[Cite as *State v. Winters*, 2011-Ohio-141.]

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

State of Ohio	Court of Appeals No. F-10-010
Appellee	Trial Court No. 09CR184
v.	
Jondale R. Winters	**DECISION AND JUDGMENT**
Appellee	Decided: January 14, 2011

* * * * *

Scott A. Haselman, Fulton County Prosecuting Attorney, for appellee.

Brian D. Smith, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the May 3, 2010 judgment of the Fulton County Court of Common Pleas, which sentenced appellant, Jondale Winters, after he was convicted by a jury of violating R.C. 2923.24(A), possessing criminal tools, a felony of the fifth degree, R.C. 2923.03(A) and R.C. 2913.02(A)(1), complicity to commit theft, a felony of the fifth

degree. Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellant asserts the following assignments of error on appeal:

{¶ 2} "I. The State failed to produce sufficient evidence to convict the Defendant-Appellant of complicity to [sic] theft and possession of criminal tools, violating due process.

{¶ 3} "II. The Defendant-Appellant's conviction of complicity to [sic] theft and possession of criminal tools is against the manifest weight of the evidence.

{¶ 4} "III. The trial Court erred in allowing presentation of a video recording that the Prosecutor did not provide to the Defendant or his counsel prior to the day of trial.

{¶ 5} "IV. The Defendant-Appellant received ineffective assistance of counsel."

{¶ 6} On December 22, 2009, appellant was indicted in a multi-count indictment alleging violations of R.C. 2913.02(A)(1), complicity to commit theft, and R.C. 2923.24(A), possession of criminal tools. The following evidence was presented at trial. In addition to witnesses testimony, the prosecution also submitted copies of the surveillance recordings from that night. The surveillance recording of the parking lot showed appellant and two companions arrived at the Wal-Mart in Wauseon, Ohio, at 3:05 a.m. on November 29, 2009. A man wearing a hooded sweatshirt, Steven Ostrander, exited from the back seat of the vehicle, which was driven by Jennifer Reichard, put on his Carhartt coat, and immediately entered the store. Appellant, a front seat passenger, and Reichard entered the store five minutes later. Appellant, who is bald, was wearing a black coat and blue jeans and sometimes a blue stocking cap. As appellant entered the store, he

kept his head turned sharply to the left while he entered the store, which the asset protection coordinator testified is commonly done so that the face would not be visible on the camera. Reichard wore a white coat, which she later draped over the infant seat at the front of the shopping cart covering her large purse. The asset protection coordinator for Wal-Mart testified that this is a common method shoplifters use to hide merchandise. Furthermore, he testified that it is common with organized retail crime that individuals work as a group. They pretend not to know one another, and while two people strip and conceal the merchandise, the other person serves as a lookout.

{¶ 7} A cashier at the Wauseon Wal-Mart, testified that she was working that morning and noticed the sensor alarms, which sounded at the cash register, were not going off as people entered the store, but were going off as they exited. Normally, when the alarm is sounded, another employee stops the person at the door. The cashier went to the door to check and found the greeter at the door had checked the person after the sensors went off and he did not have anything. The greeter testified that when the alarm sounded, appellant was exiting the store. The greeter stopped appellant, whom the greeter described as the man without the stocking cap, but he did not have anything on him. The greeter testified that appellant showed the greeter his cell phone and the greeter let him go because he knew that the sensor can sometimes be set off by things other than security tags. There was no surveillance video of this area presented at trial.

{¶ 8} Because the cashier was suspicious, she told another cashier that she thought something was going on and that person called the manager. The night manager testified

that after he was notified, he walked the store and observed two men and one woman. One of the men and the woman were together and they seemed to move whenever the manager came around.

{¶ 9} The surveillance recording shows that appellant and Ostrander entered the electronics department from separate directions at 3:13 a.m. Both men wandered around and in and out of the department for the next 45 minutes scanning the merchandise. The asset protection coordinator testified that while the men were in the electronics department they scanned the merchandise like a shoplifter, rather than an ordinary customer. Reichard is seen coming in and out of the department several times.

{¶ 10} The asset protection coordinator, who was watching the surveillance tape at the time, watched Reichard as she entered the infant department, moved into the electronics department, and then passed into the toy department where there were no surveillance cameras. He saw the men take items into the toy department and disappear off camera. Afterward, Reichard left the area with a draped cart and headed for the grocery isle. The men left in a different direction, went around the cash registers, along the front of the store, in and out of the bathrooms, and eventually exited the store together. One of the police officers also watched the video and viewed the electronics area. He believed that appellant was in the area of the products that were found in the car, but the officer could not see appellant actually shoplifting. The night manager watched the men on the video for a short time, but did not see the men concealing merchandise.

{¶ 11} The cashier continued to watch the exit and relieved the greeter at the door for a short period of time. Around 4:30 a.m., the cashier saw a bald-headed man, whom she identified as appellant, leave and then return to the store. He made a comment to her that he had the wrong set of keys or needed keys from his buddy. Appellant hung around the bathrooms and cash registers and talked to someone near the women's clothing area. When the cashier saw Ostrander had entered the bathroom, the cashier had the greeter go into the bathroom to check to see if Ostrander was stealing something. The greeter returned and said that there was a man in the stall who was opening something. The cashier sent the greeter back into the restroom and then she saw appellant go into the bathroom for a short time. During the time he was in the restroom, the greeter testified, he overheard one man ask the other man for a set of keys. The greeter believed that appellant was in the stall and the other man, the one "with a stocking cap," came in asking for the keys. Shortly thereafter, both men exited the store without setting off the alarms. At the same time, the manager called the police. The greeter checked the stall and found merchandise packaging for two Boost cell phones.

{¶ 12} The cashier watched the men get into a silver car and drive to a nearby gas station. When the police arrived, the cashier told the officers about her suspicions and where she thought the men had driven. The packaging for a GPS was found in the parking lot. The manager recognized the merchandise packaging for the two cell phones and the GPS as merchandise sold in the electronics department. The GPS was accessible to consumers at that time, but the phones were locked up with a magnetic key. He also

testified that expensive video games, with a price over $49.99, are kept in a case locked with a key, but that all of the locks can be easily jimmied open.

{¶ 13} Two police officers came to investigate. They were met by some of the employees who gave a description of the vehicle and suspects. At that time, the silver car was leaving the gas station and one of the officers left to apprehend the suspects in the vehicle. The other officer entered the store to talk to Reichard who was still inside the store. He found Reichard, the woman described by the employees, and took her to the scene where the car had been stopped.

{¶ 14} The officers discovered that the car was registered to Reichard. Upon a search of the car, the officers found that it was filled with clothes and other items scattered around the car. In the glove box they found two Boost Mobile phones. There was a Garmin GPS in the back seat, but not in a box. Initially, the officers did not think the GPS had been stolen but retrieved it when the employees found the packaging in the parking lot. In the trunk, there were video games in a trash bag. They did not find any Wal-Mart shopping bags or receipts. The video games were in their packaging and had Wal-Mart price stickers on them. The officers only removed items that were in their original packaging or had a Wal-Mart price tag. The officer gave an employee the items to scan and create a receipt. After the officers learned that the GPS was stolen, they returned with some additional items from the car to scan on a separate receipt. The first receipt totaled $702.92 and the second, $39.59. The phones and GPS had serial numbers that the officers could match to the packaging that was found.

{¶ 15} The night manager testified that the serial numbers on the phones matched the packaging found in the store. The other items could not be traced that way. While the manager knew that the store carried the types of items that were recovered, he could not verify that the merchandise had been stolen from the store. The cashier and the asset protection coordinator also testified that there was no way to know if the merchandise had been in their inventory.

