[Cite as *State v. Murray*, 2009-Ohio-2580.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91268

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

AMBROSE MURRAY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Common Pleas Court
Case No. CR-505052

BEFORE: Boyle, J., Kilbane, P.J., and Sweeney, J.

RELEASED: June 4, 2009

JOURNALIZED:

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MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Ambrose Murray, appeals his conviction for receiving stolen property. Finding no merit to the appeal, we affirm.

{¶ 2} Murray was indicted for receiving stolen property, namely, a motor vehicle, a violation of R.C. 2913.51(A). He pled not guilty to the charge, and the matter proceeded to a bench trial where the following evidence was presented.

{¶ 3} Oscar Frazier lived in an apartment building on Shaker Boulevard and parked his vehicle, a 1997 Bonneville, in the indoor parking garage near his building. He testified that he had parked his vehicle in the garage sometime in the evening on December 15, 2007, but that the vehicle was gone the following morning. He contacted the police and reported the vehicle stolen. Frazier further testified that he locked his vehicle but left his wallet, a set of car keys, and the vehicle's registration in the glove compartment of the car.

{¶ 4} Frazier stated that he had installed a stereo system in the car, worth approximately $2,300, which included a "DVD radio" on the dashboard, "12-inch woofers" by the rear windows, and speakers located on the front doors.

{¶ 5} On December 17, Frazier received notice from the impound lot that his vehicle had been recovered. Frazier testified that the vehicle was "trashed" – "[t]here [were] cigarette butts, cups, property that wasn't mine, tools, *** crack pipes." The stereo was gone – "it was stripped out"; the wires connecting the stereo system and speakers were "pulled out on the passenger side" and "driver side." The covers on

the door speakers were missing and all the other speakers were gone. Frazier further testified that his personal items in the glove compartment had been taken.

{¶ 6} Frazier identified at trial the tools and tool box found in his vehicle on the floor of the passenger side. The tools, which did not belong to him, included a saw, wrench, scissor set, razor blade, and knife.

{¶ 7} Cleveland police officer Jeffrey Cox testified that he and his partner were patrolling the area of Kinsman Avenue in the early hours of December 17, 2007 when they observed a vehicle with four occupants traveling eastbound. They randomly ran the license plate and discovered that the vehicle had been reported stolen. The vehicle pulled into a gas station at East 139th and Kinsman, and all four occupants went inside the store. The officers parked across the street and called for backup. The officers ultimately pulled behind the vehicle, blocked it from leaving, and ordered all four occupants out at gunpoint when the vehicle attempted to exit the parking lot. The officers apprehended Murray, the driver of the vehicle, and placed him in their police vehicle. Upon questioning by Officer Cox's partner, Murray stated that he "traded crack cocaine for the vehicle." Murray stated that he knew the owner by his first name only, but could not recall it.

{¶ 8} Cleveland detective Larry Russell followed up with the investigation and interviewed Murray while he was in jail. Det. Russell testified that Murray reiterated the same story he told the police earlier, i.e., he rented the car from the owner in exchange for crack cocaine. Murray further told Det. Russell that he knew the owner

– "a guy that lived in Shaker Square" – but could not remember his name.

{¶ 9} On cross-examination, Det. Russell testified that his experience in dealing with these so called "crack rentals" has been mixed: some involve actual owners leasing their car for crack; others involve stolen vehicles exchanged for crack.

{¶ 10} As its final witness and over the objection of defense counsel, the state offered the testimony of Cleveland lieutenant Ronald Timm. Lt. Timm testified as to his involvement with a 1990 arrest of Murray involving a stolen vehicle. In that case, Lt. Timm observed Murray in the driver's seat of a parked car that had its "door lock punched" and "column peeled." The vehicle had been reported stolen. In explaining his possession of the vehicle, Murray told the police that "the owner of the car was a Charles and that he obtained it by giving this male a rock of crack cocaine."

{¶ 11} The trial court found Murray guilty on the single count of receiving stolen property (a vehicle) and sentenced him to 18 months in prison. Murray appeals, raising the following two assignments of error:

{¶ 12} "[I.] The trial court erred by admitting testimony regarding a 1990 incident involving the defendant and a police officer as Rule 404(B) evidence.

{¶ 13} "[II.] The trial court erred by rendering a verdict that was against the manifest weight and sufficiency of the evidence and contrary to law."

Other Acts Evidence

{¶ 14} In his first assignment of error, Murray argues that the trial court

erroneously allowed the state to introduce evidence of his prior arrest involving a stolen motor vehicle and that such evidence was not admissible under Evid.R. 404(B). He contends that the prior bad act was too remote in time, i.e., 17 years, and that it did not share enough common features with the instant case.

{¶ 15} Evid.R. 404(B) provides:

{¶ 16} "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶ 17} This rule is consistent with R.C. 2945.59, which states:

{¶ 18} "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

{¶ 19} "Because R.C. 2945.59 and Evid.R. 404(B) codify an exception to the common law with respect to evidence of other acts of wrongdoing, they must be construed against admissibility, and the standard for determining admissibility is strict." *State v. Broom* (1988), 40 Ohio St.3d 277, 281-282. But if the enumerated

matter, such as knowledge or absence of mistake, is a material issue at trial and the other acts evidence tends to show that matter by substantial proof, then the evidence of the other acts may be admissible for that limited purpose. *State v. Wightman*, 12th Dist. No. CA2006-12-045, 2008-Ohio-95, ¶26, citing *Broom* at 281-282; see, also, *State v. Lowe* (1994), 69 Ohio St.3d 527, 530. Like all evidence, however, other acts evidence is still subject to the limitations provided in Evid.R. 402 and 403; therefore, the proffered evidence must be relevant and its probative value must outweigh its potential for unfair prejudice. *State v. Gaines*, 8th Dist. No. 82301, 2003-Ohio-6855, ¶16.

{¶ 20} Here, the state offered Lt. Timm's testimony regarding Murray's earlier arrest for receiving stolen property for the purpose of demonstrating "lack of mistake" or "knowledge." Specifically, the state sought to introduce the evidence to counter the defense's theory that Murray did not know the vehicle was stolen. Given that the circumstances of his prior arrest involved an alleged crack rental and were nearly identical to the current case, the state contended that the evidence was relevant to show that Murray knew or should have known that the car was stolen. We agree.

{¶ 21} In discussing the admissibility of other acts evidence for the purpose of establishing absence of mistake, the Ohio Supreme Court in *State v. Burson* (1974), 38 Ohio St.2d 157, 159, set forth the following standard:

{¶ 22} "When the purpose of evidence of other acts is to show the absence of mistake or accident on the part of the defendant in committing the offense charged, it

must be shown that a connection, in the mind of the defendant, must have existed between the offense in question and the other acts of a similar nature. See *State v. Moore* (1948), 149 Ohio St. 226. The other acts of the defendant must have such a temporal, modal, and situational relationship with the acts constituting the crime charged that evidence of the other acts discloses purposeful action in the commission of the offense in question. The evidence is then admissible to the extent it may be relevant in showing the defendant acted in the absence of mistake or accident."

{¶ 23} Murray argues that the prior arrest did not share enough common features with the instant case to be admissible. Specifically, he contends that the condition of the vehicle involved in the prior arrest, i.e., "a punched lock" and "peeled steering column," significantly distinguishes it from this case. But Murray focuses only on the conditions of the vehicles and ignores what uniquely connects these two cases: the manner in which he received the stolen vehicles – a crack rental. The evidence of Murray's earlier crack rental involving a stolen vehicle is probative to the issue of knowledge and lack of mistake. Simply put, if Murray previously obtained a stolen vehicle in a crack rental, he should have been highly suspicious that the vehicle he obtained years later as part of another crack rental was also stolen.

{¶ 24} And while we recognize that the 17 years between the two incidents would ordinarily render such evidence inadmissible, we decline to say that the trial court abused its discretion in admitting the evidence given the strong similarities

between the two incidents.[1] Indeed, weighing the probative value of evidence versus its prejudicial effect is a judgment call that lies with the trial court. As repeatedly recognized by the Ohio Supreme Court, "'the trial court has broad discretion in the admission *** of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere.'" *State v. Maurer* (1984), 15 Ohio St.3d 239, 265, quoting *State v. Hymore* (1967), 9 Ohio St.2d 122, 128. See, also, *State v. Lowe* (1994), 69 Ohio St.3d 527, 532.

{¶ 25} Our holding is further supported by the fact that this case involved a bench trial. Trial judges are presumed to know the law and apply it properly. Thus, contrary to Murray's assertion, we are confident that the trial court considered this evidence for its proper purpose, i.e., to prove knowledge or lack of mistake, and not simply for the proposition that Murray acted in conformity with a prior bad act. See *State v. Craig*, 4th Dist. No. 01CA8, 2002-Ohio-1433, ¶13 (concern that other acts evidence will be improperly considered by trier of fact does not exist in a bench trial).

{¶ 26} Accordingly, the first assignment of error is overruled.

Sufficiency and Manifest Weight of the Evidence

{¶ 27} In his second assignment of error, Murray argues that his conviction is

[1]We also note that the usual concern of the reliability of testimony relating to an incident that occurred many years ago does not exist in this case. Here, there is no dispute that Murray was arrested for receiving stolen property under the circumstances described by Lt. Timm. Further, Lt. Timm relied on a police report issued in connection with Murray's 1990 arrest as opposed to relying on his own recollection when testifying.

against the manifest weight of the evidence and not supported by sufficient evidence.

{¶ 28} A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the State has met its burden of production at trial. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. On review for sufficiency, courts are to assess not whether the State's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. Id. 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* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 29} A challenge to the manifest weight of the evidence, on the other hand, attacks the credibility of the evidence presented. *Thompkins*, supra, at 387. Because it is a broader review, a reviewing court may determine that a judgment of a trial court is sustained by sufficient evidence, but nevertheless conclude that the judgment is against the weight of the evidence. Id., citing *State v. Robinson* (1955), 162 Ohio St. 486, 487.

{¶ 30} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as a "thirteenth juror," and, after "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." *Thompkins*, supra, at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." Id.

{¶ 31} Murray was convicted of receiving stolen property, a violation of R.C. 2913.51(A), which provides 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." Murray argues that, absent the improper admission of Lt. Timm's testimony regarding the 1990 arrest, there was no evidence that he knew or should have known that the car was stolen. We disagree.

{¶ 32} As discussed above, the trial court did not abuse its discretion in allowing the admission of the other acts evidence. But even excluding this evidence, the record contains sufficient evidence to support the conviction.

{¶ 33} Contrary to Murray's assertion, the state presented evidence, apart from Lt. Timm's testimony, that a reasonable trier of fact could infer that Murray knew or should have know that the vehicle was stolen. For example, Frazier testified that

there were wires exposed throughout the car and that tools were found on the passenger floor of the vehicle. A reasonable trier of fact could have easily concluded that the tools were used to manipulate the locks as well as remove the stereo system. Further, Murray was unable to provide any significant identifying information regarding the alleged lessor of the vehicle. Thus, the condition of the vehicle and the manner in which Murray obtained the vehicle, namely, a crack rental, constitutes sufficient circumstantial evidence that Murray knew or should have known that the vehicle was stolen.

{¶ 34} Further, the mere fact that the outer appearance of the vehicle did not immediately reveal that the vehicle was stolen does not render the verdict against the weight of the evidence. See *State v. Butler* (Dec. 16, 1999), 8th Dist. No. 75487.

{¶ 35} Accordingly, we find that the state presented sufficient evidence as to the sole count of the indictment and that the verdict is not against the manifest weight of the evidence.

{¶ 36} The second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
JAMES J. SWEENEY, J., CONCUR