[Cite as *State v. Colon*, 2010-Ohio-4482.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93651

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

YAZMANI COLON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-504455

BEFORE: Dyke, J., Rocco, P.J., and McMonagle, J.

RELEASED AND JOURNALIZED: September 23, 2010

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ANN DYKE, J.:

{¶ 1} Defendant-appellant, Yazmani Colon ("appellant"), appeals his conviction for receiving stolen property. For the reasons set forth below, we affirm.

{¶ 2} On December 13, 2007, the Cuyahoga County Grand Jury indicted appellant on one count of receiving stolen property, in violation of R.C. 2913.51(A), and one count of possessing criminal tools, in violation of R.C. 2923.24(A). He pled not guilty to the charges.

{¶ 3} On May 27, 2009, after appellant voluntarily waived his right to a jury, the case proceeded to a bench trial. At trial, Elsie Diaz testified that she was at home around 9:00 p.m. on November 6, 2007, when she heard a car engine

start. She watched as her 1993 Honda Accord exited her driveway with appellant driving down the street. Immediately, she telephoned the police and Officer Byron Brody and his partner arrived at her home to take her statement. She gave various details about the vehicle including it was low on gas.

{¶ 4} With this information, Officer Brody and his partner canvassed the area and approximately 30 minutes later discovered the vehicle near West 117th Street and Lorain Road. When they performed a traffic stop of the vehicle, appellant was driving the vehicle and in the passenger seat was appellant's girlfriend, Aimee Allen. The officers pulled appellant and Allen from the vehicle and appellant told the officers that a man named Carlos, whose last name he did not know, gave him the vehicle at a nearby gas station. He then exited the station by himself in the vehicle and picked up his girlfriend nearby. The officers, unpersuaded by appellant's explanation, arrested him at the scene.

{¶ 5} Shortly thereafter, Diaz arrived at the scene of the arrest and identified appellant as the man she saw driving away in her vehicle. Diaz testified that a later inspection of the vehicle revealed that a radio and a spoiler from the back of the vehicle were missing. Additionally, there was significant damage to the Honda's bumper and the driver's side window was crooked, out of balance, and she could not roll it up or down. Also, Diaz stated that when she first entered the vehicle, a key was already in the ignition and the car was running. She had never seen the key prior to the arrest and had no idea of the origin of the key. The key did not look like her Honda key. Rather, it was

attached to a “New York” key chain and in the shape of Toyota key rather than a Honda key. Furthermore, Diaz provided that she had never seen appellant before and did not lend him the vehicle.

{¶ 6} Following presentation of the aforementioned testimony, appellant moved for acquittal pursuant to Crim.R. 29(A). The trial court denied his request and he presented his girlfriend, Aimee Allen, to testify on his behalf.

{¶ 7} Allen testified that she was with appellant at the gas station when his friend, Carlos, gave him the Honda. She explained that Carlos started the vehicle for appellant, which she admitted was “strange.” Finally, Allen testified that, shortly after leaving the gas station, police stopped the vehicle at West 117th Street and Lorain Road.

{¶ 8} Following Allen’s testimony, appellant again moved for acquittal and the trial court denied this request as well.

{¶ 9} On May 29, 2009, the trial court found appellant guilty of receiving stolen property but not guilty of possessing criminal tools. The trial court sentenced him to 24 months of community control sanctions on June 25, 2009.

{¶ 10} Appellant now appeals and presents two assignments of error for our review. His first assignment states:

{¶ 11} “The trial court erred in denying appellant’s motion for acquittal as to the charges when the state failed to present sufficient evidence to sustain a conviction.”

{¶ 12} His second assignment of error provides:

{¶ 13} "Appellant's conviction is against the manifest weight of the evidence."

{¶ 14} Within these assignments of error, appellant asserts that the state failed to present sufficient evidence and the evidence was against the manifest weight for establishing that appellant knew or had reasonable cause to believe that the Honda was stolen. Additionally, appellant maintains that the prosecution failed to establish that Diaz owned the Honda Accord. We find appellant's arguments unpersuasive.

{¶ 15} Under the Due Process Clause of the Fourteenth Amendment, a defendant in a criminal case cannot be convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he or she is charged. *Jackson v. Virginia* (1979), 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560; *In re Winship* (1970), 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368. In analyzing claims of insufficient evidence, the court must determine 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 beyond a reasonable doubt." *Jackson*, 443 U.S. at 319; *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. An appellate court's function, when reviewing the sufficiency of the evidence to support a criminal conviction, is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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. Id.

{¶ 16} On the other hand, in *Thompkins*, supra, the court illuminated a different test for manifest weight of the evidence as follows:

{¶ 17} "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other.' It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*. Black's [Law Dictionary (6 Ed.1990)], at 1594." Id. at 386.

{¶ 18} 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 jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. See *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. 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. Id.

{¶ 19} Thus, the test for sufficiency of the evidence is a quantitative one,

while the test in determining whether the evidence is against the manifest weight of the evidence is a qualitative one. *State v. Sanders* (Feb. 16, 1999), Stark App. No.1998-CA-0235. Furthermore, sufficiency of the evidence is a question of law for the trial court and manifest weight of the evidence is a question of fact for the factfinder. Id. Accordingly, even if a judgment is sustained by sufficiency of the evidence, it may nevertheless be against the manifest weight of the evidence. Id.

{¶ 20} The essential elements of receiving stolen property are defined in R.C. 2913.51, which provides that "(A) 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."

{¶ 21} In the absence of an admission by the defendant, reasonable cause to believe that an item was stolen may only be established via circumstantial evidence. *State v. Stewart*, Cuyahoga App. No. 91199, 2009-Ohio-2384, at ¶16, citing *State v. Hankerson* (1982), 70 Ohio St.2d 87, 92, 434 N.E.2d 1362. See, also, *State v. Prater*, Cuyahoga App. No. 80678, 2002-Ohio-5844, at ¶9. Thus, in determining whether reasonable minds could conclude that a defendant should have known the property was stolen, the following factors are considered:

{¶ 22} "(a) the defendant's unexplained possession of the merchandise, (b) the nature of the merchandise, (c) the frequency with which such merchandise is stolen, (d) the nature of the defendant's commercial activities, and (e) the relatively limited time between the theft and the recovery of the merchandise."

Stewart, supra at ¶15; *Prater*, supra.

{¶ 23} In the instant matter, we have viewed the evidence in a light most favorable to the state and find sufficient evidence existed that appellant knew, or in the least, had reasonable cause to believe that the Honda had been stolen. Diaz identified appellant as the man driving her vehicle from her driveway without her permission on November 6, 2007. Additionally, Officer Brody testified that approximately 30 minutes later, he and his partner discovered appellant driving the Honda at a location near Diaz's house. After recovering her vehicle, Diaz discovered that the driver's window had been tampered with, her radio and the spoiler were missing, and a "dummy" key was in the ignition.

{¶ 24} Furthermore, while appellant maintained that his friend Carlos gave him the vehicle and he did not know the vehicle was stolen, his story lacks credibility. First, appellant was unable to provide police with Carlos's last name. Next, appellant and Allen's testimony conflicted as to whether she was present at the gas station with appellant when Carlos allegedly gave him the Honda — appellant maintains she was not and Allen asserts she was present. Additionally, Allen admitted that it was "strange" that Carlos started the vehicle for appellant. The aforementioned evidence sufficiently establishes that appellant received or retained Diaz's vehicle and knew or had reasonable cause to believe the Honda was stolen.

{¶ 25} Also, within these assignments of error, appellant complains that R.C. 4505.04 requires the state to present the title to the Honda establishing that

Diaz owned the vehicle in order to sustain a conviction for receiving stolen property. This court has previously rejected this same argument, finding the reliance on R.C. 4505.04 was misplaced in holding that "[t]o satisfy the element of 'property of another' there must only be a showing of a wrongful taking from the possession of another; the production of a certificate of title is both immaterial and unnecessary." *State v. Trawick*, Cuyahoga App. No. 51266, relying on *State v. Emmons* (1978), 57 Ohio App.2d 173, 177, 386 N.E.2d 838, and *State v. Shimits* (1984), 10 Ohio St.3d 83, 85, 461 N.E.2d 1278. See, also, *State v. Rhodes* (1982), 2 Ohio St.3d 74, 442 N.E.2d 1299, syllabus; *State v. Miller* (Mar. 6, 1984), Pickaway App. No. 82 CA 24.

{¶ 26} In this case, Diaz testified that she owned the vehicle, it was parked in her driveway until it was stolen, she did not know appellant, and she did not grant him permission to use her vehicle. Officer Brody further provided that he contacted Diaz as the owner of the vehicle once it was located near West 117th and Lorain. Keeping in line with this court's precedent in *Trawick*, supra, we find the aforementioned evidence sufficient to establish the necessary element of "property of another" to sustain a conviction for receipt of stolen property.

{¶ 27} In the case sub judice, we find the state presented sufficient evidence establishing the elements of receiving stolen property. Additionally, we cannot say that the court clearly lost its way and created a manifest miscarriage of justice in convicting appellant of the offense as the evidence presented by the state was thorough, credible, and consistently established that appellant knew or

had reasonable cause to believe that the Honda was stolen. Therefore, appellant's conviction is affirmed and his two assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

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

ANN DYKE, JUDGE

KENNETH A. ROCCO, P.J., and
CHRISTINE T. MCMONAGLE, J., CONCUR