[Cite as *State v. Miller*, 2015-Ohio-644.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
SHELBY COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 17-13-24**

v.

JEROMY J. MILLER, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Sidney Municipal Court
Trial Court No. 13-CRB-485

Judgment Affirmed

Date of Decision: February 23, 2015

APPEARANCES:

Jim R. Gudgel **for Appellant**

Jeffrey L. Amick **for Appellee**

SHAW, J.

{¶1} Defendant-Appellant, Jeromy J. Miller ("Miller"), appeals the judgment of the Sidney Municipal Court, convicting him of Criminal Trespass and Theft and sentencing him to 120 days in jail. On appeal, Miller argues that he was denied his right to due process when he was not allowed to testify in his own defense and that he was denied effective assistance of counsel. For the reasons that follow, we affirm the trial court's judgment.

{¶2} On May 20, 2013, two complaints were filed in the Sidney Municipal Court alleging that Miller committed Theft in violation of R.C. 2913.02(A)(1), a misdemeanor of the first degree, and Criminal Trespass in violation of R.C. 2911.21(A)(1), a misdemeanor of the fourth degree. Miller was subsequently arraigned and pled not guilty to the charges.

{¶3} The matter proceeded to a jury trial on October 10, 2013. As its first witness, the State called Jennifer McKibben. McKibben testified that she lived next door to Robert Benshoff and that Benshoff owned a white and blue all-terrain vehicle ("ATV"). McKibben testified that she had familiarity with the ATV because her father-in-law asked if she wanted to buy it before selling it to Benshoff some 3-4 years prior. She further testified that, on May 17, 2013, a green pickup truck pulled into her driveway. Later, she saw a man load Benshoff's ATV onto the truck. When she asked the man what he was doing, he

told her to "go ahead and call the police." (Tr. at 58). After first calling Benshoff to determine whether Benshoff had given permission to anyone to take the ATV, she called the sheriff's office to report the ATV stolen. A deputy came to her house and she recounted what she had seen, including a description of the perpetrator, the ATV, the truck, and a part of the truck's license plate. McKibben made an in court identification of Miller and identified him as the man who took Benshoff's ATV.

{¶4} The State next called Benshoff to the stand. He testified that he owned the ATV that was taken from his property on May 17, 2013. Benshoff was able to identify pictures of the ATV due to "some distinctive features and marks" as well as an "on/off kill switch" that he had placed on the vehicle. (Tr. at 73). He also testified that he purchased the ATV from McKibben's father-in-law at a price of $500, and that he had not given Miller permission to take the ATV from his property, nor had he sold it. On cross-examination, he admitted that he had no documentation showing ownership of the ATV and that the person he purchased it from had no documentation either as it was purchased from a swap meet.

{¶5} The next witness called by the State was Frank Bleigh, a Deputy for the Shelby County Sheriff's Office. Deputy Bleigh testified that in response to McKibben's call, he went to her house where he took statements from McKibben and Benshoff. The partial license plate originally did not produce any results, but

when run a different way it matched a green pickup owned by Miller. Deputy Bleigh went to Miller's address and saw the pickup that matched the description provided by McKibben. He spoke with Miller, who also matched McKibben's description, and asked him whether he had the ATV. Miller responded that he had the ATV and showed the officer where it was located. The ATV matched the description of the ATV provided by Benshoff. When asked where he acquired the ATV, Miller stated that he had taken it from Benshoff's property. Deputy Bleigh then placed Miller under arrest.

{¶6} On cross-examination, Deputy Bleigh testified Miller's explanation for taking the ATV was "because he believed it was his." (Tr. at 115). Deputy Bleigh then testified as to a police report filed by Miller's wife regarding a stolen ATV, which indicated that an ATV had been stolen from them on May 8, 2011. (Tr. at 127).

{¶7} After Deputy Bleigh's testimony, the State rested. Miller's counsel stated that they did not have any witnesses to present. Both sides presented closing arguments, and the trial court charged the jury before deliberations.

{¶8} The jury returned guilty verdicts on both counts on October 10, 2013, which were accepted by the trial court. The trial court then proceeded to sentence the defendant that same day. After hearing evidence and argument relating to the issue of punishment, the court imposed a 30-day jail sentence for the one count of

criminal trespass; and a 120-day jail sentence for the one count of theft, to be served concurrently. The trial court also ordered that Miller serve two years of probation. Also on that same day, the trial court issued a judgment entry journalizing Miller's conviction and sentence.

{¶9} It is from this judgment that Miller timely filed this appeal, presenting the following assignments of error for our review.

ASSIGNMENT OF ERROR 1

THE DEFENDANT WAS DENIED DUE PROCESS WHEN HE WAS PREVENTED FROM TESTIFYING AT HIS CRIMINAL TRIAL AS PROVIDED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR 2

THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE DEFENDANT'S PUBLIC DEFENDER REFUSED TO HAVE THE DEFENDANT TESTIFY AT HIS CRIMINAL TRIAL AND FAILED TO PRESENT EXCULPATORY EVIDENCE.

First Assignment of Error

{¶10} In his first assignment of error, Miller argues that he was denied due process when he was prevented from testifying in his own defense. We disagree.

{¶11} At the outset, we would note that Miller *never* asserted any desire to testify during the trial on the record and "a trial court is *not required* to conduct an inquiry with the defendant concerning the decision whether to testify in

his defense." (Emphasis added as to the word "not"). *State v. Bey*, 85 Ohio St.3d 487, 497 (1997).

{¶12} Despite the fact that he never expressed his desire to testify on the record, on appeal Miller argues that he had expressed to his attorney that he wished to testify in this case. As support for this proposition Miller attached an affidavit to his brief stating the same. This affidavit is not in the trial court's record and is not properly before this court for our consideration. *See* App.R. 9. "We are not permitted to go beyond the record to decide issues raised in an appeal." *State v. Cook*, 10th Dist. Franklin No. 05AP-515, 2006-Ohio-3443, ¶ 30. Our inquiry into this matter could simply end here, as the record is wholly devoid of any affirmative instance of Miller expressing his desire to testify to the trial court, to his attorney, or through his attorney to the trial court. However, in the interests of justice we will examine Miller's actions throughout the trial as a whole to see if he somehow otherwise asserted a desire to testify.

{¶13} Once Miller's trial began, there were multiple incidents of Miller addressing the trial court, or being addressed by the trial court. The first of these incidents occurred almost immediately, when the court was going over its opening introductions and instructions with the jury pool (prior to voir dire). At that time, the court was interrupted by Miller who stated, "I didn't have a witness on the list

–[.]" (Tr. at 5). The court responded, "Mr. Miller, now is not the time." (*Id*.) There was no indication of Miller expressing a desire to testify.

{¶14} Miller was then quiet through jury selection and the State's opening statement, but he was addressed by the trial court at the end of his attorney's opening statement for apparent outbursts, which are not recorded in the transcript. At that time, the court said to Miller's counsel, "Counselor, could you inform your client that he has a right to remain silent in this courtroom and that anything he says can and may be held against you. Additionally, he has counsel to speak for him. At this time is not an appropriate time for Mr. Miller to make comment." (Tr. at 49-50).

{¶15} As the trial proceeded, Miller was silent through the State's first two witnesses. During the State's third witness's testimony, the court sent the jury out to discuss an evidentiary matter and the court took it upon itself to address Miller briefly for his antics that had apparently been occurring during the State's presentation of evidence.

> **THE COURT: I do have a housekeeping issue. Mr. Miller?**
>
> **THE DEFENDANT: Yes.**
>
> **THE COURT: Your exaggerated motions do not assist you in your defense. They are a form of using statements which may be used against you. You need to understand that when you make those statements, you are allowing – those may be used against you by a variety of persons. Although you – they may be exaggerated motions, you've made a variety of them during this**

> **trial. I've made a point to try not to bring them to anyone's attention. This is an opportunity to do it outside of the jury that, in fact, you may be making statements which could result in other issues for you. I would suggest that you do not do that.**
>
> **Counsel, I would encourage you to admonish your client to try and retain some dignity in the courtroom.**

(*Id.* at 101-102). While the court was still discussing evidentiary matters outside the jury's presence, Miller apparently again started making gesticulations and the court warned, "[i]f I need to do something to make sure that you cannot move in this courtroom, I'm going to have to do that." (*Id.* at 104).

{¶16} Afterward the trial proceeded and Miller was silent through the conclusion of the State's case. When the State rested, defense counsel requested a brief recess so that she and Miller could go over "how we're going to prepare." (Tr. at 128). The trial court granted that recess and when the court reconvened Miller's counsel stated that they would not be presenting any witnesses. (Tr. at 129). Miller made no statements whatsoever at this time indicating dissatisfaction with his attorney or indicating a desire to testify. He was entirely silent.

{¶17} The trial then proceeded and the State delivered its closing argument. After the prosecutor had finished his closing argument, Miller interrupted, and the following brief conversation between Miller and the court took place.

> **THE DEFENDANT: "Your Honor, I think –**
>
> **THE COURT: Mr. Miller.**

THE DEFENDANT: (Unintelligible).

THE COURT: Mr. Miller, Mr. Miller, we're in closing arguments.

THE DEFENDANT: (Unintelligible), sir.

THE COURT: Mr. Miller, I have indicated to you previously –

MILLER: Yes, sir.

TRIAL COURT: -- that I would cause a variety of sanctions to occur, and I would prefer not to did [sic] these undertakings in front of the jury.

If you do not mind, at this point I'm going to allow [your counsel] to give her closing argument, and I will be glad to listen to you then.

(Tr. at 136-137). Miller thus again spoke at an inappropriate time, was properly admonished by the trial court for doing so and did not affirmatively indicate a desire to testify.

{¶18} Miller's counsel then gave her closing argument and the State presented its rebuttal closing argument. Afterward the trial court gave its instructions to the jury, but before the jury was released to deliberate, the following exchange took place.

TRIAL COURT: Does either counsel have anything further at this time?

MILLER: Your Honor –

TRIAL COURT: [State]?

MILLER: (Unintelligible).

> **TRIAL COURT: Mr. Miller, Mr. Miller, Mr. Miller, I have cautioned you previously that you are exercising - - Mr. Miller - -**
>
> **MILLER: Okay.**
>
> **TRIAL COURT: You have a right to remain silent, and I am trying to assist you in remaining silent at this point in time. I will give you an opportunity to speak once I have adjourned the jury.**
>
> **MILLER: Yes, sir.**
>
> **TRIAL COURT: However, at this point in time you need to remain still. Are we understood?**
>
> **MILLER: Yes, sir. Thank you, sir.**

(*Id.* at 152-153).

{¶19} The jury was then excused to deliberate, and the following exchange took place.

> **TRIAL COURT: Okay. Now, Mr. Miller – you can be seated. Mr. Miller, I appreciate that you have something you wish me to hear. However, before I proceed, I must again warn you that you have a – you need to understand that anything can happen in these cases and should you make a statement in open court, it is subject to cross-examination, even poss –**
>
> **Mr. Miller, would you just listen? Just listen.**
>
> **Even if there were a successive hearing, you might be subject to cross-examination by someone not in this room. And so when you make a statement, you must be aware of its ramification.**
>
> **And it's my understanding that you have a disagreement with counsel. You need to appreciate that disagreements do occur,**

and the Court is never going to involve itself in whatever the parties and counsel may discuss. I appreciate you may have some rights, but before you exercise anything today, I caution you, please, sir, I caution you to sit back and think of what you do before you try to do anything. It may have serious ramifications.

MILLER: Your Honor –

TRIAL COURT: Mr. Miller, I am going to first defer to your counsel.

[Counsel], it appears Mr. Miller wishes to say something, and I am inclined not to listen to it under the current circumstances. Unless you urge it upon me that is my position. I'm open to whatever you might wish to say. I appreciate the difficulties between client and counsel all the time.

Anything you wish to tell me.

[MILLER'S COUNSEL]: Your Honor (unintelligible) I have advised him not to say anything.

TRIAL COURT: I'm going to – at this point in time I think what I'm going to do is I'm going to take a recess and I'm going to allow cooler heads to prevail for a moment.

We will adjourn. Before we bring the jury back if there's anything anyone wishes to say, I'll be glad to listen, Mr. Miller, but I'm telling you that you really, really – I'm urging you as someone who's been in a lot of trials, you really need to follow whatever your instructions of counsel are.

So we're going to take a recess and allow cooler heads to prevail and we'll go from there. And we'll leave the courtroom unless you have someplace you'd like to go.

[MILLER'S COUNSEL]: Your Honor –

THE COURT: Mr. Miller, I'm going to listen to your attorney.

> **[MILLER'S COUNSEL]: I don't think this is a dispute that's going to be resolved today. I've advised Mr. Miller things he can do after today, but there is no –**
>
> **THE DEFENDANT: (Unintelligible).**
>
> **[MILLER'S COUNSEL]: I don't think that it's going to be --**
>
> **TRIAL COURT: It appears that Mr. Miller does not wish to listen. I've instructed him multiple times to keep from making gesticulations in court, and he persists in doing so. I'm of concern here, but we're really trying to be appropriate in how we deal with it. At this point I appreciate all that counsel have done respectively.**
>
> **If there's a discussion that needs to be held, Mr. Miller, I would suggest you return – you may talk with counsel. I'll allow the Bailiff to decide how best to proceed with that, but please wait until the rest of us leave the room if you don't mind. We're in recess.**

(*Id.* at 153-156).

{¶20} The excerpted portions above contain the entirety of Miller's interactions with the trial court during the trial. These interactions seem to indicate that Miller repeatedly disrupted the proceedings at inappropriate times against the advice of counsel and was admonished by the trial court for doing so. In response, it appears that the court exercised control over the improper outbursts of the defendant, which it is certainly entitled to do. *State v. Clifford*, 162 Ohio St. 370, 372 (1954) ("[a] judge is at all times during the sessions of the court

empowered to maintain decorum and enforce reasonable rules to insure the orderly and judicious disposition of the court's business.").

{¶21} At no time during the trial did Miller affirmatively indicate a desire to testify. Nor does the record demonstrate that any of Miller's "gesticulations" and outbursts during the trial were motivated by a desire to testify. As a result, the trial record contains nothing from which this court could conclude that either the trial court or defense counsel was somehow apprised that Miller was asserting a right or desire to testify at the trial.

{¶22} On the contrary, despite Miller's apparent willingness to interject comments at multiple times throughout the trial, we would note that Miller specifically did not say anything at the close of the State's case-in-chief, when he had the most obvious opportunity to bring the issue of his testifying to the attention of the trial court. Instead, after the State rested, defense counsel requested a recess so that she could speak with Miller about how to proceed in presenting their case and whether they were going to present any evidence. That recess was granted and when the court reconvened defense counsel stated that the defense did not wish to present any evidence. At that time Miller was completely silent and gave no indication that his counsel's statement was in any way inconsistent with his wishes.

{¶23} There is no other issue raised by appellant either at trial or in his appeal to this court. As a result, the foregoing analysis is all that is necessary to completely address and dispose of the appellant's assignment of error in this case.

{¶24} Nevertheless, we believe it is necessary to respond to the dissent's arguments, based entirely upon unsworn comments made by Miller at the *sentencing* hearing, 1) that Miller at one time previously owned the ATV in question; 2) that the ATV had been stolen from him; 3) that the prosecution engaged in misconduct by improperly keeping this information from the jury; and 4) that because Miller "believed" the ATV was his, he cannot be convicted of a theft offense of the ATV as a matter of law.

{¶25} At the outset, we note that while Miller's previous ownership of this particular ATV was suggested by testimony at trial, it was never conclusively established in the trial record. Specifically, Deputy Bleigh testified that this was Miller's *excuse* as to why he took the ATV. In addition, Deputy Bleigh testified that Miller's wife filed a police report in May of 2011 alleging that a "similar" ATV had been stolen. The jury was thus aware of Miller's claims and defense counsel made it a chief argument in the defense's case.

{¶26} However, we would first note that the *timeline* of Miller's claims of ownership of the ATV conflicts with the testimony at trial. The police report for Miller's stolen ATV was filed in May of 2011, but both McKibben and Benshoff

testified that Benshoff had acquired the ATV over three years prior to the October 2013 trial date.[1] Benshoff was confident in his estimation as he had got it for his son's eighth birthday, who was eleven and a half at the time of the trial.

{¶27} The dissent next claims that the failure to conclusively establish the identification and previous ownership of the ATV at trial was due solely to prosecution misconduct, because the investigative report in possession of Deputy Bleigh, apparently filed with the court and with defense counsel in the discovery process, *but never proffered into the record at trial*, contained hearsay information received in a fax from the manufacturer indicating that the VIN number of the ATV stolen in 2011 matched the VIN number of the ATV in this case.

{¶28} Notably, the testimony established that the original theft report did not identify the ATV by VIN number. Nor was the deputy initially successful in obtaining the VIN number through dealer inquiry. However, it appears that through further dealer inquiry, eventually the Deputy contacted the manufacturer and received a fax identifying the VIN number of the stolen ATV. The deputy then attached or included this fax in his report and it was specifically the information on the fax that was solicited during cross-examination by defense counsel. When defense counsel attempted to elicit this information from the Deputy at trial, the State objected and the trial court sustained the objection

[1] Miller would later explain at sentencing that he was in prison when the ATV had been allegedly stolen.

because the fax received by the Deputy was hearsay. No evidence from the manufacturer was introduced or proffered into the trial record, nor was the fax or report of the deputy. As a result, this court cannot lawfully conclude that the trial record establishes that this particular ATV was once owned by Miller.

{¶29} More importantly, however, whether or not the identity of the ATV had been established at trial, the mere fact that Miller at one time may have previously owned or somehow "believed" he owned the ATV in question does not give him a legal right to forcibly "steal it back" from the current lawful owner and does not establish a defense to the charge of theft in this case. The Ohio Revised Code definition of "owner" for the purposes of Theft is not concerned merely with "ownership," but rather also with possession. Revised Code 2913.02(A)(1) defines Theft as "(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over * * * property * * * (1) Without the consent of the owner or person authorized to give consent[.]" Owner, as defined by the Revised Code and by the jury instructions used in this case means "any person, other than the actor, who is the owner of, who has *possession or control of, or who has any license or interest in property or services, even though the ownership, possession, control, license, or interest is unlawful*." (Emphasis added.) R.C. 2913.01(D).

{¶30} Thus, it is not necessary to prove title ownership under the theft statute, and all that is required is proof that a defendant deprived someone of property who had "possession or control of, or any license or any interest in" that property. *State v. Grayson*, 11th Dist. Lake App. No.2006-L-153, 2007-Ohio-1772, ¶ 26, citing *State v. Rhodes*, 2 Ohio St.3d 74, 76 (1982). "[T]he gist of a theft offense is the wrongful taking by the defendant, not the particular ownership of the property." *State v. Jones*, 8th Dist. Cuyahoga No. 92921, 2010-Ohio-902, ¶ 12.

{¶31} For all of these reasons, Miller's first assignment of error is overruled.

Second Assignment of Error

{¶32} In Miller's second assignment of error, he argues that he was denied effective assistance of counsel. He bases his assignment wholly on the argument that his counsel was ineffective for preventing him from testifying as argued in the first assignment. As we have found no error in Miller's first assignment, we cannot find that his counsel was ineffective based on those same arguments. Accordingly, Miller's second assignment of error is overruled.

{¶33} For the foregoing reasons Miller's assignments of error are overruled and the judgment of the Sidney Municipal Court is affirmed.

Judgment Affirmed

PRESTON, J., concurs.

ROGERS, P.J., dissents.

{¶34} I must respectfully dissent from the opinion of the majority, and would find, for a variety of reasons, that Miller's conviction should be reversed. Specifically, I believe that Miller invoked his right to testify and was denied that constitutional right, he had a complete defense against the charge of theft, and that the prosecutor engaged in prosecutorial misconduct.

Right to Testify

{¶35} As the United States Supreme Court has noted, "[a]t this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." *Rock v. Arkansas*, 483 U.S. 44, 49, 107 S.Ct. 2704 (1987). This right arises from several provisions in the U.S. Constitution. *Id.* at 51. "The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony." *Id.* The right of a defendant to testify at trial also arises from the Sixth Amendment's compulsory process clause and as a corollary to the protection against compelled testimony found in the Fifth Amendment. *Id*. at 52.

{¶36} "Generally, the defendant's right to testify is regarded both as a fundamental and a personal right that is waivable only by an accused." *State v. Bey*, 85 Ohio St.3d 487, 499 (1999). Attorneys cannot deprive their clients of this

fundamental right. *See State v. Winstead*, 1st Dist. Hamilton No. C-080092, 2009-Ohio-973, ¶ 16 (finding attorney could not be ineffective for placing defendant on stand, as attorney could not deny defendant this right). Nor can a court deny a defendant this right when it is aware of his desire to testify. *See City of Cleveland v. Alton*, 118 Ohio App.3d 642, 645 (8th Dist.1997) (court erred by refusing to allow defendant to testify after being informed of his desire by counsel). However, as with other constitutional rights afforded criminal defendants, the right to testify can be waived and thus is "contingent upon a timely demand by the defendant." *State v. Stewart*, 11th Dist. Ashtabula No. 2001-A-0011, 2002-Ohio-3842, ¶ 53; *see also State v. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-6624, ¶ 43 (finding nothing in the record that suggested defendant wished to testify and was refused, and instead found voluntary waiver).

{¶37} The State erroneously argues that "[i]n point of fact, no such constitutionally protected right [to testify] exists in the law." (Appellee's Br., p. 6). This is clearly incorrect.[2] The State also argues that, even if there is a constitutional right to testify, Miller failed to make a timely demand to the trial court. The majority analyzed the way that the trial court addressed Miller's outbursts, and found that it cannot infer that Miller expressed a desire to testify. I disagree.

[2] I note that the State's brief only utilizes court decisions that were decided before 1987, the year that the United States Supreme Court found that a defendant has a constitutional right to testify. *See Rock v. Arkansas*, 483 U.S. 44, 49, 107 S.Ct. 2704 (1987).

{¶38} Here, the trial court commented on Miller's behavior, explaining to him that his exaggerated motions would not be tolerated. However, the trial court addressed Miller's attempts to speak different than such gestures. Throughout the course of the trial, Miller attempted to address the court, and was told that his turn to be heard would come. While the trial court was speaking to the jury before voir dire, the trial court addressed Miller by stating: "Mr. Miller, now is not the time." Trial Tr., p. 5. When Miller's counsel finished opening arguments, the trial court stated "*At this time* [it] is not an appropriate time for Mr. Miller to make comment." (Emphasis added.) *Id.* at p. 50. After the State's closing argument, Miller attempted to speak again, and was told: "If you do not mind, at this point I'm going to allow [your counsel] to give her closing argument, and *I will be glad to listen to you*." (Emphasis added.) *Id*. at p. 137. Before the jury was released to deliberate, Miller attempted to speak and was told by the trial court: "I will give you an opportunity to speak once I have adjourned the jury." *Id.* at p. 153.

{¶39} Once the jury left the courtroom, the trial court stated:

> Okay. Now, Mr. Miller – you can be seated. Mr. Miller, I appreciate that you have something you wish me to hear. However, before I proceed, I must again warn you that you have a – you need to understand that anything can happen in these cases and should you make a statement in open court, it is subject to cross-examination, even poss –
>
> Mr. Miller, would you just listen? Just listen.

> Even if there were a successive hearing, you might be subject to cross-examination by someone not in this room. And so when you make a statement, you must be aware of its ramifications.
>
> * * *
>
> I appreciate you may have some rights, but before you exercise anything today, I caution you, please, sir, I caution you to sit back and think of what you do before you try to do anything. It may have serious ramifications.

Id. at p. 154-155.

{¶40} Once the trial court had decided it was the appropriate time to listen to Miller, it specifically warned him that if he spoke, he would be cross-examined. Only when a defendant testifies on his own behalf is he subject to cross-examination. *Raffel v. United States,* 271 U.S. 494, 497, 46 S.Ct. 566 (1926). Thus, by warning Miller of cross-examination, the trial court acknowledged that Miller was asking to testify on his own behalf. Otherwise, this warning would not apply.

{¶41} After the trial court warned Miller of the consequences of speaking, the following exchange then took place:

> MILLER: Your Honor –
>
> TRIAL COURT: Mr. Miller, I am going to first defer to your counsel.
>
> [Counsel], it appears Mr. Miller wishes to say something, and I am inclined not to listen to it under the current circumstances. Unless you urge it upon me that is my position. I'm open to

> whatever you might wish to say. I appreciate the difficulties between client and counsel all the time.
>
> Anything you wish to tell me.
>
> MILLER'S COUNSEL: Your Honor (unintelligible) I have advised him not to say anything.

Id. at p. 155. Miller was asked if he wanted to speak, and then not allowed to answer! It is obvious that the trial court presumed that had Miller been allowed to answer, he would have exercised his right to testify, in light of the court's admonishment regarding cross-examination.

{¶42} Moreover, the majority completely ignores all of the "unintelligible" sections of the record, presuming that none of them are Miller asking to testify. However, "[c]ourts are to indulge every reasonable presumption against the waiver of a fundamental constitutional right * * *." *State v. Dyer*, 117 Ohio App.3d 92, 95 (2d Dist.1996). In *Dyer*, the transcript of the proceedings in the lower court was unintelligible. *Id.* at 96. While the court acknowledged that this would typically foreclose the ability to prove error, "in the case of a waiver of a fundamental constitutional right, the waiver * * * must affirmatively appear in the record." *Id*. Without the transcript, the court presumed that the appellant's right to representation of counsel was not effectively waived. *Id.* Therefore, in this case, once the court asked if Miller wanted to speak, and did not allow him to answer, we must presume that Miller *would not have waived that right*.

{¶43} The majority relies on the Ohio Supreme Court's decision in *Bey* to stand for the proposition that the trial court need not ask the defendant whether he wants to invoke his right to testify. I do not disagree. However, *Bey* also stated the reasoning behind this rule:

> Reasons vary for rejecting the requirement. Such an inquiry is thought to be simply unnecessary. Alternatively, it may be thought harmful. As Chief Justice Erickson of the Colorado Supreme Court noted, an inquiry "unduly interfere[s] with the attorney-client relationship." *People v. Curtis* 681 P.2d 504, 519 (Colo.1984) (concurring opinion). An inquiry "places the judge between the lawyer and his client and can produce confusion as well as delay." *Underwood v. Clark* 939 F.2d 473, 476 (7th Cir.1991). For example, questioning can lead into the judge's evaluation of the wisdom of the defendant's decision, the substance of the testimony, or simply evoke a dramatic change in a previously carefully considered trial strategy. *See, e.g., United States v. Goodwin* 770 F.2d 631, 636 (7th Cir.1985). "Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right." *Brooks v. Tennessee* 406 U.S. 605 (1972).

Bey, 85 Ohio St.3d at 497.

{¶44} Here, the trial court *inquired into whether Miller wanted to speak.* It told him the consequences. It advised him that it was not a good idea to speak. It asked that he follow counsel's advice. Contrary to the reasoning in *Bey*, the trial court clearly evaluated the wisdom of Miller's desire to testify, interfering with the attorney-client relationship. This is not a case where a defendant sits idly by during the course of the proceedings and then argues on appeal that he wanted to

speak. The trial court began an inquiry, and then stopped short of allowing the defendant to answer.

{¶45} The majority combs the record to show that Miller never said the magic words necessary to invoke his right to testify and puts great weight on the fact that Miller's counsel asked for a recess before she proceeded with her defense, inferring that she convinced Miller that he should not testify. This analysis ignores the trial court's actual inquiries as to whether he wanted to speak and Miller's continued outbursts after the recess. The trial court asked whether Miller wanted to speak, and then never allowed him to answer the question. While the trial court was not required to inquire of Miller, it did inquire, and then did not allow Miller to respond. Further, that this inquiry was in response to Miller's continued attempts to try and speak *after the recess* negates any inference that he agreed he would not take the stand.

Mistake of Fact & Prosecutorial Misconduct

{¶46} After discussing how Miller never properly invoked his right to testify, the majority then makes the outlandish statement that the only relevant inquiry in this case is who owned the ATV when Miller took it. Specifically, the majority states that "the mere fact that Miller at one time may have previously owned or somehow 'believed' he owned the ATV in question * * * does not establish a defense to the charge of theft in this case." Majority Opin., ¶ 29.

{¶47} Initially, I must note that it is "well-settled legal authority which establishes that it is legally impossible for one to steal from oneself." *City of Fairfield v. Sims*, 12th Dist. Butler No. CA97-12-247, 1998 WL 883795, (Dec. 21, 1998); *see also State v. Beyers*, 2d Dist. Greene No. 95-CA-32, 1996 WL 200582, *3 (Apr. 26, 1996) (reasoning that a defendant cannot be guilty of theft when taking abandoned property because it is the same as taking property that turns out to be his own). This aside, the majority, as well as the prosecutor in this case, completely disregard the element *of intent*. Miller was charged with one count of theft, in violation of R.C. 2913.02, which states that "[n]o person, with the *purpose* to deprive the owner of property or services, shall knowingly exert control over either the property or services * * * [w]ithout the consent of the owner * * *." "A person acts *purposely* when it is his *specific intention to cause a certain result* * * *." (Emphasis added.) R.C. 2901.22(A). Thus, "[t]heft is a specific intent crime." *State v. LeMasters*, 11th Dist. Lake No. 2007-L-129, 2008-Ohio-2139, ¶ 42; *see also State v. Feltner*, 2d Dist. Greene No. 06-CA-20, 2007-Ohio-866, ¶ 10; *State v. Crisp*, 10th Dist. Franklin No. 06AP-146, 2006-Ohio-5041, ¶ 10.

{¶48} "Mistake of fact is widely recognized as a defense to specific intent crimes such as theft since, when the defendant has an honest purpose, such a purpose provides an excuse for an act that would otherwise be deemed criminal."

State v. Snowden, 7 Ohio App.3d 358, 363 (10th Dist.1982). The defendant can negate the *intent* element by showing that he reasonably believed that what he took belonged to him. *See id*.; *see also State v. Holden*, 8th Dist. Cuyahoga No. 78669, 2001 WL 1035177, *5 (Sept. 6, 2001) (hereinafter "*Holden I*") (finding son who reasonably believed he was collecting his father's tools, when they in reality belonged to another, did not have purpose to deprive the owner); *State v. Holden*, 8th Dist. Cuyahoga No. 78594, 2001 WL 755827, *4 (July 5, 2011) (hereinafter "*Holden II*") (father's reasonable belief that he owned property he had purchased for job site barred his conviction for theft).

{¶49} In *Snowden*, the court found that the defendant had presented evidence that he reasonably believed that the paycheck he took from a cash register was owed to him as satisfaction of a debt, which warranted a jury instruction that he lacked intent. *Snowden* at 363. In *Holden I*, the defendant had the reasonable belief that the tools he took from a worksite belonged to his father, and therefore "did not have the specific intent to deprive the owner * * * of his property which is required for a finding of guilt under R.C. 2913.02." *Holden I* at *5. In *Holden II*, the defendant was charged with burglary for breaking into an apartment complex and taking remodeling materials. *Holden II* at *2. However, the defendant presented evidence that he had purchased the materials he had taken, and had not been reimbursed. *Id*. at *4. As a result, the court found that "he did

not have the specific intent to deprive the owner, [the victim], of his property which is required for a finding of guilt * * *." *Id.* In essence, the court recognized that while the victim was the *owner* of the remodeling supplies, the defendant's reasonable belief that he was the owner meant that he did not have the necessary intent to be culpable of theft. *See id.*

{¶50} Here, Miller *believed* that the ATV he took was his own. He took the ATV in broad daylight in front of a neighbor. When the police arrived, he admitted he took the ATV and showed the police where it was. He informed the officer that it was his ATV and it had been stolen from him. That Miller reported an ATV as stolen that was similar to the one he took from Roberts is evidence that he believed the ATV he took *was his own*. Even if the ATV was not the one stolen from Miller, it would not necessarily make Miller's *belief* unreasonable. That it *was* Miller's ATV at one time makes the reasonableness of that belief even stronger. Had the jury found this belief reasonable, he would have been acquitted.

{¶51} The majority also claims that Miller's belief regarding the ownership of the ATV was put before the jury, but that "the *timeline* of Miller's claims of ownership of the ATV conflicts with the testimony at trial." (Emphasis sic.) Majority Opin., ¶ 26. The majority then goes on to state that "this court cannot lawfully conclude that the trial record establishes that this particular ATV was

once owned by Miller." *Id.* at ¶ 28. However, Deputy Bleigh's police report of the incident describes his investigation into whether Miller ever owned the ATV:

> We flipped the ATV over and Sgt. Schaffner rubbed some dirt off the left rear frame and located a vin. We ran it through our dispatch and it did not return with any information.
>
> I called Mid-Ohio [Suzuki dealership] back and spoke with a different service person. I explained what I needed. The tech was able to run the vin and it returned to Jeromy Miller. Mid-Ohio was able to fax the original paperwork with the owners name on it and the purchase date.

(Docket No. 2, Ohio Uniform Incident Report, p. 7). Attached to the police report was the fax from the Suzuki dealership that stated that Miller had purchased this particular ATV. Further, the State knew that the ATV in question was in fact owned by Miller at one time, as the police report continues:

> I called and left a message with [the prosecutor] about how to continue with this case. The ATV will remain in our impound for now.
>
> * * *
>
> I made contact with [the prosecutor] about this case. He suggested that I verify [Miller's wife's] claim of making the theft report with Sidney PD as she stated earlier. [Prosecutor] said to continue with the theft charge at this time but to also file a trespass charge against [Miller] for going onto [Benshoff's] property without consent.

(*Id.*).

{¶52} This information makes the prosecutor's actions in this case troubling. He knew that Miller had once owned the ATV that he had taken, and

should have known that Miller's reasonable belief that he owned the ATV would be a complete defense to the theft charge. However, the prosecutor did not dismiss the theft charge. At trial, the State repeatedly objected to the admission of the fax Deputy Bleigh had received from the Suzuki dealership which would have proved that Miller had in fact owned this ATV at one point. The State then elicited testimony regarding inconsistencies between the police report of theft filed by Miller and the ATV in the current case, as noted by the majority, when the State *knew* they were one and the same. The State then made the following remarks during closing argument:

> [Defense] raised the issue of the police report, and I didn't bring that up. It was brought up by the Defendant. But what was the testimony. That report not into [sic] evidence, but there was testimony about it. Remember when that report was made? 2011. Two years before this event.
>
> How long did Mr. Benshoff own this? At least three, possibly four years. So you know, again, *if Mr. Miller is trying to claim some ownership, the time line doesn't fit.*

(Emphasis added.) Trial Tr., p. 141-142.

{¶53} The prosecutor is tasked with clearing up any testimony that he knows to be misleading. *State v. Staten*, 14 Ohio App.3d 78, 82 (2d Dist.1984). Failing to clarify known misleading statements is prosecutorial misconduct. *Id.* It is "particularly offensive to the notion of the fair administration of justice when, not only does misleading evidence knowingly get submitted to the jury, but, this

evidence is actually used by the state in its opening and closing remarks to the jury." *Id.* In *Staten*, the prosecutor "sat idly by knowing full well that the witness' testimony did not accurately reflect the actual facts." *Id.* The court found that the prosecutor engaged in misconduct when he asked the jury to draw an inference from this testimony that he knew to be misleading. *Id.*

{¶54} Here, had the State asked Deputy Bleigh directly whether Miller had ever owned the ATV, his answer would have been "yes." Indeed, the prosecutor specifically objected to the defense's attempts to use the fax from the Suzuki dealership to keep the jury from hearing this answer. Worse than sitting idly by, the prosecutor then specifically elicited testimony that called into question whether the ATV Miller reported stolen was the ATV in the current case, and then asked the jury to infer that these inconsistencies prove that Miller *never owned the ATV*, an inference the prosecutor knew did not accurately reflect the facts of the case. This is prosecutorial misconduct.

{¶55} The prosecutor argued that the only relevant inquiry was whether Benshoff was an owner. It appears that the prosecutor would like to change the old adage that possession is nine tenths of the law, to ten tenths. This belief is just as incorrect as his belief that a defendant has no constitutional right to testify in his own defense.

{¶56} I do not condone going onto someone else's property to take back what you believe is yours. Miller should not have resorted to criminal trespass to retrieve his ATV. Indeed, typically self-help is discouraged. However, while Miller should have approached the situation differently, it does not mean that his taking of the ATV became criminal. He had an ATV stolen. He believed he had found his stolen property, and he retrieved it without violence or threats. His purpose was not to deprive an owner of the property, but reclaim what he believed was his own. While he should have gone about reclaiming his property in a different way, it does not mean that the actual taking of the ATV, under the circumstances, was criminal.

{¶57} Accordingly, I would reverse the trial court's ruling.

/jlr