[Cite as *State v. Hollstein*, 2009-Ohio-4771.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-08-1184

Appellee — Trial Court No. CR-2007-3260

v.

Beverly Hollstein — **DECISION AND JUDGMENT**

Appellant — Decided: September 11, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, Kevin A. Pituch and Michael D. Bohner, Assistant Prosecuting Attorneys, for appellee.

Tim A. Dugan, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, following a jury trial, in which appellant, Beverly Hollstein, was found guilty of one count of receiving stolen property, in violation of R.C. 2913.51, and was sentenced to

serve a prison term of 18 months. On appeal, appellant sets forth the following three assignments of error:

{¶ 2} "1) The trial court erred in denying appellant's motion to acquit under Ohio Criminal Rule 29, violating appellant's due process rights.

{¶ 3} "2) The jury's verdict of guilty was against the manifest weight of the evidence.

{¶ 4} "3) The trial court imposed a prison sentence contrary to law."

{¶ 5} The undisputed, relevant facts are as follows. Over Labor Day weekend in 2006, a trailer belonging to Richard Schmidt was stolen. Inside the trailer were more than 50 plastic and wooden crates containing metal signs, antique pictures, and old magazine articles. Each of the items bore a label and an individual price. Each of the pictures and articles was encased in plastic and placed in the crates according to subject, separated by cardboard dividers. After Schmidt discovered that the trailer was missing, he reported the theft to the police, and estimated that the trailer's contents were worth a total of $150,000.

{¶ 6} In April and May 2007, Tom Tadsen, a local dealer in used goods, purchased several crates containing metal signs, antique pictures and old magazine articles from appellant and her brother, Ray Hollstein. Appellant's brother told Tadsen that he acquired the items from a neighbor, who told several people they could have what they wanted from her garage. Tadsen made purchases from appellant and her brother on several occasions. He kept receipts from all of those purchases.

{¶ 7} Later that summer, Ray Hollstein sold several crates of vintage advertisements to Timothy Chase, the owner of a body shop known as Pit Stop Collision. Chase gave the crates of merchandise to his wife, who attempted to sell them at a garage sale. Schmidt saw the merchandise at the garage sale and recognized it as his own. Schmidt reported his find to Toledo Police Detective Margarett Rybarczyk.

{¶ 8} As part of her investigation, Detective Rybarczyk presented a series of photographs to Tadsen, who identified appellant and her brother as the individuals who sold him the merchandise in question. Rybarczyk then issued warrants for their arrest.

{¶ 9} On October 31, 2007, both Hollsteins were indicted by the Lucas County Grand Jury on one count each of receiving stolen property, a fourth degree felony. The siblings were codefendants at a jury trial, which was held on April 28 and 29, 2008. At trial, the prosecution presented testimony by Chase, Tadsen, Detective Rybarczyk and Schmidt.

{¶ 10} Chase testified at trial that Ray Hollstein came to his place of business in the summer of 2007, and offered to sell him several crates containing pictures, cards and other items. Chase stated that Ray had the crates in his car. Chase further stated that he purchased three of the crates for $60 and gave them to his wife, who took them to a garage sale. Chase testified that his wife sold one crate; however, when Schmidt saw the other crates at the garage sale and said they were his property, Chase's wife gave Schmidt the remaining crates. Chase further testified that, one week later, when appellant came to Chase's business to offer him more crates, he declined. On cross-examination, Chase

stated that his wife sold one crate for $20. On redirect, Chase testified that appellant and her brother showed no proof that they owned the crates, and that there were tags on the backs of each of the items in the crates.

{¶ 11} Tadsen, a self-described dealer in "used goods," testified at trial that Ray Hollstein and later, appellant, brought approximately 50 crates containing antique ads to his store, Americana Cash, on several different occasions in July 2007. Tadsen further testified that the crates contained "hundreds of items." Tadsen stated that the siblings told him they were "liquidating the stuff from a garage - or for a house that they [appellant and her brother] were cleaning out." Tadsen further stated that he sold the crates back to Schmidt after becoming aware that they were stolen. Tadsen testified that he cooperated with Rybarczyk's investigation by purchasing more crates and issuing receipts. He also identified appellant and her brother from a photo array. On cross-examination, Tadsen stated that Ray Hollstein used to live with Tadsen's ex-wife. Tadsen further stated that he did not suspect the merchandise was stolen when it first was brought it into his store. Tadsen also stated that, although he had purchased items from Ray Hollstein before July 2007, those previous items did not include antique advertisements.

{¶ 12} Detective Rybarczyk testified at trial that her investigation began when Schmidt reported the recovery of some of his property in June or July 2007, and stated that it was sold to Tadsen by appellant and Ray Hollstein. She then instructed Tadsen to purchase more of the merchandise and sell it back to Schmidt. Rybarczyk further testified that the merchandise was organized in crates, with the paper items either

laminated or covered in plastic, and all were marked with price tags. She stated that arrest warrants were issued after Tadsen identified appellant and her brother, Ray, from photographs.

{¶ 13} Rybarczyk stated that appellant responded to the warrant by telling Rybarczyk that a neighbor, Erica Vance, told her to "take whatever she wanted" from the neighbor's garage. However, appellant refused to give Rybarczyk Vance's address. Rybarczyk further stated that she eventually got Vance's telephone number from appellant's attorney; however, Vance refused to corroborate appellant's story. Rybarczyk also stated that Vance hung up before the conversation was over, after saying she did not want anything to do with the investigation.

{¶ 14} On cross-examination, Rybarczyk testified that Schmidt first reported the theft of a black trailer containing $300,000 worth of property on September 4, 2006. She further testified that a theft investigation usually begins with a report from the victim, and that nothing is resolved unless the seller of the merchandise is found. Rybarczyk stated that she did not know that an asset management company actually cleaned out Vance's house and garage, after the property went into foreclosure.

{¶ 15} Schmidt testified at trial that he saved money to start a business reselling antiques and collectibles while he was in prison, serving a sentence for manslaughter. Schmidt further testified that his inventory consists of items such as metal advertising signs and vintage ads from newspapers and magazines. He stated that ads are packaged 225 to a crate, and signs are 75 to 100 per crate, and sold for $9.50 each. Schmidt stated

that his trailer was stolen over Labor Day weekend in 2006, after he returned from participating in a show in Tiffin. It was never recovered. Although he initially reported the value of its contents at $300,000, upon further reflection, he later revised that amount down to $150,000.

{¶ 16} Schmidt testified that each item had a "Dillard's" sticker on it with a stylized "D." The boxes were separated by "banquet tables" supported by plywood dividers that kept the boxes apart. Schmidt stated that his stickers were still on the recovered merchandise, although some of the cardboard separating the different categories of merchandise had been re-written. Schmidt further stated that, to his knowledge, no other vendor uses similar packaging.

{¶ 17} Schmidt testified that he was notified by another dealer, "Bailey," who saw Schmidt's merchandise at a garage sale. He said that, in addition to the boxes he repurchased from Tadsen, he was able to recover one and one-half more boxes from Chase. Schmidt stated that appellant contacted him and said that she was innocent, and asked him to drop the charges. Schmidt also stated that appellant told him she suspected "wrongdoing" at Vance's home because trucks were coming and going late at night, and that people at Vance's house were "up to no good, basically." Schmidt testified that, altogether, he lost almost $100,000 worth of merchandise, including 19 boxes of metal signs, all of his farming ads, and all of the boxes containing Corvette, John Deere, and Mustang signs. On cross-examination, Schmidt testified that he never sold more than ten items to one person, and each item sold had a label on it.

{¶ 18} At the close of Schmidt's testimony, the prosecution rested. Appellant and Ray Hollstein made separate motions for acquittal, which the trial court denied. The defense then presented testimony by appellant and Theodore Wells.

{¶ 19} Appellant testified at trial that her neighbor, Erica Vance, asked appellant to clean out her garage because Vance's home was in foreclosure. Appellant stated that the items in Vance's garage "looked like junk;" nevertheless, the neighbors, including appellant, took stuff from the "porch and in the inside" of the house. Appellant further stated that she took ten to 15 crates, which she pawned at Americana Cash for $10 to $15 per crate.

{¶ 20} On cross-examination, appellant testified that she spoke to Rybarczyk on the telephone; however, she could not give the detective information because Rybarczyk kept screaming at her. She did, however, manage to give Rybarczyk Vance's telephone number. Appellant further testified that people who were cleaning out Vance's house put items on the curb and told the neighbors to "come, take it." She stated that items in the crates were "well-kept" and wrapped in plastic. Appellant further stated that the things she took from Vance had belonged to the man Vance was living with at the time. Appellant said that Vance once told appellant that her children's father was a "professional thief."

{¶ 21} At the close of appellant's testimony, her defense rested. Wells then testified at trial that he had had known appellant and her brother for 12 to 15 years. Wells stated that friends helped remove items from Vance's house, and that Vance was

giving things away to anyone who wanted it. Wells further stated that he gave appellant and Ray rides so that they could sell the items they acquired from Vance. Wells testified that he contacted Rybarczyk by telephone after appellant and Ray were arrested; however, Rybarczyk seemed "disinterested" in talking to Wells.

{¶ 22} On cross-examination, Wells testified that he was on appellant's porch when Vance's home was being cleaned out by approximately ten people. He also testified that people from a moving company were placing items on the porch for other people to take, and even put some of the items in appellant's backyard. Wells also testified that he was unable to carry on a telephone conversation with Rybarczyk, because the detective was screaming at him the entire time.

{¶ 23} At the close of Wells' testimony, appellant's defense rested. Appellant and Ray renewed their motions for acquittal, which the trial court denied. The matter was then submitted to the jury, which found appellant and Ray guilty of one count each of receiving stolen property, valued at $50,400.

{¶ 24} A sentencing hearing was held on May 14, 2008. No testimony was presented on appellant's behalf. The trial court reviewed appellant's prior criminal history, which included one felony conviction and eight misdemeanor convictions. The trial court stated that it had considered the record, which included the presentence investigation report, along with the principles and purposes of sentencing pursuant to R.C. 2929.11, and had balanced the seriousness and recidivism factors set forth in R.C. 2929.12. Thereafter, the trial court found that appellant was not a "proper candidate for

placement in a program of shock incarceration or the intensive prison program." The trial court then advised appellant as to her limited right of appeal, and sentenced her to serve 18 months in prison, with 19 days of credit for time served. Appellant was also ordered to make restitution in the amount of $1,350. A timely notice of appeal was filed on June 9, 2008.

{¶ 25} In her first assignment of error, appellant asserts the trial court erred when it denied her motion for acquittal pursuant to Crim.R. 29. In support, appellant argues that the evidence presented at trial "fails to show the Defendants knew they had retained stolen property."

{¶ 26} Crim.R. 29(A) states, in relevant part, that:

{¶ 27} "The court on motion of a defendant * * *, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged * * *, if the evidence is insufficient to sustain a conviction of such offense or offenses. * * *"

{¶ 28} This court has held that the standard of review for a Crim.R. 29 motion is "the same standard as is used to review a sufficiency of the evidence claim." *State v. Witcher*, 6th Dist. No. L-06-1039, 2007-Ohio-3960, ¶ 20. Accordingly, the relevant inquiry is "whether any rational fact finder, after reviewing the evidence in a light most favorable to the state, could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Clemons* (1998), 82 Ohio St.3d 438, 444, certiorari denied (1998), 525 U.S. 1077, 119 S.Ct. 816. (Citations omitted.)

{¶ 29} Appellant was convicted of receiving stolen property, in violation of R.C. 2913.51(A), which states that "[n]o person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense." On appeal, appellant does not dispute whether the merchandise in question was stolen from Schmidt. Appellant does argue, however, that no rational jury could find her guilty because circumstantial evidence shows only that appellant and her brother obtained possession of "collectibles" through cleaning out Vance's garage, and they did not attempt to sell the items until eight months later. Appellant further argues that price stickers on the merchandise do not necessarily indicate the items were stolen, since it is not necessary for collectors to remove the stickers in order to view them.

{¶ 30} Ohio courts have held that, even in cases where an element of a crime cannot be proved by direct evidence, "circumstantial evidence may be used to provide an inference of guilt." *State v. Reed*, 10th Dist. No. 08AP-20, 2008-Ohio-6082, ¶ 44, citing *State v. Caldwell* (Nov. 16, 2000), 10th Dist. No. 99AP1107. (Other citation omitted.) "In a prosecution for receiving stolen property, the jury may arrive at a finding of guilty by inference when the accused's possession of recently stolen property is not satisfactorily explained in light of surrounding circumstances developed from the evidence. *State v. Caldwell*, supra, citing *State v. Arthur* (1975), 42 Ohio St.2d 67, 69.

{¶ 31} In this case, it is undisputed that the merchandise appellant and her brother sold to Tadsen and Chase was originally stolen from Schmidt. As to how the siblings

acquired the merchandise, testimony was presented by appellant that Vance allowed the siblings to remove it from Vance's garage when she was forced to move due to foreclosure. In contrast, Wells testified that unidentified persons removed the merchandise from Vance's home, and even placed some of it in Beverly's backyard. Schmidt testified that the stolen merchandise was organized and packaged for sale, and that each item contained a sticker imprinted with a distinctive "D" design and marked with a price. In addition, Schmidt stated that, normally, a collector of these types of items would not purchase more than ten items at a time; nevertheless, the crates obtained and offered for sale by appellant and her brother contained hundreds of items. Schmidt also testified that appellant told him she believed the occupants of Vance's house were engaged in suspicious activity, and were "up to no good, basically."

{¶ 32} Upon consideration of the record as set forth above, this court finds that, at least, appellant should have questioned whether Vance had legal possession of the crates containing hundreds of wrapped and labeled signs and advertisements. Accordingly, we conclude that sufficient evidence was presented at trial to allow a rational jury, after reviewing the evidence in a light most favorable to the state, to find that the elements of the crime were proven beyond a reasonable doubt, and the trial court therefore did not err by denying appellant's Crim.R. 29 motion for acquittal. Appellant's first assignment of error is not well-taken.

{¶ 33} In her second assignment of error, appellant asserts that that her conviction was against the manifest weight of the evidence. In support, appellant argues that the

jury lost its way when it found appellant guilty beyond a reasonable doubt, because no evidence was presented at trial that appellant knew the merchandise was stolen.

{¶ 34} Even if a court of appeals determines that the trial court's judgment is supported by sufficient evidence, it is free to conclude that the judgment is against the weight of the evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 387, citing *State v. Robinson* (1955), 162 Ohio St. 486, 487. Weight of the evidence concerns "'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.'" Id., quoting Black's, supra, at 1594.

{¶ 35} Under a manifest weight standard, the appellate court sits as a "'thirteenth juror' and may disagree with the fact finder's resolution of the conflicting testimony." *Toledo v. Combs*, 6th Dist. No. L-07-1364, 2009-Ohio-3207, ¶ 20, citing *Thompkins*, supra. In so doing, an appellate court reviews "'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 reversed and a new trial ordered.'" *Thompkins*, supra, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. However, a conviction is to be overturned on the basis of manifest weight only in the

most "'exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins*, supra, at 387, quoting *State v Martin* (1983), 20 Ohio App.3d 172, 175. Ordinarily, the credibility of witnesses and the weight to be given to testimony presented at trial are matters to be resolved by the jury. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231.

{¶ 36} This court has reviewed the entire record of proceedings that was before the trial court and, upon consideration thereof and our determination as to appellant's first assignment of error, we conclude that the jury did not lose its way so as to create a miscarriage of justice in this case. Accordingly, appellant's conviction for receiving stolen property was not against the manifest weight of the evidence, and her second assignment of error is not well-taken.

{¶ 37} In her third assignment of error, appellant asserts that the trial court erred by sentencing her to serve 18 months in prison. In support, appellant argues that her sentence was "unreasonable and contrary to law" because "the facts brought out a trial and the presentence investigation report does not support a maximum sentence" in this case.

{¶ 38} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the Supreme Court of Ohio set forth the following test for appellate courts to use when reviewing felony sentences:

{¶ 39} "First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence

is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of the imprisonment is reviewed under the abuse-of-discretion standard." Id., at ¶ 26. See, also, R.C. 2953.08.

{¶ 40} Appellant was convicted of one count of receiving stolen property, in violation of R.C. 2913.51(C), a fourth degree felony. Pursuant to R.C. 2929.14(A)(4), the trial court could impose a sentence ranging anywhere from six to 18 months. Pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the trial court is not required to give reasons or make factual findings to justify imposing more than the minimum sentence in felony cases. *Kalish*, supra, at ¶ 11. Nevertheless, the trial court is still required to consider R.C. 2929.11, which specifies the purposes of sentencing, and 2929.12, which provides guidance relating to the seriousness of the offense and recidivism of the offender. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38.

{¶ 41} In this case, the trial court imposed an 18 month sentence, which is within the statutory range. In addition, the trial court stated at the sentencing hearing and in its judgment entry of sentencing that it had considered the entire record, appellant's presentence investigation report and the principles and purposes of sentencing, and had balanced the seriousness of the offense and recidivism factors pursuant to R.C. 2929.11 and 2929.12. In addition, the trial court noted appellant's prior criminal history, which included one felony and eight misdemeanor offenses, and found that appellant was not a candidate for shock incarceration or the intensive prison program, before sentencing her to serve 18 months in prison.

{¶ 42} On consideration of the foregoing, this court finds that the trial court's imposition of an 18 month sentence in this case is not contrary to law and does not constitute an abuse of discretion. Appellant's third assignment of error is not well-taken.

{¶ 43} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James R. Sherck, J. _____
CONCUR.
JUDGE

Judge James R. Sherck, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.