[Cite as *State v. Pruitt*, 2012-Ohio-1134.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-T-0047**
- vs -	:	
NIKEISHA PRUITT,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2010 CR 00125.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Matthew M. Nee, The Law Office of Matthew M. Nee, 1956 West 25th Street, Suite 302, Cleveland, OH 44113 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Nikeisha Pruitt, appeals from the judgment of the Trumbull County Court of Common Pleas, finding her guilty of Robbery and Tampering With Evidence. The issue to be decided by this court is whether choking constitutes physical harm for the purposes of Robbery and whether removing stolen merchandise from the scene of a Robbery incident constitutes Tampering With Evidence. For the following reasons, we affirm the decision of the trial court.

{¶2} On March 18, 2010, Pruitt was indicted by the Trumbull County Grand Jury on one count of Aggravated Robbery, a felony of the first degree, in violation of R.C. 2911.01(A)(3), and one count of Tampering With Evidence, a felony of the third degree, in violation of R.C. 2921.12(A)(1).

{¶3} A trial to the court was held on December 10, 2010. The following testimony was presented.

{¶4} Susan Fritz, a loss prevention officer at the JCPenney store located in the Eastwood Mall, in Niles, Ohio, testified that on December 24, 2009, she saw Pruitt and Pruitt's mother, Joanna Blackwell, shopping in the children's clothing section of JCPenney. She witnessed Blackwell remove newspaper from her purse and throw it on the floor. She then saw Blackwell and Pruitt picking up handfuls of children's clothing off of the display tables and walking to the back of the store. Fritz saw Blackwell filling her purse with children's clothing. Fritz witnessed Pruitt handing more clothing items to Blackwell, who placed these items inside of her coat. Both women walked together outside of the store, without paying for any of the items.

{¶5} After the two women exited the store, Fritz followed them into the parking lot. She identified herself as "JCPenney security" and requested that Blackwell come back into the store. At that time, Pruitt continued to stand next to Blackwell. Blackwell refused to come into the store and Fritz began to hold onto her arm. Pruitt grabbed Blackwell's other arm and tried to pull her into a vehicle located in the parking lot.

{¶6} Fritz testified that Pruitt then "put her hand onto [Fritz's] throat," pushed her up against a car and began to "choke" her. Fritz was not able to breathe, "started to

panic," and was in fear of passing out. Fritz began kicking at Pruitt in order to get her to stop, and Pruitt let go.

{¶7} Fritz explained that Blackwell subsequently dropped the purse containing the merchandise and that another JCPenney employee, Colleen Bellus, picked up the purse, but Pruitt "ripped it out of" Bellus' hands and ran away, across the parking lot. Fritz handcuffed Blackwell and she was taken into the JCPenney security office.

{¶8} After the incident, Fritz did not receive medical treatment and continued working. She stated that there were no marks on her neck and that no photographs of her neck were taken. Fritz also stated that JCPenney was able to recover some of the stolen merchandise on that day and its value was $253.40.

{¶9} Colleen Bellus, a supervisor at JCPenney, testified that on December 24, Fritz informed her that she was following two females who had stolen clothing. Bellus also began following the women, but remained inside of the exit doors after Fritz and the women exited the store and entered the parking lot. Through the glass doors, Bellus witnessed Fritz trying to apprehend Blackwell. She saw Pruitt putting her hand around Fritz's throat and saw Fritz "being held up against a car by her throat." Bellus stated that she did not see Fritz kicking Pruitt.

{¶10} Bellus yelled to another supervisor to call the police and ran into the parking lot, where Pruitt had let go of Fritz. Bellus saw that the purse containing the merchandise was on the ground, picked it up, but Pruitt then grabbed it from her hands and walked away. Bellus followed Pruitt and saw her walk toward the area where Office Max was located. Bellus identified Pruitt as being the one of the two women in the store that Fritz had seen committing theft.

{¶11} Elaine Chachko, a supervisor at JCPenney, testified that she became aware of an incident occurring in the parking lot on December 24. She went to see what was happening, and heard Fritz identify herself to the two women as a loss prevention officer. Chachko stated that Pruitt said "I don't know you, I don't know you" to Fritz, but Fritz said "yes, I just identified myself."

{¶12} Chachko saw clothing falling from Blackwell's jacket. Chachko said Fritz was having difficulty placing handcuffs on Blackwell and that Blackwell was moving around. After that, she saw Pruitt "choking" Fritz with both hands and then she saw Fritz "flailing" her feet. Chachko later testified that Pruitt may have had Fritz in a "choke hold."

{¶13} After Pruitt let go of Fritz, Chachko witnessed Bellus pick up the purse and some clothing on the ground, and saw Pruitt grab the purse away and run across the parking lot.

{¶14} Officer Robert Ludt, of the Niles Police Department, testified that on the date of the incident, he responded to a call of a disturbance or fight at JCPenney. He was then told to go to Office Max, based on information that one of the suspects had fled there. Inside of Office Max, he asked if anyone had just run inside, and was directed toward Pruitt. Upon seeing Pruitt, he approached her and asked if she was involved in an incident at JCPenney, to which she responded affirmatively. He then drove Pruitt to JCPenney. He subsequently arrested her and patted her down, finding a pair of wire snips, which he stated he believed were often used to cut security tags off of clothing.

{¶15} Officer Tony Johnson, an officer with the Niles Police Department, testified that he responded to the Office Max on the date of the incident. He saw Officer Ludt talking to Pruitt. Johnson then searched the store to attempt to locate the purse with the merchandise. He found the purse on a shelf, located between some boxes of paper. He noted that there was clothing inside of the purse at the time.

{¶16} Pruitt testified that on December 24, she went shopping at Eastwood Mall with Blackwell, as well as her friend and a cousin. She explained that she was not allowed in JCPenney due to prior theft charges, so she went to Kids Foot Locker while the other three women went to JCPenney. She testified that she never went into JCPenney, but went back to the truck in the parking lot after she was done at Foot Locker to wait for the other women to return.

{¶17} While sitting in the vehicle, Pruitt saw Blackwell exit JCPenney with a white female, who she later learned to be Fritz, following her. Pruitt heard Blackwell saying "give me my money, give me my money." Pruitt saw Fritz take money out of Blackwell's purse, so she got out of the vehicle and grabbed the money from Fritz's hand. Pruitt stated that she tried to separate Blackwell and Fritz and that Fritz "just started kicking" Pruitt. She stated that she did not choke Fritz. Pruitt explained that after she was kicked to the ground by Fritz, a JCPenney employee told her to "just leave" because she had "nothing to do with this." Pruitt stated that the employee handed her Blackwell's purse and that she then walked away, over to the Office Max, where she requested that an employee call the police because she was in pain. Pruitt stated that while she was at the Office Max, she set the purse down on a shelf, where it was visible. She stated that when Ludt began to escort her from Office Max she told

him to “hold on” so she could get the purse, the officer said “no let’s go,” but Pruitt told the other officer where to get the purse, and he went back and got it.

{¶18} Pruitt testified that Fritz never told her who she was and that she did not know Fritz was a security officer. After being transported to the JCPenney security office by Ludt, Pruitt stated that she heard Fritz say that she “tried to kick that baby out of” Pruitt, who was pregnant at the time of the incident.

{¶19} On January 27, 2011, the trial court issued a Judgment Entry, finding Pruitt guilty of the lesser included offense of Robbery, a felony of the second degree, in violation of R.C. 2911.02(A)(2). The court found that the “serious physical harm” element of Aggravated Robbery was not proven. Pruitt was also found guilty of Tampering With Evidence, a felony of the third degree, as charged in the Indictment.

{¶20} On April 7, 2011, the trial court sentenced Pruitt to serve a prison term of three years for Robbery and a term of one year for Tampering with Evidence. The sentences were to run concurrently, for a total term of imprisonment of three years.

{¶21} Pruitt timely appeals and raises the following assignments of error.

{¶22} “[1.] The trial court erred by denying Ms. Pruitt’s Motion for Acquit[t]al because the evidence is insufficient to support a guilty verdict for Robbery and Tampering With Evidence.

{¶23} “[2.] Finding Ms. Pruitt guilty of Robbery and Tampering With Evidence is against the manifest weight of the evidence.”

{¶24} As Pruitt’s first and second assignments of error deal with the sufficiency and manifest weight of the evidence, we will address them jointly.

{¶25} "'[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, 678 N.E.2d 541 (1997), 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 trier of fact 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*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). 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." (Citation omitted.) (emphasis deleted.) *Thompkins* at 387. Whereas the "sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a 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, 865 N.E.2d 1264, ¶ 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*, 70 Ohio St.2d 79, 434 N.E.2d 1356 (1982), syllabus. When reviewing a manifest weight challenge, however, the appellate court sits as the "thirteenth juror." (Citation omitted.) *Thompkins* at 387. 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 [trier of fact] 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*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶29} In order to convict Pruitt of Robbery, the State was required to prove, beyond a reasonable doubt, that Pruitt, "in attempting or committing a theft offense or in fleeing immediately after the attempt or offense," did "[i]nflict, attempt to inflict, or threaten to inflict physical harm on another." R.C. 2911.02(A)(2).

{¶30} Pruitt first argues that the State failed to prove that she committed a theft offense because there is no surveillance video of Pruitt committing a theft and since Chachko and Bellus did not witness Pruitt committing a theft. However, the testimony of Fritz established that she personally witnessed Pruitt picking up items, as well as handing items to Blackwell to place into her purse, and then leave without paying for these items, which is sufficient to establish that a theft offense occurred. *See State v.*

Garcia, 3rd Dist. No. 5-01-12, 2001 Ohio App. LEXIS 3988, *2 (Sept. 10, 2001) (conviction for theft was upheld when the loss prevention officers observed appellant handing items to his wife, who placed them in a bag, and both individuals exited the store without paying); *In re M.T.*, 11th Dist. No. 2008-A-0049, 2009-Ohio-538, ¶ 17-18 (where a defendant helped other girls place items in a shopping cart, walked beside the shopping cart, and pushed a store employee, evidence was sufficient to support a Robbery conviction). In addition, Bellus testified that she saw Fritz inside of the store following two women, who she identified as Blackwell and Pruitt, further supporting Fritz's testimony that Pruitt took part in the theft. Some of the stolen merchandise was subsequently found in the purse that, according to the testimony of several witnesses, was taken to Office Max by Pruitt. It is not necessary for every witness to have seen the theft occur or for there to be video evidence in order for the State to prove beyond a reasonable doubt that theft occurred.

{¶31} In addition, Pruitt argues that it was not proven that she inflicted or attempted to inflict harm on anyone while fleeing the theft. "Physical harm" is defined in R.C. 2901.01(A)(3) as "any injury, illness, or other physiological impairment, regardless of its gravity or duration."

{¶32} The testimony of both Fritz and Bellus established that Pruitt had been in the store, exited, and immediately began arguing with Fritz in the parking lot, while trying to get her mother into the car to leave. All three JCPenney employees testified that Pruitt "choked" Fritz or grabbed her throat, and the testimony established that this occurred while Fritz was attempting to retrieve the merchandise and handcuff Blackwell, who was in possession of the stolen items. This establishes both that Pruitt was

attempting to flee after the theft offense was committed and that physical harm was inflicted. *See State v. Beach*, 5th Dist. No. 2006CA00097, 2007-Ohio-10, ¶ 16-17 (choking a victim constitutes physical harm for the purposes of sustaining a Robbery conviction). Although Fritz did not seek any medical treatment, there is no requirement that she do so, as long as it is proven that an injury occurred. *See In re Lower*, 4th Dist. No. 06CA31, 2007-Ohio-1735, ¶ 27. After viewing 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 Robbery proven beyond a reasonable doubt.

{¶33} Regarding the manifest weight of the evidence, although Pruitt asserts she did not choke Fritz and that she did not steal any items from JCPenney, conflicting or inconsistent testimony does not make a conviction against the manifest weight of the evidence. *State v. Pruitt*, 11th Dist. No. 2001-T-0101, 2003-Ohio-1882, ¶ 40. The testimony of Fritz that she saw Pruitt commit the theft, along with the testimony of Bellus that she saw Pruitt in the store, supports a finding that a theft offense occurred. In addition, the testimony of the three JCPenney employees was that a choking occurred, and "the qualification of the physical contact as 'physical harm' is a matter to be determined by the trier of fact." (Citation omitted.) *In re Oliver*, 5th Dist. No. 2005-CA-40, 2005-Ohio-5792, ¶ 41. When weighing all of the testimony presented by the State against Pruitt's conflicting testimony, Pruitt's conviction for Robbery was supported by the manifest weight of the evidence.

{¶34} Pruitt also argues that her conviction for Tampering With Evidence was supported by insufficient evidence and was against the weight of the evidence.

{¶35} In order to convict Pruitt of Tampering With Evidence, the State was required to prove, beyond a reasonable doubt, that Pruitt, "knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted," did "[a]lter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation." R.C. 2921.12(A)(1).

{¶36} In the present case, the testimony established that Pruitt knew an official investigation was in progress, or was going to be in progress, as she both committed the crime of Robbery and had been stopped by a loss prevention official. This knowledge of the commission of the crime was sufficient to sustain a finding that the first element of Tampering With Evidence was committed. *State v. Kovacic*, 11th Dist. No. 2010-L-065, 2012-Ohio-219, ¶ 39 (Whether a defendant "had actual notice of an impending investigation is irrelevant. When an offender commits an unmistakable crime, the offender has constructive knowledge of an impending investigation of the crime committed.") (citation omitted); *State v. Mitchell*, 10th Dist. No. 10AP-756, 2011-Ohio-3818, ¶ 30 (where appellant took actions to commit a crime, he had "cause to know that the police would investigate the incident and would be interested in" the gun that was part of the crime).

{¶37} Moreover, regarding the second element of Tampering With Evidence, the evidence showed that Pruitt did both remove and conceal the purse containing the stolen items such that it would not be available in an investigation. The testimony established that she took the purse from the scene of the incident, walked across the parking lot to the Office Max, and placed the purse on a shelf, behind some boxes.

Officer Ludt testified that Pruitt left the purse when he took her into custody and that she did not inform him of its whereabouts. Therefore, a rational trier of fact could have found the essential elements of the crime of Tampering With Evidence proven beyond a reasonable doubt.

{¶38} Regarding the manifest weight of the evidence, Pruitt asserts that she testified that she did not know what was in the purse and that she did not conceal the bag on the shelf. The credibility of such testimony is an issue for the finder of fact. *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986) (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"). The trial court was entitled to believe the testimony from Chachko and Officer Johnson that there was merchandise inside of the purse at the time Pruitt had it and at the time it was recovered. Moreover, Officer Johnson testified that the item was recovered between boxes on the shelf, which can be construed as concealing the evidence. When coupled with the evidence that she was aware a crime had occurred, Pruitt's conviction for Tampering With Evidence is not against the manifest weight of the evidence.

{¶39} 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 trial court clearly lost its way when it found Pruitt guilty of Robbery and Tampering With Evidence. Under the circumstances of the instant case, we see no reason to substitute our judgment for that of the trier of fact. As the State provided

evidence that was sufficient to support the elements of each crime, a reasonable trier of fact could have found Pruitt guilty of Robbery and Tampering With Evidence.

{¶40} The first and second assignments of error are without merit.

{¶41} Based on the foregoing, the judgment of the Trumbull County Court of Common Pleas, finding Pruitt guilty of Robbery and Tampering With Evidence, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.