[Cite as *State v. Kerr*, 2015-Ohio-2228.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio — Court of Appeals No. OT-13-036

Appellee — Trial Court No. 12CR028I

v.

Jeremy Kerr — **DECISION AND JUDGMENT**

Appellant — Decided: June 5, 2015

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
David R. Boldt, Assistant Prosecuting Attorney, for appellee.

Amanda A. Krzystan, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is a delayed appeal, pursuant to App.R. 5, by Jeremy Kerr, appellant, from the nunc pro tunc judgment of the Ottawa County Court of Common Pleas journalized on September 4, 2013. The judgment convicted appellant of two counts of theft, one for violation of R.C. 2913.02(A)(3) and the other for violation of R.C.

2913.02(A)(2). Both counts are third degree felonies. The convictions are pursuant to guilty verdicts returned by a jury at trial in May 2013.

{¶ 2} The trial court sentenced appellant to serve a 30 month prison term on each count and ordered that the sentences be served consecutively to each other and consecutive to the sentence appellant was serving in the Ohio Department of Rehabilitation and Corrections at the time of sentencing.

{¶ 3} The theft charges against appellant relate to payments made by Keith H. Lenz totaling $234,670 towards the purchase and erection of a steel barn and associated work and materials on Lenz's farm located at State Route 579 and Opfer-Lentz Road in Curtice, Ottawa County, Ohio.

Assignments of Error

{¶ 4} Appellant asserts three assignments of error on appeal:

> Assignment of error No. 1. Appellant's convictions are based upon insufficient evidence and are against the manifest weight of the evidence.
>
> Assignment of error No. 2. The Court erred in allowing the prosecution to use other act and non-relevant evidence to show character and conformity throughout the trial.
>
> Assignment of error No. 3. The Trial Court erred when it admitted other acts testimony in violation of R.C. 2945.59, Evid.R. 404(B), and appellant's rights under Article I, Section 10 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.

{¶ 5} Keith Lenz testified at trial that on June 5, 2010, a tornado destroyed a 90 by 160 pole barn located on his farm in Curtice, Ohio. Afterwards, appellant contacted Lenz with proposals to replace the barn with a Kirby Building Systems ("Kirby") steel building. In the summer of 2010, Lenz discussed with appellant a series of proposals and price estimates based on the size building Lenz wanted.

{¶ 6} On September 20, 2010, Lenz, personally, and appellant, on behalf of Kerr Buildings, Inc., executed a contract for the steel barn project. Under the terms of the contract, Lenz agreed to pay the total sum of $437,200 for the purchase of a Kirby steel building, its erection on his property, and associated work and materials. Lenz testified that $234,670.00 of the total contract price was for the Kirby steel building itself. The contract provided for a down payment of $87,000. Lenz paid the $87,000 by check to Kerr Buildings Inc. on September 20, 2010, the date the parties executed the contract.

{¶ 7} The record demonstrates that appellant placed an order with Kirby for the steel building. State's Exhibit 11 is a document dated September 28, 2010, from Kirby to Jeremy Kerr at Kerr Buildings. It is referenced to Keith H. Lenz, K10E0431A, and is entitled "Order Acknowledgement and Acceptance." The document states an agreed "contract price" of $234,670 for the order. It also specifies a "Price Protection Date" of January 3, 2011, and various other requirements by Kirby to secure fabrication and delivery of the order.

{¶ 8} Lenz testified at trial that he was responsible under the contract to clear the construction site of equipment and debris to permit the project to proceed. According to

Lenz, at the time he entered into the contract for the barn, 40 percent of the destroyed prior barn remained on site, as well as, certain farm equipment. Lenz testified that "[m]y responsibilities were to, you know, to get the equipment moved and the building removed, out of the way, so that he [Kerr] could start building the building."

{¶ 9} Lenz testified that the contract specified an original start date for construction of October 10, 2010, and that by that date, he had not removed the large equipment from the site due to wet conditions on the property. A small portion of the prior building also remained to be removed. According to Lenz, he and appellant reached a verbal agreement that appellant would give Lenz "a four-to-five day notice before he was ready to start." Lenz testified that appellant never complained of delay or gave notice of his intent to start the project. According to Lenz, if he had received notice, he would have "gotten additional people" involved and probably would have cleared the site within "three, four days at the most."

{¶ 10} Lenz testified that after he entered into the contract for the project, he never saw appellant on the property and appellant never started the project. Appellant did not stake the site out and did not perform any of the concrete work that was to be performed prior to erection of the building. No building materials were ever delivered to the site and no building was ever erected.

{¶ 11} Lenz testified that he had not seen any documents from Kirby on the project until January 12, 2011. On that date appellant provided Lenz copies of various documents appellant received from Kirby. One was a letter dated January 6, 2011 from

Kirby to appellant. The letter notified appellant that a January 3, 2011 price protection date had passed and that as a result the contract price of the Kirby order had increased an additional $42,240.60.

{¶ 12} Lenz testified further that he and appellant spoke on January 12, 2011, and he proposed that they tender the full, original $234,670 contract price for the steel building to Kirby at that time to see if Kirby would honor the original price. Lenz testified that on January 13, 2011, he wrote a check in the amount of $147,670 payable to Kerr Buildings for that purpose and handed it to appellant. At Lenz's direction, appellant wrote in the memo field of the check: "Balance on Kirby Build No Labor." This payment plus the prior payment ($87,000) totaled the original contract price of $234,670. Lenz testified that appellant accepted the check and agreed that the payment would be used to get the Kirby steel building.

{¶ 13} The evidence at trial established that appellant cashed both the $87,000 and $147,670 checks and failed to use any of the proceeds for the project. Lenz demanded return of the $234,670 that he paid.

{¶ 14} State Exhibits 15 and 16 are letters from appellant, as president of Kerr Buildings, Inc., to Keith Lenz dated May 5 and 17, 2011. In them, appellant objected to delays in making the site ready to start construction. Appellant proposed (1) that they cancel the original contract, (2) that Kerr's company retains $80,000 of payments made by Lenz under the contract and (3) that the remaining $154,675 paid by Lenz be placed towards a new contract. Kerr claimed that the $80,000 was to compensate his company

for losses incurred for delays caused by Lenz in clearing the site to permit construction. Lenz did not agree to the proposal. No refund of any kind was made to Lenz.

{¶ 15} Under assignment of error No. 1, appellant contends that his convictions are not supported by sufficient evidence and that they are against the manifest weight of the evidence.

Sufficiency of the Evidence

{¶ 16} A challenge to a conviction based upon the sufficiency of the evidence to support a conviction presents a question of law on whether the evidence at trial is legally adequate to support a jury verdict on all elements of a crime. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). An appellate court does not weigh credibility when reviewing the sufficiency of evidence to support a verdict. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. A reviewing court considers whether the evidence at trial "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.*

{¶ 17} Appellant was convicted of two counts of theft, violations of R.C. 2913.02(A)(3) and 2913.02(A)(2). R.C. 2913.02(A)(3) prohibits theft by deception. The statute provides:

(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:

* * *

(3) By deception;

{¶ 18} R.C. 2913.02(A)(2) prohibits theft by knowingly obtaining or exerting control over property or services beyond the scope of the express or implied consent of the owner:

(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:

* * *

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

{¶ 19} In *State v. Coleman*, 2d Dist. Champaign No 2002 CA 17, 2003-Ohio-5724, the Second District Court of Appeals considered the proof required to establish violations of R.C. 2913.02(A)(3) and 2913.02(A)(2) in the context of a claimed contract dispute. To prove theft by deception under R.C. 2913.02(A)(3), "the State must demonstrate that at the time the defendant took the money he had no intent to repay the money or perform under the contract in exchange. *State v. Bakies* (1991), 71 Ohio App.3d 810, 595 N.E.2d 449." *Coleman* at ¶ 29. "[F]or a violation of R.C.

2913.02(A)(2), the State must prove that at the time the defendant exceeded the scope of consent of the owner of the money, he had the intent to deprive the owner of the money. *State v. Dortch* (October 15, 1999), Montgomery App. No. 17700; *State v. Metheney* (1993), 87 Ohio App.3d 562, 622 N.E.2d 730." *Id.* at ¶ 29.

{¶ 20} Under *Coleman*, performance of a significant amount of the work under the contract demonstrates an intent to perform the contract (R.C. 2913.02(A)(3)) and precludes an inference that the defendant exceeded the scope of the owner's consent with intent to deprive the owner of the money (R.C. 2913.02(A)(2)). *Id.* at ¶ 40.

{¶ 21} Appellant argues that he had begun work on the project, ordered and purchased materials and had met Lenz on a number of occasions in order to work on the building. In our view, construing the evidence most favorably to the prosecution, the record demonstrates that appellant placed a preliminary order for the Kirby building in September 2010, and that appellant failed to undertake performance of the contract afterwards. He did not return to the farm. He did not stake out the building or perform concrete work for the building. No building materials were ever delivered to the contract site. Appellant did not erect a steel building on the site and refused to make a refund of the $234,670 paid by Lenz for the project.

{¶ 22} We conclude that appellant's placing the order for the building with Kirby, alone does not constitute significant performance of the contract with Lenz. Performing minimally on a contract is insufficient to negate a finding of the required intent to support a conviction under either R.C. 2913.02(A)(3) or R.C. 2913.02(A)(2). *See State v.*

Dalton, 11th Dist. Portage No. 2008-P-0097, 2009-Ohio-3149, ¶ 33; *State v. Smith*, 12th Dist. Butler No. CA2004-11-275, 2005-Ohio-6551, 17-18; *Coleman* at ¶ 31, 40.

{¶ 23} We find appellant's claim that his convictions are not supported by sufficient evidence to be without merit.

Manifest Weight of the Evidence

{¶ 24} Appellant also argues under assignment of error No.1 that his guilty verdicts are against the manifest weight of the evidence. An appellate court in considering a challenge to a verdict on the grounds that it is against the manifest weight of the evidence acts as a "thirteenth juror," reviews the entire record, weighs the evidence, and may disagree with the factfinder's conclusions on conflicting testimony. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997):

> The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and new trial ordered. *Thompkins* at 387, 678 N.E.2d 541, quoting with approval, *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1983).

{¶ 25} There is a presumption that the findings of the trier-of-fact are correct. *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). "Judgments supported by some competent, credible evidence going to all the essential

elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus. Reversals on the ground that a verdict is against the manifest weight of the evidence are granted "only in the exceptional case in which the evidence weighs heavily against conviction." *Thompkins* at 387.

{¶ 26} We have reviewed the entire record. There is competent, credible evidence in the record demonstrating that appellant did not undertake any significant performance under the contract after the contract was made, despite payments by Keith Lenz totaling $234,670 for the project. We find no manifest injustice in the jury's treatment of Keith Lenz's testimony as credible concerning the issues of nonperformance of the contract, appellant's agreement to provide Lenz four or five day notice of his intent to proceed with construction, appellant's failure to provide Lenz notice of intent to proceed, and the fact that appellant did not complain of delays in making the site ready for construction.

{¶ 27} We find substantial credible evidence exists in the record supporting a conclusion that when appellant took the $87,000 and $147,670 payments from Lenz, he had no intent to repay the money or perform under the contract and, further, that at the time he exceeded the scope of consent of Lenz with respect to use of the money, he acted with purpose and intent to deprive Lenz of his property.

{¶ 28} Accordingly, we conclude that appellant's argument that the theft guilty verdicts are against the manifest weight of the evidence is without merit.

{¶ 29} We find assignment of error No. 1 not well-taken.

{¶ 30} Under assignment of error No. 2, appellant argues that the trial court erred in admitting other acts evidence at trial, specifically the testimony of Nicholas Moskal concerning his dealings with appellant on a contract to construct a steel barn. Appellant contends that Moskal other acts evidence was inadmissible under Evid.R. 404(B). Under assignment of error No. 3, appellant argues that the trial court erred by admitting the other acts testimony of Moskal, contending that the evidence is inadmissible under Evid.R. 404(B), R.C. 2945.59, Article I, Section 10 of the Ohio Constitution, and the Fourteenth Amendment to the United States Constitution. We consider these two assignments of error together.

Admissibility of Other Acts Evidence

{¶ 31} Nicholas Moskal testified that he is a resident of Ottawa County and that in December 2011, he entered a contract with appellant for appellant to build him a steel barn. Moskal testified that he paid appellant $5,340 under the contract, but appellant did not build the barn. In cross-examination, Moskal admitted appellant dug a hole on the property to check for water and afterwards told him that due to water conditions he couldn't pour concrete to build the barn. Moskal disputed that water conditions precluded the work.

{¶ 32} Moskal also testified that he asked appellant for his money back. Appellant neither performed under the contract nor paid the money back. Ultimately Moskal had a pole barn built on the property by someone other than appellant.

{¶ 33} Evid.R. 404(B) provides in part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

{¶ 34} In a criminal case, R.C. 2945.59 also permits use of other acts evidence of a defendant which "tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question." The standard for determining admissibility under Evid.R. 404(B) and R.C. 2945.59 is strict. *State v. Broom*, 40 Ohio St.3d 277, 533 N.E.2d 682 (1988), paragraph one of the syllabus.

{¶ 35} In *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, the Ohio Supreme Court directed trial courts to conduct a three-step analysis when considering the admissibility of other acts evidence. *State v. Ridley*, 6th Dist. Lucas No. L–10–1314, 2013-Ohio-1268, ¶ 33. The analysis provides:

> The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts

evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. *See* Evid.R 403. *Williams* at ¶ 20.

{¶ 36} Appellate courts review trial court decisions on the admissibility of other acts evidence under an abuse of discretion standard of review. *State v. Morris*, 132 Ohio St.2d 337, 2012-Ohio-2407, 972 N.E.2d 528, syllabus.

{¶ 37} Appellant argues that the Moskal testimony was not admissible under Evid.R. 404(B) and that the evidence was used to attack his character. Appellant contends that concerns about claimed water problems on the Moskal property distinguishes the Moskal dispute and precludes the other acts evidence from having any probative value on Evid.R. 404(B) issues in this case.

{¶ 38} The state argues that the Moskal dispute was similar in that appellant obtained money for the erection of a steel building, performed no substantial services, and did not refund the money paid. The state argues that the other acts evidence was relevant to prove a common scheme or plan, intent, and lack of mistake.

{¶ 39} Undertaking the required *Williams* analysis, we conclude that the Moskal other acts evidence was relevant in this case to prove plan, intent, and lack of mistake and that the evidence held probative value on those issues. The other acts evidence was not presented to prove the character of appellant but was presented for legitimate purposes under Evid.R. 404(B). We acknowledge that the probative value of the Moskal other acts

evidence is lessened by the existence of a dispute over the effect of water conditions on contract performance, we nevertheless conclude that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice at trial. Accordingly, we conclude that the trial court did not abuse its discretion in admitting the Moskal other acts evidence at trial.

{¶ 40} We find assignments of error Nos. 2 and 3 not well-taken.

{¶ 41} Justice having been afforded the party complaining, we affirm the judgment of the Ottawa County Court of Common Pleas. We order appellant to pay the costs of this appeal, pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE