[Cite as *State v. Hollowell*, 2014-Ohio-1142.]

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

State of Ohio — Court of Appeals No. WD-12-072

Appellee — Trial Court No. 2012CR0297

v.

Morton Irving Hollowell — **DECISION AND JUDGMENT**

Appellant — Decided: March 21, 2014

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Aaron T. Lindsey and David E. Romaker, Jr., Assistant Prosecuting Attorneys, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Morton Irving Hollowell, appeals from his convictions in the Wood County Court of Common Pleas, on one count of vandalism, one count of theft and one count of breaking and entering. For the reasons that follow, we affirm.

{¶ 2} This case involves a theft from Electro Prime, an automotive parts supplier located in Rossford, Ohio. As the result of an investigation, appellant was indicted for the crime. His jury trial commenced on December 3, 2012.

{¶ 3} Danny Ray Bennett, a former employee of Electro Prime, testified that on the evening of April 29, 2012, he was walking his dog on Electro Prime's property when he saw other people on the property. Bennett testified that the individuals were approximately 50-75 yards away from him. When the individuals noticed his presence, they immediately closed the rear door of their vehicle and drove away. Bennett testified that the vehicle was either a sport utility vehicle or a van. Because of the distance, Bennett was not close enough to establish a good view of the vehicle. He testified that he found radiators from an air conditioning unit stacked up on the ground where the individuals had been. He then contacted law enforcement.

{¶ 4} Rossford Police detective Todd Kitzler testified that on April 29, he arrived on the scene and observed radiators on the ground. Kitzler testified that because of the amount of work these individuals put into the task, he believed they would return to retrieve the radiators. He then set up an infrared camera in the area that would take pictures when its motion sensor was activated. When he later returned that night, he found that the materials were gone and the camera had taken pictures of an individual and a van. Kitzler testified that the pictures were distributed to law enforcement investigators and media outlets. As a result of the distribution, Kitzler received a tip which brought him

to a property in Ottawa Lake, Michigan. Kitzler testified that he and a sheriff's deputy searched the property and found a stack of radiators and a van.

{¶ 5} At the property, appellant was subsequently arrested and waived his *Miranda* rights. His written statement contained an admission that he and two others damaged the air conditioning unit and removed the radiators.

{¶ 6} On December 3, 2012, a jury found appellant guilty of vandalism, theft, and breaking and entering. Appellant now appeals setting forth the following assignments of error:

> I. The trial court abused its discretion by improperly precluding Appellant from conducting thorough cross examination of a witness thereby denying Appellant's right to due process.
>
> II. The trial court awarded Electro Prime $5,500 in restitution without a basis for determining the exact amount.
>
> III. The trial court erred in denying Appellant's Rule 29 Motion for Acquittal at the completion of the state's case in chief.
>
> IV. Appellant's conviction was against the manifest weight of the evidence presented at trial.

{¶ 7} We will initially consider appellant's fourth assignment of error. Appellant contends that his convictions for vandalism, theft, and breaking and entering were against the manifest weight of the evidence.

{¶ 8} The "weight of the evidence" refers to the jury's resolution of conflicting testimony. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In determining whether a verdict is against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and "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." *Id*. An appellate court must defer to the factual findings of the jury regarding the weight to be given the evidence and credibility of the witnesses. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. When examining witness credibility, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986). The factfinder is free to believe all, part, or none of the testimony of each witness appearing before it. *State v. Brown*, 11th Dist. Trumbull No. 2002-T-0077, 2003-Ohio-7183, ¶ 53.

{¶ 9} Appellant was convicted of vandalism, a violation of R.C. 2909.05(B)(1)(a) and (E). The elements of vandalism are as follows:

> No person shall knowingly cause physical harm to property that is owned or possessed by another, when either of the following applies:
>
> (a) The property is used by its owner or possessor in the owner's or possessor's profession, business, trade, or occupation, and the value of the

property or the amount of physical harm involved is one thousand dollars or more.

* * *

(E) * * * If the value of the property or the amount of physical harm involved is seven thousand five hundred dollars or more but less than one hundred fifty thousand dollars, vandalism is a felony of the fourth degree."

{¶ 10} Appellant conceded that he knowingly caused physical harm to property that did not belong to him. Appellant, however, contends that the air conditioning unit was not used by its owner, in the owner's business and, that a value of $1,000 or more was not established.

{¶ 11} Both witnesses in the trial, Bennett and John Lauffer, owner of Electro Prime, testified to the use and value of the air conditioning unit. Bennett testified that the air conditioning unit in question was one of three units owned by Electro Prime, two active units and one spare unit. The spare unit, the unit in question, was used for spare parts to service the two active units and also as a full replacement backup unit. This unit had only been used for parts, but could be operational if it were "re-piped and re-plumbed." Bennett also testified that the spare unit had, in fact, been used for spare parts.

{¶ 12} The air conditioning units were utilized to cool paint in the plant to a specific temperature to ensure the appropriate application of the paint to motor vehicle parts. Bennett testified that the spare unit was an asset to Electro Prime; if one of the primary air conditioning units were to malfunction or cease operation, the spare would

provide Electro Prime with replacement parts or a replacement unit. Bennett testified that Electro Prime's business requires no delays in processing, therefore it is more effective for the business to have a spare unit ready than to lose one day of processing.

{¶ 13} Similarly, Lauffer testified that the active and spare air conditioning units were needed to ensure an appropriate plant temperature for his business to function properly. Without functioning units, Electro Prime faced potential supplier fines greater than $20,000 per minute. Lauffer testified that the spare unit was used for parts to service the active units and served as a potential full replacement to an active unit. The unit was "serviceable" if pipes and wiring were installed. Because of the damage done to the spare unit, Lauffer testified that he made provisions with a company that rented industrial air conditioning units.

{¶ 14} Appellant mistakenly contends that, because the spare air conditioning unit was not "operational," it was not used by Electro Prime in its business. Permitting such an interpretation of the statute would result in alleged vandals skirting appropriate consequences because they happen to damage property that was not in use at that particular moment. Such a result would be untenable.

{¶ 15} Additionally, both witnesses testified that the value of the damaged air conditioning unit would exceed $7,500. Bennett testified that the unit contained six fans and motors, with the motors being valued at $250-$500 each. A few motors were missing prior to the damage being done. Bennett testified that the six radiators, which are made of aluminum and copper, would each be worth $250-$300 each in the scrap metal market.

He estimated that these same radiators would each cost $1,500-$2,000 to replace. In light of these estimates, Bennett estimated the total damage to the air conditioning units would be greater than $7,500.

{¶ 16} Lauffer testified that a used replacement air conditioning unit with similar capacity to the damaged unit would cost an estimated $10,000-$20,000. Lauffer testified that the damaged unit was a 67-ton unit. In state's exhibit No. 58, prosecution presented evidence of estimates Lauffer found online for similar units. The estimates showed prices for a 40-ton unit for $6,000, a 70-ton unit for $18,300, a 30-ton unit for $16,000-$18,500, and a 15-ton unit for $4,500. Additionally, Lauffer testified that he received $1,800-$2,000 for the damaged radiators he had to scrap.

{¶ 17} R.C. 2909.11 provides that "if * * * the physical harm is such that the property cannot be restored substantially to its former condition, the value of the property, in the case of personal property, is the cost of replacing the property with new property of like kind and quality * * *." Both witnesses testified that the air conditioning unit was damaged beyond repair. Because of this damage, R.C. 2909.11 requires the value be measured by "the cost of replacing the property with new property of like kind and quality."

{¶ 18} Bennett testified that replacement of the radiators alone would cost $9,000-$12,000 (i.e. 6 radiators x $1,500-$2,000 each). Lauffer's testimony, supported by state's exhibit No. 58, estimated that a used unit replacement would cost $10,000-$20,000. This

evidence supported the contention that the value of the damaged unit was greater than $7,500.

{¶ 19} Appellant was also convicted of theft, a violation of R.C. 2913.02(A)(1) and (B)(2). The elements are as follows:

> (A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:
>
> (1) Without the consent of the owner or person authorized to give consent;
>
> * * *
>
> (B)(2) * * * If the value of the property or services stolen is one thousand dollars or more and is less than seven thousand five hundred dollars * * * a violation of this section is theft, a felony of the fifth degree.
>
> * * *

{¶ 20} Lauffer testified that appellant did not have permission to exert control over the air conditioner. In his written statement to the police, appellant stated that he and two others entered Electro Prime property and dismantled the air conditioning unit. Appellant further recounts that he and another later returned to Electro Prime to remove the unit in the hopes of removing the aluminum.

{¶ 21} Finally, appellant was convicted of breaking and entering, a violation of R.C. 2911.13(B) and (C). The elements are as follows:

> No person shall trespass on the land or premises of another, with purpose to commit a felony. Whoever violates this section is guilty of breaking and entering, a felony of the fifth degree.

{¶ 22} It is undisputed that appellant trespassed on Electro Prime land and committed a felony.

{¶ 23} In sum, there is no evidence in the record to support a contention that the jury lost its way and created a manifest miscarriage of justice in its conviction of appellant for vandalism, theft, and breaking and entering. The jury was presented with two witnesses who both testified as to the importance of the spare unit to the business, as an on-site replacement for an entire unit or spare parts. The witnesses also testified as to the value of the damaged unit, both establishing a value greater than $7,500. Appellant admitted that he entered onto Electro Prime property to dismantle an air conditioning unit and sell it for scrap parts. Appellant did not have permission to be on the premises. Accordingly, appellant's fourth assignment of error is found not well-taken.

{¶ 24} Next, we will consider appellant's third assignment of error. Appellant contends that the court erred in denying his Crim.R. 29 motion for acquittal.

{¶ 25} We review a ruling on a Crim.R. 29 motion under the same standard used to determine whether the evidence was sufficient to sustain a conviction. *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 40. Under the sufficiency standard, we must determine whether the evidence admitted at trial, "if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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, citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.E.2d 560 (1979); *see also Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541. Therefore, "[t]he verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier-of-fact." *State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997), citing *Jenks* at paragraph two of the syllabus.

{¶ 26} As shown by the analysis to appellant's fourth assignment of error, a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. The elements for vandalism, theft, and breaking and entering were sufficiently demonstrated by the prosecution. Appellant's third assignment of error is found not well-taken.

{¶ 27} In his first assignment of error, appellant contends that the trial court abused its discretion by improperly precluding appellant from conducting a thorough cross-examination of a witness. In order to establish the value of the air conditioning unit, appellant attempted to utilize a used car analogy. The court then called appellant's counsel to the bench and instructed him against using the analogy. Appellant was then permitted to further cross-examine Lauffer and question him about the overall

replacement value of the air conditioning unit and the value of the individual parts of the unit.

{¶ 28} Reviewing courts will not reverse a judgment of a trial court because of a limitation of cross-examination of a witness, unless it clearly appears that there has been an abuse of discretion therein, resulting in manifest prejudice to the complaining party. *Fabian v. State*, 97 Ohio St. 184, 119 N.E. 410 (1918). It is well settled that "'[t]he scope of cross-examination and the admissibility of evidence during cross-examination are matters which rest in the sound discretion of the trial judge.'" *State v. Lundgren*, 73 Ohio St.3d 474, 487, 653 N.E.2d 304 (1995), quoting *O'Brien v. Angley*, 63 Ohio St.2d 159, 163, 407 N.E.2d 490 (1980). Thus, when the trial court allows or disallows certain testimony, the order or ruling of the court will not be reversed absent a clear and prejudicial abuse of discretion. *O'Brien* at 163. An abuse of discretion is more than an error in judgment or a mistake of law; it connotes that the court's attitude is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶ 29} Given the fact that appellant was provided the opportunity to question Lauffer regarding value, it cannot be said that appellant was prejudiced by the exclusion of a "used car analogy." Moreover, the prosecution presented evidence, relied upon by Lauffer, to establish valuation of the air conditioning unit. Appellant failed to object to any of this evidence regarding valuation. Accordingly, it cannot be said that the trial court's limitation of appellant's cross-examination was unreasonable, arbitrary, or

unconscionable. Finding no abuse of discretion, appellant's first assignment of error is found not well-taken.

{¶ 30} In his second assignment of error, appellant contends that the trial court erred in awarding Electro Prime $5,500 in restitution without a basis for determining the exact amount. Appellant contends that there was a lack of credible evidence in the record to establish a figure for restitution.

{¶ 31} R.C. 2929.18 provides that a court imposing sentence on an offender convicted of a felony may impose financial sanctions, including restitution to the victim of the offender's crime.

> If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made 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. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount. R.C. 2929.19(A)(1).

{¶ 32} To be a lawful order, the amount of the 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. 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. *State v. Marbury*, 104 Ohio App.3d 179, 181, 661 N.E.2d 271 (8th Dist.1995).

{¶ 33} The figure upon which the restitution was derived from, the testimony of Lauffer and Bennett, along with evidence of internet estimates, was submitted into the record. Lauffer and Bennett testified that the value of a replacement unit would be at least $7,500. The trial court found the restitution figure by calculating the difference between the replacement value ($7,500) and the recovered value of scrap metal sold by Lauffer ($2,000).

{¶ 34} The plain language of the statute permits the amount of restitution to be based on "estimates or receipts indicating the cost of repairing or replacing property." The state presented two witnesses who testified to the value of replacing the damaged air conditioning unit. Additionally, evidence of Lauffer's online research for comparable units was entered into the record. The testimony of the witnesses along with the internet price quotations served as competent, credible evidence which allowed the court to discern the price of the damaged air conditioning unit to a reasonable degree. Therefore,

the trial court did not abuse its discretion in determining the restitution figure and appellant's second assignment of error is not well-taken.

{¶ 35} The judgment of the Wood County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE