

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

ROBIN LORENZO BLACKSHEAR

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Julie A. Edwards, J.

Hon. Patricia A. Delaney, J.

Case No. 2008CA00233

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Canton Municipal Court,  
Stark County, Ohio, Case No.  
2008CRB00426

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

June 29, 2009

APPEARANCES:

For Defendant-Appellant

RICHARD DRAKE  
303 Courtyard Centre  
116 Cleveland Ave. N.W.  
Canton, Ohio 44702

For Plaintiff-Appellee

JOSEPH MARTUCCIO  
Canton Law Director

TYRONE D. HAURITZ  
Canton City Prosecutor

JENNIFER FITSIMMONS  
Assistant Prosecutor, City of Canton  
218 Cleveland Avenue, S.W.  
Canton, Ohio 44702

*Hoffman, P.J.*

{¶1} Defendant-appellant Robin L. Blackshear appeals his conviction in the Canton Municipal Court on one count of theft. Plaintiff-appellee is the State of Ohio.

#### STATEMENT OF THE FACTS AND CASE

{¶2} On December 4, 2007, Appellant removed a large, forty-foot section of railroad railing from a railroad yard on Mulberry Street in Canton, Ohio. The rail had been lying in an area of high grass since 2002, when U.S. Castings opened their business at the location. The rail was located approximately twenty-feet from the pavement of Mulberry Street, and approximately fifty-feet from an active Norfolk and Southern Railroad line. Prior to removing the rail, Appellant contacted William Lyons, a co-owner of U.S. Castings, advising Lyons he planned to take the railing. Mr. Lyons informed Appellant the railing did not belong to U.S. Castings; rather, he believed it belonged to the railroad.

{¶3} Officers from the Canton Police Department stopped Appellant's vehicle as he was transporting the rail to a scrap yard. However, Appellant was released due to uncertainty as to the owner of the railing. Appellant was subsequently charged with theft, in violation of R.C. 2913.02, and criminal trespass, in violation of R.C. 2911.21.

{¶4} The matter proceeded to jury trial in the Canton Municipal Court on September 11, 2008. The jury found Appellant guilty of theft, and not guilty of criminal trespass. The trial court sentenced Appellant to one hundred and eighty days in jail, suspending all but twenty-six days. The court further ordered Appellant pay restitution to Norfolk and Southern Railroad.

{¶5} Appellant now appeals, assigning as error:

{¶6} “I. THE TRIAL COURT’S FINDING OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.”

{¶7} In his sole assignment of error, Appellant asserts his conviction was against the manifest weight of the evidence and was not supported by sufficient evidence.

{¶8} A review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct determinations. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, superseded by constitutional amendment on other grounds as stated by *State v. Smith*, 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668. “While the test for sufficiency requires a determination of whether the State has met its burden of production at trial, a manifest weight challenges questions whether the State has met its burden of persuasion.” *State v. Thompkins*, supra at 78 Ohio St.3d 390.

{¶9} In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492 superseded by State constitutional amendment on other grounds as stated in *State v. Smith* (1997), 80 Ohio St.3d 89, 684 N.E.2d 668.

{¶10} Specifically, 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*, supra. This test

raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. The 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.” *State v. Thompkins*, 78 Ohio St.3d at 386, 678 N.E.2d 541.

{¶11} In *State v. Thompkins* supra, the Ohio Supreme Court held “[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary.” *Id.* at paragraph three of the syllabus. However, to “reverse a judgment of a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required.” *Id.* at paragraph four of the syllabus; *State v. Miller* (2002), 96 Ohio St.3d 384, 2002-Ohio-4931 at ¶ 38, 775 N.E.2d 498.

{¶12} Our standard of review on a manifest weight challenge to a criminal conviction is stated as follows: “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.” *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. See, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. The granting of a new trial “should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *Martin* at 175, 485 N.E.2d 717.

{¶13} Appellant was convicted of one count of theft, in violation of R.C. 2913.02, which reads:

{¶14} “(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

{¶15} “(1) Without the consent of the owner or person authorized to give consent;

{¶16} “(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

{¶17} “(3) By deception;

{¶18} “(4) By threat;

{¶19} “(5) By intimidation.

{¶20} “(B)(1) Whoever violates this section is guilty of theft.”

{¶21} Appellant maintains the State failed to demonstrate whether the rail was located on the property of Norfolk and Southern Railroad or in the City of Canton’s right-of-way. Further, Appellant claims the section of track was abandoned, and had not been used for at least six years. Appellant argues he reasonably believed the owner had abandoned the property; therefore, he did not have the requisite criminal intent to deprive the owner of the property.

{¶22} As noted in the statement of facts, supra, Appellant contacted William Lyons, co-owner of U.S. Castings, prior to removing the large section of railing, and was informed Lyons thought the railing belonged to Norfolk and Southern Railroad. Further, the railing was located approximately fifty-feet from an active Norfolk and Southern

Railroad line. We find this represents both sufficient and competent, credible evidence upon which the jury could rely in finding Appellant knew or probably knew the railing belonged to the railroad based upon the proximity of the railing to an active line and the advice of Mr. Lyons. Therefore, the assignment of error is overruled.

{¶23} Appellant's conviction in the Canton Municipal Court is affirmed.

By: Hoffman, P.J.

Edwards, J. and

Delaney, J. concur

s/ William B. Hoffman  
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards  
HON. JULIE A. EDWARDS

s/ Patricia A. Delaney  
HON. PATRICIA A. DELANEY

