[Cite as *State v. Rodriguez*, 2010-Ohio-400.]

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

STATE OF OHIO	C. A. No. 09CA009629
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DOMINIC RODRIGUEZ	AVON LAKE MUNICIPAL COURT COUNTY OF LORAIN, OHIO
Appellant	CASE No. CRB 0800702

DECISION AND JOURNAL ENTRY

Dated: February 8, 2010

MOORE, Presiding Judge.

{¶1} Appellant, Dominic Rodriguez, appeals from the judgment of the Avon Lake Municipal Court. This Court affirms.

I.

{¶2} During the late evening hours of May 14, 2008 or the early morning hours of May 15, 2008 someone entered Allumalloy in Avon Lake and stole several computers loaded with approximately $20,000 worth of software, 144 35-pound aluminum ingots and approximately 48 36-packs of Pepsi products. The date on at least one of the stolen packs of pop had long been expired and the pack had been set aside. Due to the nature of Allumalloy's business, the packages of pop were all covered in dust. Christopher Daniels, the foundry manager at Allumalloy, testified as to the nature and description of the stolen items. Daniels' testimony indicated that the theft may have been accomplished by an employee.

{¶3} Antonio Rodriguez is an employee of Allumalloy. The State attempted to link Dominic Rodriguez to Antonio Rodriguez[1] through the introduction of phone records. The phone records indicated that 27 calls were made during a short span of time on the night of the theft between a phone registered to Dominic and a phone registered to Antonio.

{¶4} On May 15, 2008, while investigating the theft, Detective Pickering of the Avon Lake Police Department visited scrap yards in Cuyahoga County, including All Scrap. At All Scrap an employee turned over to him an ingot matching the description of those stolen from Allumalloy. He also provided the contact information for Dominic Rodriguez. The All Scrap employee did not testify at trial, however, based on the conversation with the All Scrap employee, the detective visited Rodriguez and questioned him regarding the theft. Rodriguez admitted scrapping an aluminum ingot but testified at trial that it was a different ingot from those taken from Allumalloy. Rodriguez told the detective that he noticed the ingot while urinating near a bridge in Cleveland. Rodriguez indicated that he was looking for signs of drag racing at that time. As they spoke, the detective noticed several dusty 36-packs of Pepsi and Diet Pepsi in Rodriguez's home. Rodriguez offered five different explanations as to the origin of the Pepsi. One pack of Diet Pepsi bore an expiration date of October 30, 2006. One pack of long-expired pop at Allumalloy shared the same expiration date.

{¶5} The State charged Rodriguez with one count of receiving stolen property, including the ingot and four 36-packs of Pepsi and Diet Pepsi, in violation of R.C. 2913.51(A), a misdemeanor of the first degree. On March 19, 2009, the matter was tried to the court, which found Rodriguez guilty of the single charge.

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[1] The record indicates that Dominic Rodriguez and Antonio Rodriguez are not related.

{¶6} Rodriguez timely filed a notice of appeal, raising five assignments of error for our review.

II.

{¶7} As Rodriguez was charged with a single count of receiving stolen property, namely the ingot and four packs of Pepsi and Diet Pepsi, the State needed to prove each element of the charge beyond a reasonable doubt for at least one of the items. See *State v. Wilson* (1985), 21 Ohio App.3d 171, 172.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED IN DENYING [RODRIGUEZ'S] MOTION FOR ACQUITTAL FOR LACK OF SUFFICIENT EVIDENCE, BECAUSE THE CITY FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE PEPSI OR INGOTS WERE STOLEN."

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED IN DENYING [RODRIGUEZ'S] MOTION FOR ACQUITTAL FOR LACK OF SUFFICIENT EVIDENCE, BECAUSE THE CITY FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT [RODRIGUEZ] KNEW OR SHOULD HAVE KNOWN THAT THE PEPSI OR INGOT WERE STOLEN."

ASSIGNMENT OF ERROR IV

"THE ADMISSION OF HEARSAY EVIDENCE BY THE TRIAL COURT WAS PLAIN ERROR AND DENIED [RODRIGUEZ] A FAIR TRIAL."

{¶8} Because Rodriguez's first, second and fourth assignments of error are related, we consider them together. In his first assignment of error, Rodriguez contends that the State failed to prove beyond a reasonable doubt that either the aluminum ingot or any of the four packs of Pepsi and Diet Pepsi were stolen. Rodriguez further contends that all of the evidence that the ingot was stolen constituted inadmissible hearsay. With regard to the Pepsi, Rodriguez contends that the City's case impermissibly, although not wholly, relied upon inadmissible hearsay. In Rodriguez's second assignment of error, he contends that the State failed to prove beyond a

reasonable doubt that Rodriguez knew or should have known that the items were stolen. In his fourth assignment of error, Rodriguez contends that the trial court committed plain error when it admitted hearsay evidence regarding Pepsi products carried at Marc's and Giant Eagle; as well as hearsay evidence regarding the UPC codes on the Pepsi packages found at Rodriguez's home. We disagree.

{¶9} When considering a challenge to the sufficiency of the evidence, the court must determine whether the prosecution has met its burden of production, while a manifest weight challenge requires the court to examine whether the prosecution has met its burden of persuasion. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). To determine whether the evidence in a criminal case was sufficient to sustain a conviction, an appellate court must view that evidence in a light most favorable to the prosecution:

> "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 crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶10} R.C. 2913.51(A) provides that "[n]o person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense." "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. "Receive is not defined in the statute, but a generally accepted definition of receive is to acquire 'control in the sense of physical dominion over or the apparent legal power to dispose of said property.'" *State v. Brewer* (July 19, 2000),

9th Dist. No. 99CA007483 at *2 quoting *State v. Jackson* (1984), 20 Ohio App.3d 240, 242. "Possession of stolen property for purposes of the receiving stolen property statute, R.C. 2913.51, may be constructive as well as actual. Constructive possession exists when an individual knowingly exercises dominion and control over an object, even though that object may not be within his immediate physical possession." *State v. Hankerson* (1982), 70 Ohio St.2d 87, at syllabus.

> "Absent an admission by a defendant, the element of reasonable cause to believe that an item was stolen can only be proved by circumstantial evidence. In determining whether reasonable minds could conclude that a defendant knew or should have known that property has been stolen, the following factors are relevant:
>
> "(a) [T]he defendant's unexplained possession of the merchandise, (b) the nature of the merchandise, (c) the frequency with which such merchandise is stolen, (d) the nature of the defendant's commercial activities, and (e) the relatively limited time between the thefts and the recovery of the merchandise.
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> "In addition, [p]ossession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which a [trier of fact] may reasonably infer and find, in the light of the surrounding circumstances shown by the case, that the person in possession knew that the property had been stolen." (Internal citations and quotations omitted.) *State v. Colon*, 9th Dist. No. 20949, 2002-Ohio-3985, at ¶¶18-20.

{¶11} The State presented sufficient evidence that Rodriguez received and retained a 36-pack of Diet Pepsi, which he knew or had reasonable cause to know was stolen. The record indicates that between 9:30 p.m. on May 14, 2008 and 6:30 a.m. of May 15, 2008, a break-in and theft occurred at Allumalloy in Avon Lake, Ohio. On May 15, the Avon Lake Police Department began to investigate. During the investigation, the police learned that approximately 144 aluminum ingots and approximately 50 36-packs of Pepsi products were stolen. Allumalloy purchased the Pepsi products at BJ's Wholesale Club. Allumalloy reported that at least one of the boxes had expired according to the date printed on the package. Later that morning the police began scouring scrap yards for the ingots. During the course of this investigation, the detective

from the Avon Lake Police Department learned that Rodriguez had scrapped an aluminum ingot that morning. A scrap yard employee had taken down Rodriguez's license information. The detective then went to Rodriguez's home to question him about the ingot.

{¶12} Rodriguez contends that the detective's testimony regarding the ingot constituted inadmissible hearsay. We disagree.

> "Hearsay is an out of court statement offered into evidence to prove the truth of the matter asserted. Evid.R. 801(C). If the statement is not offered to prove the truth of the matter asserted, then it does not constitute hearsay. For instance, a witness may testify to an out of court statement if that statement demonstrates why the witness undertook investigative activities. *State v. Thomas* (1980), 61 Ohio St.2d 223, 232." *State v. Chojnacki* (Dec. 30, 1994), 9th Dist. No. 2326-M at *2.

{¶13} In this case, the detective's testimony was introduced for just such a purpose. The detective's testimony explained how his investigation led him to Rodriguez. Similarly, the detective's testimony with regard to the UPC codes and his investigation of products carried by Marc's and Giant Eagle were offered to show why he undertook these investigative activities. With regard to these instances of testimony, having not objected at trial, Rodriguez has argued plain error on appeal.

{¶14} Typically, if a party fails to object in the trial court, reviewing courts may notice only "[p]lain errors or defects affecting substantial rights[.]" Crim.R. 52(B). Pursuant to Crim.R. 52(B), a plain error or defect that affects a substantial right may be noticed although it was not brought to the attention of the trial court. "A plain error must be obvious on the record, such that it should have been apparent to the trial court without objection." *State v. Kobelka* (Nov. 7, 2001), 9th Dist. No. 01CA007808, at *2, citing *State v. Tichon* (1995), 102 Ohio App.3d 758, 767. As notice of plain error is to be taken with utmost caution and only to prevent a manifest miscarriage of justice, the decision of a trial court will not be reversed due to plain

error unless the defendant has "established that the outcome of the trial clearly would have been different but for the alleged error." *Kobelka*, supra, at *2, citing *State v. Waddell* (1996), 75 Ohio St.3d 163, 166, and *State v. Phillips* (1995), 74 Ohio St.3d 72, 83.

{¶15} The detective testified that, in attempting to verify Rodriguez's explanation for his possession of the Pepsi, he went to Marc's and Giant Eagle and learned that neither carried 36-packs of Pepsi products. The record does not disclose whether the detective spoke with store employees or simply observed firsthand that no 36-packs were offered for sale. The detective also testified that his investigation at BJ's revealed that the UPC codes on the Pepsi at Rodriguez's house are specific to packages sold at BJ's. Daniels testified that Allumalloy purchased the stolen Pepsi from BJ's. Even assuming that the testimony regarding Marc's and Giant Eagle constituted hearsay, coupled with the testimony regarding BJ's, these two pieces of evidence admitted by the trial court do not rise to the level of plain error because we cannot say that the outcome would clearly have been different but for the alleged error. Id.

{¶16} While questioning Rodriguez at his home, the detective observed four 36-packs of Pepsi and Diet Pepsi lying on the floor. The detective noticed that all of the boxes had dust on them consistent with the boxes that were left at Allumalloy. However, on cross-examination he conceded that the dust was not chemically tested to confirm the presence of aluminum metal dust. When questioned about the origin of the Pepsi products, Rodriguez offered the detective five different explanations: 1) he purchased them at Giant Eagle; 2) he purchased them at Marc's; 3) somebody probably just dropped them off; 4) he might have taken them at the conclusion of a car show; and, 5) that they had been at his house for an extremely long period of time so he could not remember. The detective also testified that he compared the expiration dates on the Pepsi products from Rodriguez's home to the expiration dates on the expired pop

left at Allumalloy. One pack of Diet Pepsi at Rodriguez's home bore an expiration date of October 30, 2006. One pack at Allumalloy shared the same expiration date.

{¶17} The presence of dust on all of the cases of pop, not just the oldest, tends to demonstrate that the pop at Rodriguez's home was taken from Allumalloy. More importantly, the chance that Rodriguez innocently and coincidentally possessed a case of Diet Pepsi with an expiration date exactly matching that of a case of Pepsi still in Allumalloy's possession which expired more than one-and-a-half years prior is quite remote. While this evidence is circumstantial, "if the State relies on circumstantial evidence to prove any essential element of an offense, it is not necessary for 'such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction.'" (Internal quotations omitted.) *State v. Tran*, 9th Dist. No. 22911, 2006-Ohio-4349, at ¶13, quoting *State v. Daniels* (June 3, 1998), 9th Dist. No. 18761, at *2. Circumstantial and direct evidence possess the same probative value. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph one of the syllabus.

{¶18} With regard to the factors relevant to a determination of whether reasonable minds could conclude that Rodriguez was aware the Pepsi was stolen, three factors in particular apply: 1) his unexplained possession of the items; 2) the nature of the items; and 3) the relatively short period of time between the theft and the recovery of the items. In this instance, the first two factors are linked. Pepsi in and of itself is a relatively common household item. However, the fact that it is so common would appear to make the explanation of one's possession of Pepsi a simple and straightforward matter. Rodriguez was unable to satisfactorily explain his possession of the Pepsi. Instead, he offered five distinct explanations for the origin of the Pepsi in his kitchen. First, he bought it at Giant Eagle. Second, he purchased it at Marc's. Third, somebody probably just dropped it off. Fourth, he could have taken it home from a car show.

Finally, he suggested that he possessed the Pepsi so long that he simply forgot its origin. The final explanation would be plausible as to the case that expired October 30, 2006, but appears less so for the other cases, one of which expired as late as December 22, 2008. The short time span between the accomplishment of the theft and the recovery of the Pepsi at Rodriguez's home lends further support to the inference that Rodriguez knew it was stolen. The record indicates that the theft from Allumalloy took place in the late evening hours of May 14, 2008 or the early morning hours of May 15, 2008. The detective's investigation later on May 15th led to the discovery of the Pepsi at Rodriguez's house that same day. Viewed in the light most favorable to the State, this evidence was sufficient to convince any rational trier of fact that Rodriguez was guilty of receiving stolen property with regard to the expired Diet Pepsi. *Jenks*, 61 Ohio St.3d at paragraph two of the syllabus. The trial court did not rely upon inadmissible hearsay in making this finding, and did not commit plain error in admitting the evidence. Accordingly, Rodriguez's first, second and fourth assignments of error are overruled.

ASSIGNMENT OF ERROR III

> "THE TRIAL COURT'S RULING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, IN VIOLATION OF ARTICLE IV, SECTION 3 OF THE OHIO CONSTITUTION."

{¶19} In his third assignment of error, Rodriguez contends that his conviction for receiving stolen property was against the manifest weight of the evidence for two reasons. Rodriguez contends the State produced only hearsay evidence to prove essential elements of the charge. He also contends that the attempt to link Dominic Rodriguez to Antonio Rodriguez was specious, as there is no proof that Antonio committed the theft. We disagree.

{¶20} A determination of whether a conviction is against the manifest weight of the evidence does not permit this court to view the evidence in the light most favorable to the State

to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

> "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." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶21} Noting our analysis of Rodriguez's hearsay contentions with regard to his sufficiency argument, we are unwilling to overturn his conviction as against the manifest weight of the evidence on that ground. The record demonstrates that Rodriguez testified at trial. When questioned regarding the ingot that he scrapped his testimony differed from that of the detective. Rodriguez testified that he found a very different ingot in Cleveland while searching for telltale signs of drag racing. He stated that he found a dull-gray piece of aluminum in the shape of "three little round things, a little bit bigger than a Pepsi can hooked together." Rodriguez testified that he noticed the ingot while urinating near a bridge. He also testified that he has diabetes so he cannot drink regular pop and he has "been real sick, and [he] can't have caffeine, so [he] switched over to Sierra Mist, so the Pepsi sat there." With regard to his inability to explain the origin of the Diet Pepsi in his home Rodriguez testified that he has had memory problems "ever since [he] died of lack of oxygen."

{¶22} Although Rodriguez offered a competing explanation for the ingot, the detective's investigation led him to Rodriguez's home. There, the detective identified dusty Diet Pepsi with an expiration date exactly matching the long-expired pop left behind at Allumalloy. Further, Rodriguez offered five distinct explanations for the existence of the pop. At trial he explained that his lack of a singular explanation was due to memory problems he developed as a result of

lack of oxygen. Rodriguez's testimony regarding what we presume are hypoxia-induced memory problems presented credibility issues for the trial court to resolve.

{¶23} As for Rodriguez's contention that any attempt to link him to Antonio Rodriguez was specious because there is no proof that Antonio committed the theft, this contention is incorrect. The State attempted to link Dominic Rodriguez to Antonio Rodriguez and prove circumstantially that Antonio committed the theft. The State introduced some of Daniels' testimony to suggest that the theft from Allumalloy was accomplished by an employee. Antonio is an Allumalloy employee. The State then introduced phone records for a phone registered to Dominic Rodriguez. The detective testified that the records demonstrate 27 phone calls between a phone registered to Dominic and phones associated with Antonio during the night of May 14th and the morning hours of May 15th. However, there are only two questions involved in our review of a conviction of receiving stolen property: "'whether Defendant received, retained, or disposed of the property of another, and whether Defendant knew or had reasonable cause to believe that the property was obtained by theft.'" *State v. Ray*, 9th Dist. No. 21233, 2003-Ohio-2159, at ¶10, quoting *State v. Ortiz* (Oct. 25, 2000), 9th Dist. No. 3040-M. Therefore, although not necessary to Rodriguez's conviction for receiving stolen property, it was relevant that Antonio, who was connected to Dominic, may have committed the theft.

{¶24} After reviewing the entire record, weighing the inferences and considering the credibility of the witnesses, we cannot say that the trial court created a manifest miscarriage of justice in finding Rodriguez guilty of receiving stolen property, specifically a 36-pack of Diet Pepsi. *Otten*, 33 Ohio App.3d at 340. Accordingly, Rodriguez's third assignment of error is overruled.

ASSIGNMENT OF ERROR V

"THE ADMISSION OF LAY-WITNESS DANIELS' TESTIMONY AS TO THE IDENTITY OF EXHIBIT A WAS PLAIN ERROR BECAUSE IT OFFERED A CONCLUSION AS TO AN ULTIMATE ISSUE."

{¶25} In his fifth assignment of error, Rodriguez contends that the admission of Daniels' lay-witness testimony identifying the aluminum ingot as one taken from Allumalloy constituted plain error because it offered a conclusion as to an ultimate issue. As noted previously, because all five items were the basis for the single charge of receiving stolen property, the State was required to prove each element of the charge in relation to one of the items. See *Wilson*, 21 Ohio App.3d at 172. Our determination that the conviction for receiving stolen property with regard to the Diet Pepsi is supported by sufficient evidence and is not against the manifest weight of the evidence necessarily means that the State was not required to prove the charge in relation to the ingot. Id. Consequently, Rodriguez's fifth assignment of error is moot. App.R. 12(A)(1)(c).

III.

{¶26} Rodriguez's assignments of error are overruled. The judgment of the Avon Lake Municipal Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Avon Lake Municipal Court, County of Lorain, 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.

CARLA MOORE
FOR THE COURT

CARR, J.
DICKINSON, J.
CONCUR

APPEARANCES:

ANDREW R. MALONE, Attorney at Law, for Appellant.

JOHN REULBACH, Attorney at Law, for Appellee.