[Cite as *State v. Flachbart,* 2009-Ohio-5063.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-011**
- vs -	:	
RANDY A. FLACHBART,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 08 CR 000670.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Randy A. Flachbart, appeals the judgment of the Lake County Court of Common Pleas, finding him guilty of two counts of Complicity to Theft and sentencing him to an eleven-month prison sentence. For the following reasons, we affirm the decision of the court below.

{¶2} On November 10, 2008, Flachbart was indicted by the Lake County Grand Jury on one count of Complicity to Theft, a felony of the fifth degree in violation of R.C. 2923.03(A)(1), i.e. that Flachbart "did knowingly solicit or procure another to commit Theft," and on one count of Complicity to Theft, a felony of the fifth degree in violation of R.C. 2923.03(A)(2), i.e. that Flachbart "did knowingly aid or abet another in committing Theft."

{¶3} On November 18 and 19, 2008, Flachbart was tried before a jury on these charges.

{¶4} The State's first witness at trial was Misael Villanueva, an employee of Wal-Mart in Eastlake, Ohio, in the asset protection department. Villanueva testified that on March 11, 2008, he observed Flachbart and a woman, Jessica DeFranco, in the health and beauty department. The woman was carrying a plastic Wal-Mart shopping basket with twelve DVDs of only two movies, Bee Movie and Hitman. The basket was also full to overflowing with several brands of disposable razors. When some of the razors fell to the floor, DeFranco handed the basket to Flachbart while she picked up the razors and returned some of them to the basket and others to a canvas Wal-Mart shopping bag. According to Villanueva, selecting multiple copies of the same movie is considered suspicious behavior.

{¶5} Villanueva testified that he observed Flachbart and DeFranco walk to the pet department. There, DeFranco transferred the items from the basket to the bag while Flachbart "turned around and *** was looking *** for customers or people to come while she completed her concealment with everything in the bag."

{¶6} Villanueva testified that DeFranco left the empty basket in the aisleway and left the store accompanied by Flachbart. Villanueva approached them outside the store and described what happened as follows: "Once I introduced myself, I said, 'I am store security,' [DeFranco] started running and [Flachbart] was telling her, 'Run Jessica. Run, Jessica.' I finally caught up to her in the parking lot and she started struggling, she started being combative. So I finally grabbed the bag. [Flachbart] came to the spot where I was at and [DeFranco] wanted to leave and she wanted the keys and I was telling [Flachbart], 'Don't give her the keys, the cops are on the way.' Finally, he got in the driver['s] side and the next thing I knew he punched the gas and I was right behind the truck and he almost hit me with the truck."

{¶7} While these events were occurring, Villanueva was talking to 9-1-1. At trial, the State played a recording of the 9-1-1 call in which Villanueva is heard telling Flachbart not to give DeFranco the keys and to stay where he was. Flachbart is heard saying that he has not done anything.

{¶8} Villanueva testified that the value of the merchandise taken from the store was $916.53.

{¶9} Patrolman Tim Hauser of the Eastlake Police Department testified that he received a dispatch "for a shoplifting in progress." Based on Villanueva's description of Flachbart's vehicle, Hauser stopped a blue Ford Bronco travelling westbound on State Route 2. Thereupon, he arrested Flachbart and DeFranco.

{¶10} DeFranco testified on behalf of Flachbart. She testified that, at the time of the shoplifting episode at Wal-Mart, she was a heroin addict. She said she manipulated

Flachbart into taking her to Wal-Mart by telling him she needed things for her children and by promising him that she would not steal anything.

{¶11} Contrary to Villanueva's testimony, DeFranco testified that Flachbart was still in the store when she was confronted in the parking lot. When he did leave the store, Flachbart asked Villanueva if he was in "any trouble" or "being held" and Villanueva responded, "no."

{¶12} Flachbart took the stand and testified that he brought DeFranco, his girlfriend, to the Wal-Mart on the day in question, but that she promised she would not steal anything. Flachbart testified that they entered and exited the store separately and were never together while inside the store. Inside, Flachbart only went to the electronics department to look for a power cord for a Game Boy.

{¶13} Flachbart testified that when he left the store he found DeFranco and Villanueva in the parking lot. According to Flachbart, Villanueva told him not to leave or give her the keys but that he was not being detained. Flachbart admitted unlocking the door for DeFranco. Flachbart testified he told Villanueva that if he wanted DeFranco, he should come take her out of the truck. Since he had done nothing wrong and Villanueva had recovered the merchandise and had not attempted to remove DeFranco from the truck, Flachbart believed he was able to leave without waiting for the police to arrive.

{¶14} The jury found Flachbart guilty of both counts of Complicity to Theft.

{¶15} On December 22, 2008, a sentencing hearing was held. The court sentenced Flachbart to serve an eleven-month prison term for the first count of Complicity to Theft and merged the second count with the first, for purposes of

sentencing. On December 29, 2008, the court's Judgment Entry of Sentence was journalized.

{¶16} On January 22, 2009, Flachbart filed his Notice of Appeal.

{¶17} On appeal, Flachbart raises the following assignment of error: "The trial court erred to the prejudice of the defendant-appellant when it returned a verdict of guilty against the manifest weight of the evidence."

{¶18} A challenge to the manifest weight of the evidence involves factual issues. The "weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶25 (citation omitted); *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52 ("[w]eight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial'") (emphasis sic) (citation omitted). "In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's?" *Wilson*, 2007-Ohio-2202, at ¶25.

{¶19} "The [appellate] 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 a new trial ordered." *Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. "[T]he weight to be given to the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, at syllabus; *State v. Thomas* (1982), 70 Ohio St.2d 79, at the syllabus. However, when considering a weight of the evidence argument, a reviewing court "sits as a 'thirteenth juror'" and may "disagree[] with the factfinder's resolution of the conflicting

testimony." *Thompkins*, 78 Ohio St.3d at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42. "The only special deference given in a manifest-weight review attaches to the conclusion reached by the trier of fact." Id. at 390 (Cook, J., concurring opinion).

{¶20} Flachbart does not dispute that the testimony of Wal-Mart's security guard, Villanueva, is sufficient to prove the charges against him, i.e. that he knowingly solicited, procured, or aided and abetted DeFranco in her Theft. Rather, he contends Villanueva's testimony was "unreliable, uncertain, fragmentary, incredible and self-serving."

{¶21} Flachbart notes that Villanueva's testimony was contradicted by his own and DeFranco's testimony. Flachbart and DeFranco's testimony was consistent on the following salient points: that DeFranco promised Flachbart she would not steal anything and that they were never together while inside the store. Flachbart comments that, if he were watching for people while DeFranco concealed the merchandise as Villanueva claimed, he would have noticed Villanueva's surveillance. Flachbart notes there was no physical evidence to support Villanueva's testimony or other witnesses to his involvement in DeFranco's shoplifting. Finally, Flachbart speculates that Villanueva's testimony was motivated by his "frustration" with Flachbart on account of his "mistaken" belief that Flachbart tried to hit him with his vehicle when leaving the parking lot.

{¶22} The arguments presented by Flachbart as to why his testimony is more credible than that of the State is not compelling. Flachbart and DeFranco's testimony was consistent, but there were several reasons why DeFranco might try to protect Flachbart. DeFranco had already been convicted and sentenced for her role in the shoplifting. Flachbart described DeFranco as his girlfriend, whom he visited while she

was serving her jail sentence and whom he might marry one day. Villanueva has eight years of experience in asset loss prevention. It is not incredible that he could observe Flachbart and DeFranco without being noticed.

{¶23} Flachbart and DeFranco's testimony is impeached by the 9-1-1 tape played at trial. They testified that Villanueva told Flachbart that he was not being detained or being held. On the tape, however, Villanueva is heard telling Flachbart, "You stay there. You're going to jail, sir." Flachbart professed to being concerned about the possibility of DeFranco shoplifting. Yet, when confronted by this fact, by his own admission Flachbart unlocked his vehicle for her and drove her away from the store. This conduct is more probative of Flachbart's complicity in the crime than an honest desire to prevent its occurrence.

{¶24} The fact that the jury found the State's evidence more credible in the present case did not result in a miscarriage of justice. The sole assignment of error is without merit.

{¶25} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas, finding Flachbart guilty on two counts of Complicity to Theft, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.