[Cite as *State v. Groesser*, 2018-Ohio-2713.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. John W. Wise, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. Earle E. Wise, J.
	:	
-vs-	:	
	:	Case No. 2017CA00182
JACK GROESSER	:	
	:	
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING:	Criminal appeal from the Stark County Court of Common Pleas, Case No. 2016CR2373
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 9, 2018

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO PROSECUTING ATTORNEY BY: KRISTINE BEARD 110 Central Plaza South, Ste. 510 Canton, OH 44702	DEREK LOWRY 610 Market Avenue N.W. Canton, OH 44702

Gwin, J.

{¶1} Plaintiff-appellant Jack Groesser ["Groesser"] appeals his conviction and sentence after a jury trial in the Stark County Court of Common Pleas.

Facts and Procedural History

{¶2} In June of 2016, for the price of $114,000.00, Bobby Lake and his wife purchased a three-bedroom ranch home. Their plan was to renovate and move into the home. Their real estate agent, John Heddleson, recommended contractor, Jack Groesser, to make upgrades.

{¶3} Originally, the Lakes just wanted to renovate the bathroom and add a four season's room. Groesser convinced them that additional work needed to be done. Groesser prepared a contract for the renovation that quoted an estimated price of $43,000.00 for materials and services. Groesser also advised Mr. Lake that the project would be completed by the first week in August.

{¶4} To begin the project, Groesser met Mr. Lake at Lowe's to pick out kitchen appliances, kitchen fixtures, bathroom fixtures, tile, carpeting, cabinets and counter tops. Groesser told Mr. Lake not to purchase the items that day, but rather to give him, (Groesser), the money for the merchandise and he would purchase the supplies through a local Lowe's where he had an account. In accordance with Groesser's request, Mr. Lake gave Groesser a check for $25,000.00 to purchase the supplies from Lowe's and to begin demolition on the house.

{¶5} Groesser, Groesser's father and an assistant, Bobby, did the demolition on the property. Mr. Lake found the demolition work to be appropriate and timely. However, Mr. Lake became concerned when the renovation went beyond the agreed date. He was

also concerned because the cabinets, kitchen counters, appliances and other materials were not delivered to the site for installation. The Lakes continued to make change orders, writing several checks to cover additional expenses. Prior to the completion of the terms of the original contract, Mr. Lake provided additional money for the installation of a garden window and a hot water heater neither of which were ever delivered to the Lake house. Mr. Lake also paid Groesser to do electrical work in the garage that was never completed. From July to September, Groesser and/or his co-workers showed up sporadically to work on the house. In September, Groesser abandoned the project leaving the Lakes with an uninhabitable house and requiring Mr. Lake to move and store the tools Groesser left behind. Before Groesser abandoned the project, Mr. Lake paid him a total $42,000.00 toward the original contract and change orders.

{¶6} Because Groesser abandoned the project leaving behind an uninhabitable property, Mr. Lake had to hire new contractors to do the renovations. In addition, Mr. Lake had to personally purchase the appliances, fixtures and other materials. Mr. Lake filed a complaint with the Perry Township Police Department alleging that he had given Groesser $42,000.00 and had never received the items that were to have been purchased from Lowe's for his renovation or the agreed upon services. Mr. Lake's complaint led to the indictment of Groesser for a felony charge of theft by deception.

{¶7} Gary Prince is a subcontractor from ATM Contracting. Prince installs Lowe's products for remodeling, restoration and custom home building. Prince testified that the homeowner is responsible for making any necessary purchases for the renovation from Lowe's. Prince then uses the purchased products for the project.

{¶8} In late October/early November, Prince was employed by Mr. Lake, to finish the inside of the Lake house. During trial, Prince testified about the services he performed to complete the renovation. Prince testified that when he arrived at the Lake house, the original bathroom had been removed, and it was in a partial state of remodel. Prince had to shim, straighten the bathroom walls, and remove the newly installed wall tile in order to make the flow of the tile, plumb with the shower. Prince had to uninstall the shower and remove the glass mosaic floor tile for safety reasons. Prince rebuilt the shower, installed showerheads and did all the new tiling. Prince also installed the vanity and reinstalled the exhaust fan.

{¶9} In the living room, Prince had to uninstall the insulation and make the walls flat in order to install the marble wall tile and re-insulate the walls. Prince testified that there was a hump in the living room floor where the newly installed floating floor was not touching the base on either side. Prince fixed the hump in the floor and re-installed the flooring.

{¶10} In the bedroom, which was being converted into a utility room, Prince had to add five inches to the platform that had been installed for the washer and dryer. Prince also finished tiling the room and re-ran the vents for the dryer. When Prince turned on the washer, it flooded the basement. Prince had to cut into the wall to repair the improperly installed pipe fitting to the drain.

{¶11} In the kitchen, Prince had to cut the previously installed floating floor to install the cabinets that had been purchased by Mr. Lake. Prince installed the backsplash and under cabinets lights and wired the kitchen for light fixtures and receptacles. Another

of Lowe's contractor installed the granite counter tops. Prince also installed the hot water heater.

{¶12} Prince testified that he did everything to make the house one hundred percent livable. He stated, "There wasn't much we didn't touch." Prince fixed the doors, trim, the crown molding and areas that needed to be painted. Although he did not know the entire cost of the work, on cross-examination he testified that the cost of re-doing the bathroom alone was approximately $12,000.00.

{¶13} Kevin Deckerd, is self-employed, and engages in residential construction. Deckerd was hired by the Lakes to complete the four season's room. When Deckerd arrived to view the project area, he found that partial work had been done but that it had been exposed to the elements and had to be replaced. Deckerd testified that the porch structure was unsound. He noted that Groesser had cemented new posts to the existing posts and the posts and cement needed to be removed in order to repair the structure. Deckerd pulled out 19 posts and remove 300 pounds of concrete. Deckerd testified that he had to rebuild the four season's room from scratch. The initial estimate for the project was $27,870.00. The project took approximately two months at a final cost of approximately $35,000.00.

{¶14} At trial, Groesser argued that this matter was a civil contract dispute and not a crime. Groesser argued that he and his co-workers had performed substantial work on the property including the demolition, painting, carpet installation and tiling. A witness for the defense also provided copies of receipts totaling approximately $7,200.00. The receipts included some supplies but mostly the purchase of tools for Groesser's business.

Grosser did not provide the jury with any employee income statements or receipts for the purchase of kitchen and bathroom fixtures, or appliances.

{¶15} After the presentation of evidence, Groesser was found guilty as charged, was sentenced to serve 60 days in the Stark County jail and 5 years of community control. Restitution for $28,000.00 was ordered by the court.

Assignments of Error

{¶16} Groesser raises three assignments of error,

{¶17} "I. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO CALL TWO WITNESSES AS LAY WITNESSES WHO OFFERED IRRELEVANT AND IMPROPER LAY OPINIONS.

{¶18} "II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S RULE 29 MOTION FOR ACQUITTAL AS THERE WAS INSUFFICIENT EVIDENCE OF INTENT DUE TO APPELLANT'S SUBSTANTIAL PERFORMANCE OF THE CONTRACT AND PURCHASE OF MATERIALS FOR THE JOB.

{¶19} "III. THE JURY FUNDAMENTALLY LOST ITS WAY AND RENDERED A VERDICT THAT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I.

{¶20} In his first assignment of error, Groesser argues state's witnesses Prince and Deckerd gave improper opinion testimony that was beyond the ken of a lay witness; however, they were never properly qualified as expert witnesses.

{¶21} Prior to trial, Groesser filed a motion in limine to exclude the testimony of two construction contractors, Gary Prince and Kevin Deckerd. Prince and Deckerd were hired by the Lakes to complete Groesser's unfinished construction project. In the motion,

Groesser argued that the witnesses' testimony should be precluded pursuant to Evid.R. 402 and Evid.R. 404(B). Prior to trial, the court held a hearing on the matter wherein the court denied Groesser's motion.

{¶22} Groesser argues that the introduction of an expert witness triggers certain duties by the expert's proponent. Criminal Rule of Procedure 16(K) requires an expert witness to prepare a written report summarizing his opinions and how he arrived at them, including his mode of analysis, findings, and conclusions. This report must be provided to opposing counsel at least 21 days prior to trial along with a summary of the witness's qualifications. Crim. R. 16(K).

{¶23} Groesser filed a Request for Discovery on March 9, 2017 that compelled the state to comply with the requirements of Criminal Rule 16(K) and Ohio Rule of Evidence 404(B) by disclosing the identity of any expert witnesses and providing their qualifications and reports. Groesser argues the state never provided any discovery response identifying Deckerd or Prince as experts or complying with Criminal Rule 16(K). In absence of proper qualification, Groesser contends he filed and argued a motion in limine and objected to and renewed his objection to the witnesses' testimony. Groesser submits that the state called Deckerd and Prince essentially as expert, not fact, witnesses.

{¶24} Groesser argues that he was prejudiced by being deprived the right to confront the witnesses on the scope of their training and expertise, the methodology they used in evaluating Groesser’s work on the Lake home, and the extent of their training and education in the field of construction.

{¶25} Groesser submits the inappropriate testimony offered by the witnesses was prejudicial to the jury who were presented with two witnesses who described construction

as their "expertise" and described the poor quality of Groesser's work but were not able to be meaningfully questioned about how they evaluated that work, their training, their experience, and the standards and practices in the field of construction. The inability of Groesser to examine a report of Deckerd or Prince's findings deprived him of the ability to consult an expert of his own who may have been able to debunk the witnesses' practices and procedures.

STANDARD OF APPELLATE REVIEW.

{¶26} **"**[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake Cty*., 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991). A trial court's ruling as to the admission or exclusion of testimony is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *Miller v. Bike Athletic Co.,* 80 Ohio St.3d 607, 1998-Ohio-178, 687 N.E.2d 735. Unless the trial court has "clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere" with the exercise of such discretion. *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967). We have defined "abuse of discretion" as an "unreasonable, arbitrary, or unconscionable use of discretion, or as a view or action that no conscientious judge could honestly have taken." *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23.

{¶27} Evid.R. 402 states that all relevant evidence is admissible. "Relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

{¶28} In *State v. Crotts,* the Ohio Supreme Court explained,

> As a legal term, "prejudice" is simply "[d]amage or detriment to one's legal rights or claims." Black's Law Dictionary (8th Ed.1999) 1218. Thus, it is fair to say that all relevant evidence is prejudicial. That is, evidence that tends to disprove a party's rendition of the facts necessarily harms that party's case. Accordingly, the rules of evidence do not attempt to bar all prejudicial evidence—to do so would make reaching any result extremely difficult. Rather, only evidence that is unfairly prejudicial is excludable.
>
> "'Exclusion on the basis of unfair prejudice involves more than a balance of mere prejudice. If unfair prejudice simply meant prejudice, anything adverse to a litigant's case would be excludable under Rule 403. Emphasis must be placed on the word "unfair." Unfair prejudice is that quality of evidence which might result in an improper basis for a jury decision. Consequently, if the evidence arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence may be unfairly prejudicial. Usually, although not always, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect.' " *Oberlin v. Akron Gen. Med. Ctr.* (2001), 91 Ohio St.3d 169, 172, 743 N.E.2d 890, *quoting Weissenberger's Ohio Evidence* (2000) 85–87, Section 403.3.

104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302, ¶ 23-24.

ISSUE FOR APPEAL

Whether the trial court abused its discretion by admitting Prince and Deckard's testimony.

{¶29} At no time did the state ask the trial court to declare Prince or Deckerd as an expert witness. The trial court did not instruct the jury that Prince or Deckerd was an expert witness or that their testimony should be judged differently than any other witness.

{¶30} Groesser was aware before trial of the substance of the testimony that Groesser and Deckerd would provide as evidenced by his motion in limine. (1T. at 10). Groesser fails to elucidate with any specificity how the lack of a report prevented him from retaining an expert witness concerning the work that he performed or the standards in the industry.

{¶31} The contractors provided the jury with first-hand knowledge about the services they provided and the materials they installed for the Lake house renovation. Their first-hand knowledge was relevant to understand the extent of Groesser's deceptive conduct. How each contractor evaluated Groesser's work, their training and experience were all proper subjects for cross-examination. Groesser makes no claim that the trial court prohibited him from questioning Prince or Deckerd on any subject. The testimony was relevant and probative to the issues to be decided and was not unfairly prejudicial.

{¶32} The trial court did not abuse its discretion in permitting the testimony. The decision to permit the testimony of Prince and Deckerd was not "unreasonable, arbitrary, or an unconscionable use of discretion, or a view or action that no conscientious judge could honestly have taken." *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23.

{¶33} Groesser's First Assignment of Error is overruled.

II.

{¶34} In his Second Assignment of Error, Groesser alleges that the trial court erred in not granting his Crim. R. 29 motion for acquittal. In determining whether a trial court erred in overruling an appellant's motion for judgment of acquittal, the reviewing court focuses on the sufficiency of the evidence. See, *e.g., State v. Carter*, 72 Ohio St.3d 545, 553, 651 N.E.2d 965(1995); *State v. Jenks*, 61 Ohio St.3d 259, 273, 574 N.E.2d 492(1991), *superseded by State constitutional amendment on other grounds in State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668(1997). In his Third Assignment of Error, Groesser contends his conviction is against the manifest weight of the evidence produced by the state at trial.

STANDARD OF APPELLATE REVIEW.

A. Sufficiency of the Evidence.

{¶35} The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." This right, in conjunction with the Due Process Clause, requires that each of the material elements of a crime be proved to a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. __, 133 S.Ct. 2151, 2156, 186 L.Ed.2d 314 (2013); *Hurst v. Florida*, 136 S.Ct. 616, 621, 193 L.Ed.2d 504 (2016). The test for the sufficiency of the evidence involves a question of law for resolution by the appellate court. *State v. Walker,* 150 Ohio St.3d 409, 2016-Ohio-8295, 82 N.E.3d 1124, ¶30. "This naturally entails a review of the elements of the charged offense and a review of the state's evidence." *State v. Richardson,* 150 Ohio St.3d 554, 2016-Ohio-8448, 84 N.E.3d 993, ¶13.

{¶36} When reviewing the sufficiency of the evidence, an appellate court does not ask whether the evidence should be believed. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Walker,* at ¶30. "The relevant inquiry is whether, after viewing the evidence in the 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." *Jenks* at paragraph two of the syllabus. *State v. Poutney,* Oh. Sup. Ct. No. 2016-1255, 2018-Ohio-22, 2018 WL 328882 (Jan. 4, 2018), ¶19. Thus, "on review for evidentiary sufficiency we do not second-guess the jury's credibility determinations; rather, we ask whether, '*if believed*, [the evidence] would convince the average mind of the defendant's guilt beyond a reasonable doubt.'" *State v. Murphy*, 91 Ohio St.3d 516, 543, 747 N.E.2d 765 (2001), *quoting Jenks* at paragraph two of the syllabus (emphasis added); *Walker* at ¶31. We will not "disturb a verdict on appeal on sufficiency grounds unless 'reasonable minds could not reach the conclusion reached by the trier-of-fact.'" *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 94, *quoting State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997); *State v. Montgomery*, 148 Ohio St.3d 347, 2016-Ohio-5487, 71 N.E.3d 180, ¶74.

ISSUE FOR APPEAL

Whether, after viewing the evidence in the light most favorable to the prosecution, the evidence, "if believed, would convince the average mind of the Groesser's guilt on each element of the crime beyond a reasonable doubt."

{¶37} In this case, Groesser was charged with grand theft in violation of R.C. 2913.02(A)(1) and/or (A)(2) and/or (A)(3) which states in as follows:

(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: (1) Without the consent of the owner or person authorized to give consent; (2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent; (3) By deception;

* * *

{¶38} R.C. 2913.01(A) defines "deception" as follows,

Knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.

{¶39} The term "deprive" in the statute means to do any of the following,

(1) Withhold property of another permanently, or for a period that appropriates a substantial portion of its value or use, or with purpose to restore it only upon payment of a reward or other consideration;

(2) Dispose of property so as to make it unlikely that the owner will recover it;

(3) Accept, use, or appropriate money, property, or services, with purpose not to give proper consideration in return for the money, property,

> or services, and without reasonable justification or excuse for not giving proper consideration.

R.C. 2913.01(C)(1)-(3).

{¶40} A person acts "purposely" when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature. R.C. 2901.22(A).

{¶41} The term "knowingly," as used in the requirement of "knowingly obtain or exert control," means that a person, regardless of purpose, is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist. R.C. 2901.22(B).

{¶42} Because intent lies within the privacy of a person's own thoughts and is therefore not susceptible to objective proof, intent is determined from the surrounding facts and circumstances, and persons are presumed to have intended the natural, reasonable and probable consequences of their voluntary acts. *State v. Garner*, 74 Ohio St.3d 49, 60, 1995-Ohio-168, 656 N.E.2d 623.

{¶43} "[U]nder the combination of R.C. 2913.02(A)(3) and 2913.01(A), the state, in order to prove theft by deception, must establish: (1) that the accused knowingly obtained or exerted control over property or services; (2) that the accused obtained or exerted such control with purpose to deprive; (3) that the accused obtained or exerted such control by knowing deception; and (4) that such knowing deception was the result of misrepresentation or other conduct creating a false impression in another." *State v.*

Graven (1978), 54 Ohio St.2d 114, 126, 374 N.E.2d 1370, 1377. (J. Brown, dissenting), *reversed on other grounds, State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492(1991). *Accord*, *State v. Snyder*, 5th Dist. Licking No. 2008-CA-25, 2080-Ohio-6709, 2008 WL 5265826, ¶ 25.

{¶44} In the case at bar, Groesser met Mr. Lake at Lowe's to pick out materials for the renovation. Groesser told Mr. Lake to give him a check for $25,000.00 and he would purchase the materials and begin the Lake house renovation. After completing the demolition, Groesser and his co-workers appeared sporadically to work on the project. Groesser also received additional money to perform services for change orders. Eventually, Groesser abandoned the project leaving behind his tools and an uninhabitable home. Mr. Lake was forced to hire new contractors to repair half-finished or shoddy work and complete the renovation project. The cost of the new contractors alone was more than $35,000.00. In addition, Mr. Lake had to purchase the materials, such as cabinets, appliances and fixtures that Groesser never delivered to the site. Groesser never refunded any of the Lakes money for the materials or unperformed services.

{¶45} If the state relies on circumstantial evidence to prove an essential element of an offense, it is not necessary for "such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction." *State v. Jenks*, 61 Ohio St.3d 259, 272, 574 N.E. 2d 492(1991), paragraph one of the syllabus, *superseded by State constitutional amendment on other grounds as stated in State v. Smith*, *80 Ohio St.3d 89, 684 N.E.2d 668(1997).* "Circumstantial evidence and direct evidence inherently possess the same probative value [.]" *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus. Furthermore, "[s]ince circumstantial evidence and direct evidence are

indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that i[t] weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt." *Jenks*, 61 Ohio St.3d at 272, 574 N.E. 2d 492. While inferences cannot be based on inferences, a number of conclusions can result from the same set of facts. *State v. Lott*, 51 Ohio St.3d 160, 168, 555 N.E.2d 293(1990), citing *Hurt v. Charles J. Rogers Transp. Co*, 164 Ohio St. 329, 331, 130 N.E.2d 820(1955). Moreover, a series of facts and circumstances can be employed by a jury as the basis for its ultimate conclusions in a case. *Lott,* 51 Ohio St.3d at 168, 555 N.E.2d 293, citing *Hurt,* 164 Ohio St. at 331, 130 N.E.2d 820.

{¶46} Viewing the evidence in the case at bar in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that Groesser committed theft by deception. We hold therefore that the state met its burden of production regarding theft by deception and, accordingly, there was sufficient evidence to support Groesser's conviction.

B. Manifest weight of the evidence.

{¶47} As to the weight of the evidence, the issue is whether the jury created a manifest injustice in resolving conflicting evidence, even though the evidence of guilt was legally sufficient. *State v. Thompkins*, 78 Ohio St.3d 380, 386–387, 678 N.E.2d 541 (1997), *superseded by constitutional amendment on other grounds as stated* by *State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668, 1997–Ohio–355; *State v. Issa,* 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001).

> "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every

> reasonable presumption must be made in favor of the judgment and the finding of facts.
>
> * * *
>
> "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment."

Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

{¶48} The reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve. *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Murphy*, 4th Dist. Ross No. 07CA2953, 2008–Ohio–1744, ¶ 31. Because the trier of fact sees and hears the witnesses and is particularly competent to decide whether, and to what extent, to credit the testimony of particular witnesses, the appellate court must afford substantial deference to its determinations of credibility. *Barberton v. Jenney,* 126 Ohio St.3d 5, 2010–Ohio–2420, 929 N.E.2d 1047, ¶ 20. In other words, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. Mahoning No. 99 CA 149, 2002–Ohio–1152, at ¶ 13, *citing State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125(7th Dist. 1999). Thus, an appellate court will leave the issues of weight and credibility of the evidence to the fact finder, as long as a rational basis exists in the record for its decision. *State v. Picklesimer*, 4th Dist. Pickaway No. 11CA9, 2012–Ohio–1282, ¶ 24.

{¶49} Once the reviewing court finishes its examination, an appellate court may not merely substitute its view for that of the jury, but must find that " '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. Thompkins, supra*, 78 Ohio St.3d at 387, *quoting State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720–721(1st Dist. 1983). Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." Id.

ISSUE FOR APPEAL.

Whether the jury court clearly lost their way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

{¶50} In the case at bar, Groesser's defense centered upon his suggestion that he may be a poor bookkeeper, some of his work may not have been executed in a workmanlike manner, and that his business is perhaps poorly managed, there was no evidence that he had any intent to not complete the work he was retained to do.

{¶51} The jury as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the trier of fact may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Craig*, 10th Dist. Franklin No. 99AP–739, 1999 WL 29752 (Mar 23, 2000) *citing State v. Nivens*, 10th Dist. Franklin No. 95APA09–1236, 1996 WL 284714 (May 28, 1996). Indeed, the trier of fact need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, 10th Dist. Franklin No. 02AP–604, 2003–Ohio–958, ¶ 21, *citing State v. Antill*, 176 Ohio St. 61, 67, 197

N.E.2d 548 (1964); *State v. Burke*, 10th Dist. Franklin No. 02AP–1238, 2003–Ohio–2889, *citing State v. Caldwell*, 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist. 1992). Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks*, 61 Ohio St.3d 259, 272, 574 N.E.2d 492 (1991), paragraph one of the syllabus*, superseded by State constitutional amendment on other grounds as stated in State v. Smith, 80 Ohio St.3d 89, 102 at n. 4, 684 N.E.2d 668 (1997).*

{¶52} In the case at bar, the jury heard the witnesses, viewed the evidence and heard Groesser's attorney's arguments and explanations about Groesser's intentions. The jury was able to see for themselves Groesser subject to cross-examination. Thus, a rational basis exists in the record for the jury's decision.

{¶53} We find that this is not an "'exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins*, 78 Ohio St.3d 380, 386–387, 678 N.E.2d 541 (1997), *quoting Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. The jury neither lost his way nor created a miscarriage of justice in convicting Groesser of theft by deception.

{¶54} Based upon the foregoing and the entire record in this matter we find Groesser's conviction for theft by deceptions is not against the sufficiency or the manifest weight of the evidence. To the contrary, the jury appears to have fairly and impartially decided that matter. The jury heard the witnesses, evaluated the evidence, and was convinced of Groesser's guilt of theft by deception.

{¶55} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed, proves all the elements of the

crime of theft by deception in violation of R.C. 2913.02(A)(1); (A)(2); and/ or (A)(3) for which Groesser was convicted.

{¶56} Groesser's Second and Third Assignments of Error are overruled.

{¶57} The judgment of the Stark County Court of Common Pleas is affirmed.

By Gwin, J,

Wise, John, P.J., and

Wise, Earle, J., concur