

[Cite as *State v. Smiley*, 2010-Ohio-656.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92572

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KENNETH SMILEY

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-514523

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

RELEASED: February 25, 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).

LARRY A. JONES, J.:

{¶ 1} Defendant -appellant, Kenneth Smiley (“Smiley”), appeals his conviction for receiving stolen property. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the judgment of the lower court.

STATEMENT OF THE CASE

{¶ 2} Smiley, was charged in a two-count indictment for receiving stolen property, in violation of R.C. 2913.51(A), and with misuse of a credit card, in violation of R.C. 2913.21(B)(2). The charges are a felony of the fifth degree and a misdemeanor of the first degree, respectively.

{¶ 3} A jury trial commenced on October 23, 2008. At the close of the state’s case, the defense moved for acquittal pursuant to Crim.R. 29. The motion was denied as to both counts. The defense presented no evidence, and on Monday, October 27, 2008, the defense again moved for acquittal. The motion was denied.

{¶ 4} The jury returned a guilty verdict on Count 1 of the indictment, receiving stolen property. The jury could not reach a unanimous verdict on Count 2, and that count was dismissed by the court.

{¶ 5} On November 18, 2008, the court sentenced Smiley to serve 12 months in the Lorain Correctional Institution. That sentence was to run concurrent to the sentence Smiley received in Case No. CR-496772.

STATEMENT OF THE FACTS

{¶ 6} The state presented three witnesses at trial: Beverly Richards (“Richards”), Robert Osborn, Jr. (“Osborn”), and Detective Malloy (“Malloy”) of the Cleveland Police Department. Osborn testified that he is the vice president of Directional Boring, Inc., a company operating as a contractor for FirstEnergy. The company is co-owned by Osborn and Stephen Cotleur (“Cotleur”), and has been operating for 14 years. Osborn’s job requires him to travel extensively. In June 2005, he moved from his home in North Olmsted to the hotel located near the intersection of Bagley Road and Engle Road, where he resided until December 2005.

{¶ 7} The company had a primary bank account at Charter One Bank. Osborn handled all of the banking business for the company. Monthly bank account statements were mailed directly to Osborn’s personal residence. He did not personally review the statements, primarily because of his personal sense of security garnered by the fact that he “didn’t have to see if [he] had \$100 in the bank because [he] usually had 100 grand in the bank.”¹ He simply let the statements stockpile and submitted them at a later time to the company’s accountant.

{¶ 8} Both Osborn and Cotleur had debit cards, drawn on the same account, that allowed the withdrawal of cash from ATMs. The card issued to Osborn had the name of “Robert W. Osborn, Jr.” on its front side.

¹ Tr. 223.

{¶ 9} Osborn first met Smiley on the same day that he moved into the hotel. Smiley resided in the room immediately adjacent to Osborn's. The two men would see each other quite often, sometimes on a daily basis. They went out approximately once a week to have drinks at the local pub, located down the street from the hotel. Osborn testified that while Smiley's proper name was "Kenneth Smiley," everyone knew him as, "Damico."

{¶ 10} Osborn would use the subject debit card to pay for drinks and to withdraw money when he and Smiley were out together. The card was frequently used in Smiley's presence. To withdraw cash with the card, Osborn had to enter a PIN (personal identification number). The PIN was "DENY." When he made cash ATM withdrawals, the amounts would usually be between \$300 and \$500. Osborn explained that he tried to limit the number of times he made cash withdrawals to once per week, hoping to withdraw enough money at one time to last throughout the week.

{¶ 11} Osborn learned that his debit card was missing from his hotel room on or about September 4, 2005. He called the bank on September 9th to request another card. To initialize the new card, he took it to the bank and notified the teller that he was activating the new card. As part of the process, the teller made a telephone call and Osborn was required to go to the ATM and enter a new PIN. He did so, selecting the same PIN of "DENY." After activating the second card, he then had two active ATM cards in his name.

{¶ 12} At that time, Osborn did not believe the other card was stolen — he thought he might have left it at home with his wife, or that it was just misplaced in the hotel room. Osborn’s room had a low balcony, reachable from ground level, adjoining to the balcony of Smiley. Osborn also recalled having a tendency to leave the patio door open for ready access to relax on the balcony.

{¶ 13} On January 1, 2006, Osborn attempted to make an ATM cash withdrawal and “had trouble getting money out.”² On January 3, 2006, Osborn contacted Chris Lambert (“Lambert”) at Charter One Bank and asked why he had no money in his account. She instructed him to come into the bank so she could show him how the funds had been withdrawn. Once at the bank, Lambert showed Osborn a computer screen that displayed various withdrawals having been made at different ATM machines during the prior 30 days. Information on the computer screen included the dates, times, and specific locations that each ATM was accessed using his card. Lambert also reviewed paper statements with Osborn.

{¶ 14} Osborn knew that he had not been at the withdrawal locations because he had just returned from Florida and Cancun, and therefore was not in Ohio on the dates and at the times the withdrawals were made. Based on this information, Osborn called Richards, manager of the nearby BP store, to ask if she had a video camera monitoring the ATM machine.

²Tr. 266.

{¶ 15} Richards testified that she was employed as a general manager at the BP gas station located at the intersection of State and Brook Park Roads. The station had operable video surveillance cameras working during the time the withdrawals were made. The cameras recorded to a DVR and the footage was retained by the system on a hard drive for 45 days.

{¶ 16} Richards knew Osborn as a regular customer at the gas station. At Osborn's request, she viewed surveillance video from the ATM machine for the date of December 30, 2005 for the time approximately five minutes before 5 p.m. Osborn went to the BP station to view the video as well.

{¶ 17} Richards, on direct examination, confirmed that Osborn called her and asked if she had video footage for the ATM machine for December 30th or 31st at approximately 5 p.m., and that she showed it to Osborn upon his arrival at the BP station. After Osborn reviewed the video, Richards made a copy of it and preserved it for later retrieval by the detective.

{¶ 18} Osborn filed a police report in January 2006 and the case was assigned to Malloy, who was in the Financial Crimes Unit. As part of his investigation, he retrieved the video from the BP station. During trial, he confirmed that the video presented to the witnesses and jury was, in fact, the same video footage that he obtained from the BP. During the course of Malloy's investigation, he was able to conclude that over \$29,000 was missing from Osborn's account at Charter One Bank. The transactions that caused the loss occurred without Osborn's permission.

{¶ 19} Richards confirmed that the video entered as Exhibit 6 was the same video that was provided to the police. She testified that a single male made two transactions on her station's ATM during the time period of 16:45:48 and 16:58:56 on December 30, 2005. During the trial, Osborn was shown a portion of the video as well. He testified that he observed (in the video) Smiley arriving at the station in a red car that Osborn recognized as the car owned by Smiley's girlfriend, Jessica Townsend. Osborn further testified that, on the video, he observed Smiley walking through the front door of the BP station toward the ATM machine, and standing in front of it. Osborn's recognition was based on his visual recognition of the hairstyle that Smiley wore, the leather jacket and shoes Smiley had on, and a red Ford Fiesta that Smiley drove every day.

{¶ 20} Further, Osborn testified that the quality of the original video display was higher, such that his identification of Smiley's car when he first saw the video at the station was "unquestionable." Osborn stated that the best view of Smiley in the video was at the time of 4:55:48-49, when Smiley looked over his right-hand shoulder. This gesture was made almost precisely at the exact time frame for the portion of the video for which Osborn had asked Richards to retrieve.

{¶ 21} Repeatedly throughout his review of the video, Osborn recognized Smiley as the man in the video using the ATM machine at the specific time frame of footage he requested from Richards.

{¶ 22} The last time Osborn spoke with Smiley was on January 2nd or 5th in 2006, when he confronted Smiley about seeing him on the video surveillance

system at BP. Osborn stated that Smiley told him that he would be willing to give Osborn's money back if Osborn agreed not to inform police and otherwise press charges.

Assignments of Error

{¶ 23} Appellant assigns two assignments of error on appeal:

{¶ 24} “[1.] The evidence was insufficient as a matter of law to support a finding beyond a reasonable doubt that appellant was guilty of receiving stolen property.

{¶ 25} “[2.] Appellant's conviction for receiving stolen property was against the manifest weight of the evidence.”

LEGAL ANALYSIS

Insufficient Evidence and Manifest Weight

{¶ 26} Due to the substantial interrelation between appellant's first and second assignments of error, we shall address them together.

{¶ 27} “The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different.

{¶ 28} “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. In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. In addition, a conviction based on legally insufficient evidence constitutes a denial

of due process. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. (Internal citations omitted.)

{¶ 29} “Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may, nevertheless, conclude that the judgment is against the weight of the evidence. 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. It indicates clearly to the jurors that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.’

{¶ 30} “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 fact-finder’s resolution of the conflicting testimony.” *Id.*

{¶ 31} As to a claim that a judgment is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, 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. The discretionary power to grant a new trial

should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212.

{¶ 32} Smiley was convicted of receiving stolen property, in contravention of R.C. 2913.51(A), which provides as follows: “(A) No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense.”

{¶ 33} R.C. 2913.51(C) provides that, “if the property involved is any of the property listed in R.C. 2913.71, then receiving stolen property is a felony of the fifth degree.” R.C. 2913.71 states that “[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) Credit Card***”

{¶ 34} According to R.C. 2913.01(U), and as properly illustrated by the trial court’s jury instructions, a credit card “includes, but is not limited to, a card, code, devise, 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

cash dispensing machine.” Accordingly, Smiley’s conviction was a felony of the fifth degree.

{¶ 35} The record in the case at bar verifies that significant evidence was presented to the trial court. The state proved beyond a reasonable doubt that Smiley possessed and used an ATM debit card issued in the name of Robert W. Osborn, Jr. that was drawn on Osborn’s company’s Charter One Bank account, at approximately 4:45 p.m. on December 30, 2005. Olson testified that he used his card in the presence of Smiley on numerous occasions, and entered his PIN in Smiley’s presence.

{¶ 36} Osborn also stated that he resided in the room adjacent to Smiley, often leaving his balcony door unlocked, thereby giving Smiley ample opportunity to seize and remove the ATM debit card. Osborn also testified that he believed that he may have simply misplaced his card and requested a duplicate card. Osborn further testified that upon learning from his bank of the exact date, time, and location of the most recent activity on his card, he was able to obtain video footage from the BP station where the card was used. Osborn was able to positively identify Smiley from the BP video surveillance tape. Osborn’s identification was based on Smiley’s clothing, the car he was known to drive, and more specifically, Smiley’s face in the video.

{¶ 37} We find that there was sufficient evidence for a jury to conclude that appellant was guilty of receiving stolen property. In addition, there is substantial evidence upon which the court could reasonably conclude that appellant

committed the crime charged. Moreover, there is nothing in the record to suggest that the jury lost its way and created such a miscarriage of justice as to require a reversal of appellant's conviction.

{¶ 38} Accordingly, appellant's two assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover of 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.

LARRY A. JONES, JUDGE

SEAN C. GALLAGHER, A.J., and
JAMES J. SWEENEY, J., CONCUR

