

[Cite as *State v. Fasino*, 2015-Ohio-2265.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101788

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSEPH V. FASINO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-582468-A

BEFORE: E.A. Gallagher, J., Jones, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: June 11, 2015

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EILEEN A. GALLAGHER, J.:

{¶1} Defendant-appellant Joseph Fasino appeals the judgment of the Cuyahoga County Court of Common Pleas finding him guilty of two counts of theft and one count of petty theft. For the following reasons, we affirm but remand.

{¶2} On February 12, 2014, Fasino was indicted with three counts of theft by deception in violation of R.C. 2913.02(A)(3). The case proceeded to a bench trial where the following facts were adduced.

{¶3} On September 23, 2011, Fasino entered into a contract with Richard Brichta to install a new roof on a rental property Brichta owned in Parma, Ohio. Brichta and his wife Janet provided Fasino with a check for \$4,000 for materials. Shortly after the contract was signed, Fasino put a blue tarp over the property's roof to prevent a water leak until he performed the work. At the time the Brichtas signed the contract, they believed the work would be completed that year. However, for the remainder of 2011, whenever the Brichtas contacted Fasino, he would indicate he was not presently available to do the job and would possibly perform the work the "next week." After the winter, Fasino stopped answering the Brichtas' phone calls. They called him roughly 30 times over a six-month period but never received any return calls. The job was never completed and no materials were ever delivered.

{¶4} On November 30, 2011, Fasino entered into a contract with Brian Plona to replace the roof of his home in Lakewood, Ohio. Plona provided Fasino with a \$4,000 check as a deposit and Fasino indicated that he would perform the work within two or

three weeks depending on the weather. Fasino called Plona's insurance company at Plona's request to resolve an insurance issue with the roof but he never began the contracted work or delivered any materials. When Fasino was slow to begin the work, Plona attempted to engage him by asking him to return to the house to look at other projects but nothing came of the house call. Plona and Fasino communicated extensively via text messages wherein Fasino repeatedly offered excuses for not performing the job. In September or October 2012, Plona threatened litigation and the communications ended. The excuses evidenced in the text messages are too numerous to recount here but strained credulity and devolved to a nadir of "my dog bit the neighbor."

{¶5} In March 2012, Fasino appeared in Victor Beltz's driveway offering to give him an estimate for repairs to the gutters on Beltz's home. On March 4, 2012, Fasino entered into a contract with Beltz to replace the gutters, and on March 8, 2012, Beltz provided him with a \$400 deposit for materials. The work was to be done the following week but Fasino never returned to the house and calls placed to his phone by Beltz and his wife over the next period of four to six months went to voicemail.

{¶6} During the course of an investigation into the incidents, Detective John Porec of the Parma Police Department spoke to Fasino who claimed that he purchased materials for the Plona job from Home Depot but no evidence was introduced to support this claim.

{¶7} The trial court denied a Crim.R. 29 motion by Fasino and found him guilty of two counts of theft and one count of petty theft. Fasino was sentenced to concurrent one

year terms of community control sanctions for the theft counts and 60 days in jail on the petty theft count with credit for 60 days served. Fasino appeals and his first assignment of error provides:

The trial court erred to the prejudice of the Defendant-Appellant when it returned a verdict of guilty against the manifest weight of the evidence.

{¶8} A manifest weight challenge attacks the credibility of the evidence presented and questions whether the state met its burden of persuasion at trial. *State v. Whitsett*, 8th Dist. Cuyahoga No. 101182, 2014-Ohio-4933, ¶ 26, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541; *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13. Because it is a broader review, a reviewing court may determine that a judgment of a trial court is sustained by sufficient evidence, but nevertheless conclude that the judgment is against the weight of the evidence.

{¶9} “When considering an appellant’s claim that a conviction is against the manifest weight of the evidence, the court of appeals sits as a ‘thirteenth juror’ and may disagree ‘with the factfinder’s resolution of conflicting testimony.’” *Thompkins* at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). The reviewing court must examine the entire record, weigh the evidence and all reasonable inferences, consider the witnesses’ credibility, 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. *Thompkins* at 387, citing *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983). In conducting such a review, this court remains mindful that the credibility of

witnesses and the weight of the evidence are matters primarily for the trier of fact to assess. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraphs one and two of the syllabus. “Unlike a manifest weight challenge to a conviction resulting from a jury verdict, which requires a unanimous concurrence of all three appellate judges to reverse, a manifest weight challenge to a conviction resulting from a bench trial requires only a majority concurrence to reverse.” *State v. Burke*, 4th Dist. Washington No. 12CA39, 2013-Ohio-2888, ¶ 8, citing *State v. Hill*, 7th Dist. Mahoning No. 09-MA-202, 2011-Ohio-6217, ¶ 49; *see also State v. Gilkerson*, 1 Ohio St.2d 103, 104, 205 N.E.2d 13 (1965). Reversal on manifest weight grounds is reserved for the “exceptional case in which the evidence weighs heavily against the conviction.”

{¶10} All three of Fasino’s convictions were violations of R.C. 2913.02(A)(3), theft by deception, with the sole difference among the counts being the amount in question which simply affected the degree of the offenses. R.C. 2913.02(A)(3) provides:

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

* * *

(3) By deception.

{¶11} “When proving a violation of R.C. 2913.02(A)(3), the State must demonstrate that at the time the defendant took the money he had no intent to repay the

money or perform under the contract in exchange.” *State v. Waiters*, 8th Dist. Cuyahoga No. 91586, 2009-Ohio-1251, ¶ 17, citing *State v. Coleman*, 2d Dist. Champaign No. 2002 CA 17, 2003-Ohio-5724. Fasino cites our decision in *Waiters* in support of his argument the state failed to prove that he had no intent to perform under the contracts at the time he accepted the victims down payments. As in *Waiters*, Fasino asserts that this is a breach of contract case, not a criminal case. We disagree.

{¶12} In *Waiters*, the defendant contractor agreed to do remodeling work in the victim’s home and accepted a \$1,000 check as a down payment. Waiters purchased some supplies for the job and returned to the victim’s home within a week to begin work.

At that point a dispute occurred between Waiters and the homeowner regarding the work to be performed resulting in Waiters leaving the home. He did not return to complete further work or return the victim’s money. This court held that the evidence was insufficient to establish that Waiters had no intent to perform under the contract at the time he accepted the victim’s down payment. We noted that, “[t]his is not a case in which the defendant accepted the victim’s money and was never heard from again.”*Id. citing State v. Belt*, citing 3d Dist. Union No. 14-03-36, 2004-Ohio-1511.

{¶13} Conversely, in *Belt*, the Third District upheld a theft by deception conviction of a contractor who accepted a down payment check and never responded to follow-up calls from the victim and never returned to begin the work.

{¶14} We find the present case distinguishable from our decision in *Waiters*. Here, Fasino never returned to begin the work on any of the three projects he contracted

to perform nor did he purchase and deliver the supplies and materials for which he received down payments.

{¶15} Although Fasino argues that the evidence failed to demonstrate his intent to abscond with the victims' funds at the time he entered into the above contracts, "[i]ntent may be inferred from the circumstances surrounding the crime." *State v. Herring*, 94 Ohio St.3d 246, 266, 2002-Ohio-796, 762 N.E.2d 940. Because intent dwells in the mind of the accused, an intent to act can be proven from the surrounding facts and circumstances. *State v. Treesh*, 90 Ohio St.3d 460, 484-485, 739 N.E.2d 749 (2001). In this instance, during the month after Fasino contracted to replace the Brichtas' roof he was accepting another \$4,000 from Brian Plona instead of fulfilling his contractual obligations to the Brichtas. Furthermore, although he communicated extensively with Plona by way of text messages his communications were limited to excuses for evading his obligations and not returning Plona's money. Finally, during March 2012, while Fasino was demonstrating an absence of intent to abide by his commitments to Brichta and Plona, he appeared uninvited at Victor Beltz's residence and sold to him a gutter replacement job. In regard to Beltz, Fasino's actions mirrored the obvious theft example this court distinguished in *Waiters* in that he simply "accepted the victim's money and was never heard from again."

{¶16} On these facts we cannot say that 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.

{¶17} Fasino's first assignment of error is overruled.

{¶18} Fasino's second assignment of error states:

The trial court erred to the prejudice of the Defendant-Appellant in denying his motion for acquittal made pursuant to Crim.R. 29(A).

{¶19} A Crim.R. 29 motion challenges the legal sufficiency of the evidence. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 12. 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. Thompkins*, 78 Ohio St.3d at 386, 678 N.E.2d 541.

{¶20} Fasino reiterates the arguments from his first assignment of error for the proposition that the state failed to introduce sufficient evidence of his intent to take the victims' money with no intention at the time of repaying it or performing under the contract. For the reasons addressed above we find no merit to his argument. The state introduced sufficient evidence of Fasino's intent to commit theft by deception in each of the subject instances by way of the extensive circumstantial evidence addressed above.

{¶21} Fasino's second assignment of error is overruled.

{¶22} This court, however, sua sponte remands this case with instruction to the trial court to enter a nunc pro tunc order that conforms with *State v. Dumas*, 8th Dist. Cuyahoga No. 95760, 2011-Ohio-2926, and *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, paragraph one of the syllabus.

{¶23} The order issued by the trial court on July 10, 2014, purportedly complied with this court's order of March 12, 2015. However, this order does not clarify the

initial sentencing entry. The trial court is ordered to prepare a journal entry which clearly sets for the ramifications to the defendant upon violation of community control sanctions which were set forth on the record at the time of sentencing.

{¶24} The judgment of conviction of the trial court is affirmed and case remanded.

It is ordered that appellant recover from appellee the 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.

EILEEN A. GALLAGHER, JUDGE

LARRY A. JONES, P.J., and
MARY J. BOYLE, J., CONCUR