[Cite as *State v. Emery*, 2013-Ohio-208.]

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

State of Ohio — Court of Appeals No. L-11-1228

Appellee — Trial Court No. CR0201101253

v.

Edward Emery — **DECISION AND JUDGMENT**

Appellant — Decided: January 25, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, Brenda J. Majdalani and Bruce J. Sorg, Assistant Prosecuting Attorneys, for appellee.

Tim A. Dugan, for appellant.

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YARBROUGH, J.

{¶ 1} Defendant-appellant, Edward Emery, appeals his conviction following a one-day jury trial for receiving stolen property in violation of R.C. 2913.51, a fourth degree felony. The Lucas County Court of Common Pleas imposed sentence on August 29, 2011. Emery has timely appealed.

I. Trial Record

{¶ 2} The material facts are not in dispute. The story begins on January 23, 2011, when Roque Brown, an off-duty Toledo police officer, was returning a landscaping trailer that he had borrowed to Yoder Machinery Sales, located in Holland, Ohio. Before Brown became a police officer, he had once worked there and knew the owner and several of the employees. The business, housed in a large warehouse, buys and sells metal-shaping equipment such as dies, rollers, lathes and stamping devices. When Brown arrived, it was 11:15 a.m. on a Sunday morning, a light snow was falling, and Yoder Machinery was closed. From the front parking lot, a narrow road runs alongside the warehouse and then around behind it to an area where unused trailers are kept and scrap metals stored. Brown was maneuvering his truck to get the trailer parked next to the building when a "burnt orange Mazda Miata" came out from the back and started up the road.

{¶ 3} The Miata slowed to a stop about five feet from the passenger side of Brown's truck. The driver started to speak and Brown, because it was hard to hear, got out and came around to get closer. Brown testified that the driver said "[he was] just using the bathroom, that [he] had to go, and they were just leaving right away." The driver was "an older white male, had white hair, and was kind of scruffy looking. Had a beard, unshaven in appearance." Brown added that the man's "hair was wild and wavy, looked like a lion's mane and he was unshaven - looked unkempt."

{¶ 4} Finding this behavior suspicious, Brown noted the license plate number as the wild-haired man in the orange Miata drove off slowly into the cold winter morning. Brown then called a person he still knew at the business, Jake Yoder, and described what happened and gave him the license number. Yoder responded that no one should have been on the property or behind the building at that time, and he believed the man was stealing scrap metal. Yoder then contacted the Holland Police Department.

{¶ 5} Later that morning at the warehouse, Yoder met Holland police officer, Jon Dellabona, and related Brown's information as they went to the back. Checking the ground carefully, Dellabona could detect no "yellow snow" or other telltale trace of anyone having "used the facilities" earlier that morning. Yoder, however, discovered something. A large industrial wire basket that had been filled with triangle-shaped aluminum castings, called "chucks" or "chuck jaws," was now empty. There were fresh footprints in the snow around the basket as well as tire tracks nearby. The pattern of the tire tracks indicated that a vehicle had been backed up to the basket.[1]

{¶ 6} Eventually Dellabona traced the license plate number to Emery's wife, Hedwig, and obtained the address of their home in Sylvania, Ohio. Arriving there early on the morning of January 24, Dellabona observed a large number of aluminum chucks scattered around the yard, although the recent snowfall had covered some of them. Some chucks were lying in piles, while others were strewn about individually near the

[1] At trial Yoder explained that aluminum chucks are used in metal work in sets of threes to hold fixtures for lathes and that an individual chuck could weigh 65 pounds.

driveway. Most were in "plain view" from the street and a number lay within 10 to 12 feet of a side door to the home. More were found in the back yard. Dellabona then sent another Holland officer, Robert Coates, to get a search warrant from Sylvania Municipal Court.

{¶ 7} After Coates left, an orange Mazda Miata pulled into the driveway bearing the same license plate number Brown had given Yoder some twenty hours earlier. Dellabona confronted the male driver, asked for identification, and found that he was not Emery but a man named David Post. The officer, checking further, soon learned that Post had active warrants for his arrest as well as a suspended driver's license. He was taken into custody and placed in Dellabona's vehicle. Other officers arrived to help secure the scene and Coates soon returned with the search warrant. Before proceeding on the warrant, however, Dellabona summoned both Brown and Yoder to the residence. Once there, Yoder confirmed that the chucks in Emery's yard were the same ones missing from his business. Brown likewise identified the Miata as the same vehicle he saw at Yoder's, but indicated that Post had not been its driver.

{¶ 8} At that point it was now mid-morning, and Dellabona and Coates decided to act on the warrant. When yelling and repeatedly banging on the rear door of the home prompted no response, the officers kicked in the door and entered the kitchen. This commotion flushed out Emery and his wife from an adjacent bedroom. Emery was now clean-shaven. Dellabona described him as having "the appearance of a man [who] is carrying a beard for some time and then shaves it off suddenly. There [were] slight tear

marks where hair would have been pulled out instead of shaving cleanly. He was bleeding slightly in a couple of small spots, not so much from cuts, but from possibly hair being pulled."

{¶ 9} The officers explained why they were there and armed with the search warrant. Emery denied knowing how Yoder's chucks got on his property. He indicated that he did sculpturing and people often left materials at his house. In a written statement to Dellabona, Emery stated that the Miata had "mechanical problems" and that early on the evening of January 22 he had given Post the car to repair.

{¶ 10} At trial, Brown identified Emery, now *sans* beard, as the driver of the orange Miata he encountered at Yoder Machinery. Yoder testified that as many as 75 chucks had been in the basket before the theft, although only 22 were recovered from Emery's yard. More than 50 were still missing. He explained that each matching set of three chucks has a value between $900 and $1,000, while an individual chuck is worth about $250. No one had been given permission to remove the chucks from company property. When the state concluded its case-in-chief, Emery moved for a Crim.R. 29 judgment of acquittal. After the trial court denied this motion, Emery rested his case without testifying or calling any defense witnesses. A guilty verdict followed.

II. Analysis

{¶ 11} Emery has assigned two errors for our review:

> 1) Appellant's conviction was not supported by legally sufficient evidence.

2) Appellant's conviction fell against the manifest weight of the evidence.

A. Sufficiency

{¶ 12} A sufficiency review entails an elements-based analysis of the evidence. "In essence, sufficiency is a test of adequacy." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). An appellate court must determine whether the state presented enough evidence on each element of the crime to allow the case to go to the jury. *Id.* No assessment of weight—persuasive force—is involved. "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 (1981), paragraph two of the syllabus, *superseded by constitutional amendment on other grounds*, *State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668 (1997).

{¶ 13} R.C. 2913.51(A) defines the elements of receiving stolen property:

{¶ 14} "(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."[2]

{¶ 15} This reasonably plain language means that the state need establish only two elements to gain a conviction for this offense: (1) the defendant received, retained or

[2] On the date of Emery's conviction, this statute classified the offense as a felony of the fourth degree if "the value of the property involved" was $5,000 or more but less than $100,000. R.C. 2913.51(C).

disposed of property which was not his own; and (2) the defendant knew or had reasonable cause to believe the property was stolen. Theft is not an element and the state is not required to prove an underlying theft, although in certain circumstances, and with certain property, an act of theft will be established nonetheless. *State v. Hill*, 4th Dist. No. 02CA-11, 2002-Ohio-7368, ¶ 11.

{¶ 16} Emery does not challenge the fact that the chucks were removed from Yoder Machinery by theft nor their value. Instead, Emery argues that the state's evidence failed to show he "received" the chucks within the meaning of the first element above. He highlights the fact that the chucks were recovered outside his home, not within it, and he was not seen handling any of the chucks. But if these points purport to create some distinction, they are without a relevant legal difference. Emery does not deny his awareness of the chucks, nor that they arrived in his yard *en mass* the day after being stolen.

{¶ 17} "'Receive' is not defined in the statute, but a generally accepted definition of receive is to acquire 'control in the sense of physical dominion over or the apparent legal power to dispose of said property.'" *State v. Rivers*, 9th Dist. No. 10CA009772, 2011-Ohio-2447, ¶ 6, quoting *State v. Jackson*, 20 Ohio App.3d 240, 242, 485 N.E.2d 778 (1984). Further, we have held that a conviction for this crime may be based on the defendant's "*constructive* possession of the property. Constructive possession exists when an individual exercises dominion and control over an object, even though that object may not be within his immediate physical possession." *State v. Rodriguez*, 6th

Dist. No. WD-05-026, 2006-Ohio-2121, ¶ 38. (Emphasis added.) Dominion and control over recently stolen items, and therefore constructive possession, may be inferred from the discovery of those items on the defendant's premises or residential property *and* his awareness of them. Actual possession need not be shown. *State v. Hankerson,* 70 Ohio St.2d 87, 91, 434 N.E.2d 1362 (1982); *State v. Conway,* 10th Dist. No.03AP-585, 2004-Ohio-1222, ¶ 18. In this sense the state sufficiently demonstrated that Emery "received" the chucks.

{¶ 18} Emery next maintains there was no *direct* evidence that he knew or would have had a reasonable basis for believing the chucks were the product of a theft offense—the second element above. When a disputed element of an offense is not susceptible of proof by direct evidence, circumstantial evidence may be used to provide an inference of guilt. *State v. Hollenstein,* 6th Dist. No. L-08-1164, 2009-Ohio-4773, ¶ 27. In a prosecution for receiving stolen property, the jury may infer guilty knowledge when the defendant's possession of recently stolen property either goes unexplained or is not satisfactorily explained in the context of the surrounding circumstances, as shown by the evidence. *State v. Arthur,* 42 Ohio St.2d 67, 68-69, 325 N.E.2d 888 (1975).[3]

[3] "'Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which [a jury] may reasonably draw the inference and find * * * that the person in possession knew that the property had been stolen.'" *Id.* at 68, quoting *Barnes v. United States,* 412 U.S. 837, 839, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973).

{¶ 19} In determining whether a rational jury could circumstantially conclude, beyond a reasonable doubt, that the defendant knew or had reasonable cause to believe that property he received was stolen, courts have identified several considerations to guide the jury's drawing of the inference. These include "(a) the defendant's unexplained possession of the merchandise, (b) the nature of the merchandise, (c) the frequency with which such merchandise is stolen, (d) the nature of the defendant's commercial activities, and (e) the relatively limited time between the theft and the recovery of the merchandise." *State v. Davis*, 49 Ohio App.3d 109, 112, 550 N.E.2d 966 (8th Dist.1988); *see also State v. Collins*, 10th Dist. No 11AP-130, 2012-Ohio-372, ¶ 14.

{¶ 20} On this record there is little question that sufficient evidence was presented from which the jury could infer, beyond a reasonable doubt, that Emery knew or had reasonable cause to believe the chucks were stolen property. Emery was in receipt of a substantial number of the chucks less than 24 hours after they went missing from Yoder Machinery. The chucks themselves are a unique type of material—by shape, weight, and the role they serve in fabrication work—and, being aluminum, their inherent value for resale is an obvious attraction.

{¶ 21} More important is the utter weakness of Emery's explanation for their sudden presence at his home. Because Emery neither testified nor presented any witnesses, the only explanation the jury heard came from Officers Dellabona and Coates. They relayed Emery's pithy statement that went no further than to blame unknown

persons who routinely drop off materials for his alleged artistic use.[4] That statement, notably, did not indicate when the chucks arrived, how they were transported, or the identity of the person or persons involved. *State v. Terry*, 186 Ohio App.3d 670, 2010-Ohio-1604, 929 N.E.2d 1111, ¶ 33 (4th Dist.2010) ("[Defendant] did not testify and thus explain why he thought the [forged] check was legitimate. All other circumstances could reasonably indicate to jurors that [he] knew the check was stolen."); *State v. Caldwell*, 10th Dist. No. 99-AP-1107, 2000 WL 1707841 (Nov. 16, 2000) (noting that defendant neither testified nor called witnesses on his behalf to rebut the inference of guilty knowledge, and finding his "only" explanatory statement to police "weak"). Nor did Emery, as the state points out, attempt to report the obvious illegality of someone "dumping" 65-pound blocks of aluminum all over his yard.

{¶ 22} Undoubtedly strengthening these circumstantial considerations was the license plate match that led to Emery's wife and the *direct* evidence Brown provided in his identification testimony. Emery's statement that he gave Post the car on January 22 implied that Post had been driving the orange Miata the morning the chucks disappeared. This set up a direct conflict with Brown's testimony, given that he placed Emery in the car after it emerged from behind the warehouse, and his testimony went unrebutted. If believed, as it indeed was, it more than sufficed to strengthen the reasonableness of

[4] In his testimony, Coates quoted Emery's explanation for the chucks strewn around his yard as: "'I don't know how that property got there. I have people give me stuff all the time. * * * I'm a sculptor,' that sort of stuff. Just real vague kind of [answers]."

inferring guilt, when juxtaposed with an otherwise tissue-thin explanation. In sum, the absence of a satisfactory explanation for the presence of the stolen chucks at Emery's residence, the surrounding circumstances, and Brown's testimony, all gave the jury sufficient evidence from which they could rationally conclude that the elements of receiving stolen property were proven beyond a reasonable doubt.

{¶ 23} Accordingly, the first assigned error is not well-taken.

B. Manifest Weight

{¶ 24} In criminal appeals challenging the jury's verdict on manifest-weight grounds, the issue is whether the state met its burden of *persuasion.* *Thompkins*, 78 Ohio St.3d at 390, 78 N.E.2d 541 (Cook, J. concurring). "Weight is not a question of mathematics, but depends on its *effect in inducing belief.*" (Emphasis sic.) *Id.* at 387. Sitting as the putative "thirteenth juror," the appeals court must "examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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.'" (Internal citations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 81.

{¶ 25} Where conflicts or gaps exist in the testimonial evidence that plainly bear on what the jury could reasonably believe or disbelieve, the standard to be met before overturning a guilty verdict based on manifest weight is necessarily a high one. *State v. Fell*, 6th Dist. L-10-1162, 2012-Ohio-616. Because guilty knowledge may be inferred

from the unexplained, or unsatisfactorily-explained, receipt of stolen property, it is appropriate, in weighing this type of evidence, to consider the personal interest and motivation of a defendant who tries to distance himself from such items upon discovery. Under the "reasonable cause to believe" standard of R.C. 2913.51(A), a denial of knowledge is tested for reasonableness against the context in which the denial is made. *Compare Woodrow v. Heintschel*, 194 Ohio App.3d 391, 2011-Ohio-1840, 956 N.E.2d 855 (6th Dist.2011), ¶ 41. We may also consider obvious gaps or discrepancies in a putative explanation, its vagueness, and whether any attempt was made to corroborate or prove it when the opportunity existed. *Caldwell*, *supra*, 10th Dist. No. 99-AP-1107, 2000 WL 1707841.

{¶ 26} Emery's jury obviously attached little credibility to his claim that he did not know how the chucks got to his home—except, possibly, as material passed on to a self-described sculptor by an unknown patron in a random act of largesse. We see no reason to second-guess their assessment.

{¶ 27} This case, moreover, is somewhat unique in that the weight of Brown's identification testimony impacts what would otherwise be a purely circumstantial case. Notwithstanding Emery's haphazard removal of his beard, Brown confirmed that he was behind the wheel of the Miata, not Post. The jury was fully entitled to believe Brown and to infer that Emery had tried to alter his appearance shortly before the police descended on him with the search warrant.

{¶ 28} Having reviewed the entirety of the trial transcript, we conclude that the jury did not "clearly [lose] its way" in finding Emery guilty. Nor are we persuaded that "the evidence weighs heavily against the conviction." *Thompkins*, 78 Ohio St.2d at 386-387, 678 N.E.2d 541.

{¶ 29} Accordingly, the second assigned error is not well-taken.

III. Conclusion

{¶ 30} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is hereby affirmed. Pursuant to App.R. 24, costs are assessed against appellant.

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, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE