[Cite as *State v. Armocida*, 2020-Ohio-3621.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

PENNY LYNN ARMOCIDA,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 MA 0015

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 17 CR 751 A

BEFORE:
Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.
Sentence Modified.

Atty. Paul J. Gains, Mahoning County Prosecutor and *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Atty. Richard J. Hura, P.O. Box 3707, Boardman, Ohio 44513, for Defendant-Appellant.

Dated: June 30, 2020

WAITE, P.J.

{¶1} Appellant Penny Lynn Armocida appeals a January 23, 2018 Mahoning County Common Pleas Court judgment entry convicting her on one count of theft. Appellant argues that her conviction is not supported by sufficient evidence because the state did not produce either the actual bank or credit card or a photograph of the card that she was charged with stealing. Appellant also argues that her conviction is against the manifest weight of the evidence. At oral argument, Appellant raised an entirely new argument: that the state failed to present sufficient evidence to prove the value of the card. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed. However, Appellant's sentence is *sua sponte* modified to vacate the community control portion of her sentence.

Factual and Procedural History

{¶2} On July 5, 2017, a woman drove her daughter to a Chick-fil-A in Boardman. As the woman pulled into the parking lot, she saw Appellant reach into the partially open window of a silver Impala and unlock the door. The woman thought this was odd, as the window was located on the passenger's side of the car. The woman pulled her car into a nearby parking spot and watched as Appellant entered the car and sat in the passenger's seat. The woman became concerned and called 911 as she watched Appellant rummage through the car. She saw Appellant exit the car carrying an armful of items, including a purse and a red shirt. She followed Appellant in her car and maintained contact with law enforcement by phone.

{¶3} Appellant walked to a light green Toyota parked in a nearby McDonald's parking lot. A man was leaning against the Toyota's passenger door. Appellant and the man, later determined to be her husband, entered the Toyota. Once inside, Appellant changed her clothing, including her shirt and hat. Shortly thereafter, a third defendant exited the McDonald's and entered the backseat of the Toyota. The Toyota left the McDonald's parking lot and pulled into Marshall's parking lot. The third defendant exited the backseat and entered Marshalls. Shortly thereafter, police arrived on the scene.

{¶4} The victim was working at Chick-fil-A at the drive-through window when her manager approached her and asked if she drove a silver Impala. When she responded that she did, the manager told her that someone had broken into her car. The manager followed the victim outside where they met with police officers.

{¶5} Patrolman Mike Calautti of the Boardman Police Department arrived first and approached the Toyota. He located the victim's phone, which had a pink glitter case, jammed between a seat and center console in the Toyota. Based on this, he searched the car and recovered several of the victim's possessions, including her red DiBella's uniform and wallet.

{¶6} Officer David Jones of the Boardman Police Department arrived later and was tasked with finding the third defendant. Eventually, the third defendant exited Marshalls and Officer Jones approached her. Appellant, her husband, and the third defendant were arrested. Appellant was charged with theft, a violation of R.C. 2913.02(A)(1), a felony of the fifth degree, and is the sole defendant in the instant case.

{¶7} On December 12, 2017, a jury convicted Appellant on the charged offense. On January 23, 2018, the trial court imposed a sentence. The sentence is somewhat

unclear, however. The court imposed a three-year community control sanction with 120 days in jail as part of that three-year term. The trial court credited Appellant with 96 days of jail time served. It appears that the trial court also reserved a prison term of twelve months in the event that Appellant violated community control. We can also glean that the court intended to credit Appellant with three months of time served in the event that she violated her community control. The court also ordered a mental health, drug and alcohol evaluation to be completed in Pennsylvania at Appellant's request. It is from this entry that Appellant timely appeals.

