[Cite as *State v. Pruett,* 2015-Ohio-1377.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101471

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DANIEL A. PRUETT

DEFENDANT-APPELLANT

JUDGMENT:
VACATED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-580766-A

BEFORE: S. Gallagher, J., Jones, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: April 9, 2015

ATTORNEYS FOR APPELLANT

Robert L. Tobik
Cuyahoga County Public Defender
By: Cullen Sweeney
Assistant Public Defender
Courthouse Square Suite 200
310 Lakeside Avenue
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
By: Ryan J. Bokoch
Assistant Prosecuting Attorney
Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

SEAN C. GALLAGHER, J.:

{¶1} Defendant Daniel Pruett appeals his conviction for a single theft count. For the following reasons, we vacate his conviction and remand for a new trial.

{¶2} According to the state, Pruett was arrested on November 19, 2013, in connection with a theft claim initiated by Detroit Lakewood Automotive ("Lakewood Automotive") and Neubert Painting ("Neubert"). On Monday, November 11, 2013, an owner of Lakewood Automotive, Timothy Miller, noticed that one of their house account holders, Neubert, was charged for a fuel purchase a day earlier. Miller questioned the transaction because Neubert employees supposedly did not work on Sundays. Miller contacted Matthew Buchwald, an operations manager for Neubert, and inquired about its Sunday work habits. Together, Miller and Buchwald went through a year's worth of Neubert's house account transactions with Lakewood Automotive. A Neubert employee stated that no transaction could occur on a Sunday, although the records show that Neubert employees authorized a transaction for Sunday April 7, 2013.

{¶3} As Miller explained, Neubert held a house account with Lakewood Automotive. This meant that a Neubert employee could pump fuel or get a vehicle repaired without tendering immediate payment. Instead, the Neubert employee signed a ticket indicating the amount owed, and Lakewood Automotive would bill Neubert at the end of the month.

{¶4} After discovering the disputed Sunday transaction, Miller and Buchwald loosely matched the signature on that ticket to 90 other transactions during the year. The frequency of the disputed transactions tracked Neubert's summer-centric workload. Although most of the signatures on the disputed tickets were similar, several were unintelligible and remarkably different. Those 90 disputed transactions totaled nearly $3,500.

{¶5} The signature loosely appeared to be by a person with the initials E.H. Buchwald maintained that Neubert employed only one individual with those initials, but he was not hired until the summer of 2013. The disputed transactions started in January of that year. Buchwald authenticated a list of Neubert's employees in 2012 and 2013 that was produced during discovery at Pruett's request. The list was incomplete. In December 2013, a person named Ron Andregg signed a ticket for fuel, and although his identity was alluded to during trial testimony, he was not listed as a Neubert employee according to that list. In the process of reviewing the disputed transactions, Miller concluded that the only attendant on duty at the time of the transactions was Pruett. There are several undisputed transactions, however, that do not bear any signature and were handled by other attendants. For unknown reasons, Neubert accepted those transactions as legitimate.

{¶6} On Monday, November 11, Miller questioned Pruett about the Sunday, November 10 purchase. Pruett told Miller that a Neubert employee with curly, black hair had purchased fuel and was a regular Neubert customer. Miller immediately

concluded that Pruett must have been stealing cash and terminated Pruett on November 11, 2013.[1] Three days later, Miller and Buchwald went to the Lakewood Police Department to report the alleged theft. Armed with the 90 disputed tickets and a handwritten calendar indicating that Pruett worked on the days of the disputed transactions, the two initiated a police report.

{¶7} The intake officer, Officer Ciresi, took the documents and forwarded the file to Detective Fuerst. Det. Fuerst received the file on November 18, 2013. Thereafter, a short discussion was had between Det. Fuerst and Pruett. No handwriting exemplar was requested, and therefore, no expert reviewed whether Pruett signed the disputed tickets as E.H. Pruett was arrested the next day and charged with theft in violation of R.C. 2913.02(A)(3), a fifth-degree felony.

{¶8} At trial, the state asked Det. Fuerst whether, based on his investigation, he had any reason to doubt that Pruett signed the tickets as E.H. Det. Fuerst responded in the negative. Officer Ciresi testified that he verified the information as related by Miller and Buchwald. Neither Officer Ciresi nor Det. Fuerst conducted an investigation beyond speaking with the victims and Pruett.[2]

{¶9} Miller explained the basis for his belief that Pruett stole money. According

---

[1]Miller testified that Pruett was fired on November 11, 2013, but the time sheet for November 2013 indicated that Pruett worked through November 13.

[2]In fairness, there was little the Lakewood police could do in the absence of a separate internal accounting review of the business procedures at Lakewood Automotive and Neubert. Further, by the time the Lakewood police were notified, Pruett had already been confronted and fired, removing the possibility of the police conducting a "sting" to verify Miller and Buchwald's accusations.

to Miller, a house account should appear a certain way in the cash register receipts. As a demonstration, the state introduced two exhibits that contained copies of a handful of transactions as they appeared in the cash register printout tapes.[3] Miller explained that the house account should not be listed as prepay, as many of the disputed transactions appeared. A prepay on a house account was a red flag because none of the house accounts used the prepay process, and the only reason to enter a transaction on the house account as prepay was to steal cash. According to the state's theory, Pruett pocketed cash from a random customer prepaying a fuel purchase. Instead of placing the cash in the register, Pruett allegedly stole the money and wrote up a ticket against Neubert's account for the requested amount. In that way, the register tapes would match the till count at the end of the day. Miller specifically claimed that any house account transaction entered as a prepay was conclusive evidence of theft and was adamant that no other house account had fraudulent transactions.[4]

{¶10} The state's primary evidence of theft came from an inferential leap.

---

[3]The register tapes for the disputed transactions were not introduced in evidence. The state attempted to offer three months' worth at trial; however, those were excluded because the state failed to turn over the register tapes during discovery. We also note that neither Det. Fuerst nor Officer Ciresi were provided the register tapes.

[4]In the state's exhibit No. 18, a copy of the register tape for several transactions occurring around October 15, 2013, there is a prepay transaction for $40 referencing a house account number "911" that is not included in the disputed transactions nor in Neubert's October transactions in general. The only logical conclusion, considering the witnesses testified that the documentation represented all of Neubert's transactions for October 2013, was that this transaction was for another of Lakewood Automotive's house accounts. This is perplexing in light of Miller's testimony that no other account had suspect transactions, but a prepay on a house account was conclusively a theft under Miller's view of the transactions.

According to the state, the disputed transactions occurred only on Pruett's watch, and therefore, Pruett must have stolen the money from Neubert or the service station. In order to bolster Miller and Buchwald's claim regarding the illegitimacy of the 90 transactions with the E.H.-like signature, the state offered evidence of four transactions in which it was claimed that Pruett entered a house account transaction, and immediately voided the transaction as a ploy to skim money from the cash register.

{¶11} Miller's calendar, however, indicated that one such disputed transaction for $40 occurred on October 16. In reviewing the register tape in the state's exhibit No. 13, which covered that period, fuel worth $35 was pumped during that transaction. The state's theory rested on the necessary assumption that no fuel was dispensed during those four transactions because Pruett was using the house account to cover the missing cash skimmed from the register. According to the state's evidence, however, the documents supporting the October 16 transaction facially contradicted the state's theory because fuel was actually pumped. The other three transactions were free of this discrepancy.

{¶12} Upon this evidence, the jury found Pruett guilty of theft. The court sentenced Pruett to two years of community control, including 30 days of county jail time. Pruett timely appealed. In his second assignment of error, Pruett claims his trial counsel rendered ineffective assistance by failing to object to Officer Ciresi's and Det. Fuerst's statements attesting to the veracity of witnesses. We agree. As a result, Pruett's first and third assignments of error, claiming error with the admissibility of evidence and his conviction being against the manifest weight of the evidence, are moot.

{¶13} 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, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 98, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland* at 689. In Ohio, there is a presumption that a properly licensed attorney is competent. *State v. Calhoun*, 86 Ohio St.3d 279, 289, 1999-Ohio-102, 714 N.E.2d 905. The defendant has the burden of proving his counsel rendered ineffective assistance. *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 223.

{¶14} Pruett specifically challenged the admissibility of two statements. At trial, Pruett's counsel did not object to Officer Ciresi's testimony that he verified Miller and Buchwald's story. At the end of his testimony, Officer Ciresi stated in response to a question about his involvement:

> Officer: My involvement was I documented the receipts. I documented this calendar *and what Mr. Miller and Mr. Buchwald told me*, and then I forwarded that to the officer in charge.
>
> Prosecutor: Now, were you ever able to take a look at the receipts as well as the calendar?
>
> Officer: Yes. Back in November of last year I did.
>
> Prosecutor: Were you able to verify the information that was provided to you?
>
> Officer: Yes, I was.

(Emphasis added.) Tr. 249:3-12. Officer Ciresi, based on the information he was provided, accepted Miller and Buchwald's theory of the alleged theft. There also was no objection to the state's question posed to Det. Fuerst:

> Prosecutor: Based upon your investigation into the matter, was there any reason to doubt that was Daniel Pruett that signed those slips?
>
> Detective: No.
>
> Prosecutor: And you spoke with Daniel Pruett?
>
> Detective: Yes.

Tr. 270:16-21. Like Officer Ciresi, in the absence of any independent accounting of Lakewood Automotive's business records or the opportunity to conduct a sting of Pruett's conduct, Det. Fuerst was put in the position of accepting Miller and Buchwald's theory of the alleged theft.

{¶15} Pruett argues that both statements violated the prohibition against witness bolstering, and therefore, his trial counsel's performance was deficient in failing to object to the prosecutor's line of questioning. Generally, "the opinion of a witness as to whether another witness is being truthful is inadmissible." *State v. Dzelajlija*, 8th Dist. Cuyahoga No. 88805, 2007-Ohio-4050, ¶ 34, citing *State v. Boston*, 46 Ohio St.3d 108, 128, 545 N.E.2d 1220 (1989). "In our system of justice, it is the factfinder, not the expert or lay witness, who bears the burden of assessing the credibility or veracity of a witness." *Id.*, citing *State v. Eastham*, 39 Ohio St.3d 307, 312, 530 N.E.2d 409 (1988). In this case, we agree the statements were improper based primarily on the fact that there really was no underlying accounting of the business records of Lakewood Automotive.

Here, the case was presented to police in an "after-the-fact" manner, and the police conducted no investigation beyond their discussions with Pruett, the contents of which were never disclosed in the record, and with the victims.[5]

{¶16} Officer Ciresi testified to verifying Miller and Buchwald's statements. Without an accounting, there was nothing for Officer Ciresi to verify. *See State v. Sutton*, 8th Dist. Cuyahoga No. 100037, 2014-Ohio-1074, ¶ 51 (officer's testimony that there were inconsistencies in a witness's version of events based on the subsequent investigation was not a comment on the witness's veracity); *State v. Black*, 8th Dist. Cuyahoga No. 92806, 2010-Ohio-660, ¶ 31 (officer's testimony comparing witness statements to other statements is not attesting to the veracity of a witness). It must be remembered that Miller and Buchwald presented Officer Ciresi with the tickets from only the 90 disputed transactions and their claim that Pruett was the only attendant working on the days of those transactions and the signatures on the tickets were not from an employee of Neubert. The tickets themselves could not be objectively compared to the calendar because the tickets were not time stamped. It is undisputed that Pruett generally worked

---

[5]Again, we note there was not a great deal the police could do in terms of an investigation by the time they received this case. They were not given the register tapes when Miller and Buchwald initially turned over the tickets and calendar. Even if the tapes had been obtained, it would be impractical for the Lakewood police to bear the costs of a business accounting over a $3,500 theft. Lakewood, like many police departments, has limited resources for investigations. We are not suggesting that a forensic accounting is necessary in every case to bring a theft charge, but where the records are incomplete or conflicting, or the business practices to prevent theft are questionable, an accounting can either confirm theft or identify bad business practices. Arguably, because of limited resources, the felony conviction was obtained without confirming the veracity of the records. In addition, no handwriting analysis was completed, and no interviews with other employees were conducted to confirm or verify the limited business records.

only part of the day. Without an accounting of the records, the only verification Officer Ciresi could offer was his belief in the credibility of Miller and Buchwald's story. Although understandable, this is nevertheless impermissible. *See State v. Campbell*, 8th Dist. Cuyahoga Nos. 100246 and 100247, 2014-Ohio-2181, ¶ 17 (officer's testimony that the witness was "honest" in relating her version of events was improper).

{¶17} The prosecution's elicited statement from Det. Fuerst that he had no doubt Pruett signed the tickets as E.H. was equally improper. The investigation at that point was limited to speaking with the victims and Pruett, the only conclusion being that the detective believed the victims' story, but not Pruett's. Again, the documentary evidence provided to Det. Fuerst could not be objectively reviewed. The evidence meant nothing without the victims' interpretation. The "fact that the vouching witness was a police officer makes the opinion testimony even more [significant.] 'Jurors are likely to perceive police officers as expert witnesses, especially when such officers are giving opinions about the present case based upon their previous experience with other cases.'" *Dzelajlija*, 8th Dist. Cuyahoga No. 88805, 2007-Ohio-4050, ¶ 37, quoting *State v. Huff*, 145 Ohio App.3d 555, 561, 763 N.E.2d 695 (1st Dist.2001). Both statements were inadmissible and should have been excluded had an objection been raised. Admitting the statements over an objection is reversible error. *Boston*, 46 Ohio St.3d 108, 128-129, 545 N.E.2d 1220 (1989).

{¶18} In light of the deficient performance, we now turn to whether that deprived Pruett of a fair trial. "*Strickland* directs us to look at the 'totality of the evidence before

the judge or jury,' keeping in mind that 'some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture * * *.'" *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 72, citing *Strickland*, 466 U.S. at 695-696, 104 S.Ct. 2052, 80 L.Ed.2d 674. We, therefore, must consider the errors in the aggregate as they relate to the remaining evidence. Prejudice is demonstrated if there is "a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus.

{¶19} We note that the error cannot be cured by instructing the jury that it is their burden, and theirs alone, to determine the credibility of witnesses in cases in which there is no corroborating evidence of guilt beyond the credibility of the bolstered witness. *See State v. Boston*, 9th Dist. Summit No. 13107, 1988 Ohio App. LEXIS 732 (Mar. 2, 1988) (appellate court originally held that the jury instruction cured the error in admitting the bolstering evidence, but the Ohio Supreme Court ultimately overruled that decision and reversed for a new trial); *but see State v. Black*, 12 Dist. Butler No. CA95-06-102, 1996 Ohio App. LEXIS 1562 (Apr. 22, 1996) (jury instruction cured any plain error in admitting bolstering evidence).

{¶20} In this case, the evidence of theft is the interpretation of the tickets based on the credibility of the three witnesses: Miller, Buchwald, and Pruett. When viewed in this light, our decision in *Dzelajlija*, is instructive. In that case, only one witness could identify the defendant as the perpetrator of a crime, and there was no corroborating

evidence to support her testimony. *Id.* at ¶ 38. Her credibility was the crux of the state's case. *Id.* As a panel of this court recognized, having a police officer's opinion as evidence of the key witness's credibility "improperly 'acted as a litmus test of the key issue in the case and infringed upon the role of the fact finder, who is charged with making determinations of veracity and credibility.'" *Id.* at ¶ 39, citing *State v. Eastham*, 39 Ohio St.3d 307, 312, 530 N.E.2d 409 (1988) (Brown, J., concurring); *see also State v. Hart*, 8th Dist. Cuyahoga No. 79564, 2002-Ohio-1084, *11-12 (without corroborating evidence, the witness's credibility is a dispositive issue and the inadmissible bolstering evidence was reversible error); *Huff* at 562.

{¶21} In this case, although Pruett did not dispute that he created the disputed tickets, he disputed the allegation that he signed each ticket as E.H. Pruett's, Miller's, and Buchwald's credibility was a dispositive issue. They provide the only evidence linking the 90 disputed transactions to a theft, by Pruett. There is no corroborating evidence beyond the witnesses' testimony, all affected by the improper statements. The documents admitted at trial are not proof of a crime until interpreted through the lens of Miller and Buchwald's testimony. Eliciting both officers' opinions as to the veracity of Miller, Buchwald, and Pruett impermissibly infringed upon the role of the jury to determine the witnesses' credibility.

{¶22} Accordingly, we cannot say that the deficient performance of Pruett's trial counsel still provided Pruett a fair trial. Having substantiated both prongs of the ineffective assistance of counsel argument, Pruett's second assignment of error is

sustained. We need not consider his remaining assigned errors. Pruett's conviction is vacated, and the case remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee 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.

SEAN C. GALLAGHER, JUDGE

ANITA LASTER MAYS, J., CONCURS;
LARRY A. JONES, SR., P.J., CONCURS IN JUDGMENT ONLY