[Cite as *State v. Hollstein*, 2009-Ohio-4773.]

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

State of Ohio — Court of Appeals No. L-08-1164

Appellee — Trial Court No. CR-2007-3260

v.

Ray 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.

Patricia Horner, 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, Ray 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 two assignments of error:

{¶ 2} "I. Defendant Ray Hollstein's conviction was against the manifest weight

{¶ 3} "II. There was insufficient evidence to support defendant's conviction"

{¶ 4} 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.

{¶ 5} 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 his sister, Beverly Hollstein. Appellant 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 his sister on several occasions. He kept receipts from all of those purchases.

{¶ 6} Later that summer, appellant 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.

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

{¶ 8} 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.

{¶ 9} Chase testified at trial that appellant 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 appellant 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 Beverly Hollstein 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 showed no proof that he owned the crates, and that there were tags on the backs of each of the items in the crates.

{¶ 10} Tadsen, a self-described dealer in "used goods," testified at trial that appellant and later, appellant's sister, 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 his sister] 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 his sister from a photo array. On cross-examination, Tadsen stated that appellant used to live with Tadsen's ex-wife. Tadsen further stated that he did not suspect the merchandise was stolen when appellant first brought it into the store. Tadsen also stated that, although he had purchased items from appellant before July 2007, those previous items did not include antique advertisements.

{¶ 11} 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. 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 further testified that arrest warrants were issued after Tadsen identified appellant and his sister, Beverly, from photographs.

{¶ 12} Rybarczyk stated that Beverly Hollstein 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, Beverly refused to give Rybarczyk Vance's address. Rybarczyk further stated that she eventually got Vance's telephone number from Beverly's attorney; however, Vance refused to corroborate Beverly's story. Rybarczyk also stated that Vance hung up, after saying she did not want anything to do with the investigation.

{¶ 13} 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.

{¶ 14} 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.

{¶ 15} 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.

{¶ 16} 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 Beverly Hollstein contacted him and said that she was innocent, and asked him to drop the charges. Schmidt also stated that Beverly 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.

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

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

{¶ 19} On cross-examination, Beverly 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. Beverly 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. Beverly further stated that the things she took from Vance had belonged to the man Vance was living with at the time. Beverly said that Vance once told Beverly that her children's father was a "professional thief."

{¶ 20} At the close of Beverly's testimony, her defense rested. Wells then testified for the defense on behalf of appellant. Wells testified at trial that he had had known appellant and his sister 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 Beverly rides so that they could sell the items they acquired from Vance. Wells testified that he contacted Rybarczyk by telephone after appellant and Beverly were arrested; however, Rybarczyk seemed "disinterested" in talking to Wells.

{¶ 21} On cross-examination, Wells testified that he was on Beverly'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 Beverly'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.

{¶ 22} At the close of Wells' testimony, appellant's defense rested. Appellant and Beverly both made renewed motions for acquittal, which the trial court denied. The matter was then submitted to the jury, which found appellant and Beverly guilty of one count each of receiving stolen property, with a value of $50,400.

{¶ 23} 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 three felony convictions and 33 misdemeanor convictions. The trial court also noted that appellant was on community control at the time the instant offense was committed. Thereafter, 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. The trial court then advised appellant as to his limited right of appeal, and sentenced him to serve 18 months in prison, with 64 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.

{¶ 24} In his second assignment of error, appellant asserts that there was insufficient evidence to support his conviction. In support, appellant argues that no evidence was presented to show that appellant knew, or had any reason to know, that the milk crates and their contents were stolen.

{¶ 25} The term "sufficiency," in regard to evidence presented in a criminal case, "is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, citing Black's Law Dictionary (6 Ed.1990) 1433. In cases where a defendant challenges the sufficiency of the evidence presented at trial, the appellate court must determine "whether any rational factfinder, after viewing 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, cert. denied (1998), 525 U.S. 1077, 119 S.Ct. 816.

{¶ 26} 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 argue whether the merchandise in question was stolen from Schmidt. Appellant does argue, however, that no reasonable jury could find him guilty because the state "did not present evidence as to where Hollstein picked up these milk crates, nor did they present evidence establishing that Hollstein had any knowledge, or reasonable belief, that the milk crates had been stolen."

{¶ 27} 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 guilt by inference when the accused's possession of recently stolen property is not satisfactorily explained in light of surrounding circumstances developed from the evidence. Id.; *State v. Arthur* (1975), 42 Ohio St.2d 67, 69.

{¶ 28} In this case, it is undisputed that the merchandise appellant and his sister sold to Tadsen and Chase was originally stolen from Schmidt. As to how the siblings acquired the merchandise, testimony was presented by Beverly Hollstein 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 his sister contained hundreds of items.

{¶ 29} 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. Appellant's second assignment of error is not well-taken.

{¶ 30} In his first assignment of error, appellant asserts that his conviction was against the manifest weight of the evidence. In support, appellant argues that the jury was "confused and lost its way" when it found him guilty of receiving stolen property.

{¶ 31} 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*, supra. 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.'" (Emphasis added.) Id., quoting Black's, supra, at 1594.

{¶ 32} 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, weights 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, quoting *State v Martin*, supra. 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.

{¶ 33} 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 second assignment of error, we conclude that the jury did not lose its way so as to create a manifest miscarriage of justice in this case. Accordingly, appellant's conviction for receiving stolen property was not against the manifest weight of the evidence, and his first assignment of error is not well-taken.

{¶ 34} 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.