[Cite as *State v. Riley*, 2010-Ohio-1350.]

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

STATE OF OHIO Appellee v. JOE S. RILEY, JR. Appellant	C.A. No. 24789 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 09 02 0349

DECISION AND JOURNAL ENTRY

Dated: March 31, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Joe Riley, Jr., appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} In August 2008, Riley rented a P5000 lift truck (hereinafter "forklift") from Fallsway Equipment Company ("Fallsway") in his capacity as the owner and president of TR Construction. Riley paid the first two months of the forklift's rental via automatic withdrawal on TR Construction's credit card, but the third month's payment was declined when Fallsway ran the credit card for the amount due. Thereafter, Fallsway did not receive any more rental payments. The content and frequency of any contact between Riley and Fallsway after Riley retained the forklift without paying the monthly rental fee is in dispute. In any event, Fallsway filed a police report in January 2009 to report the theft of its forklift. Fallsway recovered its forklift on January 30, 2009 after police arrested Riley.

{¶3} On February 19, 2009, a grand jury indicted Riley on one count of grand theft, a fourth-degree felony in violation of R.C. 2913.02(A)(2). The matter proceeded to a bench trial, after which the court found Riley guilty of the lesser-included offense of theft, a fifth-degree felony.

{¶4} Riley now appeals from his conviction in the court below and raises two assignments of error for our review.

II

Assignment of Error Number One

> "THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTION OF THEFT."

{¶5} In his first assignment of error, Riley argues that his theft conviction is based on insufficient evidence. We disagree.

{¶6} In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 274. Furthermore:

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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." Id. at paragraph two of the syllabus; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

"In essence, sufficiency is a test of adequacy." *Thompkins*, 78 Ohio St.3d at 386.

{¶7} R.C. 2913.02(A)(2) provides, in relevant part, that "[n]o person, with purpose to deprive the owner of property[,] *** shall knowingly *** exert control over either the property or services *** [b]eyond the scope of the express or implied consent of the owner or person

authorized to give consent." The term "deprive" includes the act of "[w]ithhold[ing] property of another *** for a period that appropriates a substantial portion of its value or use[.]" R.C. 2913.01(C)(1). "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).

{¶8} Riley argues that his theft conviction is based on insufficient evidence because the mere nonpayment of a contract does not give rise to criminal charges. According to Riley, the evidence does not show that he purposely deprived Fallsway of its property because: (1) Fallsway could have retrieved the forklift at any time; and (2) the nonpayment of three months rent was not a "substantial portion of [the forklift's] value or use."

{¶9} Jeffery Romano testified that he was the rental and used equipment manager at Fallsway when Riley rented a forklift on August 12, 2008. Riley rented the forklift on a month-to-month basis, paying $1,495 for the first month and approximately $1,262 per month thereafter. The first month's rental fee included extra charges for delivery from, and eventually back to, Fallsway. Riley paid for the forklift's monthly rental fee via credit card so that Fallsway would simply run the credit card each month when the rental fee became due. Romano testified that when Fallsway ran the credit card for the third month's payment, the payment was declined. Thereafter, Riley failed to make any further payments.

{¶10} Romano testified that Fallsway made several phone calls and sent letters to Riley to notify him that Fallsway had not received payment. When Riley did not respond, Fallsway attempted to recover the forklift in December 2008. TR Construction's building was locked, however, and Fallsway's employees could not gain access to the forklift. Romano testified that Fallsway filed a police report based on the theft of its forklift on January 18, 2009, at which point Riley had not paid the forklift's rental fee for three months. Fallsway recovered the forklift with the aid of officers on January 30, 2009. Romano testified that the forklift was damaged when Fallsway recovered it. According to Romano, Riley never told Fallsway that the forklift had been involved in the commission of a crime.

{¶11} Sandy Dorsey, the rental coordinator for Fallsway, testified that she called Riley approximately seven to eight times and sent him a letter to inform him that the monthly rental fees for the forklift were outstanding and Fallsway wanted its forklift. Dorsey testified that she never spoke to Riley, but she did receive a voicemail from him on one occasion. In the voicemail, Riley indicated that TR Construction had lost the key to the forklift, had not been able to use it, and still wanted to keep it. Riley further acknowledged in the voicemail that rental fees were due. Dorsey testified that Fallsway sent a truck to TR Construction's building on December 5, 2008 to retrieve the forklift, but Fallsway's employees were unable to gain access to the forklift because the building was locked. Dorsey further testified that she left voicemails for Riley and told him that Fallsway would need to involve law enforcement if it did not get back its forklift. Dorsey stated that the certified mail she sent to Riley was returned with a notation that it had been refused. Dorsey confirmed that Riley never told Fallsway that its forklift had been involved in the commission of a crime.

{¶12} Detective Bob Pankonien, Jr. of the Akron Police Department testified that he spoke with Riley after Riley was arrested for the theft of the forklift. According to Detective Pankonien, Riley told police that he had kept the forklift because: (1) it belonged to him; (2) he had rented it for a six-month term; (3) it had been involved in the commission of a crime and he needed to retain it as part of the criminal investigation; and (4) he had spoken to "Rosemary" at Fallsway, and they had agreed TR Construction could retain the forklift if Riley eventually resumed making payments when he could afford to do so. Romano testified that Fallsway does not have an employee named "Rosemary."

{¶13} Viewing the evidence in a light most favorable to the prosecution, we must conclude that a rational trier of fact could have found that the State proved the essential elements of theft beyond a reasonable doubt. While the nonpayment of a contract, standing alone, will not give rise to criminal charges, the record contains evidence beyond mere nonpayment. Several witnesses testified that Riley knew TR Construction was retaining Fallsway's forklift without its permission and without paying the forklift's monthly rental fee. Even if Riley initially obtained control over the forklift by lawful means, there is evidence that Riley unlawfully exerted control over the forklift after Fallsway requested its return several times and threatened to involve law enforcement if Riley did not comply. "Exerting control, as opposed to initially gaining control over property, beyond the scope of the owner's consent, and with the purpose to deprive the owner of the property, constitutes theft under [R.C. 2913.02(A)(2)]." *State v. Nazar* (Dec. 7, 1988), 9th Dist. No. 4375, at *1. Moreover, purpose to deprive may be inferred from circumstantial evidence. *State v. Cadle*, 9th Dist. No. 24064, 2008-Ohio-3639, at ¶7. A rational trier of fact could have inferred that Riley intended to deprive Fallsway of its forklift based on the fact that he did not arrange for its return, failed to pay its rental fee for three months, refused

Fallsway's certified mail, and gave multiple, inconsistent reasons as to why he did not return the forklift. See *State v. Asberry*, 10th Dist. No. 04AP-1113, 2005-Ohio-4547, at ¶9-10 (concluding that theft occurred where defendant continued to exert control over rental property without paying and evidence showed he knew he should return the property); *State v. Marshall*, 2d Dist. No. 20744, 2005-Ohio-5585, at ¶26-37 (concluding that theft occurred where defendant refused to return rental property after failing to maintain rental payments); *State v. Martindale* (Apr. 3, 2001), 5th Dist. No. 00CA30, at *2 (concluding that theft occurred where defendant refused to maintain rental payments on rented property and kept the property for over four months). See, also, R.C. 2913.72(A)(2) (providing that a rentee's failure to return rented property after a written, mailed demand for its return shall be considered as evidence of the rentee's intent to commit theft of the rented property).

{¶14} Contrary to Riley's assertion, Fallsway could not recover its Forklift at anytime. Both Romano and Dorsey testified that Fallsway could not gain access to its forklift when Fallsway's employees attempted to retrieve it in December 2008 because the forklift was locked inside TR Construction's building. By the time Fallsway recovered its forklift, over three months had elapsed. To the extent that Riley argues three month's rent does not amount to a "substantial portion of [the forklift's] value or use," he fails to cite to any law in support of his argument. See App.R. 16(A)(7). Riley's first assignment of error lacks merit.

Assignment of Error Number Two

"APPELLANT'S CONVICTION FOR THEFT WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶15} In his second assignment of error, Riley argues that his theft conviction is against the manifest weight of the evidence. We disagree.

{¶16} In determining whether a conviction is against the manifest weight of the evidence an appellate court:

> "[M]ust 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* (1986), 33 Ohio App.3d 339, 340.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Id. Therefore, this Court's "discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶17} Riley argues that his theft conviction is against the manifest weight of the evidence because the reason Riley was not paying Fallsway was that TR Construction was burglarized and its "[u]se of the forklift was frustrated by the intervening burglary." Detective Pankonien acknowledged that, on December 2, 2008, Riley had reported a break-in at TR Construction. He also testified, however, that the alleged break-in was not the only reason Riley gave for failing to allow Fallsway to retrieve its forklift. Riley gave the police several, inconsistent reasons for not returning the forklift, one of which was that he was the forklift's owner. Moreover, Romano and Dorsey both testified that Riley never informed Fallsway about the alleged break-in at TR Construction, and Riley's own voicemail to Fallsway indicated that he had "lost" the key to the forklift, not that the key had been stolen.

{¶18} Riley testified that he received a voicemail and a letter from Fallsway and spoke to someone there about keeping the forklift and making payments at a later date. He denied telling the police that he spoke to "Rosemary," but nevertheless insisted that he told someone at Fallsway about the break-in at TR Construction. Riley also testified that he never rejected any certified mail from Fallsway.

{¶19} Based on our review of the record, we cannot agree that Riley's conviction was against the manifest weight of the evidence. While Riley's testimony differs from the other witnesses, this is not the exceptional case in which the evidence weighs heavily against the conviction. The differing testimony simply created an issue of credibility, which the trial court resolved in favor of Fallsway. Riley's second assignment of error lacks merit.

III

{¶20} Riley's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

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.

BETH WHITMORE
FOR THE COURT

CARR, J.
CONCURS

BELFANCE, P. J.
DISSENTS, SAYING:

{¶21} I respectfully dissent. I do not believe that sufficient evidence was presented to conclude beyond a reasonable doubt that Riley committed theft, even when that evidence is viewed in a light most favorable to the State.

{¶22} At its heart, this matter boils down to a civil, contract dispute. Riley rented a forklift from Fallsway. He made several months worth of payments and prepaid the cost for delivery and pick up of the lift. It is true that Riley missed several payments and thus was in breach of the rental agreement. It is equally clear that Riley could have handled the situation better. However, those facts standing alone do not warrant a felony conviction for theft. I am concerned that the majority's holding will allow the State to prosecute any small business owner who falls behind on a few payments.

{¶23} Riley was convicted of theft in violation of R.C. 2913.02(A)(2) which provides that:

> "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * * * [b]eyond the scope of the express or implied consent of the owner or person authorized to give consent."

Among other things, deprive means to "[w]ithhold 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[.]" R.C. 2913.01(C)(1).

{¶24} There was no evidence presented which would allow the trier of fact to conclude that Riley's three-month possession of the forklift without payment appropriated "a substantial portion of the [forklift's] value or use." See id. There was no testimony even suggesting what portion of the forklift's value Riley appropriated by his three months of possessing the forklift without making payments.

{¶25} While the majority states that Riley did not provide any law to support his conclusion that three months of rent did not constitute a substantial portion of the forklift's value, and thus does not address his argument, I believe Riley's argument alludes to the State's failure to meet its burden. It is the State's burden to prove all the elements of the crime beyond a reasonable doubt. R.C. 2901.05(A). Because there was no evidence in the record whereby the trial court could conclude that Riley's three-month possession of the forklift without payment appropriated "a substantial portion of the [forklift's] value or use[,]" R.C. 2913.01(C)(1), I would conclude the evidence was insufficient as a matter of law to convict Riley of theft.

APPEARANCES:

JEFFREY N. JAMES, Attorney at Law, for Appellant.

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