[Cite as *State v. Swank*, 2015-Ohio-1500.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. John W. Wise, P.J.
Plaintiff - Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	
EDWIN C. SWANK	:	Case No. 14CA60
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 2014-CR-036
JUDGMENT:	Affirmed in part; Reversed and remanded in part
DATE OF JUDGMENT:	April 17, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
BAMBI S. COUCH-PAGE Prosecuting Attorney	DOUG HOLTHUS Poling Law 300 East Broad Street, Suite 350 Columbus, OH 43215
By: JILL COCHRAN Assistant Prosecuting Attorney 38 South Park Street Mansfield, OH 44902	

Baldwin, J.

{¶1} Appellant Edwin C. Swank appeals a judgment of the Richland County Common Pleas Court convicting him of theft in office (R.C. 2921.41(A)(2)) and sentencing him to two years community control. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} Appellant became a township trustee for Worthington Township in 1984. In 2012, township road worker Brian Grant noticed from the gauge that fuel was being removed from the township's diesel fuel tank after he and Craig Hallabrin, the other road worker, left for the day, but before they returned in the morning. Grant began keeping records of all fuel put into township trucks and equipment.

{¶3} On November 21, 2012, employees set up a motion-activated deer trail camera to monitor the tank. The footage showed appellant on six occasions putting township diesel fuel in his personal pickup truck. The amount of fuel taken in the months of November and December was 197 gallons.

{¶4} Appellant was indicted on two counts of theft in office. The case proceeded to bench trial in the Richland County Common Pleas Court.

{¶5} At trial, appellant admitted that he put the 197 gallons of fuel in his truck. However, he testified that he had been named acting road superintendent during this time, and he and the other trustees had a "gentlemen's agreement" that in lieu of reimbursement for performing this function, he could put township fuel in his personal truck to compensate him for his travel through the township checking on roads and supervising the two road workers. Dale Pore, who served as trustee with appellant during this time, confirmed that they had such an agreement, but they never discussed the agreement at a meeting nor adopted it as a resolution.

{¶6} The trial court found appellant guilty. The State elected to proceed on Count Two for sentencing. The court sentenced appellant to two years of community

control and ordered him to pay restitution in the amount of $4,069.00 for the amount of missing fuel between the dates of October of 2012 and November of 2013.

{¶7} Appellant assigns four errors:

{¶8} "I. DEFENDANT/APPELLANT SWANK'S SENTENCE WAS EXCESSIVELY HARSH AND WAS NOT BASED ON ANY EVIDENCE OF LOSS OR DAMAGE PROVEN AT TRIAL, PURSUANT TO THE LIMITATIONS OF O.R.C. 2921.41(C)(2).

{¶9} "II. DEFENDANT/APPELLANT SWANK WAS DEPRIVED OF HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL FAILED TO OBJECT DURING SENTENCING, IN CONTRAVENTION OF SWANK'S RIGHTS GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION.

{¶10} "III. DEFENDANT/APPELLANT SWANK WAS SUBJECT TO PROSECUTORIAL MISCONDUCT DURING THE SENTENCING PHASE OF HIS CONVICTION.

{¶11} "IV. THE DECISION OF THE TRIAL COURT WAS AGAINST THE SUFFICIENCY AND MANIFEST WEIGHT OF THE EVIDENCE; THE STATE FAILED TO PROVE DEFENDANT/APPELLANT SWANK ACTED WITH THE REQUISITE LEVEL OF INTENT, PURSUANT TO O.R.C. 2913.02(B)."

I.

{¶12} In his first assignment of error, appellant argues that the court committed plain error in ordering him to pay restitution in the amount of $4,069.00.

{¶13} At the sentencing hearing, the State argued that based on the fuel bills for the time period in question, the restitution amount for fuel taken by appellant between November 1, 2012 and December 31, 2012 was $748.60. The State also presented a restitution request for $4,069.00, representing fuel taken from October, 2012 through

November, 2013. Appellant did not object to paying the full amount of restitution from October of 2012 through November of 2013, although the indicted offense only covered November and December of 2012.

{¶14} Because appellant failed to object to the amount of restitution at the sentencing hearing, he has waived all but plain error. *State v. Griffin,* 6th Dist. Lucas No. L–11–1283, 2013-Ohio-411, ¶43. In order to constitute plain error, the error "must be so obvious that it should have been apparent to the trial court without objection." *State v. Thompson,* 10th Dist. Nos. 10AP1004, 10AP–1173, 2011–Ohio–5169, ¶ 22.

{¶15} R.C. 2941.41(C)(2)(a) specifically provides for restitution for a conviction of theft in office:

> A court that imposes sentence for a violation of this section based on conduct described in division (A)(2) of this section shall require the public official or party official who is convicted of or pleads guilty to the offense to make restitution for all of the property or the service that is the subject of the offense, in addition to the term of imprisonment and any fine imposed. A court that imposes sentence for a violation of this section based on conduct described in division (A)(1) of this section and that determines at trial that this state or a political subdivision of this state if the offender is a public official, or a political party in the United States or this state if the offender is a party official, suffered actual loss as a result of the offense shall require the offender to make restitution to the state, political subdivision, or political party for all of the actual loss experienced, in addition to the term of imprisonment and any

fine imposed.

{¶16} The State argues that this statute allows the court to order restitution for all of the fuel appellant allegedly took from the township diesel tank regardless of the period of time specified in the indictment. We disagree. The statute specifically states that the offender is to make restitution for the property that is the *subject* of the offense.

{¶17} In *State v. Fitzpatrick*, 76 Ohio App.3d 149, 601 N.E.2d 160 (8th District Cuyahoga 1990), the court charged the defendant with the costs of the investigation as restitution. Examining R.C. 2941.41(C)(2)(a), the Court of Appeals reversed, finding that the right to order restitution is limited to the actual damage or loss caused by the offense of which the defendant is convicted. *Id*. at 153, 601 N.E. 2d at 162. Similarly, in *State v. Ruppert,* 12th Dist. Warren No. CA2009-10-136, 2010-Ohio-1281, ¶10, the court found that a trial court erred in ordering restitution for property which was the subject of an offense for which the defendant was charged but not convicted, as the charge was dismissed as part of a plea bargain.

{¶18} Appellant was convicted only of taking fuel in the months of November and December of 2012. The court therefore committed plain error in ordering him to pay restitution for a time period stretching from October of 2012 through November of 2013.

{¶19} The first assignment of error is sustained.

II., III.

{¶20} Appellant's second assignment of error claims counsel was ineffective for failing to object to the amount of restitution. In his third assignment of error, he argues that the prosecutor committed misconduct by seeking restitution for a crime of which appellant was not convicted. These assignments are rendered moot by our decision in the first assignment of error.

{¶21} The second and third assignments of error are overruled.

IV.

{¶22} Appellant argues that the judgment is against the manifest weight and sufficiency of the evidence because the State failed to prove that he acted "knowingly." He argues that his conduct in taking the fuel was not accompanied by an intent to deprive the township of property; rather, he used the fuel in with the consent of the other trustees, for township business.

{¶23} In evaluating a challenge to the verdict based on a manifest weight of the evidence claim in a bench trial, the trial court assumes the fact-finding function of the jury. *State v. Strickland,* 183 Ohio App. 3d 602, 918 N.E.2d 170, 2009-Ohio-3906, ¶25. Accordingly, this Court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts in evidence the trial court "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id.*

{¶24} An appellate court's function when reviewing the sufficiency of the evidence is to determine whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, 574 N.E.2d 492, paragraph two of the syllabus (1991).

{¶25} Appellant was convicted of theft in office in violation of R.C. 2921.41(A)(2):

{¶26} "(A) No public official or party official shall commit any theft offense, as defined in division (K) of section 2913.01 of the Revised Code, when either of the following applies:

{¶27} "(2) The property or service involved is owned by this state, any other state, the United States, a county, a municipal corporation, a township, or any political

subdivision, department, or agency of any of them, is owned by a political party, or is part of a political campaign fund."

{¶28} The theft offense underlying the conviction is defined by R.C. 2913.02, which provides that no person, with purpose to deprive the owner of property, shall knowingly exert control over the property without the consent of the owner or beyond the scope of the consent of the owner. Knowingly is defined by R.C. 2901.22(B):

> A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

{¶29} The trial court stated from the bench at sentencing:

{¶30} "I was also persuaded that your use of fuel, even if it were used for township purposes, didn't amount to the amount of fuel you were taking. And then I was also persuaded you were not authorized to take that fuel in any event." Sent. Tr. 6.

{¶31} Appellant acknowledged that pursuant to township policy, trustees are only permitted mileage reimbursement for travel outside the county. Although appellant and Dale Pore both testified at trial that appellant was acting as road superintendent and had been given permission to take fuel from the tank, neither the appointment nor permission to take fuel from the tank appear in the minutes of the trustees, nor were

they adopted by resolution of the trustees. Appellant's testimony conflicted with Pore's as to whether their conversation occurred in 2011 or 2012. The third member of the Board of Township Trustees during this time period did not testify. None of the township employees were informed of this agreement. Both township road employees testified that they rarely saw appellant, and Craig Hallabrin believed he had the responsibility of determining what work to do on a daily basis, not appellant. The trial court specifically found the testimony of these employees to be more credible than appellant's testimony.

{¶32} Further, appellant acknowledged taking 197 gallons of township diesel fuel during November and December of 2012. He provided monthly calendars showing mileage he drove during these months on township business, which were printed from a computer in 2014 and showed he drove 49 to 64 miles every day. However, the total length of township roads is only 46 to 48 miles. Appellant testified that his truck gets 10 to 18 miles to a gallon. Based on an estimate of 15 miles per gallon, the court found that appellant would have been able to travel 2,955 miles in November and December of 2012, and his own records showed travel of only 1,259 miles.

{¶33} The judgment of the court finding that appellant acted knowingly in exerting control over the diesel fuel without consent or beyond the consent of the owner is not against the manifest weight or sufficiency of the evidence.

{¶34} The fourth assignment of error is overruled.

{¶35} The judgment convicting appellant of theft in office is affirmed. The portion of the sentence ordering him to pay restitution in the amount of $4,069.00 is reversed. In all other respects the sentence is affirmed. This case is remanded to the Richland County Common Pleas Court with instructions to calculate the amount of restitution based solely on the time period specified in the indictment. Costs are divided

evenly between the parties.

By: Baldwin, J.

Wise, J. and

Delaney, J. concur.