[Cite as *State v. Patton*, 2019-Ohio-2769.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 18CA9
v.	:	
CASEY PATTON,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	**RELEASED: 02/04/2**019

APPEARANCES:

Marley C. Nelson, Assistant State Public Defender, Columbus, Ohio, for appellant.

Anneka P. Collins, Highland County Prosecuting Attorney, and Molly Bolek, Highland County Assistant Prosecutor, Hillsboro, Ohio, for appellee.

Hoover, J.

{¶1} Defendant-appellant, Casey W. Patton ("Patton"), appeals the judgment of the Highland County Court of Common Pleas, which convicted him of Grand Theft of a Motor Vehicle and sentenced him to fifteen months of incarceration. On appeal, Patton contends that he was denied a fair trial due to prosecutorial misconduct; that the trial court abused its discretion in ordering him to pay restitution; and that he was denied due process because the conviction was not supported by sufficient evidence. Having reviewed the record, we find that the prosecution's remarks did not prejudicially affect the outcome of Patton's trial. However, we find that the trial court did err in ordering restitution without competent, credible evidence in the record to establish the amount of the restitution to a reasonable degree of certainty.

{¶2} Therefore, the judgment of the trial court is affirmed in part and reversed in part; and this matter is remanded for further proceedings consistent with this opinion.

I. Facts and Procedural History

{¶3} On January 28, 2018, Steven O'Connor ("O'Connor") drove his girlfriend's blue 2014 Chevrolet Sonic ("Chevy Sonic") to Community Markets in Hillsboro, Ohio to pick up some items for dinner. (Tr. at 113). O'Connor parked the car and left it running for his two dogs while he ran into the store. (*Id.*). At that time, Patton was walking through Community Markets' parking lot. (Tr. at 101). After O'Connor entered the store, Patton entered the Chevy Sonic and drove away. (*Id.*).

{¶4} When O'Connor exited the store, he noticed that the Chevy Sonic was gone and promptly called the police. (Tr. at 114). Officer Jeremy Conley ("Officer Conley") of the Hillsboro Police Department responded to the scene and reviewed the surveillance video. (Tr. at 100–101). Officer Conley testified that he called OnStar, a GPS system in the Chevy Sonic, and was able to locate the vehicle. (Tr. at 106–107).

{¶5} Soon thereafter, Officer William Vandemark ("Officer Vandemark") of the Seaman Police Department received a report that the stolen vehicle was heading south on OH-247 towards Seaman, Ohio. (Tr. at 118–119). Officer Vandemark testified that he was heading north on OH-247 when he observed a blue Chevy Sonic heading southbound. (Tr. at 120). Officer Vandemark chased the Chevy Sonic and was eventually able to cut the vehicle off at an intersection in Seaman, Ohio. (Tr. at 120–121). Officer Vandemark identified Patton as the driver and sole occupant of the stolen vehicle at the time of the stop. (Tr. at 121).

{¶6} After being advised that a Seaman police officer had stopped the Chevy Sonic, Officer Conley arrived at the scene and made contact with Patton. (Tr. at 107). Officer Conley testified that Patton was wearing the same clothing as the male he observed in the surveillance video. (Tr. at 105, 108). According to Officer Conley, Patton had the Chevy Sonic for

approximately four and a half hours before the vehicle was recovered. (Tr. at 108). Officer Conley also testified that he did not look to see if there was any damage done to the vehicle. (Tr. at 110).

{¶7} Sometime after midnight, Officer Adam Day ("Officer Day") of the Hillsboro Police Department interviewed Patton at the Highland County Justice Center about the incident. (Tr. at 132). According to Officer Day, Patton claimed that he needed a ride; therefore, he took the car to New Vienna, Ohio to speak with his girlfriend and then headed to Seaman, Ohio to see his uncle. (Tr. at 130). Patton cooperated with the investigation and gave a voluntary statement. Patton explained that he "stole" the vehicle and told Officer Day where he had dropped O'Connor's dogs off. (Tr. at 130, 132). Patton also told Officer Day that he was planning to take the vehicle back to the parking lot after he visited his uncle. (Tr. at 131–132).

{¶8} On January 29, 2018, a police officer called Chelsea Wilson ("Wilson"), O'Connor's girlfriend and the owner of the blue 2014 Chevy Sonic. (Tr. at 136). Based on the information Patton gave to the police, Wilson and O'Connor were able to find their dogs. (Tr. at 136–137). Wilson was also able to pick her vehicle up that day from Seaman, Ohio. (Tr. at 136). Wilson and O'Connor both testified that the rear view mirror had been ripped out and that the items stored in the glove box were missing. (Tr. at 116, 136). O'Connor testified that the mirror was equipped with OnStar emblems, which allow you to make a call in case of an emergency. (Tr. at 117, 128). Further, Wilson and O'Connor both testified that they did not know Patton. (Tr. at 114, 135).

{¶9} On March 6, 2018, the Highland County Grant Jury indicted Patton on one count of Grand Theft of a Motor Vehicle, a fourth degree felony, in violation of R.C. 2913.02(A)(2). (OP 1). A jury trial was conducted on April 23, 2018. Before closing arguments, the jury was

instructed on both Grand Theft of a Motor Vehicle and the lesser included offense of Unauthorized Use of a Motor Vehicle. (Tr. at 160–168). After deliberating, the jury found Patton guilty of Grand Theft of a Motor Vehicle. (Tr. at 190). The trial court sentenced Patton to fifteen months of imprisonment, to be served consecutively to his sentence for violating his post-release control in a previous case. (Tr. at 194). In addition, the trial court ordered Patton to pay $158.00 in restitution to the victim. (Tr. at 195).

II. Assignments of Error

{¶10} On appeal, Patton assigns the following assignments of error for our review:

Assignment of Error I:

> Prosecutorial misconduct denied Mr. Patton a fair trial and due process of law. Fifth and Fourteenth Amendments to the United States Constitution; Article I, Sections 6 and 10, Ohio Constitution. (T.p. 177).

Assignment of Error II:

> The trial court abused its discretion when it ordered Mr. Patton to pay restitution. R.C. 2929.18 (T.p. 116–117, T.p. 136).

Assignment of Error III:

> Mr. Patton's conviction for grand theft of a motor vehicle was supported by insufficient evidence in violation of Mr. Patton's right to due process of law. Fifth and Fourteenth Amendments to the United States Constitution; Article I, Section 10, Ohio Constitution. (T.p. 189; April 23, 2018 Judgment Entry of Conviction of a Felony).

III. Law and Analysis

A. The Prosecution's Remarks Did Not Prejudicially Affect the Outcome of the Trial

{¶11} In his first assignment of error, Patton argues that the prosecutor made improper remarks in her rebuttal closing argument that prejudicially affected the outcome of the trial. According to Patton, the prosecutor's references to the Chevy Sonic's rear view mirror were improper because they were based on facts outside the evidence. Absent these remarks, Patton

argues that there was insufficient evidence to establish that Patton had a "purpose to deprive" the victim of her motor vehicle. Therefore, Patton asserts that a reasonable probability exists, absent the prosecutor's improper remarks, that the jury would not have found him guilty of Grand Theft of a Motor Vehicle.

{¶12} The State argues that the prosecutor's references to the Chevy Sonic's rear view mirror were proper because the statements relied on reasonable inferences and facts directly established through evidence. In the alternative, if the prosecutor's references to the rear view mirror were improper, the State argues that it is clear beyond a reasonable doubt that, absent the prosecutor's remarks, the jury would still have found Patton guilty of Grand Theft of a Motor Vehicle.

{¶13} "The test for prosecutorial misconduct is whether the conduct was improper and, if so, whether the rights of the accused were materially prejudiced." *State v. Purdin*, 4th Dist. Adams No. 12CA944, 2013-Ohio-22, ¶ 31, quoting *State v. Leonard*, 4th Dist. Athens No. 08CA24, 2009-Ohio-6191, ¶ 36, citing *State v. Smith*, 97 Ohio St.3d 367, 376, 780 N.E.2d 221 (2002). "To establish prejudice, a defendant must show that a reasonable probability exists that, but for the prosecutor's improper remarks, the result of the proceeding would have been different." *State v. Topping*, 4th Dist. Lawrence No. 11CA6, 2012-Ohio-5617, ¶ 83, citing *State v. Moore*, 2012-Ohio-1958, 970 N.E.2d 1098, ¶ 76 (8th Dist.), *State v. Porter*, 4th Dist. No. 10CA15, 2012-Ohio-1526, ¶ 20, and *State v. Morgan*, 9th Dist. No. 07CA0124-M, 2008-Ohio-5530, ¶ 21. Thus, "[n]ot every intemperate remark by counsel can be a basis for reversal." *State v. Landrum*, 53 Ohio St.3d 107, 112, 559 N.E.2d 710 (1990). "The 'conduct of a prosecuting attorney during trial cannot be grounds for error unless the conduct deprives the defendant of a fair trial.' " *Purdin* at ¶ 31, quoting *State v. Givens*, 4th Dist. Washington No 07CA19, 2008-

