[Cite as *State v. Gaines*, 2014-Ohio-1989.]

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

State of Ohio — Court of Appeals No. F-13-004

Appellee — Trial Court No. 12CR142

v.

Johnathon R. Gaines — **DECISION AND JUDGMENT**

Appellant — Decided: May 9, 2014

* * * * *

Scott A. Haselman, Fulton County Prosecuting Attorney,
for appellee.

Diana L. Bittner, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Fulton County Court of Common Pleas, following a jury trial, in which appellant, Johnathon Gaines, was found guilty of one count of receiving stolen property in violation of R.C. 2913.51(A). On appeal, appellant sets forth the following assignments of error:

1. The trial court erred in denying defendant-appellant's request for a continuance or by otherwise not sanctioning the state for violations of discovery rules pursuant to Crim.R. 16.

2. The trial court erred in denying defendant-appellant's Rule 29 motion at the close of the state's case, as defendant-appellant's conviction was not supported by legally sufficient evidence.

3. Defendant-appellant's conviction was against the manifest weight of the evidence.

4. The trial court erred in overruling defendant-appellant's objections to improper statements made by the state in its closing argument.

5. The trial court's judgment entry of verdict and judgment entry of sentencing are improper as they recite the incorrect level of felony for which defendant-appellant was convicted.

{¶ 2} The undisputed facts that are relevant to the issues raised on appeal are as follows. In August 2012, Randall Webken told Toledo police that his 2004 red and black Yamaha motorcycle, which he described as a sport-style "crotch rocket," [1] was stolen from his apartment near the campus of Mercy College. Webken told police that the Yamaha was stolen while he was on vacation. Webken said that, before leaving on

[1] A "crotch rocket" is a term used to describe a low profile, sport-style motorcycle, where the rider is required to lean forward while driving, as opposed to a touring-style cycle where the rider is in a more upright position.

vacation, he parked the cycle under a tree, secured it with a "fork lock,"[2] and removed the ignition key.

{¶ 3} In the early morning hours of September 18, 2012, police were called to a reported domestic disturbance at the 700 building of the East Gardens Apartments in Archbold, Ohio. By the time police arrived, the incident was over. Samantha Poling, a resident of the 700 building, told the officers that appellant, Johnathon Gaines, was involved in the incident and may have left the premises on his motorcycle. However, another resident stated that appellant was not gone, because his motorcycle was parked outside.

{¶ 4} In the building's parking lot, police saw a Yamaha "crotch rocket" style motorcycle. Upon inspecting the Yamaha, they noticed that parts of the cycle appeared to have been painted over with white paint, the key-activated ignition was replaced by a toggle switch, and the fork lock mechanism was missing. After checking the vehicle identification number ("VIN") and license plate, the officers learned that the VIN [JYARJ06E14A014296] and the sticker number [73PXV] on the plate matched Webken's missing motorcycle, but the Yamaha's license plate number [85NNZ] belonged to a Harley Davidson motorcycle. The officers impounded the Yamaha and had it towed from the scene, after which they contacted Webken and informed him that his motorcycle had been found.

[2] "Fork lock" is a term used to describe a method of securing a motorcycle, whereby the front wheel is turned to the side to engage a locking mechanism that can only be unlocked by breaking the lock or by using a key.

{¶ 5} On October 15, 2012, the Fulton County Grand Jury indicted appellant on one count of receiving stolen property in violation of R.C. 2913.51(A). Appellant entered a plea of not guilty, and a jury trial was eventually set for April 9, 2013. Discovery commenced, with each side issuing subpoenas for witnesses to appear at trial.

{¶ 6} On April 8, 2013, appellant filed a motion for a continuance because the state notified appellant that morning of its intent to call two additional witnesses to testify at the trial. A hearing was held later that same day, at which appellant's attorney argued that a continuance was needed so he would have time to investigate the two new witnesses and the accompanying reports of police interviews with those individuals. Defense counsel further argued that the state's tardy disclosure of the two witnesses amounted to a "discovery violation" which required a continuance and the setting of a new trial date.

