[Cite as *State v. Johnson*, 2010-Ohio-3046.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-A-0050**
- vs -	:	
NATHAN D. JOHNSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2008 CR 491.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

John D. Lewis, Law Office of John D. Lewis, L.L.C., 34 South Chestnut Street, #200, Jefferson, OH 44047 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Nathan D. Johnson, appeals the Judgment on the Verdict of the Ashtabula County Court of Common Pleas, finding him guilty of Receiving Stolen Property. Johnson was ordered to serve a prison sentence of eight months. For the following reasons, we affirm the decision of the court below.

{¶2} On February 20, 2009, Johnson and a co-defendant, William M. Schreiber, Jr., were jointly indicted and each charged with one count of Receiving Stolen Property, a felony of the fourth degree in violation of R.C. 2913.51.

{¶3} On February 26, 2009, Johnson entered a plea of not guilty to the charge. The trial court appointed an attorney from the Ashtabula County Public Defender's office to represent him.

{¶4} On April 24, 2009, Johnson failed to appear at a scheduled pre-trial conference. Johnson was arrested the same day at the Eastern County Court, attending to an unrelated matter.

{¶5} Thereafter, Johnson's family retained private counsel to represent him.

{¶6} On May 19, 2009, following a show cause hearing, the trial court entered a Judgment Entry finding that Johnson "did not make any effort to flee the jurisdiction," but "failed to properly notify the Court and his attorney as to how he could be reached."

{¶7} On October 13, 2009, counsel for Johnson issued subpoenas to David Janson and Brad Nicholson to appear as witnesses for the defense.

{¶8} On October 14 and 15, 2009, a jury trial was held. Schreiber did not appear for trial. The following testimony was given.

{¶9} Brad Nicholson, of Rock Creek, Ohio, testified that December 1, 2008, a Monday, was the first day of hunting season for bow hunting. At about 6 a.m., that morning, he went to his garage to retrieve his 2004 Honda four-wheeler/all-terrain vehicle for hunting. The four-wheeler was not there. The four-wheeler had been left in the garage the night before with the key in the ignition. Nicholson called the Ashtabula

County Sheriff's Department to report the vehicle missing. He then went out to his driveway to await the Sheriff's Department.

{¶10} At about 7:00 a.m., Nicholson heard a four-wheeler coming down Riverdale Road. There were two riders on the four-wheeler, which sounded and looked like his four-wheeler. As they past his driveway, Nicholson and the riders looked at each other. The driver, identified in court as Johnson, "gave it the gas" and accelerated heading eastbound.

{¶11} Nicholson chased the four-wheeler in his truck, eventually forcing it to stop by blocking it against a ditch running alongside Riverdale Road. He identified the passenger as Schreiber. Nicholson was familiar with Schreiber prior to this incident. Nicholson's nearest neighbor is Schreiber's step-father, Dave Janson, who lives about 300 feet to the west of Nicholson's property.

{¶12} Nicholson confronted them, asking "what are you doing on my four-wheeler?" They denied it was his. Nicholson "popped them both a couple of times." He pushed Johnson off the four-wheeler and took the key. Johnson and Schreiber jumped to the other side of the ditch. Nicholson began yelling at them. They told him they were using the four-wheeler to pick up a deer they had shot. Johnson told him that his name was "Luke." Nicholson told them to wait and that the Sheriff's Department was on its way. Johnson and Schreiber ran off into the woods. Nicholson inspected the vehicle and found no damage, although a decoy bag had been stocked with beer. According to Nicholson, neither Johnson nor Schreiber had a gun or the orange vest required for hunting.

{¶13} Richard Schupska is a "road deputy" with the Ashtabula County Sheriff's Office and responded to Nicholson's report of a missing four-wheeler. Schupska testified that he confirmed the four-wheeler belonged to Nicholson by checking the vehicle identification number. Shortly after 9:00 a.m., Deputy Schupska received a report of two males walking "in the area of Camp Beaumont," north of Riverdale Road.

{¶14} At about 10:15 a.m., Deputy Schupska found Johnson and Schreiber, who matched the description given by Nicholson. They told Deputy Schupska that they were hunting and became lost. Deputy Schupska noted that they had no hunting gear with them, except for a knife. They told Deputy Schupska that they were staying on Schreiber's step-father, Janson's, property.

{¶15} Deputy Schupska separated Johnson and Schreiber and questioned them individually. Johnson initially denied knowing anything about a four-wheeler. He then said that he and Schreiber had walked from Janson's property about four miles north to the Roaming Shores area. There, they had picked up the four-wheeler from a friend of Schreiber's, named "Calvin" or "Calvin Roberts."[1] Johnson's version of events was different from the one provided by Schreiber.

{¶16} Deputy Schupska arrested Johnson and Schreiber. He attempted to locate Calvin in the Roaming Shores area but without success.

{¶17} Johnson testified on his own behalf. He had only known Schreiber for a couple of weeks before the incident with the four-wheeler. He had driven Schreiber to his step-father's house and they were going to camp and hunt the following morning. Between 1:30 and 2:00 a.m., Schreiber said he was going to pick up a four-wheeler to

1. Deputy Schupska testified that Johnson and Schreiber only provided the name "Calvin," but that Nicholson reported that they had told him the name was "Calvin Roberts."

carry any deer they killed. Schreiber returned with the four-wheeler after, at most, an hour and a half. Schreiber told him the vehicle belonged to his friend Calvin.

{¶18} Johnson and Schreiber took the four-wheeler to visit a friend of Johnson's, Robbie Workman. They stayed at Workman's until just before dawn and were returning to Janson's when Nicholson chased them. When Nicholson told them that the police were coming, Schreiber fled. Johnson said that he followed because he did not want to be left alone with Nicholson.

{¶19} On cross-examination and over the objection of defense counsel, Johnson testified that he was currently serving prison sentence for unrelated Aggravated Theft and Receiving Stolen Property convictions. Johnson admitted that he did not have a gun or a hunting license. Johnson said that he picked up the beer in the decoy bag from his mother's house in Roaming Shores. He acknowledged that, when he passed Nicholson's house, he was driving away from Janson's property.

{¶20} Janson, Schreiber's step-father, testified for the defense. He said that Schreiber and Johnson spent the night on his property camping and were "supposedly" going hunting the next day. Their campsite had two hunting vests, a blue tarp, and a high-powered rifle which was inappropriate for hunting.

{¶21} On October 15, 2009, the jury found Johnson guilty of Receiving Stolen Property.

{¶22} On October 20, 2009, following a sentencing hearing, the trial court ordered Johnson to serve an eight-month prison term.

{¶23} On November 17, 2009, Johnson filed a Notice of Appeal. On appeal, he raises the following assignments of error:

{¶24} "[1.] Appellant was denied the effective assistance of counsel, in violation of his rights under the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution."

{¶25} "[2.] Appellant's conviction is against the manifest weight of the evidence."

{¶26} "[3.] Prosecutorial misconduct rendered appellant's trial fundamentally unfair, in violation of the Ohio and United States Constitutions."

{¶27} In his first assignment of error, Johnson argues that he was denied the right to counsel under the United States and Ohio Constitutions as a result of trial counsel's professional errors.

{¶28} "It has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson* (1970), 397 U.S. 759, 771, fn. 14. Where counsel's performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," a defendant has effectively been denied the right to counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 686; *Cuyler v. Sullivan* (1980), 446 U.S. 335, 344-345 ("we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers").

{¶29} The Ohio Supreme Court has adopted a two-part test to determine whether an attorney's performance has fallen below the constitutional standard for effective assistance. To reverse a conviction for ineffective assistance of counsel, the defendant must prove "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding."

State v. Madrigal, 87 Ohio St.3d 378, 388-389, 2000-Ohio-448, citing *Strickland*, 466 U.S. at 687-688. "To warrant reversal, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Stojetz*, 84 Ohio St.3d 452, 457, 1999-Ohio-464, citing *Strickland*, 466 U.S. at 694; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus.

{¶30} Johnson's first argument under this assignment is that trial counsel should have moved to sever his case from Schreiber's or to have requested a continuance upon Schreiber's failure to appear for trial. Johnson maintains he was prejudiced by Schreiber's absence from the trial, since "a reasonable person in the jury box would have deduced that Schreiber failed to appear for his own trial because he was guilty or hiding from justice, and that by inference, [Johnson] must be guilty too." We disagree.

{¶31} As a practical matter, the trial judge conducted Johnson's trial as if he were the only defendant. Neither of the State's witnesses were allowed to testify as to any statements made by Schreiber. This situation worked to Johnson's advantage. Nicholson's testimony that the four-wheeler was stolen was uncontradicted. Thus, the only issue is whether Johnson knew that it had been stolen. According to his in-court testimony, Schreiber alone was responsible for obtaining the stolen four-wheeler. The implication of Johnson's testimony was that Schreiber stole the four-wheeler himself or obtained it from the actual thief. In either case, Johnson's testimony exculpated himself while inculpating Schreiber. Johnson's counsel encouraged the jury to look to Schreiber as the guilty party by asking rhetorically, "where is Will Schreiber?" Schreiber's

absence served to bolster the impression created by Johnson that he was the guilty party.

{¶32} Johnson speculates that Schreiber might have corroborated his testimony. There is no basis in the record for supposing Schreiber would have corroborated his testimony. Without providing details, Deputy Schupska noted that Johnson and Schreiber's version of events differed. Thus, it is just as likely that Schreiber's testimony would have contradicted Johnson's testimony as it is likely that he would have corroborated it.

{¶33} Johnson next argues trial counsel was ineffective for failing to properly subpoena Robbie Workman as a defense witness. Johnson's trial counsel filed subpoenas the day before trial began. Counsel inadvertently issued one of the subpoenas against the State's witness, Brad Nicholson, rather than Workman.

{¶34} The question, then, is whether there is a reasonable probability that the failure to have Workman testify altered the outcome of the trial. We conclude that it did not. As an initial matter, we note that, generally, "[t]he failure to subpoena witnesses is not prejudicial if the testimony of those witnesses simply would have been corroborative." *Middleton v. Allen* (1989), 63 Ohio App.3d 443, 448. In the present case, Workman would not have been an alibi witness, i.e., his testimony could not have established Johnson's innocence. Johnson testified that Schreiber obtained the four-wheeler before they went to visit Workman together. While Workman could have corroborated Johnson's story that Schreiber obtained the four-wheeler himself, this testimony would have been lacking any independent value. Workman did not have any first-hand information as to how the four-wheeler was obtained. At most, he could have

confirmed that Johnson and Schreiber came to his house on a four-wheeler between 2:30 a.m., and dawn on December 1, 2008. There is no reasonable probability that the absence of this testimony altered the outcome of Johnson's trial.

{¶35} Finally, Johnson argues that trial counsel was ineffective for not eliciting testimony regarding his convictions for Aggravated Theft and Receiving Stolen Property during direct examination. Allowing the State to elicit this testimony on cross-examination "was extremely harmful to [Johnson's] credibility, in a case where his credibility was crucial to his defense."

{¶36} It is accepted trial strategy "for a party to 'draw the sting' of cross-examination by bringing out, on direct examination, facts that tend to discredit that party's own witness." *State v. Tyler* (1990), 50 Ohio St.3d 24, 34; *State v. Ferguson* (1991), 71 Ohio App.3d 342, 349 (citation omitted). "This is not done to impeach the witness, but to present an image of candor to the trier of fact." *Tyler*, 50 Ohio St.3d at 34.

{¶37} Whether to "draw the sting" regarding prior convictions on direct examination or allow that information to come into the record on cross-examination is a matter of trial strategy. It is not a measure of reasonable representation. Substantively, the fact of Johnson's convictions was the same on cross-examination as it would have been on direct examination. By not questioning Johnson about the convictions on direct examination, he was able to testify without the jury having reason to question his veracity. On cross-examination, Johnson's prior convictions were brought before the jury amidst other compromising testimony, such as the fact that he had neither a license or gun for hunting and that he had already driven past Janson's property when stopped

by Nicholson. "[D]ebatable trial tactics do not establish ineffective assistance of counsel." *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, at ¶45.

{¶38} Finally, we reject Johnson's contention that the cumulative effect of trial counsel's alleged errors effectively deprived him of a fair trial. Only the failure to properly subpoena Workman rose to the level of a professional error. As noted above, the likelihood of this failure altering the outcome of the trial was not reasonably probable. Cf. *Strickland*, 466 U.S. at 693-694 ("[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding," rather "[t]he defendant must show that there is a reasonable probability that *** the result of the proceeding would have been different *** sufficient to undermine confidence in the outcome").

{¶39} The first assignment of error is without merit.

{¶40} In his second assignment of error, Johnson claims his conviction is against the manifest weight of the evidence.

{¶41} A challenge to the manifest weight of the evidence involves factual issues. The "weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶25 (citation omitted); *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52 ("[w]eight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial'") (emphasis sic) (citation omitted). "In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's?" *Wilson*, 2007-Ohio-2202, at ¶25.

{¶42} "The [appellate] 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." *Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. "[T]he weight to be given to the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, at syllabus; *State v. Thomas* (1982), 70 Ohio St.2d 79, at the syllabus. However, when considering a weight of the evidence argument, a reviewing court "sits as a 'thirteenth juror'" and may "disagree[] with the factfinder's resolution of the conflicting testimony." *Thompkins*, 78 Ohio St.3d at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42. "The only special deference given in a manifest-weight review attaches to the conclusion reached by the trier of fact." Id. at 390 (Cook, J., concurring opinion).

{¶43} In order to convict Johnson of Receiving Stolen Property, the State had to prove, beyond a reasonable doubt, that Johnson "did receive, retain or dispose of certain property, being a motor vehicle ***, the property of another, one Brad Nicholson, *** knowing or having reasonable cause to believe said property had been obtained through the commission of a theft offense, to-wit: a 2004 Honda ATV." Cf. R.C. 2913.51(A).

{¶44} Johnson argues there was conflicting evidence before the jury that should have been resolved in his favor, e.g., whether he truly intended to go hunting that morning and whether he accelerated while passing Nicholson's house. Johnson further argues that if he had known the four-wheeler was stolen, he would never have driven past Nicholson's house. Also, if Schreiber had stolen the four-wheeler from Nicholson,

rather than receiving it from Calvin, it would not have taken him an hour and a half to obtain it and return to his step-father's property.

{¶45} Johnson's arguments do not render the jury's verdict a manifest miscarriage of justice. There were many inconsistencies in Johnson's testimony, rendering its veracity suspect. Johnson provided no credible explanation as to why they were riding Nicholson's four-wheeler that morning. *State v. Arthur* (1975), 42 Ohio St.2d 67, 69, citing *Barnes v. United States* (1973), 412 U.S. 837, 843 (observing that, "[f]or centuries," juries have been allowed to infer guilty knowledge from the fact of unexplained possession of stolen goods). Regardless of what was intended, Johnson was not actually hunting on the morning in question. Johnson claimed he was returning to their campsite after visiting with Workman, but he had already driven past Janson's property and was driving away from it when observed by Nicholson. Johnson testified he had an automobile that evening, but did not explain why Schreiber had to walk three or four miles to Roaming Shores to obtain a four-wheeler so they could drive and visit Workman. Nor does Johnson explain why Schreiber would walk three or four miles to Roaming Shores to obtain a four-wheeler so they could drive back to Roaming Shores to obtain beer from his mother.

{¶46} Deputy Schupska and Nicholson provided credible testimony that Johnson knew the four-wheeler was stolen as evidenced by his behavior that morning. Johnson ran away when Nicholson told him that he had contacted the Sheriff's Department. Although Nicholson admitted that he had "popped" Johnson a couple of times, Johnson testified that the situation was no longer confrontational: "we stood there and we actually started having a civilized conversation." When detained by Deputy Schupska,

Johnson initially claimed not to know about a four-wheeler and that he had become lost while hunting. Johnson then changed his story and told him that both he and Schreiber had obtained the four-wheeler from a person named Calvin in the Roaming Shores area. Finally, Deputy Schupska noted that Johnson and Schreiber gave conflicting accounts regarding the four-wheeler. Johnson's actions are consistent with the knowledge that the four-wheeler was stolen. *State v. Sherman*, 9th Dist. No. 22227, 2005-Ohio-720, at ¶9 (upholding defendant's conviction for Receiving Stolen Property: "[a]lthough the physical condition of the car would not have necessarily indicated the stolen nature of the vehicle, the only explanation given by Defendant as to where he received the vehicle remains suspicious: an unknown individual gave him the car"); *State v. Kyles*, 5th Dist. No. CA-9479, 1994 Ohio App. LEXIS 3127, at *4 (upholding defendant's conviction for Receiving Stolen Property: the defendant was found operating a vehicle near the location from which it had been stolen and claimed he had borrowed the vehicle from an otherwise unidentified friend).

{¶47} "Where from the evidence reasonable minds can reach different conclusions on the issue of whether the defendant is guilty beyond a reasonable doubt, the case is one for determination by the jury." *State v. Antill* (1964), 176 Ohio St. 61, at paragraph five of the syllabus. In the present case, the jury's decision to credit the State's evidence and infer Johnson's knowledge that the four-wheeler was stolen constituted a reasonable interpretation of the evidence.

{¶48} The second assignment of error is without merit.

{¶49} In the third and final assignment of error, Johnson contends he was deprived of a fair trial by the prosecutor's improper comments on his failure to produce

evidence of his innocence. Specifically, Johnson asserts the prosecutor commented on the failure of Robbie Workman and Calvin Roberts to testify on his behalf, thus creating the impression that he "had some duty to prove his innocence."[2]

{¶50} As a general rule, "wide latitude is given to counsel during closing argument to present their most convincing positions." *State v. Phillips*, 74 Ohio St.3d 72, 90, 1995-Ohio-171 (citations omitted). Before a conviction is reversed for prosecutorial misconduct, a reviewing court must determine "whether the [prosecutor's] remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant." *State v. Smith* (1984), 14 Ohio St.3d 13, 14 (citation omitted). The closing argument must be considered in its entirety before determining if the prosecutor's remarks are prejudicial. *State v. Moritz* (1980), 63 Ohio St.2d 150, 157; *Smith v. Phillips* (1982), 455 U.S. 209, 219.

{¶51} Contrary to Johnson's position, "[t]he prosecutor may comment upon the failure of the defense to offer evidence in support of its case." *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, at ¶248. The Ohio Supreme Court has rejected Johnson's argument that questions/comments on the failure to produce a corroborative witness places the burden on the defendant to prove his innocence. *State v. D'Ambrosio*, 67 Ohio St.3d 185, 193, citing *State v. Petro* (1948), 148 Ohio St. 473, 498 ("[t]he fact that one of the parties fails to call a witness who has some knowledge of the matter under investigation may be commented upon"); *State v. Collins*, 89 Ohio St.3d 524, 527, 2000-Ohio-231 ("[s]uch comments do not imply that the burden of proof has shifted to the defense").

2. To the extent that trial counsel failed to object to the prosecutor's comments, Johnson claims counsel rendered constitutionally ineffective assistance.

{¶52} Criminal Rule 16, however, provides: "The fact that a witness' name is on a list furnished [by defense counsel in discovery], and that the witness is not called shall not be commented upon at the trial." Crim.R. 16(C)(3).

{¶53} In the present case, Johnson's Submission of Reciprocal Discovery identified Robby Workman as a witness, but not Calvin Roberts. Accordingly, the prosecutor was free to comment on Calvin's absence as a witness. *State v. Foster* (1982), 8 Ohio App.3d 338, at paragraph two of the syllabus.

{¶54} The reference to Workman was erroneous, inasmuch as he was identified on the defense witness list and his failure to testify may be attributable to defense counsel's failure to properly subpoena him. With respect to Workman, the prosecutor made the following comments in closing argument:

{¶55} They go, they pick up the ATV, supposedly Will Schreiber drives back, picks up [Johnson], and together at 2:30 in the morning they go to visit this person named Robbie [sic] Workman, who again is another person that either, if he exists, he isn't here today, and if he exists, why isn't he here today to say, yes, they came to my house, as absurd as it sounds, at 2:30 in the morning to get warm. Another -- I mean, there's just, there's just so many discrepancies.

{¶56} "A conviction will be reversed only where it is clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would not have found appellant guilty." *State v. Benge*, 75 Ohio St.3d 136, 141, 1996-Ohio-227; *Smith*, 14 Ohio St.3d at 14.

{¶57} In the present case, the reference to Workman's absence, as with the absence itself, did not prejudice Johnson or deprive him of a fair trial. As noted under the first assignment of error, the issue of whether Johnson actually visited Workman's residence on the morning in question is not strictly relevant to the issue of his guilt or innocence. Workman's testimony would have contributed nothing of substance with

respect to the circumstances in which Johnson and Schreiber acquired the four-wheeler or with respect to their conduct when confronted by Nicholson and Deputy Schupska.

{¶58} As the prosecutor noted, there were many discrepancies in Johnson's testimony. Those entailed by the purported visit to Workman were fairly inconsequential and their effect would have merely been cumulative. Moreover, the discrepancies raised by the purported visit to Workman derive from Johnson's testimony. They would still have been evident had the prosecutor omitted all mention of Workman in his closing argument.

{¶59} The third assignment of error is without merit.

{¶60} For the foregoing reasons, the judgment of the Ashtabula Court of Common Pleas, finding Johnson guilty of Receiving Stolen Property, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.