[Cite as *State v. Ladson*, 2005-Ohio-5339.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 85709

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
SONYIA LADSON	:	
	:	
Defendant-Appellant	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	OCTOBER 6, 2005
	:	
CHARACTER OF PROCEEDINGS	:	Criminal appeal from
	:	Common Pleas Court
	:	Case No. CR-450293
	:	
JUDGMENT	:	CONVICTION VACATED;
	:	DEFENDANT DISCHARGED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee:

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For defendant-appellant:

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FRANK D. CELEBREZZE, JR., P.J.:

{¶ 1} Sonyia Ladson appeals the judgment of the common pleas court, rendered following bench trial, finding her guilty of identity theft. After review of the record and the arguments of the parties, we vacate the conviction and discharge the appellant.

{¶ 2} On March 26, 2004, appellant was indicted by the Cuyahoga County Grand Jury on one count of identity fraud, in violation of R.C. 2913.49, and one count of theft, in violation of R.C. 2913.02.

{¶ 3} These charges stemmed from the creation of five fraudulent cell phone accounts that were opened under the name of Dawn Fuller, but with an address belonging to the appellant.

{¶ 4} On October 27, 2004, appellant waived her right to a jury and proceeded to bench trial. On November 1, 2004, she was found guilty of identity fraud, a felony of the fourth degree, but not guilty of theft. She was subsequently sentenced to one year of community control under the supervision of the Adult Probation Department. Appellant now appeals her conviction raising the following three assignment of error.

{¶ 5} "I. THE COURT'S DECISION FINDING THE DEFENDANT GUILTY OF FOURTH DEGREE FELONY IDENTITY FRAUD WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE WHEN NO EVIDENCE AS TO THE VALUE OF THE LOSS, IF ANY, WAS PRESENTED AT TRIAL.

{¶ 6} "II. MS. LADSON'S RIGHT TO CONFRONT THE WITNESS AGAINST HER WAS VIOLATED WHEN HEARSAY STATEMENTS OF ALLTEL INVESTIGATOR PATRICK WILLIAMS WERE INTRODUCED THROUGH DETECTIVE MELER.

{¶ 7} "III. THE COURT'S DECISION FINDING THE DEFENDANT GUILTY OF IDENTITY FRAUD WAS NOT SUPPORTED BY SUFFICIENT PROBATIVE EVIDENCE AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 8} In her first assignment of error, appellant argues that the trial court's decision finding her guilty of fourth degree felony identity fraud was not supported by sufficient evidence. Her contention is that the state failed to present sufficient evidence to establish the necessary value of loss to sustain a conviction on this crime as a felony of the fourth degree. After a thorough review of the record, this court finds that appellant's first assignment of error has merit and warrants a reversal of the lower court's conviction.

{¶ 9} Crim.R. 29 provides, in pertinent part:

{¶ 10} "The court on motion of a defendant *** shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment *** if the evidence is insufficient to sustain a conviction of such offense or offenses."

{¶ 11} In *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, the Ohio Supreme Court reexamined the standard of review to be applied by an appellate court when reviewing a claim of insufficient evidence:

{¶ 12} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such

evidence, if believed, would convince the average mind of defendant's guilt beyond a reasonable doubt. 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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)" Id. at paragraph two of the syllabus.

{¶ 13} Essentially, a challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the state has met its burden of production at trial. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. In *Thompkins*, the Ohio Supreme Court stated:

{¶ 14} "With respect to sufficiency of the evidence, '"sufficiency" is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.' Black's Law Dictionary (6 Ed.1990) 1433. See, also, Crim.R. 29(A) (motion for judgment of acquittal can be granted by the trial court if the evidence is insufficient to sustain a conviction). 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. Robinson* (1955), 162 Ohio St. 486, 55 Ohio Op. 388, 124 N.E.2d 148. In addition, a conviction based on legally insufficient evidence constitutes a

denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 [*387] S.Ct. 2211, 2220, 72 L.Ed. 2d 652, 663, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560." Id. at 386-387.

{¶ 15} Finally, we note that a judgment will not be reversed upon insufficient or conflicting evidence if it is supported by competent credible evidence which goes to all the essential elements of the case. *Cohen v. Lamko* (1984), 10 Ohio St.3d 167, 462 N.E.2d 407.

{¶ 16} In the case at bar, a review of the record reveals that the state did, in fact, fail to present any evidence to establish a value of loss, an essential element in convicting a person of fourth degree felony identity fraud. Here, appellant was indicted for, and found guilty of, fourth degree felony identity fraud, in violation of R.C. 2913.49, which reads in pertinent part:

{¶ 17} "(I) Whoever violates this section is guilty of identity fraud. Except as otherwise provided in this division, identity fraud is a misdemeanor of the first degree. If the value of the credit, property, services, debt, or other legal obligation involved in the violation or course of conduct is five hundred dollars or more and is less than five thousand dollars, identity fraud is a felony of the fourth degree ***"

{¶ 18} Furthermore, the state specifically indicted appellant under the fourth degree felony form of the offense. Count one of the indictment charges that appellant:

{¶ 19} "*** did obtain, possess or use any personal identifying information of Dawn Fuller, with the intent to fraudulently obtain credit, property, or services or avoid the payment of a debt or any other legal obligation.

{¶ 20} "The value of the credit, property, services, debt, or other legal obligation involved in the violation or course of conduct *** was more than five hundred dollars but less than five thousand dollars, in violation of Revised Code Section 2913.49."

{¶ 21} The state, however, failed to present any evidence whatsoever to establish a value of the loss resulting from any conduct on the part of the appellant. Nothing was presented at trial asserting any dollar amount -- greater than five hundred dollars or not -- as required to sustain a conviction of fourth degree felony identity fraud. Therefore, the state has failed to meet its burden of production in proving its case against the appellant as charged in the indictment. We, therefore, have no choice but to find reversible error in the lower court's judgment. Because there was insufficient evidence to prove every element of the crime beyond a reasonable doubt, we are now required by the fundamental principles of law to vacate appellant's conviction for fourth degree felony identity fraud.

{¶ 22} Appellant's first assignment of error is sustained, therefore, the remaining assignments of error need not be addressed.

{¶ 23} Appellant's conviction is vacated, and she is hereby ordered discharged.

The conviction is vacated and defendant ordered discharged.

It is, therefore, ordered that appellant recover from appellee costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR.
PRESIDING JUDGE

ANTHONY O. CALABRESE, JR., J., CONCURS;

SEAN C. GALLAGHER, J., CONCURS IN JUDGMENT ONLY (WITH SEPARATE OPINION).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 85709

STATE OF OHIO	:	
	:	CONCURRING
	:	
Plaintiff-Appellee	:	OPINION
	:	
vs.	:	
	:	
SONYIA LADSON	:	
	:	
	:	
Defendant-Appellant	:	
	:	

DATE OCTOBER 6, 2005

SEAN C. GALLAGHER, J., CONCURRING IN JUDGMENT ONLY:

{¶ 24} I concur in judgment only with the majority result vacating the conviction, albeit for different reasons.

{¶ 25} While the majority focuses on the first assignment of error regarding the state's failure to establish the threshold value of five hundred dollars for a felony under R.C. 2913.49(I), a

conviction for a misdemeanor can be sustained regardless of value under the language in R.C. 2913.49(B).

{¶ 26} Nevertheless, in my view, it is unnecessary to decide that issue. Unlike the majority, I would address the second assignment of error and decide the case on that basis. For the reasons outlined below, I would find that Detective Meler's testimony regarding his investigation was largely based on hearsay statements and conclusions of Alltel investigator Patrick William. As such, I would sustain the second assignment of error and reverse the conviction.

{¶ 27} The second assignment of error states:

{¶ 28} "Ms. Ladson's right to confront the witnesses against her was violated when hearsay statements of Alltel investigator Patrick Williams were introduced through Detective Meler."

{¶ 29} In *Crawford v. Washington* (2004), 541 U.S. 36, the United States Supreme Court held that where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation. The oral statements by Investigator Williams to Detective Meler and the findings and statements from his written report implicating Ladson were clearly testimonial. Williams, as an investigator, knew his report could be used in a subsequent prosecution, and it is undisputed that Meler not only used the statements and the conclusions in the

report as the basis of his testimony, but actually testified about them.

{¶ 30} The trial testimony bears this out:

{¶ 31} "Detective Meler: There were 11 cell phone accounts, fraudulent accounts, opened up in that same time, including the five cell phone accounts in victim Fuller's name. When he plotted calls that were made by these cell phones --

{¶ 32} "The Court: Who are you speaking of?

{¶ 33} "Detective Meler: The Investigator Williams in his report indicated --

{¶ 34} "Defense Counsel: Your honor, I object to all of this stuff about William's [sic] report. Williams is not here to testify about what he found in his investigation. This detective is not qualified to testify as to what Williams determined in his investigation. That's all hearsay.

{¶ 35} "Prosecutor: Your honor, I would object. [sic] This officer is qualified in that he is the investigating officer in this matter and this was a part of this investigation. He had to rely on that information.

{¶ 36} "The Court: Overruled."

{¶ 37} While Detective Meler could certainly rely on the Williams report, he could not testify about its contents. Further, while it is true that Meler did conduct an investigation independent of Williams's efforts, the record shows he nevertheless

testified extensively about Williams's findings. While Ladson was free to cross-examine Meler on his testimony, she could not cross-examine Williams, the clear source for Meler's testimony. The inherent problem in being unable to cross-examine the true source of the testimonial evidence was discussed in the historical context in *Crawford* by referencing the trial of Sir Walter Raleigh.[1]

{¶ 38} I am cognizant that in recent cases this court has carved out some narrow exceptions to *Crawford* involving testimonial statements that were either not offered to prove "the truth of the matter asserted" *(State v. Smith*, 162 Ohio App.3d 208, 2005-Ohio-3579) or were admitted for purposes of medical treatment or diagnosis *(In re D.L.,* Cuyahoga App. No. 84643, 2005-Ohio-2320).

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[1] "The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: 'Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour.' 1 D. Jardine, Criminal Trials 435 (1832). Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that '[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face. . . .' 2 How. St. Tr., at 15-16. The judges refused, id., at 24, and, despite Raleigh's protestations that he was being tried 'by the Spanish Inquisition,' id., at 15, the jury convicted, and Raleigh was sentenced to death." *Crawford*, at 44.

"* * * Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court." Id. at 51.

In addition, some admissions were found harmless (*State v. Lazzaro,* Cuyahoga App. No. 84956, 2005-Ohio-4118).

{¶ 39} The instant case, however, has no exception. Under Evid.R. 801, "hearsay" is defined as follows:

{¶ 40} "(A) Statement. --A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

{¶ 41} "(B) Declarant. --A 'declarant' is a person who makes a statement.

{¶ 42} "(C) Hearsay. 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

{¶ 43} The statements by Williams and the contents of his report were classic hearsay, and they were offered to prove the truth of the allegations against Ladson. While Detective Meler was free to testify about his investigation, his testimony invariably included what Investigator Williams told him, as well as the specific contents of Williams's report. This denied Ladson her right to confront Williams directly, violating her Sixth Amendment right to confrontation. For these reasons, I would vacate the conviction.