

[Cite as *State v. Jones*, 2010-Ohio-902.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92921

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MINYON JONES

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-513663

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

RELEASED: March 11, 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).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant, Minyon Jones, appeals her conviction in the Cuyahoga County Court of Common Pleas. For the reasons stated herein, we affirm.

{¶ 2} Jones was charged in a five-count indictment on July 24, 2008, with one count of aggravated burglary, one count of burglary, two counts of robbery, and one count of theft with an elderly specification. The indictment set forth the date for the offenses as on or about June 3, 2008.

{¶ 3} The case proceeded to a bench trial on December 16, 2008. At trial, the victim testified that he was born in 1943, that he was 65 years old, and that he would be 66 years old on January 17. He testified to events occurring on or about June 3, 2008. He stated that Jones, the victim's niece, came to his house for the purpose of collecting money that he owed her. According to the victim, Jones took a scooter that belonged to him and said she was going to keep it until he paid her. He further stated that she took two telephone organizers belonging to him, as well as his apartment keys.

{¶ 4} The following day, the victim reported the incident to the Cleveland police. That evening, Jones returned and took the victim's wheelchair and a walker. According to the victim, on this second day, Jones struck him in the forehead and was hitting him. The victim fell to the floor where Jones proceeded to stomp on him. The victim indicated that Jones was upset with him for calling the police. The victim testified that he went to the hospital and was treated "for my head, and they took X-rays of my side and everything." The victim stated he

sustained bruises from the incident. He spent one night in the hospital, and thereafter, he went to the police station to report this second incident. The victim asked Jones for his property back, but he only recovered one of his organizers and the push wheelchair.

{¶ 5} Officer John Donitzen testified that he responded to a call at the victim's home on June 3, 2008. He stated that the victim reported that two of his nieces came to his apartment, and that one ran in and took items from the victim's home. The victim reported that an electric scooter and other items were taken and indicated that he would not get them back until he paid a debt.

{¶ 6} Detective Charles Battle testified that he conducted a follow-up investigation to the June 3rd incident. He learned in his investigation that Jones had pushed past the victim into his home, demanded money, and taken a scooter. He also testified that when he spoke to Jones, she denied assaulting the victim or taking the reported items. There were no reported injuries to the victim with regard to the June 3rd incident. The detective was only aware of the report that was made on June 3rd. He indicated that it was possible that another report was made at the station, but that he did not have knowledge of such a report.

{¶ 7} Following the state's case, Jones made a Crim.R. 29 motion for acquittal that was denied by the trial court. Jones then called her mother, Sharon Coleman, to testify. Coleman stated that the victim is her stepbrother and that he "is on drugs[,] "lies all of the time[,] and "manipulates you, tries to

get money out of you.” However, she also testified that the victim told her that Jones had taken his wheelchair and “beat him up.” Coleman stated that she told the victim she did not wish to hear about it. She further claimed that the victim went to the hospital for an asthma attack and had been in the hospital several times. However, Coleman had no personal knowledge with regard to the incidents in question or concerning the victim’s stay in the hospital following the incidents.

{¶ 8} Upon the testimony and evidence presented, the trial court found Jones guilty of one count of robbery (Count 4), a third-degree felony, and one count of theft (Count 5) with the elderly specification to raise the offense to a fifth-degree felony. The court imposed a one-year probation period for both offenses. Jones was found not guilty of the remaining charges.

{¶ 9} Jones filed this appeal, raising five assignments of error for our review. Jones’s first assignment of error provides as follows: “The trial court erred in finding the defendant guilty of robbery (count 4) and theft (count 5) as said decision is not supported by sufficient evidence.”

{¶ 10} When an appellate court reviews a claim of insufficient evidence, “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. Leonard*, 104 Ohio St.3d 54, 67, 2004-Ohio-6235, 818 N.E.2d 229, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the

syllabus. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. Tenace*, 109 Ohio St.3d 255, 260, 2006-Ohio-2417, 847 N.E.2d 386.

{¶ 11} Jones argues that the state failed to produce sufficient evidence to show that the victim owned the scooter and the wheelchair that were taken from him. She states that the evidence only established that the victim possessed these items.

{¶ 12} R.C. 2913.01(D) defines an “owner” for the purposes of a theft offense, which includes the robbery and theft offenses charged herein, as follows:

“‘Owner’ means, unless the context requires a different meaning, any person, other than the actor, who is the owner of, who has possession or control of, or who has any license or interest in property or services, even though the ownership, possession, control, license, or interest is unlawful.” R.C. 2913.01(D). Thus, it is not necessary to prove title ownership under the theft statute, and all that is required is proof that a defendant deprived someone of property who had “possession or control of, or any license or any interest in” that property. *State v. Grayson*, Lake App. No. 2006-L-153, 2007-Ohio-1772, citing *State v. Rhodes* (1982), 2 Ohio St.3d 74, 76, 442 N.E.2d 1299. “It is * * * the defendant’s, relationship to the property which is controlling. The important question is not whether the person from whom the property is stolen was the actual owner, but rather whether the defendant had any lawful right to possession.” *Rhodes*, supra. As this court has recognized, the gist of a theft

offense is the wrongful taking by the defendant, not the particular ownership of the property. *State v. Thomas*, Cuyahoga App. No. 87666, 2006-Ohio-6588.

{¶ 13} In this case, there was sufficient evidence from which a rational trier of fact could conclude that the victim was the “owner” of the scooter and the wheelchair for purposes of R.C. 2911.02 (robbery) and R.C. 2913.02 (theft), regardless of whether he actually possessed title ownership. Furthermore, there was sufficient evidence to infer that Jones, with purpose to deprive the victim of his possession and control of the property, knowingly exerted possession and control over the property without consent of the owner. With regard to the taking of the wheelchair, there was sufficient evidence that Jones assaulted the victim in the commission of the offense.

{¶ 14} Therefore, Jones’s argument fails under a sufficiency of the evidence review, as the evidence on this issue, if believed, is sufficient to support a conviction.

{¶ 15} Jones also argues that the indictment sets forth the date of the offenses as June 3, 2008, and that she should not have been convicted of the robbery that was alleged to have occurred on June 4, 2008. The testimony from the victim in this matter established that there were two separate incidents occurring a day apart. According to the victim, on the first day, Jones took his scooter and on the second day, she assaulted him and took his wheelchair. The indictment specified that the offenses occurred on or about June 3, 2008.

{¶ 16} The precise time and date of an offense are not ordinarily considered to be essential elements of an offense; hence, the failure to provide specific times and dates in the indictment is not, in and of itself, a basis for dismissal of the charges. *State v. Sellards* (1985), 17 Ohio St.3d 169, 478 N.E.2d 78; see, also, R.C. 2941.03(E); R.C. 2941.08(C). Indeed, “[a] certain degree of inexactitude of averments, where they relate to matters other than elements of the offense, is not per se impermissible or necessarily fatal to a prosecution.” *Sellards*, supra, at 171.

{¶ 17} In this case, Jones has failed to demonstrate that she was prejudiced by the absence of specific dates set forth in the indictment. There was sufficient evidence to prove that the offenses took place on a date reasonably near the date claimed. Accordingly, we find no error in this regard.

{¶ 18} Finally, Jones argues that there was insufficient evidence to establish the elderly specification. To convict Jones of theft from an elderly person, the state, in addition to establishing the theft offense, was required to prove that the victim was 65 years of age or older. R.C. 2913.01(CC). In this case, the victim testified that he was born in 1943, that he was 65 years old, and that he would be 66 years old on January 17, 2009. The victim’s testimony, if believed, was sufficient for a reasonable trier of fact to conclude that the victim was aged 65 at the time the offenses occurred.

{¶ 19} Jones’s first assignment of error is overruled.

{¶ 20} Jones's second assignment of error provides as follows: "The trial court erred in finding the defendant guilty of robbery (count 4) and theft (count 5) as said decision is against the manifest weight of the evidence."

{¶ 21} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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." (Internal citations and quotations omitted.) *Leonard*, 104 Ohio St.3d at 68.

{¶ 22} Jones argues that the victim's testimony was refuted by Coleman, who testified that the victim used drugs and was a liar. Jones also points to testimony by the victim about suffering from a blood vessel bursting that resulted in memory loss.

{¶ 23} The record reflects that Coleman did not have any personal knowledge of the incidents related to the charged offenses. The victim provided a detailed account of what occurred. He testified that Jones came to his home, took an electric scooter and other items belonging to him, and said she was going to keep the items until the victim paid a debt he owed. The victim reported the incident to the police, and the next day, Jones returned, struck him in the head,

kicked him in the sides, and took his push wheelchair. Police testimony was provided to confirm the report of the initial incident. The victim indicated that he went to the hospital as a result of the later assault and that he reported the second incident at the police station. He also testified to his age. The victim further testified: “Somebody you care about, you don’t stomp them and hurt them, especially an old man like me. You don’t do that if you care about them. You don’t physically hurt them in no kind of way. That’s wrong.” Upon our review of the record, we find that there was substantial evidence to support the conviction, that no manifest miscarriage of justice occurred, and that Jones’s conviction was not against the manifest weight of the evidence.

{¶ 24} Although raised under another assignment of error, Jones also argues that there was a lack of evidence to establish the value of the scooter. The state concedes this point. However, because the elderly specification was met, the trial court properly enhanced the penalty, elevating the theft offense from a misdemeanor to a felony under R.C. 2913.02(A)(3). Jones’s second assignment of error is overruled.

{¶ 25} Jones’s third assignment of error provides as follows: “The trial court erred in finding the defendant guilty of both robbery (count 4) and theft (count 5) as these counts are allied offenses of similar import and the defendant may be convicted for only one of them.”

{¶ 26} Jones argues that the two offenses for which she was convicted are allied offenses of similar import. As no objection was raised at trial, we review for plain error.

{¶ 27} The victim in this case testified to two separate offenses that occurred a day apart. The record reflects that on June 3, 2008, Jones took the motorized scooter and miscellaneous items from the victim. The following day, after the victim had notified the police of the earlier theft, Jones struck and kicked the victim and took his push wheelchair. Because the offenses were committed separately, the offenses do not constitute allied offenses of similar import. See R.C. 2941.25(B). Jones's third assignment of error is overruled.

{¶ 28} Jones's fourth assignment of error provides as follows: "The defendant was deprived of her constitutional rights due to the ineffective assistance of legal counsel."

{¶ 29} In order to substantiate a claim of ineffective assistance of counsel, the appellant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant so as to deprive him of a fair trial.

State v. Trimble, 122 Ohio St.3d 297, 310, 2009-Ohio-2961, 911 N.E.2d 242, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland*, 104 S.Ct. at 2065.

{¶ 30} Jones argues that her trial counsel was ineffective for failing to request a merger of the offenses. As we have already determined that the

offenses were not allied offenses of similar import, this argument is without merit.

Likewise, we find no merit to Jones's argument regarding proof of ownership of the wheelchair and scooter.

{¶ 31} Jones also argues that trial counsel was ineffective for failing to object to the lack of evidence supporting the victim's age and failing to demand proof of his age. As discussed above, there was sufficient testimony from the victim to establish his age in support of the elderly specification. Also, as Jones and her mother were related to the victim, defense counsel may have been aware of the victim's age and made a tactical decision not to draw further attention to it. Furthermore, Jones has failed to show that the outcome of the trial would have been different.

{¶ 32} Jones's fourth assignment of error is overruled.

{¶ 33} Jones's fifth assignment of error provides as follows: "The trial court erred when it subjected the defendant to an enhanced penalty when applying the elderly specification set forth in R.C. 2913.03."

{¶ 34} In this matter, the victim testified to his date of birth and his age. The victim provided clear and detailed testimony at trial, and the trier of fact was in the best position to determine the credibility of the witness. Although the victim first stated his age as 56, he quickly corrected the statement to 65 and confirmed his year and date of birth. Further, although the victim testified about suffering from a blood vessel bursting that resulted in memory loss, he directly answered the questions concerning his age and was able to provide clear and

specific testimony concerning the offenses that occurred. Upon this record, the trial court determined the victim's testimony to be credible and applied the elderly specification to enhance the penalty for the theft charge. We find no error and overrule Jones's fifth assignment of error.

Judgment 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.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

KENNETH A. ROCCO, J., and
COLLEEN CONWAY COONEY, J., CONCUR