

[Cite as *State v. Hunt*, 2011-Ohio-4054.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 10AP-618
v.	:	(C.P.C. No. 09CR-09-5599)
	:	
Norman S. Hunt,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on August 16, 2011

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*Ron O'Brien*, Prosecuting Attorney, and *Sarah W. Creedon*,  
for appellee.

*Olivia O. Singletary*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Norman S. Hunt, from a judgment of sentence and conviction entered by the Franklin County Court of Common Pleas following a jury trial in which appellant was found guilty of two counts of robbery.

{¶2} On September 17, 2009, appellant was indicted on two counts of robbery, one in violation of R.C. 2911.02(A)(2), and the other in violation of R.C. 2911.02(A)(3). The indictment arose out of an incident that took place at a Radio Shack store at 2106 N. High Street, Columbus, on September 9, 2009.

{¶3} The matter came for trial before a jury beginning April 12, 2010. The first witness for the state was Alan Goss, a sales associate who was working at the Radio Shack store on September 9, 2009. On that date, an individual, later identified as appellant, entered the Radio Shack and inquired about updating a cell phone plan. Appellant told Goss that he had an account with Radio Shack, but Goss was unable to locate any account information.

{¶4} Appellant then began asking Goss about specific cell phones. Goss became suspicious because appellant kept looking around the store, asking "redundant questions, and [behaving] real nervous[ly] and jittery." (Tr. 39.) Appellant made a comment to Goss regarding three youths in the store at the time, stating: "I bet they're here to steal something." (Tr. 39.) Appellant asked Goss which phone "would cost more." (Tr. 42.) Goss was worried that if he handed appellant a phone "he's running with it." (Tr. 40.)

{¶5} At trial, the state introduced a surveillance video taken from the store. Goss identified appellant on the tape holding a phone. Appellant eventually expressed interest in a particular phone, but Goss did not want to let appellant handle the phone. Appellant continued asking Goss if he could see the phone, but Goss remained suspicious. Appellant and Goss eventually walked toward the front of the store; Goss was holding the phone in his hand, and appellant kept asking the same questions "over and over again." (Tr. 49.) Goss was "bored" by the conversation and looked out the window at a passing car; Goss then saw "a fist coming at me at the side of my head out of the corner of my eyes." (Tr. 49.) Appellant's fist struck Goss on the left cheek, under his eye. Appellant then grabbed the phone from Goss and "was going out of the store with it." (Tr. 50.)

Goss, however, pursued appellant and "got the phone back." (Tr. 50.) Appellant exited the store and walked across the street, "not running but faster than a normal walk." (Tr. 50.) Appellant walked east on Frambes Avenue and went around a corner. Goss then telephoned the police.

{¶6} Police officers arrived at the store within several minutes. A short time later, officers told Goss they had a suspect in custody; the officers drove Goss to Woodruff Avenue, where Goss identified the suspect as his assailant. Goss testified that the individual "was dressed exactly the same, and his face, it was him without question." (Tr. 54.)

{¶7} Eric Peterson, a part-time employee at Radio Shack, was working at the store on September 9, 2009. Peterson observed Goss and a customer talking about a cell phone sale that day. Later, Peterson heard a commotion, and he turned and saw Goss "raising up." (Tr. 85.) Goss then grabbed a cell phone out of the customer's hand and told the man to leave the store. (Tr. 85.) The man exited the store and walked south on High Street.

{¶8} On September 9, 2009, at approximately 2:30 p.m., Columbus Police Officer Kris Klein was on duty when he received a dispatch regarding an incident at the Radio Shack store on North High Street. As Officer Klein was en route to the store, an individual flagged him down and gave him a description of a suspect. Officer Klein detained an individual at the intersection of Pearl Street and Woodruff Avenue, and placed him in the cruiser. Another officer subsequently brought a witness to the scene, and the witness gave a positive identification of the suspect. While inside the cruiser, the suspect asked the officer "if this was the incident about the Radio Shack." (Tr. 108.)

Officer Klein testified: "I didn't respond to anything, and then he responded that he ended up punching the witness at the Radio Shack, and I still did not respond to anything." (Tr. 108-09.)

{¶9} Columbus Police Detective Phillip Thomas conducted an investigation of the incident and interviewed various individuals, including appellant. Appellant told the detective that he had been in the Radio Shack store three or four days earlier with his grandson, and that an individual made some sort of racial remark. Appellant left the store after hearing the remark. On September 9, appellant returned to the store and interacted with the same store employee; appellant told the detective that he punched him in response to the comment made a few days earlier. After the interview, appellant was charged with robbery.

{¶10} Following deliberations, the jury returned verdicts finding appellant guilty of both counts of robbery. By judgment entry filed June 18, 2010, the trial court sentenced appellant to four years imprisonment on each count, to run concurrent with each other.

