[Cite as *State v. Kunz*, 2011-Ohio-3115.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio — Court of Appeals No. WD-10-047

Appellee — Trial Court No. 2010CR0238

v.

Jeffrey Kunz — **DECISION AND JUDGMENT**

Appellant — Decided: June 24, 2011

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Aram Ohanian, Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

SINGER, J.

{¶1} Appellant, Jeffrey Kunz, appeals from his conviction in the Wood County Court of Common Pleas on one count of robbery, a violation of R.C. 2911.02(A)(2) and a

felony of the second degree. For the reasons that follow, we affirm in part and reverse in part.

{¶2} Appellant was indicted for robbery on May 20, 2010. A jury trial commenced on June 10, 2010. The state's first witness, Ibrahim Isaq, testified that he is employed as a cab driver. He was working the night of December 21, 2009, when he was called to pick up a fare in Toledo, Ohio. He was accompanied by his girlfriend, Erin Albing Al-Hammoudi. The fare, who Isaq identified as appellant, asked to be taken to Northwood, Ohio. He told Isaq that he didn't have any money for the ride but that his aunt would pay for him once he reached his destination. Isaq testified he was apprehensive about agreeing to the arrangement so he called his office. After discussing the matter with his office and after receiving more assurances from appellant that he would be paid, Isaq accepted the fare.

{¶3} Isaq testified that when they arrived at the Northwood location, he insisted on walking up to the house with appellant. Isaq testified that the house was dark. Appellant began knocking on the door, insisting his aunt was home. When no one answered, Isaq followed appellant to the back door where again, no one answered his knocks. Isaq asked appellant to get back into the cab so they could return to Toledo and get the money from appellant's dad, the location where appellant was initially picked up. Appellant then jumped on Isaq and then began to run. During the scuffle, Isaq grabbed appellant's jacket and pulled it off of him. Isaq began to chase appellant but soon lost

him. He then called 911. Isaq testified that while he was on the phone, he saw appellant again and chased him. Isaq cornered him and then told him that the police were on their way. Isaq testified that appellant then pulled a large piece of wood off a fence and struck Isaq with it. Appellant ran again but Isaq did not chase him because he was afraid of sustaining a more serious injury.

{¶4} Northwood Police Officer Bob McDonald testified that he was on duty the evening of December 21, 2009, when he responded to a call from a cab driver, located at 211 Short Street, who claimed his fare did not pay him and assaulted him. Isaq gave him appellant's jacket and the fence post with which Isaq claimed he had been hit. McDonald testified that the fence post had nails sticking out of it. Based on Isaq's description of the incident, he followed fresh footprints in the snow to 213 Short Street. He knocked on the door and observed that the inside lights were being turned off. When no one came to the door, McDonald's fellow officers watched the house while a search warrant was obtained. At one point, one of the officers saw appellant's head through the window.

{¶5} Sergeant John Romstadt of the Northwood Police Department testified that he was also at the scene. While the police were waiting for a search warrant, the resident of 213 Short Street arrived home. Romstadt explained the situation to her and she agreed to sign a consent to search form for her home. As she was signing, appellant walked out of the back door and was taken into custody.

{¶6} Appellant took the stand in his own defense. He testified that he called the cab on December 21, 2009. When the cab driver asked for the cab fare upfront, appellant told him his aunt would pay once they got to Northwood. When asked what his real intention was, appellant testified: "[T]o run from the cab driver and not pay him." Appellant acknowledged that he purposely ran from Isaq once they got to Northwood. He ended up at his friend's house, 213 Short Street. Once he saw the police around the house, he decided to come out because he was scared. Appellant, however, categorically denied threatening or hitting Isaq with a fence post.

{¶7} On June 9, 2010, the jury convicted appellant of robbery. He was sentenced to serve five years in prison. Appellant now appeals setting forth the following assignments of error:

{¶8} "I. The trial court abused its discretion and erred to the prejudice of appellant by incorrectly memorializing his sentence in the court's judgment entry.

{¶9} "II. The trial court erred to the prejudice of appellant by not appointing an interpreter for Mr. Isaq, the state's witness, whose command of the English language was limited thereby resulting in testimony that was unresponsive and unintelligible.

{¶10} "III. The trial court abused its discretion by improperly precluding appellant from conducting thorough cross examination of a witness thereby denying appellant's right to due process.

{¶11} "IV. The trial court committed error when it failed to instruct the jury on the lesser included offense of theft.

{¶12} "V. Appellant received ineffective assistance of counsel in violation of his rights under the sixth and fourteenth amendments to the United States Constitution and Article I, §10 of the Constitution of the State of Ohio.

{¶13} "VI. The trial court abused its discretion and erred to the prejudice of appellant at sentencing by imposing a prison term in excess of the minimum in violation of appellant's right to due process under the sixth and fourteenth amendments of the United States Constitution.

{¶14} "VII. Appellant's conviction was against the manifest weight of evidence presented by the state and contrary to law."

{¶15} In his first assignment of error, appellant contends that the court erred by describing his five-year sentence as mandatory in the sentencing journal entry. We agree.

{¶16} It is well established that a trial court speaks through its journal entries. *State v. King* (1994), 70 Ohio St.3d 158, 162. The offense of robbery pursuant to R.C. 2911.02(A)(2) is a second degree felony. The basic prison terms of the Ohio Revised Code provide as follows: "[F]or a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years." R.C. 2929.14(A)(2). R.C. 2929.13(F), the statute which sets forth the offenses requiring mandatory prison sentences, does not include R.C. 2911.02(A)(2). As such, appellant's sentence is contrary to law.

Accordingly, the portion of appellant's sentence that describes the sentence as "mandatory" is hereby vacated. The remainder of the sentence shall stand. See *State v. Randa*, 9th Dist. No. 10CA0015–M, 2011-Ohio-1535. Appellant's first assignment of error is found well-taken.

{¶17} In his second assignment of error, appellant contends that the court erred in not appointing an interpreter for cab driver Ibrahim Isaq. Appellant contends that as a Somolian immigrant, Isaq has limited command of the English language which in turn made his testimony unresponsive and unintelligible.

{¶18} R.C. 2311.14(A)(1) provides, in pertinent part:

{¶19} "Whenever because of a hearing, speech or other impairment a party to or witness in a legal proceeding cannot readily understand or communicate, the court shall appoint a qualified interpreter to assist such person. * * * "

{¶20} The decision to appoint a translator, whether to assist a witness or a defendant, is within the trial court's sound discretion. *State v. Mota*, 6th Dist. L-04-1354, 2006-Ohio-3800, ¶ 23; *State v. Saah* (1990), 67 Ohio App.3d 86, 95. An appellate court will not upset the decision of the trial court regarding the need for an interpreter absent an abuse of discretion. Id. An abuse of discretion is more than a mistake of law or an error in judgment, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶21} The record shows that the defense never requested a translator. Thus, the issue is deemed waived absent plain error. *State v. Drummond,* 111 Ohio St.3d 14, 2006-Ohio-5084. In order to prevail under a plain error standard, an appellant must not only demonstrate that there was an obvious error in the proceedings, but also demonstrate that, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Noling,* 98 Ohio St.3d 44, 2002–Ohio–7044, ¶ 63.

{¶22} Our review of the transcript shows that while Isaq may have struggled with some words or spoken imperfect grammar, he clearly was able to communicate what he witnessed the night of December 21, 2009. Moreover, his girlfriend's testimony was consistent with his and Officer McDonald was able to understand Isaq's account of the events when he arrived at the scene. Finding no abuse of discretion, appellant's second assignment of error is found not well-taken.

{¶23} In his third assignment of error, appellant contends that he was denied his right to thoroughly cross-examine a witness. Specifically, appellant contends that the court violated his right to due process in limiting his cross-examination of Detective Sergeant Jeff Zahradnik.

{¶24} Zahradnik testified that he is the property room supervisor for the Northwood Police Department. On December 21, 2009, he received a wooden fence post, some shoes, a sweatshirt jacket and a cigarette butt from Officer McDonald and

Sergeant Romstadt. The items were placed in the property room. On cross-examination, appellant's counsel presented Zahradnik with the following hypothetical:

{¶25} "If I were to walk into a store and take a pair of Jordan shoes or any other tennis shoes off the shelf and walk out of the store and the value of those shoes were $100 and I was caught and you were the officer in charge, in charge of making the arrest and the charge ..."

{¶26} Appellant's counsel was unable to complete his hypothetical because the prosecutor objected. When the court asked appellant's counsel about the purpose of his hypothetical, counsel explained he was trying to differentiate between a simple theft offense and a robbery. The court sustained the prosecutor's objection.

{¶27} The admission or exclusion of evidence rests within the sound discretion of the trial judge and, therefore, such decisions will not be reversed on appeal absent an abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173.

{¶28} We find no error in the trial court's restriction of counsel's cross examination. Zahradnik was not directly involved in the arrest of appellant. As head of the police property room, his testimony was relevant to prove the proper chain of custody of the evidence. His opinion on a hypothetical theft situation occurring in a store was clearly irrelevant. Accordingly, we do not find that the trial court erred in sustaining the prosecutor's objection. Appellant's third assignment of error is found not well-taken.

{¶29} In his fourth assignment of error, appellant contends that the court erred in failing to instruct the jury on the lesser included offense of theft, an instruction appellant's counsel requested.

{¶30} When reviewing a court's refusal to give a requested jury instruction, an appellate court considers whether the trial court's refusal to give said instruction was an abuse of discretion under the facts and circumstances of the case. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68.

{¶31} Theft is a lesser included offense of robbery. *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260, paragraph two of the syllabus. Nonetheless, a party is not entitled to an instruction on a lesser included offense unless the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense. See *State v. Anderson*, 12th Dist. No. CA 2005-06-156, 2006-Ohio-2714, ¶ 10. In making this determination, the court must view the evidence in the light most favorable to a defendant. Id. But an instruction on a lesser included offense is not warranted every time "some evidence" is presented to support the inferior offense. See *State v. Shane* (1992), 63 Ohio St.3d 630. There must be "sufficient evidence" to "allow a jury to reasonably reject the greater offense and find the defendant guilty on a lesser included (or inferior degree) offense." Id. at 632-633.

{¶32} R.C. 2911.02(A)(2), robbery, provides:

{¶33} "(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶34} "* * *

{¶35} "(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;"

{¶36} R.C. 2913.02, misdemeanor theft, provides:

{¶37} "(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

{¶38} "(1) Without the consent of the owner or person authorized to give consent;

{¶39} "(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

{¶40} "(3) By deception;

{¶41} "(4) By threat;

{¶42} "(5) By intimidation."

{¶43} The main difference between theft and robbery is an element of actual or potential harm to persons. *State v. Furlow* (1992), 80 Ohio App.3d 146. The jury heard evidence that physical harm was inflicted in the course of a theft from Isaq and the jury heard evidence that no harm was inflicted from appellant. Because this case rests largely on the credibility of the witnesses, we cannot say that the jury would reasonably reject the

greater offense of robbery. Thus the court did not abuse its discretion in failing to instruct the jury on the elements of theft. Appellant's fourth assignment of error is found not well-taken.

{¶44} In his fifth assignment of error, appellant contends he was denied effective assistance of counsel. Specifically, appellant contends his counsel was ineffective in failing to object to the lack of an interpreter during Isaq's testimony.

{¶45} To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington* (1984), 466 U.S. 668, 687. Proof of prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. Further, debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips* (1995), 74 Ohio St.3d 72, 85.

{¶46} Having found no error in the court's failure to appoint an interpreter in appellant's second assignment of error, we find no merit to this argument. Appellant's fifth assignment of error is found not well-taken.

{¶47} In his sixth assignment of error, appellant contends that the court erred in not imposing the minimum sentence.

{¶48} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio relevantly held that "[t]rial courts [now] have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences."

{¶49} As appellant's five year sentence is well within the statutory range for second degree felonies, we find no abuse of discretion. Appellant's sixth assignment of error is found not well-taken.

{¶50} Finally, in appellant's seventh assignment of error, he argues that his conviction is against the manifest weight of the evidence.

{¶51} The "weight of the evidence" refers to the jury's resolution of conflicting testimony. *State v. Thompkins*, 78 Ohio St.3d 380, 387. In determining whether a verdict is against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and " * * * 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." Id. An appellate court must defer to the factual findings of the jury regarding the weight to be given the evidence and credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of

the syllabus. When examining witness credibility, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. The factfinder is free to believe all, part, or none of the testimony of each witness appearing before it. *State v. Brown*, 11th Dist. No.2002-T-0077, 2003-Ohio-7183, ¶ 53.

{¶52} Here, the trier of the facts, in this case the jury, chose to believe the testimony of Isaq over the testimony of appellant. On review, we cannot say that the jury clearly lost its way or perpetrated a manifest miscarriage of justice. Accordingly, appellant's seventh assignment of error is found not well-taken.

{¶53} On consideration whereof, the judgment of the Wood County Court of Common Pleas is affirmed in part and reversed in part. Appellant's conviction is affirmed, his sentence is vacated, and this cause is remanded for resentencing. Appellant and appellee are ordered to each pay one-half of the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED, IN PART
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE