

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92879

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HERESA ANDERSON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-514840

BEFORE: Blackmon, J., McMonagle, P.J., and Sweeney, J.

RELEASED: April 15, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run

upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Theresa Anderson appeals her convictions for receiving stolen property, forgery, and aggravated theft. She assigns the following two errors for our review:

“I. There was insufficient evidence to support the guilty verdicts for [sic] and appellant’s conviction was against the manifest weight of the evidence.”

“II. Appellant received ineffective assistance of counsel in violation of his rights pursuant to the Sixth Amendment to the United States Constitution and Section 10, Article 1 of the Ohio Constitution.”

{¶ 2} Having reviewed the record and relevant law, we affirm Anderson’s convictions. The apposite facts follow.

Facts

{¶ 3} Anderson is the sister of the victim, Michael Boyd. On February 17, 2008, Boyd went to Anderson’s home to visit. Also living with Anderson at the time were Boyd’s son, Charles Vance, and Boyd’s ex-wife, Sharon Davison. Boyd spent most of the time drinking in the kitchen with Anderson.

{¶ 4} Boyd told Anderson that he had received several checks from a temporary agency for work he had performed. Anderson asked Boyd if she could have one of the checks, to which he responded “No.” He then left the

room to smoke a cigarette outside with his son. While he was out of the room, Anderson moved a bag that Boyd had brought with him. The checks were in the bag. When he asked where the bag was, Anderson told him she moved it because the cat was “messaging” with it. Boyd did not see the bag for the remainder of his visit.

{¶ 5} Upon returning home, he realized that he had forgotten his bag. He returned to retrieve it, but Anderson would not allow him into the home. She told him that she did not have his bag and that she would call the police if he did not leave. He called Anderson the next day, and she again told him she did not have the bag.

{¶ 6} Several days later, Boyd called the temporary agency to stop payment on the checks. The agency told him that two of the checks had been deposited into Theresa Anderson’s account; therefore, it could not stop payment or reimburse him for those checks. The camera at the bank photographed Anderson’s car at the ATM machine at the time of the deposits.

{¶ 7} Boyd admitted at trial that the signatures on the back of the check did not look like his sister’s handwriting. An expert called at trial stated that it was inconclusive whether Anderson’s signatures on the back of the checks were written by her because he only had copies of the checks, not the originals; also, disguised handwriting is difficult to compare with natural handwriting. He testified that he was unable to perform a comparison of Boyd’s forged

signature because it is was not legible. He could not reach a conclusion as to whether Vance endorsed the checks because of the quality of the documents submitted for comparison.

{¶ 8} Anderson's roommate, Sharon Davison, testified that she was formerly married to Boyd, but lived with Anderson and took care of her because Anderson suffers from multiple sclerosis. She stated that Vance had access to Anderson's car and that he had previously signed checks on his aunt's behalf. She also stated that Anderson lost her ATM card at the same time that the checks went missing. According to Davison, Anderson's sole source of income was from monthly disability checks.

{¶ 9} Anderson's niece, Veronica Adams, testified that she had previously seen Vance using Anderson's car. She also stated that Vance has a prior conviction for computer tampering.

{¶ 10} Based on the evidence, the jury found Anderson guilty on all counts. The court sentenced her to one year of community control.

Evidence was Insufficient and against the Manifest Weight

{¶ 11} In her first assigned error, Anderson contends that her convictions were not supported by sufficient evidence and were against the manifest weight of the evidence.

{¶ 12} The sufficiency of the evidence standard of review was set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus as follows:

“Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.”

{¶ 13} See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394; *State v. Davis* (1988), 49 Ohio App.3d 109, 113, 550 N.E.2d 966.

{¶ 14} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, in which the Ohio Supreme Court held:

“An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted at trial to determine whether such evidence, if believed, would convince the average mind of the 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.)”

{¶ 15} Anderson contends her convictions were not supported by sufficient evidence because two other people, Vance and Davison, had access to her ATM card and car. While two other people did have access to her ATM card and could have possibly driven her car, the checks were deposited into

Anderson's account, not the others' accounts. According to Boyd, Anderson was angry because he would not give her one of the checks. He also stated that Anderson had moved his bag while he was outside smoking a cigarette and that when he returned to the home after noticing he forgot his bag, Anderson refused to let him back in the home to retrieve the bag.

{¶ 16} While the handwriting expert could not determine definitely whether the signature was Anderson's, he also stated that he could not definitely exclude the signature as hers. Moreover, the fact that the checks were deposited into Anderson's account indicates that Anderson knew of the theft and could have had someone else endorse the checks on her behalf.

{¶ 17} Therefore, based on the fact that there is evidence that Anderson and her brother argued over the checks, Anderson hid the bag containing the checks, the checks were later deposited into Anderson's account, and her car is depicted on the ATM photograph taken at the time of the deposits, sufficient circumstantial evidence was presented that Anderson took the checks and deposited them into her account. Because circumstantial evidence is given the same weight as direct evidence, sufficient evidence was presented in support of Anderson's convictions. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph one of the syllabus.

{¶ 18} Anderson also contends her convictions were not supported by the weight of the evidence. In *State v. Wilson*, 113 Ohio St.3d 382,

2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

“The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence’s effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive -- the state’s or the defendant’s? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. ‘When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a “thirteenth juror” and disagrees with the factfinder’s resolution of the conflicting testimony.’ Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.”

{¶ 19} However, an appellate court may not merely substitute its view for that of the jury, but must find that “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.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541. Accordingly, reversal on manifest weight grounds is reserved for “the exceptional case in which the evidence weighs heavily against the conviction.” Id.

{¶ 20} Anderson contends the evidence was against the manifest weight because two other people had access to her ATM card and car. The individuals who testified that others had access to Anderson's ATM card and car were Sharon Davison, who was Boyd's ex-wife and a close friend of Anderson, and Veronica Adams, who is Anderson's niece. The jury heard their testimony and could assess their credibility against that of Boyd and the existing evidence.

{¶ 21} When there are two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one should be believed. *State v. Gore* (1999), 131 Ohio App.3d 197, 201, 722 N.E.2d 125. Rather, we defer to the jury, who was best able to weigh the evidence and judge the credibility of witnesses by viewing the demeanor, voice inflections, and gestures of the witnesses testifying. See *Seasons Coal Co. v. Cleveland* (1994), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273; *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. The jury may have disbelieved the testimony of Davison and Adams because they obviously shared a close relationship with Anderson. Accordingly, Anderson's first assigned error is overruled.

Ineffective Assistance of Counsel

{¶ 22} In her second assigned error, Anderson contends her counsel was ineffective.

{¶ 23} We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Under *Strickland*, a reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the 'deficient performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph one of the syllabus. To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different. *Id.* at paragraph two of the syllabus. Judicial scrutiny of a lawyer's performance must be highly deferential. *State v. Sallie*, 81 Ohio St.3d 673, 1998-Ohio-343, 693 N.E.2d 267.

{¶ 24} Anderson contends her counsel was ineffective for failing to present evidence that once she discovered that deposits other than her social security check were made to her account, she notified the bank. She also contends that counsel failed to present evidence that Boyd told her that he believed his son deposited the checks. We cannot rely upon her unsworn statements at the sentencing hearing regarding this evidence. *State v. Jeffries* (June 28, 2001), Cuyahoga App. No. 78070. Accordingly, Anderson's second assigned error is overruled.

{¶ 25} Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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.

PATRICIA ANN BLACKMON, JUDGE

CHRISTINE T. MCMONAGLE, P.J., and
JAMES J. SWEENEY, J., CONCUR