

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-L-034
CATHY M. URBANCIC,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 09 CR 000150.

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).

Concetta F. Grimm, 11455 Rust Drive, Chesterland, OH 44026 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Cathy Urbancic, appeals her convictions for Theft and Tampering With Records, following a jury trial in the Lake County Court of Common Pleas. Urbancic was sentenced to ninety days of jail, four years of probation, and to pay \$900 restitution to the victim. For the following reasons, we affirm the decision of the court below.

{¶2} On July 23, 2009, Urbancic was indicted by the Lake County Grand Jury on two counts of Grand Theft, felonies of the fourth degree, in violation of R.C.

2913.02(A)(1), and two counts of Tampering With Records, felonies of the third degree, in violation of R.C. 2913.42(A)(1). On one count of Grand Theft, the grand jury found that the amount stolen was \$7,236.97 and on the second count, the amount was \$5,943.20.

{¶3} The case was tried before a jury, commencing on January 11, 2010.

{¶4} Mentor Police Department Detective Eric Kupchik testified that the Mentor Police Department was contacted on August 20, 2008, by M.C. Mobility Systems (M.C. Mobility), a company with its corporate office located in Mentor, about a possible theft of money by an employee. In September of 2008, Detective Kupchik requested M.C. Mobility to provide documentation of the theft in order to conduct an investigation. On November 11, 2008, Kupchik received various records from M.C. Mobility, including bank statements and customer invoices, indicating that money was missing. Kupchik determined, based on these records and other information provided by M.C. Mobility employees, that Urbancic was a suspect for theft of the money from M.C. Mobility.

{¶5} Mary Ward, a certified public accountant and the controller for M.C. Mobility, performed duties such as overseeing the bookkeeping for M.C. Mobility, completing budgets and tax returns, and preparing monthly financial statements. Ward testified that Urbancic had been a bookkeeper for M.C. Mobility since 2005 and her duties included handling accounts payable and accounts receivable. During Ward's testimony, the State introduced various documents into evidence, including M.C. Mobility's computer accounting records, customer invoices, reconciliation statements, and M.C. Mobility's bank account statements. These documents were described throughout Ward's testimony.

{¶6} Ward testified that Urbancic received customer payments, used a computer program to record payments to the customer accounts, and prepared bank deposits. Upon receiving payment, Urbancic stamped a customer invoice as paid, entered M.C. Mobility's computer system, and recorded the type of payment (cash, check, or credit card), and the amount paid. If a check payment was made, the check number was to be recorded. If a credit card payment was made, the credit card number was to be recorded. After recording such payments, Urbancic prepared a deposit report of the amount to be deposited into M.C. Mobility's bank account. If the deposit was paid by credit card, Urbancic used a credit card machine located at the M.C. Mobility office and the money was automatically deposited into M.C. Mobility's bank account. Similarly, if payment was made by check, Urbancic performed the bank deposit herself, using a bank deposit machine located at M.C. Mobility's office. If the deposit involved cash, Urbancic prepared a bank deposit report and M.C. Mobility president, Carmen Paterniti, typically took the cash to the bank to deposit. On some occasions, Paterniti's son, C.J., or Urbancic took the cash to the bank. Upon depositing the amount, Paterniti or the other individual received a bank deposit slip, which was returned to Urbancic. Urbancic then attached the deposit slip to the bank deposit report and placed it in the customer's file.

{¶7} Aside from this work, Urbancic also created bank reconciliation reports each month. Ward testified that Urbancic was the only person in the office who did so. These reconciliations involved comparing monthly bank statements with M.C. Mobility's records to ensure that each amount recorded by Urbancic into the computer system had been deposited into M.C. Mobility's bank account.

{¶8} Ward testified that she did not actually see Urbancic take any money. However, Ward testified that Urbancic “handled all the customer payments” and that it was her job to receive payments. Ward stated that Urbancic was also the “only person that inputted cash payments” into the computer accounting system. Ward also testified that Urbancic worked late on most days, worked on weekends, and never took a vacation, so no one else handled these duties. According to Ward, M.C. Mobility hired a certified public accountant, Dawn Opara, to take over Urbancic’s accounting duties, such as accounts receivable, so Urbancic could do other duties such as traveling to other M.C. Mobility store locations. Ward testified that Opara never actually performed these tasks because Urbancic refused to delegate her accounting duties to Opara. On several occasions, Ward and Paterniti had meetings with Urbancic, asking her to delegate her duties of receiving and preparing deposits to Opara. On July 30, 2008, Paterniti decided to terminate Urbancic’s employment because of her refusal to delegate these duties.

{¶9} After Urbancic was terminated, Ward began to reconcile the company’s accounts. She determined that multiple amounts of money had been entered into M.C. Mobility’s system as having been paid by the customer to M.C. Mobility; however, this money was not ultimately deposited into M.C. Mobility’s bank account.

{¶10} Ward explained that a pattern existed surrounding the amounts of missing money. First, these amounts were entered into M.C. Mobility’s computer accounting system, but were not deposited into M.C. Mobility’s bank account. Forty-three of the forty-nine missing customer payments were entered into the computer system as “Check Number 1,” implying that the amounts were paid with a check that was

numbered one in the right-hand corner. However, Ward found no checks or cancelled checks in the paperwork surrounding these transactions. Ward checked Urbancic's desk for any missing checks or money, but was unable to find any. Ward concluded that the allegedly stolen amounts must have actually been paid by the customer in cash form and not check form for several reasons. First, no checks relating to these transactions were ever found. Additionally, on several customer invoices, an employee had recorded that the customer paid in cash, but in the computer system the payment was entered as "Check Number 1." On many of the other invoices, there simply was no notation as to whether the payment was in check or cash form.

{¶11} Ward testified that many of the invoices had a date written on them indicating the date on which the payment was received. Ward stated that although she did not see Urbancic actually receive the money, the date written on the invoices, marked as paid, was in Urbancic's writing. Ward also testified that it was Urbancic's job to receive money and no one else was to receive or record the money into the system.

{¶12} After discovering that money was missing, Ward looked at past reconciliations performed by Urbancic. In these reconciliations, Urbancic had checked certain amounts as having "cleared," meaning that they had shown up on the bank statements as deposited. However, Ward discovered that although Urbancic marked these amounts as having cleared, the money had not actually been deposited into M.C. Mobility's account. The State introduced M.C. Mobility's bank statements as well as Urbancic's reconciliation reports as evidence of this.

{¶13} Dawn Opara, a certified public accountant, was an employee of M.C. Mobility from November of 2007 through July of 2008. She stated that she was hired to

manage accounts payable and accounts receivable and Urbancic was to give up those duties in order to travel between M.C. Mobility store locations throughout the state. Opara testified that during her employment with M.C. Mobility, she never handled customer payments made in cash because Urbancic never allowed her to do so. She stated that Urbancic never gave her any work to do involving accounting or handling deposits from customers. Opara also testified that Urbancic was typically still working when Opara left for the day.

{¶14} Suzanne Ledford, an employee of M.C. Mobility from May of 2006 until present, testified that she does bookkeeping and title processing for M.C. Mobility. Ledford testified that while Urbancic worked at M.C. Mobility, Urbancic did not allow Ledford to handle any money. Ledford stated that Urbancic handled all cash payments received from customers. Ledford testified that Urbancic was always at the office late, worked on Saturdays, and did not take vacations. According to Ledford, Urbancic kept the cash from customer transactions in her desk drawer prior to the money being deposited in the bank.

{¶15} Linda Tyler, the current bookkeeper of M.C. Mobility, who previously worked as a bookkeeper for D&S Automotive, a company located in the same building as M.C. Mobility, testified that Urbancic often worked late hours and on weekends. Tyler also testified that Urbancic would not allow Tyler to help her with any of her work.

{¶16} Carmen Paterniti, M.C. Mobility's president, testified that Opara was hired to work on accounts receivable and other accounting matters so that Urbancic could travel between stores and take on other responsibilities. Paterniti stated that Urbancic "kept saying [Opara] wasn't qualified, kept taking work away from [Opara]" and wanted

to remain in “control” of accounting matters. Paterniti testified that he fired Urbancic because she would not delegate her duties to other employees as requested and “was chasing all of the good people out of [M.C. Mobility].”

{¶17} Paterniti testified that he had not seen Urbancic steal any money. He stated that he had witnessed one transaction where Urbancic received money that was not later deposited into M.C. Mobility’s bank account. An M.C. Mobility employee, Steve Holva, purchased a vehicle from the company. Paterniti testified that he personally witnessed Holva giving a \$900 cash payment to Urbancic. Paterniti further stated that the bank records show that the \$900 was never deposited into M.C. Mobility’s bank account.

{¶18} Upon the conclusion of the State’s case, Urbancic moved for acquittal pursuant to Crim.R. 29. The court denied this motion.

{¶19} On January 14, 2010, the jury found Urbancic guilty of the lesser included offenses of one count of Theft, a felony of the fifth degree, and one count of Tampering With Records, a felony of the fifth degree.

{¶20} On February 24, 2010, a sentencing hearing was held. At the conclusion of the hearing, the trial court sentenced Urbancic to ninety days of jail, four years of probation, and required her to complete 200 hours of community service. The court also ordered that Urbancic pay \$900 in restitution to the victim, M.C. Mobility, based on the jury’s statement that it had found that Urbancic stole \$900 from M.C. Mobility.

{¶21} Urbancic filed a Motion for Leave to Appeal and her Notice of Appeal on April 21, 2010. This court granted Urbancic’s Motion for her delayed appeal.

{¶22} On appeal, Urbancic raises the following assignments of error:

{¶23} “[1.] The trial court erred to the prejudice of the defendant-appellant when it denied her motion for acquittal made pursuant to Crim.R. 29(A).

{¶24} “[2.] 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.”

{¶25} The Ohio Rules of Criminal Procedure provide that a defendant may move the trial court for a judgment of acquittal “if the evidence is insufficient to sustain a conviction.” Crim.R. 29(A). “[S]ufficiency’ is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury,” i.e. “whether the evidence is legally sufficient to support the jury verdict as a matter of law.” *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, quoting Black’s Law Dictionary (6 Ed.1990), 1433. Essentially, “sufficiency is a test of adequacy,” that challenges whether the state’s evidence has created an issue for the jury to decide regarding each element of the offense. *Id.*

{¶26} “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.” *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 319. In reviewing the sufficiency of the evidence to support a criminal conviction, “[t]he 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.*

{¶27} Weight of the evidence, in contrast to its sufficiency, involves “the inclination of the greater amount of credible evidence.” *Thompkins*, 78 Ohio St.3d at 387 (citation omitted) (emphasis omitted). Whereas the “sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support the verdict as a matter of law, *** 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). “In other words, a reviewing court asks whose evidence is more persuasive -- the state’s or the defendant’s?” *Id.*

{¶28} Generally, the weight to be given to the evidence and the credibility of the witnesses is primarily for the trier of fact to determine. *State v. Thomas* (1982), 70 Ohio St.2d 79, at the syllabus. When reviewing a manifest weight challenge, however, the appellate court sits as the “thirteenth juror.” *Thompkins*, 78 Ohio St.3d at 387 (citation omitted). The reviewing court must consider all the evidence in the record, the reasonable inferences, and the credibility of the witnesses, to determine 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶29} In order to convict Urbancic of Theft, the State had to prove, beyond a reasonable doubt, that Urbancic, “with purpose to deprive the owner of property or services, *** knowingly obtain[ed] or exert[ed] control over either the property or

services *** [w]ithout the consent of the owner or person authorized to give consent.”
R.C. 2913.02(A)(1).

{¶30} With respect to Tampering With Records, the State was required to prove, beyond a reasonable doubt, that Urbancic, knowing she had no privilege to do so and with the purpose to defraud or knowing that she was facilitating a fraud, did “[f]alsify, destroy, remove, conceal, alter, deface, or mutilate any writing, computer software, data, or record.” R.C. 2913.42(A)(1).

{¶31} Since both assignments of error raise challenges to the sufficiency and/or manifest weight of the evidence supporting Urbancic’s convictions, we will address them jointly.

{¶32} Urbancic challenges her convictions for Theft and Tampering With Records as not supported by legally sufficient evidence and argues that the convictions are against the manifest weight of the evidence. Regarding the Theft conviction, Urbancic argues that the State failed to present sufficient evidence, and that the jury was without the greater amount of credible evidence to find, that cash was the form of payment made and that Urbancic took any money at all. Urbancic first argues that the evidence presented required the factfinder to engage in “an impermissible stacking of inference upon inference” to find Urbancic guilty.

{¶33} “Circumstantial evidence has been characterized as the ‘proof of facts by direct evidence from which the trier of fact may infer or derive by reasoning other facts in accordance with the common experience of mankind.’” *State v. Rodgers*, 11th Dist. No. 2007-T-0003, 2008-Ohio-2757, at ¶34, citing *State v. Silverman*, 10th Dist. Nos. 05AP-837, 05AP-838 and 05AP-839, 2006-Ohio-3826, at ¶102. “It is well-settled that

‘[d]irect evidence, circumstantial evidence, or both may establish an element of the charged offense.’” *State v. Griesmar*, 11th Dist. No. 2009-L-061, 2010-Ohio-824, at ¶50 (citations omitted). “Circumstantial evidence and direct evidence inherently possess the same probative value.” *Jenks*, 61 Ohio St.3d 259, at paragraph one of the syllabus.

{¶34} “While ‘inferences cannot be built upon inferences, several conclusions may be drawn from the same set of facts.’” *Sanders*, 2008-Ohio-6771, at ¶53, citing *State v. Grant*, 67 Ohio St.3d 465, 478, 1993-Ohio-171 (citation omitted). An “inference *** based in part upon another inference and in part upon facts is a parallel inference and, if reasonable, may be indulged in [by a jury].” *State v. Cowans*, 87 Ohio St.3d 68, 78, 1999-Ohio-250, citing *Hurt v. Charles J. Rogers Transp. Co.* (1955), 164 Ohio St. 329, at paragraph two of the syllabus.

{¶35} Although some of the case against Urbancic may have required the jury to make inferences, the jury’s finding that Urbancic was guilty was not against the manifest weight of the evidence. The State presented the testimony of essentially all employees who worked on accounting or related matters at M.C. Mobility during the time period the money was taken. Each testified that they did not work on accounts receivable and did not receive money from customers on any occasion. Several testified that only Urbancic received money and only Urbancic entered the payment information into the computer. Ward, who was familiar with Urbancic’s handwriting, also testified that as to several of the missing sums of money, she saw Urbancic’s handwritten date on the receipt, indicating she had received the receipt and payment. Also, Paterniti testified that he saw Urbancic receive a \$900 cash payment. Since the jury disclosed for the purposes of restitution payment that it found Urbancic stole \$900, the jury was not

inferring that Urbancic received cash. They were relying on the testimony of a witness who saw Urbancic receive the payment. Although the evidence presented may have required the jury to make some inferences, the inferences were not built on each other but instead simply came from the same set of facts. The jury did not lose its way when finding that Urbancic received cash payments from customers and ultimately stole those payments from M.C. Mobility. See *State v. Powers*, 12th Dist. No. CA2008-06-071, 2009-Ohio-2625, at ¶41 (where, although no one saw defendant steal money, circumstantial evidence of a “complex scheme” to cover up missing money was presented, defendant’s conviction for Grant Theft was not against the manifest weight of the evidence.)

{¶36} Additionally, there was sufficient evidence to support a conviction for Theft. As outlined above, the State presented the jury with testimony and evidence supporting each element of the crime of Theft. Specifically, testimony showed that Urbancic was the only one who received payments from the customers. Additionally, Paterniti’s testimony, along with the exhibits admitted into evidence, show that cash payment was received, Urbancic was the person who would receive such payment, and that the payment was not deposited in M.C. Mobility’s bank account. After viewing all of the foregoing evidence and testimony in a light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime of Theft proven beyond a reasonable doubt.

{¶37} Urbancic also argues that the jury had to rely mainly on Ward’s testimony and inferences in order to reach its verdict.

{¶38} When examining witness credibility, “[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact.” *State v. Awan* (1986), 22 Ohio St.3d 120, 123. The factfinder may believe all, some, or none of the testimony of each witness appearing before it. *State v. Brown*, 11th Dist. No. 2002-T-0077, 2003-Ohio-7183, at ¶53 (citation omitted).

{¶39} While much of the State’s case was dependent upon Ward’s testimony, it is not for this court to determine whether Ward was a credible witness. The jury, as the factfinder, was within its rights to determine how much weight to give to Ward’s testimony and to rely on her observations and conclusions.

{¶40} Regarding Urbancic’s conviction for Tampering With Records, Urbancic asserts that there was not sufficient evidence and it was against the manifest weight of the evidence to find that Urbancic input the records in question, that she was without privilege to do so, and that she acted with a fraudulent purpose.

{¶41} At trial, testimony was presented of virtually every other M.C. Mobility office employee that worked for M.C. Mobility during Urbancic’s employment, they did not input account information into the computer and that Urbancic was the only person to do so. All of the testimony offered at trial pointed to Urbancic entering the information, as every other person stated that they did not do so. Additionally, invoices for several of the amounts of missing money had been written on by Urbancic, indicating that she had received the money. Ward testified that after Urbancic received money, she was to enter the payment information into the computer system. An employee who was not in possession of the money and the customer invoice would not

know the customer information and would be unable to enter such information into the computer system. Only Urbancic was in the position to enter many of the transactions into the computer system.

{¶42} Regarding the issue of whether the evidence showed that Urbancic had a fraudulent purpose, the testimony presented showed that the sole purpose of altering the records was to hide the fact that the missing money had not been deposited into M.C. Mobility's account. Ward testified that "Check Number 1" was entered into the system so it would appear as though Urbancic deposited the money using M.C. Mobility's check machine. This would hide the fact that a cash payment had occurred but had not been deposited into M.C. Mobility's bank account. The exhibits introduced by the State showed that several payments entered into the system as "Check Number 1" were actually cash payments, supporting Ward's testimony. Additionally, Ward testified that in performing the bank reconciliation, Urbancic checked off the missing amounts as having cleared the bank when the bank statement showed that the amounts had never been deposited. Ward also testified that Urbancic did not have permission to check off amounts as having cleared the bank when they had not cleared, nor was Urbancic allowed to enter amounts into the system as "Check Number 1" when the amounts were actually paid with cash. In the instance of the \$900 amount, Paterniti witnessed Urbancic receive cash, yet the amount was entered into the computer system as "Check Number 1." In light of this evidence, the jury did not clearly lose its way when finding Urbancic guilty of Tampering With Records. Additionally, as the foregoing facts show, the State was able to prove each element of the crime of Tampering With

Records and a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

{¶43} After careful review of the entire record, weighing the evidence and all reasonable inferences and considering the credibility of the witnesses, this court cannot conclude that the jury clearly lost its way when it found Urbancic guilty of Theft and Tampering With Records. The jury was in the best position to evaluate the credibility of the witnesses and give proper weight to their testimony. Power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *State v. Wynder*, 11th Dist. No. 2001-A-0063, 2003-Ohio-5978, at ¶23. Under the circumstances of the instant case, we see no reason to substitute our judgment for that of the jury. Additionally, as the State provided evidence that was sufficient to support the elements of each crime, a reasonable jury could have found Urbancic guilty of Theft and Tampering With Records.

{¶44} Urbancic's first and second assignments of error are without merit.

{¶45} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas, finding Urbancic guilty of Theft and Tampering With Records is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.