

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009CA00303
ROBERT JOSEPH JOHNSON	:	
	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of  
Common Pleas Case No. 2009-CR-0759

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: REISSUED and FILED ON  
NOVEMBER 15, 2010

APPEARANCES:

For Plaintiff-Appellee:

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*Delaney, J.*

{¶1} This Court issued an opinion and judgment entry in this matter on June 28, 2010. The Clerk of Courts file stamped the opinion and judgment entry, however, the Clerk failed to serve them upon parties. Further, the Clerk failed to note receipt of the opinion and judgment entry on the appearance docket. For this reason, we vacate our opinion and judgment entry of June 28, 2010 pursuant to the dictates of *State ex rel. Sautter, et al. v. Grey, Judge, et al.* (2008), 117 Ohio St.3d 465, 884 N.E.2d 1062 and reissue our opinion and judgment entry.

{¶2} Defendant-Appellant, Robert Johnson, appeals his conviction of one count of theft of a motor vehicle, a felony of the fourth degree, in violation of R.C. 2913.02, following a jury trial. The State of Ohio is Plaintiff-Appellee.

{¶3} On January 9, 2009, seventeen-year old Matthew Turner and his two friends, Matthew Stahl and Delbert Owens, took Turner's new four wheel ATV to ride in Navarre, Ohio, behind a Sterilite building, which is a place where people commonly take their ATVs to ride. Turner and his friends arrived at Sterilite at approximately 8:30 p.m. Approximately an hour later, another 20 to 30 people arrived to ride their ATVs as well.

{¶4} During the evening, a man who Turner did not know, approached him and asked to borrow his ATV. The two stories that witnesses provided regarding this request were (1) that the man claimed that his bike broke down and that he needed to use the ATV to get to the broken bike, and (2) that another person was stranded because their ATV had broken down and the man needed to go help the person.

{¶5} Turner initially declined to let the man borrow his ATV. According to Turner and his friends, the man continued to forcefully request to borrow the ATV.

Turner eventually acquiesced to the request, stating that he did not feel that he had a choice because he was a kid and the man was a bigger adult.

{¶6} Two men got onto the ATV and rode it away. Turner never saw his ATV again after that.

{¶7} Turner initially gave the police a different version of events because he was afraid that he would get into trouble with his dad for letting someone borrow his bike. When Turner first spoke with the police, he told them that he stopped and got off of his ATV, at which time, someone jumped on it without asking and rode off. He then told the police the real story, which was that he agreed to let the unknown man borrow the ATV. Turner was unable to identify the man who borrowed the ATV, as the man was wearing a Carhart jacket and a full face mask.

{¶8} Delbert Owens testified at trial and stated that the man who asked to borrow the ATV made the request twice. Owens stated that he did not hear Turner say yes or no to the man, but that two men got onto the ATV and drove it away. According to Owens, the man who asked to borrow the bike got onto the bike with the man who drove it away. Owens was not able to identify any suspect out of a photo array.

{¶9} Matthew Stahl testified that the two men asked Turner if they could borrow his ATV four or five times, claiming that they needed to help get another ATV unstuck. According to Stahl, Turner agreed to let them borrow the ATV and the two men got on the bike and left.

{¶10} Kenneth Gibson was riding his ATV at Sterilite on the same night. He overheard an individual named Lacy Harvey speaking on the phone to a person “about a truck” right before Harvey and Appellant approached Turner and asked if he could

borrow his ATV. According to Gibson, Appellant did not speak to Turner during this exchange. Gibson observed Turner demonstrating to Appellant how to operate the ATV.

{¶11} Gibson stated that he watched Appellant and Harvey drive the bike up a hill where another bike appeared to be stuck. According to Gibson, he then left the scene and did not believe that Appellant and Harvey were stealing the ATV at that time.

{¶12} Thomas Fife was also at the scene on January 9, 2009. Fife, who was in the Stark County Jail for a probation violation at the time of his testimony, stated that he met up with Harvey and Appellant on the evening of January 9, 2009. He identified Appellant as “Bob.” Fife stated that he observed Appellant riding with an individual named Steve Fitzgerald on the evening of January 9, and that Appellant was not riding on his own ATV.

{¶13} Fife testified that he overheard Appellant and a man named Dave talking about how Turner’s dad was rich and that Turner did not deserve to have a new ATV. He then observed Appellant and Harvey talking to Turner and watched them drive off on Turner’s ATV.

{¶14} Appellant was subsequently indicted on one count of theft, a felony of the fourth degree, in violation of R.C. 2913.02. On November 30, 2009, the indictment was amended to include the language “and/or beyond the scope of the express or implied consent of Mark Turner.” Appellant did not object to the amendment.

{¶15} Appellant exercised his right to a jury trial and was convicted as charged. The trial court sentenced Appellant to twelve months in prison.

{¶16} Appellant now challenges his conviction and raises two Assignments of Error:

{¶17} “I. THE TRIAL COURT’S FINDING OF GUILT IS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

{¶18} “II. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY AS TO THE APPROPRIATE LESSER INCLUDED OFFENSE.”

I.

{¶19} In his first assignment of error, Appellant argues that his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence.

{¶20} When reviewing a claim of sufficiency of the evidence, an appellate court’s role 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. Contrary to a manifest weight argument, a sufficiency analysis raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. 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.” *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶21} Conversely, when analyzing a manifest weight claim, this court sits as a “thirteenth juror” and in 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.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 548, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶22} In order to convict Appellant of theft, the State needed to prove that Appellant, either as a principal offender or as an accomplice, knowingly deprived another of their property, without their consent, or beyond the scope of the express or implied consent of the owner.

{¶23} The evidence introduced at trial supports Appellant’s conviction.

{¶24} Matthew Turner testified that he did not give anyone permission to take his ATV and not return it to him. While Turner testified that he did acquiesce to letting the men take his ATV, he did so only because he felt that he did not have a choice.

{¶25} Turner’s friends testified that the men who were asking to take the ATV were aggressive and forceful and that they felt threatened by the men. When Turner was asked on cross-examination whether he told the men to stop when they took his vehicle, his response was, “What am I supposed to do? He’s an adult. I’m a kid. He’s big. There’s a lot of them. There is three of us. What am I supposed to do?”

{¶26} Moreover, both Thomas Fife and Kenneth Gibson identified Appellant as being the man accompanying Lacy Harvey that evening. They both testified that Appellant and Harvey got on Turner’s ATV and drove it away.

{¶27} This testimony, viewed in the light most favorable to the prosecution, provided sufficient evidence to support Appellant’s conviction. Moreover, as a reviewing court on a manifest weight claim, we do not find that the jury clearly lost its way in convicting Appellant of theft.

{¶28} Appellant's first assignment of error is overruled.

II.

{¶29} In his second assignment of error, Appellant argues that the trial court committed plain error by failing to sua sponte instruct the jury on the lesser included offense of unauthorized use of a motor vehicle. We disagree.

{¶30} As the Appellant failed to request a lesser included offense instruction at trial, we review his claim under a plain error standard of review. A plain error is an error or defect affecting substantial rights which "may be noticed although they were not brought to the attention of the court." Crim. R. 52(B). "Notice of plain error under Crim. R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 372, N.E.2d 804, paragraph three of the syllabus. The failure of a trial court to provide a jury instruction "does not constitute a plain error or defect under Crim. R. 52(B) unless, but for the error, the outcome of the trial clearly would have been otherwise." *Id.*, at paragraph two of the syllabus

{¶31} An instruction on a lesser included offense is warranted only when the evidence presented at trial supports such an instruction. "Even though an offense may be statutorily defined as a lesser included offense of another, a charge on such a lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *State v. Thomas* (1988), 40 Ohio St.213, 533 N.E.2d 286, paragraph two of the syllabus.

{¶32} Ohio's Unauthorized Use of a Motor Vehicle statute, codified at R.C. 2913.03 provides, in pertinent part:

{¶33} "(A) No person shall knowingly use or operate an aircraft, motor vehicle, motorcycle, motorboat, or other motor-propelled vehicle without the consent of the owner or person authorized to give consent.

{¶34} "(B) No person shall knowingly use or operate an aircraft, motor vehicle, motorcycle, motorboat, or other motor-propelled vehicle without the consent of the owner or person authorized to give consent, and either remove it from this state or keep possession of it for more than forty-eight hours."

{¶35} It was not contested at trial that someone stole Turner's ATV. The question presented to the jury was who the person or persons were who stole the ATV. The evidence simply does not support an instruction on unauthorized use of a motor vehicle, as the ATV was never returned to Turner.

{¶36} Accordingly, the trial court did not commit error, plain or otherwise, in failing to sua sponte give a jury instruction on the offense of unauthorized use of a motor vehicle. Appellant's second assignment of error is overruled.



{¶37} For the foregoing reasons, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J.

Gwin, P.J. and

Wise, J. concur.

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HON. PATRICIA A. DELANEY

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HON. W. SCOTT GWIN

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HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
ROBERT JOSEPH JOHNSON	:	
	:	
Defendant-Appellant	:	Case No. 2009CA00303
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, we vacate our opinion and judgment entry of June 28, 2010, and reissue our opinion and judgment entry affirming the judgment of the Stark County Court of Common Pleas. Costs assessed to Appellant.

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HON. PATRICIA A. DELANEY

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HON. W. SCOTT GWIN

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HON. JOHN W. WISE