

[Cite as *State v. Roberts*, 2015-Ohio-2716.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 26431
Plaintiff-Appellee	:	
	:	Trial Court Case No. 14-CRB-4931
v.	:	
	:	(Criminal Appeal from
DESTINY ROBERTS	:	Dayton Municipal Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 2nd day of July, 2015.

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LYNN DONALDSON, Atty. Reg. No. 0041507, and STEPHANIE L. COOK, Atty. Reg. No. 0067101, by JOSHUA T. SHAW, Atty. Reg. No. 0087456, Dayton City Prosecutor’s Office, 335 West Third Street, Room 37, Dayton, Ohio 45402
Attorney for Plaintiff-Appellee

CHRISTOHER W. THOMPSON, Atty. Reg. No. 0055379, Law Office of the Public Defender, 117 South Main Street, Suite 400, Dayton, Ohio 45422
Attorney for Defendant-Appellant

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FAIN, J.

{¶ 1} Defendant-appellant Destiny Roberts appeals from her conviction for Theft, a

misdemeanor of the first degree, in violation of R.C. 2913.02(A)(1). Roberts contends that the trial court erred in overruling her Crim. R. 29 motion for a judgment of acquittal, based on insufficiency of the evidence.

{¶ 2} We conclude that the court did err in convicting Roberts of violating R.C. 2913.02(A)(1) based on facts constituting a violation of R.C. 2913.02(A)(2). The two crimes require proof of different elements. Accordingly, the judgment of the trial court is Reversed.

I. Roberts Pawns her Landlord's Air Conditioner

{¶ 3} In December 2013, Roberts entered into a one-year lease with David Oliver for a residential apartment located at 1361 Florence Street, Dayton, Ohio. The lease was not admitted in evidence, but Oliver testified that in exchange for monthly rent of \$500, Roberts had consent to occupy the premises and to use the appliances provided in the apartment, including two window air-conditioning units. Oliver testified that Roberts paid all of her monthly rent late, and as a result, he commenced eviction proceedings against her, requiring her to move out by June 14th. Oliver testified that he inspected the apartment after Roberts moved out in mid-June, and discovered the two window air-conditioning units were missing. Oliver contacted Roberts numerous times, then contacted the police to report the missing units. He learned that Roberts had taken the units to Mr. Pawnbroker in April and used them to secure a loan. After Roberts was called to the police station to make a statement, her mother went to Mr. Pawnbroker, settled the debt, and returned the air-conditioning units in good working order to Oliver. Oliver agreed that Roberts had consent to use the air-conditioning units to cool the apartment,

but he testified that she did not have consent to remove them from the apartment or to use them to secure a loan from a pawnbroker.

II. The Course of Proceedings

{¶ 4} The day after the units were returned, Roberts was charged with Theft, a violation of R.C. 2913.02(A)(1) and Receiving Stolen Property, a violation of R.C. 2913.51. Initially, the complaint alleged that the theft occurred in July, but at the start of the trial, the trial court allowed the State to amend the complaint to allege that the theft occurred on or about April 14, 2014.

{¶ 5} A bench trial was conducted, during which testimony was received from two police officers, the pawnbroker and the landlord, Oliver. At the completion of the State's case, Roberts moved for a judgment of acquittal pursuant to Crim. R. 29, conceding that the State had proven the elements of R.C. 2913.02(A)(2), but contending that the elements of R.C. 2913.02(A)(1), the offense with which she was charged, had not been proven. The State did not seek to amend the complaint to change the theft charges to a violation of R.C. 2913.02(A)(2), or to Unauthorized Use of Property, in violation of R.C. 2913.04. The trial court did not, sua sponte, amend the complaint. In a written decision, the trial court overruled the motion to dismiss and made the following specific findings:

The Court finds that Defendant went beyond the consent given by the owner. The Court further finds that it can reasonably infer from the owner's testimony that the Defendant went beyond the owner's consent and converted the air conditioner and pawned it for cash without authorization by the owner.

The Court does find that Defendant had a limited consent to use the air conditioner for its normal purpose which was to cool the property the Defendant rented.

The Court further finds that this is not a case of embezzlement or a situation where a person acquired possession by reason of employment or a position of trust. The action by Defendant went beyond the limited consent given by the owner. The Defendant's actions also violated a tenant's duty to preserve and protect the property of her owner and landlord.

Dkt. at 24.

{¶ 6} Based on these findings, the trial court concluded there was sufficient evidence to establish all the elements of R.C. 2913.02(A)(1), and after Roberts rested without presenting any evidence,¹ found Roberts guilty of Theft, but not guilty of Receiving Stolen Property. Roberts was sentenced to 60 days in jail, with 56 days suspended and credit for one day served. A stay of execution was granted by the trial court.

III. The Evidence Is Insufficient to Support a Conviction of R.C. 2913.02(A)(1)

{¶ 7} Roberts's sole assignment of error states as follows:

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S
CRIM. R. 29 MOTION AS THE EVIDENCE WAS NOT SUFFICIENT TO
SUSTAIN A CONVICTION.

¹ Roberts renewed her Crim.R. 29 motion, which the trial court overruled.

{¶ 8} “Reviewing the denial of a Crim. R. 29 motion * * * requires an appellate court to use the same standard as is used to review a sufficiency of the evidence claim.” *State v. Cokes*, 2d Dist. Montgomery No. 26223, 2015-Ohio-619, ¶ 23 (internal citation omitted).

{¶ 9} When a defendant challenges the sufficiency of the evidence, she is arguing that the State presented inadequate evidence on at least one element of the offense to sustain the verdict as a matter of law. *State v. Hawn*, 138 Ohio App.3d 449, 471, 741 N.E.2d 594 (2d Dist. 2000). “ ‘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.’ ” *State v. Morefield*, 2d Dist. Montgomery No. 26155, 2015-Ohio-448, ¶ 18, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 10} The elements of the offense of Theft are found in R.C. 2913.02 (A):

(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:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception;

(4) By threat;

(5) By intimidation.

{¶ 11} The sole assignment of error focuses on the issue of whether the evidence is sufficient to prove the elements of the crime charged in the complaint, R.C. 2913.02(A)(1). As found by the trial court, there is no dispute that Roberts had entered into a lease with Oliver, which gave her consent to occupy the premises and to use the appliances in the apartment, including the air-conditioning units. Since the written lease was not admitted in evidence, the precise terms of the landlord/tenant relationship are not part of the record. The State takes the position that Roberts never had consent to take the air conditioners out of the apartment or to use them for any purpose other than to cool the apartment. Roberts argues that since she had consent to use the air conditioners pursuant to the residential lease, there is no evidence to support the element of the offense that she acted “without consent of the owner,” even though the evidence supports the element of a different offense. Roberts has conceded that the facts do support all of the elements of R.C. 2913.02(A)(2), which define Theft as exerting control over property, “beyond the scope of the express or implied consent of the owner.” Although the trial court made a factual finding that Roberts had limited consent to use the air conditioner, the trial court found that the evidence was sufficient to prove the element that she acted without the consent of the owner when she removed the air conditioning units from the

apartment.

{¶ 12} In some circumstances, when the evidence supports a conviction of an offense that is different than the offense identified in the charging document, Crim. R. 7 provides as follows:

The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. * * * unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made.

{¶ 13} We have previously cited with approval a case in which the First District Court of Appeals held that a trial court erred by amending Theft charges, pursuant to Crim. R. 7, identified in the original charging document as a violation of R.C. 2913.02(A)(1), to Theft in violation of R.C. 2913.02(A)(2), because the nature of the charges are different, requiring different elements. See *State v. Dortch*, 2d Dist. Montgomery No. 17700, 1999 WL 819569 (Oct. 15, 1999), citing *State v. Woody*, 29 Ohio App. 3d 364, 505 N.E. 2d 646 (1st Dist. 1986). The facts in *Woody* are similar to the case before us, because the defendant in that case had rented the property and failed to return it, so he originally had consent from the owner before the alleged theft occurred. *Id.* In *Dortch*, we found that when a truck driver who had consent to take scrap metal to a specific salvage yard, delivered it to a different salvage yard in an attempt to keep the proceeds, the defendant could not be convicted under R.C. 2913.02(A)(1). We explained:

We agree with the First District's holding that these two provisions of the statute are separate crimes requiring proof of different elements. *State v. Woody* (1986), 29 Ohio App.3d 364, 365, 505 N.E.2d 646. More specifically, the provision that is violated depends on whether the individual ever had consent to control the property. Once a person lawfully has control over property with consent, that person cannot thereafter *exert* control for a different purpose. That person already has control. Instead, what changes is whether or not the individual [acted] within the scope of the consent. If the individual begins to use the property for something outside what the owner specifically authorized, the individual has gone beyond the owner's consent. The statute allows for this precise situation in R.C. 2913.02(A)(2).

State v. Dortch, supra, at *4.

{¶ 14} In *State v. Frezgi*, we distinguished our holding in *Dortch*, in a case where the defendant failed to return his employer's cell phone, after he was terminated from his job. *State v. Frezgi*, 2d Dist. Montgomery No. 22439, 2008-Ohio-4732. We concluded that the State had proved all the elements of R.C. 2913.02(A)(1), because when Frezgi was terminated, his employer's "consent ended, entirely, with the termination of his employment, well before the time of the alleged offense." *Id.* at ¶ 9. In the case before us, the State alleged that Roberts engaged in a violation of R.C. 2913.02(A)(1), on April 14, 2014, at a time when the lease was in effect and had not yet been terminated, so at the time of the alleged offense Roberts had control over the property with the owner's consent. As found by the trial court, that consent was limited in scope, and Roberts's

actions went beyond that scope. Under these facts, we conclude that the State proved a violation of R.C. 2913.02(A)(2), but there is not sufficient evidence to prove a violation of R.C. 2913.02(A)(1).

{¶ 15} Therefore, we conclude that the trial court erred in overruling Roberts's Crim. R. 29 motion for a judgment of acquittal. Roberts's sole assignment of error is Sustained.

IV. Conclusion

{¶ 16} Roberts's sole assignment of error having been sustained, the judgment of the trial court is Reversed, and Roberts is discharged of the offense of Theft.

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FROELICH, P.J., and DONOVAN, J., concur.

Copies mailed to:

Lynn Donaldson
Stephanie L. Cook
Joshua T. Shaw
Christopher W. Thompson
Hon. John S. Pickrel