

[Cite as *State v Tesyk*, 2002-Ohio-1529.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 00-C.A.-245
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	<u>O P I N I O N</u>
)	
JOHN TESYK)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Struthers Municipal Court of Mahoning County, Ohio Case No. 0000459 A & B
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JUDGMENT:	Affirmed.
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APPEARANCES:

For Plaintiff-Appellee:	Attorney Carol Clemente Wagner Prosecuting Attorney Struthers Municipal Court 6 Elm Street Struthers, Ohio 44471
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For Defendant-Appellant:	Atty. Walter David Ritchie 725 Boardman-Canfield Road L-1 Boardman, Ohio 44512
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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: March 21, 2002

WAITE, J.

{¶1} This timely appeal challenges the conviction of John Tesyk ("Appellant") in Struthers Municipal Court on counts of theft and criminal damaging. Appellant's sole assignment of error argues that the conviction was against the manifest weight of the evidence. Based on the record herein, Appellant's conviction is hereby affirmed.

{¶2} The trial transcript of this case reveals that Elizabeth Perry ("the victim") was a bartender at St. Anthony's on Lowellville Road in Struthers, Ohio. (Tr. 3). She was tending bar at approximately 6:30 p.m. on September 4, 2000. (Tr. 3, 9). At that time a young man, who introduced himself as Tek, ordered a drink from her. (Tr. 4). The man left the bar shortly before 7:00 p.m. (Tr. 9).

{¶3} The victim left the bar shortly after 7:00 p.m., after her shift had ended. (Tr. 5). She approached her car in the parking lot and noticed a man in it. (Tr. 5). The man was the same one who had earlier introduced himself as Tek in the bar. (Tr. 5). The victim asked him what he was doing, told him to get out and that she was going to call the police. (Tr. 6). She returned to the bar to make good on her promise. On returning to her car, she saw the man on a red mountain bike carrying all of the compact disks ("CD"s) that had been in her car. (Tr. 6). She ran after him as he fled on the bike. (Tr. 10). When she returned to her car, she saw the stereo was broken and that the

driver's side window was off its track. (Tr. 7).

{¶4} Officers from the Struthers Police Department arrived a few minutes after the victim called them. (Tr. 9). Captain Patrick Bundy ("Capt. Bundy") testified that he and another officer arrived at the scene at 7:15 p.m. He testified that he interviewed the victim at that time and that she gave an accurate description of the assailant. (Tr. 18). Officer Thomas Granshay ("Off. Granshay"), the other officer at the scene, testified that he took pictures of the victim's damaged vehicle and attempted, unsuccessfully, to find the suspect that evening. (Tr. 12).

{¶5} At some point prior to trial, someone anonymously returned most of the victim's CDs to St. Anthony's, and they were returned to the victim. (Tr. 8).

{¶6} Two complaints were filed against Appellant on September 5, 2000. The first complaint charged him with one count of theft in violation of Struthers Municipal Ordinance §545.01, a first degree misdemeanor. The second complaint charged him with one count of criminal damaging in violation of Struthers Municipal Ordinance §541.03, a second degree misdemeanor.

{¶7} Appellant was arrested on September 5, 2000. A bench trial was held on October 6, 2000. Appellee called a number of witnesses at trial, including the victim, Capt. Bundy, Off. Granshay, and another officer. Appellant was convicted on both charges. He was sentenced to 180 days in jail on the theft

charge, and 90 days in jail on the criminal damaging charge, to be served concurrently. A fine was also imposed and he was given one year of probation.

{¶8} Appellant filed this timely appeal on November 2, 2000. Appellee did not file a brief in this appeal.

{¶9} Appellant's sole assignment of error asserts:

{¶10} "THE VERDICT OF THE COURT BELOW WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶11} Appellant makes three points in his argument. First, he argues that the only witness who identified him as the assailant was the victim, and that her testimony was not corroborated by any other witness. Second, he asserts that the victim's testimony was not credible because she contradicted herself when she was asked to identify Appellant in court. Third, Appellant maintains that the victim gave conflicting testimony as to whether the assailant had spoken to her outside of the bar. Appellant contends that these errors and inconsistencies require a reversal of his conviction.

{¶12} In reviewing a decision as being against the manifest weight of the evidence, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences and consider the credibility of the witnesses to determine whether, in resolving evidentiary conflicts, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that

the judgment must be reversed. *State v. Jordan* (1992), 73 Ohio App.3d 524, 534. The decision to grant a new trial based on the manifest weight of the evidence should be exercised only in exceptional cases, where the evidence weighs heavily against the judgment. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, weight and credibility determinations are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231.

{¶13} When reviewing a trial court decision on the basis that the verdict was against the manifest weight of the evidence, a court of appeals acts as a "thirteenth juror," especially when it reviews the trial court's resolution of conflicts in testimony. *Thompkins, supra*, at 387 citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42.

{¶14} "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 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.

{¶15} The testimony of a single victim, if believed, is sufficient to sustain a conviction, unless a particular statute dictates otherwise. *State v. Stern* (2000), 137 Ohio App.3d 110, 116; *State v. Tillman* (1997), 73 Ohio App.3d 110, 116.

119 Ohio App.3d 449, 460. Contrary to Appellant's assertion, the victim's eyewitness identification testimony in this case was clear and unequivocal. The trial transcript reflects the following exchange between the prosecutor and the victim:

{¶16} "Q. And he actually introduced himself to you, said, 'I'm John Tesyk'?"

{¶17} "A. Well, he said Tek.

{¶18} "* * *

{¶19} "Q. He introduced himself to you?

{¶20} "A. Yes.

{¶21} "Q. And is that individual who introduced himself to you in the courtroom today?

{¶22} "A. No. What do you mean?

{¶23} "Q. Let me rephrase the question.

{¶24} "A. Did he introduce himself to me?

{¶25} "Q. No, no, no. The individual that introduced himself to you that evening as Tek, is he in the courtroom today?

{¶26} "A. Yes.

{¶27} "Q. Can you please point him out?

{¶28} "A. He's right there.

{¶29} "[Prosecutor]: Let the record reflect she's indicated the Defendant." (Tr. 4-5).

{¶30} The victim went on to testify:

{¶31} "Q. And when you walked out, you saw the man who introduced himself as Tek in your vehicle?

{¶32} "A. Yes.

{¶33} "* * *

{¶34} "Q. There's no doubt in your mind that this gentleman sitting in the courtroom that you just pointed out is him?

{¶35} "A. No. It's him." (Tr. 5, 7).

{¶36} Appellant is also mistaken in asserting that the victim contradicted herself concerning whether she spoke with Appellant outside the bar. The victim clearly testified that she spoke to Appellant outside the bar:

{¶37} "Q. And when you walked out [of the bar], you saw the man who introduced himself as Tek in your vehicle?

{¶38} "A. Yes.

{¶39} "Q. And then what did you do?

{¶40} "A. I asked him what he was doing and then I just told him to get out. * * *

{¶41} "Q. Did he say anything to you?

{¶42} "A. No. He just kind of looked at me. (Tr. 5-6).

{¶43} On cross-examination, the victim also testified:

{¶44} "Q. Do you recall telling the officer that the suspect spoke to you outside?

{¶45} "A. No. I don't remember what he said to me outside, if he said anything." (Tr. 9-10).

{¶46} It is evident from this testimony that the victim spoke to Appellant, but that Appellant did not respond in reply. The victim's testimony is completely consistent and credible, and there is no basis for arguing that the verdict was against the

manifest weight of the evidence based on alleged inconsistencies in the victim's testimony. Even if her testimony had been contradictory, the trial court was in the best position to weigh the evidence and was free to believe all, part or none of the victim's testimony. *State v. Jackson* (1993), 86 Ohio App.3d 29, 33.

{¶47} For the foregoing reasons, Appellant's conviction must be affirmed.

Donofrio, J., concurs.

Vukovich, P.J., concurs.