Ohio-1202, ¶ 28, quoting *State v. Gest*, 108 Ohio App.3d 248, 257, 670 N.E.2d 536 (8th Dist.1995). Therefore, the "touchstone analysis * * * is the fairness of the trial, not the culpability of the prosecutor. * * * The Constitution does not guarantee an 'error free, perfect trial.' " *Purdin* at ¶ 31, quoting *Leonard* at ¶ 36, quoting *Gest* at 257. "Further, an appellate court must not focus on isolated comments but must examine the prosecution's closing argument in its entirety to determine whether the prosecutor's comments prejudiced the defendant." *Topping* at ¶ 84, citing *Treesh* at 466; *State v. Keenan*, 66 Ohio St.3d 402, 410, 613 N.E.2d 203 (1993).

{¶14} "During closing arguments, the prosecution is generally given wide latitude to convincingly advance its strongest arguments and positions." *Topping* at ¶ 83, citing *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 149; *State v. Phillips*, 74 Ohio St. 72, 90, 656 N.E.2d 643 (1995); *State v. Treesh*, 90 Ohio St.3d 460, 466, 739 N.E.2d 749 (2001). In fact, "[p]rosecutorial misconduct constitutes reversible error only in rare instances." *Purdin* at ¶ 31, quoting *State v. Edgington*, 4th Dist. Ross No. 05CA2866, 2006-Ohio-3712, ¶ 18, citing *State v. Keenan*, 66 Ohio St.3d 402, 406, 613 N.E.2d 203 (1993). "Nevertheless, a prosecution must avoid going beyond the evidence presented to the jury to obtain a conviction." *Topping* at ¶ 83, citing *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). "[P]rosecutors must be diligent in their efforts to stay within the boundaries of acceptable argument and must refrain from the desire to make outlandish remarks, misstate evidence, or confuse legal concepts." *State v. Fears*, 86 Ohio St.3d 329, 332, 715 N.E.2d 136 (1999). However, a prosecutor may comment in closing argument on what the evidence has shown and what reasonable inferences the prosecutor believes may be drawn from it. *State v. Lott*, 51 Ohio St.3d 160, 165, 555 N.E.2d 293 (1990).

{¶15} Patton takes issue with the following portion of the State's rebuttal closing argument:

> MS. BOLEK: [Patton] also told law enforcement that he dumped the dogs somewhere around Line Road close to New Vienna. * * * This is significant because [Patton] . . . it demonstrates that [Patton] had no intention of returning the vehicle, he was getting rid of the dogs. Something else that [Patton] said stands out as well. Remember, [O'Connor] told you that the rear view mirror was missing from the vehicle? This is significant because that rear view mirror had the OnStar emblem, and it had the call buttons for OnStar.Officer Day told you that even though that rear view mirror was now missing from the vehicle, they were able to track the vehicle and locate it because of OnStar.If [Patton] just needed a quick ride, why did he remove the OnStar controls from the vehicle? He didn't want to be tracked. His intention was not to just take the vehicle without . . .
>
> MR. KIRK: Objection, Your Honor
>
> THE COURT: Overruled.
>
> MS. BOLEK: . . . without permission, it was to deprive the rightful owners of their property. He didn't want them to track the vehicle.

(Tr. at 177). Absent these comments from the prosecution, Patton argues that there is a reasonable probability that the jury would have found that the State failed to prove beyond a reasonable doubt that Patton had a "purpose to deprive" the victim of her motor vehicle. Therefore, the jury would have found him not guilty of Grand Theft of a Motor Vehicle.

{¶16} However, even assuming that these comments were improper, we cannot find that Patton was denied a fair trial. The missing rear view mirror was not the only evidence the

prosecution used to establish that Patton acted with a purpose to deprive Wilson of her motor vehicle. The prosecutor gave the following succinct summary of the evidence in her closing argument:

> MS. BOLEK: The last element the State must prove beyond a reasonable doubt is that [Patton] acted with a purpose to deprive the victim of her property. Officer Day testified that [Patton] specifically stated that he "stole" the vehicle from Community Markets. [Patton's] conduct also demonstrates that he intentionally deprived [Wilson] of her vehicle. [Patton] immediately drives away from the parking lot once he gets in the vehicle. He drops the dogs off at another location near New Vienna. And, he continues to drive the vehicle down into Adams County, away from Hillsboro. The car was not recovered for several hours. His own statements establish, and his conduct establishes that he intentionally was depriving [Wilson] of her motor vehicle.

(Tr. at 172).

{¶17} In light of the evidence before the jury, we cannot find that a reasonable probability exists that, absent the comments by the prosecution, the jury would have found Patton not guilty of Grand Theft of a Motor Vehicle. According to the jury instructions, "deprive" means to "[w]ithhold property of another permanently * * *." (Tr. at 163). Even though Patton told Officer Day that he was planning to return the vehicle to the parking lot after he visited his uncle, overwhelming competent and credible evidence contradicts his statement. Because no reasonable probability exists that the outcome of Patton's trial would have been different had the prosecution not mentioned the Chevy Sonic's rear view mirror, we find that any alleged prosecutorial misconduct did not deprive Patton of his right to a fair trial.

{¶18} Accordingly, we overrule Patton's first assignment of error.

B. The Trial Court Did Err in Ordering Restitution Absent Competent, Credible Evidence

{¶19} In his second assignment of error, Patton argues that the trial court abused its discretion by ordering restitution in an amount that had not been established to a reasonable degree of certainty. According to Patton, the prosecution did not adequately establish the amount of restitution owed. The State argues that the trial court's order of restitution should be upheld because the prosecutor spoke on the issue of restitution on behalf of the victim and reported a precise dollar amount.

{¶20} In *State v. Marcum*, the Ohio Supreme Court set forth the standard of review that appellate courts must apply when reviewing felony sentences:

> Applying the plain language of R.C. 2953.08(G)(2), we hold that an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law.

State v. Marcum, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1.

{¶21} In response to *Marcum*, the Twelfth District stated the following:

> Pursuant to R.C. 2953.08(G)(2)(b), this court may increase, reduce or otherwise modify a sentence that is appealed, or vacate the sentence and remand the matter for resentencing, if we clearly and convincingly find the sentence is contrary to law. The term "sentence" as utilized in R.C. 2953.08(G)(2)(b) encompasses an order of restitution. [*State v. Collins*, 12th Dist. Warren No. CA2014-11-135, 2015-Ohio-3710,] ¶ 31, fn.1. This is an "extremely deferential" standard of

review for the restriction is on the appellate court, not the trial judge. *State v. Durham*, 12th Dist. Warren No. CA2013-03-023, 2013-Ohio-4764, ¶ 43. *State v. Geldrich*, 12th Dist. Warren No. CA2015-11-103, 2016-Ohio-3400, ¶ 6.

{¶22} Similarly, the Sixth District stated that: "Our standard of review on this issue is whether the imposition of costs and financial sanctions was contrary to law. R.C. 2953.08(A)(4) and (G)(2)(b)." *State v. Farless*, 6th Dist. Lucas Nos. L-15-1060 and L-15-1061, 2016-Ohio-1571, ¶4; *contra State v. Nitsche*, 8th Dist. Cuyahoga No. 103174, 2016-Ohio-3170, ¶ 73 (using an abuse of discretion standard to review a restitution order).

{¶23} Therefore, when reviewing restitution orders, this court applies the extremely deferential standard used by the Twelfth and Sixth Districts. "Prior to increasing, reducing, or otherwise modifying a sentence that is appealed, or vacating the sentence and remanding the matter for resentencing, we will seek to determine whether the trial court's restitution order is clearly and convincingly contrary to law." *State v. Anderson*, 4th Dist. Scioto No. 15CA3696, 2016-Ohio-7252, ¶ 33.

{¶24} "If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim * * * 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." R.C. 2929.18(A)(1). "Economic loss" is defined in R.C. 29290.01(L) as "any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense and includes * * * any property loss * * * incurred as a result of the commission of the offense."

{¶25} "Evid.R. 101(C) excepts application of the Rules of Evidence * * * from certain proceedings, such as miscellaneous criminal proceedings. Among those listed as specifically

excepted from the Rules of Evidence are proceedings for * * * sentencing * * *." *State v. Cook*, 83 Ohio St.3d 404, 425, 700 N.E.2d 570 (1998); *see* Evid.R. 101(C)(3). Therefore, a court is not restricted by the Rules of Evidence when determining the amount of a restitution order. However, the amount of restitution the trial court orders must " 'bear a reasonable relationship to the actual loss suffered as a result of the defendant's offense.' " *State v. Alexander*, 4th Dist. Scioto No. 10CA3402, 2012-Ohio-2041, ¶ 12, quoting *State v. Johnson*, 4th Dist. Washington No. 03CA11, 2004-Ohio-2236, ¶ 11. Additionally, " 'the amount of the restitution must be supported by competent, credible evidence in the record from which the court can discern the amount of the restitution to a reasonable degree of certainty.' " (Other citations omitted.) *Id.*, quoting *Johnson* at ¶ 10. An award of restitution is limited to the actual loss caused by the defendant's criminal conduct for which he was convicted. *State v. Jones*, 10th Dist. Franklin No. 14AP-80, 2014-Ohio-3740, ¶ 21.

{¶26} We also note that "[a] trial court is under no duty to itemize or otherwise explain how it arrived at the amount of restitution it orders, so long as the trial court can discern the amount of restitution to a reasonable degree of certainty from competent, credible evidence in the record." *State v. Noble*, 4th Dist. Athens No. 15CA20, 2017-Ohio-1440, ¶ 49, quoting *State v. Shifflet*, 4th Dist. Athens No. 13CA23, 2015-Ohio-4250, ¶ 58. " 'The evidence to support a restitution order can take the form of either documentary evidence or testimony.' " *Id.* at ¶ 52, quoting *State v. Jones*, 10th Dist. Franklin No. 14AP-80, 2014-Ohio-3740, ¶ 23.

{¶27} Here, the trial court proceeded to sentencing immediately after the jury returned its verdict. When considering the issue of restitution, the trial court heard only the following from the prosecution:

> MS. BOLEK: I would ask the Court to impose a term of incarceration of seventeen (17) months. And I would also ask that the Court order restitution in the amount of $158.00, and that is for the damaged mirror in the vehicle.

(Tr. at 192). O'Connor and Wilson testified that the rear view mirror was missing when they went to retrieve the Chevy Sonic, but neither testified as to the cost of a replacement mirror. (Tr. at 116, 136). With no evidence in the record regarding the value of the rear view mirror, we cannot find that the trial court's order of $158.00 in restitution bears a reasonable relationship to the actual loss the victim suffered as a result of Patton's offense. Although the standard of review is extremely deferential, we cannot uphold the trial court's order of restitution because the record is devoid of competent, credible evidence that would have allowed the court to determine the amount of the restitution to a reasonable degree of certainty.

{¶28} Accordingly, we sustain Patton's second assignment of error. We vacate the portion of Patton's sentence that ordered him to pay $158.00 and remand the case to the trial court to determine the proper amount of restitution due to Wilson.

IV. Conclusion

{¶29} Based on the foregoing reasons, we overrule Patton's first assignment of error and sustain his second assignment of error. Having found in response to Patton's first assignment of error that the evidence supports his conviction for Grand Theft of a Motor Vehicle, Patton's third assignment of error is moot. Hence, we need not address it. *See* App.R. 12(A)(1)(c).

{¶30} Accordingly, the judgment of the trial court is affirmed in part and reversed in part; and this matter is remanded for further proceedings consistent with this opinion.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED. Appellant and Appellee shall split the costs equally.

The Court finds that reasonable grounds existed for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellee to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellee to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, P.J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court,

By: _____
Marie Hoover, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.