

[Cite as *State v. Guzzo*, 2004-Ohio-4979.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2003-09-232
 :
 -vs- : O P I N I O N
 : 9/20/2004
 :
 ROBERTA GUZZO, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM MIDDLETOWN MUNICIPAL COURT
Case No. 03CRB01811-A

Bruce Fassler, City of Middletown, One Donham Plaza,
Middletown, OH 45042, for plaintiff-appellee

John H. Forg, III, 6 S. Second Street, Suite 208, Hamilton, OH
45011, for defendant-appellant

POWELL, J.

{¶1} Defendant-appellant, Roberta Guzzo, appeals her conviction in the Middletown Municipal Court for petty theft. We affirm the conviction.

{¶2} Appellant is the sister of Barbara Peterson, the victim of the theft in this case. During the period of time surrounding the events of this case, the two sisters, along with appellant's daughter and Peterson's husband, lived together in a trailer home owned by Peterson. For some period of time

prior to the theft, the sisters' mother and her husband also resided at the trailer. Peterson and appellant testified at trial that appellant and appellant's daughter began living in Peterson's home when appellant was in the process of being evicted from her home.

{¶3} Peterson's husband was an over-the-road truck driver, and shortly after appellant and her daughter moved into the trailer, Peterson left town with her husband to accompany him on one of his trips. Peterson testified that after returning from the trip, she became aware that several items of Dale Earnhardt memorabilia were missing from the trailer home. She initially questioned appellant concerning the whereabouts of the memorabilia, then accused her mother and brother of stealing the items, placing an obvious strain on family relations.

{¶4} Peterson's quest to locate the missing property eventually led her and her husband to the "Swap Shop," a business similar to a pawn shop in which customers sell their property to the owner in exchange for cash.

{¶5} After Peterson discovered the items at the Swap Shop, the Middletown police began an investigation. According to the police report of May 13, 2003, the owner of the Swap Shop, Jim Miller, advised the investigating officer that he had purchased the items from appellant. Miller's testimony, business records produced at trial, and appellant's testimony later confirmed that appellant had in fact sold the memorabilia to the Swap

Shop. Peterson's husband advised the officer that the items were his, and Peterson swore out an affidavit later that day stating that on or about April 19, 2003, appellant stole, among other things, a Dale Earnhardt jacket, memorabilia plaque, Snap-On tool set, and race car clock. A bench trial took place on July 30, 2003 and appellant was found guilty of petty theft.

{¶6} Appellant's sole assignment of error on appeal is that her conviction was against the manifest weight of evidence.

{¶7} An appellate court will not reverse a judgment as against the manifest weight of the evidence in a bench trial where the trial court could reasonably conclude from substantial evidence that the state has proved the offense beyond a reasonable doubt. State v. Eskridge (1988), 38 Ohio St.3d 56, 59. The standard to be used by an appellate court when reviewing whether a trial verdict is against the manifest weight of evidence has been articulated 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 [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." State v. Thompkins, 78 Ohio St.3d 380, 387, 1997-Ohio-52.

{¶8} Appellant was convicted of petty theft in violation of Middletown Municipal Code 642.02(a)(1). Middletown's theft

ordinance states that "no person, with purpose to deprive the owner of property * * *, shall knowingly obtain or exert control over * * * the property without the consent of the owner * * *."

{¶9} At its core, Guzzo's trial concerned the consent element of the theft ordinance. It is uncontroverted that appellant knowingly obtained possession and control of the Dale Earnhardt memorabilia and that appellant then sold the items to the Swap Shop. Appellant's own testimony at trial was enough to establish this element of the charged offense. The crucial fact for the trial court to determine in this case was whether the sale of the memorabilia was with or without the consent of Peterson. Appellant testified that the sale was with consent. Peterson testified that it was not. Neither Peterson's nor appellant's testimony concerning the issue was corroborated at trial by anyone with firsthand knowledge of the communications between Peterson and appellant.

{¶10} Appellant called her mother and her daughter to testify on her behalf, but neither testified that they heard firsthand a conversation between appellant and Peterson concerning the Dale Earnhardt memorabilia. There was, however, clear testimony at trial that on at least one prior occasion Peterson asked, and appellant agreed, to sell property for Peterson.

{¶11} Appellant argues that because Peterson requested appellant to sell items for her in the past, and because the

prosecution offered no evidence to corroborate Peterson's testimony that the sale of the Dale Earnhardt items was without her permission, the trial court erred in not finding the sale was authorized.

{¶12} While it would not have been unreasonable for the trial court to infer that appellant obtained permission to sell the Dale Earnhardt memorabilia because she sold items for Peterson in the past, appellant requests that this court take one step further and find that any inference to the contrary would be against the manifest weight of evidence.

{¶13} An inference that appellant sold the items with Peterson's consent, however, is not logically compelled. Although a reviewing court looks at the record anew when considering whether a verdict at trial is against the manifest weight of evidence, the trial court, not the appellate court, is in the best position to evaluate testimony and determine the credibility of witnesses. State v DeHass (1967), 10 Ohio St.2d 230. "[W]hen conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the [trier of fact] believed the prosecution testimony." State v. Zentner, Wayne App. No. 02CA0040, 2003-Ohio-2352, ¶21.

{¶14} Peterson testified that appellant did not have permission to sell the items. Evidence was also presented that appellant was not financially well-off. She was on the verge of an eviction at her prior residence; she was living primarily

on disability income; and she was a regular customer at the Swap Shop. Thus, it would not be unreasonable for a trier of fact to infer that appellant had the motive, opportunity, and purpose to steal Peterson's items, bring them to the Swap Shop, and keep the money from the sale for herself. Furthermore, it would certainly not be unreasonable for the trial court, which is in a position to view appellant's demeanor during trial, to interpret appellant's testimony as essentially self-serving in nature.

{¶15} In this case, appellant presented testimonial evidence that the sale of the memorabilia to the Swap Shop was with the consent of Peterson. Nevertheless, the trial court determined that Peterson was the credible witness, and we refuse to overturn appellant's conviction merely because the trial court found Peterson's testimony to be most credible.

{¶16} Evidence sufficient to convict appellant of petty theft was presented at trial, and evidence presented to the contrary did not rise to a level that warrants a reversal on the grounds that the verdict was against the manifest weight of the evidence. "The power to reverse a conviction on the manifest weight of the evidence * * * should be exercised with caution, and an appellate court should reverse only if the evidence weighs heavily against conviction." State v. Allen (1990), 69 Ohio App.3d 366, 374. Evidence in this case was presented on both sides at trial, and after a careful review of

the record, we cannot say that the totality of the evidence presented weighed heavily against conviction.

{¶17} Judgment affirmed.

YOUNG, P.J., and VALEN, J., concur.