

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

State of Ohio

Court of Appeals No. WD-12-052

Appellee

Trial Court No. 11 CR 570

v.

Marlo Williams

DECISION AND JUDGMENT

Appellant

Decided: June 6, 2014

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Aaron
Lindsey and Jacqueline M. Kirian, Assistant Prosecuting
Attorneys, for appellee.

Tim A. Dugan, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas, which sentenced defendant-appellant, Marlo Williams, to two years of community control following her conviction on one count of theft. Appellant now challenges that judgment through the following assignments of error:

1) Appellant's conviction was not supported by legally sufficient evidence.

2) Appellant's conviction fell against the manifest weight of the evidence.

{¶ 2} On November 4, 2011, appellant was indicted and charged with one count of theft in violation of R.C. 2913.02(A)(3) and 2913.02(B)(2), a fifth degree felony. The facts leading up to that indictment are as follows.

{¶ 3} On October 6, 2011, the Home Depot store in Rossford, Wood County, Ohio, received a phone call from an individual purporting to place an order for construction materials for a Jay's Construction Company. The sale ultimately totaled \$6,800.83 in merchandise. Because the sale exceeded \$500, the sales associate who took the order needed a manager's approval and consulted Tammy Moffatt, the operations assistant store manager at the time. Moffatt reviewed the order and approved the sale, which was then processed and paid for with a Discover credit card at 1:36 p.m. Subsequently, Moffatt realized that information on the order did not match up. Because Moffatt was nearing the end of her shift, she contacted Mike Rioux, the specialty assistant manager, who had just started his shift, and asked him to contact the district operations manager to follow up. Nevertheless, because the customer indicated that the order would be picked up later that day employees of the store began to assemble the order.

{¶ 4} As Rioux reviewed the order, he realized that although Jay's Construction had a Cleveland, Ohio address, the phone number listed for the company was a Flint, Michigan number. In addition, the order was created over multiple phone calls, including at least one with a female. When the store did not have items requested, it simply made substitutions with similar products. The customer did not seem to care but needed to know that the order could be picked up that day and needed Home Depot to take a credit card over the phone. Ultimately, Rioux called the district operations manager, who directed him to continue to take care of the customer and process the order.

{¶ 5} Later that afternoon, Sergeant Todd Kitzler of the Rossford police department and a detective from Perrysburg Township arrived in unmarked patrol vehicles to await the arrival of the customer. It was at that time that Rioux learned the customer was not the authorized owner of the Discover credit card number provided. The officers stayed at the store for several hours, but when no one came to claim the order, they left.

{¶ 6} Around the same time, Janeth Davis, a resident of Cleveland, Ohio, was shopping in Akron, Ohio, when her Discover credit card was declined. Davis called Discover and learned that her card had just been used for a nearly \$7,000 purchase at a Home Depot store in Rossford, Ohio. Discover shut down her account and instructed her to shred her card.

{¶ 7} Later that evening, appellant and her nephew arrived at the Home Depot store in Rossford to pick up the order. She was driving a U-Haul truck that she had

rented in Detroit, Michigan. Rioux met them at the service desk and indicated he would have employees help load the order. At some point, either appellant or her nephew signed the customer pick-up confirmation form with the initials “PKH,” although Rioux testified at the trial below that he did not see who signed the form. Rioux did testify, however, that appellant was the customer in charge of the pick-up. As the U-Haul was being loaded, Rioux left and called his district operations manager, as he had earlier been instructed to do. Shortly thereafter, Sergeant Kitzler and the detective returned to the store. After watching the suspects for a few minutes, the officers apprehended appellant and her nephew, Martel Harper.

{¶ 8} Appellant agreed to speak to the officers. She stated that she was a mystery shopper, that she worked for SnelleTT Temporary Service, in Berke or Berkley, Michigan, and that she was only there to pick up the order. She could not provide a telephone number, address or contact name for anyone at SnelleTT, and never asked to speak to her employer to straighten out the situation. Before transporting her to the police station, Kitzler searched the cab of the U-Haul and found several sheets of paper. One was the U-Haul rental receipt from U-Haul Moving & Storage in Detroit, which lists appellant as the customer. A second was a half sheet of paper that included Janeth Davis’ address, Social Security number, and Discover credit card number, including the three-digit security code number and expiration date. That sheet also contained hand-written notations, including the phone number that was listed on the Home Depot customer invoice and the word’s Jay’s Construction. Upon questioning from Kitzler, appellant had

no explanation for the items found in the cab. She also had no address for where she was to deliver the order. She simply said she was to deliver the order somewhere in Toledo.

{¶ 9} After Kitzler secured the U-Haul, he returned to the police station to interview the suspects. Appellant waived her *Miranda* rights and provided a written statement which reads:

I received a temporary job as a driver/mystery shopper from Snелlet temp services. I was given a mystery shopper assignment and scored 35 stars which awards you higher paying assignments and vouchers for gifts, food, movie tickets, etc. I was assigned to drive and pick up an order from Home Depot for a project in Toledo. Because I suffer from panic attacks I didn't want to drive by myself so I asked my nephew to ride with me. The information for the assignment was not revealed to me. The mystery shopper information is never revealed either. While picking up the order the police came and arrested my nephew and I. My nephew was tired from working and listened to his iPod and slept the entire ride. He doesn't know where I work and I only had been with the company for a few months after they advertised immediately hiring.

{¶ 10} In investigating the case, Kitzler tried to find Snелlett Temporary Services. He used a database available to law enforcement, but found no such business. Although he did find and contact a business called Snелlett Staffing in Southfield, Michigan, he testified that that contact was not productive. Kitzler also ran the phone number

associated with Jay's Construction on the Home Depot receipt. Kitzler stated that every time he called, a female voice came on an answering machine saying "Jay's Construction, leave a message." Kitzler left several messages which were never returned. In addition, Kitzler used the law enforcement database to attempt to find Jay's Construction, but was again unsuccessful.

{¶ 11} On November 4, 2011, appellant was indicted and charged with one count of theft in violation of R.C. 2913.02(A)(3) and 2913.02(B)(2), a fifth degree felony. Appellant pled not guilty to the charge and the case proceeded to a jury trial on June 13, 2012. Following testimony through which the facts as set forth above were presented, appellant asserted a Crim.R. 29 motion for acquittal. The court denied the motion. Thereafter, the jury returned a guilty verdict, with a special finding that the value of the goods stolen was \$1,000 or more but less than \$7,500. The court subsequently sentenced appellant to two years of community control with numerous terms and conditions.

{¶ 12} Appellant's assignments of error are related and will be discussed together. Appellant contends that her conviction was not supported by legally sufficient evidence and was against the manifest weight of the evidence.

{¶ 13} The terms "sufficiency of the evidence" and "manifest weight of the evidence" are quantitatively and qualitatively different legal concepts. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Sufficiency of the evidence is purely a question of law. *Id.* At its core, sufficiency of the evidence is a determination of adequacy and a court must consider whether the evidence was sufficient to support the

conviction as a matter of law. *Id.* The proper analysis 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. Williams*, 74 Ohio St.3d 569, 576, 660 N.E.2d 724 (1996), quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 14} In contrast, a manifest weight challenge questions whether the state has met its burden of persuasion. *Thompkins* at 387. In making this determination, the court of appeals sits as a “thirteenth juror” and, after:

“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.” *Id.* quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st. Dist.1983).

{¶ 15} Appellant was convicted of theft in violation of R.C. 2913.02(A)(3), theft by deception. That statute reads:

(A) 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:

* * *

(3) By deception[.]

{¶ 16} “Deception” is defined by R.C. 2913.01(A) as:

knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.

{¶ 17} Appellant asserts that the state failed to provide evidence which, if believed, could convince the average mind of appellant’s guilt beyond a reasonable doubt that appellant used deception to deprive Home Depot of merchandise. Appellant further contends that because Rioux testified that merchandise only becomes the property of the customer when it is signed for at pickup, and because no one at trial could testify that appellant signed for the order, the state did not prove all of the elements of the crime.

{¶ 18} While Rioux testified that he did not see appellant sign for the order, he did state that after appellant and her nephew arrived, the order was signed for. He also stated that appellant took the lead and spoke to Rioux about picking up the order, after which Rioux left to find employees to help load the order. The order was loaded onto a U-Haul truck that was rented by appellant. By the time officers arrived to apprehend appellant, approximately half of the order had been loaded onto the truck and the remaining items

were on the ground outside the truck waiting to be loaded. Within the cab of the truck, officers found a sheet of paper that contained the stolen credit card information of Janeth Davis and the phone number for Jay's Construction. In light of Sergeant Kitzler's investigation, Jay's Construction is by all accounts a fictitious company. Finally, in appellant's written voluntary statement to the police, she admitted that she was there to pick up the order.

{¶ 19} In light of all the evidence presented below, a reasonable jury could conclude that appellant in fact signed for the order, albeit using initials that were not her own. A jury could further conclude that appellant knowingly deceived Home Depot by taking possession of merchandise for which she had not legally paid. Viewing the evidence in a light most favorable to the prosecution, we must conclude that a rational trier of fact could have found the essential elements of the crime of theft by deception proven beyond a reasonable doubt. We further cannot say that the jury clearly lost its way and created a manifest miscarriage of justice in convicting appellant. The two assignments of error are therefore not well-taken.

{¶ 20} On consideration whereof, the court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Wood 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

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
