[Cite as *State v. Bartolomeo*, 2009-Ohio-3086.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 08AP-969 (C.P.C. No. 08CR-05-4205)
v.	:	No. 08AP-970 (C.P.C. No. 08CR-04-2435)
Todd G. Bartolomeo,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 25, 2009

Ron O'Brien, Prosecuting Attorney, *John H. Cousins, IV*, and *Seth L. Gilbert*, for appellee.

Dennis W. McNamara, for appellant.

APPEALS from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} In these consolidated appeals, defendant-appellant, Todd G. Bartolomeo, appeals from judgments of conviction and sentence entered by the Franklin County Court of Common Pleas following a bench trial in which appellant was found guilty of vandalism and theft.

{¶2} In common pleas case No. 08CR-04-2435, appellant was charged with two counts of theft, in violation of R.C. 2913.02, and in common pleas case No. 08CR-05-4205, appellant was charged with one count of vandalism, in violation of R.C. 2909.05.

The state filed a motion for joinder of the cases, which the trial court granted. Appellant waived his right to a jury trial, and the trial court conducted a bench trial August 14, 2008.

{¶3} At trial, the state presented the following evidence. In November 2007, Erin Merten and appellant began a dating relationship that lasted approximately three and a half months; Merten testified that she decided to end the relationship in March 2008, after suspecting appellant had made misrepresentations to her regarding his background.

{¶4} On March 19, 2008, appellant and Merten had dinner with another couple at Merten's residence. Earlier that day, Merten called appellant and told him to cancel the dinner because she knew she would be ending the relationship; appellant, however, persuaded Merten to go ahead with the dinner plans. That evening, appellant became upset when Merten informed the other couple that she was breaking up with him. Appellant began crying and became hysterical, threatening suicide. Although appellant and Merten did not reside together, she allowed him to remain at her residence that evening because she thought he was too upset to drive to his parent's house in Dublin.

{¶5} The next morning, Merten told appellant he needed to gather his items and leave. Upon realizing that Merten was serious about ending the relationship, appellant's mood changed. He entered a room Merten used as an office and began collecting some DVDs. Merten became concerned because her purse was in that room, and, when she thought appellant was not looking, she took the purse and placed it under a pile of clothing in her bedroom.

{¶6} Appellant, who was wearing a pullover jacket, went into Merten's bathroom and locked the door. After several minutes, appellant came out of the bathroom and went downstairs to Merten's garage, stating he was going to gather some tools. Merten's

Subaru and appellant's Jeep were parked inside the garage, and both garage doors were down.

{¶7} After Merten heard appellant's vehicle leave, she opened the garage door and heard a hissing sound; she then observed the left rear tire of her car deflating. Merten discovered a nail on the sidewall of the tire, as well as a slit in the area where the nail entered. Merten then noticed that her right rear tire was totally deflated, and that this tire also had a slit in it. The garage door timer light had just gone off, and Merten estimated appellant had driven from the garage approximately two and a half minutes earlier.

{¶8} Merten, who always locked her car doors when the vehicle was parked in the garage, noticed that the car was unlocked, and she later realized her spare car key was missing. Merten went back inside her residence and discovered that her cell phone and wallet were missing from her purse, and she also noticed that a utility knife was missing from the kitchen. Merten testified that the purse contained a wallet with $250 in cash, a cell phone from her workplace valued at $499, and a cell phone case valued at $60. Merten subsequently paid $554.86 to have the tires replaced, and she also paid $841.51 to have the vehicle "re-keyed" because of the missing spare key.

{¶9} On March 20, 2008, Gahanna Police Officer Norman Monroe was dispatched to Merten's residence. Merten showed the officer her vehicle in the garage; Officer Monroe observed that both rear tires were flat, and that a nail was protruding from the side of the left rear tire. Merten informed the officer that her wallet had been stolen, as well as a cell phone, debit cards, credit cards, and her driver's license.

