

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2003-10-269
 :
 - vs - : O P I N I O N
 : 10/4/2004
 :
 DAVID W. HIGHLEY, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR03-08-1200

Robin N. Piper, Butler County Prosecuting Attorney, Randi E. Froug, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

Charles M. Conliff, 6660 Dixie Highway, Suite 302, Fairfield, Ohio 45014, for defendant-appellant

VALEN, J.

{¶1} Defendant-appellant, David W. Highley, appeals his conviction and sentence in Butler County Court of Common Pleas for the unauthorized use of a motor vehicle.

{¶2} Appellant was originally charged with the theft of a motor vehicle in connection with events that occurred in Middletown, Ohio on April 12, 2003.

{¶3} The alleged victim in this case, Todd Singh, testified at trial that he left work at the end of his shift

and went to a Middletown bar shortly after 11 p.m. on April 11.

Singh testified that he had not seen appellant before that evening, but the two men struck up a conversation, and, with other patrons, stayed until the bar closed around 2:30 a.m.

{¶4} Singh testified some of the bar patrons decided to continue to a party at a patron's home, and Singh gave appellant a ride to the house. The two men did not stay because the other patrons decided to end the festivities.

{¶5} Singh indicated that he and appellant decided to get some food at a nearby Taco Bell. Singh testified that he began to feel "nauseous" and appellant drove them in Singh's automobile to Taco Bell. As the vehicle entered the parking lot, Singh testified that he told appellant to stop the vehicle. Singh exited the automobile and vomited in a grassy area of the parking lot. Singh told the jury that he looked up and saw appellant driving Singh's vehicle out of the parking lot.

{¶6} Singh encountered a police officer at Taco Bell and told the officer that his car was gone. Singh testified that he did not think that appellant was stealing his vehicle at the time. Singh eventually went home by taxi. Singh's automobile was found after 4:00 a.m., on fire, near a mobile home park where appellant was reportedly staying. The vehicle fire was ruled an arson.

{¶7} Singh provided police with a description of appellant, which included a description of two of appellant's

tattoos. Singh would later choose appellant's photo from a photo array.

{¶8} At the conclusion of the state's case-in-chief, appellant moved for a judgment of acquittal under Crim.R. 29(A). The motion was denied.

{¶9} Appellant would testify that he was suffering from back pain on the night in question and spent all night at his mother's mobile home. Additional family members would testify about their interactions with appellant that evening.

{¶10} A jury found appellant guilty of unauthorized use of a motor vehicle. Appellant was sentenced on the misdemeanor immediately after the jury was discharged. The trial court ordered appellant to pay restitution to Singh, but no restitution amount was available to the trial court at sentencing.

{¶11} According to the trial transcript, the state indicated that it would secure that figure and inform appellant before the restitution amount was placed in the entry of conviction. The trial court indicated from the bench that a hearing would be set if the amount was disputed. The record shows an entry of conviction listing \$2,999 in restitution.

{¶12} Appellant appeals his conviction and sentence, setting forth two assignments of error.

{¶13} Assignment of Error No. 1:

{¶14} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT WHEN IT DENIED HIS RULE 29 MOTION FOR

ACQUITTAL[.] "

{¶15} Appellant argues that his Crim.R. 29 motion should have been granted because the state failed to prove that he acted without the vehicle owner's consent under R.C. 2913.02(A)(1), as charged. Specifically, appellant asserts that he had permission to drive the vehicle, so his actions could only constitute acting beyond the scope of consent, which is prohibited under a separate subsection of the theft statute.

{¶16} R.C. 2913.02(A)(1), states, in part, that "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: Without the consent of the owner or person authorized to give consent[.]"

{¶17} When reviewing the trial court's denial of a motion for acquittal under Crim.R. 29, this court applies the same test as it would in reviewing a challenge based upon the sufficiency of the evidence to support a conviction. State v. Thompson (1998), 127 Ohio App.3d 511, 525. 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. Jenks (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶18} According to Singh's testimony, he permitted

appellant to drive him in his vehicle to Taco Bell because Singh did not feel well enough to drive. The vehicle was stopped at Taco Bell and Singh exited and became physically ill. Viewing the evidence most favorably for the prosecution, any rational trier of fact could have found that appellant took advantage of the fact that Singh left the vehicle to then commit the theft offense by driving off with the vehicle, thereby exerting control over the vehicle at that time for the purpose of depriving Singh of the vehicle without Singh's consent. See R.C. 2913.02(A)(1).

{¶19} Accordingly, the trial court did not err in overruling appellant's Crim.R. 29 motion. Appellant's first assignment of error is overruled.

{¶20} Assignment of Error No. 2:

{¶21} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT BY ORDERING RESTITUTION FOR A CRIME THAT HE WAS NEITHER INDICTED NOR CONVICTED."

{¶22} Appellant argues that he cannot be ordered to pay restitution for the damage to Singh's vehicle that occurred during an arson subsequent to his offense, and further, no evidence was presented to support the restitution amount.

{¶23} Appellant was found guilty of unauthorized use of a motor vehicle. The judgment entry of conviction lists the offense as a misdemeanor of the first degree. Under R.C. 2929.21(E), the court may require a person convicted of a misdemeanor to "make restitution for all or part of the

property damage that is caused by the offense and for all or part of the value of the property that is the subject of any theft offense, as defined in division (K) of section R.C. 2913.01 of the Revised Code, that the person committed."¹

{¶24} Upon review of the record, we cannot find that the trial court erred in ordering restitution for damage caused by the unauthorized use or all or part of the value of the property subject to the unauthorized use. Testimony at trial revealed that the vehicle was damaged while appellant was depriving Singh of this property without Singh's consent.

{¶25} The jury apparently chose not to believe appellant's alibi that he never drove or took Singh's vehicle that evening. There was evidence in the record sufficient for the jury to find that appellant took the vehicle. There is no evidence in the record that the damage to the vehicle occurred at any time other than while the vehicle was under appellant's control and during the commission of the theft offense.

{¶26} However, there must be sufficient evidence in the record from which the court can ascertain the amount of restitution to a reasonable degree of certainty. State v. Hooks (2000), 135 Ohio App.3d 746, 749, citing State v. Brumback (1996), 109 Ohio App.3d 65, 83. There is nothing in the record concerning damages, value, or restitution. There is no presentence investigation or victim impact statement available. Accordingly, it is appropriate to vacate the

1. R.C. 2913.01(K) lists unauthorized use of a motor vehicle as a theft offense.

restitution order and remand this matter to the trial court for a restitution hearing. Appellant's second assignment of

error is sustained to the extent that this matter will be remanded to the trial court for a restitution hearing.

{¶27} Judgment affirmed in part, reversed in part and vacated, and remanded for proceedings consistent with this opinion.

YOUNG, P.J., and POWELL, J., concur.