

[Cite as *State v. Boyce*, 2010-Ohio-3870.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93543

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL BOYCE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-513541

BEFORE: Sweeney, J., Gallagher, A.J., and Rocco, J.

RELEASED AND JOURNALIZED: August 19, 2010

ATTORNEY FOR APPELLANT

Thomas A. Rein
Leader Building, Suite 940
526 Superior Avenue
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Belinda Kyles-Gest
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Michael Boyce (“defendant”), appeals his conviction for theft, a fifth degree felony, and intimidation, a first degree misdemeanor. Defendant challenges his convictions as not being supported by sufficient evidence and as being against the manifest weight of the evidence. He further asserts that he was deprived of a fair trial due to prosecutorial misconduct consisting of improper comments during closing arguments in his bench trial. For the reasons that follow, we affirm.

{¶ 2} Defendant elected to pursue a bench trial and executed a waiver of his right to trial by jury. Shakena Jackson (“Jackson”) testified that she rented a

two-family house from defendant located in Cleveland, Ohio for a few months in 2007-2008. She resided there with her fiancé, Roderick Simmons (“Simmons”), who was a childhood friend of defendant. Jackson was the sole source of income for the household as Simmons was unemployed. Jackson furnished the rental with furniture she was leasing from Aaron’s. According to Jackson, Aaron’s verified her tenancy with defendant prior to moving her furniture into the rental house. Although defendant physically received the rental payments from Simmons, Jackson testified that defendant knew she was paying the rent. Jackson said she did not owe defendant any money, that she was only late paying the rent once in December 2007, and that defendant never evicted her from the property.

{¶ 3} Jackson had a verbal altercation with Simmons on or about March 31, 2008, which caused her to stay with her mom for a period of four days. When she returned to the rental property, her key no longer worked and she could see through the windows that all of her furniture was gone. She confronted Simmons about her missing furniture, who, in turn, instigated a three-way call with defendant. During this call, Simmons told defendant he had to give Jackson her “stuff” back. Defendant’s response was to demand \$700 from Jackson for the return of the furniture. Jackson refused to pay defendant for her furniture. After a few days, Jackson filed a police report.

{¶ 4} Jackson then testified that after defendant was arrested and bailed out of jail, he made several offers to return her furniture so that she would not go

to court for this case. Defendant reportedly went to Jackson's residence several times trying to get her to accept return of the furniture. Jackson said that defendant is known for his "aggressiveness." Jackson admitted that she was not present when the furniture was removed and did not know whether Simmons sold it to defendant. Jackson, however, repeatedly said that defendant knew the furniture belonged to her as Aaron's provided this information to him before moving it into the rental unit.

{¶ 5} Jackson's furniture rental agreement was introduced as State's Exhibit 1. She had made payments of \$607.71 before the furniture was taken and still owed \$1,644.42 to Aaron's at the time of trial. Jackson owned the bed set that was removed from the rental unit, for which she paid \$120.

{¶ 6} Detective Cunningham gave brief testimony to the effect that his conversations with defendant about this matter were very limited for the reason that defendant did not want to incriminate himself.

{¶ 7} William Hart, aka Wood, testified that he performed electrical work for defendant. On one occasion he was with defendant when Simmons called. Defendant instructed Wood to make a detour in order to pick up furniture from Simmons's residence. Simmons let them into the rental unit and Wood and "a guy named Pluke" moved the furniture through the front window and loaded it onto defendant's truck. They moved the furniture to a location on Kinsman. Defendant paid Wood about \$20 or \$30 for moving the furniture. Wood saw

defendant also give Pluke some money and saw defendant give money to Simmons twice that day.

{¶ 8} Later, Jackson and Simmons came to Wood's house looking for Jackson's furniture. Wood told Jackson that he moved the furniture for defendant and that Simmons was there at the time.

{¶ 9} The trial court denied defendant's motions for acquittal. During closing arguments the prosecutor began to comment about defendant's decision not to speak to the detective; however, the court sustained the defense objection to this line of discussion.

{¶ 10} The trial court found defendant guilty of theft, a felony of the fifth degree and intimidation, a first degree misdemeanor. The court found defendant not guilty of all other charges. The court imposed a sentence consisting of a two-year period of community control sanctions and ordered the defendant to pay restitution to Jackson.

{¶ 11} Defendant appeals raising three assignments of error for our review.

{¶ 12} "I. The trial court erred in denying appellant's motion for acquittal when the State failed to present sufficient evidence to sustain a conviction."

{¶ 13} 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 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. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541.

{¶ 14} Defendant's first conviction is for theft in violation of R.C. 2913.02(A)(1), which provides:

{¶ 15} "(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

{¶ 16} "(1) Without the consent of the owner or person authorized to give consent."

