[Cite as *State v. Townsend*, 2010-Ohio-4417.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CAA-11-0096
DEXTER TOWNSEND	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Delaware County Court of Common Pleas Case No. 09CR-I-01-0047

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: September 14, 2010

APPEARANCES:

For Plaintiff-Appellee:

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Delaney, J.

{¶1} Defendant-Appellant, Dexter Townsend, appeals from his conviction and sentence of one count of theft, a misdemeanor of the first degree, in violation of R.C. 2913.02(A)(1).

STATEMENT OF THE FACTS AND CASE

{¶2} On the evening of November 7, 2008, Appellant went to a local bar named Clancy's and met up with his friends, Amber Parish and Adam Ward. At Clancy's, Parish recognized Kevin White and invited him to socialize with her, Ward, and Appellant. Around closing time, Appellant left the bar with White, Parish, and Ward. They drove in Appellant's car to White's apartment and continued to socialize. Over the course of the night, Parish, Ward, and Appellant went one by one to White's bedroom to retire; however, White fell asleep on the couch in his living room.

{¶3} It was a cold night and earlier in the evening Appellant had promised Parish a ride home. Some time after Parish fell asleep, Appellant woke her and said he was leaving. However, before Parish was able to put on her shoes, Appellant had left alone.

{¶4} Parish woke Ward, who proceeded to take a sweatshirt from White's closet, and they walked home together.

{¶5} White awoke Saturday morning alone in his apartment. He dressed himself with clothes kept in his living room and did not enter his bedroom. After breakfast, White went to Wal-Mart with a friend to buy shells for a shotgun that he purchased at a flea market two weeks earlier.

{¶6} After White returned from Wal-Mart, he entered his bedroom to retrieve the shotgun and realized that it and his crossbow were missing. White immediately alerted the police and an investigation ensued.

{¶7} Laurie Curry, who shared a room with Appellant at the time, contacted the police and stated that Appellant had come home intoxicated between 5:00 a.m. and 6:00 a.m. on November 8 and placed a shotgun and crossbow into the closet. After Curry inquired into what he was doing, Appellant responded by telling her that he just robbed somebody.

{¶8} Appellant was indicted by the Delaware County Grand Jury on January 1, 2009 for one count of theft in violation of R.C. 2913.02(A)(1), a felony of the third degree, and proceeded to a jury trial where he was found guilty of the lesser-included offense of one count of theft in violation of R.C. 2913.02(A)(1), a misdemeanor of the first degree, on November 14, 2009, and sentenced to the maximum of six months in jail.

{¶9} Appellant now raises two assignments of error:

{¶10} "I. THE TRIAL COURT ERRED BY SENTENCING THE APPELLANT TO THE MAXIMUM SENTENCE FOR A MISDOMEANOR [SIC].

{¶11} "II. THE CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I.

{¶12} In his first assignment of error, Appellant argues that the trial court's imposition of the maximum sentence for a misdemeanor was an abuse of discretion because the trial court considered uncharged conduct in its determination.

{¶13} As an appellate court, we will not reverse the trial court's sentencing decisions absent an abuse of discretion. *State v. Kandel,* 5th Dist. No. 04COA011, 2004-Ohio-6987, at ¶ 7. We note that an abuse of discretion is more than an error of law or judgment; it implies that the lower court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Clark* (1994), 71 Ohio St.3d 466, 470, 644 N.E.2d 331; *State v. Moreland* (1990), 50 Ohio St.3d 58, 61, 552 N.E.2d 894; *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶14} R.C. 2929.22 governs sentencing on misdemeanors and provides, in relevant part:

{¶15} "(B)(1) In determining the appropriate sentence for a misdemeanor, the court shall consider all of the following factors:

{¶16} "(a) The nature and circumstances of the offense or offenses;

{¶17} "(b) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender has a history of persistent criminal activity and that the offender's character and condition reveal a substantial risk that the offender will commit another offense;

{¶18} "(c) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender's history, character, and condition reveal a substantial risk that the offender will be a danger to others and that the offender's conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences;

{¶19} "(d) Whether the victim's youth, age, disability, or other factor made the victim particularly vulnerable to the offense or made the impact of the offense more serious;

{¶20} "(e) Whether the offender is likely to commit future crimes in general, in addition to the circumstances described in divisions (B)(1)(b) and (c) of this section.

