[Cite as *State v. Arnold*, 2009-Ohio-6077.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 24685
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
STEVEN L. ARNOLD	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 09 3056

DECISION AND JOURNAL ENTRY

Dated: November 18, 2009

BELFANCE, Judge.

{¶1} Defendant-Appellant Steven Arnold appeals from the decision of the Summit County Court of Common Pleas. For reasons set forth below, we affirm.

FACTS

{¶2} Arnold was an employee of United Capital Mortgage of Ohio ("United Capital"). In August 2008, Arnold cashed two checks, totaling $3,676.68, from Titanium Title made payable to United Capital and deposited a portion of each into his personal account and retained the remaining proceeds in cash. Arnold was charged with one count of theft in violation of R.C. 2913.02(A)(1). A jury found him guilty and he was sentenced to six months, which was suspended upon meeting certain conditions, including the completion of eighteen months of community control. Arnold has appealed to this Court raising two assignments of error.

SUFFICIENCY

{¶3} Arnold argues that the trial court erred in denying his Crim.R. 29 motion as the State presented insufficient evidence to maintain a conviction for theft. We disagree.

{¶4} "When reviewing the trial court's denial of a Crim.R. 29 motion, this [C]ourt assesses the sufficiency of the evidence 'to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt.'" *State v. Flynn*, 9th Dist. No. 06CA0096-M, 2007-Ohio-6210, at ¶8, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. In reviewing challenges to sufficiency, we must view the evidence in a light most favorable to the prosecution. *State v. Cepec*, 9th Dist. No. 04CA0075-M, 2005-Ohio-2395, at ¶5, citing *Jenks*, 61 Ohio St.3d at 279.

{¶5} We note that while Arnold did make a Crim.R. 29 motion at the end of the State's case, which was denied, he did not renew the motion after presenting his case. In the past, in similar situations, we have found waiver "when a defendant who is tried before a jury puts on a defense and fails to renew h[is] [or her] motion for acquittal at the close of all the evidence." See *State v. Thornton*, 9th Dist. No. 23417, 2007-Ohio-3743, at ¶13. However, in *Thornton*, after examining Supreme Court precedent and the precedent of other districts, we concluded that because a conviction based on insufficient evidence would violate due process and "almost always amount to plain error[,]" we would consider Thornton's assignment of error concerning sufficiency despite the fact that she failed to renew her Crim.R. 29 motion. (Internal citations and quotations omitted.) Id. at ¶¶ 13-14. Thus, we will consider Arnold's assignment of error.

{¶6} Pursuant to R.C. 2913.02(A)(1), "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * * * [w]ithout the consent of the owner or person authorized to give consent[.]" "A

person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." R.C. 2901.22(A). "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). "'Deprive' means to do any of the following: (1) Withhold property of another permanently, or for a period that appropriates a substantial portion of its value or use, or with purpose to restore it only upon payment of a reward or other consideration; (2) Dispose of property so as to make it unlikely that the owner will recover it; (3) Accept, use, or appropriate money, property, or services, with purpose not to give proper consideration in return for the money, property, or services, and without reasonable justification or excuse for not giving proper consideration." R.C. 2913.01(C). "'Owner' means, unless the context requires a different meaning, any person, other than the actor, who is the owner of, who has possession or control of, or who has any license or interest in property or services, even though the ownership, possession, control, license, or interest is unlawful." R.C. 2913.01(D).

{¶7} We initially note that in his merit brief to this Court Arnold recites R.C. 2913.02(A)(3), theft via deception, as the section of the statute he violated. However, in fact, Arnold was charged and found guilty of violating R.C. 2913.02(A)(1), depriving or exerting control over property without consent. Arnold's sole contention is that the money he allegedly took belonged to him and he therefore could not steal it.

{¶8} The State presented the testimony of several witnesses to support its case. Keith Allman, the then branch manager of the United Capital location where Arnold worked as a loan

officer, testified that initially Arnold was a branch manager for a different branch of United Capital. As a branch manager, Arnold would have access and signatory powers on a joint account with Fifth Third Bank where checks from title companies would be deposited. Allman testified that all the checks were always made out to United Capital and were always deposited into the joint account. Allman went on to state that an independent payroll company would then sweep the account for taxes, fees and to take out overhead costs each month. Allman testified that as a branch manager he was paid at the end of the month if the branch had any profit. Allman would submit that information to payroll and payroll would overnight a check to his office. Loan officers were "W-2 employees and payroll [was] run through the corporate accounting department."

{¶9} Allman testified that sometime in June or July 2008, United Capital's CEO contacted him to discuss Arnold's performance as a branch manager. Allman was informed that due to Arnold's inability to meet expenses and make a profit, United Capital would be terminating Arnold's position as branch manager and closing his joint account with Fifth Third. Allman stated that he then agreed to bring Arnold on as a loan officer at Allman's branch and Arnold agreed to take the position. Allman testified that he specifically told Arnold that he was not going to be a branch manager anymore, and instead would be a loan officer.

{¶10} Marvin Reed, the owner of Titanium Title, testified regarding the two checks at issue that his company wrote to United Capital. The proceeds of the checks were from loans that Arnold originated. Reed indicated to Arnold that Reed was going to send the two checks down to United Capital's corporate office in Cincinnati. Reed said that the general procedure was for him to either send the checks to Cincinnati or to give the checks to the proper branch manager for deposit into the corporate account. Arnold responded that he would pick up the

checks as he had to mail the loan documents to Cincinnati and so Arnold would just overnight everything together and save Reed the expense. Reed believed that Arnold was still a branch manager at the time he gave Arnold the two checks. Reed complied and assumed Arnold was sending the checks to Cincinnati. Reed testified that he would not have given Arnold the checks if he knew that Arnold intended to cash them and put some of the proceeds in his personal account. Concerning the two checks, Allman provided that he "never gave [Arnold] permission to handle any checks at all. Again, I wasn't aware of those two checks at the time; no he's received no permission from me." Allman also stated that loan officers, such as Arnold, did not generally pick up checks for delivery, and only in rare cases would branch managers give loan officers permission to do so.

{¶11} United Capital's corporate office contacted both Allman and Reed concerning the two checks. Reed testified that the individual at the corporate office indicated that the checks and the loan documents were never received. Reed retrieved the cancelled checks and saw that Arnold had cashed them. Allman stated that when he spoke with Arnold, Arnold "kept talking in circles." Arnold told Allman that he tried to put the checks in the joint account with Fifth Third, but found the account had been closed. Arnold then had his wife cash the checks and put some of the money in his own account with TeleCommunity Credit Union. Allman spoke with Arnold a second time and indicated that if Arnold returned the money, United Capital would just call it a mistake and no charges would be filed. Arnold refused to comply and said that the money was his. Allman then contacted the police.

{¶12} A detective with the Fairlawn Police Department testified that Allman reported the theft of the two checks by Arnold. The detective spoke with Arnold and Arnold stated that his wife deposited the checks and that the money was his. When questioned further, Arnold

stated "they owed me that money." The detective further provided that Arnold was evasive in answering the detective's questions.

{¶13} The two tellers from TeleCommunity Credit Union who cashed the checks at issue also testified. They stated that Arnold himself cashed the checks and that they had clearly made a mistake in allowing Arnold to cash the checks since they were made payable only to United Capital and not Arnold. Arnold received the majority of the proceeds in cash and deposited only a small portion.

{¶14} We conclude that the State met its burden. The testimony indicates that Arnold knowingly cashed checks which were not payable to him and retained the proceeds. It can be inferred from the fact that Arnold first attempted to put the checks in the joint account with Fifth Third that Arnold knew that he was not directly entitled to the money. Also, even if Arnold initially believed that the money was his that belief became unreasonable when Allman talked to Arnold about the checks and indicated that everything would be alright if Arnold returned the money. Arnold's subsequent refusal to return the funds leads to the inference that his purpose was to deprive United Capital of funds that he knew did not belong to him and that he held the funds without consent of the owner. Further, the indictment lists United Capital as the owner of the proceeds of the two checks. The testimony also evidences that Allman, who at the time of the incident was Arnold's boss and also the branch manager, was a representative of United Capital who had the authority to give Arnold permission to handle the checks. Allman specifically testified that he did not give Arnold permission to handle the checks and did not give Arnold permission to cash them and retain the proceeds in his personal account or otherwise. When viewed in a light most favorable to the State, the evidence presented leads to the conclusion that the money was not Arnold's, that Arnold knew, or should have known, that the

money was not his and he nonetheless cashed the checks and retained the proceeds. Such a conclusion is also circumstantially supported by the detective's testimony that Arnold was evasive in answering questions and Allman's testimony that Arnold "kept talking in circles[]" when asked about the incident. Arnold's first assignment of error is overruled.

MANIFEST WEIGHT

{¶15} Arnold contends in his second assignment of error that his conviction for theft in violation of R.C. 2913.02(A)(1) is against the weight of the evidence. We disagree. When determining whether a conviction is supported by the manifest weight of the evidence,

> "'an appellate 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 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.'" *Cepec* at ¶6, quoting *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

We must only invoke this discretionary power in "extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant." *Flynn* at ¶9, citing *Otten*, 33 Ohio App.3d at 340.

{¶16} In addition to the above testimony presented by the State, Arnold himself testified, and also presented the testimony of a customer whose loan he originated, resulting in Titanium Title issuing one of the checks Arnold was charged with stealing.

{¶17} Arnold's testimony contradicts that of Allman. Arnold testified that he was never a branch manager for United Capital and that he was always only a loan officer. Arnold further testified that neither he nor Allman could be branch managers because neither location was properly licensed by the State of Ohio. Arnold stated that while Allman did ask Arnold to become a loan officer at Allman's location, Arnold refused to do so until Allman got his branch license. Arnold believes Allman never received that license. Arnold stated that he was paid

"100 percent commissions[]" that "come[] from the fee that [he] charge[s] to originate [his] loans." He also indicated that all of the proceeds from those fees belonged to him and that the only reason there was a joint account between Arnold and United Capital was to maintain a link between himself and United Capital. However, he also testified that he had the joint account with United Capital so that he "could deposit the proceeds from the loans that [he] closed in the joint bank account, as well as pay [his] expenses." Arnold provided that Reed had previously given Arnold checks made out to United Capital which Arnold deposited into the joint account. Concerning the two checks at issue, Arnold stated that he "immediately went to Fifth Third Bank in Fairlawn * * * to deposit the checks in [his] corporate account." Before that time Arnold was not aware that his joint account had been closed, however he also stated that he knew that the checks were supposed to be deposited in a business account. When Arnold asked someone at Fifth Third what the problem was, the individual told Arnold that the CFO of United Capital had closed the account. Without attempting to seek an explanation from United Capital, Arnold then proceeded to take the checks to TeleCommunity Credit Union to cash. He deposited a portion of the proceeds into the "Connected Solutions" business account he had with TeleCommunity Credit Union. Arnold claimed he used this account to pay expenses. Arnold testified that prior to depositing the two checks at issue in his personal account, he previously did the same with "hundreds" of other similar checks made payable to either United Capital or Premier Mortgage, the company that employed him prior to United Capital, and he never had a problem with it before. United Capital was not a signatory on Arnold's Connected Solutions account.

{¶18} Arnold believed he was entitled to the money because even though United Capital was directly his employer, his job was like "being self-employed." So Arnold believed that because he originated the loans, essentially he was United Capital for purposes of cashing the

checks. Arnold testified that the checks were never supposed to be sent to Cincinnati as Reed indicated in his testimony and that he never told Reed that he would mail the checks to Cincinnati. Arnold contends that his actions were completely in line with company procedures. Arnold testified that to get paid he could either "call to order [his] own payroll" or he could write himself a check from the joint account. He further stated that he was entitled to pick up the checks and deposit them into his own account.

{¶19} Arnold's customer testified only that he dealt with Arnold during the process of getting the loan and that he never worked with Allman.

{¶20} "'[I]n reaching its verdict, the jury is free to believe, all, part, or none of the testimony of each witness.'" *Thornton* at ¶21, quoting *Prince v. Jordan,* 9th Dist. No. 04CA008423, 2004-Ohio-7184, at ¶35, citing *State v. Jackson* (1993), 86 Ohio App.3d 29, 33. Here it is clear that the jury believed the testimony of the State's witnesses and not the testimony of Arnold when it found Arnold guilty. Both Reed and Allman testified that Arnold did not have permission to cash the checks for his personal use and Allman testified that Arnold did not have permission at all to handle the checks. Arnold does not deny signing and cashing the checks which were made payable to United Capital from Titanium Title, providing evidence that he knowingly exerted control over the funds. Nor does Arnold contend that he was acting with the consent of the owner. His sole contention on appeal is that he is the owner. However, Arnold's own testimony that he originally tried to deposit the two checks into the joint account, which Allman testified would have been proper procedure had Arnold been a branch manager and not a loan officer, could reasonably lead the jury to believe that Arnold knew that the checks did not belong to him and that they were in fact the property of United Capital. Further, Arnold's refusal to return the money when asked leads to the inference that it was Arnold's purpose to deprive

United Capital of the funds and that he knowingly exerted control over the funds without the consent of the owner. After a thorough review of the record, we cannot conclude that the jury lost its way in believing the testimony of the State's witnesses and disbelieving Arnold's testimony and thereby finding Arnold guilty of theft. See *Cepec* at ¶6, quoting *Otten*, 33 Ohio App.3d at 340. Arnold's assignment of error is without merit.

CONCLUSION

{¶21} In light of the foregoing, we affirm the judgment of the Summit County Court of Common Pleas.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

EDDIE SIPPLEN, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.