

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-170129
	:	TRIAL NO. C-17-CRB-1399B
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
GLENN EADS,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Following a bench trial, Glenn Eads was acquitted of possessing criminal tools, but convicted of theft. He stole an air mattress from a package, which was left outside an apartment building. The package was addressed to a person named “Miller.” A witness across the street observed the theft. Eads now appeals, raising four assignments of error for our review. We affirm in part.

In his first assignment of error, Eads contends that he was denied the effective assistance of counsel.

To establish a claim of ineffective assistance of counsel, appellant must show that counsel’s performance was deficient and that counsel’s deficient performance prejudiced him. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 133, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80

L.Ed.2d 674 (1984). The failure to make either showing defeats a claim of ineffective assistance of counsel. *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989), citing *Strickland* at 697.

Here, Eads contends that his trial counsel acted ineffectively when counsel withdrew an objection to the arresting officer's testimony that the officer had concern about the tools in Eads's backpack because "at that point we knew what Mr. Eads's history was with breaking and entering." Regardless of whether it was error for the counsel to withdraw his objection to that testimony, Eads did not demonstrate that he suffered any prejudice from the admission of that statement. That testimony went to the charge of possessing criminal tools, which Eads was acquitted of, and, additionally, there was other evidence presented to support Eads's conviction for theft.

Next, Eads maintains that his counsel was ineffective for failing to object to hearsay testimony. Here, the arresting officer testified that he had returned the air mattress to the person whose name had been on the box that had contained a packing slip for an air mattress, and testified that that person said "he [had] paid for [the air mattress]." Eads argues that this testimony is prejudicial because it is the only evidence that the victim had owned the package in question. But there was no prejudice because other circumstantial evidence demonstrated that Miller was the owner of the air mattress. For example, his name was on the package containing the air mattress.

Because there was no prejudice stemming from the admission of any of the challenged testimony, we overrule the first assignment of error.

In his second and third assignments of error, Eads contests the sufficiency and weight of the evidence underlying his conviction.

In a challenge to the sufficiency of the evidence, the question is whether after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found all the essential elements of the crime proved beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 491 (1991), paragraph two of the syllabus. When considering a challenge to the weight of the evidence, an appellate court “reviews 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.” *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 151, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), and *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

R.C. 2913.02(A)(1) provides that “[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * * * [w]ithout the consent of the owner or person authorized to give consent.”

Here, Eads argues that the state failed to prove that Eads, in taking the air mattress, acted without the consent of Miller. We are unpersuaded. The state can prove that Eads did not have consent to take the air mattress by circumstantial evidence; there was no need for Miller to testify at trial. *See State v. Johnson*, 6th Dist. Lucas No. L-14-1001, 2015-Ohio-567, ¶ 13. At trial, the witness who had worked in the neighborhood for many years testified that he had observed Eads stop in front of the apartment building, pick up the package, which was later to be found

to be addressed to Miller, dump the bubble wrap out and ride away on his bicycle with the air mattress under his arm. The witness followed Eads and called the police. The arresting officer testified that they found the air mattress within feet of where Eads stood but Eads denied having any knowledge of it. The trial court could reasonably infer that Miller had not given his consent for Eads to take the air mattress because Eads denied having any knowledge of the air mattress despite the fact that a witness saw him take it. Further, this is not one of those cases where the trial court clearly lost its way and created a manifest miscarriage of justice in finding Eads guilty of theft. Accordingly, the second and third assignments of error are overruled.

In his fourth assignment of error, Eads argues that the trial court erred by imposing court costs without informing Eads of those costs in open court. The state concedes this error.

In *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, the Ohio Supreme Court held that it is reversible error under Crim.R. 43(A) for the trial court to impose court costs in its sentencing entry when it did not impose those costs in open court at the sentencing hearing. *Id.* at ¶ 22. The court found that a defendant is harmed by the trial court's error in such cases because he is "denied the opportunity to claim indigency and to seek a waiver of the payment of court costs before the trial court." *Id.* The court determined that the remedy in such a situation is a limited remand to the trial court to allow the defendant to seek a waiver of court costs. *Id.* at ¶ 23.

In this case, the record reflects that the trial court did not mention costs at sentencing, but then imposed court costs in its journal entry of sentencing. Accordingly, we sustain the fourth assignment of error, reverse the imposition of

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costs and remand this matter for the limited purpose of allowing Eads to move the trial court for a waiver of payment of courts costs. *See State v. Geary*, 1st Dist. Hamilton No. C-160195, 2016-Ohio-7001, 72 N.E.2d 153, ¶ 46. The judgment of the trial court is affirmed in all other respects.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., ZAYAS and MILLER, JJ.

To the clerk:

Enter upon the journal of the court on February 9, 2018
per order of the court _____.
Presiding Judge