

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

City of Sylvania/State of Ohio

Court of Appeals No. L-14-1001

Appellee

Trial Court No. CRB1201744

v.

John Johnson

DECISION AND JUDGMENT

Appellant

Decided: February 13, 2015

* * * * *

Robert A. Pyzik, City of Sylvania Chief Prosecutor, and Melissa R. Bergman, Assistant Prosecutor, for appellee.

Daniel H. Grna, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, John B. Johnson, appeals the decision of the Sylvania Municipal Court, convicting him of petty theft. For the following reasons, we affirm.

{¶ 2} Following his conviction, appellant was sentenced to serve 43 days with 40 days of the sentence suspended, required to complete 64 hours of community service, pay

a \$250 fine, and placed on probation for three years. Appellant appealed, and asserts the following assignments of error:

1) Appellant's conviction for petty theft was against the manifest weight of the evidence.

2) The trial court committed error when it failed to grant appellant's motion for acquittal.

{¶ 3} Appellant was given a citation for petty theft after he was accused of taking scrap metal from a demolition site located at 5610 Monroe Street in Sylvania, Ohio. Ken Marciniak, the real estate broker of the property, testified for the state. Marciniak testified that on September 1, 2012, he drove to the property to check on the progress of the demolition. When he arrived he saw appellant with a long piece of metal in his hand walking towards a pickup truck with appellant's co-defendant, Clifton Carswell, in the passenger seat.

{¶ 4} As Marciniak had not given anyone permission to be on the site or to remove items from it, he investigated the presence of appellant and Carswell further by contacting one of the owners of the property. Marciniak was able to reach Mike Belinski, one of the owners, and asked if he had allowed anyone on the property or to remove material from the site.

{¶ 5} Marciniak then contacted the demolition contractor to ensure he had not allowed anyone to be on the property or to remove items from the site. The contractor

told Marciniak he did not authorize anyone to be on the site that day and had his father call the police.

{¶ 6} On cross-examination, Marciniak was unable to tell exactly where the piece of metal in appellant's hand came from and that he did not see appellant take the metal from the property. He also stated that the site was not fenced in and "No Trespassing" signs were not posted. Marciniak was aware that it is a common practice for people to dump their trash and scrap on construction sites to be hauled away with the rest of the site's materials.

{¶ 7} The state then presented the testimony of two of the responding officers as well as photographs taken on September 1, 2012. The first officer to testify was Officer Michael Shaw. He testified that he spoke with both appellant and Carswell and they admitted to being on the property. Appellant and Carswell stated they were on the front side of the property and that they took the metal from that part of the property.

{¶ 8} Shaw also took photographs of the property that day, which he authenticated at trial. The photographs were taken on the site from different areas and depicted the state of the materials on the day in question. The photographs showed the contractor had already begun to sort the materials according to their worth. They also showed several dumpsters located on the site which were being used for trash disposal. Other photographs showed all of the materials that were in appellant's truck at the time he was pulled over.

{¶ 9} The final witness was Officer Zachary Andrejewski, who was the responding officer to the call from the contractor's father. Andrejewski testified that during the course of the stop, appellant admitted to being on the site and removing materials from it. Appellant also told the officer he thought the scrap metal was trash. Carswell stated that he did help load property into the back of appellant's truck but he was vague about which material he helped load and where he helped load property into the truck. Andrejewski then issued appellant and Carswell citations for petty theft.

{¶ 10} In his first assignment of error, appellant contends his conviction was against the manifest weight of the evidence. He asserts the state failed to prove appellant took the scrap metal without the consent of the owner because the owner of the property and the demolition contractor did not testify.

{¶ 11} "In a bench trial, the trial court assumes the fact-finding function of the jury." *Cleveland v. Welms*, 169 Ohio App.3d 600, 2006-Ohio-6441, 863 N.E.2d 1125, ¶ 16 (8th Dist.). In reviewing a bench trial, an appellate court "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered." *Id.*, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

{¶ 12} Both defendants were charged with petty theft, which is defined, in relevant part, as "No person, with intent to deprive the owner of property or services, shall

knowingly obtain or exert control over either property or services in any of the following ways: (1) Without the consent of the owner or person authorized to give consent.”

Sylvania Municipal Code 545.05.

{¶ 13} Appellant makes much of the fact that neither the contractor nor the owner of the property testified at trial. However, as several appellate courts have held, the testimony of the owner is not necessary to sustain a theft charge. *State v. Perez*, 6th Dist. No. L-06-1237, 2008-Ohio-471, ¶ 11 (allowing circumstantial evidence to prove lack of consent), *State v. Emmons*, 57 Ohio App.2d 173, 177, 386 N.E.2d 838 (2d Dist. 1978) (“All that is necessary * * * is evidence of a wrongful taking from the [p]ossession of another * * *. Particular ownership is not vital as to the thief.”)

{¶ 14} Though the contractor and the owner did not testify at trial, the contractor’s father was the person who called the police that day in an effort to apprehend appellant and Carswell. A trial court could reasonably infer that if the contractor had given consent for appellant to be on the property and to remove the scrap metal, he would have told Marciniak or, at the very least, not had his father inform the police of the theft.

{¶ 15} As this is not one of those exceptional cases where the trial court clearly lost its way and created a manifest miscarriage of justice, appellant’s first assignment of error is not well-taken.

{¶ 16} In his second assignment of error, appellant asserts the trial court erred when it failed to grant his motion for acquittal at the close of the trial. Appellant claims

his conviction is not based on sufficient evidence and therefore his motion for acquittal should have been granted by the trial court.

{¶ 17} An appellate court reviews a ruling on a Crim.R. 29 motion under the same standard used to determine whether the evidence was sufficient to sustain a conviction. *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 39-40. The court should not reverse a conviction if, when viewing the evidence in a light most favorable to the prosecution, there is substantial evidence for a trial court to reasonably decide that all of the elements have been proven beyond a reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193, 702 N.E.2d 866 (1998), citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979). An appellate court must determine “whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.” *State v. Jenks*, 61 Ohio St.3d 259, 273, 574 N.E.2d 492 (1991), *superseded by constitutional amendment on other grounds as stated in State v. Smith*, 80 Ohio St.3d 89, 102, 684 N.E.2d 668, fn. 4 (1997). In doing so, the court must examine the evidence admitted at trial, and “determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt.” *Id.* at 194, citing *State v. Eley*, 56 Ohio St.2d 169, 172, 383 N.E.2d 132 (1978). The verdict should not be overruled unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier of facts. *State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997), citing *Jenks* at 273.

{¶ 18} Appellant argues that the state failed to prove the scrap metal was taken without the consent of the owner. However, there was sufficient evidence to find appellant guilty for the same reasons set forth in appellant's first assignment of error. The state proved appellant did not have consent to take the metal from the site through circumstantial evidence provided by the testimony of Marciniak. Marciniak spoke with the owner and the contractor, who stated no one had the authorization to be on the site that day. Though the owner and the contractor did not testify at trial, given the circumstantial evidence, their testimony was not required. *Perez*, 6th Dist. No. L-06-1237, 2008-Ohio-471 at ¶ 11. *Emmons*, 57 Ohio App.2d at 177, 386 N.E.2d 838. In addition, had the contractor allowed appellant and Carswell to be on the property or to remove items from it, he would not have had his father inform the police of the possible theft. Therefore, we find that appellant's conviction is supported by sufficient evidence. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 19} For the foregoing reasons, the judgment of the Sylvania Municipal Court is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

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

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>.