[Cite as *State v. Stokes*, 2016-Ohio-612.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CHAMPAIGN COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2015-CA-22
	:	
v.	:	T.C. NO. 15TRD1035
	:	
GAIL STOKES	:	(Criminal Appeal from
	:	Municipal Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the ___19th___ day of _____February_____, 2016.

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FROELICH, J.

{¶ 1} Gail Stokes was found guilty after a bench trial in the Champaign County Municipal Court of wrongful entrustment of a motor vehicle, in violation of R.C. 4511.203.[1]

[1] Neither the ticket, the complaint, the court's verdict entry, nor the sentencing entry specifies the subsection of R.C. 4511.203 under which Stokes was prosecuted. However, prior to trial, the State clarified that it was proceeding under R.C. 4511.203(A)(1), and defense counsel agreed that R.C. 4511.203(A)(1) was the relevant

The trial court imposed a fine of $225, plus court costs. Stokes appeals from her conviction. For the following reasons, the trial court's judgment will be reversed and her conviction will be vacated.

{¶ 2} Stokes's assignments of error claim that her conviction for wrongful entrustment of a motor vehicle was based on insufficient evidence and was against the manifest weight of the evidence.

{¶ 3} "A sufficiency of the evidence argument disputes whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law." *State v. Wilson*, 2d Dist. Montgomery No. 22581, 2009-Ohio-525, ¶ 10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). When reviewing whether the State has presented sufficient evidence to support a conviction, the relevant inquiry is whether any rational finder of fact, after viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997). A guilty verdict will not be disturbed on appeal unless "reasonable minds could not reach the conclusion reached by the trier-of-fact." *Id*.

{¶ 4} In contrast, "a weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive." *Wilson* at ¶ 12; *see Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 19 (" 'manifest weight of the evidence'

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subsection. The trial court's verdict entry reflects that the court applied R.C. 4511.203(A)(1) in reaching its verdict.

refers to a greater amount of credible evidence and relates to persuasion"). When evaluating whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, 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* at 387, citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 5} Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson*, 2d Dist. Montgomery No. 16288, 1997 WL 476684 (Aug. 22, 1997). The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence. *Wilson* at ¶ 14. A judgment of conviction should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *Martin* at 175.

{¶ 6} Stokes was tried under R.C. 4511.203(A)(1), which provides that "[n]o person shall permit a motor vehicle owned by the person or under the person's control to be driven by another if * * * [she] knows or has reasonable cause to believe that the other person does not have a valid driver's or commercial driver's license * * *."

{¶ 7} At trial, the State presented the testimony of Lieutenant Aller of the Ohio State Patrol. His testimony established the following facts:

{¶ 8} At approximately 1:30 p.m. on April 24, 2015, Aller was on patrol on State Route 29 in Champaign County, when he observed a Chevy Trailblazer speeding. Aller stopped the vehicle and learned that Frederick Stokes was the driver. Upon running the

vehicle's license plate, the registration came back to Gail Stokes, Frederick's wife. Frederick[2] told the officer that he was driving under suspension and did not have a license. Frederick indicated that he had been running errands, including taking money to his brother, who was in jail. Frederick did not indicate whether his wife knew that he was running errands.[3]

{¶ 9} Lieutenant Aller permitted Frederick to contact someone to pick him up. Frederick first called his wife, who was at work in Bellefontaine and could not come. Frederick then called a friend. Aller did not speak with Gail, but told Frederick to advise her that he (Aller) would be issuing a summons for wrongful entrustment for allowing Frederick to drive her vehicle.

{¶ 10} Lieutenant Aller called the Champaign County Sheriff's Office to see if the Chevy had been reported missing. No report had been made. Aller also looked at Frederick's driving history and confirmed that Frederick's license was under suspension. Aller noticed that Frederick was "under at least five different suspensions." The most recent traffic violation had occurred approximately a year before on April 19, 2014, when Frederick was stopped in Gail's vehicle for operating a vehicle under the influence of

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[2] For clarity, we will refer to Stokes and her husband by their first names from this point forward.

[3] At trial, defense counsel objected, on hearsay grounds, to Aller's testimony regarding Frederick's statements during the traffic stop. The trial court overruled the objection, and Gail did not challenge the trial court's evidentiary ruling on appeal. Even if we were to disagree with the trial court's ruling, when conducting a review of the sufficiency of the evidence, we must consider all the evidence admitted at trial, even improperly admitted evidence. *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, citing *Lockhart v. Nelson*, 488 U.S. 33, 38, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988). *Contrast State v. Kareski*, 137 Ohio St.3d 92, 2013-Ohio-4008, 998 N.E.2d 410 (appellate court should not consider judicially-noticed fact when reviewing sufficiency of the evidence).

drugs or alcohol (OVI). Frederick had less recent traffic violations in his own vehicle. The Law Enforcement Automated Database (LEADS) report showing Frederick's driving record was admitted as Exhibit A. The report did not indicate when Frederick's license was placed under suspension.

{¶ 11} Defense counsel moved for a judgment of acquittal, pursuant to Crim.R. 29. The trial court denied the motion on the ground that Frederick and Gail were married, which the court found constituted prima-facie evidence "of the offense," pursuant to R.C. 4511.203(B).

{¶ 12} Frederick testified as a defense witness, and Gail testified on her own behalf. Frederick acknowledged that he and Gail were and are married and that his license was under suspension on April 24, 2015. Gail works as an administrator in Bellefontaine, and her standard work hours are 8:00 a.m. to 5:00 p.m. He stated that he buys and resells items and works on their farm.

{¶ 13} Frederick testified that Gail owns three vehicles, including the Trailblazer. He stated that Gail does not permit him to drive her vehicles, but she allows others to drive him around in her vehicles. Frederick stated that Gail has not specified who the authorized drivers are, but Frederick has three people, all licensed drivers, who he regularly uses to drive him around.

{¶ 14} Frederick testified that he drove on April 24, because "family problems" came up, and the man that was supposed to drive him did not show up. Frederick explained that he was required to retrieve items (mannequins, tables, and the like) from a JC Penney store that day and that his mother had called and was "freaking out" about Frederick's brother's arrest and the charges. Frederick stated that he "got tired of

waiting" and told his mother that would he take money to his brother; the jail was five minutes away from the Stokeses' house. Frederick did not tell his wife that he was taking the car, and she was at work when he drove. He testified that Gail was upset with him when she learned he had driven.

{¶ 15} On cross-examination, Frederick testified that his wife keeps the keys to the vehicles on a key rack by the door to the house and that he has access to them. Frederick indicated that he had been pulled over in his wife's vehicle in 2014. She did not physically restrict his access to the keys after that, but "made it pretty clear that I'm not to drive." Frederick testified that, on April 24, 2015, he was stopped on his way to the home of the gentleman who was supposed to drive him around that day; they were going to the JC Penney store after that.

{¶ 16} Gail testified that she and Frederick had been married for 10 years and that she was aware of his license suspension. She reiterated her job responsibilities and work hours. Gail stated that she went to work at 8:00 a.m. on April 24, and Frederick was at home when she left. When asked if she authorized Frederick to use any of her vehicles, Gail responded:

> It was our standard practice that if he had work to do that, he would get a driver to drive that vehicle. That particular vehicle is the only vehicle that has a hitch on it that can pull the trailer that he needs so that's the vehicle he took to use for work. So I knew that he would get John or one of the other drivers if he had work to do.
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> He has – he has certain gentlemen who do have a driver's license

> who will come and pick him up at the house and then work with him during the day. Most of the type of projects that he has are two-person jobs anyway. So, you know, he'll pay people to come and drive him and help him with the jobs that he gets. He cuts firewood and things like that.
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> So that's worked very well, and he's been able to help support our family. Even though he has a long-term suspension, we had to come up with a solution that would enable him over the next few years to help support our family.

Gail stated that she did not authorize her husband to drive her motor vehicles, and she did not know that he was going to drive without permission on April 24.

{¶ 17} Gail stated that she was aware that her husband was impulsive, due to a traumatic brain injury. However, she indicated that she generally could work out a solution if she were made aware of a problem; she did not know about the situation with his brother and mother on April 24.

{¶ 18} Gail testified on cross-examination that she either left the keys in the vehicles (she stated that was common practice for people who live on a farm in the country, as they did) or put them on a key rack in the kitchen by the garage door. She acknowledged that Frederick had been pulled over once before in 2014, and at that point, they "had to decide whether we were going to be able to stay married and function as a family." As a result of the 2014 incident, the couple decided that Frederick would have a licensed driver help him from that point forward.

{¶ 19} Construing the evidence in the light most favorable to the State, we conclude that there was insufficient evidence, both at the time of Gail's Crim.R. 29 motion

and at the conclusion of trial, to prove beyond a reasonable doubt that Gail "permitted" her husband to drive her vehicle without a valid license.

{¶ 20} The term "permit" is not statutorily defined. Definitions of "permit" include "to allow by silence, agreement or giving a license"[4] and to "give authorization or consent to (someone) to do something".[5] Black's Law Dictionary defines "permit" as "1. To consent to formally; to allow (something) to happen, esp. by an official ruling, decision, or law <permit the inspection to be carried out>. 2. To give opportunity for; to make (something) happen <lax security permitted the escape>. 3. To allow or admit of <if the law so permits>." *Black's Law Dictionary* (10th Ed.2014).

{¶ 21} We have held that "permit" is not limited to overt, affirmative acts of consent, but can include acts of omission and failing to prevent another from doing an act. *State v. Finfrock*, 196 Ohio App.3d 249, 2011-Ohio-3862, 963 N.E.2d 177, ¶ 27 (2d Dist.). However, permission requires "some awareness of one's actions and the consequences of those actions." *Akron v. Meissner*, 92 Ohio App.3d 1, 633 N.E.2d 1201 (9th Dist.1993); s*ee Finfrock* at ¶ 28.

{¶ 22} Initially, we conclude that the trial court should have granted Gail's Crim.R. 29 motion. Although the standard for reviewing the trial court's denial of a Crim.R. 29 motion is the same as for a sufficiency of the evidence claim, we consider only the evidence presented in the State's case-in-chief when reviewing the denial of a Crim.R. 29 motion. *See, e.g., State v. Richardson*, 2015-Ohio-757, 29 N.E.3d 354, ¶ 22 (2d Dist.); *State v. Sheppeard*, 2d Dist. Clark No. 2012 CA 27, 2013-Ohio-812, ¶ 55. In

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[4] http://legal-dictionary.thefreedictionary.com/permit

[5] http://www.oxforddictionaries.com/us/definition/american_english/permit

contrast, we consider all of the evidence admitted at trial when considering whether a defendant's conviction was supported by sufficient evidence.

{¶ 23} Considering only the evidence in the State's case-in-chief, namely Lt. Aller's testimony and the LEADS report, there was no evidence that Gail permitted Frederick to drive her Trailblazer. Lieutenant Aller's testimony did not suggest that Gail engaged in any conduct that might have enabled Frederick to drive her vehicles. The State presented no evidence as to how Frederick came to have access to the vehicle's keys and whether Gail's actions or inactions contributed to his driving. Moreover, there was no indication that Gail affirmatively allowed Frederick to drive or that she even knew that Frederick might drive her vehicle. Aller testified that Frederick had been stopped in Gail's vehicle a year before this incident, but there was no direct evidence that Frederick's license was under suspension at the time (April 2014) or that Gail was aware of the prior incident. In short, the State simply presented evidence that Frederick was stopped by the police while driving Gail's vehicle with a suspended license. This evidence, by itself, does not suggest permission by Gail.

{¶ 24} In denying the Crim.R. 29 motion, the trial court relied on R.C. 4511.203(B), which provides, in relevant part:

> (B) Without limiting or precluding the consideration of any other evidence in determining whether a violation of division (A)(1), (2), (3), (4), or (5) of this section has occurred, it shall be prima-facie evidence that the offender knows or has reasonable cause to believe that the operator of the motor vehicle owned by the offender or under the offender's control is in a category described in division (A)(1), (2), (3), (4), or (5) of this section if any

of the following applies:

(1) Regarding an operator allegedly in the category described in division (A)(1), (3), or (5) of this section, the offender and the operator of the motor vehicle reside in the same household and are related by consanguinity or affinity.

{¶ 25} Under the language of R.C. 4511.203(B), evidence that Frederick and Gail were married and resided in the same household provided prima facie evidence that Gail knew or had reasonable cause to believe that Frederick did not have a valid driver's license. The State did not present any evidence that Frederick and Gail, although married, resided in the same household. And even if that evidence had been presented, there was still no evidence that Gail permitted Frederick to drive her vehicle, an element of wrongful entrustment that R.C. 4511.203(B) does not address.

{¶ 26} It is possible for sufficient evidence to be introduced in the defense case. *Richardson*, 2015-Ohio-757, 29 N.E.3d 354, ¶ 22. As stated above, when determining whether there is sufficient evidence to support a conviction, an appellate court considers all of the evidence admitted against the defendant at trial. *Id.*; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 80.

{¶ 27} The Stokeses' testimony at trial reflects that Gail left the keys to the Chevy Trailblazer either on a key rack in the kitchen or in the vehicle, thus providing her husband access to the vehicle. Frederick had driven Gail's vehicle while under suspension once before, approximately one year before the April 24 incident. In response to the prior incident, Gail had expressly forbidden Frederick from driving, and the couple had agreed that Frederick would get a driver to drive him around in Gail's vehicles.

{¶ 28} The State likens Gail's actions to those in *Finfrock*. In that case, the police observed a young man speeding and driving recklessly, and he sped away from the police when the officers tried to pull him over. The driver eventually drove the car into the front yard of his house, driving straight into it, and ran from the officers. In speaking with the young man's mother (Finfrock), the mother indicated that her son had been in a severe motorcycle accident about a year earlier, which caused permanent brain damage and partial blindness in his right eye. Finfrock knew that her son could not drive and that his license was suspended; she stated that he never had a driver's license. *Finfrock*, 196 Ohio App.3d 249, 2011-Ohio-3862, 963 N.E.2d 177, at ¶ 8.

{¶ 29} Finfrock had testified that she had not given her son permission to drive her car, but her son drove every chance he had. Finfrock also stated that her son had taken her vehicle a couple of times, including one time when it had to be towed. There were also times when he had taken her car in the middle of the night, when she was asleep. Finfrock admitted that her son had been fleeing from the police when he was involved in the motorcycle accident. Finfrock admitted that officers had warned her that her son could not drive her car. On the night of the incident, Finfrock had left her car keys on the table after coming home from working a double shift at her job; she stated that she had also been under a great deal of stress due to her son's injuries and problems. Finfrock indicated that she did not leave her keys on the table purposely, but was very tired and had other things on her mind. *Finfrock* at ¶ 9-10.

{¶ 30} Under the facts of the case, we concluded that the trial court, as the trier of fact, reasonably found that Finfrock "permitted" her son to drive her vehicle, within the meaning of R.C. 4511.203. We reasoned:

> In the case before us, Finfrock was well aware that Scott [her son] had improperly driven her car on a number of occasions. Finfrock had also been warned by the police not to allow this to happen. Yet despite this knowledge and awareness of the danger that Scott's driving could pose, Finfrock left her keys on the table where Scott could easily retrieve them and drive the car. Her excuse was that she was tired and had other things on her mind.
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> Essentially, the trial court inferred from Finfrock's repeated failures to prevent her son from driving her car that she had given him her implicit permission to drive it. We conclude that this was a reasonable inference for the trial court, as the finder of fact, to draw from the evidence in this record.

Finfrock at ¶ 27, 30.

{¶ 31} The facts of this case bear only a superficial resemblance to those in *Finfrock*. As in *Finfrock*, Gail knew that her husband's driver's license was suspended, and that he should not be driving. Both Frederick and Finfrock's son had traumatic brain injuries, affecting their impulse control. Gail denied giving her husband permission to drive her vehicles, and she testified that she expressly forbade it. Gail nevertheless kept the keys to her vehicles in a location that was accessible to her husband.

{¶ 32} However, unlike Finfrock's son, Frederick did not display a history of driving his wife's vehicles without a valid license, and Gail had not been warned to keep her husband from driving her vehicles. Frederick and Gail admitted that Frederick had driven

one of Gail's vehicles while under suspension once in 2014, but they both testified that, after that 2014 incident, they agreed that Frederick would get a driver to drive Gail's vehicle when he needed it for his work. Frederick provided the names of three individuals who typically drove him around using Gail's vehicle. Approximately a year had passed between the 2014 incident and the April 24, 2015 incident. Frederick explained that he only drove on April 24 because of an unexpected family situation and the fact that the person who was supposed to drive him had not shown up. Given the facts of this case, we conclude that the evidence at trial does not support a reasonable inference that Gail's leaving her car keys for Frederick's driver in a location that was accessible to Frederick was tantamount to permitting Frederick to drive her vehicle himself.

{¶ 33} Gail's conviction for wrongful entrustment of a motor vehicle is based on insufficient evidence. It necessarily is also against the manifest weight of the evidence. *State v. Spears*, 178 Ohio App.3d 580, 2008-Ohio-5181, 899 N.E.2d 188, ¶ 24 (2d Dist.). Her assignments of error are sustained.

{¶ 34} The trial court's judgment will be reversed, and Gail Stokes's conviction will be vacated.

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DONOVAN, P.J. and HALL, J., concur.

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