{¶11} On appeal, appellant sets forth the following two assignments of error for this court's review:

I. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT ON THE CHARGE OF ROBBERY WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION AND THE CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE WHEN THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT COMMITTED A THEFT.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT SENTENCED APPELLANT TO MULTIPLE SENTENCES FOR ALLIED OFFENSES OF SIMILAR IMPORT COMMITTED WITH A SINGLE ANIMUS, IN VIOLATION OF R.C. § 2941.25.

{¶12} Under his first assignment of error, appellant challenges both the sufficiency of the evidence to support his convictions as well as the manifest weight of the evidence. With respect to the sufficiency of the evidence, appellant contends that the state failed to prove beyond a reasonable doubt all the elements of "theft." In his manifest weight challenge, appellant argues that the state's primary witness gave conflicting testimony.

{¶13} Sufficiency of the evidence and weight of the evidence are distinct legal concepts. *State v. Stone*, 1st Dist. No. C-040817, 2006-Ohio-1375, ¶10. In *State v. Sexton*, 10th Dist. No. 01AP-398, 2002-Ohio-3617, ¶¶30-31, this court discussed those distinctions as follows:

To reverse a conviction because of insufficient evidence, we must determine as a matter of law, after viewing the evidence in a light most favorable to the prosecution, that a rational trier of fact could not have found the essential elements of the crime proved beyond a reasonable doubt. \* \* \* Sufficiency is a test of adequacy, a question of law. \* \* \* We will not disturb a jury's verdict unless we find that reasonable minds could not reach the conclusion the jury reached as the trier of fact. \* \* \* We will neither resolve evidentiary conflicts in the defendant's favor nor substitute our assessment of the credibility of the witnesses for the assessment made by the jury. \* \* \* A conviction based upon legally insufficient evidence amounts to a denial of due process, \* \* \* and if we sustain appellant's insufficient evidence claim, the state will be barred from retrying appellant. \* \* \*

A manifest weight argument, by contrast, requires us to engage in a limited weighing of the evidence to determine whether there is enough competent, credible evidence so as to permit reasonable minds to find guilt beyond a reasonable doubt and, thereby, to support the judgment of conviction. \* \* \* Issues of witness credibility and concerning the weight to attach to specific testimony remain primarily within the province of the trier of fact, whose opportunity to make those determinations is superior to that of a reviewing court. \* \* \* Nonetheless, we must review the entire record. With caution and deference to the role of the trier of fact, this court weighs the evidence and all reasonable inferences, considers the

credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the jury, as the trier of facts, clearly lost its way, thereby creating such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against a conviction. \* \* \*

{¶14} As noted, appellant was found guilty of robbery as defined under R.C. 2911.02(A)(2) and (3). Pursuant to R.C. 2911.02(A)(2), "[n]o person, in attempting or committing a theft offense \* \* \* shall \* \* \* [i]nflict, attempt to inflict, or threaten to inflict physical harm on another." R.C. 2911.02(A)(3) proscribes the use of force, or the threat of immediate use of force, against another in attempting or committing a theft offense or in fleeing immediately after the attempt or offense.

{¶15} A theft offense occurs when a person, "with purpose to deprive the owner of property," knowingly obtains or exerts control over the property "[w]ithout the consent of the owner or person authorized to give consent." R.C. 2913.02(A)(1). Pursuant to R.C. 2913.01(C), "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."

{¶16} R.C. 2923.02(A) defines "attempt" as follows: "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense." The Supreme Court of Ohio has "elaborated on the statutory definition as follows: 'A "criminal attempt" is when one purposely does or omits to do anything which is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.' " *State v. Group*, 98 Ohio St.3d 248, 2002-

Ohio-7247, ¶95, quoting *State v. Woods* (1976), 48 Ohio St.2d 127, paragraph one of the syllabus.

{¶17} In challenging the sufficiency of the evidence, appellant argues that the record fails to contain testimony that he deprived Radio Shack of any property permanently or for a period that appropriates a substantial portion of value. Appellant does not dispute that there was testimony to show that he punched Goss; appellant maintains, however, that grabbing an item out of someone's hand does not automatically constitute theft or attempted theft. At most, appellant contends, the prosecution proved an assault on Goss.

{¶18} Construing the evidence in a light most favorable to the state, as we are required to do in considering a sufficiency argument, the record indicates that appellant entered the Radio Shack store and asked a sales associate, Goss, about cell phones, including which phone was the most expensive. Goss became suspicious of appellant's behavior and did not want to hand appellant a particular phone. After repeatedly asking to hold the phone, appellant struck Goss on the side of the face, grabbed the phone from him, and began to exit the store. Goss, however, was able to regain possession of the phone.

{¶19} Here, the jury could have reasonably concluded that appellant's act of striking Goss, grabbing the phone, and starting to leave the store with the phone constituted an attempt to permanently deprive Radio Shack of property. The fact that appellant only had the phone momentarily before Goss was able to retrieve it does not negate the inference that appellant intended to permanently deprive the store of property; rather, the facts and circumstances support a reasonable inference that, had appellant

been successful in his actions, he would have left the store with the phone. Upon review, the evidence was sufficient for the jury to find proof of guilt beyond a reasonable doubt as to the elements of the robbery offenses.

{¶20} In his manifest weight challenge, appellant first asserts the jury was given conflicting accounts. Specifically, appellant argues that Goss acknowledged writing out a statement in which he indicated that he tackled appellant and grabbed the phone out of his hand. Appellant contends, however, that Goss downplayed his description of "tackling" appellant during his trial testimony.

{¶21} While appellant maintains Goss gave conflicting accounts, we note that defense counsel cross-examined the witness about these potential discrepancies. Specifically, counsel questioned Goss about a police statement in which Goss indicated that he "tackled him and somehow got the phone out of his hand." (Tr. 71.) During cross-examination, Goss explained: "I didn't knock the guy on the ground. I just kind of grabbed him and got the phone back." (Tr. 71.) Goss further elaborated: "I didn't tackle the guy, tackling in the sense of football, \* \* \* no. I grabbed the phone back out of his hands, and then he left the store." (Tr. 72.)

{¶22} Thus, the record indicates that the purported inconsistency was brought to the jury's attention, and Goss explained that he "grabbed him and got the phone back," but did not knock appellant to the ground. Here, " '[t]he jury was free to believe all, part, or none of the testimony of each witness.' " *State v. Dillon*, 10th Dist. No. 04AP-1211, 2005-Ohio-4124, ¶20, quoting *State v. Colvin*, 10th Dist. No. 04AP-421, 2005-Ohio-1448, ¶34. Further, "[a]ny weight to be given to alleged inconsistencies in the witnesses' testimony were determinations within the province of the jury, and such inconsistencies

do not render a conviction against the manifest weight of the evidence." *Dillon* at ¶20. See also *State v. Nivens* (May 28, 1996), 10th Dist. No. 95APA09-1236 ("[w]hile the jury may take note of the inconsistencies and resolve or discount them accordingly, \* \* \* such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence").

{¶23} Appellant also points to a different plausible explanation for the incident through a statement he made to a detective during an interview. Specifically, Detective Thomas testified that appellant related that he punched Goss because the sales associate had made a racial remark four days earlier when appellant was in the store with his grandson. The trier of fact, however, was in the best position to assess all the evidence, including both appellant's statement and the testimony of the state's witnesses, and to weigh the credibility of that testimony, and the jury was not required to credit appellant's self-serving statement to the detective. Upon review, we conclude that the jury, in resolving the conflicts in the evidence, did not lose its way and create a manifest miscarriage of justice so as to require a new trial.

{¶24} Based upon the foregoing, appellant's first assignment of error is not well-taken and is overruled.

{¶25} Under his second assignment of error, appellant argues that the trial court committed error in sentencing him on two counts of robbery for allied offenses of similar import committed with a single animus. Appellant argues that the indictment for each count was based upon the same set of facts, and that Counts 1 and 2 are so similar as to be indistinguishable.

{¶26} We note that, during the sentencing hearing, the trial court indicated that "Counts One and Two will merge \* \* \* as one." (May 13, 2010 Tr. at 18.) In the trial court's sentencing entry, however, the court imposed a sentence of "FOUR (4) YEARS AS TO COUNT ONE AND FOUR (4) YEARS AS TO COUNT TWO, TO RUN CONCURRENT WITH EACH OTHER."

{¶27} The state concedes that appellant's separate convictions for robbery arose out of a single criminal act, and that the trial court's failure to merge the two robbery convictions at sentencing constitutes plain error. The state thus acknowledges that this matter should be remanded to the trial court for a new sentencing hearing. See *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶25 ("[i]f \* \* \* a court of appeals finds reversible error in the imposition of multiple punishments for allied offenses, the court must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant").

{¶28} Upon review, we agree that the trial court committed plain error when it failed to merge the robbery convictions. We therefore sustain the second assignment of error, and remand this matter to the trial court for the limited purpose of resentencing.

{¶29} Based upon the foregoing, appellant's first assignment of error is overruled, the second assignment of error is sustained, the judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and this matter is remanded to the trial court for a new sentencing hearing to allow the merger of the robbery offenses.

*Judgment affirmed in part and reversed in part;  
cause remanded with instructions.*

KLATT and SADLER, JJ., concur.

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