

[Cite as *State v. Terry*, 2011-Ohio-1681.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95049

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

GERALD TERRY

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-528187

BEFORE: Jones, J., Celebrezze, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: April 7, 2011

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Gerald Terry (“Terry”), appeals his aggravated theft conviction. Finding no merit to the appeal, we affirm.

Procedural History and Facts

{¶ 2} In 2009, Terry was charged with four counts of aggravated theft. The matter proceeded to a trial before the bench, at which the following evidence was adduced.

{¶ 3} In 2008, Terry got a job with a local branch of the United Cerebral Palsy Association (“UCP”). His position was as site supervisor, responsible for supervising disabled adults working at the Oatey Company, a plumbing supplies manufacturer. Sharon Meixner (“Meixner”), Terry’s supervisor at UCP, testified that UCP hired Terry to serve as the liaison between UCP and Oatey. Terry was responsible for training and supervising eight special-needs clients and providing on-site supervision and occasional transportation for the clients. The program was funded through the Cuyahoga County Board of Developmental Disabilities (“the Board”) and assisted not only those with cerebral palsy, but also clients with other special needs, such as those with autism, spina bifida, epilepsy, or other disability.

{¶ 4} Meixner explained that UCP’s policy was that any exchange of money between an employee and client was frowned upon but if money was ever exchanged, the supervisor was to give the client a receipt. She also testified that supervisors were never to leave the clients unattended because many of the clients needed constant supervision for safety reasons.

{¶ 5} About a month after Terry started working for UCP, Meixner met with him to discuss allegations that he had taken \$10 from one of the clients to buy the client safety goggles, but had not purchased the goggles or returned the money. Meixner told Terry he was not to take a client’s money without giving the client a receipt and he was not to leave the work site to run errands because he was responsible for the clients’ welfare. Terry subsequently returned the \$10 to the client.

{¶ 6} Terry worked for UCP for another three months before he was suspended. Meixner scheduled a meeting with Terry to explain why he was being suspended, but Terry never appeared for the meeting. In an email tendering his resignation from UCP, Terry wrote that he was being discriminated against.

{¶ 7} After the investigation was complete, UCP reimbursed four of Terry's clients for a total of \$1,572.

{¶ 8} Pamela Wingfield, a UCP client confined to a wheelchair, testified that Terry was her supervisor at Oatey and had offered to sell her a dining room set for \$75. Terry showed her a picture of the dining room set and Wingfield agreed to buy it. She paid him the \$75 in four installments. She testified that she never received the dining room set nor did she get her money back. She further testified that she had a collection of music CDs that she gave to Terry to copy, valued at \$250. Terry never returned the CDs, despite Wingfield's repeated requests that he do so.

{¶ 9} Wingfield also testified that she called Terry three times after he left UCP in an attempt to get the dining room set and recover her CD collection. She testified that Terry also called her after he resigned and she was scared of him because he sounded angry on the phone.

{¶ 10} Paul Helm, also confined to a wheelchair, testified that he worked at Oatey through UCP and Terry was his supervisor. Terry offered to sell Helm a stereo, VCR, and television and showed him pictures of the stereo and VCR. Helm gave Terry \$500 for the

stereo and \$662 for the television. Helm testified that Terry came to his house with a stereo and VCR, and the stereo was wrapped in plastic wrap. Later, when Helm opened the stereo, he testified that it did not look very nice and it did not work. Helm testified that he thought he was also buying a big screen television from Terry, who told Helm that he had a “hook up” at Best Buy, but the television Terry showed him was only a 13" set and it was old. He also testified that it was difficult for him to remember details of things that happened so long ago.

{¶ 11} On cross-examination, Helm testified that Terry assisted him with his grocery shopping. He also testified that the electronics were in his closet and he never touched them because he did not want to get in trouble.

{¶ 12} Paul Luszcwieski, the third victim, testified that one day he gave Terry \$10 for McDonald’s chicken nuggets and french fries, but never received his change. He also gave a dime to Terry another time but Terry did not pay him back.

{¶ 13} Florence Catchings testified that she worked at Oatey through UCP and gave Terry \$20 for a McDonald’s lunch but did not receive any change. Catchings testified that Terry was very nice to her and never offered to sell her anything.

{¶ 14} Terry Starr (“Starr”) testified that he was employed by the Board as an investigator and was assigned to the investigation. The Board had been contacted by Helm’s mother with concerns that Helm’s supervisor had taken money from her son. Starr interviewed Terry, who denied ever selling anything to Helm or any other client. Starr

testified that Terry told him of one incident where Terry accepted money from the clients and brought food from home for them so they could all enjoy a “special” lunch of fried chicken. He was going to do it again and the clients offered to give him money for the food. But, according to Terry, the UCP found out he was accepting money from the clients and his supervisor cancelled the luncheon. So Terry went to McDonald’s and brought back food for the clients’ lunch.

{¶ 15} Starr further testified that he met with Helm at his apartment and saw the stereo Terry sold Helm. He noted that the stereo was ten years old and in poor condition. Starr testified that Helm told him that he once gave Terry \$30 for food for a “special” lunch, but did not receive any change. Helm also told Starr that he gave Terry \$662 for a large flat-screen television, but only received a small television from Terry. According to Starr, Helm told Terry that he did not want the television, but never got his money back. Starr testified that Terry denied ever going to Helm’s apartment or contacting any of the clients outside of work.¹

{¶ 16} Starr submitted the results of his investigation to UCP, substantiating misappropriation against Terry.

{¶ 17} Terry took the stand in his own defense. He testified that while he sometimes bought McDonald’s for the clients, he always returned their change. He testified that on occasion he paid for lunches from McDonald’s if the clients did not have money. He stated

¹ On cross-examination, Terry admitted to going to Helm’s apartment a couple of times, but stated it was only to help him grocery shop and to give him the stereo.

that he gave Helm the stereo for free and never took Wingfield's CDs or offered to sell her a dining room set.

{¶ 18} Terry testified that he contacted Starr shortly after learning about his suspension from work. He testified that he met with Starr that same day and explained to Starr that he stopped getting McDonald's for the clients when his supervisor told him it was against UCP policy. Terry stated he resigned before he could be terminated because he did not want to get fired. He testified that he did not receive training on whether he could use clients' money to buy them lunch, but conceded that he signed his employee manual that discussed misappropriation and a disabled person's bill of rights.

{¶ 19} The trial court convicted Terry of all four counts of aggravated theft, sentenced him to one year of community control sanctions, and ordered him to pay restitution to UCP.

{¶ 20} Terry appeals his convictions, raising two assignments of error for our review:

"I. The trial court erred in denying Appellant's motion for acquittal as to the charges when the state failed to present sufficient evidence to sustain a conviction.

"II. Appellant's convictions are against the manifest weight of the evidence."

Sufficiency of the Evidence

{¶ 21} An appellate court's function in 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. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 22} Terry was convicted of four counts of aggravated theft, in violation of R.C. 2913.02(A)(3), which provides 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.” R.C. 2913.02(B)(3) provides for an enhancement if the victim of the theft is a disabled adult. During trial, defense counsel stipulated to the fact that all four victims were “disabled adults” as defined by R.C. 2913.01(DD).

{¶ 23} Terry argues that there is insufficient evidence to convict him of theft because the state was unable to prove the element of deception.

{¶ 24} R.C. 2913.01(A) defines “deception” as “knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.”

{¶ 25} We find that the state provided sufficient evidence that Terry deceived four disabled adults into giving him money, either for goods that were not delivered or for goods that he misrepresented the condition or size of, or for food, which Terry bought but did not

return change. Wingfield testified she paid Terry \$75 in four installments for a dining room set and she lent him her CD collection. Terry never delivered the furniture, never returned her CDs, and never refunded any of her money. Helm testified that he thought he was buying a new large flat-screen television, a stereo, and a VCR from Terry, but Terry delivered an old, broken stereo and a small television.² The state also presented sufficient evidence that all four victims gave Terry money for food, which Terry did not return after he was unable to provide the food he promised or change from the McDonald's food he ended up purchasing for their lunch.

{¶ 26} Therefore, we find that the state presented sufficient evidence to support Terry's convictions for aggravated theft. Accordingly, the first assignment of error is overruled.

Manifest Weight of the Evidence

{¶ 27} Terry further argues that his convictions were against the manifest weight of the evidence. While the test for sufficiency of the evidence requires a determination of whether the prosecution has met its burden of production at trial, a manifest weight challenge questions

²We note that there were inconsistencies in the testimony about the amount of money Helm paid Terry for the electronics. Helm does not challenge the dollar amount of the theft on appeal and we find sufficient evidence that Helm gave Terry over \$500 in cash, which supports his conviction for aggravated theft. See R.C. 2913.61(A) (providing in pertinent part that in any case in which the "court determines that the value of the property* * *was five hundred dollars or more, it is unnecessary to find and return the exact value, and it is sufficient if the finding and return is to the effect that the value of the property* * *involved was five hundred dollars or more and less than five thousand dollars* * *.".)

whether the prosecution has met its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541. When considering a manifest weight claim, a reviewing court must examine the entire record, weigh the evidence, and consider the credibility of witnesses. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80, 434 N.E.2d 1356. The court may reverse the judgment of conviction if it appears that the fact finder “‘clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.’” *Thompkins* at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. A judgment should be reversed as against the manifest weight of the evidence “only in the exceptional case in which the evidence weighs heavily against the conviction.” *Thompkins* at 387. A finding that a conviction was supported by the manifest weight of the evidence necessarily includes a finding of sufficiency. *Id.* at 388.

{¶ 28} Terry argues that there was not credible, reliable evidence linking him to committing theft; rather, he claims he was just trying to help the clients by getting them food and giving them other items. We disagree. The testimony provided by the witnesses established that Terry abused his position of trust to take advantage of four of the disabled people he was charged with supervising. Although we recognize various inconsistencies in the victims’ trial testimony, we also are cognizant that these victims were developmentally and physically disabled and were not able to remember all the details of thefts that had occurred more than 18 months prior to taking the stand and testifying. Other evidence, including the

testimony of Starr and Meixner and Starr's investigative reports, corroborated the victims' testimony. The trial court, as the trier of fact in this case, was in the best position to view the witnesses and their demeanor and we find that this is not a case where the evidence weighed heavily against conviction.

{¶ 29} The second assignment of error is overruled.

{¶ 30} Accordingly, judgment is 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.

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

LARRY A. JONES, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and
SEAN C. GALLAGHER, J., CONCUR