**[Cite as *State v. Gau*, 2018-Ohio-5191.]**

**IN THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**LAKE COUNTY, OHIO**

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| STATE OF OHIO, | : | **O P I N I O N** |
| Plaintiff-Appellee, | : | **CASE NO. 2018-L-044** |
| - vs - | : | |
| RAYMOND ROBERT GAU, | : | |
| Defendant-Appellant. | : | |

Criminal Appeal from the Lake County Court of Common Pleas.
Case No. 2017 CR 000666.

Judgment: Affirmed.

*Charles E. Coulson*, Lake County Prosecutor, and *Jennifer A. McGee*, Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*Mandy J. Gwirtz*, Mandy Gwirtz, LLC, 20050 Lakeshore Boulevard, Euclid, OH 44123 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

**{¶1}** Appellant, Raymond Robert Gau, appeals the March 9, 2018 judgment entry of the Lake County Court of Common Pleas. Appellant was found guilty by a jury of one count of grand theft of a motor vehicle, a fourth-degree felony in violation of R.C. 2913.02(A)(1). He was sentenced to a prison term of 15 months with credit for 139 days served. On appeal, appellant argues his conviction is not supported by sufficient

evidence and is against the manifest weight of the evidence. The trial court's judgment is affirmed for the following reasons.

**{¶2}** On September 1, 2017, appellant was indicted by the Lake County Grand Jury on the above-stated charge. Appellant waived his right to be present at arraignment and entered a plea of not guilty.

**{¶3}** The matter proceeded to a jury trial on February 6, 2018. The testimony included the following:

**{¶4}** Patricia Laturell and Franklin McElroy divorced in 2013. As part of their divorce decree, Laturell agreed to continue making loan and insurance payments on the motorcycle that she and McElroy purchased while they were married. Although the title was in Laturell's name, she agreed McElroy could keep possession of the motorcycle, and she would transfer title to him when the loan was paid in full. McElroy agreed to maintain the vehicle's registration. Laturell testified that she did not mind making the loan payments as long as McElroy divorced her and left.

**{¶5}** Subsequently, McElroy began having trouble with his hip, and he allowed appellant to use the motorcycle. Appellant continued to retain possession while McElroy was in Tennessee for 18 months and then while McElroy was in prison for 6 months. At trial, McElroy indicated he gave appellant possession of the motorcycle, but appellant did not buy it from him. McElroy further indicated he did not trade the motorcycle to fulfill a debt he owed appellant.

**{¶6}** Before Laturell had paid the loan in full, appellant notified her that McElroy sold the motorcycle to him. Laturell continued making the loan and insurance payments, and appellant gave her money for the license plates.

**{¶7}** Laturell completed the loan payments in 2017. McElroy was incarcerated and was unable to take title to the motorcycle. They agreed that Laturell would transfer title to McElroy's nephew, Michael Nichols. On May 1, 2017, Laturell and Nichols went to the title bureau to complete the transfer.

**{¶8}** After title was transferred to Nichols, he called appellant on several occasions about the motorcycle. When Nichols was unable to reach appellant, he drove his truck to appellant's home and loaded the motorcycle into the truck. Nichols attempted to notify appellant that he had taken the motorcycle but was unable to reach him.

**{¶9}** On May 8, 2017, Nichols took the motorcycle to a repair shop to get new tires. While at the motorcycle shop, appellant arrived and accused Nichols of stealing the motorcycle from him. Appellant told Nichols that he was going to take the motorcycle. Nichols refused to allow appellant to take the motorcycle and informed appellant that he had the title. Nichols made attempts to contact Laturell and offered to pay appellant in order to make him leave. However, appellant ignored Nichols' attempts to resolve the conflict and argued with Nichols' friend in the parking lot. While Nichols was notifying the shop owner of the situation, he saw appellant reach under the motorcycle. Nichols testified appellant then "jumped on the bike and took off." Nichols went to the police station and filed a report.

**{¶10}** At the close of the state's evidence, defense counsel made a motion for acquittal pursuant to Crim.R. 29. The trial court denied the motion. The motion was renewed after the defense rested and was again denied.

**{¶11}** The jury found appellant guilty as charged. Appellant was sentenced on March 5, 2018. The judgment entry of sentence was filed on March 9, 2018.

**{¶12}** Appellant noticed a timely appeal. On appeal, he raises two assignments of error.

**{¶13}** Appellant's first assignment of error states:

**{¶14}** "The trial court erred to the prejudice of the defendant-appellant in denying his motion for acquittal made pursuant to Crim.R. 29(A)."

**{¶15}** Crim.R. 29(A) requires the trial court to grant a motion for judgment of acquittal if the evidence is insufficient to sustain a conviction on the charged offenses. "Thus, when an appellant makes a Crim.R. 29 motion, he or she is challenging the sufficiency of the evidence introduced by the state." *State v. Patrick*, 11th Dist. Trumbull Nos. 2003-T-0166 & 2003-T-0167, 2004-Ohio-6688, ¶18.

**{¶16}** A "sufficiency" argument raises a question of law as to whether the prosecution offered some evidence concerning each element of the charged offense. *State v. Windle*, 11th Dist. Lake No. 2010-L-033, 2011-Ohio-4171, ¶25 (citations omitted). "In essence, sufficiency is a test of adequacy." *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). When reviewing whether sufficient evidence was presented to sustain a conviction, "[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. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307 (1979). Thus, a claim of insufficient evidence invokes a question of due process, the resolution of which does not allow for a weighing of the evidence. *State v. Habo*, 11th Dist. Portage No. 2012-P-0056, 2013-Ohio-2142, ¶14, citing *State v. Lee*, 11th Dist. Lake No. 2010-L-084, 2011-Ohio-4697, ¶9.

**{¶17}** R.C. 2913.02 provides: "(A) No person, with purpose to deprive the owner of property * * *, shall knowingly obtain or exert control over * * * the property * * * in any of the following ways: (1) Without the consent of the owner or person authorized to give consent[.]" If the property stolen is a motor vehicle, the offense is a fourth-degree felony referred to as grand theft of a motor vehicle. R.C. 2913.02(B)(5).

**{¶18}** Appellant argues there was insufficient evidence that he committed theft of the motorcycle because Laturell and McElroy consented to his possession and use of the motorcycle. In response, appellee argues the state presented sufficient evidence that at the time appellant took the motorcycle, Nichols was the owner, and he did not give appellant consent to take the motorcycle.

**{¶19}** For purposes of Revised Code Chapter 2913, "owner" is defined as "any person, other than the actor, who is the owner of, who has possession or control of, or who has any license or interest in property or services, even though the ownership, possession, control, license, or interest is unlawful." R.C. 2913.01(D). This definition addresses not only "ownership" but also possession. *State v. Miller*, 3d Dist. Shelby No. 17-13-24, 2015-Ohio-644, ¶29. "Thus, for the purpose of proving ownership under the theft statute, it is unnecessary to prove 'title ownership in a specific person other than the defendant.'" *State v. Grayson*, 11th Dist. Lake No. 2006-L-153, 2007-Ohio-1772, ¶26, quoting *State v. Rhodes*, 2 Ohio St.3d 74, 76 (1982). "Instead, 'it is merely necessary to prove that a defendant deprived someone of property who had "possession or control of, or any license or any interest in" that property.'" *Id.*, quoting *Rhodes*, *supra*, at 76. "The important question is not whether the person from whom the property is stolen was the actual owner, but rather whether the defendant had any lawful right to possession." *State v. Jones*, 8th Dist. Cuyahoga No. 92921, 2010-Ohio-

902, ¶12, citing *Rhodes*, *supra*, at 76. "[T]he gist of a theft offense is the wrongful taking by the defendant, not the particular ownership of the property." *Id.*, citing *State v. Thomas*, 8th Dist. Cuyahoga No. 87666, 2006-Ohio-6588, ¶28.

**{¶20}** The state presented sufficient evidence to sustain the conviction and to prove the elements of grand theft of a motor vehicle. The evidence established that appellant did not have a right to lawful possession of the motorcycle. Nichols both had title to and possession of the motorcycle when appellant took it from the shop on May 8, 2017. McElroy testified that while he was in jail, he asked Nichols to obtain title to the motorcycle from Laturell. McElroy further testified that he never sold his motorcycle to appellant. Laturell and Nichols both testified that Laturell transferred title for the motorcycle to Nichols on May 1, 2017. The title document was entered into evidence, which reflects Nichols as the owner. Chief Jackson Leonard of the Fairport Police Department testified regarding the chain of title to the motorcycle and confirmed that on May 8, 2017, Nichols was the owner. Nichols also testified that he retrieved the motorcycle from appellant's home and took it to the repair shop. Further, the evidence showed that Nichols did not give appellant consent to take the motorcycle. Nichols testified that when appellant argued the motorcycle belonged to him and that he was taking it, Nichols responded, "no, you don't, I got the title."

**{¶21}** Appellant further argues the evidence showed that appellant "believed [the motorcycle] was his property."

**{¶22}** R.C. 4505.04(B) provides, in pertinent part:

> [N]o court shall recognize the right, title, claim, or interest of any person in or to any motor vehicle sold or disposed of, or mortgaged or encumbered, unless evidenced:

> (1) By a certificate of title, an assignment of a certificate of title made under section 4505.032 of the Revised Code, a manufacturer's or importer's certificate, or a certified receipt of title cancellation to an exported motor vehicle issued in accordance with sections 4505.01 to 4505.21 of the Revised Code[.]

**{¶23}** Although "R.C. 4505.04 does not *mandate* that a certificate of title be produced by the prosecution to demonstrate that the person deprived of the motor vehicle is the 'owner'" within the meaning of R.C. 2913.01, it is admissible to prove ownership. *Rhodes*, *supra*, at 76-77 (emphasis added).

**{¶24}** Here, appellant did not claim to have a certificate of title and therefore, based on the above statute, had no right to claim any ownership interest in the motorcycle. *See Rucker v. Alston*, 2d Dist. Montgomery No. 19959, 2004-Ohio-2428, ¶9; *State v. Willis*, 10th Dist. Franklin No. 81AP-508, 1981 WL 3672, *1-2 (Dec. 15, 1981). As stated above, the state provided sufficient evidence, including the certificate of title, to establish that appellant was not the owner of the motorcycle. Further, the fact that appellant "believed" he owned the motorcycle "does not give him a legal right to forcibly 'steal it back'" from the lawful owner. *Miller*, *supra*, at ¶29.

**{¶25}** Appellant's first assignment of error is without merit.

**{¶26}** Appellant's second assignment of error states:

**{¶27}** "The trial court erred to the prejudice of the defendant-appellant when it returned a verdict of guilty against the manifest weight of the evidence."

**{¶28}** To determine whether a verdict is against the manifest weight of the evidence, a reviewing court must consider the weight of the evidence, including the credibility of the witnesses and all reasonable inferences, to determine whether the trier of fact "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins*, *supra*, at 387,

quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). A judgment of a trial court should be reversed as being against the manifest weight of the evidence "'only in the exceptional case in which the evidence weighs heavily against the conviction.'" *Id.* at 387, quoting *Martin*, *supra*, at 175.

**{¶29}** We are mindful that the jury, as the trier of fact, is entitled to believe all, part, or none of a witness's testimony. *State v. Williams*, 11th Dist. Lake No. 2012-L-078, 2013-Ohio-2040, ¶21. "The trier of fact is in the best position to evaluate inconsistencies in testimony by observing the witness's manner and demeanor on the witness stand—attributes impossible to glean through a printed record." *Id.* (citation omitted). Therefore, in weighing the evidence submitted at a criminal trial, an appellate court must give substantial deference to the factfinder's determinations of credibility. *State v. Tribble*, 2d Dist. Montgomery No. 24231, 2011-Ohio-3618, ¶30, citing *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus.

**{¶30}** In support of his argument, appellant relies on the "factors" set out in *State v. Mattison*, 23 Ohio App.3d 10 (8th Dist.1985). The *Mattison* "factors" to which appellant refers are actually "guidelines to be taken into account by the reviewing court." *Id.* at syllabus. We emphasize that those guidelines do not create a specific standard of review to be applied to manifest weight claims. *State v. Thompson*, 11th Dist. Trumbull No. 2015-T-0087, 2016-Ohio-7154, ¶31, citing *State v. Higgins*, 11th Dist. Lake No. 2005-L-215, 2006-Ohio-5372, ¶38. Rather, this court has repeatedly deferred to the standard of review set forth by the Supreme Court of Ohio. *Id.*, citing *Higgins*, *supra*, at ¶38.

**{¶31}** Appellant first argues that McElroy's testimony that he did not sell the motorcycle to appellant was not credible because it "would be incredible to believe that

McElroy would allow [appellant] to have his motorcycle for nothing at all." However, McElroy explained that appellant was his friend and that he allowed appellant to possess the motorcycle because McElroy was having problems with his hip and, later, because McElroy could not take the bike when he went to Tennessee or when he was subsequently incarcerated.

**{¶32}** Appellant further argues that McElroy's testimony that he did not sell the motorcycle to appellant was not credible because it was self-serving and conflicted with the testimony of other witnesses. Laturell was the only witness to testify that McElroy had sold the motorcycle to appellant. However, Laturell stated she learned that information from appellant, and she emphasized that she never transferred title to appellant. Furthermore, as stated above, there was substantial evidence that appellant never had title to the motorcycle.

**{¶33}** Based on the testimony presented at trial and set forth above, we cannot say the jury lost its way in weighing the evidence.

**{¶34}** Appellant's second assignment of error is without merit.

**{¶35}** The judgment of the Lake County Court of Common Pleas is affirmed.

THOMAS R. WRIGHT, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.