

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

STATE OF OHIO,	:	APPEAL NO. C-061012
	:	TRIAL NO. 04CRB-36358
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
TIMOTHY NEIL ZUREICK,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Following a trial to the bench, defendant-appellant Timothy Neil Zureick was convicted of the theft of various plants from Spring Grove Cemetery. Zureick has appealed his conviction. In his first assignment of error, he argues that the trial court erred in excluding relevant character evidence. In his second assignment of error, he argues that his conviction was not supported by the sufficiency or the weight of the evidence. We address these assignments out of order.

The evidence presented at trial demonstrated that, on August 25, 2004, Spring Grove Cemetery employee James King saw Zureick carrying plants from the cemetery's rose garden and placing them in his car. After noting Zureick's license plate, King investigated the area from which Zureick had come. King discovered that various plants in the rose garden had been dug up. Several plants were lying next to holes in the ground, and various plants had been removed. King reported the theft and identified Zureick from a photographic lineup. Mark Funke, the grounds manager of

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Spring Grove Cemetery, testified that Zureick was not employed by the cemetery and did not have permission to remove plants from the rose garden.

Zureick testified on his own behalf, stating that he owned a wholesale container tree nursery, and that he had visited the cemetery with the intention of donating various plants from his nursery to the cemetery. Zureick had donated plants in the past to Brian Jorg, a former horticulturist at Spring Grove. But upon his arrival, Zureick discovered that Jorg was no longer employed by Spring Grove, and he was not able to make his donation that day. Zureick further testified that, because the plants had been in his car for a lengthy period of time, they needed to be watered. Consequently, he had removed the plants from his car to water them and had then placed the plants back in his car. Zureick denied digging up and removing plants from the cemetery. The state presented rebuttal testimony from James King, who stated that, although there was a watering spigot in the cemetery, Zureick had not been traveling from the direction of the spigot when he was seen carrying the plants. Rather, Zureick had been coming from the direction of the garden.

Following our review of the record, we conclude that Zureick's conviction for theft was supported by sufficient evidence.² The evidence demonstrated that Zureick had, with the purpose to deprive Spring Grove Cemetery of its property, knowingly removed various plants from the cemetery without consent.³ Zureick alleges that the state failed to prove the value of the plants that had been taken. But valuation is not an element of the crime of theft,⁴ and the state was not required to prove the specific value of the stolen plants. We further conclude that Zureick's conviction for theft was not against the manifest weight of the evidence. The trial court was in the best position to

² See *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

³ See R.C. 2913.02(A)(1).

⁴ See *State v. Reese*, 165 Ohio App.3d 21, 2005-Ohio-7075, 844 N.E.2d 873, ¶36.

judge the credibility of the witnesses, and we cannot conclude that it lost its way and created a manifest miscarriage of justice.⁵

Zureick additionally argues under this assignment of error that the state's failure to serve him with a warrant until approximately two years after the theft had occurred violated his due-process rights. Although Zureick was not served until approximately two years after the theft had occurred, the Cincinnati Police attempted service on Zureick numerous times during this period. When the Cincinnati Police were unable to serve Zureick, the Hamilton County Sheriff's Department attempted service. But it was unable to reach Zureick as well.

Moreover, Zureick failed to raise this issue before the trial court and consequently has waived it.⁶ We further note that Zureick was brought to trial within the allotted statutory speedy-trial time.⁷ The second assignment of error is overruled.

In his first assignment of error, Zureick argues that the trial court erred in excluding relevant character evidence. The trial court prohibited Zureick from testifying about additional plant donations that he had made to other organizations. The trial court also excluded the testimony of Mary Ann Westendorf. Westendorf's testimony was proffered at the close of trial, and it indicated that Zureick had donated plant material to the Civic Garden Center of Greater Cincinnati in the past. Zureick argues that this testimony would have demonstrated his good character, and that because he had acted in conformity with his good character, he could not have committed the theft offense.

Evid.R. 404(A)(1) permits an accused to introduce evidence of a pertinent character trait. An accused is permitted to offer such evidence "to demonstrate that on the particular occasion involving the charged offense he acted in conformity with his

⁵ See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

⁶ See *State v. Awan* (1986), 22 Ohio St.3d 120, 122, 489 N.E.2d 277.

⁷ See R.C. 2945.71.

good character and did not commit the crime charged.”⁸ Evid.R. 405 provides how character evidence may be used. An accused may offer reputation or opinion testimony of his or her good character.⁹ But character may not be proved by specific instances of conduct unless the character trait is an essential element of a charge, claim, or defense.¹⁰

Zureick sought to demonstrate his character traits for honesty and generosity by introducing specific instances of conduct, namely prior plant donations. But Evid.R. 405 did not permit the use of specific instances of conduct to prove character in this case, and the trial court did not abuse its discretion in excluding this evidence.¹¹ Furthermore, although the trial court excluded certain evidence, Zureick was permitted to testify that he had made multiple donations to Spring Grove in the past. Consequently, we further conclude that Zureick was not prejudiced by the exclusion of the character evidence. Zureick’s second assignment of error is overruled.

Therefore, the judgment of the trial court is affirmed.

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.

HENDON, P.J., CUNNINGHAM and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on September 26, 2007

per order of the Court _____.

Presiding Judge

⁸ *State v. Grubb* (1996), 111 Ohio App.3d 277, 280, 675 N.E.2d 1353.

⁹ See Evid.R. 405(A).

¹⁰ See Evid.R. 405(B).

¹¹ See *Bernal v. Lindholm* (1999), 133 Ohio App.3d 163, 176, 727 N.E.2d 145.