{¶ 7} In response, the prosecutor argued that the two additional witnesses were disclosed right before the trial because the state was constantly updating discovery. Accordingly, such a disclosure was not a discovery violation. The prosecutor explained that one of the witnesses, Christy Hoyt, appellant's girlfriend, previously refused to give a statement and was later unavailable because she was in a drug treatment facility, and that police recently determined that the other new witness, Misti Cook, may have seen appellant with the Yamaha cycle. The prosecutor stated that both witnesses were scheduled to testify on the second day of the trial, so that defense counsel would have

time to investigate and prepare for their testimony and, in addition, defense counsel was given a "narrative supplement" from the officer who interviewed both witnesses.

{¶ 8} After hearing counsel's arguments, the trial court denied the motion for a continuance stating that, in doing so, it created "an appealable issue here." Thereafter, the jury was chosen and the trial commenced.

{¶ 9} At trial, the state presented a total of 13 witnesses. Archbold Police Officer Jaime Rodriguez testified that he responded to a domestic disturbance call at 701 East Lutz Road, the address of the East Gardens Apartments, in the early morning hours of September 18, 2012. He spoke to Samantha Poling, who said that appellant may have been involved in the disturbance. Rodriguez stated that he looked for a motorcycle in the parking lot because he was told appellant had one. Upon finding a red and white Yamaha "crotch rocket" in the lot, he discovered that the VIN number and the license sticker, which were registered to Webken, did not match the license plate number, which belonged to a Harley Davidson cycle registered to a Leonard Hill. Rodriguez stated that he called a tow truck but he did not issue special instructions to preserve any evidence on the cycle. He also stated that there was no indication that the Harley Davidson cycle was stolen. On cross-examination, Rodriguez testified that there was no fight when he arrived at the apartment complex. He denied seeing appellant that night.

{¶ 10} Archbold Police Officer Thomas Ross testified that he was with Rodriguez at the East Gardens Apartments on September 18, 2012. Ross stated that he took statements from apartment manager Amanda Bowser and residents Samantha Poling,

Paulette Pettry, Rodney Bunce and Tori Knicely. He then went to T's Towing to process the Yamaha for fingerprints. Ross stated that bike had "obviously been painted," the ignition was replaced by toggle switches, and a decal was placed on the Yamaha. He was able to retrieve two partial prints from the bike, but they were too degraded to be identified. Ross stated that he did not send the bike or the partial prints to a crime lab for further processing. On cross-examination, Ross stated that there was no physical evidence tying appellant to the stolen Yamaha.

{¶ 11} Randall Webken testified at trial that he purchased the Yamaha motorcycle in 2007 or 2008, and that he kept the cycle at his student apartment in Toledo, where he attended Mercy College of Nursing. Webken stated that, before leaving for vacation in August 2012, he used the fork lock to secure the Yamaha, which he parked under a tree in front of his building. When he came home on August 15, the bike was gone, and he reported it stolen. He described the bike as black and red, with a factory paint job, and no decals. He further stated that the Yamaha had a key-activated ignition. Webken said that he does not go to Archbold, and did not know appellant or any of the other witnesses. Webken identified the Yamaha as his bike, even though it was partially repainted with white paint and had a decal added to it, and the ignition switch was missing. Webken testified that the entire time he owned the bike, it had the same license plate with the same number, 73PXV.

{¶ 12} Other witnesses who testified for the state included Rodney Bunce, II, who lived in the 400 building of the apartment complex, Bunce's sisters, Meagan Bunce and

Samantha Poling and their mother, Jane Stuck, Bunce's ex-girlfriend, Tori Knicely, East Gardens Apartments employees Paulette Pettry and Amanda Bowers, Archbold Police Officer Anthony Schroeder, appellant's ex-girlfriend, Christy Hoyt, and Hoyt's sister, Misti Cook.

{¶ 13} Rodney Bunce testified that he knew appellant, and saw him riding a "red Yamaha crotch rocket" sometime in the "June, July, August area" of 2012. Rodney further stated that he did not see anyone else at the complex riding a motorcycle, and he did not know that the police were interested in the ownership of the bike until they asked him to make a statement on September 18, 2012. On cross-examination, Rodney stated that he has "really bad eyes"; however, he was able to identify the Yamaha from a photograph as the one appellant was riding in 2012.

{¶ 14} Tori Knicely testified that she moved to the East Gardens Apartments in July 2012, and that she knew appellant through mutual friend Meagan Bunce. Knicely stated that she saw appellant numerous times on the red, black and white "crotch rocket" in "early August" of that year. On cross-examination, Knicely stated that she is near sighted and needs to wear glasses to see clearly.

{¶ 15} Jane Stuck testified that she lives in a house outside of Archbold, and that she was on vacation in August 2012 when appellant asked her daughter, Samantha Poling, if he could paint his Yamaha motorcycle in Stuck's driveway. Stuck stated that she saw appellant in July 2012, when he dropped her other daughter, Meagan, at her house during a cookout. She stated that, at that time, appellant was riding on a Harley

motorcycle, which may have been black in color. Stuck said that she did not know that appellant may have painted the cycle at her home until the police asked to see her driveway, and she did not remember seeing any paint on the driveway after returning from vacation.

{¶ 16} Samantha Poling testified that she first met appellant in 2011, when he moved in with Christy and their two children, who lived across the hall. Samantha stated that, during the time he lived with Hoyt, appellant had "an SUV and two different motorcycles," which she described as a blue "Harley Davidson" and a red and white "sports bike." She recalled first seeing the sports bike in the summer of 2012, and stated that, when appellant was not riding on the cycle, it had a "rag" or a "scarf" covering the ignition and odometer area.

{¶ 17} Poling stated that she gave appellant permission to paint his bike at her mother's house in August 2012. Initially, Poling was not sure whether appellant covered black parts of the bike with white paint or vice versa. However, ultimately, she stated that appellant used white spray paint to cover up portions of the bike that originally were black. Poling testified that appellant took the bike apart before spraying the removed parts with white paint, and that the process was completed over a four-day period of time. She did not remember seeing a decal on the bike.

{¶ 18} Poling said that she knew the bike came from Toledo, and made a passing comment that Christy told her it was stolen, to which the defense did not object. Poling stated that she told police that appellant and Hoyt were arguing on September 18, 2012,

however, the argument had stopped by the time police arrived. Poling stated that the argument began over the nature of appellant's relationship with Poling's sister, Meagan. She also stated that the police became interested in the motorcycle after appellant's son told them that appellant must still be at the complex because his motorcycle was parked outside.

{¶ 19} On cross-examination, Poling said that she told police appellant was riding the Yamaha for "two months," beginning in June 2012. Thereafter, defense counsel and Poling engaged in the following exchange:

> Question: Alright. * * * On September 18, 2012, you wrote to the Archbold Police Department, "I found out last night from his girlfriend that the bike was stolen." Correct?
>
> Answer: Uh-huh [affirmative response].
>
> Question: So we're talking about September 17th to the 18th is when you found out it was stolen; correct?
>
> Answer: Oh, yea.
>
> Question: Okay. Now when someone says I've got something that's hot. You interpreted it as it's stolen; correct?
>
> Answer: Yes.

{¶ 20} Thereafter, defense counsel questioned Poling regarding her criminal history, which included a charge of breaking and entering in October 2012. She then admitted to taking Benadryl during September and October 2012, which may have

affected her memory during that time. Poling also stated that some white spray paint was on the concrete driveway of her mother's home after appellant painted the Yamaha, but she was not sure if any paint was still there at the time of trial. Poling said that she was not upset over allegations that appellant slept with her sister, Meagan, because appellant is a liar. On redirect, Poling stated that appellant removed black parts from the Yamaha and painted them white.

{¶ 21} Meagan Bunce testified at trial that she and appellant became friends after he moved into East Gardens Apartments with Christy Hoyt. She stated that appellant would "come and go" from the apartment. Meagan said that she last saw appellant in June 2012 when he took her to a cookout at her mother's house on the Harley motorcycle. She stated that another neighbor, Chris Cook, had a dark-colored crotch rocket bike for a while. As to events on September 18, 2012, Meagan testified that she argued with appellant and Poling because someone said that appellant was telling other people that appellant and Meagan were more than friends. Meagan said that she saw police looking at the Yamaha bike and taking pictures as she was walking through the hallway, near the laundry room, but she did not tell police who owned the bike because she was not sure, and did not want to get involved. She did, however, see appellant standing near the bike on several occasions. She denied knowing anything about the ignition. Meagan stated that she called appellant to tell him that police officers were looking at his bike and taking pictures. She denied knowing how appellant came to possess the bike.

{¶ 22} On cross-examination, Meagan testified that she was upset about the rumors concerning herself and appellant, but she did not believe the rumors started with appellant. Meagan said that she and appellant got along before the rumors started and said that she is not mad at him any more. Meagan said that she wears contact lenses, without which she is near sighted.

{¶ 23} Paulette Pettry testified that she works at East Gardens Apartments, and that she knows most of the residents, including Christy Hoyt and her children. Although Pettry knew that appellant lived with Hoyt for a while, she did not know his name. She said that appellant would come to visit, riding a "sporty black and white" motorcycle. She also identified a "sporty" yellow motorcycle as belonging to Chris Cook. She said that appellant was riding the red and white Yamaha in July and August of 2012. She did not notice any rags or cloths covering the bike when it was in the parking lot.

{¶ 24} Amanda Bowers testified that she has been the manager of the East Gardens Apartments, and several other rental properties, for over three years. Bowers said that, because of her position, she knew the residents "very well." She also said that residents are required to register all vehicles and, if any vehicle is in violation of the rules, the police are called to find out if it was stolen. Bowers stated that appellant began staying with Hoyt approximately four months after Hoyt and her boys rented apartment 706, but he was never certified as a resident. Bowers also stated that she saw appellant riding a red, white and black "crotch rocket" style motorcycle that was "more of a sporty bike" than a Harley. She stated that appellant took a "sweatshirt or something" off of the

vehicle and laid it on the sidewalk before getting on it and riding off. She also said that Chris Cook's yellow motorcycle was dropped off at the complex by a truck, and was removed after only a few days. She testified that, approximately one week before the Yamaha was seized by police, appellant was staying at the apartment to watch the boys because Hoyt was incarcerated. On cross-examination, Bowers testified that she saw the Yamaha at the apartment complex "quite often." She first saw it possibly in the "middle to the end" of July, through August 2012.

{¶ 25} Archbold Police Officer Anthony Schroeder testified that he went to East Gardens Apartments several days after the Yamaha was seized, to follow up on the investigation. As part of the investigation, Schroeder spoke to appellant on the telephone. Appellant, who Schroeder knew from past contacts, denied stealing the Yamaha motorcycle. On October 4, 2012, Schroeder interviewed Poling and Meagan Bunce, after which he went to Stuck's house; however, after searching the stone driveway and concrete pad outside Stuck's garage, he was unable to locate any paint residue.

{¶ 26} Schroeder said that he interviewed Christy Hoyt and her sister, Misti Cook, on April 6, 2013, days before the trial was to commence. He stated that Misti Cook identified appellant's motorcycle, which was the only one in the police garage at the time. Schroder said that he knew Misti from her past encounters with law enforcement.

{¶ 27} Hoyt testified that, at the time of trial, she was incarcerated at the Corrections Center of Northwest Ohio for petty theft. Hoyt stated that she and appellant had a 15-year relationship, and they had two children, Zane and Javen, together. She said

that although she and appellant were never married, appellant periodically stayed at East Gardens Apartments with Hoyt and the boys. Hoyt also stated that appellant owned a "crotch rocket" motorcycle in "April or May," but he never told her where the bike came from. Hoyt said that she was at her mother's apartment unit in the East Gardens complex on September 18, 2012, when they saw lights flashing outside. Later, Meagan told Hoyt that the police were there "about some bike." Hoyt said that appellant came and stayed at her mother's apartment for a few hours, and then left. When Hoyt went back to her own apartment, it was "trashed."

{¶ 28} On cross-examination, Hoyt denied knowing whether or not appellant started the bike with a key. She admitted to having an addiction to opiates, which affected her short-term memory.

{¶ 29} Cook, Hoyt's sister, testified that she lives at East Gardens Apartments, and she knew appellant through his relationship with Hoyt. Cook recalled that appellant, who frequently visited the apartments, previously owned a yellow bike and a "blue bike that was like an old, an older guy's bike," followed by the red and white Yamaha. Cook also stated that her soon-to-be ex-husband, Christopher Cook, once owned a "crotch-rocket" motorcycle that was different than the one appellant possessed.

{¶ 30} Cook said that she first saw the Yamaha at the end of the summer in 2012. She identified the Yamaha as the one possessed by appellant, and stated that she recognized the "sticker" on the front portion of the bike. Cook also said that she was home the morning of September 18, 2012, when Meagan told her police were there.

{¶ 31} On cross-examination, Cook testified that she first heard the bike was stolen property on September 19, 2012. Cook said she told Schroeder that she first saw the Yamaha in the "late summer" of 2012. Cook testified that she recognized the Yamaha from a picture Schroeder showed to her. Cook said that she was not upset with appellant, in spite of hearing rumors that he cheated on her sister.

{¶ 32} At the close of Cook's testimony, the state rested its case. Defense counsel then made a motion for acquittal pursuant to Crim.R. 29, which was denied. Thereafter, the defense presented one witness, Barbara Carswell, appellant's mother.

{¶ 33} Carswell testified that Hoyt and appellant had an "unhealthy" relationship, and Hoyt had problems with drug abuse. She also testified that appellant drove motorcycles, including a "black" Harley. Carswell stated that, for the most part, appellant lived with her or his sister in the summer of 2012. Carswell also stated that her memory was affected by a stroke that she suffered four years earlier. On cross-examination, Carswell stated that Archbold police never contacted her about the events of September 18, 2012.

{¶ 34} After Carswell testified, the defense rested and closing arguments were presented by defense counsel and the state, followed by jury instructions. Thereafter, the jury retired to deliberate. After a period of deliberation, the jury unanimously found appellant guilty of one count of receiving stolen property, in violation of R.C. 2913.51(A).

{¶ 35} A sentencing hearing was held on May 6, 2013, at which defense counsel stated that, other than "issues" with "low tier * * * drug trafficking charges" in 2008, appellant had no previous felony convictions. After stating that appellant was convicted of a fourth-degree felony in this case, defense counsel asked the trial court to sentence appellant to community control or, in the alternative, impose "very minimal prison time." The state then argued that appellant is not amenable to community control, and has prior felony convictions, for which he has served time in prison.

{¶ 36} After reviewing the entire record, including the presentence investigation report, the trial court stated that it had considered the principles and purposes of sentencing pursuant to R.C. 2929.11 and balanced the seriousness and recidivism factors set forth in R.C. 2929.12. Thereafter, the trial court found that appellant was convicted by a jury of "one count of Receiving Stolen Property, a felony of the 4th degree." The trial court further found that appellant had previously served a prison term, he was not amenable to community control, prison was consistent with the purposes of R.C. 2929.11, and the shortest possible prison term would demean the seriousness of the offense and would not adequately protect the public.

{¶ 37} The trial court sentenced appellant to serve 12 months in prison, to be served consecutively with a term that appellant was currently serving pursuant to an unrelated conviction in Defiance County. Appellant was then advised as to his right to file an appeal, and the terms of postrelease control that could be imposed upon his release from prison. A timely notice of appeal was filed in this court on May 8, 2013.

{¶ 38} In his first assignment of error, appellant asserts that the trial court erred when it denied his motion to continue the trial date. In support, appellant argues that the state disclosed Christy Hoyt and Misti Cook as witnesses the morning before the trial was to begin, leaving the defense with insufficient time to investigate and prepare for cross-examination. Appellant further argues that the late addition of two witnesses amounts to a discovery violation by the state, for which a continuance would have been "a lesser sanction than excluding the testimony of the newly discovered witnesses altogether."

{¶ 39} The trial court's decision to grant or deny a motion for a continuance will not be overturned on appeal absent a finding of abuse of discretion. *Sweet v. Hunt*, 2d Dist. Greene No. 2013-CA-37, 2014-Ohio-631, ¶ 9, citing *In re M.H.*, 2d Dist. Montgomery No. 25084, 2012-Ohio-5216, ¶ 31. An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 276 (1983). Factors to be considered in reviewing the trial court's denial of a motion for a continuance where a discovery violation is alleged are "whether there was a willful violation of the discovery rules, if foreknowledge would have benefited the accused in the preparation of his * * * defense and whether the accused was unfairly prejudiced." *State v. Cochrane*, 10th Dist. Franklin No. 01AP-1440, 2002-Ohio-4733, ¶ 21.

{¶ 40} Crim.R. 16 states, in relevant part, that:

> (A) **Purpose, scope and reciprocity.** Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures.
>
> * * *
>
> (1) **Witness list.** Each party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or sur-rebuttal. * * *
>
> * * *
>
> (L) **Regulation of discovery.**
>
> (1) The trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances. * * *

{¶ 41} The record shows that a hearing on appellant's motion for a continuance was held on April 8, 2013, one day before the jury trial was scheduled to begin. At that

hearing, defense counsel acknowledged that the prosecution had fully complied with all of the trial court's discovery orders until that day, when two additional witnesses were disclosed. Of those two witnesses one, Christy Hoyt, was known to the defense. The other, Misti Cook, became known to Officer Schroeder during the interview of another witness on Friday, April 5, 2013. The prosecution told the court that Hoyt and Cook were not scheduled to testify until the second day of trial, which would give the defense time to prepare for their cross-examination. In addition, the prosecution stated that the defense was given a copy of Hoyt's criminal record, as well as a "narrative supplement from the Officer that interviewed these two individuals over the weekend."

{¶ 42} After hearing arguments from both parties, the trial court noted that seven months had passed since appellant was indicted. Thereafter, the court denied the motion for a continuance, and recognized that its decision could provide an "appealable issue."

{¶ 43} After reviewing the record, which includes a transcript of the hearing held on April 8, 2013, this court finds that the state's addition of Hoyt and Cook as witnesses the day before trial did not constitute a violation of Crim.R. 16. We further find that, although appellant stated that a continuance was necessary to prepare to cross-examine Hoyt and Cook, he has not specifically demonstrated how foreknowledge of their testimony would have benefitted the preparation of his defense. Finally, appellant does not argue, and the record does not show, how the inclusion of Hoyt and Cook as witnesses under the conditions stated above constituted prejudice so as to deprive appellant of a fair trial. Accordingly, we find that the trial court did not abuse its

discretion when it denied appellant's motion for a continuance. Appellant's first assignment of error is not well-taken.

{¶ 44} Appellant asserts in his second assignment of error that the trial court erred by denying his motion to dismiss. In support, appellant argues that insufficient evidence was presented by the state to support his conviction. Specifically, appellant argues that witnesses' accounts differed as to when appellant was first seen riding the Yamaha motorcycle, and there was a "lack of any physical evidence" that connected appellant to the "stolen motorcycle," mostly due to police officers' failure to collect and/or preserve such evidence.

{¶ 45} This court recently recognized that the standard of review for a decision regarding a Crim.R. 29 motion for acquittal is the same as that for a decision on a sufficiency challenge, i.e.: "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. Gonzales*, 6th Dist. Wood No. WD-12-037, 2014-Ohio-545, ¶ 35. (Other citations omitted).

{¶ 46} Appellant was charged with one count of receiving stolen property, in violation of R.C. 2913.51(A), which states that "[n]o 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."

{¶ 47} At trial, Webken testified that he reported his red and black Yamaha "crotch rocket" motorcycle was stolen from his apartment in Toledo in August 2012. He

identified state's exhibit No. 1, which showed the Yamaha that was recovered from appellant, as his stolen motorcycle. Testimony was also presented that appellant had repainted portions of a red and black Yamaha that otherwise fit the description of Webken's cycle, changing its color scheme to mainly red and white. In addition, although the number of the Yamaha's actual license was registered to a Harley Davidson cycle, the license plate sticker and VIN number on the red and white Yamaha matched those of Webken's stolen cycle. Testimony was also presented that the ignition switch on the Yamaha had been replaced by a toggle switch, and the fork lock was broken. Poling testified that appellant kept the toggle switch area covered with a "rag" or a "scarf."

{¶ 48} We note that some of the testimony regarding when appellant was seen with the Yamaha cycle is inconsistent. However, in spite of appellant's arguments to the contrary, these inconsistencies are not fatal to his conviction since it is the jury, as the finder of fact, that reviews the evidence and judges the credibility of witnesses and may believe or disbelieve all, part, or none of a witness's testimony. *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964).

{¶ 49} On consideration of the foregoing we find that, 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. Accordingly, the trial court did not err by denying appellant's Crim.R. 29 motion for an acquittal, and his second assignment of error is not well-taken.

{¶ 50} In his third assignment of error, appellant asserts that his conviction was against the manifest weight of the evidence. In support, appellant argues that "the muddled, contradictory testimony of the State's witnesses could not prove to a rational trier of fact that the essential elements of the crime in this case were proven beyond a reasonable doubt."

{¶ 51} A manifest weight challenge questions whether the state has met its burden of persuasion. *State v. Thompkins*, 78 Ohio St .3d 380, 386, 678 N.E.2d 541 (1997). In considering such a challenge the court of appeals, acting as a "thirteenth juror," reviews the record, weighs the evidence and all reasonable inferences, and determines whether in resolving evidentiary conflicts the jury clearly lost its way so as to create a manifest miscarriage of justice so as to warrant the extreme remedy of a reversal. *Id.*

{¶ 52} In this case, after weighing all of the evidence and all reasonable inferences, we find no indication that the jury lost its way so as to create a manifest miscarriage of justice and warrant the reversal of appellant's conviction. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 53} In his fourth assignment of error, appellant asserts that the trial court erred by overruling his objection to statements made by the prosecutor during closing arguments. Specifically, appellant argues that, during closing, the prosecutor referred to the 1984 Harley Davidson motorcycle which appellant was observed riding, and to which the number on the Yamaha's license plate, 85NNZ, was registered, as follows:

> Well, these records [sic] 1984 Harley Davidson, blue in color. Everybody said that was something similar. [Appellant's] own mother just said, late seventies, early eighties, Harley Davidson. A really old one. Now she called it black, I think a couple of other witnesses called it dark in color, but you also heard a [sic] least two people, I think including Samantha [Poling] say it was blue. That's not a coincidence. Now whether that Harley is stolen as well, who knows?

{¶ 54} Appellant's counsel objected immediately following the above remarks. The trial court overruled the objections, stating that "this is argument," and the trial continued. On appeal, appellant argues that the prosecutor's remark amounts to prosecutorial misconduct because appellant was unduly prejudiced by the implication that the Harley Davidson motorcycle may have also been stolen. Appellant concludes that such a comment implied to the jury that appellant engaged in a "pattern of behavior" that was not supported by any evidence in the record.

{¶ 55} Generally, "[p]rosecutorial misconduct occurs when the prosecutor makes a statement that is improper and the improper statement causes prejudice to appellant." *State v. Stowers*, 6th Dist. Erie No. E-12-055, 2014-Ohio-147, ¶ 39, citing *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). "Although prosecutors may not state their personal beliefs regarding guilt and credibility, they may characterize a witness as a liar, or a claim as a lie, if the evidence reasonably supports that characterization." *State v. Howard*, 1st Dist. Hamilton No. C-130058, 2014-Ohio-655, ¶ 31.

{¶ 56} Appellant conceded at trial that the Yamaha motorcycle was stolen. In addition, several witnesses, including appellant's mother, testified that appellant was seen riding a blue or black Harley Davidson motorcycle in the summer of 2012. Finally, it is undisputed that the license plate on the Yamaha was registered to a blue Harley Davidson motorcycle owned by someone named Leonard Hill, while the registration sticker bore the number assigned to Webken's stolen Yamaha motorcycle.

{¶ 57} On consideration, we do not find that the prosecutor's characterization of the Harley Davidson as possibly stolen was improper in the context of closing argument, or that appellant was overly prejudiced thereby. Appellant's fourth assignment of error is not well-taken.

{¶ 58} In his fifth assignment of error, appellant asserts that the jury's verdict and the trial court's judgment entries are "improper and erroneous" and, therefore, should be set aside. In support, appellant argues that the jury verdict stated that appellant was guilty of violating "R.C. 2913.51(A), a felony of the 5th degree," while the indictment charged appellant with a fourth degree felony, and the trial court sentenced appellant to serve 12 months in prison after finding that he was "convicted by a jury of his peers of one count of Receiving Stolen Property, a felony of the 4th degree." Appellant further argues that the trial court compounded its error by advising the jury that he was charged with a fifth degree felony. We disagree with appellant, for the following reasons.

{¶ 59} Because appellant did not object to the allegedly defective jury verdict forms and otherwise did not attempt to correct the trial court's error, he has waived all

but plain error pursuant to Crim.R. 52(B). For the plain error doctrine to apply, appellant must demonstrate "an obvious error that affected substantial rights under exceptional circumstances. Crim.R. 52(B); *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). An alleged error cannot rise to the level of plain error unless the outcome clearly would have been different if not for the error. *State v. Waddell*, 75 Ohio St.3d 163, 166, 661 N.E.2d 1043 (1996)." *State v. Shaw*, 7th Dist. Mahoning No. 12 MA 95, 2013-Ohio-5292, ¶ 87.

{¶ 60} As stated above, appellant was convicted of one count of receiving stolen property in violation of R.C. 2913.51 which states, in relevant part, that:

> (A) 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.
>
> * * *
>
> (C) Whoever violates this section is guilty of receiving stolen property. * * * If the property involved is a motor vehicle, * * * receiving stolen property is a felony of the fourth degree * * *.

{¶ 61} The indictment correctly stated that appellant was charged with a violation of R.C. 2913.51(A), "a felony of the fourth degree * * *." A copy of the indictment was supplied to the jury during its deliberations. The stolen item in this case was a motorcycle, which undisputedly qualifies as a "motor vehicle" pursuant to R.C. 2913.51. In addition, as set forth above, appellant's trial counsel acknowledged at the pretrial

hearing, and again at the sentencing hearing, that appellant was convicted of and was to be sentenced for a fourth-degree felony, and the final judgment of sentencing, issued on May 8, 2013, stated that appellant was convicted of a fourth degree felony. Finally, pursuant to R.C. 2929.14(A)(5), the range of sentencing for a fourth degree felony is from six to 18 months, while the maximum sentence for a fifth degree felony is 12 months. In this case, the trial court sentenced appellant to a 12-month prison term, well short of the maximum sentence for a fourth degree felony, and not beyond the maximum for a fifth degree felony.

{¶ 62} On consideration of the foregoing, we cannot say that the outcome of appellant's trial, or the sentence imposed by the trial court, clearly would have been different but for the erroneous reference to a fifth degree felony on the jury verdict form. Accordingly, we find no plain error and appellant's fifth assignment of error is not well-taken.

{¶ 63} The judgment of the Fulton 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

Thomas J. Osowik, J. _____
JUDGE

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