Sua Sponte Sentencing Issue

{¶8} Although not raised by the parties, the trial court sentenced Appellant to both a community control sanction and reserved a prison term for the same offense. It is unclear from the sentencing hearing transcripts whether the trial court imposed the twelve month prison term as a suspended sentence or whether the court was simply informing Appellant of her potential sentence if she should violate her community control. The former is impermissible while the latter is permissible. The Ohio Supreme Court has held that "the current versions of the felony-sentencing statutes, including R.C. 2929.13 and 2929.19, continue to reflect that the General Assembly intended prison terms and community-control sanctions to be alternative sanctions." *State v. Anderson,* 143 Ohio St.3d 173, 2015-Ohio-2089, 35 N.E.3d 512, ¶ 28. Consequently, "as a general rule, when a prison term and community control are possible sentences for a particular felony offense, absent an express exception, the court must impose either a prison term or a community-control sanction or sanctions." *Id.* at ¶ 31.

{¶9} The rule applies to "split sentences." *State v. Paige,* 153 Ohio St.3d 214, 2018-Ohio-813, 103 N.E.3d 800, ¶ 6. A split sentence occurs when a trial court imposes both a prison term and a community control sanction for the same offense. *Id.* Here, Appellant was convicted on a single theft offense. This record reflects that the trial court sentenced her to three years of community control with 120 days in jail included, gave her credit for 96 days served, and also sentenced her to a prison term for this single offense. Thus, this record reveals that the court imposed a split sentence.

{¶10} The trial court did indicate that the three month (120 day) jail sentence would be credited towards the twelve month prison sentence imposed should Appellant violate community control. Hence, it appears Appellant has been ordered to serve time for a community control violation that has not occurred.

{¶11} We note that Appellant has served her entire jail sentence and has approximately one year remaining on her community control sanction. Appellant did not request a stay of her sentence pending appeal. As a defendant cannot be sentenced to a prison term and community control sanction for the same offense and Appellant has completed her jail term, we hereby modify Appellant's sentence to vacate the community control portion of her sentence.

ASSIGNMENT OF ERROR NO. 1

> The Trial Court prejudicially erred when it failed to grant appellant's motion for a directed verdict of acquittal based on the Prosecutor's failure to satisfy Criminal Rule 26 which thereby created a failure to prove all elements of the theft.

ASSIGNMENT OF ERROR NO. 2

The verdict is against the manifest weight of the evidence in that all elements of the indictment were not established

{¶12} In Appellant's brief, she argues that the trial court erroneously denied her Crim.R. 29 motion for a directed verdict based on the state's failure to provide either the physical bank or credit card she was charged with stealing, or at least a photograph of the card. Without evidence that the card exists, Appellant argues that she cannot be guilty of stealing it. Appellant notes that at least one officer testified a photograph of the card was taken before it was returned to the victim, yet that photograph was not presented at trial. An evidence log demonstrating that police recovered the card from Appellant's vehicle was also not presented at trial. At oral argument, however, Appellant argued instead that the state failed to prove the value of the card, which may lower her charge from a felony to a misdemeanor. For ease of understanding, we will analyze both of Appellant's assignments of error together.

{¶13} The state does not directly respond to Appellant's argument regarding her contention that the state was required to present evidence to demonstrate that the card existed. Instead, the state argues that it presented sufficient evidence to support Appellant's conviction based on the witness' testimony that she watched the theft occur and the officers' testimony that the missing items were recovered from Appellant's vehicle shortly after the items were stolen. Appellant now argues that if the card was a bank card connected to the victim's account, its value could only be determined by proof of the amount of money that was in the account at the time it was allegedly taken. Conversely,

the value of a credit card can be determined by the credit limit. Regardless, Appellant argues orally that these are very different things in a legal sense. The state did respond to Appellant's change in tactic at oral argument regarding proof of the value of the card. The state directs this Court to R.C. 2913.71, which provides that the theft of a credit card is a felony of the fifth degree regardless of its value. The state points out that R.C. 2913.01(U) defines a credit card as any card, code, or device used to obtain money, which would include a bank card.

{¶14} In relevant part, Crim.R. 29(A) states:

> The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses.

{¶15} Sufficiency of the evidence involves a legal question that addresses adequacy. *State v. Pepin-McCaffrey*, 186 Ohio App.3d 548, 2010-Ohio-617, 929 N.E.2d 476 ¶ 49 (7th Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "Sufficiency is a term of art meaning that legal standard which is applied to determine whether a case may go to the jury or whether evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Draper*, 7th Dist. Jefferson No. 07 JE 45, 2009-Ohio-1023, ¶ 14, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955). An appellate court does not determine "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a

conviction." *State v. Rucci*, 7th Dist. Mahoning No. 13 MA 34, 2015-Ohio-1882, ¶ 14, citing *State v. Merritt*, 7th Dist. Jefferson No. 09-JE-26, 2011-Ohio-1468, ¶ 34. In other words, did the state present evidence of every element of the charged crime that, if believed, supports conviction.

{¶16} Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." (Emphasis deleted.) *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. It is not a question of mathematics, but depends on the effect of the evidence in inducing belief. *Id*. Weight of the evidence involves the state's burden of persuasion. *Id.* at 390, 678 N.E.2d 541 (Cook, J. concurring). The appellate court reviews the entire record, weighs the evidence and all reasonable inferences, looks at witness testimony, 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. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, citing *Thompkins*, at 387, 678 N.E.3d 541, 678 N.E.2d 541. This discretionary power of the appellate court to reverse a conviction is to be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id*.

{¶17} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact is in the best position to weigh the evidence and judge the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461

N.E.2d 1273 (1984). The jurors are free to believe some, all, or none of each witness' testimony and they may separate the credible parts of the testimony from the incredible parts. *State v. Barnhart*, 7th Dist. Jefferson No. 09 JE 15, 2010-Ohio-3282, ¶ 42, citing *State v. Mastel*, 26 Ohio St.2d 170, 176, 270 N.E.2d 650 (1971). When there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, this Court will not choose which one is more credible. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶18} The argument Appellant briefed is based on Crim.R. 26, which provides that:

> Physical property, other than contraband, as defined by statute, under the control of a Prosecuting Attorney for use as evidence in a hearing or trial should be returned to the owner at the earliest possible time. To facilitate the early return of such property, where appropriate, and by court order, photographs, as defined in Evid. R. 1001(2), may be taken of the property and introduced as evidence in the hearing or trial. The admission of such photographs is subject to the relevancy requirements of Evid. R. 401, Evid. R. 402, Evid. R. 403, the authentication requirements of Evid. R. 901, and the best evidence requirements of Evid. R. 1002.

{¶19} We note that Appellant raised the failure of the state to submit either the card itself or a photograph of this evidence during her motion for directed verdict. The trial court overruled the motion, finding that requiring the state to submit physical evidence

or a photograph of every item of evidence would be unduly burdensome. (Trial Tr., p. 219.)

{¶20} The plain language of Crim.R. 26 appears to be designed to allow the state to present evidence of a stolen item without depriving the victim of that item, rather than imposing a requirement on the state to present certain evidence in order to support a conviction. In other words, if the state chooses to present evidence, it is not required to hold the physical item from the victim until a trial occurs. The state "may" take a photograph of the item and the photo "may" be introduced as evidence. This rule does not require either the item or a photo of the item be introduced as evidence in order to sustain a conviction. In fact, it appears there is no such rule.

{¶21} This conclusion is supported by caselaw from the Ohio Supreme Court, *State v. Murphy,* 49 Ohio St.3d 206, 551 N.E.2d 932 (1990). The *Murphy* Court addressed whether a firearm, or some other type of physical evidence showing or describing the firearm, must be introduced at trial in order to prove its existence. The *Murphy* Court held that evidence of the firearm's existence was sufficiently proven through lay witness testimony. *Id.* at 209.

{¶22} The cases relied on by Appellant do not support her argument. Appellant first cites to a Twelfth District case, *State v. Penwell,* 12th Dist. Fayette No. CA2010-08-019, 2011-Ohio-2100. Appellant seems to argue that the *Penwell* court affirmed appellant's conviction due to its reliance on the introduction at trial of an evidence log. However, neither the evidence log nor Crim.R. 26 were raised in the court's analysis of sufficiency of the evidence. The only mention of the evidence log is found in the factual and procedural history. Instead, the court clearly discussed and relied on witness

testimony that a laptop and a television set were stolen and sold to two separate individuals. The witness in *Penwell* testified that she purchased a laptop and noticed that the user name listed on the login screen for the computer and for Facebook did not match the name of the person who sold the laptop. *Id.* at ¶ 69. After learning of a burglary involving a stolen laptop and television set, she contacted the police. While the court did discuss photographs of the stolen property within its sufficiency analysis, this discussion was relevant only to a separate argument that the state failed to present evidence of the value of the stolen property. Regardless, the court was not presented with, and did not otherwise conduct, a Crim.R. 26 analysis.

{¶23} Appellant also relies on *State v. Mathews,* 7th Dist. Columbiana No. 83-C-32, 1984 WL 4985 (July 12, 1984). According to Appellant, the *Mathews* court found that the physical stolen property did not need to be presented at trial because photocopies of the property was admitted into evidence. However, the issue in *Mathews* was whether the admission of photocopies of stolen money, rather than the actual money, prejudiced the appellant in his ability to compare the denominations of the bills that were allegedly stolen from a hardware store with the bills that were recovered from the appellant. *Id.* at *2.

{¶24} Here, the property at issue was a PNC bank or credit card. The victim testified that the card was inside her wallet, which was recovered by police officers from the suspect's car. According to Patrolman Calautti, the card was still inside the wallet when recovered. Patrolman Calautti testified that the card was added to the evidence log, photographed, and then returned to the victim. (Trial Tr., p. 145.) This record shows that the victim and Patrolman Calautti provided ample evidence to demonstrate the

existence of the card. The issue in this case is not whether the card recovered was the type of card stolen, it was that the card was taken at all. The issue, then, is witness credibility and, based on the verdict, the jury found the witnesses credible. Furthermore, because a bank or credit card typically includes an account number, account holder name, and expiration date, there is some reason to withhold this evidence or a photo of the evidence from the jury.

{¶25} While first raised at oral argument, thus not properly briefed or presented on appeal, we will address Appellant's "value" argument. As to the value of the stolen card, R.C. 2913.71 states: "[r]egardless of the value of the property involved and regardless of whether the offender previously has been convicted of a theft offense, a violation of section 2913.02 or 2913.51 of the Revised Code is a felony of the fifth degree if the property involved is any of the following: (A) A credit card."

{¶26} Pursuant to R.C. 2913.01(U), the definition of a "credit card"

> includes, but is not limited to, a card, code, device, or other means of access to a customer's account for the purpose of obtaining money, property, labor, or services on credit, or for initiating an electronic fund transfer at a point-of-sale terminal, an automated teller machine, or a cash dispensing machine. It also includes a county procurement card issued under section 301.29 of the Revised Code.

{¶27} Because a bank card is a card used to obtain money, it falls within the definition of "credit card" provided by R.C. 2913.03(U). Thus, the theft of a bank card is

automatically a felony of the fifth degree in accordance with R.C. 2913.71 and Appellant's argument that some proof of value must be admitted at trial has no merit.

{¶28} Accordingly, Appellant's first and second assignments of error are without merit and are overruled.

Conclusion

{¶29} Appellant argues that her conviction is not supported by sufficient evidence as the state did not produce a physical or photographic evidence of the card she was charged with stealing. Appellant also argues that her conviction is against the manifest weight of the evidence. Appellant additionally contended at oral argument that the state failed to present sufficient evidence to prove the value of the card. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed. Appellant's sentence is *sua sponte* modified to vacate the community control portion of her sentence.

Donofrio, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Appellant's sentence is *sua sponte* modified to vacate the community control portion of her sentence. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.