[Cite as *State v. Hariston*, 2015-Ohio-4500.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102606

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TIA HARISTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-589732-A

BEFORE: E.T. Gallagher, J., Celebrezze, A.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: October 29, 2015

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Tia Hariston ("Hariston"), appeals from her petty theft conviction and sentence, raising five assignments of error for review:

> 1. The trial court erred when it did not reverse the jury verdict of guilty when the verdict was against the manifest weight of the evidence.
>
> 2. The trial court erred in instructing the jury prior to the closing arguments from counsel.
>
> 3. The trial court erred by improperly instructing the jury.
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> 4. The trial court erred by allowing defendant-appellant to be deprived of effective assistance of counsel.
>
> 5. The trial court erred in sentencing defendant-appellant to a suspended sentence of six (6) months in jail.

{¶2} After careful review of the record and relevant case law, we affirm in part, reverse in part, and remand with instructions for the trial court to modify its sentencing journal entry.

I. Procedural and Factual History

{¶3} In October 2014, Hariston was indicted and charged with vandalism in violation of R.C. 2909.05(A), and petty theft in violation of R.C. 2913.02(A)(1). At her arraignment, Hariston entered a plea of not guilty and the matter proceeded to a jury trial where the following facts were adduced.

{¶4} In January 2013, Hariston entered into a residential lease agreement with her landlord, Norman King ("King"), to rent the upstairs unit of a two-family residence located in South Euclid, Ohio. As part of the lease agreement, King agreed to supply the upstairs unit with certain household appliances, including a stove and refrigerator.

{¶5} In June 2014, Hariston moved out of the upstairs unit following a series of disagreements with King. In the process of moving, Hariston removed the stove and refrigerator from the upstairs unit and took the appliances with her to her new residence.

{¶6} Carletta Bridges ("Bridges") testified that she lived in the family unit below Hariston. Bridges stated that she was home at the time Hariston was moving and observed two men load "a beige stove and refrigerator" into Hariston's moving truck. Bridges testified that approximately three-to-four minutes after Hariston left in her moving truck, water from Hariston's upstairs unit began to flood into Bridges's unit through the ceiling. Bridges immediately called King who arrived at the house shortly thereafter.

{¶7} King testified that when he arrived at the house, he discovered that the drains in the upstairs kitchen sink, bathroom sink, and tub were plugged with towels. Collectively, King estimated that the flooding caused approximately $6,500 in damages. Upon further inspection, King noticed that the beige stove and refrigerator he had purchased for Hariston's unit were missing from the kitchen. King testified that he did not give Hariston permission to take the appliances from the unit and that he never allowed tenants of his properties to purchase their own appliances. Furthermore, although King could not recall whether he ever had a conversation with Hariston about her desire to purchase her own appliances, he specifically stated that he never removed appliances from Hariston's apartment so that she could install her own. Subsequently, King filed a vandalism and theft report with the Euclid Police Department.

{¶8} Detective Greg Costello ("Det. Costello"), of the Euclid Police Department, testified that he was assigned to investigate the reported vandalism of King's property. Det. Costello stated that upon responding to the residence, he observed water on the floor of the upstairs unit and significant damage to the walls, ceiling, and floor of the lower unit. Additionally, Det. Costello

testified that he noticed that the stove and refrigerator were missing from the upstairs unit. In the course of his investigation, Det. Costello contacted Hariston about the missing stove and refrigerator. Hariston stated that she had purchased the stove and refrigerator from Wal-Mart. However, Det. Costello testified that Hariston never provided him with receipts for her purchase of the appliances.

{¶9} In September 2014, Hariston was arrested on a warrant and brought into the Euclid police station where she agreed to speak with Detective Anthony Medved ("Det. Medved"). According to Det. Medved, Hariston admitted that she was at the residence on the day in question but denied any involvement in the flooding of the upstairs unit. Further, Hariston claimed that she had purchased the missing stove and refrigerator and could provide corresponding receipts. However, Det. Medved testified that Hariston never provided him with the receipts.

{¶10} Defense witness, Thomas Carter ("Carter"), testified that in February 2014, he sold Hariston a used black stove and a used white refrigerator for $850 in cash. Carter explained that he had extra appliances after moving back to the Cleveland area from Texas and agreed to sell Hariston the appliances after meeting her through his sister. Carter provided signed and dated handwritten receipts for the purchase of each appliance.

{¶11} At the conclusion of trial, the jury found Hariston not guilty of vandalism but guilty of petty theft as charged in Count 2 of the indictment. In February 2015, the trial court sentenced Hariston to six months in county jail, but suspended the sentence and placed her on conditional community control for two years. Additionally, the court ordered Hariston to pay $580 in restitution to King.

{¶12} Hariston now appeals her conviction and sentence.

II. Law and Analysis

A. Manifest Weight of the Evidence

{¶13} In her first assignment of error, Hariston argues her petty theft conviction was against the manifest weight of the evidence.

{¶14} In contrast to a challenge based on sufficiency of the evidence, a manifest weight challenge attacks the credibility of the evidence presented and questions whether the state met its burden of persuasion rather than production. *State v. Whitsett*, 8th Dist. Cuyahoga No. 101182, 2014-Ohio-4933, ¶ 26, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13. When considering a claim that a conviction is against the manifest weight of the evidence, this court sits as a "thirteenth juror" and may disagree "with the factfinder's resolution of conflicting testimony." *Thompkins* at 387. The weight-of-the-evidence standard "addresses the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *Thompkins* at 386-387.

{¶15} This court reviews the entire record, weighs the evidence and all reasonable inferences, considers the witnesses' credibility and determines 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, 175, 485 N.E.2d 717 (1st Dist.1983). In conducting such a review, this court remains mindful that the credibility of the witnesses are primarily for the trier of fact to assess. *State v. Bradley*, 8th Dist. Cuyahoga No. 97333, 2012-Ohio-2765, ¶ 14, citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact is in the best position to make credibility determinations because this court cannot view the demeanor of a witness while testifying. Therefore, the trier of fact is in the best position to

determine if the proffered testimony is credible. *State v. Holloway*, 8th Dist. Cuyahoga No. 101289, 2015-Ohio-1015, ¶ 42, citing *State v. Kurtz*, 8th Dist. Cuyahoga No. 99103, 2013-Ohio-2999, ¶ 26. Reversal on manifest weight grounds is reserved for the "'exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins* at 387, quoting *Martin* at 175.

{¶16} Hariston was convicted of petty theft in violation of R.C. 2913.02(A)(1), which states:

> 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: (1) Without the consent of the owner or person authorized to give consent.

{¶17} In challenging the weight of the evidence supporting her conviction, Hariston argues the testimony presented at trial supports defense counsel's theory that "Hariston purchased her own stove and refrigerator from Carter, and those were the appliances that she removed from the residence."

{¶18} After careful review of the record in its entirety, we are unable to conclude that this is the exceptional case in which the evidence weighs heavily against the conviction. Given the nature of the testimony presented at trial, the trier of fact was required to resolve conflicting versions of the facts. On one hand, defense counsel argued that the stove and refrigerator Hariston removed from the upstairs unit when she moved in June 2014 were the appliances she purchased from Carter in February 2014. Carter corroborated defense counsel's theory, providing copies of handwritten receipts and stating that he sold Hariston a "black" stove and a "white" refrigerator for $850. On the other hand, the state maintained that Hariston took the stove and refrigerator that were provided by King, without his consent. In support of the state's case, King testified that, as required under the rental agreement, he installed a "beige colored" stove and

refrigerator into Hariston's unit and that he would never permit a tenant to use his or her own appliances during the term of their lease. Further, Bridges testified that the stove and refrigerator she witnessed Hariston move out of the house were "beige." Finally, although Hariston told officers that she purchased the appliances from Wal-Mart and had receipts to verify her purchase, she never provided the officers with those receipts.

{¶19} As stated, the credibility of the witnesses and the weight to be given to their testimony are matters for the jury, as the trier of fact, to determine. In this case, the jury was in the best position to weigh the testimony of each witness and, given the inconsistencies in Hariston's case, was free to give more weight to the state's version of the facts. Accordingly, Hariston's petty theft conviction is not against the manifest weight of the evidence.

{¶20} Hariston's first assignment of error is overruled.

B. Jury Instruction Prior to Closing Arguments

{¶21} In her second assignment of error, Hariston argues the trial court erred by instructing the jury prior to closing arguments.

{¶22} Crim.R. 30(A) obligates the trial court to instruct the jury after closing arguments and provides in part as follows:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies shall be furnished to all other parties at the time of making the requests. The court shall inform counsel of its proposed action on the requests prior to counsel's arguments to the jury and shall give the jury complete instructions after the arguments are completed. The court also may give some or all of its instructions to the jury prior to counsel's arguments. The court need not reduce its instructions to writing.

{¶23} In *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), the Ohio Supreme Court held that Crim.R. 30(A) imposes an affirmative duty on the trial court to give a comprehensive jury charge after closing arguments that fully and completely repeats any

preliminary or cautionary instructions "which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." *Id.* The *Comen* court reasoned that:

> Crim.R. 30(A) clearly requires that "* * * the court shall instruct the jury after the arguments are completed * * *." The language in the rule is mandatory and there is good reason for the mandate. Jurors, being laypersons selected from the citizens of a particular district, are better able to grasp the importance of instructions after they have heard all the evidence. If the preliminary or cautionary instructions include matters of law vital to the rights of a defendant, the trial court is not excused from including or repeating all such instructions after the arguments are completed. Repeating instructions means fully instructing the jury on the law applicable to the case and not providing them simply with a cursory reminder of what was earlier provided in either the preliminary or cautionary instructions. Regardless of the length of trial, the court cannot assume the jury recalls or remembers the prior instructions.

Id. at 209.

{¶24} However, the court also held that a criminal defendant must affirmatively demonstrate that he was prejudiced by the trial court's failure to fully and completely provide instructions after closing arguments before a conviction may be reversed. *Id*. at 210. *See also State v. Owens*, 91 Ohio App.3d 479, 485, 632 N.E.2d 1301 (1993).

{¶25} In this case, the trial court gave its instructions to the jury prior to closing arguments and charged the jury only with instructions regarding its procedure in deliberation once closing arguments were concluded. Under these circumstances, we find that the trial court failed to comply with the requirements of Crim.R. 30(A).[1]

{¶26} It is our belief, however, that Hariston has failed to demonstrate that she was prejudiced by the timing of the trial court's instructions. As in *Comen*, we are unable to conclude that the trial court's failure to comply with the exact requirements of Crim.R. 30(A) adversely affected Hariston's right to a fair trial or that any of Hariston's substantial rights were

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We recognize that we are confined to the language of Crim.R. 30 and its application in *Comen*. However, we note that it can be reasonably argued that providing the jury with comprehensive instructions prior to closing arguments, as the court did in this case, would assist the jury more effectively than providing the jury with instructions after closing arguments. Generally, the elements and legal definitions relevant to the case are highly scrutinized and debated during closing arguments. Under these circumstances, there may be legitimacy to appellate counsel's position that the jury would be better prepared to render a judgment beyond a reasonable doubt if they were educated prior to closing arguments and had a grasp of the relevant legal terms as counsel applied them to the facts of the case.

compromised. Despite Hariston's conclusory statement that she was prejudiced, the jury's verdict evidences that the jury carefully considered all the instructions given throughout the trial as they acquitted Hariston on the vandalism charge. *See State v. Singleton*, 8th Dist. Cuyahoga No. 98301, 2013-Ohio-1440, ¶ 24. Accordingly, we find no evidence of prejudice which would justify reversing Hariston's petty theft conviction. *See Comen*, 50 Ohio St.3d at 210, 553 N.E.2d 640.

{¶27} Hariston's second assignment of error is overruled.

C. Jury Instructions

{¶28} In her third assignment of error, Hariston argues the trial court improperly instructed the jury to make a finding as to whether the value of the property taken "was or was not less than $1,000" where she was indicted on one count of misdemeanor petty theft, which by definition alleges that the value of the property taken was less than $1,000. Hariston contends that the trial court's instruction erroneously provided the jury with the opportunity to enhance the misdemeanor theft count to a felony conviction depending on its determination of the value of the property taken.[2]

{¶29} While an appellate court normally reviews alleged errors in jury instructions for an abuse of discretion, when a defendant does not request a specific jury instruction and fails to object to the jury instructions as given, he waives all but plain error. *State v. Edgerson*, 8th Dist. Cuyahoga No. 101283, 2015-Ohio-593, ¶ 15. Under Crim.R. 52(B), a plain error affecting a substantial right may be noticed by an appellate court even though it was not brought to the

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[2] R.C. 2913.02(B)(2) classifies theft as a misdemeanor of the first degree but also states:
Except as otherwise provided in this division or division (B)(3), (4), (5), (6), (7), (8), or (9) of this section, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is one thousand dollars or more and is less than seven thousand five hundred dollars or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, a violation of this section is theft, a felony of the fifth degree. * * * .

attention of the trial court. An error rises to the level of plain error only if, but for the error, the outcome of the proceedings would have been different. *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, 912 N.E.2d 1106, ¶ 61; *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978). Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." *Id*.

{¶30} The state concedes that the trial court provided the jury with inapplicable instructions concerning the value of the property stolen. However, we find that Hariston has failed to demonstrate that the trial court's improper jury instruction affected her substantial rights. Hariston was indicted for and ultimately convicted of petty theft, a first-degree misdemeanor as charged in her indictment. Thus, despite the fact that the trial court placed the issue of value before the jury, Hariston has not, and is unable to, establish that the outcome of the proceedings would have been different but for the improper jury instruction.

{¶31} Hariston's third assignment of error is overruled.

D. Ineffective Assistance of Counsel

{¶32} In her fourth assignment of error, Hariston argues she received ineffective assistance of counsel when defense counsel failed to object to the instructions provided to the jury.

{¶33} The test for ineffective assistance of counsel requires a defendant to prove "(1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defendant." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In reviewing a claim of ineffective assistance of counsel, we examine whether counsel's acts or omissions "were outside the wide range of professionally competent assistance" and "recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*. at 690. To

establish the second element, the defendant must demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on has having produced a just result." *Id*. at 686.

{¶34} Under the totality of the circumstances, we find Hariston has failed to demonstrate resulting prejudice from defense counsel's failure to object to the trial court's jury instructions concerning the value of the property allegedly taken. Despite the court's instruction, the state did not allege, nor did it present evidence to suggest, that the value of the property taken exceeded $1,000. Instead, the resolution of this case hinged on the jury's determinations concerning the credibility of the witnesses, i.e., whether the appliances taken from the apartment were owned by King or Hariston. Accordingly, had defense counsel successfully raised an objection to the trial court's valuation instruction, there is nothing in the record to suggest that the outcome of the trial would have been different. Accordingly, we reject Hariston's ineffective assistance of counsel claim.

{¶35} Hariston's fourth assignment of error is overruled.

E. Misdemeanor Sentence

{¶36} In her fifth assignment of error, Hariston argues the trial court erred in sentencing her to a suspended sentence of six months in jail.

{¶37} Under R.C. 2929.24(A)(1), a trial court may impose a jail sentence of not more than 180 days for an offense constituting a first-degree misdemeanor. In this case, however, the trial court sentenced Hariston to a six-month term of incarceration—in excess of the 180 days permitted under the statute. *See State v. Pierce*, 4th Dist. Meigs No. 10CA10, 2011-Ohio-5353, ¶ 10

(recognizing that "six months is not the same as one hundred eighty days because each month has a different number of days.").

{¶38} The state concedes that Hariston's sentence should have been "180 days" instead of "six months." The disagreement between Hariston and the state is whether the matter should be remanded to the lower court for resentencing or whether this court should simply correct the sentence under App.R. 12(B).

{¶39} Because a term of six months exceeds 180 days, we can reasonably assume that the trial court intended to impose the maximum sentence permitted under R.C. 2929.24(A)(1). Because the trial court's intent is clear from the record, it is appropriate and is in the interest of judicial economy for us simply to modify the judgment entry to substitute "180 days" for "six months" under the authority of App.R. 12(B). *See State v. Polus*, 6th Dist. Lucas Nos. L-13-1119, L-13-1120, 2014-Ohio-2321, ¶ 23. Accordingly, Hariston's sentencing journal entry should now read:

> IT IS NOW ORDERED AND ADJUDGED THAT SAID DEFENDANT TIA HARISTON, IS SENTENCED TO THE CUYAHOGA COUNTY JAIL FOR A TERM OF 180 DAYS. * * *

{¶40} Hariston's fifth assignment of error is well taken.

III. Conclusion

{¶41} Hariston's petty theft conviction is not against the manifest weight of the evidence. Further, Hariston was not prejudiced by the timing or content of the trial court's jury instructions nor was she prejudiced by defense counsel's failure to object to the challenged instructions. However, we find that Hariston was improperly sentenced to a six-month sentence instead of a 180-day sentence.

{¶42} Judgment affirmed in part, reversed in part, and remanded with instructions for the trial court to modify its sentencing journal entry.

It is ordered that appellee and appellant share 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 T. GALLAGHER, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
ANITA LASTER MAYS, J., CONCUR