{¶ 17} Jackson testified that defendant knew the furniture in the rental unit belonged to her and that he took it without her consent. Jackson offered her rental agreement with the furniture store and stated that the store contacted defendant before moving her furniture into the unit. According to Jackson, defendant knew Simmons was unemployed and that she was the sole source of income for their household. Jackson never consented to defendant's removal of her belongings and Simmons did not have any authority to consent to it. The evidence is sufficient to support a conviction for theft.

{¶ 18} Defendant's remaining conviction is for intimidation pursuant to R.C. 2921.04(A), which provides:

{¶ 19} "(A) No person shall knowingly attempt to intimidate or hinder the victim of a crime in the filing or prosecution of criminal charges or a witness

involved in a criminal action or proceeding in the discharge of the duties of the witness.”

{¶ 20} Jackson testified that defendant demanded her to pay \$700 for the return of her furniture. Only after she pursued charges against him did defendant offer to return the furniture in order to avoid getting in “trouble.” Jackson said defendant wanted her to take back her furniture because they did not want her to go to court. There was sufficient evidence to support defendant’s intimidation conviction.

{¶ 21} Assignment of Error I is overruled.

{¶ 22} “II. Appellant’s conviction is against the manifest weight of the evidence.”

{¶ 23} In a bench trial, the court assumes the fact-finding function of the jury. Accordingly, to warrant reversal from a bench trial under a manifest weight of the evidence claim, it must be determined that the court clearly lost its way in resolving conflicts in the evidence and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541. We must review the entire record, weigh the evidence and all reasonable inferences and consider the credibility of witnesses in making this determination. *Id.*

{¶ 24} Reversal of defendant’s convictions for theft and intimidation are not warranted under this standard. There is no dispute that the furniture from the Jackson/Simmons rental unit was removed and loaded onto defendant’s truck

when Jackson was not present. When Jackson and Simmons asked defendant to return the furniture, he demanded \$700 from Jackson for its return. Although defendant suggests that Simmons sold him the furniture, Jackson insisted that defendant knew Simmons had no authority to do so. Jackson's furniture rental agreement is part of the record. There appears no dispute that defendant was a lifelong acquaintance, if not a friend, of Simmons who had reportedly been virtually unemployed for the past eight years. Defendant's conviction for theft pursuant to R.C. 2913.02(A)(1) is not against the manifest weight of the evidence.

{¶ 25} Defendant did not offer to return Jackson's property until after he had been arrested and only then in effort to prevent her from testifying against him. According to Jackson, defendant contacted her at least three times to avoid any "trouble" for taking her furniture. Jackson said defendant did not want her to come to court. Accordingly, his conviction for misdemeanor intimidation pursuant to R.C. 2921.04(A) was not against the manifest weight of the evidence.

{¶ 26} Assignment of Error II is overruled.

{¶ 27} "III. Appellant was denied a fair trial due to prosecutorial misconduct by the assistant prosecutor commenting on appellant's failure to testify."

{¶ 28} Defendant challenges the following excerpt from closing arguments as constituting prosecutorial misconduct that deprived him of a fair trial:

{¶ 29} “[Prosecutor]: * * * We also know that during the investigation with the police, he didn’t name anybody. He didn’t say anything about another person, no one, not, hey, Roderick sold this to me and —

{¶ 30} “[Defense Attorney]: Objection, your Honor.”

{¶ 31} “* * *

{¶ 32} “[The Court]: Sustained.

{¶ 33} “[Prosecutor]: The detective testified that the only thing that he found out from the defendant was that —

{¶ 34} “[Defense Attorney]: Objection.

{¶ 35} “[The Court]: Sustained.”

{¶ 36} “The test for prosecutorial misconduct is whether remarks are improper and, if so, whether they prejudicially affected substantial rights of the accused.” *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293. When misconduct is alleged during closing arguments, an appellate court must examine the entire statement to determine whether the result of the proceedings would have been different had the prosecutor not made the remarks at issue. *State v. Treesh*, 90 Ohio St.3d 460, 2001-Ohio-4, 739 N.E.2d 749; *State v. Loza* (1990), 71 Ohio St.3d 61, 641 N.E.2d 1082. Additionally, defendant was tried before the bench and not before the jury. There is a presumption in a bench trial in a criminal case that the court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary. *State v. Post* (1987), 32 Ohio St.3d 380, 384, 513 N.E.2d 754.

{¶ 37} We find no evidence in the record to show that the bench considered any irrelevant, immaterial, or incompetent evidence in rendering its decision. To the contrary, the trial court sustained defendant's objections to the only comments made by the prosecutor during closing arguments that are at issue under this assignment of error.

{¶ 38} Assignment of Error III is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its 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 Court of Common Pleas to carry this judgment into execution. 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.

JAMES J. SWEENEY, JUDGE

SEAN C. GALLAGHER, A.J., and
KENNETH A. ROCCO, J., CONCUR