[Cite as *State v. Scimone,* 2011-Ohio-75.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94339

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY SCIMONE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-524731

BEFORE: Kilbane, A.J., Gallagher, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: January 13, 2011

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MARY EILEEN KILBANE, A.J.:

{¶ 1} Defendant-appellant, Anthony Scimone ("Scimone"), appeals his theft conviction. Finding no merit to the appeal, we affirm.

{¶ 2} In June 2009, Scimone was charged with theft, with a specification that the value of the property taken was greater than $5,000 but less than $100,000. The matter proceeded to a bench trial, at which the following evidence was adduced.

{¶ 3} In the summer of 2007, Gene Veronesi ("Veronesi") hired Scimone to work at Veronesi's State liquor store in Shaker Square. This store closed in January 2008, and Scimone was transferred to Veronesi's liquor store on Van Aken Boulevard (Shaker Square Beverage). Veronesi owned another liquor store in Severance Town Center in Cleveland Heights also named Shaker Square Beverage.

{¶ 4} In early 2008, Veronesi transferred Scimone to the Severance location. At this location, Scimone was initially supervised by Jeff Harrod ("Harrod"), another employee of Veronesi's. Veronesi planned on undergoing hip replacement surgery in April 2008, so he transferred Harrod to the Van Aken store and made Scimone store manager at Severance. As manager, Scimone was responsible for the sales, paperwork, inventory control, accounts payable, accounts receivable, rent, and daily deposits to the Ohio State Liquor Control Commission.[1]

{¶ 5} During the third week of May 2008, when Veronesi resumed his responsibilities with the businesses after hip surgery, Scimone advised Veronesi that he was leaving the Severance location for another job. Scimone's new job required that he attend corporate training outside of Cleveland in less than a

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[1]Veronesi testified that the liquor is bought on consignment from the State. When it is delivered, it is inventoried into the State's system and Veronesi's system. Veronesi then has to deposit the daily liquor sales into a bank account for the State. The State then electronically withdraws the liquor sales amount for that day. The State keeps a record of the inventory and when each bottle of liquor is sold.

week. Veronesi then informed Scimone that before he left certain procedures had to be completed, including a comprehensive inventory and review of all the accounts with his accountant and Harrod. Scimone informed Veronesi that he would make sure that the Severance location was in working order before his final day on May 29, 2008. Harrod went to the Severance location that day to meet with Scimone, but Scimone did not come to work.

{¶ 6} Harrod was not able to access the safes because Scimone had the keys. He had to wait for another employee to bring him the keys. When he opened the safe that should have contained the rent money, it was empty. Harrod then looked at the records to verify the liquor deposits and determined that some of the deposits were not made. He spoke with Veronesi, who instructed him to make a police report with the Cleveland Heights Police Department. In the report, Harrod stated: "[o]n 5-29-08 we found that approx $25,000.00 in sales over a 4 day period is missing/not deposited by a former employee who left a drunken message with the owner, Gene Veronesi, making accusations and informing him he is leaving and not responsible for shortages or problems at [the] store."[2] Harrod also testified that Scimone had on at least two or three occasions taken the night deposits home and did not deposit them until the next day or longer.

{¶ 7} The trial court found Scimone guilty of theft and sentenced him to

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[2]Veronesi testified that on May 28, 2008, Scimone left him a message on his answering machine stating, "I am not a thief, I have never stole anything from you[.]"

two years of community control sanction. The trial court also ordered Scimone to pay $34,358.33 as restitution. The trial court noted that in the event that Veronesi was reimbursed by his insurer, Scimone would not be required to repay Veronesi.[3]

{¶ 8} Scimone now appeals, raising three assignments of error for review, which shall be discussed together.

ASSIGNMENT OF ERROR ONE

> "The guilty verdict and conviction entered by the trial court against [Scimone] was based upon insufficient evidence."

ASSIGNMENT OF ERROR TWO

> **"The trial court erred in its denial of [Scimone's] motion for judgment of acquittal made pursuant to [Crim.R. 29]."**

ASSIGNMENT OF ERROR THREE

> **"The guilty verdict and conviction entered by the trial court against [Scimone] was against the manifest weight of the evidence."**

{¶ 9} A motion for an acquittal pursuant to Crim.R. 29 challenges the sufficiency of the evidence.[4] In *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶113, the Ohio Supreme Court explained the standard for sufficiency of the evidence:

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[3]The restitution order was deleted by the trial court in January 2010 because Veronesi's insurance company paid him $34,358.33.

[4]Crim.R. 29(A) provides that the court "shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment * * * if the evidence is

> **"Raising the question of whether the evidence is legally sufficient to support the jury verdict as a matter of law invokes a due process concern. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. In reviewing such a challenge, '[t]he 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, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560."**

{¶ 10} In evaluating a challenge to the verdict based on the manifest weight of the evidence in a bench trial, "the trial 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, this court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered." *Cleveland v. Welms*, 169 Ohio App.3d 600, 2006-Ohio-6441, 863 N.E.2d 1125, ¶16 citing *Thompkins*; *Brooklyn v. Nova*, Cuyahoga App. No. 83550, 2004-Ohio-3610.

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insufficient to sustain a conviction of such offense or offenses."

{¶ 11} In the instant case, Scimone was convicted of theft under R.C. 2913.02(A)(1), which provides that: "[n]o person, with purpose to deprive the owner of property * * *, shall knowingly obtain or exert control over * * * the property * * * [w]ithout the consent of the owner or person authorized to give consent[.]" Scimone argues there is no evidence that affirmatively states that he took control of the money. He acknowledges that circumstantial and direct evidence are to be given equal weight at trial, but argues that his conviction cannot be predicated solely on circumstantial evidence when that evidence does not preclude all reasonable theories of innocence. He claims it is plausible that Harrod or some other employee was responsible for the failure to deposit the liquor sales money on the days in question. In support of his argument, he relies on *State v. Jacobozzi* (1983), 6 Ohio St.3d 59, 451 N.E.2d 744.

{¶ 12} In *Jacobozzi*, the Ohio Supreme Court found insufficient evidence to sustain Jacobozzi's unlawful interest in public contract convictions. The court stated that: "[w]ithout question there are multiple inferences that could be drawn from the state's circumstantial evidence that Jacobozzi was cognizant of his wife's interest. However, given an equally plausible theory of innocence, any doubt must be resolved in favor of the accused. [*State v. Sorgee* (1978), 54 Ohio St.2d 464, 377 N.E.2d 782; *State v. Kulig* (1974), 37 Ohio St.2d 157, 309 N.E.2d 897.]" Id. at 62. The court noted that: "'[a]n appellate court will reverse a conviction based solely on circumstantial evidence where that evidence does not, as a matter of law, preclude all reasonable theories of innocence.'" Id. at 61, quoting *Sorgee*.

{¶ 13} However, Scimone's theory of innocence in the instant case is not plausible. An accused may be convicted of a crime solely on the basis of circumstantial evidence. *State v. Nicely* (1988), 39 Ohio St.3d 147, 151, 529 N.E.2d 1236, citing *Kulig*. "'* * * [P]roof of guilt may be made by circumstantial evidence as well as by real evidence and direct or testimonial evidence, or any combination of these three classes of evidence. All three classes have equal probative value, and circumstantial evidence has no less value than the others.' 'Circumstantial evidence is not less probative than direct evidence, and, in some instances, is even more reliable.'" (Citations omitted.) Id.

{¶ 14} Although there was no direct testimony that Scimone took money from the Severance location, there was significant circumstantial evidence linking

Scimone to the theft. The State produced evidence that Scimone's responsibilities as manager included paying the rent and making the daily bank deposits. Upon Veronesi's return to work after recovering from hip surgery, Scimone gave Veronesi three days notice advising him that he took a new job in Columbus. Veronesi advised Scimone that there were a few items that needed to be addressed before his last day. However, Scimone did not come to work on his last day and Harrod discovered that the rent money ($8,300) was missing from the safe. The bank records indicate that on May 24, 25, and 27, 2008 no money was deposited for the liquor sales. Furthermore, from the end of April 2008 through May 2008, some money was deposited into the liquor account, but not the full amount of liquor sales.

{¶ 15} An audit of the Severance location completed by the State of Ohio Department of Liquor Control from February 8, 2008 to May 29, 2008 revealed an inventory shortage of $1,392.25 and a cash account shortage of $23,865.85, for a total of $25,258.20.[5] Testimony revealed that the missing money did not go to payroll, rent, or cash payments to distributors.

{¶ 16} Scimone also argues that his conviction was against the manifest weight of the evidence because Veronesi and Harrod provided conflicting testimony as to the events that occurred at the Severance location and did not know important details of the business operation.

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[5]The Severance location was found to be in compliance during the prior audit.

{¶ 17} We note that when assessing witness credibility, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123, 489 N.E.2d 277, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 461 N.E.2d 1273. The factfinder is free to believe all, part, or none of the testimony of each witness appearing before it. *Hill v. Briggs* (1996), 111 Ohio App.3d 405, 412, 676 N.E.2d 547. The court below is in a much better position than an appellate court "to view the witnesses, to observe their demeanor, gestures and voice inflections, and to weigh their credibility." Id. at 412, citing *Seasons Coal Co.*

{¶ 18} Here, the trial court found the documentary evidence and surrounding circumstantial evidence overwhelmingly persuasive. The trial court noted that circumstantial and direct evidence possess the same probative value. The court further noted that typically in financial crimes involving employee theft, circumstantial evidence is the only evidence available because it is rare to have

{¶ 19} eyewitness testimony of someone taking the money. Furthermore, the court stated that Scimone's argument that "every witness who appeared for the State is biased is without merit and the implication that any of these people lied is not only without basis but offensive."

{¶ 20} Based on the aforementioned facts and circumstances, we find that there was sufficient evidence to support Scimone's theft conviction. We further find that the trial court did not lose its way and create a manifest injustice in

convicting Scimone.

{¶ 21} Thus, the first, second, and third assignments of error are overruled.

{¶ 22} Accordingly, judgment is 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.

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

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

SEAN C. GALLAGHER, P.J., and
MELODY J. STEWART, J., CONCUR