[Cite as *State v. Hutchinson*, 2014-Ohio-1004.]

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

State of Ohio — Court of Appeals No. F-13-008

Appellee — Trial Court No. 12CR000163

v.

Tyrone Hutchinson, Jr. — **DECISION AND JUDGMENT**

Appellant — Decided: March 7, 2014

* * * * *

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

Jordan J. Grant, for appellant.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellant, Tyrone Hutchinson, Jr., appeals from the judgment of the Fulton County Court of Common Pleas, following a jury trial, which convicted him of one count of felony theft. We affirm.

A. Factual and Procedural Background

{¶ 2} On November 21, 2012, the Fulton County Grand Jury indicted appellant on one count of breaking and entering in violation of R.C. 2911.13(A), one count of theft in violation of R.C. 2913.02(A)(1), and one count of possessing criminal tools in violation of R.C. 2923.24(A). All are felonies of the fifth degree. The matter proceeded to a jury trial, which revealed the following.

{¶ 3} During the early morning hours of August 29, 2011, the silent alarm at the Main Stop gas station in a rural part of Fulton County alerted the police to a possible break-in. When deputies from the Fulton County Sheriff's Office arrived, they found that the door to the store had been pried open, and the store appeared to have been ransacked. Video surveillance would later show two individuals wearing sweatpants, sweatshirts, gloves, and ski masks break into the store using a crowbar, and steal cigarettes by throwing them into garbage cans that they then carried out. The store manager testified that the value of the stolen cigarettes was $4,600.

{¶ 4} As the deputies were beginning their investigation, a newspaper delivery person arrived and notified the deputies that she had observed a man wearing dark clothing running along the road in the opposite direction of the gas station. One of the deputies left to search for that person, and found appellant running alongside the road approximately two miles away. Appellant, a resident of Toledo, was wearing dark clothing, and it appeared that his clothes were wet from either sweat or dew. When questioned, appellant answered that he thought he was near Perrysburg, and stated that

some friends with whom he had been drinking earlier had dropped him off. Appellant further stated that his friends' names were Paul, Shaffer, and Morencia.[1] Appellant was taken into custody, but eventually released.

{¶ 5} Meanwhile, the investigation at the gas station continued. A canine unit arrived, and began to track the perpetrators' scent. The trail led the deputies along the route to where appellant was arrested. Along the way, the deputies discovered a gray sweatshirt in the soybean fields. When they reached the end of the trail, the deputy in charge of the canine noticed a visible difference in the soybean fields where it appeared a person had walked or run through them. The deputy initiated a reverse search, and the canine tracked the scent to the other side of the road where a ski mask was found in a soybean field behind a house. A few months after the incident, an ODOT worker found a trash can matching the one used in the video, and containing several packs of cigarettes, in a ditch near the gas station. The ODOT worker also testified that he found a dark blue sweatshirt or pair of sweatpants after he inadvertently mowed over them.

{¶ 6} Ultimately, the ski mask was sent to BCI&I for a DNA analysis, which revealed a positive match to James Friess. Friess was arrested, and agreed to a negotiated plea of guilty to one count of theft in exchange for his testimony against appellant. Friess and appellant have known each other for several years, and used to be neighbors. Evidencing this fact was a 2006 police report detailing an accident appellant was

[1] Paul Shaffer is the bandleader on the Late Show with David Letterman. The location of the robbery was approximately three miles from the town of Morenci, Michigan.

involved in when he was driving Friess's girlfriend's car. Friess testified that appellant was the second person in the surveillance video, and that the two of them planned and executed the theft. He testified that after they had stolen the cigarettes, they discussed going back to the gas station to steal the safe. As they approached, however, they noticed that the deputy sheriffs had already arrived, so they ran back towards the car, which was parked further down a crossroad. Friess stated that at that point, the two became separated, and when appellant did not appear at the car, Friess left and drove back to Toledo.

{¶ 7} Following the presentation of evidence and closing arguments, the trial court instructed the jury. As to the charge of theft, the trial court instructed, in relevant part,

> [B]efore you can find the Defendant guilty of this charge, you must find beyond a reasonable doubt that on or about the twenty-ninth of August, 2011, and in Fulton County, Ohio, the Defendant, with purpose to deprive the owner of cigarettes, knowingly exerted control over the cigarettes without the consent of the owner or the person authorized to give consent.

The jury then retired. As they were deliberating, the jurors sent out the following question:

> [D]oes [appellant] have to be one of the two people in the store to be found guilty of theft?

The trial court and counsel discussed the question, and discussed whether the jurors could find appellant guilty based on complicity. The trial court noted that complicity was never

discussed throughout the trial. Ultimately, it ruled that the answer to the jury's question was "No."

{¶ 8} However, upon further discussion, the trial court elected not to directly answer the jury's question. Instead, the jury was called back into the courtroom, and the following instruction was given:

> Members of the jury you have been returned to the courtroom because of your request for further instructions. The instructions previously given cover the matter contained in the request, however it is difficult to remember all of the instructions, therefore I will repeat an instruction previously given to you. The Defendant is charged with theft. Before you can find the Defendant guilty of this charge, you must find beyond a reasonable doubt that on or about the twenty-ninth day of August, 2011, and in Fulton County, Ohio, the Defendant, with purpose to deprive the owner of cigarettes, knowingly exerted control over the cigarettes without the consent of the owner or the person authorized to give consent. By repeating this instruction I do not empathize [sic] it over any of the other part of the instructions. If this does not clarify the law for you, you may request further instruction—you may request in writing a further explanation. And that is all I am authorized to give you at this time.

{¶ 9} Following deliberations, the jury found appellant guilty of theft, but not guilty of breaking and entering and possessing criminal tools. The matter was then

continued for a sentencing hearing, where the trial court sentenced appellant to 11 months in prison.

B. Assignments of Error

{¶ 10} Appellant has timely appealed, raising two assignments of error:

1. Trial court committed reversible error by failing to provide complete jury instructions on the law of complicity.

2. The conviction of theft is against the sufficiency and manifest weight of the evidence.

II. Analysis

A. Jury Instructions

{¶ 11} We initially note, "After arguments are completed, a trial court must fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder. (Crim.R. 30(A), construed.)" *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus.

{¶ 12} In his first assignment of error, appellant argues, "[W]hen the Court instructed the jury that they may convict the Appellant of theft without setting foot inside the gas station it implicated the Appellant on grounds of complicity for the indictment." Appellant contends that the court erred by failing to give a full instruction on the law of complicity to commit theft, and that the court's ruling on the jury's question "created

confusion to the jury which resulted in a guilty verdict on a complicity to commit theft charge."

{¶ 13} Here, appellant's argument is premised on the jury having received the court's ruling that appellant need not be physically present in the store to be guilty of theft. However, the record very clearly shows that the jury never received the court's ruling. Instead, the court re-instructed the jury on the elements of theft. No mention of complicity was ever made to the jury at any time during the trial. Therefore, because appellant's argument is based on facts that never occurred, we find it to be without merit. Furthermore, we find that the trial court's instruction on the charge of theft was a full, complete, and accurate statement of the law.

{¶ 14} Accordingly, appellant's first assignment of error is not well-taken.

B. Sufficiency and Manifest Weight

{¶ 15} In his second assignment of error, appellant argues that his conviction is based on insufficient evidence and is against the manifest weight of the evidence.

{¶ 16} Insufficiency and manifest weight are distinct legal theories. "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "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*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 17} In contrast, when reviewing a manifest weight claim,

> The court, 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 reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, quoting *Thompkins* at 387.

{¶ 18} Specifically, appellant argues that because the jury found him not guilty of breaking and entering, they must have determined that he did not enter the store. Thus, since all of the cigarettes were located inside the store, the verdicts are inconsistent. Further, appellant argues that there is no evidence that he was inside the store, other than the testimony of Friess, which he argues is contradicted by the facts that his DNA and fingerprints were not found in the store, his DNA was not found on any clothing recovered by the deputies, and when he was detained he did not have any cigarettes on him and his clothing was different than that of the perpetrators on the video. Finally, appellant points out that a deputy testified that the individuals in the video were of similar stature, but he is approximately six inches taller and weighs significantly more than Friess.

{¶ 19} Regarding appellant's inconsistency argument, the Ohio Supreme Court has held, "The several counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count." *State v. Brown*, 12 Ohio St.3d 147, 465 N.E.2d 889 (1984), syllabus. Here, appellant was charged in three separate counts with three different crimes, each containing different elements. Thus, our analysis will focus solely on whether there is evidence to support the theft conviction.

{¶ 20} R.C. 2913.02(A)(1) provides, "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: (1) Without the consent of the owner or person authorized to give consent."

{¶ 21} The state argues that even if it is believed that appellant did not enter the store, Friess's testimony that appellant helped him carry the cigarettes back to the car still supports appellant's conviction for theft. We agree. By carrying the cigarettes away from the store, appellant knowingly exerted control over them without the consent of the owner. Therefore, appellant's conviction is not based on insufficient evidence. Furthermore, in light of Friess's testimony, appellant's relationship with Friess, the discovery of the garbage can that still contained some cigarettes, appellant's presence near the scene of the crime, the track discovered by the canine unit, and appellant's responses upon being arrested, we cannot say that this is the exceptional case where the

jury clearly lost its way and created a manifest miscarriage of justice. Therefore, we hold that appellant's conviction is not against the manifest weight of the evidence.

{¶ 22} Accordingly, appellant's second assignment of error is not well-taken.

III. Conclusion

{¶ 23} For the foregoing reasons, the judgment of the Fulton 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE