[Cite as *Parma v. Boumitri*, 2015-Ohio-1737.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101532

CITY OF PARMA

PLAINTIFF-APPELLEE

vs.

JOHN G. BOUMITRI

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Parma Municipal Court
Case No. 14 CRB 01120

BEFORE: Stewart, J., Jones, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: May 7, 2015

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MELODY J. STEWART, J.:

{¶1} Defendant-appellant John Boumitri, the co-owner of an automobile body shop, became upset when the driver for a towing company delivered a damaged car in a manner that did not suit Boumitri. Words were exchanged between the two men. The driver alleged that Boumitri grabbed his company-issued electronic tablet (valued at $130) and threw it to the ground, breaking it. The city of Parma prosecuted this fit of pique as the crime of criminal damaging, a second-degree misdemeanor. The court found Boumitri guilty and this appeal followed.

{¶2} In his first assignment of error, Boumitri argues that there is insufficient evidence to prove that he threw the tablet to the ground.

{¶3} We determine whether the evidence is sufficient to sustain a verdict by examining the evidence in the light most favorable to the prosecution and determining whether any rational trier of fact could have found that the prosecution proved the essential elements of the crime beyond a reasonable doubt. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 78, citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). "[I]t is the responsibility of the [trier of fact] * * * to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the [trier of fact's] verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the [factfinder]." *Cavazos v. Smith*, 565 U.S. 1, 313, 132 S.Ct. 2, 181 L.Ed.2d 311 (2011) (per curiam).

{¶4} The city charged Boumitri with criminal damaging under Parma Codified Ordinance 642.10(A). The section states that no person shall knowingly "cause or create a substantial risk of physical harm to any property of another without the other person's consent[.]"

{¶5} Viewing the evidence most favorably to the city shows the driver testified that as the argument about how he parked the damaged car escalated, he decided to leave the premises. He testified that Boumitri grabbed his arm as he entered the tow truck and spun him around. Boumitri then grabbed a tablet that had been on the front seat of the tow truck and "then it was smashed on the ground." Tr. 10-11. The tablet suffered a cracked and broken screen.

{¶6} A rational trier of fact could find the driver's testimony sufficient to prove the elements of criminal damaging: Boumitri was in possession of the tablet when it was "smashed on the ground" without the driver's consent, thus causing physical harm to it. Given the electronic nature of the tablet, the court could rationally find that Boumitri knowingly damaged it, for smashing the tablet to the ground would have served no other purpose than to break it. The conviction was therefore supported by sufficient evidence.

{¶7} The second assignment of error complains that the court's judgment of conviction is against the manifest weight of the evidence. Boumitri argues that apart from the driver's testimony, no eyewitness to the argument saw him break the tablet; the police officer responding to the scene could not find any glass on the ground from the broken tablet; and the city failed to conduct any forensic tests (for example DNA or fingerprinting) to establish that he actually handled the tablet.

{¶8} The manifest weight of the evidence standard of review requires us to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Otten*, 33 Ohio App.3d 339, 340, 515 N.E.2d 1009 (9th Dist.1986). The use of the word "manifest" means that the trier of fact's decision must be plainly or obviously contrary to all of the evidence. This is a difficult burden for an appellant to overcome because the resolution of factual issues resides with the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact has the authority to "believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964).

{¶9} All of the witnesses agreed that Boumitri and the driver engaged in an argument over how the driver positioned the car he delivered to the body shop. Boumitri's brother (and co-owner of the body shop) and one of his customers, both of whom witnessed the argument, testified that Boumitri did not touch the tablet, much less smash it to the ground. The city countered that testimony with the driver's manager, who testified that the driver called his company after the incident and reported that Boumitri had damaged the tablet during the argument. The manager also testified that while he did not personally know the condition of the tablet when the driver started his work day, each tow truck driver was required to sign a form each day indicating that they were taking a tablet in good condition.

{¶10} A police officer who investigated the incident agreed on cross-examination that Boumitri appeared "shocked" when told about the broken tablet, giving the officer the impression that Boumitri did not know what the officer was talking about. The officer further agreed that after learning that he had been accused of breaking the tablet, Boumitri asked the officer to conduct a fingerprint analysis of the tablet and examine it for traces of his DNA to prove that he did not touch the tablet. Finally, the officer testified that while there were small pieces of glass missing from the broken tablet, he found no glass on the ground in the area where the tablet would have struck the ground.

{¶11} Although the evidence conflicted, the court found the driver to be the more credible witness. This may well have been because the driver reported the broken tablet to his manager immediately after he left the body shop. That prompted the manager to take the driver with him to the police station to file a police report. This was no inconsequential trip — the towing company is located in the South Collinwood neighborhood of Cleveland and the police station in Parma. The court may have believed that the time and effort the driver and his manager made in filing a police report suggested the sincerity of the driver's claim. The relatively low value of the tablet may have caused the court to consider it unlikely that the manager and driver would have gone through so much trouble to falsely accuse Boumitri.

{¶12} It is true that the manager did not personally know the condition of the tablet at the start of the driver's work day, but the company did require each driver to attest at the start of each work day that the tablet they were using was in good condition. And while the investigating officer did not find any shards of glass from the tablet on the ground, that did not mean they did not exist. The area of broken glass on the tablet was very small (less than one inch square) and could easily have been overlooked on the pavement of the parking lot.

{¶13} In the end, it fell to the court to resolve the contradictions in the testimony and make a credibility determination of the witnesses. The trial judge stated on the record that she found the driver to be credible. In light of the evidence we have detailed, we have no basis for finding that the court lost its way by so concluding.

{¶14} Boumitri argues that the court's desire to hear a witness different from the one he wanted to present improperly weighed upon his right to testify on his own behalf.

{¶15} As Boumitri was offering his defense to the charges, his attorney told the court that he would be calling Boumitri to testify. The court asked counsel to approach for an off-the-record discussion. When the court went back on the record, defense counsel told the court that he would be calling Boumitri's brother to the witness stand. At the conclusion of the brother's testimony, the defense rested. The court told defense counsel:

> [A]nd I do not want you to think that I don't want to hear from your client. He has every right to testify, we have plenty of time here. I thought it was more important for the Court to hear from this gentleman first, I'm glad we heard from him, and your client has every right to testify if he wants to he can [sic].

{¶16} The court made it clear to Boumitri that he not only had the right to testify, but that it was ready to hear his testimony if he wished to offer it. Defense counsel told the court that the defense would rest. There is no basis whatsoever for finding that the court denied Boumitri his right to testify.

{¶17} To the extent the court may have desired to hear defense witnesses in a different order, it has the discretion to do that under Evid.R. 611(A). The rule gives the court discretion to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to * * * make the interrogation and presentation effective for the ascertainment of the truth." To the extent that the court wished to alter defense counsel's desired ordering of his witnesses, the record shows that the court did so to further its understanding of the case. It did not abuse its discretion by doing so. And more importantly, the record convincingly shows that it was Boumitri who decided not to testify despite the court telling him in very clear terms that it was prepared to hear his testimony.

{¶18} The assignments of error are overruled.

{¶19} 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 Parma Municipal 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.

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MELODY J. STEWART, JUDGE

LARRY A. JONES, SR., P.J., and
EILEEN T. GALLAGHER, J., CONCUR