[Cite as *State v. Bowden*, 2009-Ohio-3598.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92266

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KEVIN BOWDEN

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED IN PART;
AFFIRMED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-513208

BEFORE: McMonagle, J., Gallagher, P.J., and Kilbane, J.

RELEASED: July 23, 2009

JOURNALIZED:

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Kevin Bowden, appeals his theft of a motor vehicle and possession of drugs convictions. We affirm the possession of drugs conviction, but reverse and remand with instructions to vacate the theft conviction.

{¶ 2} Bowden waived his right to a jury trial on the two above-mentioned charges. After the conclusion of the State's case, Bowden made a Crim.R. 29 motion for acquittal, which the court denied. Bowden then testified, and at the conclusion of his case, renewed his Crim.R. 29 motion, which the court again denied. The court found him guilty of both counts and sentenced him to a two-year prison term.

{¶ 3} The trial testimony established the following. Siobhan Chetnick owned a 2000 Pontiac Grand Am. On the evening of June 24, 2008, Chetnick allowed her boyfriend, William Baker, to borrow the car. Baker and Chetnick's neighbor, Tony Drake, went to a party, where Baker met Bowden. Baker and Bowden were drinking and doing drugs (crack cocaine). During the course of the evening, the two left the party several times in Chetnick's vehicle to obtain more drugs, beer, and food. Bowden testified that Baker never told him the vehicle belonged to Chetnick, and at one point, when Bowden noticed they were being

followed by the Lakewood police, he asked Baker if the car was his, to which Baker responded affirmatively.

{¶ 4} Later in the evening or early morning of the following day, Bowden wanted to leave the party again to get more drugs, but Baker did not. Baker told Bowden that he could go by himself in the Grand Am.

{¶ 5} Meanwhile, Chetnick became concerned when Baker had not returned home. She contacted Drake (her neighbor who had left with Baker) to find out where he and Baker had been. Upon learning of the area where the party was, Chetnick drove around it (obviously in another vehicle), looking for her car. Sure enough, she saw her car and "flagged down" its driver, Bowden. Chetnick told Bowden that the car was hers and she wanted it back. Bowden told Chetnick that Baker had given him permission to borrow the car, he still needed to run an errand, and asked Chetnick to use the car for another 20 minutes. He showed her where he lived, gave her his cell phone number, and had her call the number in his presence so that she would know it was legitimate. Both Chetnick and Bowden testified that they did not know each other. Chetnick agreed to allow Bowden to use the car for another few minutes.

{¶ 6} After about 30 minutes, however, Bowden had not returned the car to the agreed meeting place. Chetnick testified that she called Bowden's cell phone for a couple hours, got no response, and therefore called the police to report the car stolen. She continued calling Bowden, however, and he finally

answered his phone. Chetnick told Bowden to meet her at a specific gas station so that she could retrieve her car, and he agreed. She did not tell him that she had already reported her car as stolen to the police.

{¶ 7} Chetnick testified that Baker drove her to the meeting location, and despite the fact that Baker was the one who was "acquainted" with Bowden, and it was then nighttime, she got into the car with Bowden when he arrived because she "was just trying to talk him into giving [her] car back." She again did not mention to Bowden that she had already reported the car as stolen because she "didn't want to * * * make it worse than it was."

{¶ 8} Chetnick testified that when she got into the car with Bowden, he asked to be dropped off somewhere and she agreed. According to her, he drove them to an alley, then started "acting strangely," talking about a gun, and looking for something in the car. Chetnick "freaked out," got out of the car, called the police, and left the area. She denied asking Bowden for drugs, being a drug user, and having drugs and/or paraphernalia in her car.

{¶ 9} Bowden, however, testified to a different version of events. According to him, when Chetnick got into the car with him, she asked him if he still needed the car. Bowden told her he still needed it, and she agreed to letting him use it in exchange for him giving her some drugs. Bowden testified that he showed her what drugs he had, and then proceeded to an alley so that he could give her the drugs in a less conspicuous location. According to Bowden, when he

went to give Chetnick the drugs, they were gone and he asked her if she had taken them. Chetnick denied taking the drugs, "jumped" out of the car, and disappeared from Bowden's sight.

{¶ 10} Bowden was apprehended moments later as he pulled back into the gas station lot. A crack pipe with residue was recovered from the driver's seat. Bowden denied that it belonged to him. No weapon was recovered.

{¶ 11} In his two assignments of error, Bowden challenges the sufficiency and weight of the evidence.

{¶ 12} An appellate court's function in reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, 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* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 13} While the test for sufficiency requires a determination of whether the prosecution has met its burden of production at trial, a manifest weight challenge questions whether the prosecution has met its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541. When considering a manifest weight claim, a reviewing court must examine the

entire record, weigh the evidence, and consider the credibility of witnesses. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80, 434 N.E.2d 1356. The court may reverse the judgment of conviction if it appears that the factfinder "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins* at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. A judgment should be reversed as against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387. A finding that a conviction was supported by the manifest weight of the evidence necessarily includes a finding of sufficiency. Id. at 388.

THEFT OF A MOTOR VEHICLE

{¶ 14} Count 1 of the indictment charged Bowden with theft of a motor vehicle under R.C. 2913.02(A)(2), which provides:

{¶ 15} "(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:

{¶ 16} "* * *

{¶ 17} "(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent[.]"

{¶ 18} Upon review, we find the evidence was insufficient to sustain a theft conviction. The facts of this case appear to be more akin to an unauthorized use

of a motor vehicle under R.C. 2913.03(A),[1] rather than theft of a motor vehicle under R.C. 2913.02(A)(2). Specifically, while there was evidence that Bowden exceeded the scope of the consent given, there was no evidence that he acted with a purpose to deprive Chetnik of her car in the context of a theft offense under R.C. 2913.02(A). Exceeding the consent given can only support a theft conviction when there is evidence that the purpose in exceeding that consent was to ultimately deprive the owner of the property in question.

{¶ 19} In light of the above, the evidence was insufficient to sustain the theft conviction and, therefore, the case is reversed and remanded with instructions for the trial court to vacate the theft conviction.

DRUG POSSESSION

{¶ 20} R.C. 2925.11(A), governing drug possession, provides that "[n]o person shall knowingly obtain, possess, or use a controlled substance." Upon review, the manifest weight of the evidence supported the drug possession conviction and, therefore, the evidence for the conviction was also necessarily sufficient. Specifically, the crack pipe was in plain view on the driver's seat. Bowden testified that he had been making "drug runs" in Chetnick's car and getting high on crack cocaine. That testimony supported the conviction and the second assignment of error is overruled.

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[1]That statute provides: "(A) No person shall knowingly use or operate [a] * * * motor vehicle * * * without the consent of the owner or person authorized to give consent."

Reversed and remanded with instructions to vacate the theft of a motor vehicle conviction; the drug possession conviction is affirmed.

It is ordered that appellee and appellant equally share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for proceedings consistent with this opinion.

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

CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, P.J., and
MARY EILEEN KILBANE, J., CONCUR