[Cite as *State v. Chapman*, 2015-Ohio-902.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 14CA8
	:	
vs.	:	
	:	DECISION AND JUDGMENT
BOBBY G. CHAPMAN,	:	ENTRY
	:	
Defendant-Appellant.	:	**Released: 03/04/15**

APPEARANCES:

Timothy P. Gleeson, Gleeson Law Office, Logan, Ohio, for Appellant.

Adam R. Salisbury, Gallipolis City Solicitor, Gallipolis, Ohio, for Appellee.

McFarland, A.J.

{¶1} This is an appeal from a Gallipolis Municipal Court judgment convicting and sentencing Appellant, after he was found guilty after a bench trial, of a property violation in violation of Village of Crown City Ordinance No. 2010-5(D)(i), a second-degree misdemeanor. On appeal, Appellant contends that 1) there was insufficient evidence to support a conviction of a violation of the Village of Crown City Ordinance No. 2010-5; 2) the guilty verdict was against the manifest weight of the evidence; and 3) nonconforming use protections should have prevented his conviction.

{¶2} Because we conclude that Appellant's conviction is supported by

sufficient evidence and is not against the manifest weight of the evidence, Appellant's first and second assignments of error are overruled. Further, because the argument contained in Appellant's third assignment of error is being raised for the first time on appeal and was not raised at the trial court level, we conclude that the argument has been waived and we therefore decline to address it. Accordingly, the decision of the trial court is affirmed.

FACTS

{¶3} On July 18, 2013, a criminal complaint was filed against Appellant in the Municipal Court of Gallipolis, charging Appellant with a property violation, in violation of Village of Crown City Ordinance No. 2010-5(D)(i). The complaint alleged that Appellant "[d]id cause or permit the outdoor storage, parking or unreasonable accumulation of trash, junk, junk motor vehicles, trailers/and or abandoned mobile homes, or abandoned junk motor vehicles upon premises within the village." The statement of facts contained in the complaint stated that "Bobby Chapman has not removed a mobile home from the 26048 SR 7 Crown City, OH property. Mr. Chapman was court ordered on March 11th, 2013 to have mobile home removed from the premises. As of today mobile home has not been moved." A review of the record indicates that the violation charged is a second-degree misdemeanor criminal offense. Appellant pled not guilty to the

charge and the matter proceeded to a bench trial beginning on January 16, 2014.

{¶4} At trial, the Village presented the testimony of Deputy Montgomery regarding the placement and condition of the mobile home at issue, and also introduced exhibits, which included photos of the mobile home and a document purporting to be a "resentencing entry" issued in a prior court case involving the same mobile home. Appellant testified on his own behalf and also called the Mayor of the Village of the Crown City to testify on his behalf. However, the record indicates the Mayor's testimony provided little, if any, support in Appellant's defense. During trial, the parties stipulated that the only item at issue was the mobile home.

{¶5} After taking the matter under advisement, the trial court issued a journal entry finding Appellant guilty. In reaching its decision, the trial court cited to the testimony of both Deputy Montgomery, as well as Appellant. Appellant was sentenced on July 3, 2014, to a fine of fifty dollars, to serve forty-five days in jail, and to a one-year term of "basic probation supervision." It is from this sentencing entry that Appellant now brings his timely appeal, setting forth three assignments of error for our review.

ASSIGNMENTS OF ERROR

"I. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION OF A VIOLATION OF THE VILLAGE OF CROWN CITY ORDINANCE NO. 2010-5.

II. THE GUILTY VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. NONCONFORMING USE PROTECTIONS SHOULD HAVE PREVENTED CONVICTION."

ASSIGNMENT OF ERROR I

{¶6} In his first assignment of error, Appellant contends that there was insufficient evidence to support his conviction of a violation of the Village of Crown City Ordinance No. 2010-5. When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997) (stating that "sufficiency is a test of adequacy"); *State v. Jenks*, 61 Ohio St.3d 259, 274, 574 N.E.2d 492 (1991). The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781 (1979); *Jenks* at ¶ 273. Furthermore, a

reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *Thompkins* at ¶ 390.

{¶7} Thus, when reviewing a sufficiency-of-the-evidence claim, an appellate court must construe the evidence in a light most favorable to the prosecution. *State v. Hill*, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); *State v. Grant*, 67 Ohio St.3d 465, 477, 620 N.E.2d 50 (1993). A reviewing court will not overturn a conviction on a sufficiency-of-the-evidence claim unless reasonable minds could not reach the conclusion that the trier of fact did. *State v. Tibbetts*, 92 Ohio St.3d 146, 162, 749 N.E.2d 226 (2001); *State v. Treesh*, 90 Ohio St.3d 460, 484, 739 N.E.2d 749 (2001).

{¶8} Appellant contends that there was insufficient evidence to support his conviction, arguing that the Village of Crown City Ordinance No. 2010-5 should not apply to his mobile home. Thus, he claims the question before this Court involves a matter interpretation of the term "junk motor vehicle" as used in the ordinance. Initially we note that although Appellant characterizes the ordinance at issue as a zoning ordinance, it appears that the Village determined to criminalize the actions prohibited by the ordinance by classifying violations of the ordinance as second-degree misdemeanors for which convicted offenders are subject not only to fines,

but also to confinement. As such, the character of the ordinance is criminal. See generally, *City of Mayfield Heights v. Braun*, 8th Dist. Cuyahoga No. 59233, 1991 WL 238836, *3 (Nov. 14, 1991).

{¶9} Appellant's argument depends on whether his mobile home is a "junk vehicle" or "junk motor vehicle" as defined in the village ordinance at issue. The term "motor vehicle" is not defined in the statute; thus, we must interpret the ordinance. When interpreting a criminal statute, or in this case, ordinance, courts must construe the statute strictly against the state and liberally in favor of the accused. R.C. 2901.04(A); *State v. Gray,* 62 Ohio St.3d 514, 515, 584 N.E.2d 710 (1992). "The interpretation of a statute [or ordinance] is a question of law that we review de novo." *State v. Bundy*, 2012-Ohio-3934, 974 N.E.2d 139, ¶ 46 (4th Dist.).

> "The primary goal of statutory construction is to ascertain and give effect to the legislature's intent in enacting the statute. The court must first look to the plain language of the statute itself to determine the legislative intent. We apply a statute as it is written when its meaning is unambiguous and definite. An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language." Id.; quoting

> *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 9.

While R.C. 2901.04(A) requires courts to liberally construe criminal statutes in favor of the accused, " 'courts do not have the authority to ignore the plain and unambiguous language of a statute under the guise of either statutory interpretation or liberal construction; [instead], the court must give effect to the words utilized.' " *State v. Snowder*, 87 Ohio St.3d 335, 336-337, 720 N.E.2d 909 (1999); quoting *Morgan v. Ohio Adult Parole Auth.*, 68 Ohio St.3d 344, 347, 626 N.E.2d 939 (1994). "Thus, if the meaning of a statute is unambiguous and definite, a court must apply it as written and no further interpretation is necessary." *Bundy* at ¶ 47.

{¶10} The Village of Crown City Ordinance No. 2010-5 is entitled "An ordinance prohibiting the accumulation and storage of trash and junk in the Village of Crown City." The stated purpose of the ordinance is expressly set forth in Section 2010-5(B) and states:

> "The purpose of this ordinance is to limit and restrict the outdoor storage, parking or unreasonable accumulation of trash, junk, garbage, rags, paper products, partially dismantled or non-operating motor vehicles, tractor trailers, trailers, trailers or mobile homes and the accumulation of new or used parts

> thereof upon premises within the village; to thereby avoid injury and hazards to children and others attracted to such vehicles, equipment or trailers, the devaluation of property values and unsightly effect of the presence of such vehicles, equipment, junk, trash, trailers or mobile homes upon adjoining residents and property owners."

Section 2010-5(C) of the ordinance contains definitions. While it does not define the term "mobile home," it provides that a "junk vehicle" is defined as follows:

> "Any motor vehicle or trailer, which is wrecked, damaged, dismantled, partially dismantled, inoperative, discarded, abandoned and is stored or parked for a period of two months in one location."