{¶10} John Susi, a sales representative for Homes Lumber Corporation, testified on behalf of appellant. Appellant and Susi had become friends because appellant worked for one of Susi's clients. Appellant once asked Susi, who owned a truck, to help him move some of his items from Merten's residence. Appellant explained to Susi that he was attempting to "back away from the relationship a little bit and he wanted to get his stuff out." (Tr. 73.)

{¶11} Following the presentation of evidence, the trial court found appellant guilty of all three charges. The trial court sentenced appellant to two years community control on the theft and vandalism convictions, imposed fines, and ordered him to pay restitution in the amount of $2,000.

{¶12} On appeal, appellant sets forth the following five assignments of error for this court's review:

> ASSIGNMENT OF ERROR NO. I
>
> THE TRIAL COURT'S WRONGFUL ADMISSION OF PREJUDICIAL TESTIMONY DEPRIVED APPELLANT OF A FAIR TRIAL.
>
> ASSIGNMENT OF ERROR NO. II
>
> THE TRIAL COURT ERRED WHEN IT SUSTAINED HEARSAY OBJECTIONS TO PORTIONS OF THE TESTIMONY OF JOHN SUSI.
>
> ASSIGNMENT OF ERROR NO. III
>
> THE ACTS AND OMISSIONS OF TRIAL COUNSEL DEPRIVED APPELLANT OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

ASSIGNMENT OF ERROR NO. IV

THE TRIAL COURT ERRED WHEN IT ORDERED APPELLANT TO MAKE RESTITUTION IN THE AMOUNT [OF] TWO THOUSAND DOLLARS.

ASSIGNMENT OF ERROR NO. V

THE COMBINED EFFECT OF ALL OF THE ERRORS IDENTIFIED HEREIN DEPRIVED APPELLANT OF DUE PROCESS AND A FAIR TRIAL.

{¶13} Appellant's first, second, third, and fifth assignments of error, which raise some related issues, will be addressed together. Under the first assignment of error, appellant contends the trial court erred by allowing inadmissible testimony which, he argues, prejudiced his trial. Appellant first points to the prosecutor's direct examination of Officer Monroe, during which the officer was asked whether he had any "concerns with Ms. Merten's credibility" at the time he responded to the call at Merten's residence. (Tr. 61.) The officer responded that Merten was "very articulate," and that he "felt she was being very truthful and forthright." (Tr. 61.) Appellant asserts that the above testimony was inadmissible under Evid.R. 701, pertaining to opinion testimony by a lay witness.[1]

{¶14} Appellant also contends that Officer Monroe improperly provided hearsay testimony as to the content of the statements Merten made to the officer at the time he responded to the scene. Specifically, appellant points to Officer Monroe's testimony that Merten related "she had a wallet stolen, along with a cellular phone and a few other items." (Tr. 59.)

[1] Evid.R. 701 states: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

{¶15} At the outset, we note that defense counsel did not object to any of the above testimony at trial, thereby waiving all but plain error. Crim.R. 52(B) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Plain error does not exist unless, "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long* (1978), 53 Ohio St.2d 91, 97.

{¶16} Here, although the testimony of Officer Monroe, stating that he "felt" the witness was being "truthful," arguably bears upon the credibility of Merten, we are not persuaded that appellant has demonstrated plain error. In so holding, we recognize the principle that, "[i]n our system of justice it is the fact finder, not the so-called expert or lay witnesses, who bears the burden of assessing the credibility and veracity of witnesses." *State v. Eastham* (1988), 39 Ohio St.3d 307, 312 (Brown, J., concurring). In the instant case, however, Merten herself testified at trial and, was subject to cross-examination. Further, appellant waived a jury trial and, in matters tried to the bench, "the law presumes that * * * the court considers only relevant, material, and competent evidence." *State v. Bays*, 87 Ohio St.3d 15, 27, 1999-Ohio-216. See also *State v. Waters,* 8th Dist. No. 87431, 2006-Ohio-4895, ¶11 ("[u]nlike a jury, which must be instructed on the applicable law, a trial judge is presumed to know the applicable law and apply it accordingly").

{¶17} Similarly, appellant has failed to demonstrate plain error regarding the admission of alleged hearsay testimony. In the instant case, the challenged testimony of the police officer involves his discussion with the alleged victim shortly after the incident. In general, statements offered by police officers explaining their conduct while investigating a crime "are not hearsay because they are not offered for their truth, but,

rather, are offered as an explanation of the process of investigation." *State v. Warren,* 8th Dist. No. 83823, 2004-Ohio-5599, ¶46. Further, even assuming the testimony at issue to be improper, "hearsay is generally inadmissible because the declarant is not testifying in court and the factfinder is unable to observe the declarant and decide whether the declarant's statement is worthy of belief." Id. at ¶44. Again, in the instant case, Merten (the declarant) testified at trial, and her testimony, which during direct examination was to the same effect as the officer's statements, was subject to cross-examination. Finally, we reiterate that, "in a bench trial, the trial court is presumed to have relied only upon admissible evidence." Id. at ¶47.

{¶18} Under his second assignment of error, appellant asserts the trial court erred in sustaining the prosecutor's objections to portions of the testimony of appellant's witness, John Susi. Appellant argues that Susi was called to testify about appellant's statements to him regarding the relationship with Merten. Appellant maintains that this testimony was relevant to show whether it was Merten or appellant who took the initiative to end the relationship, and that such evidence went to the issue of whether Merten had a motive to fabricate her testimony.

{¶19} In response, the state contends that, even though the trial court initially sustained an objection to this line of questioning, Susi was eventually permitted to relate these statements; thus, the state argues, the trial court ultimately heard evidence going to defense counsel's theory that Merten fabricated her story. Upon review of the record, we agree.

{¶20} During defense counsel's direct examination of Susi, the prosecution objected to counsel's inquiry about whether appellant had ever discussed with Susi

appellant's relationship with Merten. The trial court asked defense counsel: "Is this calling for hearsay, counsel?" (Tr. 71.) Defense counsel responded: "Probably so, Your Honor," prompting the trial court to sustain the prosecutor's objection. (Tr. 72.)

{¶21} Defense counsel then questioned Susi about a request by appellant to have Susi help him move items out of Merten's apartment. The prosecution objected to an inquiry by defense counsel as to whether Susi had "any idea why you were moving his stuff." (Tr. 73.) Following the objection, the trial court told the witness to "go ahead" and "tell me what your understanding was in general." (Tr. 73.) Susi testified that his understanding "is that he wanted to back away from the relationship a little bit and he wanted to get his stuff out." (Tr. 73.) Thus, while the trial court sustained an earlier objection to the testimony at issue, we agree with the state that evidence of "motive" was subsequently permitted, and appellant has not demonstrated prejudice as a result of the court's ruling.

{¶22} Appellant argues under his third assignment of error that acts and omissions of his trial counsel deprived him of the right to effective assistance of counsel. In order to obtain reversal of a conviction based upon ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, requiring the defendant to "show, first, that counsel's performance was deficient and, second, that counsel's deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶95.

{¶23} Appellant first contends that trial counsel's performance was deficient in failing to object to purported hearsay testimony by Merten regarding the value of items

taken from her purse. Appellant notes that, in addition to testifying that she had $250 in cash in her purse, Merten stated that the value of her cell phone was $499, and that the cell phone case was valued at $60.

{¶24} In general, the admission or exclusion of evidence, "including evidence relating to the value of stolen property," lies within the sound discretion of the trial court. *State v. Cook* (Sept. 8, 1987), 12th Dist. No. CA87-04-009, citing *Schaffter v. Ward* (1985), 17 Ohio St.3d 79, 80.

{¶25} Appellant cites no authority for the proposition that a victim's testimony is insufficient to establish the value of stolen property, and Ohio courts have found otherwise. See *State v. Lockhart* (1996), 115 Ohio App.3d 370, 374 (testimony of victim sufficient evidence to prove value of stolen property was in excess of $300 for purposes of theft conviction); *State v. Green* (Apr. 19, 2001), 3d Dist. No. 14-2000-26 (victim's testimony that value of items stolen exceeded $600 "provides a firm basis for the trial court's decision to overrule the defendant's Crim.R. 29(A) motion" on felony theft charge, which required state to prove the value of items stolen was at least $500, but less than $5,000). In the present case, appellant cannot demonstrate the likelihood that the trial court would have sustained an objection to the testimony at issue, and, therefore, cannot show deficient performance by counsel. *State v. Williams,* 99 Ohio St.3d 493, 2003-Ohio-4396, ¶117 (counsel's failure to object to testimony not deficient performance where such objections would have had no merit and would likely have been overruled).

{¶26} Appellant also contends that his trial counsel's performance was deficient because counsel failed to meaningfully contest the prosecution's case. More specifically, appellant notes that the second count of the felony theft indictment was dependent upon

the prosecution proving beyond a reasonable doubt that the value of the property stolen exceeded $500. Appellant argues that the values placed on the replacement items by the victim were inflated, and that counsel should have researched those replacement costs prior to trial. Appellant points to evidence presented at the sentencing hearing, following the withdrawal of his trial counsel, in which his new defense counsel challenged the replacement value of those items for purposes of the issue of restitution. Appellant, however, cannot demonstrate prejudice, as a review of the exhibits submitted at the sentencing hearing by appellant's new counsel indicates that, even accepting those discounted figures, the replacement value of the items exceeded $500.

{¶27} Under his fifth assignment of error, appellant argues in general that the cumulative effect of the errors alleged under the first, second, and third assignments of error deprived him of a fair trial. In light of our above disposition of those assignments of error, we find unpersuasive appellant's contention that cumulative error tainted his convictions.

{¶28} Based upon the foregoing, appellant's first, second, third, and fifth assignments of error are without merit and are overruled.

{¶29} Under the fourth assignment of error, appellant contends the trial court erred in ordering him to make restitution in the amount of $2,000. Appellant argues that the trial court ordered him to reimburse Merten for two cell phones, rather than one, based upon testimony by Merten that appellant may have stolen another phone approximately one month prior to the incident at issue. Appellant also contends that Merten's evidence regarding the value of the items included inflated numbers, and that

the court should have conducted an evidentiary hearing because the amount of restitution was in dispute.

{¶30} At the sentencing hearing, the state submitted a typed list of restitution items prepared by Merten. The list set forth an amount of $2,315.51 for various items, including damage to the Subaru, and expenses for missing cell phones, a cell phone case, cash, and two gift cards (as well as a listing of other items, totaling $1,099.11, which Merten indicated she found missing after she filed the police report).[2]

{¶31} Defense counsel challenged the cost of some of those items, asserting that Merten's numbers "might be high." (Tr. Oct. 2, 2008, 4.) Specifically, counsel argued that an internet search indicated that the replacement cost of many of the items was lower than the number provided by Merten. The trial court, in considering the amounts submitted for restitution, concluded: "I'm trying to * * * give a fair number, and I think $2,000 is a fair number." (Tr. Oct. 2, 2008, 14-15.)

{¶32} The state acknowledges that the trial court did not indicate which items were included in its calculation, or what values it used in arriving at the $2,000 amount. The state thus concedes that the record in this case is inadequate to determine the reasonableness of the trial court's restitution order, and that this matter should be remanded for re-determination as to the appropriate amount of restitution. We agree, and, therefore, set aside the trial court's order of restitution and remand for a hearing to determine the proper restitution amount.

{¶33} Accordingly, appellant's fourth assignment of error is sustained.

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[2] The record does not indicate the court awarded restitution for any of the items totaling $1,099.11, as the trial court stated at the hearing: "[T]hose are not items that we covered as elements of the criminal cases that were tried * * * and, therefore, I don't see how I can award restitution for that." (Tr. Oct. 2, 2008, 12.)

{¶34} Based upon the foregoing, the judgments of the Franklin County Court of Common Pleas are affirmed in part, reversed in part as to the amount of restitution, and these matters are remanded to that court for further proceedings in accordance with law, consistent with this decision.

Judgments affirmed in part and reversed in part; and causes remanded.

KLATT and McGRATH, JJ., concur.

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