Q. Do you recall telling Detective Sergeant Radabaugh that you made Brandi Moore help you out by signaling to you when the store was empty of customers?

A. No, I don't.

Q. Do you recall telling Detective Sergeant Radabaugh that you – that Ms. Moore initially had complained about it but then she'd go along with it when you when to rob the store?

A. No.

(T. 156, 159). Moore's counsel then cross-examined Rohn.

{¶22} In *State v. Allen*, 5th Dist. Stark No. 2012CA00196, 2013-Ohio-3715, ¶ 11, we stated:

As our brethren from the Second District set forth in *State v. Reed*, 2nd Dist.

Montgomery No. 19674, 2003–Ohio–6536, ¶ 30:

"If the witness admits making the conflicting statement, then there is no need for extrinsic evidence. If the witness denies making the statement, extrinsic evidence may be admitted, provided the opposing party has an opportunity to query the witness about the inconsistency, and provided the 'evidence does not relate to a collateral matter[.]' * * * ' However, if the

witness says he cannot remember the prior statement, ‘a lack of recollection is treated the same as a denial, and use of extrinsic impeachment evidence is then permitted.’ “ (Citations omitted.) *State v. Harris* (Dec. 21, 1994), Montgomery App. No. 14343, 1994 WL 718227; see, also, *State v. Taylor* (July 26, 1996), Montgomery App. No. 15119, 1996 WL 417098 (“A prior statement of a witness may be proved by extrinsic evidence if the witness denies the statement or claims he cannot remember the statement”).

{¶23} Based on Rohn's testimony at trial, he stated he could not remember making any statement about Moore's involvement to Det. Sgt. Radabaugh. Moore's counsel was afforded the opportunity to interrogate Rohn as to his statements.

{¶24} Following Rohn's testimony, Det. Sgt. Radabaugh was called to the stand. During Det. Sgt. Radabaugh's testimony, the State asked if he talked to Rohn about whether Moore was involved in the robbery. (T. 207). Moore's counsel objected when Det. Sgt. Radabaugh was asked what Rohn told him about Moore's involvement. (T. 207). The trial court overruled Moore's objection and permitted Det. Sgt. Radabaugh to testify. (T. 210). Det. Sgt. Radabaugh stated, “He told me that they had discussed robbing the store and that he had wanted her to go in ahead of him to let him know when there were people – when other people were gone, the store was empty or nearly empty, and she was to signal to him. He told me that she was reluctant to do so but agreed to.” (T. 210).

{¶25} The trial court gave the jury a limiting instruction about Det. Sgt. Radabaugh's testimony. The trial court instructed that the statements made by Rohn were different from his statements in the courtroom and were only to be used for impeachment purposes on Rohn's testimony, not as substantive evidence. (T. 227-228).

{¶26} We find the trial court did not abuse its discretion in allowing the testimony of Det. Sgt. Radabaugh to impeach the testimony of Rohn through Evid.R. 613.

{¶27} Moore's first Assignment of Error is overruled.

II.

{¶28} Moore argues in her second Assignment of Error that her conviction for robbery and theft were against the sufficiency and the manifest weight of the evidence. We disagree.

{¶29} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997), paragraph two of the syllabus. The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held, "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."

{¶30} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "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 overturned and a new trial ordered.” *State v. Thompkins, supra*, 78 Ohio St.3d at 387, 678 N.E.2d 541. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the “exceptional case in which the evidence weighs heavily against the conviction.” *Id.*

{¶31} Moore argues the evidence submitted to the jury was insufficient to establish her complicity to robbery and was not supported by the manifest weight of the evidence. The central evidence in this case is the surveillance video, which shows Moore nodding and making a hand gesture to Rohn whom was standing outside of the Dollar General. After Moore made the hand gesture, Rohn entered the store wearing a mask on his face and yelling at Young to open the cash register.

{¶32} When interviewed by the police, Moore stated she did not know the man robbing the Dollar General. She told the police she made the hand gesture to alert Young that there was someone standing outside of the store. At trial, Moore admitted that she knew Rohn was standing outside of the store and that he robbed the store. She explained she made the hand gesture to request him to enter the store after he motioned for her to come outside.

{¶33} Moore argues she provided the jury with an alternative explanation for her hand gestures. The evidence shows that Moore provided multiple explanations for her hand gestures to the police and at trial. After viewing the surveillance video and considering the testimony, the jury chose not to believe Moore’s explanations. Upon a review of the testimony and the surveillance video, we find there was competent, credible evidence presented for the jury to find Moore was guilty of robbery and theft, and Moore’s

conviction was not against the manifest weight of the evidence nor based upon insufficient evidence.

{¶34} Moore's second Assignment of Error is overruled.

CONCLUSION

{¶35} The judgment of the Delaware County Court of Common Pleas is affirmed.

By: Delaney, J.,

Wise, P.J. and

Baldwin, J., concur.