{¶21} "(2) In determining the appropriate sentence for a misdemeanor, in addition to complying with division (B)(1) of this section, the court may consider any other factors that are relevant to achieving the purposes and principles of sentencing set forth in section 2929.21 of the Revised Code.

{¶22} "(C) Before imposing a jail term as a sentence for a misdemeanor, a court shall consider the appropriateness of imposing a community control sanction or a combination of community control sanctions under sections 2929.25, 2929. 26, 2929.27, and 2929.28 of the Revised Code. A court may impose the longest jail term authorized under section 2929.24 of the Revised Code only upon offenders who commit the worst forms of the offense or upon offenders whose conduct and response to prior sanctions for prior offenses demonstrate that the imposition of the longest jail term is necessary to deter the offender from committing a future crime."

{¶23} R.C. 2929.21, as referenced in R.C. 2929.22(B)(2), provides, in relevant part:

{¶24} "(A) A court that sentences an offender for a misdemeanor or minor misdemeanor violation of any provision of the Revised Code, or of any municipal ordinance that is substantially similar to a misdemeanor or minor misdemeanor violation of a provision of the Revised Code, shall be guided by the overriding purposes of

misdemeanor sentencing. The overriding purposes of misdemeanor sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the impact of the offense upon the victim and the need for changing the offender's behavior, rehabilitating the offender, and making restitution to the victim of the offense, the public, or the victim and the public."

{¶25} Appellant argues that the trial court abused its discretion by taking into consideration the likelihood that he persuaded his mother and mother's goddaughter to commit perjury at trial, even though Appellant was never formally charged with solicitation of perjury.

{¶26} In this case, Appellant was found guilty by a jury of stealing a shotgun and crossbow, a misdemeanor of the first degree. A misdemeanor of the first degree carries a maximum sentence of one hundred eighty days, which the trial court imposed on Appellant. R.C. 2929.24(A)(1). There is no requirement that a trial court specifically state its reasons on the record when sentencing on misdemeanor offenses. *State v. Smith*, 5th Dist. No. 09-CA-42, 2010-Ohio-1232, at ¶ 116; *State v. Harpster,* 5th Dist. No. 04COA061, 2005-Ohio-1046, at ¶20; *State v. Adams,* 5th Dist. No. 2002CA00089, 2003-Ohio-3169, at ¶16.

{¶27} Pursuant to R.C. 2929.22(B)(2) and R.C. 2929.21(A), the trial court is permitted to consider any other factors that are relevant to achieving the purposes of protecting the public from future crime by the offender and others and punishing the offender. In *Mt. Vernon v. Hayes,* 5th Dist. No. 09-CA-00007, 2009-Ohio-6819, this Court observed that appellate courts have consistently held that evidence of other

crimes, including crimes that never result in criminal charges being pursued, may be considered at sentencing. *State v. Smith*, 5th Dist. No. 09-CA-42, 2010-Ohio-1232, at ¶ 117; see, also, *State v. Cooey* (1989), 46 Ohio St.3d 20, 35, 544 N.E.2d 895 (such uncharged crimes are part of the defendant's social history and may be considered); *State v. Tolliver,* 9th Dist. No. 03CA0017, 2003-Ohio-5050, at ¶ 24 (uncharged crimes in a presentence investigation report may be a factor at sentencing); *United States v. Mennuti* (1982), 679 F.2d 1032, 1037 (similar though uncharged crimes may be considered); *United States v. Needles* (1973), 472 F.2d 652, 654-56 (a dropped count in an indictment may be considered in sentencing).

{¶28} Trial courts have full discretion to impose a jail term within the statutory range. See *State v. Mathis* (2006), 109 Ohio St.3d 54, 61-62, 846 N.E.2d 1, 2006-Ohio-855. Appellate courts can find an “abuse of discretion” where the record conveys that a trial judge refused or failed to consider statutory sentencing factors. *State v. Smith*, 5th Dist. No. 09-CA-42, 2010-Ohio-1232, at ¶ 120,citing *State v. Goggans,* 5th Dist. No. 2006-CA-07-0051, 2007-Ohio-1433, at ¶ 32. An “abuse of discretion” has also been found where a sentence is greatly excessive under traditional concepts of justice or is manifestly disproportionate to the crime or the Appellant. *State v. Smith*, 5th Dist. No. 09-CA-42, 2010-Ohio-1232, at ¶ 120, citing *Woosley v. United States* (1973), 478 F.2d 139, 147.

{¶29} At the sentencing hearing, the trial judge considered the factors required by R.C. 2929.22, including Appellant’s lack of prior record. (Tr. 192). However, the trial judge believed that Appellant had shown no remorse at trial and sentenced him to the maximum of one hundred eighty days in jail for the purposes of punishing him,

dissuading him from committing similar crimes, and making him serve as an example to others. Id.

{¶30} Upon review of the record, we believe that the trial court's statements at the sentencing hearing were guided by the overriding purposes of sentencing. Based on the transcript of the sentencing hearing, and in light of the fact that the sentence imposed is within the statutory limits, this Court cannot find that the trial court acted unreasonably, arbitrarily, or unconscionably.

{¶31} Appellant's first assignment of error is overruled.

II.

{¶32} In his second assignment of error, Appellant challenges his conviction as being against the manifest weight of the evidence.

{¶33} When analyzing a manifest weight claim, this court sits as a "thirteenth juror" and in reviewing the entire record, "weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin,* 20 Ohio App.3d at 175.

{¶34} In order to convict Appellant of theft, the State had to prove beyond a reasonable doubt that Appellant knowingly obtained or exerted control over the shotgun

and crossbow without the consent of Kevin White, the owner of the property, with purpose to deprive White of the property. R.C. 2913.02(A)(1).

{¶35} The State presented testimonial evidence from White that he had his shotgun and crossbow in his bedroom the night of November 7, and that the property was missing on November 8. In addition, White stated that Amber Parish, Adam Ward, and Appellant joined him for drinks at his apartment after leaving the bar on November 7. White's testimony that the four of them socialized after the bar at his apartment was further corroborated by testimony from Parish. Testimonial evidence by Parish conveyed that she and Ward walked home approximately two miles from White's apartment together, while Appellant drove home alone. The trier of fact could reasonably infer that it was unlikely that two people could walk together on public roads for two miles with a shotgun and crossbow in their hands without drawing attention, and that Appellant was the only one present that night who was capable of transporting the property without arousing suspicion by using a car.

{¶36} In addition, the State presented testimonial evidence from Laurie Curry that she saw Appellant place the shotgun and crossbow into a closet between 5:00 AM and 6:00 AM on November 8, and that Appellant told her that he had just robbed someone.

{¶37} Finally, Shawnna Gardner, who worked as the bouncer at Clancy's, testified that Appellant used to come to the bar almost every weekend for five weekends prior to November 7, but she had not seen him there after that night.

{¶38} Appellant argues that the State failed to meet its burden because Appellant presented two alibi witnesses that testified that Appellant was with them at a

family gathering on November 7, and that the State's direct evidence came from someone who had a prior intimate relationship with him.

{¶39} However, the State pointed out that Appellant's alibi witnesses, his mother and mother's goddaughter, did not come forward with the alibi information during the initial investigation. On cross-examination, Appellant's mother admitted to offering unsolicited information during Appellant's first conversation with Officer Barnthouse, but she did not mention the family gathering alibi at that time. Furthermore, White, Parish, and Gardner all testified that Appellant was present at Clancy's on November 7.

{¶40} An Appellant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was offered at trial. *State v. Campbell*, 10th Dist. No. 07AP-1001, 2008-Ohio-4831. We find that it was within the purview of the jury to not believe Appellant's mother and mother's goddaughter regarding Appellant's whereabouts on November 7.

{¶41} With regard to Curry's prior intimate relationship with Appellant, the State presented testimony by Curry conveying that there was no animosity between them and that even after the relationship ended, Curry never asked to have Appellant move out of her niece's home, where they were both staying.

{¶42} After reviewing the record, we cannot find that the jury lost its way. Accordingly, Appellant's second assignment of error is overruled.

{¶43} The judgment of the Delaware County Court of Common Pleas is affirmed.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

[Cite as *State v. Townsend*, 2010-Ohio-4417.]

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
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-vs-	:	JUDGMENT ENTRY
	:	
DEXTER TOWNSEND	:	
	:	
Defendant-Appellant	:	Case No. 09-CAA-11-0096
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Delaware County Court of Common Pleas is affirmed. Costs assessed to Appellant.

_____
HON. PATRICIA A. DELANEY

_____
HON. SHEILA G. FARMER

_____
HON. JOHN W. WISE