{¶ 16} A support manager for Wal-Mart, testified that she was also called by the manager to walk the floor that morning because there was a potential problem. She went to the grocery isles and began to observe a woman walking the isle looking at things. She was observing the woman when a police officer arrived and escorted the woman outside. The officer returned with some merchandise and the support manager scanned the UPC codes on each piece of merchandise as a purchase to record the items and determine the value of everything. In addition to the phones and GPS, there were also Wii games, video games, Nintendo DS games, a charger, a memory card, scarf, and sunglasses. When she scanned the item, the cash register would pull up the price. If the item was not available at Wal-Mart, she would not have been able to obtain a price for it. But, she could not tell at that moment if there was stock missing. She testified that she could make such a determination from an inventory, but she did not take an inventory.

{¶ 17} When one of the officers searched Reichard's purse, he found a 9" x 12" bag made out of tin foil and duct tape with a CO2 canister for a paint ball gun inside, a pair of scissors, a utility knife, and an Inview S-3 magnetic key wrapped in foil. The key was

inside the lining of the purse. The officer did not find any Wal-Mart shopping bags or receipts.

{¶ 18} The other officer testified that appellant, who was the driver, did not have a driver's license. Both men denied having been at Wal-Mart and said that they had just arrived from Michigan and had stopped only at the gas station. Appellant indicated that he was headed to Maumee, but was traveling southbound because of Ostrander's directions. The officer observed that appellant met the description of the man provided by the Wal-Mart employees. The officer patted appellant down and discovered cutting snips that were 6-8" long and an approximately 6" x 2" piece of foil that was folded. Appellant could not give an explanation for having the foil. Nothing was found on Ostrander, but the officer observed that there was a pair of black and yellow snips on the front passenger seat where Ostrander had been sitting.

{¶ 19} Ostrander testified, on behalf of the defense, that he is a recovering heroin addict and on November 28, he had called appellant and Reichard to request that they pick him up at his home in Maumee because he was having withdrawal symptoms (feeling sick and was sweating) and needed help until he could get into the methadone clinic in Monroe, Michigan, the next morning. He directed them to drive through Wauseon on the way to their home in Clayton, Michigan. When he got in the car, he noted that it was like a dumpster and joked about whether they were making a trash run. Reichard told him that the items in the bag were gifts for her children. Ostrander looked in the bag, which was

about one-quarter full, and saw some video games, a scarf, a teddy bear, etc. Ostrander wanted to lie down so he asked Reichard to move the bag to the trunk.

{¶ 20} Appellant and Reichard decided to stop at the Wal-Mart in Wauseon to get some groceries, arriving about 3:15 a.m. Ostrander entered the store first because appellant and Reichard were talking. Despite his testimony that he was ill and sweating, he put on a coat over his sweatshirt prior to entering the store. Ostrander testified that he just aimlessly walked around the store because he did not feel well. He passed appellant several times, sometimes talking to him and sometimes not. He knew that appellant was watching him to make sure he was okay.

{¶ 21} Ostrander stated that when he ended up in the electronics department and saw the GPS units, he decided right then to steal one. He took it into the sporting goods and then hardware departments to remove the security slide and packaging. He concealed it in his overcoat that he had removed and then went to the bathroom at the rear of the store. Ostrander intended to smoke, but did not have any keys, so he located appellant and retrieved the keys before leaving the store. Appellant actually left the store shortly before Ostrander because he was moving very slowly. Ostrander then left the store carrying his coat, with the GPS inside, and phone. When the sensor went off, he ran his arm carrying his coat and the phone pass the sensor and indicated to the greeter that the phone must have set it off. Appellant asked Ostrander if he had stolen anything, but he did not admit to it.

{¶ 22} After getting into the car, Ostrander sat there for awhile while appellant went back into the store. While he sat there, Ostrander opened up the GPS and removed the security buzzer and threw it outside the car. After awhile, he returned to the store, leaving his overcoat behind, but wearing a sweatshirt. This time, he returned to the electronics department and concealed the two Boost phones under his sweatshirt. Ostrander ran into appellant and asked him to buy a pop because he was not feeling well. After appellant purchased the pop, Ostrander went into the restroom because he knew that he could not leave the store with the packaging of the phones without setting off the sensors again.

{¶ 23} While he was in the back stall removing the packaging, he could hear someone walk into the restroom. He also heard appellant come into the restroom and he asked for the key to the car. Ostrander left the packaging behind and concealed the phones in his coat. When Ostrander came out of the stall, he saw the greeter and gave appellant the keys to the car. Appellant left the store, followed a few minutes later by Ostrander, who did not set the sensors off.

{¶ 24} Knowing that the greeter and a cashier were on to him, Ostrander suggested the two men decide to go to a nearby gas station to get some cigarettes because appellant could not find any in the car. While he was about to buy some cigarettes at the gas station, appellant called him and told him that he found some in the car. When Ostrander returned to the car, he noticed the police cars at Wal-Mart and told appellant to drive Ostrander home immediately because he was very sick. Appellant did not want to leave Reichard in the store, but Ostrander convinced him to call her and explain. Appellant asked for

directions and Ostrander told appellant which way to turn so that they could get away from the store.

{¶ 25} As the police were pulling the car over, Ostrander told appellant to deny having been at Wal-Mart. At the same time, appellant was questioning Ostrander as to whether he had stolen something from the gas station or Wal-Mart. Ostrander denied owning the snips that were found in the car and believed they belonged to appellant whom Ostrander knew was having trouble with his car stereo and had plans to fix it. Ostrander denied knowing that appellant and Reichard had foil, a magnetic key, and snips on them.

{¶ 26} Ostrander testified that he did not get a deal for testifying, but was doing so only because appellant was his friend and believed that appellant should not get in trouble for something Ostrander did.

{¶ 27} In his first assignment of error, appellant argues that there was insufficient evidence to convict him of complicity to commit theft and possession of criminal tools.

{¶ 28} A challenge to the sufficiency of the evidence is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, reconsideration denied (1997), 79 Ohio St.3d 1451. The standard for determining whether there is sufficient evidence to support a conviction is whether the evidence admitted at trial, "if believed, would convince the average mind of 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." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, citing *Jackson v.*

Virginia (1979), 443 U.S. 307. See, also, *State v. Thompkins*, supra. Therefore, "[t]he verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier-of-fact." *State v. Dennis* (1997), 79 Ohio St.3d 421, 430, certiorari denied (1998), 522 U.S. 1128, citing *State v. Jenks*, supra. In determining whether the evidence is sufficient to support the conviction, the appellate court does not weigh the evidence nor assess the credibility of the witnesses. *State v. Walker* (1978), 55 Ohio St.2d 208, 212-213, certiorari denied (1979), 441 U.S. 924. But, the court must view the evidence in the light most favorable to the prosecution. *State v. Jenks*, supra. If the state "* * * relies on circumstantial evidence to prove an element of the offense charged, there is no requirement that the evidence must be irreconcilable with any reasonable theory of innocence in order to support a conviction" so long as the jury is properly instructed as to the burden of proof, i.e., beyond a reasonable doubt. *State v. Jenks*, supra, at paragraph one of the syllabus.

{¶ 29} R.C. 2923.03(A)(2) provides that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall * * * [a]id or abet another in committing the offense." Furthermore, R.C. 2913.02(A)(1) provides that "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * * * [w]ithout the consent of the owner or person authorized to give consent." If the value of the property stolen is more than $500 but less than $5,000, the offense is a felony of the fifth degree. R.C. 2913.02(B)(2). R.C.

2923.24(A) provides that: "(A) No person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally."

{¶ 30} Appellant argues that there was insufficient evidence presented to support a finding that he stole anything from the store since none of the witnesses could testify that they saw appellant attempting to shoplift or actually remove anything from the store and Ostrander admitted to stealing the phones and GPS on his own without appellant's knowledge. Furthermore, there was insufficient evidence to support a finding that the property stolen was valued over $500 since the only evidence that can be traced back to the store is the two phones and GPS unit, with a total value of $368.96.

{¶ 31} Upon a review of the evidence, we find that there was sufficient direct and circumstantial evidence presented to submit the case to the jury. As to the complicity charge, appellant was seen in the company of one who admitted to stealing the phones and GPS; stolen merchandise was found in the car he occupied; he carried shoplifting tools; the majority of the stolen items are of the type that could be found in the electronics department where appellant spent most of his time; and appellant's behavior, and that of his companions during the entire event, was identified by the asset protection coordinator as being similar to other organized retail shoplifting groups (entering separately, hiding his face from the camera, pretending not to know Ostrander, passing in and out of the electronics department repeatedly over an extended period of time, meeting up with Reichard at times, entering the bathroom repeatedly, and scanning the merchandise rather than acting like a typical shopper).

{¶ 32} Furthermore, as to whether the prosecution proved that all of the merchandise retrieved from the car was stolen, we find that the jury could have reasonably inferred from the direct evidence (that phones and a GPS were stolen) that the Wal-Mart merchandise found in the car and in a garbage bag in the trunk was stolen that night as well. The jury could also reasonably infer from the direct evidence that appellant and Ostrander drove to a nearby gas station, had the opportunity to transfer stolen items from the car, and place them in the garbage bag in the trunk where they were later found by the police. Therefore, we find appellant's first assignment of error not well-taken.

{¶ 33} In his second assignment of error, appellant argues that his conviction of complicity to commit theft and possession of criminal tools is contrary to the manifest weight of the evidence.

{¶ 34} Even when there is sufficient evidence to support the verdict, a court of appeals may decide that the verdict is against the weight of the evidence. *State v. Thompkins*, supra, at paragraph two of the syllabus. When weighing the evidence, the court of appeals must consider whether the evidence in a case is conflicting or where reasonable minds might differ as to the inferences to be drawn from it, consider the weight of the evidence, and consider the credibility of the witnesses to determine if 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." *State v. Thompkins*, supra, at 387. See, also, *State v. Smith* (1997), 80 Ohio St.3d 89, 114, certiorari denied (1998), 523 U.S. 1125.

{¶ 35} While there was some conflicting evidence presented in this case and elements that were proven solely by circumstantial evidence, when all of the evidence is considered as a whole, we find that the jury did not lose its way in evaluating the evidence and drawing inferences from the direct evidence. Therefore, we find that appellant's convictions were not contrary to the manifest weight of the evidence. Appellant's second assignment of error is not well-taken.

{¶ 36} In his third assignment of error, appellant argues that the trial court erred in allowing presentation of a video recording that the prosecutor did not provide to the appellant prior to trial.

{¶ 37} During the trial, the prosecution obtained a copy of a continuous video recording of Reichard's car from the time the group arrived at the Wal-Mart until the time appellant and Ostrander left the parking lot. The prosecution had already obtained an edited copy of the same scene prepared by the asset protection coordinator at Wal-Mart. The prosecution and defense both indicated in opening statements that there was only a video showing appellant arriving and leaving. However, after the greeter gave conflicting testimony to the cashier about who was in the stall removing merchandise from its packaging, the asset protection coordinator who was at trial notified the prosecution that there was an extended version of the videotape of the car. During a recess, he showed the video to the prosecution and defense counsel. The prosecution wanted to use the extended version of the video at trial because of the conflicting testimonies presented by the cashier

and greeter. Appellant objected to the admission of the evidence. The court overruled the objection finding that the probative value outweighed the prejudicial effect.

{¶ 38} Former Crim.R. 16(B)(1)(c), effective July 1, 1973, provided in pertinent part that:

{¶ 39} "(B) Disclosure of evidence by the prosecuting attorney

{¶ 40} "(1) Information subject to disclosure.

{¶ 41} "(c) Documents and tangible objects. Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant."

{¶ 42} Sanctions for violating Crim.R. 16(B) may be sought if the defendant can demonstrate that: "(1) the prosecution's failure to disclose was a willful violation of the rule, (2) foreknowledge of the information would have benefited the accused in the preparation of his defense, and (3) the accused suffered some prejudicial effect. *State v. Parson* (1983), 6 Ohio St.3d 442, 445." *State v. Joseph* (1995), 73 Ohio St.3d 450, 458, certiorari denied (1996), 516 U.S. 1178.

{¶ 43} The prosecution is required to provide the defense with access to any evidence intended to be used at trial. Crim.R. 16(B)(1)(c). But, the state is only required

to provide the defense with evidence that is within the state's possession or control. *State v. Morgan*, 12th Dist. No. CA2008-08-035, 2009-Ohio-6050, ¶ 23. Furthermore, evidence that was not available until the time of trial need not be excluded simply because the prosecution could not notify the defense of the evidence prior to trial. *State v. Clark* (Aug. 5, 1992), 1st Dist. No. C-910541, at 2.

{¶ 44} Here, the prosecution only intended to use the edited videotape at trial. However, at trial, when one of its witnesses gave unexpected conflicting testimony, the prosecution learned that there was a video recording to substantiate that Ostrander entered the bathroom first and appellant is the man who returned to the store and followed Ostrander and the greeter into the bathroom to retrieve a set of keys. It also provided additional evidence that appellant entered and exited the store several times, a fact which the defense indicated in opening remarks could not be proven. We conclude that the state did not violate Crim.R. 16(B)(1)(c) since the tape was not in the prosecution's possession prior to trial. Furthermore, the surveillance video merely confirmed the testimony of the cashier that appellant entered and left the store several times.

{¶ 45} Appellant's third assignment of error is not well-taken.

{¶ 46} In his fourth assignment of error, appellant argues that his appointed counsel rendered ineffective assistance.

{¶ 47} Appellant bears the burden of proving that his counsel was ineffective since an attorney is presumed competent. *Strickland v. Washington* (1984), 466 U.S. 668, 689, and *State v. Lott* (1990), 51 Ohio St.3d 160, 174, certiorari denied (1990), 498 U.S. 1017.

To meet this burden of proof, appellant must show that: (1) there was a substantial violation of the attorney's duty to his client, and (2) the defense was prejudiced by the attorney's actions or breach of duty. *Strickland,* supra, at 687-699, and *State v. Smith* (1985), 17 Ohio St.3d 98, 100. When the claims of ineffective assistance of counsel are based upon facts outside the appellate record, the issue must be raised in a petition for postconviction relief, not on direct appeal. *State v. Hartman* (2001), 93 Ohio St.3d 274, 299, and *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 228.

{¶ 48} Appellant asserts that his counsel rendered ineffective assistance because he failed to obtain transcripts from the preliminary hearing for cross-examination purposes. Appellant asserts that the witnesses made inconsistent statements. Appellant's counsel did cross-examine the greeter to ensure that he was not confusing the two men. While he asked if the greeter remembered his earlier testimony at the preliminary hearing, the attorney could not impeach the greeter's testimony without the alleged prior inconsistent statement.

{¶ 49} Since we do not have the preliminary hearing transcript before us, nor do we know why the attorney did not order a copy of it, we cannot compare the testimonies at that hearing to the testimonies at trial. Furthermore, in his closing argument, appellant's attorney referred to the conflicting testimonies between the witnesses to bolster Ostrander's testimony that he was the only one shoplifting. Without additional evidence outside the appellate record, we cannot determine if this was trial strategy or ineffective

assistance. Thus, this issue cannot be determined on direct appeal. Appellant's fourth assignment of error is found not well-taken.

{¶ 50} Having found that the trial court did not commit error prejudicial to appellant and that substantial justice has been done, the judgment of the Fulton County Court of Common Pleas is affirmed. Appellant is hereby 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, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE