[Cite as *State v. Semer*, 2011-Ohio-6502.]

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

State of Ohio — Court of Appeals No. F-11-005

Appellee — Trial Court No. 10CRB00444W

v.

Kimberly A. Semer — **DECISION AND JUDGMENT**

Appellant — Decided: December 16, 2011

* * * * *

Eric K. Nagel, Wauseon City Prosecuting Attorney, for appellee.

Alan J. Lehenbauer, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Kimberly A. Semer, appeals from her conviction for theft in the Fulton County Court, Western District. For the reasons that follow, we affirm.

{¶ 2} On August 16, 2010, appellant was charged with theft from the Dollar General Store in Wauseon, Ohio. A jury trial commenced on January 21, 2011. Tonya

Schutt testified that in 2010, she was an assistant manager at Dollar General. On August 16, 2010, she was working when she saw appellant walk into the store carrying a large tote bag. Schutt testified that she recognized appellant because she had been suspected of shoplifting the night before. Because she recognized her, Schutt called the police. Schutt watched appellant as she picked up some blue bowls. Schutt did not see what appellant did with the bowls because she was busy with other customers. When appellant approached the cashier to pay for some toilet paper, Schutt noticed that appellant's tote bag appeared much fuller than it had when appellant first entered the store. Schutt testified that inside appellant's tote bag were some blue bowls and some fuel treatment that she was not authorized to take from the store.

{¶ 3} Wauseon Police Officer, Dawn Hendricks, testified that on August 16, 2010, she was called to investigate a possible shoplifting at the Dollar General Store in Wauseon. When she walked into the store, she spoke with Schutt who directed her to appellant. Appellant was at the counter paying for toilet paper. Hendricks testified that she asked appellant to step aside and she told her she was suspected of shoplifting. Hendricks asked to see appellant's tote bag. Inside, she found some blue bowls and some fuel treatment. Hendricks testified that appellant told her that she bought the items at another Dollar General Store and that she was planning on returning the items. She also told Hendricks that she did not have a receipt for the items. Hendricks testified that she then issued appellant a citation for theft.

{¶ 4} Appellant testified that she had purchased the blue bowls and the fuel treatment at a Dollar General Store in Akron, Ohio. She brought the items to the Wauseon store so she could return the items. Appellant, however, never made an attempt to return the items. She also acknowledged that she has been convicted of theft twice in five years.

{¶ 5} On January 21, 2011, a jury found appellant guilty of theft, a violation of R.C. 2913.02(A) and a misdemeanor of the first degree. Appellant now appeals setting forth the following assignments of error:

{¶ 6} "I. Appellant's conviction for theft is against the manifest weight of the evidence.

{¶ 7} "II. The trial court committed prejudicial error in allowing evidence of other crimes, wrongs or acts in violation of Evid. Rule 404(B).

{¶ 8} "III. The trial court committed prejudicial error in not giving a limiting instruction to the jury as to consideration of other acts evidence.

{¶ 9} "IV. Appellant was denied the effective assistance of counsel."

{¶ 10} The "weight of the evidence" refers to the jury's resolution of conflicting testimony. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. In determining whether a verdict is against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and "* * * 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." Id. An appellate court must defer to the factual findings of the jury regarding the weight to be given the evidence and credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. When examining witness credibility, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. The factfinder is free to believe all, part, or none of the testimony of each witness appearing before it. *State v. Brown*, 11th Dist. No. 2002-T-0077, 2003-Ohio-7183, ¶ 53.

{¶ 11} The elements of R.C. 2913.02(A)(1), theft, are as follows:

{¶ 12} "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

{¶ 13} "(1) Without the consent of the owner or person authorized to give consent[.]"

{¶ 14} Here, the trier of the facts, in this case the jury, chose to believe the testimony of Schutt over the testimony of appellant. On review, we cannot say that the jury clearly lost its way or perpetrated a manifest miscarriage of justice. Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 15} In her second assignment of error, appellant contends that the court erred in allowing the state to present evidence that appellant was suspected of shoplifting the day

before from the Dollar General Store. Specifically, Schutt testified that when appellant walked into the store on August 16, 2010, she recognized her from a store video she had watched the prior day when appellant was suspected of shoplifting. In her third assignment of error, appellant contends that the court erred in failing to give the jury a limiting instruction with regards to the use of other acts evidence.

{¶ 16} Evid.R. 404(B) provides: "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Accordingly, evidence of other acts may be relevant and admissible to show motive or intent, the absence of mistake or accident, or a scheme, plan or system in committing the act in question. *State v. Broom* (1988), 40 Ohio St.3d 277, paragraph one of the syllabus. Further, the other act must not be too remote and must be closely related in time and nature to the offense charged. *State v. Burson* (1974), 38 Ohio St.2d 157, 159. If the act is too distant in time or too removed in method or type, it has no probative value. *State v. Henderson* (1991), 76 Ohio App.3d 290, 294.

{¶ 17} Schutt's testimony regarding the videotape, made the night before appellant's arrest, helped to explain Schutt's identification of appellant and her reason for suspecting appellant of shoplifting when she saw her the next day. Accordingly we find that the court did not err in admitting this testimony. As we find no error in the admission of this testimony, we find no error in the court's failure to give a limiting

instruction to the jury. Appellant's second and third assignments of error are found not well-taken.

{¶ 18} In her fourth assignment of error, appellant contends she was denied effective assistance of counsel.

{¶ 19} To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "[F]irst, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington* (1984), 466 U.S. 668, 687. Proof of prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. Further, debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips* (1995), 74 Ohio St.3d 72, 85.

{¶ 20} First, appellant contends her counsel was ineffective by failing to make a Crim.R. 29(A) motion for acquittal. This argument is without merit as the state presented overwhelming evidence of appellant's guilt.

{¶ 21} Second, appellant contends her counsel was ineffective for failing to object to the prosecution asking witnesses leading questions during direct examination such as asking Schutt about the appearance of appellant's tote bag, asking Schutt what behaviors

she looks for when determining if a customer is a potential shoplifter, asking Schutt about the items found in appellant's tote bag and asking Officer Hendricks about appellant's demeanor once she was issued a citation.

{¶ 22} Evid.R. 611(C) provides that leading questions should not be used on direct examination of a witness except as may be necessary to develop the witness's testimony. Due to a trial court's broad discretion to allow leading questions, however, an attorney's decision not to object is within the realm of trial strategy. *State v. Tyler*, 10th Dist. No. 05AP-89, 2006-Ohio-6896, ¶ 37. Thus, we need not second-guess the decision of appellant's defense counsel to not object to leading questions. See *Tyler* at ¶ 37-38. See, also, *State v. Jackson*, 92 Ohio St.3d 436, 449, 2001-Ohio-1266 (declining to find ineffective assistance of counsel from an attorney's failure to object to excessive leading questions by the prosecution).

{¶ 23} Third, appellant contends that her counsel was ineffective in failing to object to the prosecution's closing argument. Specifically, appellant argues that her counsel was ineffective in failing to object when the prosecution mentioned the other acts evidence discussed above and when the prosecution mentioned that appellant had been in the automotive aisle of the Dollar General Store.

{¶ 24} The prosecution is entitled to a certain degree of latitude in closing. *State v. Grant* (1993), 67 Ohio St.3d 465, 482, citing *State v. Richey* (1992), 64 Ohio St.3d 353, 362. The prosecution "may draw reasonable inferences from the evidence presented at trial, and may comment on those inferences during closing argument." *State v. Treesh*

(2001), 90 Ohio St.3d 460, 466, citing *State v. Smith* (1997), 80 Ohio St.3d 89, 111. We review the prosecution's summation in its entirety to determine if the allegedly improper remarks prejudicially affected defendant's substantial rights. Id.; *State v. Smith* (2000), 87 Ohio St.3d 424, 442, citing *State v. Smith*, 14 Ohio St.3d 13, 14.

{¶ 25} Having already determined that it was not error for the court to admit the other acts evidence, we do not find that counsel was ineffective in failing to object to this portion of the prosecution's closing argument. As to the comment that appellant had been in the automotive aisle, we find this to be a reasonable inference given the fact that appellant was found with an automotive product.

{¶ 26} Finally, appellant contends her counsel was ineffective in failing to object to the court's jury instructions. In this argument, appellant once again argues that the jury should have received a limiting instruction regarding other acts evidence. Having already determined there was no error in admitting the evidence, appellant's argument fails.

{¶ 27} Appellant also contends that counsel was ineffective in failing to object when the court advised the jury that there was no dispute as to venue. "Although it is not a material element of the offense charged, venue is a fact which must be proved in criminal prosecutions unless it is waived by the defendant." *State v. Headley* (1983), 6 Ohio St.3d 475, 477, citing *State v. Draggo* (1981), 65 Ohio St.2d 88, 90. The standard of proof is beyond a reasonable doubt, although "[v]enue need not be proved in express terms so long as it is established by all the facts and circumstances in the case." *State v.*

Hobbs (Mar. 14, 1990), 9th Dist. No. 89CA004600, citing *State v. Dickerson* (1907), 77 Ohio St. 34, paragraph one of the syllabus.

{¶ 28} The evidence in this case established that the crime charged occurred at the Dollar General Store in the city of Wauseon, Fulton County, Ohio and that the incident was investigated by a Wauseon police officer. Accordingly, we do not find that counsel was ineffective in failing to object to the trial court's characterization of the venue issue as indisputable. Appellant's fourth assignment of error is found not well-taken.

{¶ 29} On consideration whereof, the judgment of the Fulton County Court, Western District, is affirmed. It is ordered that appellant pay the court 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE