[Cite as *State v. Peck*, 2013-Ohio-4835.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio — Court of Appeals No. S-12-046

Appellee — Trial Court No. CRB 1200841

v.

Aaron M. Peck — **DECISION AND JUDGMENT**

Appellant — Decided: November 1, 2013

* * * * *

Nancy L. Jennings, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Aaron Peck, appeals from his conviction in the Fremont Municipal Court of one count of receiving stolen property. We affirm, in part, and reverse, in part.

A. Factual and Procedural Background

{¶ 2} On August 16, 2012, a criminal complaint was initiated against appellant, charging him with one count of receiving stolen property in violation of R.C. 2913.51(A), a misdemeanor of the first degree. Appellant entered an initial plea of not guilty, and the matter was set for pretrial on September 11, 2012. At the pretrial, the victim, Joann Fox—who is also appellant's mother-in-law—was present. Appellant, however, failed to appear. Because appellant did not appear, the trial court noted that he owes Fox $200 for her missed day of work.

{¶ 3} Eventually, the matter proceeded to a jury trial. At trial, the state called Randy Beckley. Beckley owns a pawn shop in Fremont. Beckley testified that sometime in early July 2012, appellant's wife, Ashlee Peck, called Beckley near closing time and asked him to stay open for a little while longer so that they could bring in an item to pawn. Beckley stated that appellant and Ashlee arrived together and sold him a Harley Davidson knife for $5. He explained that the knife did not have any special characteristics, and that he valued the knife at $10. Beckley testified that Fox arrived a few days later and recognized the knife as her own. Beckley then sold the knife to Fox for $5 and wrote a receipt at Fox's request which stated, "Bought a Franklin Mint Harley Davidson Knife from Aaron Peck that he stole from Joann Fox[.] Paid $5.00 for it." Beckley later explained on cross-examination that he wrote what Fox wanted him to write and that he did not have any evidence to prove whether the knife was stolen or who stole it.

{¶ 4} The state next called Fox. Fox testified that around the beginning of July 2012, she invited appellant and Ashlee to bring their kids over to her house to go swimming. She testified that at one point, she went outside with the kids, and appellant and Ashley remained inside the home. A few days later, Fox noticed that a ring and other items were missing from her house. She testified that she called Ashlee and questioned her about the items, knowing that Ashlee had stolen from her in the past. Ashlee denied taking any items. A few days later, Fox started going to pawn shops looking for her items. She testified that she went into Beckley's store, saw the knife, and told Beckley that it was hers. Fox stated that Beckley then asked if she knew appellant. When she said that she did, Beckley replied, "[T]hat's the lowlife that brought it in and sold it to me." Fox then purchased the knife and requested a receipt for the purpose of filing a police report. Fox testified, though, that she did not tell Beckley what to write on the receipt. Finally, Fox testified that she was aware of theft charges filed against Ashlee relating to the incident, but she was not aware of any theft charges against appellant.

{¶ 5} Following the state's presentation of evidence, appellant moved for a Crim.R. 29(A) motion for acquittal on the grounds that the knife was not entered into evidence and the state failed to present any evidence showing that appellant knew or should have known that the knife was stolen. The trial court denied this motion.

{¶ 6} Thereafter, appellant called Ashlee as his only witness. Ashlee testified that she does not have much of a relationship with her mother. She further testified that Fox has called children's services on her before, and that Fox believes she should not have her

children. Ashlee implied that Fox is bringing the current complaint to further the goal of removing the children from her custody. Ashlee also was questioned about the alleged theft and purported sale to the pawn shop, but after consultation with an attorney, she invoked her Fifth Amendment right against self-incrimination.

{¶ 7} Following closing arguments, the case was turned over to the jury. The jury deliberated for a short time, and then returned its verdict of guilty. The trial court proceeded immediately to sentencing, and after receiving statements from appellant's probation officer, the state, appellant's attorney, and appellant himself, the court sentenced appellant to 180 days in jail. In addition, the court ordered appellant to pay Fox $200.

B. Assignments of Error

{¶ 8} Appellant has timely appealed, and now raises four assignments of error for our review:

> I. Appellant's conviction for receiving stolen property in violation of Ohio Rev. Code § 2913.51(A) was against the manifest weight of the evidence.
>
> II. The trial court erred when it denied appellant's motion for acquittal under Crim.R. 29 because the City of Fremont failed to present evidence to establish beyond a reasonable doubt the elements necessary to support the conviction.

III. Appellant's convictions [sic] were against the sufficiency of the evidence.

IV. The trial court abused its discretion when it ordered appellant to pay the victim money for her lost wages for her participation in a pre-trial.

II. Analysis

{¶ 9} For ease of discussion, we will address appellant's assignments of error out of order.

A. Sufficiency of the Evidence

{¶ 10} Because an appellate court reviews a ruling on a Crim.R. 29 motion under the same standard used to determine whether the evidence was sufficient to sustain a conviction, we will address appellant's second and third assignments of error together. *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 39-40. "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "The relevant inquiry is 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 (1991), paragraph two of the syllabus.

{¶ 11} Appellant was convicted of receiving stolen property in violation of R.C. 2913.51(A), which states, "No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been

obtained through commission of a theft offense." Here, appellant only contests whether there was evidence to show that he knew or had reasonable cause to believe that the knife was obtained by theft. Specifically, he argues that the only evidence linking him to the knife is Beckley's testimony that he came into the pawn shop with Ashlee to sell it. Appellant contends that mere presence inside a pawn shop with his wife who is in possession of a very average knife does not prove that he knew or should have known that the knife was stolen.

{¶ 12} We disagree with appellant's characterization of the evidence. Here, in addition to Beckley's testimony that appellant and Ashlee sold the knife to him, the state presented Fox's testimony that appellant was in the house with Ashlee at the time the knife and other valuables were stolen. When viewed in a light most favorable to the prosecution, we conclude that evidence showing appellant was with his wife both when the knife was stolen and when it was sold could lead a rational trier of fact to find beyond a reasonable doubt that appellant knew or should have known that the knife was stolen. Therefore, we hold that his conviction is based on sufficient evidence.

{¶ 13} Accordingly, appellant's second and third assignments of error are not well-taken.

B. Manifest Weight

{¶ 14} Similarly, in his first assignment of error, appellant claims that his conviction is against the manifest weight of the evidence because the evidence does not demonstrate that he knew or should have known that the knife was stolen.

{¶ 15} When reviewing a claim that the conviction is against the manifest weight of the evidence,

> [t]he court, 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 and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, quoting *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541.

{¶ 16} For the same reasons stated above, we do not think this is the exceptional case in which the evidence weighs heavily against appellant's conviction. Here, appellant did not present any evidence to contradict Fox's testimony that he was present with his wife when the items were stolen. Further, Beckley unequivocally testified that appellant was present with his wife when the knife was sold. Upon our review of the record, and our weighing of the evidence and all reasonable inferences, we conclude that the jury did not clearly lose its way when it found that appellant knew or reasonably should have known that the knife was stolen. Therefore, we hold that appellant's conviction is not against the manifest weight of the evidence.

{¶ 17} Accordingly, appellant's first assignment of error is not well-taken.

C. Restitution

{¶ 18} In his fourth and final assignment of error, appellant argues that the trial court committed plain error when it ordered him to pay Fox $200 as compensation for the time she missed from work to attend a pretrial at which appellant did not appear. In particular, he argues that the time Fox missed from work to attend the pretrial is not a direct and proximate result of his commission of the offense. Further, appellant contends that there was no testimony, report, or receipt offered to show how long the victim was at the courthouse or how much she made hourly or daily.

{¶ 19} Generally, we review a trial court's decision to award restitution for an abuse of discretion. *State v. Perna*, 2012-Ohio-5557, 982 N.E.2d 1312, ¶ 40 (6th Dist.). However, because appellant did not object to the restitution order during sentencing, he has waived all but plain error. *See State v. Griffin*, 6th Dist. Lucas No. L-11-1283, 2013-Ohio-411, ¶ 43, citing *State v. Alexander*, 4th Dist. Scioto No. 10CA3402, 2012-Ohio-2041, ¶ 9.

{¶ 20} R.C. 2929.28(A)(1) provides that a trial court may order "restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss." Further,

> If the court imposes restitution, the court shall determine the amount of restitution to be paid by the offender. If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation

> report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. *Id.*

Notably, "economic loss" is defined as

> any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense and includes any loss of income due to lost time at work because of any injury caused to the victim, and any property loss, medical cost, or funeral expense incurred as a result of the commission of the offense. "Economic loss" does not include non-economic loss or any punitive or exemplary damages. R.C. 2929.01(L).

{¶ 21} To be a lawful order, "the amount of restitution must be supported by competent, credible evidence from which the court can discern the amount of the restitution to a reasonable degree of certainty." *State v. Alcala*, 6th Dist. Sandusky No. S-11-026, 2012-Ohio-4318, ¶ 30, citing *State v. Gears*, 135 Ohio App.3d 297, 300, 733 N.E.2d 683 (6th Dist.1999). "When an award of restitution is not supported by such evidence, it is an abuse of discretion by the court that alters the outcome of the proceeding, thus constituting plain error." *Id.*, citing *State v. Marbury*, 104 Ohio App.3d 179, 181, 661 N.E.2d 271 (8th Dist.1995).

{¶ 22} Here, we need not decide whether Fox's missed time from work constitutes economic loss because nothing in the record supports the trial court's determination that the amount of loss suffered by the victim was $200. In particular, there is no evidence that Fox, appellant, or appellant's probation officer recommended that amount, nor was there any evidence showing how much Fox earned per hour or how long she was at the court. *See* R.C. 2929.28(A)(1). Therefore, the trial court's award of restitution constitutes plain error.

{¶ 23} Accordingly, appellant's third assignment of error is well-taken.

III. Conclusion

{¶ 24} For the foregoing reasons, the judgment of the Fremont Municipal Court is affirmed, in part, and reversed, in part. The portion of the sentence ordering appellant to pay $200 in restitution to Fox is reversed and vacated. The remaining portions of the judgment are affirmed in their entirety. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A)(4).

Judgment affirmed, in part,
and reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, J.

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JUDGE

Stephen A. Yarbrough, J.
CONCUR.

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JUDGE