[Cite as *State v. Jenkins*, 2020-Ohio-3217.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	Case Nos. 19CA6
	:	19CA7
Plaintiff-Appellee,	:	
	:	DECISION AND JUDGMENT
vs.	:	ENTRY
	:	
SHANE A. JENKINS,	:	**RELEASED 5/21/2020**
	:	
Defendant-Appellant.	:	

APPEARANCES:

Matthew F. Loesch, Portsmouth, Ohio for Appellant.

Brigham M. Anderson, Lawrence County Prosecutor, and C. Michael Gleichauf, Lawrence County Assistant Prosecutor, Ironton, Ohio, for Appellee.

Hess, J.

{¶1} This is an appeal from Lawrence County Court of Common Pleas judgment entries of conviction of Appellant, Shane Jenkins, for receiving stolen property and aggravated possession of drugs. Jenkins asserts that his conviction for receiving stolen property is against the manifest weight and sufficiency of the evidence and his trial counsel was ineffective. Based upon our review of the law and the record, we overrule Jenkins' assignments of error and affirm the judgment entry of the trial court's judgment of conviction.

PROCEDURAL HISTORY

{¶2} On June 20, 2018, the State charged Jenkins with aggravated possession of Methamphetamine. On August 22, 2018, the State charged

Jenkins with receiving stolen property, a 2014 Honda all-terrain vehicle ("ATV")[1], in a separate case.

{¶3} Both cases were set for trial on December 13, 2018. On the day of trial, Jenkins pleaded guilty to the aggravated possession charge. The court then proceeded with the trial on the receiving stolen property charge.

{¶4} The State's first witness, Kelly Caperton, testified that she lived in Ironton, Ohio, with her husband and son. She testified that she purchased a Honda ATV in May of 2015. She testified that because she purchased the ATV before she was married, it was titled in her maiden name, Kelly Wilson. Mrs. Caperton testified that she never sold the ATV to anyone. She also testified that she never gave permission to Jenkins to ride the ATV. Mrs. Caperton testified that her son was the one who drove the ATV and that he would park it near the house and would leave the keys in his boot on the front porch.

{¶5} Mrs. Caperton testified that at approximately 3:30 a.m. on March 31, 2018, she and her husband heard the ATV being driven away. She testified that her husband called the police and reported the ATV stolen.

{¶6} On cross examination, Mrs. Caperton admitted that she did not see who took the ATV. She also testified that the ATV had been returned to them.

{¶7} The State's next witness was Charles Caperton, Kelly Caperton's husband. His testimony confirmed that the Capertons owned a Honda ATV. Mr. Caperton also testified that he never sold the ATV to Jenkins or gave him permission to ride it. His testimony also corroborated that the ATV was taken from their yard early in the morning, and he did not see who was driving it. Mr.

[1] Some of the witnesses also refer to the ATV as a "four wheeler."

Caperton testified that he called the police. He testified that several days after the theft was reported to the police, he received a call that the Sheriff's Office had recovered their ATV. Mr. Caperton testified that they had the ATV towed home because the key was not in the ignition.

{¶8} The State's next witness was Christopher Dirling who lived in Kitts Hill, Ohio, which is near Ironton, Ohio. Mr. Dirling testified that he had known Jenkins all his life; they had grown up together.

{¶9} Mr. Dirling testified that on March 30, 2018, he hung out with Jenkins. Mr. Dirling testified that Jenkins had always been interested in his motorcycle. Mr. Dirling testified that Jenkins said he "was possibly gonna come up on a four wheeler he was gonna trade for [Mr. Dirling's] motorcycle."

{¶10} Mr. Dirling testified that on March 31, 2018, he received a message from Jenkins on "Facebook Messenger" offering to trade a four wheeler for Mr. Dirling's motorcycle. Mr. Dirling testified that he informed Jenkins that he might consider the trade depending on the condition of the four wheeler. Mr. Dirling testified that later that day Jenkins showed up at his house driving a red Honda four wheeler followed by Squeaky Cox in another vehicle. Mr. Dirling testified that Jenkins said that he did not have a title or bill of sale for the ATV with him, but claimed that he could produce a bill of sale. Mr. Dirling testified that he told Jenkins if he could produce a bill of sale for the ATV, he "could possibly trade."

{¶11} Mr. Dirling testified the next day, April 1, 2018, Jenkins showed up at his house riding the same ATV, but this time he was alone. Mr. Dirling testified that Jenkins again offered to trade the ATV for Mr. Dirling's motorcycle, but

Jenkins still had no bill of sale or title for the ATV. Mr. Dirling testified that he again declined the trade offer.

{¶12} Mr. Dirling testified that he and his family then left and went out for dinner. Mr. Dirling testified that when they returned from dinner he noticed the ATV on their patio, but Jenkins was nowhere in sight. Mr. Dirling testified that he had suspected the ATV was stolen so he found the vehicle identification number ("VIN") on the ATV and his father, Michael Dirling, called the Sheriff's Office and gave them the VIN. Mr. Dirling testified that within a few minutes the Sheriff's Office called back and confirmed the ATV was stolen.

{¶13} Mr. Dirling testified that he and his father provided written statements to Deputy Sisler from the Sheriff's Office regarding the ATV. Mr. Dirling testified that Charles Caperton and his son came to pick up their ATV, which was towed away.

{¶14} The State's next witness was Michael Dirling, Christopher Dirling's father. Michael Dirling's testimony corroborated his son's testimony.

{¶15} On cross examination, Jenkins' counsel established that Michael Dirling was not privy to all the communications between Christopher Dirling and Jenkins. Defense counsel asked Michael Dirling the following question about the potential trade: "And wasn't anything about that made you feel funky about the deal, was there?" Michael answered: "I felt funky about the deal from the day [Jenkins] started talking to him about it and I'm not judging [Jenkins] today, but he has a history and it made me wonder whether or not the ATV was actually legit or stolen, yes."

{¶16} The State's next witness was Deputy Steve Sisler of the Lawrence County Sheriff's Office. Deputy Sisler was dispatched to the Caperton's house to investigate their stolen ATV on Saturday, March 31st. Deputy Sisler testified that he obtained the make, model, and VIN of the ATV from the Capertons. Deputy Sisler testified the ATV's VIN was then loaded into the NCIC database accessible by law enforcement which identified it as stolen. Deputy Sisler testified that he located the ATV the next day at the Dirling's residence. Deputy Sisler testified that after speaking to Christopher and Michael Dirling, he considered Jenkins to be a suspect. Deputy Sisler testified that he observed a message on Christopher Dirling's phone that was "possibly from [Jenkins] saying that he was, had the key to the [ATV]." Deputy Sisler testified that he had Christopher Dirling send a text back to Jenkins to meet at his house to return the key. Deputy Sisler testified that he then went to Jenkins' house, but he was not home and did not return home during the hour and a half that Deputy Sisler waited.

{¶17} On cross examination, Deputy Sisler admitted that he had not seen any message between Christopher Dirling and Jenkins before that Sunday and further admitted that he could not confirm that Jenkins "was on the other end of the phone." Deputy Sisler also testified that the Sheriff's Office never determined who stole the ATV. He further testified he did not check to see if there were any surveillance cameras in the area. Deputy Sisler testified that he never interviewed Jenkins regarding the theft of the ATV, and to his knowledge, no one else from the Sheriff's Office interviewed him either. Deputy Sisler testified that

he also did not interview Squeaky Cox. Deputy Sisler testified that he had no personal knowledge or evidence that Jenkins had stolen the ATV.

{¶18} After the State rested its case, Jenkins moved for a dismissal of the charges for lack of evidence, which the trial court denied. Jenkins did not present any witnesses or evidence, so the case went to the jury, which found Jenkins guilty of receiving stolen property.

{¶19} On January 2, 2019, the trial court issued an entry in case number 18-CR-240 sentencing Jenkins to 11 months in prison for aggravated possession of drugs. On that same date, the trial court also issued an entry in case number 18-CR-352 sentencing Jenkins to 17 months in prison for receiving stolen property, which was to be served consecutively with the 11-month sentence for aggravated possession of drugs. It is from these judgment entries that Jenkins appeals, asserting two assignments of error pertaining to his conviction for receiving stolen property.

ASSIGNMENTS OF ERROR

I. APPELLANT'S CONVICTIONS FOR RECEIVING STOLEN PROPERTY WAS [SIC] AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

II. APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE IN HIS REPRESENTATION OF APPELLANT.

First Assignment of Error

{¶20} Jenkins' first assignment of error alleges his conviction was against the manifest weight and sufficiency of the evidence. Jenkins claims that the issue presented for review is "[w]here there was no evidence that the Appellant

knew about the motor vehicle in question being stolen was his conviction for receiving stolen property against the manifest weight and sufficiency of the evidence." Specifically, Jenkins claims that his counsel asked Deputy Sisler if "there was any evidence the state of Ohio possessed which demonstrated that Appellant had knowledge that the 4-wheeler was stolen," and that "Deputy Sisler responded that he did not have such information."

{¶21} In response the State argues that it "presented sufficient evidence for the jury to arrive at their verdict of guilty." The State then proceeds to set out in its brief the testimony from the trial that it believes supports Jenkins' guilt.

{¶22} Despite the fact that Jenkins' assignment of error asserts that his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence, his brief repeatedly asserts that there was "no evidence" to support that Jenkins was aware that the ATV in this case was stolen. In substance, Jenkins appears to present only a sufficiency-of-the-evidence argument. However, because his assignment of error asserts both issues, and we believe that he intended both issues to be reviewed, we will address both in our decision.

{¶23} In a sufficiency-of-the-evidence review, " ' "[t]he 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. Lodwick*, 2018-Ohio-3710, 118 N.E.3d 948, ¶ 9 (4th Dist.), quoting *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 146, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574

N.E.2d 492, paragraph two of the syllabus (1991). "The court's evaluation of the sufficiency of the evidence raises a question of law and does not permit the court to weigh the evidence." *State v. Lanning*, 161 Ohio App.3d 853, 832 N.E.2d 143, ¶ 11 (4th Dist. 2005). "In other words, the motion does not test the rational persuasiveness of the State's case, but merely its legal adequacy." *State v. Reyes-Rosales,* 4th Dist. Adams No. 15CA1010, 2016-Ohio-3338, ¶ 15, citing *State v. Koon*, 4th Dist. Hocking No. 15CA17, 2016-Ohio-416, ¶ 15.

{¶24} In a manifest-weight-of-the-evidence review, the court "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses * * *." *State v. Hammond*, 4th Dist. Ross No. 18CA3662, 2019-Ohio-4253, ¶ 55, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). "The reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve." *State v. Schroeder*, 4th Dist. Adams No. 18CA1077, 2019-Ohio-4136, ¶ 62, citing *Dunn*, *supra*, at ¶ 16; *Wickersham*, *supra,* at ¶ 25; *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, 2008 WL 1061793, ¶ 31. "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." *Id.,* citing *State v. Picklesimer*, 4th Dist. Pickaway No. 11CA9, 2012-Ohio-1282, 2012 WL 1029466, ¶ 24. Ultimately, the court must "resolve conflicts in the evidence and determine whether the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed." *Hammond* at ¶ 55.

{¶25} R.C. 2913.51 (A) sets out the elements of the offense of receiving stolen property: "No person shall receive, retain, or dispose of property of another *knowing or having reasonable cause to believe* that the property has been obtained through commission of a theft offense." (Emphasis added).

{¶26} Jenkins specifically alleges that there was insufficient evidence that he knew or had reasonable cause to believe that the ATV was stolen based on Deputy Sisler's response to the following question: "whether there was any evidence the state of Ohio possessed which demonstrated that Appellant had knowledge that the 4-wheeler was stolen." Jenkins alleges that "Deputy Sisler responded that he did not have such information."

{¶27} A review of the trial transcript reveals that Jenkins' counsel asked Deputy Sisler: "You don't have any personal knowledge of how Mr. Jenkins came into possession of the four wheeler do you?" Deputy Sisler answered: "No I do not." The mere fact that the Deputy lacked "personal knowledge" of how Jenkins acquired the ATV does not mean that there could not be other evidence that supported that Jenkins knew, or had reasonable cause to believe, that the ATV was stolen. A jury can infer from testimony that the elements of an offense are established. *See Rehab Project, Inc. v. Sarno,* 80 Ohio App.3d 265, 271, 608 N.E.2d 1188 (3rd Dist.); *State v. Barnes*, 8th Dist. No. 95557, 2011-Ohio-2917, ¶ 15.

{¶28} The evidence in this case showed that over the several days Jenkins and Christopher Dirling discussed the trade, Mr. Dirling and his father had asked Jenkins numerous times whether Jenkins could produce a registration

and/or bill of sale for the ATV. Yet, despite the fact that Jenkins claimed to possess at least a bill of sale, and that producing those documents was necessary before Christopher Dirling would consider the trade, Jenkins never produced either document, and eventually abandoned the ATV on Christopher Dirling's property without a key. The evidence that Jenkins knew or had reasonable cause to believe that the ATV was stolen is largely circumstantial. However, "a defendant may be convicted solely on the basis of circumstantial evidence." *State v. Meddock*, 2017-Ohio-4414, 93 N.E.3d 43, ¶ 54 (4th Dist.) citing *State v. Nicely*, 39 Ohio St.3d at 151, 529 N.E.2d 1236 (1988).

"Circumstantial evidence and direct evidence inherently possess the same probating value." *Jenks*, paragraph one of the syllabus. "Circumstantial evidence is '[t]estimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved.' " *Nicely* at 150, 529 N.E.2d 1236, quoting Black's Law Dictionary (5 Ed.1979); *State v. Dodson*, 4th Dist. Ross No. 18CA3629, 2019-Ohio-1465, ¶ 13.

{¶29} In viewing this evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have reasonably inferred that Jenkins either knew, or at the very least, had reasonable cause to believe that the ATV was stolen.

{¶30} In reviewing the entire record, there was ample evidence that Jenkins knew or should have known that the ATV was stolen. Therefore, we find the jury did not lose its way in convicting Jenkins so as to create a manifest

injustice warranting a new trial. Accordingly, Jenkins' conviction for receiving stolen property was not against the manifest weight of the evidence.

{¶31} Because we find that there was sufficient evidence to support Jenkins' conviction for receiving stolen property and his conviction is not against the manifest weight of the evidence, we overrule Jenkins' first assignment of error.

Second Assignment of Error

{¶32} Jenkins' second assignment of error asserts that his trial counsel was ineffective because: (1) he did not object to a witness's answer on cross examination and request a limiting instruction for that testimony, and (2) because he failed to object to the prosecutor when he improperly bolstered the credibility of two of the State's witnesses.

{¶33} "To establish constitutionally ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived the defendant of a fair trial." *State v. Carter*, 4th Dist. Pickaway No. 18CA1, 2018-Ohio-4503, ¶ 13, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "[W]hen considering whether trial counsel's representation amounts to deficient performance, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " *Id*. at ¶ 13, quoting *Strickland* at 689. "Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were 'so serious' that counsel failed to function 'as the "counsel"

guaranteed * * * by the Sixth Amendment.' " *Id*., quoting *Strickland* at 687. "[F]ailure to object, standing alone, is insufficient to sustain a claim of ineffective assistance of counsel," it may be a "tactical decision." *State v. Tyson*, 4th Dist. Ross No. 12CA3343, 2013-Ohio-3540, ¶ 32, citing *State v. Bennett,* 11th Dist. No. 2002-A-0020, 2005-Ohio-1567, ¶ 70. An attorney may decline to object to unfavorable testimony so as not to draw the jury's attention to it. *See State v. Young*, 4th Dist. Washington No. 12CA14, 2013-Ohio-3418, ¶ 51.

Cross Examination Testimony

{¶34} On cross examination, Jenkins' counsel asked Michael Dirling the following:

> Q: Trade? And wasn't anything that made you feel funky about the deal, was there?
>
> A: I felt funky about the deal from the day he started talking to him about it and I'm not judging [Jenkins] today, but he has a history and it made me wonder whether or not the ATV was actually legit or stolen, yes.
>
> Q: Did you ask [Jenkins] if it was stolen?
>
> A: I told him that I knew that . . .
>
> Q: Sir, the question was . . .
>
> A: . . . those needed a title.
>
> Q: . . . did you ask him if . . .
>
> A: No, I did not. No.
>
> Q: . . . it was stolen. You did not?

A: No.

{¶35} Jenkins argues that his counsel should have objected and requested a limiting instruction regarding Michael Dirling's answer discussing Appellant's "history." Had Jenkins' counsel moved to strike, objected to Michael Dirling's response, and asked for a limiting instruction, Jenkins' counsel would have drawn unwanted attention by the jury to Michael Dirling's testimony, which Jenkins' own counsel elicited. Therefore, we presume that Jenkins' counsel's failure to take any action was a strategy employed to prevent such undue attention.

{¶36} However, even assuming for argument sake that Jenkins' counsel's representation was deficient, we find Jenkins cannot demonstrate that the result of the trial would have been different because "the record contains ample competent, credible evidence to support Jenkins' conviction." *State v. Jenkins*, 4th Dist. Ross No. 13CA3413, 2014-Ohio-3123, ¶ 31. Specifically, we found supra, there was evidence that the ATV was stolen and there was testimony from which the jury could have, and in fact did, infer that Jenkins knew or had reasonable cause to believe that the ATV was stolen.

Bolstering Witnesses

{¶37} Jenkins also argues his counsel failed to object to the prosecutor twice bolstering the credibility of the State's witnesses. Jenkins cites the prosecutor's questions to both Christopher and Michael Dirling asking if they understood they were under oath, if they understood the penalties for lying, and

finally by asking if they were "telling the truth today." They responded affirmatively to these questions.

{¶38} "[A] prosecutor may not vouch for a witness by expressing a personal belief or opinion as to the credibility of a witness." *State v. Dailey*, 4th Dist. Adams No. 18CA1059, 2018-Ohio-4315, ¶ 40, citing *State v. Myers*, 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, ¶ 145; *State v. Williams*, 79 Ohio St.3d 1, 12, 679 N.E.2d 646 (1997). "Improper vouching occurs when the prosecutor implies knowledge of facts outside the record or places the prosecutor's personal credibility in issue." *Id*., citing *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 117, citing *State v. Keene*, 81 Ohio St.3d 646, 666, 693 N.E.2d 246 (1998). " '[I]t is common knowledge that people who commit perjury can be prosecuted," so when the prosecutor poses that question to a witness "it was merely a reminder that witnesses who provide false testimony face perjury charges." *Thomas v. Hardley*, C.D. Cal. No. EDCV 12-575 MWF (JC), 2015 WL 5029176, *9 (April 10, 2015). Similarly, when the prosecutor asked Christopher and Michael Dirling if both were "telling the truth today," we find that he was not expressing an opinion regarding their credibility.

{¶39} Moreover, even assuming arguendo the prosecutor's remarks could be construed as bolstering Christopher and Michael Dirling's credibility, any prejudice was mitigated when the prosecutor made the following statement in his closing:

> Uh, you know, I, I, I, it is what it is, y-y-you either believe [Christopher and Michael Dirling] and you find [Jenkins] guilty, or

> you don't believe them and not find him guilty. You guys are, *you weigh the, the credibility on this*. There's not, there's not evidence that I can, I can create. *It all comes down to who you believe.* Uh, and if you believe them, find [Jenkins] guilty. And if you don't, I'd ask you to find him not guilty. (Emphasis added.)

{¶40} The prosecutor reminded the jury that it alone determines the credibility of the witnesses in a criminal case, which was reinforced in the judge's instructions to the jury instructing them of the same. Therefore, even if the prosecutor's questions cited by Jenkins did bolster the testimony of the State's witnesses, it was mitigated by the prosecutor's statement in his closing argument, as well as the judge's instructions to the jury.

{¶41} Accordingly, because we find that Jenkins' trial counsel was not ineffective, we overrule Jenkins' second assignment of error.

Conclusion

{¶42} Having overruled Appellant's assignments of error, we affirm the trial court's judgment entry of conviction.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Michael D. Hess, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.