[Cite as *State v. Klepatzki*, 2009-Ohio-3288.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91795

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BENJAMIN KLEPATZKI

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510834

BEFORE: Rocco, P.J., McMonagle, J., and Boyle, J.

RELEASED: July 2, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Marcus S. Sidoti
Sidoti & Sidoti Co., L.P.A.
55 Public Square
1800 Illuminating Building
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Jeffrey Schnatter
Assistant Prosecuting Attorney
The Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant Benjamin J. Klepatzki appeals from his conviction after a jury found him guilty of fifth-degree felony theft.[1]

{¶ 2} Klepatzki presents two assignments of error. He asserts that the state failed to present sufficient evidence that the value of the property taken exceeded $500, as was required to elevate the offense to a fifth-degree felony, because the witnesses who testified failed to render an adequate opinion on worth. On that same basis, he asserts that his conviction is against the manifest weight of the evidence.

{¶ 3} Based upon the record, this court does not agree with either of Klepatzki's assertions. Consequently, his conviction is affirmed.

{¶ 4} Klepatzki's conviction results from an incident that occurred just after noon on October 17, 2007. Great Northern Mall Security Officer Charles Mesker testified that, as he patrolled near the Sears store, a car caught his attention. Loud music came from it, and, as he watched, the car parked near one entrance, stayed there for a few minutes, then moved to a different entrance. Mesker saw two men inside the car; the driver later was identified as Klepatzki.

[1]Although the jury also convicted Klepatzki of another offense, he presents no challenge to his other conviction in this appeal.

{¶ 5} By the time the two men entered the store, Mesker had notified Elaine Dickie, the store's Loss Prevention Officer. He advised her to watch them. From her office, Dickie monitored the video recording cameras located in the store section the men visited, i.e., the hardware department. She noticed them near a shelf that contained "multimeters,"[2] observing Klepatzki as he "concealed [one of the items] inside his shirt jacket."

{¶ 6} At that point, Dickie left her office and traveled to the hardware section. Since the men already had left the store, she notified Mesker that they had taken some merchandise. Mesker, in turn, notified the North Olmsted Police Department.

{¶ 7} Officer Daniel Barrett responded to the dispatch and went in pursuit of the car, but he was unable to apprehend Klepatzki. Barrett therefore proceeded to the store to meet with Dickie. Dickie showed Barrett the shelf where Klepatzki had taken an item and concealed it. Every "peg hook" on the shelf was "empty"; Klepatzki had "cut the plastic that the merchandise was on to get it off the peg hook."

{¶ 8} Barrett traced Klepatzki through the license plate of the car he drove. Klepatzki subsequently was indicted on three counts, viz., robbery, felonious assault, and failure to comply with the order or signal of a police

[2]Quotes indicate testimony given at trial.

officer. The latter two counts each contained a furthermore clause. Klepatzki's case proceeded to a jury trial.

{¶ 9} At the conclusion of trial, the jury found Klepatzki not guilty of robbery, but guilty of the lesser included offense of theft of property in an amount between $500 and $5,000, not guilty of felonious assault, and guilty of failure to comply. The trial court thereafter sentenced Klepatzki to consecutive prison terms of one and four years for each conviction.

{¶ 10} Klepatzki's appeal concerns only his conviction for theft. He presents the following two assignments of error:

> **"I. The trial court erred when it entered a guilty verdict without sufficient evidence to sustain each and every element of the conviction.**
>
> **"II. The trial court erred when it entered a verdict that was inconsistent with the manifest weight of the evidence."**

{¶ 11} Klepatzki argues that the trial court acted improperly when it denied his motion for acquittal and entered judgment on the jury's verdict on the felony theft charge. He claims that the state failed to provide sufficient evidence that the value of the stolen property exceeded $500; therefore, his conviction is also against the manifest weight of the evidence.

{¶ 12} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury. *State v. Smith*, 80 Ohio St.3d 89, 113, 1997-Ohio-355. In essence, sufficiency is a test of adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52.

{¶ 13} Whether the evidence is legally sufficient to sustain a verdict is a question of law. Id. In reviewing the record for sufficiency, 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. *Smith*, supra.

{¶ 14} In determining whether a verdict is against the manifest weight of the evidence, an appellate court reviews the entire record, examines the evidence and all reasonable inferences, 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. *Thompkins*, supra at 387.

{¶ 15} Weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. Id. In making a determination on the weight of the evidence, a reviewing court is not required to view the evidence in a light most favorable to the prosecution. Id. at 390. The court must be mindful, however, that credibility

is a matter primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

{¶ 16} The jury convicted appellant of theft in violation of R.C. 2913.02(A). That statute provides, in pertinent part, that "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services *** [b]y deception."

{¶ 17} The evidence, which consisted of testimony in addition to a video recording of the incident, demonstrated Klepatzki took merchandise from a shelf in the Sears hardware department, concealed it in his outer clothing, and left the store. Thereafter, seven multimeters could not be located on the premises. Construed in the light most favorable to the prosecution, this evidence was sufficient to demonstrate that Klepatzki used deception with the purpose to deprive Sears of the multimeters.

{¶ 18} Klepatzki contends, however, that neither Dickie nor Barrett actually knew whether some of the items had been sold; therefore, they were unqualified to testify as to the value of the property taken. Theft is a misdemeanor when the value of the property stolen is less than $500, R.C. 2913.02(B)(2), but, if the value of the property is $500 or more and is less than $5,000, theft is a fifth-degree felony. R.C. 2913.02(B)(2). Pursuant to R.C.

2913.61(D), the amount may be set by "the fair market value." *State v. Collins*, Cuyahoga App. No. 87522, 2006-Ohio-4898.

{¶ 19} Generally, before a witness may give an opinion on the value of property, the witness must be qualified to do so. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621. The trial court has discretion to determine if a witness is sufficiently acquainted with the matter to give testimony about value. *State v. Heap*, Hamilton App. No. C-040007, 2004-Ohio- 5850, at ¶23. The credibility of the witness's opinion then goes to its weight rather than its admissibility. Id.

{¶ 20} Barrett testified that Dickie consulted her inventory to determine the number of items taken from the shelf and informed him which multimeters were missing. *State v. Schandel*, Carroll App. No. 07-CA-848, 2008-Ohio-6359. He indicated Dickie provided the manufacturer and retail price of each unit for him to include in his police report. Barrett described the information he received from Dickie as follows: "Two multimeter, Trms at $59.99 each; two Ton & Probe, Kit[s] at $89.99 each; two Thermometer, Fluke 561s at $149.99 each; one Clampmeter, Fluke 322 at $109.99; and two Multimeter, Fluke 114s at $129.99 each, for a total of $969.91."

{¶ 21} Dickie, as the store's Loss Prevention Manager, was qualified to give her assessment of the items missing and the value of each; Barrett stated she

used the store's inventory as a reference. Since the inventory necessarily provided information concerning the units placed on the shelf, which ones had been sold, and which ones had been removed from the "peg hooks" during Klepatzki's store visit because the plastic securing the items to the hooks was cut, sufficient evidence existed that the value of the stolen items exceeded $500. See *State v. Miller*, Cuyahoga App. No. 84431, 2005-Ohio-771; *State v. Skinner*, Franklin App. No. 08-AP-561, 2008-Ohio-6822; *State v. Burton*, Ross App. No. 06CA2892, 2007-Ohio-2320.

{¶ 22} Thus, the trial court committed no error in denying Klepatzki's motion for acquittal, and the jury's guilty verdict on the theft charge was supported by the evidence. *State v. Schandel*, supra; *State v. Skinner*, supra.

{¶ 23} Klepatzki's assignments of error, accordingly, are overruled.

{¶ 24} His conviction is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

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KENNETH A. ROCCO, PRESIDING JUDGE

CHRISTINE T. McMONAGLE, J., and
MARY J. BOYLE, J., CONCUR