Further, the prohibitions and penalties section of the ordinance, which is contained in Section 2010-5(D) provides in (i) as follows:

> "No person shall cause or permit the outdoor storage, parking or unreasonable accumulation of trash, junk, junk motor vehicles, or abandoned junk motor vehicles upon premises within the village."

{¶11} Here, we conclude that the plain and unambiguous language of Ordinance No. 2010-5 supports the conclusion that a mobile home is considered a "motor vehicle" under the ordinance. Because the term "motor vehicle" is not defined in the ordinance, we look to the Ohio Revised Code to determine its meaning. R.C. 4501.01(B) defines a "motor vehicle" as "any vehicle, *including mobile homes* and recreational vehicles, that is propelled or drawn by power other than a muscular power or power collected from overhead electric trolley wires." (Emphasis added). Thus, reading the ordinance's definition of "junk vehicle" in light of the definition of "motor vehicle" as contained in R.C. 4501.01(B), it is clear that a mobile home is considered a "motor vehicle" under the ordinance's definition of "junk vehicle." Further, we find this interpretation of the ordinance is consistent with the intent of the ordinance, which is expressly stated in section (B) of the ordinance, set forth above.

{¶12} Further, with regard to the more generalized sufficiency of the evidence analysis, because we have determined, under Appellant's second assignment of error, that Appellant's conviction is not against the manifest weight of the evidence, we find it is supported by sufficient evidence as well. " 'When an appellate court concludes that the weight of the evidence supports a defendant's conviction, this conclusion necessarily includes a

finding that sufficient evidence supports the conviction.' " *State v. Leslie*, 4th Dist. Hocking Nos. 10CA17, 10CA18, 2011-Ohio-2727, ¶ 15; quoting *State v. Puckett*, 191 Ohio App.3d 747, 2010-Ohio-6597, 947 N.E.2d 730, ¶ 34 (4th Dist.). Thus, a conclusion that a conviction is supported by the weight of the evidence will also determine the issue of sufficiency. *Leslie* at ¶ 15.

{¶13} Finally, Appellant contends under this assignment of error that the trial court's interpretation of the ordinance "resulted in a definition for 'Junk Motor Vehicle' as used in the Ordinance being different than and in conflict with the definition of 'Junk Motor Vehicle' as set forth in the Ohio Revised Code (Section 4513.65)." Appellant contends that the trial court's interpretation thus "created a violation to the Home Rule Amendment to the State Constitution." However, as Appellant failed to raise the argument that the trial court's interpretation of the ordinance was unconstitutional as applied to him to the extent that it was in conflict with state law, he has waived the argument. *Bellefontaine v. Miller*, 3rd Dist. Logan No. 8-08-32, 2009-Ohio-2818, ¶ 24. As such, we will not consider it for the first time on appeal. Accordingly, Appellant's first assignment of error is without merit and is, therefore, overruled.

ASSIGNMENT OF ERROR II

{¶14} In his second assignment of error, Appellant contends that the guilty verdict was against the manifest weight of the evidence. When considering whether a conviction is against the manifest weight of the evidence, we must review the entire record, weigh the evidence and all reasonable inferences and consider the credibility of witnesses. *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 119. However, we must also bear in mind that credibility generally is an issue for the trier of fact. *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 191; *State v. Linkous*, 4th Dist. Scioto No. 12CA3517, 2013-Ohio-5853, ¶ 70. Accordingly we may reverse the conviction only if it appears that in its role as the fact-finder and judgment of credibility, the jury " 'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " *State v. Thompkins* at 387; quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist. 1983). Thus we will exercise our discretionary power to grant a new trial " 'only in the exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387; quoting *Martin* at 175.

{¶15} We already determined, under our analysis of Appellant's first assignment of error, that the mobile home at issue could be considered a "motor vehicle" for purposes of the Village of Crown City Ordinance No. 2010-5(D)(i), which has an expressly stated purpose, as set forth in section (B) "to limit and restrict the outdoor storage, parking or unreasonable accumulation of trash, junk, garbage, rags, paper products, partially dismantled or non-operating motor vehicles, tractor trailers, trailers or mobile homes * * *." Thus, the issue that must be determined under Appellant's second assignment of error is whether the trial court's determination that the mobile home at issue constituted a "junk vehicle" under section (C)(ii) of the ordinance and therefore a "junk motor vehicle" under section (D)(i) of the ordinance.

{¶16} The ordinance defines "junk vehicle" as follows in section (C)(ii):

> "Junk Vehicle: Any motor vehicle or trailer, which is wrecked, damaged, dismantled, partially dismantled, inoperative, discarded, abandoned and is stored or parked for a period of two months in one location."

The ordinance further provides in section (D), the prohibitions and penalties sections, as follows:

> "(i) No person shall cause or permit the outdoor storage, parking or unreasonable accumulation of trash, junk, junk motor vehicles, or abandoned junk motor vehicles upon premises within the village."

The Village presented evidence, through the testimony of Deputy Montgomery, that the mobile home had a damaged door, a cracked window with a board behind it, a rusted roof, no tires, underpinning or foundation, was positioned in a ditch line and was not connected to any utilities. Appellant testified that no one had ever lived in the mobile home, and that the mobile home had been sitting on his property for four years. Appellant, however, disagreed with Deputy Montgomery's testimony that the mobile home was uninhabitable. Here, Appellant relies on photos of the mobile home that were admitted into evidence, claiming that the "photos show the mobile home is not junk."

{¶17} Nonetheless, based upon the testimony at trial, there is evidence in the record that the mobile home was damaged, partially dismantled, somewhat inoperative in that there had never been any utilities ever attached to it, and that it had been stored or parked for a period exceeding two months. Because the trier of fact is in the best position to assess witness credibility by observing their demeanor, gestures, and voice inflections, we

cannot say that this is a case where the trial court clearly lost its way or created a manifest miscarriage of justice. See *State v. Grube*, 2013-Ohio-692, 987 N.E.2d 287, ¶ 31, 32 (4th Dist.). Further, it was within the province of the trial court, as the trier of fact, to reject Appellant's testimony as to the condition of the mobile home, and instead place more weight upon the testimony of the Village's witness. Because we cannot conclude, based upon our review of the record, that the evidence weighs heavily against Appellant's conviction, Appellant's conviction is not against the manifest weight of the evidence. Accordingly, Appellant's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

{¶18} In his third assignment of error, Appellant contends that nonconforming use protections should have prevented conviction. More specifically, Appellant contends that because the record indicates that the mobile home at issue had been located on his property since 2009, two years prior to the enactment of the village ordinance, that it constituted a nonconforming use under R.C. 713.15, which is entitled "Retroactive zoning ordinance prohibited." Appellant concedes that he did not raise the issue of nonconforming use at trial, but contends this Court should review the issue under a plain error standard.

{¶19} "Failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal." *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277, syllabus (1986). "The waiver doctrine announced in *Awan* is discretionary." *In re M.D.*, 38 Ohio St.3d 149, 151, 527 N.E.2d 286 (1988). Here, we decline to exercise our discretion to review this issue for plain error and instead find that Appellant has forfeited his right to raise the nonconforming use issue asserted in his third assignment of error.

{¶20} We base our decision, in part, on the fact that not only did Appellant fail to raise this issue as part of the underlying litigation, it appears from the record that the current litigation was preceded by separate litigation involving the same mobile home. Appellant had been ordered in previous litigation to move the mobile home, but failed to do so. It is because of Appellant's noncompliance with the prior order that the Village filed a criminal complaint. Thus, Appellant has had several opportunities to raise the issue of nonconforming use but there is no indication from the record that he has raised this issue until now. As such, we will not address

the argument for the first time on appeal. Accordingly, Appellant's third assignment of error is overruled.

{¶21} Having found no merit to any of the assignments of error raised by Appellant, the decision of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Gallipolis Municipal Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J. & Harsha, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland,
Administrative Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.