[Cite as *State v. Wells*, 2012-Ohio-4459.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-A-0073**
- vs -	:	
SCHON WELLS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2011 CR 346.

Judgment: Affirmed in part; reversed in part and remanded.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt,* Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Rick L. Ferrara, 2077 East 4th Street, 2nd Floor, Cleveland, OH 44113 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Schon Wells, appeals his conviction, following a jury trial, of failure to comply with an order or signal of a police officer, receiving stolen property, and burglary. At issue is whether the jury's verdict form was sufficient to convict appellant of second degree burglary. For the reasons that follow, we affirm in part; reverse in part and remand.

{¶2} Appellant was indicted for failure to comply with an order or signal of a police officer, a felony of the third degree, in violation of R.C. 2921.331(B) and R.C. 2921.331(C)(5) (Count One); receiving stolen property involving a motor vehicle, a felony of the fourth degree, in violation of R.C. 2913.51(A)(1) (Count Two); burglary, a felony of the second degree, in violation of R.C. 2911.12(A)(1) (Count Three); and another failure to comply with an order or signal of a police officer, a felony of the third degree, in violation of R.C. 2921.331(B) and R.C. 2921.331(C)(5) (Count Four).

{¶3} Appellant pled not guilty and the case was tried to a jury. James Jeppe testified his grandfather owns a 2010 black Honda motorcycle that he allows James to use. James said that on August 8, 2011, the motorcycle was stolen from his driveway on West 8th Street in Ashtabula, and he reported the theft to the police.

{¶4} Four days later, on August 12, 2011, at about noon, while James was on his lunch break and driving his company truck, he saw his grandfather's motorcycle being driven on West 54th Street by a male with a towel on his face wearing a white tee shirt. James followed the motorcycle to a residence off West 54th Street. He observed the driver of the motorcycle pick up a second male, who James identified in court as appellant. Appellant took the driver's seat and drove the motorcycle, and the original driver jumped on the back seat. James followed them for about one mile, but appellant made a u-turn and sped away and James lost them. James then returned to work. He told his father about the incident and his father reported it to the police. James and his father work for their family-owned construction business.

{¶5} After work, at about 6:00 p.m., James returned to the house off West 54th Street where he had seen appellant get on his motorcycle. James drove by the house

and saw the motorcycle parked on the side of the residence. He then picked up his father and returned to the house. On the way there, James flagged down Officer Burns and told him he knew where his stolen motorcycle was. The officer followed James and his father to the house off West 54th Street, but the motorcycle was gone. At that time, one of their employees called James' father and told him he had just seen James' motorcycle at the local Circle K store.

{¶6} Officer Wesley Burns of the Ashtabula Police Department testified that after he was informed that the motorcycle was at Circle K, he and James drove separately to that location. As Officer Burns was approaching the Circle K, he saw James' motorcycle pulling out of the Circle K parking lot with two males on it. The driver, who Officer Burns identified in court as appellant, was wearing a black tee shirt, and the passenger was wearing a white tee shirt.

{¶7} As the motorcycle pulled out of the parking lot, appellant made a left-hand turn driving toward Officer Burns, who was driving in the opposite direction. The officer signaled them to a parking lot across the street from Circle K. While looking directly at the driver, Officer Burns said, "I need to talk to you, pull it over." However, instead of complying, appellant drove into the wrong lane of traffic and pulled up to the curb. The passenger on the back seat jumped off and ran away, and appellant sped off.

{¶8} Officer Burns activated his overhead lights and siren, and pursued the motorcycle as it sped along several residential city streets. During the pursuit, the driver turned around and, although the driver was wearing sunglasses, Officer Burns said he was able to see his face. At one point, the officer was very close to the driver and said he got a good look at him. During the chase, appellant drove the motorcycle at speeds

approaching 60 m.p.h. until he left the road and drove onto the Greenway bicycle trail. Officer Burns' cruiser was unable to go on the trail due to the presence of metal barricades at the beginning of the trail, which are used to prevent motor vehicles from entering the trail. Officer Burns watched appellant as he continued driving on the trail. He finally lost sight of appellant when he crossed West Avenue. Officer Burns radioed the direction appellant was last seen driving.

{¶9} Officer Burns testified that Officer Defina radioed that he had located the motorcycle driving on West Avenue. Officer Defina reported that the driver jumped off the motorcycle and ran away. Officer Burns testified he went to that location to provide backup, and found the motorcycle on the ground on West Avenue. Suddenly, Officer Burns heard several neighbors yelling, "There he is." Officer Burns ran to where the neighbors were pointing. He saw appellant across the fence in a field that runs parallel to West Avenue. At that time, appellant was wearing a white tee shirt. He was on the ground and being handcuffed. Officer Burns testified there was "no doubt" the suspect who was arrested was the same person he had seen driving James' motorcycle.

{¶10} Karen Hall testified she was outside her home at 5938 West Avenue when she saw a male wearing black on a black motorcycle drive by on West Avenue swerving on the road with a police officer chasing him. Afraid that the male may be victimizing the neighborhood, she closed her garage and shed and locked the gate. She then went into her house, locked all the doors, and searched all the rooms. As she walked in the upstairs hallway, she looked into her grandson's bedroom and saw a black male sitting on the edge of the bed. The male, who she had never seen before, was wearing black and was bald. He put his finger to his lips and said, "Shhh, don't say anything, I don't

want any trouble." Mrs. Hall was terrified. She turned around and ran down the stairs. She went out the front door screaming, "He's in my house." Several neighbors were outside and alerted police in the area.

{¶11} Officer Christopher Defina of the Ashtabula Police Department testified he was in his cruiser when he heard on the radio that Officer Burns was in pursuit of a stolen motorcycle. Officer Defina saw the motorcycle driving south on West Avenue on the wrong side of the street passing several vehicles. The driver was wearing black clothes. Officer Defina pursued him with his lights and siren activated, and, although the officer was travelling at 70 m.p.h., he was unable to catch up to him. Officer Defina said that traffic and pedestrians were in the area and that the chase created a "safety hazard." Suddenly, appellant "crashed" and "wrecked" the motorcycle and ran off into the heavy brush. Officer Defina said that Mrs. Hall's house was just south of where the motorcycle crashed on West Avenue and that appellant ran in the direction of her house.

{¶12} Officer Defina took his certified K-9, Boscoe, out of his cruiser and gave the dog appellant's scent by placing him where Officer Defina had last seen appellant. Officer Defina then commanded Boscoe to track the suspect and he complied.

{¶13} Boscoe tracked south through several backyards on West Avenue in the same direction Officer Defina had seen appellant running. Boscoe was tracking along the fence that runs behind the neighbors' backyards. Boscoe tracked appellant to Mrs. Hall's backyard. He was pulling appellant's scent from the other side of the fence in Mrs. Hall's backyard. However, Boscoe could not go in her backyard because of the

fence. A neighbor said the suspect was on the other side of Mrs. Hall's fence. As a result, Officer Defina picked up Boscoe and put him over the fence.

{¶14} Boscoe led Officer Defina to an area in Mrs. Hall's backyard where there was heavy brush. Meanwhile, Detective Felt and his K-9 arrived to provide backup. Officer Defina and Detective Felt quarantined the area where Officer Defina believed the suspect was hiding in the brush.

{¶15} Detective Felt and his K-9 pursued appellant. Shortly thereafter, Officer Defina heard Detective Felt yell from a distance of about 200 yards, "Get on the ground." Officer Defina heard yelling and he walked in that direction. He then saw appellant being handcuffed.

{¶16} At the time appellant was being arrested, Mrs. Hall approached Officer Defina. She said that someone had just broken into her house, and asked him to check her house. Officer Defina went to Mrs. Hall's house where he had Boscoe perform a building search with negative results.

{¶17} Officer Defina said that as he was leaving Mrs. Hall's house by the back door, she pointed out a black tee shirt on the ground a few feet away from the door. She said it looks like the male who was in her house threw it down as he left. Officer Defina said the shirt they found was consistent with the black shirt he saw appellant wearing.

{¶18} Officer Timothy Hosken testified he was assigned to assist in the pursuit of the stolen motorcycle. He saw the motorcycle being driven south on West Avenue. There was one person on the motorcycle and he was wearing black clothing.

{¶19} Officer Hosken heard over the radio that Detective Felt had arrested the suspect. Officer Hosken responded to the scene, placed appellant in his cruiser, and transported him to the station.

{¶20} Officer Hosken took appellant to the booking room to be booked. After Officer Hosken took appellant's personal information, he allowed appellant to use a phone in the booking room. While Officer Hosken was still in the booking room, he heard appellant call someone and engage in a conversation. Appellant said he had gone to Circle K with another male. Appellant said he told the other male he wanted to drive the motorcycle. Appellant said that when he pulled out of Circle K, the other male jumped off the motorcycle. Appellant said he took off and the police chased him. He said he drove on the bicycle trail, then on West Avenue, dropped the motorcycle, and ran through several backyards. He said he was caught by a police dog.

{¶21} Finally, Detective William Felt of the Ashtabula Police Department testified he responded to the scene with his certified K-9, Reno, to provide backup. When Detective Felt reached West Avenue, he met Officer Defina, and the two officers set up a perimeter. Detective Felt and Reno then went through a wooded area. Detective Felt heard several people in the area yelling, "Here he is." The detective then saw appellant running toward him coming from the 5900 block of West Avenue. At that time the suspect was wearing a light-colored tee shirt.

{¶22} There was a four-foot chain link fence, which Detective Felt and Reno could not penetrate. While appellant and Detective Felt were running parallel to each other on opposite sides of the fence, the detective yelled commands to appellant for him

to stop or he would send his dog after him. Appellant failed to follow these instructions and continued running.

{¶23} At a break in the fence, Detective Felt let go of Reno's leash and gave him the apprehension command. Appellant ran across the parking lot and hid behind a garage at a private residence. When Detective Felt reached him, appellant was on the ground and Reno was biting him on the shoulder. Detective Felt commanded Reno to stop, and the detective handcuffed appellant. Photographs admitted in evidence showed superficial dog bite marks on appellant's shoulder. They also showed appellant was a bald black male as Mrs. Hall had described him.

{¶24} After Officer Hosken took appellant into custody, Detective Felt commanded Reno to perform a "reverse track" to trace appellant's flight path. Reno pulled the detective by the leash across the parking lot, field, and, finally, to Mrs. Hall's residence.

{¶25} Following the presentation of the state's evidence, appellant made a Rule 29 motion for acquittal. The trial court denied the motion with one exception: the court noted there was one continuous pursuit and thus merged the failure to comply charge in Count Four with that same charge in Count One.

{¶26} After the state rested, appellant presented no evidence. The state's evidence was therefore undisputed.

{¶27} The jury found appellant guilty on all counts. On Count One, the jury found him guilty of failure to comply with an order or signal of a police officer. In connection with that count, the jury also found that appellant's operation of the motorcycle caused a substantial risk of serious physical harm to persons or property.

On Count Two, the jury found appellant guilty of receiving stolen property, and also found the property involved was a motor vehicle. On Count Three, the jury found appellant guilty of burglary as charged in the indictment.

{¶28} The court sentenced appellant on Count One, failure to comply, to three years in prison; on Count Two, receiving stolen property, to 18 months; and on Count Three, burglary, to five years, each term to be served concurrently, for a total of five years in prison.

{¶29} Appellant appeals his conviction, asserting five assignments of error. For his first assigned error, he contends:

{¶30} "The trial court acted contrary to law when it sentenced appellant to a second degree felony burglary despite verdict forms sufficient only to find appellant guilty of fourth degree felony burglary."

{¶31} Appellant argues the trial court erred in sentencing him for felony-two burglary because the burglary statute allows for different degrees of burglary and the jury did not include in its verdict the degree of the offense of which he was found guilty or a statement that an aggravating element was found that made burglary a second degree felony, as required by R.C. 2945.75. As a result, he argues he could only have been convicted of the least serious degree of the offense, which, he argues, is a fourth degree felony. We agree with appellant, but only in part.

{¶32} R.C. 2945.75 provides:

{¶33} (A) When the presence of one or more additional elements makes an offense one of more serious degree:

{¶34} * * *

{¶35} (2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

{¶36} In *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, the defendant was charged with tampering with records. Pursuant to R.C. 2913.42, if the records are government records, the offense is elevated from a misdemeanor to a felony. The Supreme Court of Ohio held that "pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense." *Id*. at ¶14. The court stated that "[t]he express requirements of the statue cannot be fulfilled by demonstrating additional circumstances, such as that the verdict incorporates the language of the indictment, or by presenting evidence to show the presence of the aggravated element at trial or the incorporation of the indictment into the verdict form, or by showing that the defendant failed to raise the issue of the inadequacy of the verdict form." *Id*.

{¶37} After *Pelfrey*, Ohio Appellate Districts were divided on whether *Pelfrey* applies only to statutory offenses that include an aggravating element that must be found to enhance an offense, such as tampering with records, or whether *Pelfrey* also applies when a statutory offense contains separate subsections for different degrees of the offense. The Supreme Court of Ohio determined this issue in *State v. Sessler*, 119 Ohio St.3d 9, 2008-Ohio-3180.

{¶38} The statute at issue in *Sessler*, R.C. 2921.04, has two subsections, each defining a different offense of intimidation. R.C. 2921.04(A) provides, "No person shall knowingly attempt to intimidate * * * the victim * * * in the filing * * * of criminal charges * * *." R.C. 2921.04(B) states, "No person, knowingly *and by force or by unlawful threat of harm to any person or property*, shall attempt to * * * intimidate * * * the victim * * * in the filing * * * of criminal charges * * *." (Emphasis added.) Thus, subsection (B) of the statute contains an additional element of force or unlawful threat of harm to any person or property that is not contained in subsection (A). R.C. 2921.04(D) specifies that a violation of subsection (A) is a misdemeanor, while a violation of Subsection (B) is a felony. Sessler was indicted for felony intimidation. The verdict stated that the jury found him guilty of intimidation "as * * * charged in the indictment." However, the verdict did not specify the degree of the offense or set forth any aggravating factors. Pursuant to *Pelfrey*, the Third District held that Sessler could only be convicted of misdemeanor intimidation. In affirming, the Supreme Court of Ohio held that *Pelfrey* applies "to charging statutes that contain separate sub-parts with distinct offense levels." *Sessler*, *supra*, at ¶1; *State v. Sessler*, 116 Ohio St.3d 1505; 2008-Ohio-381.

{¶39} The mechanism in the intimidation statute for enhancing the offense is functionally equivalent to that contained in the burglary statute at issue here. R.C. 2911.12 provides:

{¶40} (A) No person, by force, stealth, or deception, shall do any of the following:

{¶41} (1) Trespass in an occupied structure * * *, *when another person * * * is present*, with purpose to commit in the structure * * * any criminal offense;

{¶42} (2) Trespass in an occupied structure * * * that is a permanent or temporary habitation of any person *when any person * * * is present or likely to be present*, with purpose to commit in the habitation any criminal offense;

{¶43} (3) Trespass in an occupied structure * * *, with purpose to commit in the structure * * * any criminal offense.

{¶44} (B) No person, by force, stealth, or deception, shall trespass in a permanent or temporary habitation of any person when any person * * * is present or likely to be present.

{¶45} * * *

{¶46} (D) Whoever violates division (A) of this section is guilty of *burglary*. A violation of division (A)(1) or (A)(2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree.

{¶47} (E) Whoever violates division (B) of this section is guilty of *trespass in a habitation when a person is present or likely to be present*, a felony of the fourth degree. (Emphasis added.)

{¶48} Thus, R.C. 2911.12 sets forth three separate burglary offenses with two distinct offense levels and one separate trespass offense. Subsections (A)(1) and (A)(2) charge burglary as felonies of the second degree, while subsection (A)(3)

charges burglary as a third-degree felony. The difference between R.C. 2911.12(A)(1) and (A)(2) on the one hand and (A)(3) on the other is that subsections (A)(1) and (A)(2) contain an additional element of another person being present or likely to be present at the time of the offense that is not contained in subsection (A)(3). The statute also sets forth a separate charge entitled, "trespass in a habitation when a person is present or likely to be present," and indicates that this offense is a felony of the fourth degree.

{¶49} We agree with appellant that R.C. 2911.12 contains separate sub-parts with distinct offense levels, and that the statute charges offenses ranging in seriousness from a second- to a fourth-degree felony. We also agree that the verdict did not include the degree of the offense of which appellant was found guilty or the additional element that enhanced the offense. However, the verdict expressly stated that appellant was found guilty of "burglary." Since the least serious degree of burglary as set forth in the statute is a felony of the third degree, the verdict was sufficient to convict appellant of that degree of felony.

{¶50} The state argues *Pelfrey* does not apply when, as here, the statute includes distinct offenses with different felony classifications. However, based on *Sessler*, *supra*, the state is wrong. We note the state does not mention *Sessler* despite its obvious relevance. Further, the state's reliance on the cases it cites in support of its argument is misplaced since none of them even mentions *Sessler*.

{¶51} Appellant's first assignment of error is overruled in part and sustained in part. Because the guilty verdict did not indicate the degree of the offense of which appellant was found guilty or state that the jury found the additional element that a person was present or likely to be present, the verdict constitutes a finding of guilty of

the least degree of the offense of which appellant was found guilty, i.e., burglary. The least degree of burglary as set forth in R.C. 2911.12 is a felony of the third degree. On remand, the trial court shall enter judgment convicting appellant of third-degree burglary, as opposed to second-degree burglary, and shall re-sentence him accordingly.

{¶52} Appellant's second and third assigned errors are related and shall be considered together. They allege:

{¶53} "[2.] Insufficient evidence supported appellant's felony conviction for failure to comply with a signal of a police officer, or any other conviction for lack of identification.

{¶54} "[3.] The manifest weight of the evidence did not support conviction for failure to comply with a signal of a police officer or receiving stolen property."

{¶55} A "sufficiency" argument raises a question of law as to whether the prosecution offered some evidence concerning each element of the charged offense. *State v. Windle*, 11th Dist. No. 2010-L-0033, 2011-Ohio-4171, ¶25. "[T]he proper inquiry is, after viewing the evidence most favorably to the prosecution, whether the jury could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Troisi*, 179 Ohio App.3d 326, 2008-Ohio-6062 ¶9 (11th Dist.).

{¶56} In contrast, a court reviewing the manifest weight observes the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the 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. *State v. Schlee*, 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *14-*15 (Dec. 23, 1994).

{¶57} First, appellant argues the state failed to present sufficient evidence to support his conviction of failure to comply with an order or signal of a police officer. Specifically, he argues the state failed to present sufficient evidence that he created a substantial risk of serious physical harm to persons or property. We do not agree.

{¶58} R.C. 2921.331 provides in pertinent part:

{¶59} (B) No person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop.

{¶60} (C)(1) Whoever violates this section is guilty of failure to comply with an order or signal of a police officer.

{¶61} * * *

{¶62} (5)(a) A violation of division (B) of this section is a felony of the third degree if the * * * trier of fact finds any of the following by proof beyond a reasonable doubt:

{¶63} * * *

{¶64} (ii) The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property.

{¶65} "Substantial risk" is defined at R.C. 2901.01(A)(8) as "a strong possibility * * * that a certain result may occur or that certain circumstances may exist."

{¶66} "Serious physical harm to persons" is defined at R.C. 2901.01(A)(5) as any of the following:

{¶67} * * *;

{¶68} (b) Any physical harm that carries a substantial risk of death;

{¶69} (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶70} * * *;

{¶71} (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged * * * pain.

{¶72} "Serious physical harm to property" is defined at R.C. 2901.01(A)(6) as "any physical harm to property that does either of the following:

{¶73} "(a) Results in substantial loss to the value of the property or requires a substantial amount of time, effort, or money to repair or replace;

{¶74} "(b) Temporarily prevents the use or enjoyment of the property or substantially interferes with its use or enjoyment for an extended period of time."

{¶75} Here, Officer Burns testified that as appellant exited the Circle K parking lot, he signaled to appellant to go into a parking lot across the street and said, "I need to talk to you, pull it over." However, instead of complying, appellant drove into the wrong lane of traffic and dropped his passenger off at the curb. Officer Burns then activated his overhead lights and siren, but appellant took off at speeds approaching 60 m.p.h. on several residential city streets.

{¶76} Officer Defina observed appellant driving his motorcycle on the wrong side of the street on West Avenue passing several vehicles. He activated his overhead lights and siren; however, appellant failed to pull over. Instead, he continued to drive at speeds in excess of 70 m.p.h., although traffic and pedestrians were in the area. Officer

Defina said the chase created a "safety hazard." He said that at the end of the chase, appellant "crashed" and "wrecked" the motorcycle and ran off into the brush.

{¶77} Appellant suggests that because the officers did not specifically testify he committed any traffic violations during their pursuit, the evidence was insufficient to sustain his conviction. However, the statute does not require any such showing and appellant has not cited any authority requiring such evidence to support a conviction.

{¶78} Viewing the evidence most favorably to the state, the jury could have found that appellant's operation of James' motorcycle caused a substantial risk of serious physical harm to himself, his passenger, other drivers on the various city streets involved in the chase, the Jeppes' motorcycle, and the vehicles of those other drivers.

{¶79} Next, appellant argues the state failed to present sufficient identification evidence linking him to any of the crimes of which he was found guilty. Again, we do not agree.

{¶80} With respect to failure to comply and receiving stolen property, Officer Burns said that when he initially told appellant to "pull it over" after he left Circle K, he was looking directly at appellant. He said that at one point during the pursuit, the driver turned around and Officer Burns was able to see his face. At another time, Officer Burns said that he got very close to appellant and that during that time he got a good look at him. Officer Burns testified there was "no doubt" appellant was the driver of the motorcycle during the chase, and the officer identified appellant in court.

{¶81} Further, James Jeppe testified appellant was the person who was driving his motorcycle at noontime and later when the motorcycle pulled out of Circle K. James also identified appellant in court.

{¶82} Perhaps the strongest identification evidence of appellant's failure to comply and receiving stolen property came from appellant himself when he admitted in a conversation overheard by Officer Hosken that he was the driver of the motorcycle during the chase.

{¶83} With respect to burglary, the state presented evidence that it was appellant who broke into Mrs. Hall's house. First, her general description of the burglar matched appellant. She said he was a bald black male wearing black. Officer Burns, Officer Defina, and Officer Hosken also said appellant was wearing a black shirt during the pursuit. Officer Defina found a black tee shirt that someone had discarded just outside Mrs. Hall's back door that, he said, looked like the one he saw appellant wearing. Further, the burglar's instruction to Mrs. Hall not to say anything because he did not want trouble is consistent with the other evidence of appellant's efforts to elude the police. In addition, Officer Defina said that after appellant crashed the motorcycle, he saw appellant running in the direction of Mrs. Hall's house. Later, after Officer Defina's dog, Boscoe, was given appellant's scent, the dog tracked appellant through backyards on West Avenue in the same direction Officer Defina had previously seen appellant running. Boscoe finally tracked appellant to the fence in Mrs. Hall's backyard. Detective Felt said that after he heard several neighbors in the area yelling, "Here he is," he saw appellant running toward him coming from the 5900 block of West Avenue where Mrs. Hall's house is located. Then, after appellant was apprehended, Detective Felt commanded Reno to perform a "reverse track" to trace appellant's flight path to its beginning. Reno pulled Detective Felt by the leash through the different areas where appellant had been seen running and, finally, directly to Mrs. Hall's residence.

{¶84} Viewing the evidence most favorably to the state, the jury could have found it was appellant who led police on a high speed chase driving a stolen motorcycle and later broke into Mrs. Hall's home in order to hide from the police.

{¶85} With respect to appellant's manifest-weight challenge, he does not cite any conflicts in the testimony or any issues of credibility with respect to any of the witnesses presented by the state, which are the hallmarks of a manifest-weight challenge. Instead, he argues the insufficiency of the evidence should be considered to affect its weight. However, the concepts of sufficiency and weight are quantitatively and qualitatively distinct in a criminal proceeding. *See*, *e.g.*, *State v. Thompkins*, 78 Ohio St.3d 380 (1977). Consequently, appellant's manifest-weight argument is nothing more than a re-hash of his sufficiency argument and for the same reasons cited above, his argument lacks merit.

{¶86} Based on our review of the record, the jury obviously believed the state's witnesses as it was entitled to do. We cannot say the jury clearly lost its way and created such a manifest miscarriage of justice that a new trial is required.

{¶87} Appellant's second and third assignments of error are overruled.

{¶88} For his fourth assigned error, appellant alleges:

{¶89} "Defense counsel provided ineffective assistance by cumulative error."

{¶90} Appellant argues that because his trial counsel failed to object to certain testimony elicited by the state, his counsel was ineffective. We do not agree.

{¶91} The standard of review for ineffective assistance of counsel is whether the representation of trial counsel fell below an objective standard of reasonableness and whether the defendant was prejudiced as a result of the deficient performance. The

defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984).

{¶92} Counsel is entitled to a strong presumption that his or her conduct falls within the vast range of reasonable professional assistance. Appellant must therefore overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Id*. at 689. Strategic and tactical decisions fall squarely within the scope of professionally reasonable judgment. *Id*. at 699. "The failure to object to error, alone, is not enough to sustain a claim of ineffective assistance." *State v. Wright*, 11th Dist. No. 2000-P-0128, 2002 Ohio App. LEXIS 1497, *18 (Mar. 29, 2002). "Objections tend to disrupt the flow of a trial and are considered technical and bothersome by the fact-finder; thus, counsel may reasonably hesitate to object." *Id*.

{¶93} First, appellant argues his counsel was ineffective because he did not object to the following leading question:

{¶94} "[The Prosecutor] Q. Did they find anything outside your house * * *?

{¶95} "[Mrs. Hall] A. Yes. They found a shirt."

{¶96} While the state's question was somewhat leading, it is innocuous because, if it was successfully objected to, the leading aspect of the question could easily have been corrected by a more general question. The state's counsel was obviously attempting to move the testimony along rather than to improperly suggest the answer. An objection at this point could have been seen by the jury as overly technical and an attempt to interfere with the introduction of admissible evidence.

{¶97} Second, appellant argues his defense counsel was ineffective because he did not object to the following testimony of Officer Defina on the ground that it contained hearsay:

{¶98} "After that I checked some outbuildings - - well, I was on the way out the back door, [Mrs. Hall] said '"Hey, does that shirt belong to the suspect - - is that shirt something I should keep? It looks like the guy who was in my house threw that down. There's a black shirt."'

{¶99} While Officer Defina's testimony thus contained a brief reference to comments made by Mrs. Hall that could technically be characterized as hearsay, in light of the fact that Mrs. Hall had previously testified to the same effect at trial, defense counsel obviously made the strategic decision not to interfere with the flow of this testimony.

{¶100} With respect to both of these instances, appellant fails to overcome the presumption that trial counsel's conduct was a strategic and tactical decision.

{¶101} Appellant's fourth assignment of error is overruled.

{¶102} For his fifth and final assignment of error, appellant contends:

{¶103} "The prosecutor committed misconduct by statements in closing argument impeaching the credibility of defense counsel."

{¶104} "The test for prosecutorial misconduct is whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Smith*, 87 Ohio St.3d 424, 442 (2000). The focus "is the fairness of the trial, not the culpability of the prosecutor." *Id*. Thus, prosecutorial misconduct is not grounds for reversal unless it so taints the proceedings that a defendant is deprived of a fair trial. *Id*.

{¶105} The sole prosecutorial comment of which appellant complains is the following, which occurred during the state's rebuttal argument: "[T]he defense tried to confuse a little bit about this gentleman with the towel [i.e., the male James first saw riding his motorcycle]. And that's why, thank goodness, there are twelve of you and only two of us." The prosecutor's comment that defense counsel had attempted to confuse the jury was meant to respond to the suggestion during defense counsel's argument that the first driver of the motorcycle was the perpetrator of these crimes. That suggestion was improper because it was not supported by any evidence. Thus, the state was entitled to respond to it. In any event, the comment was isolated and brief. Further, the state's comment was also aimed at reminding the jury that it was their duty, not that of the attorneys, to determine the facts. In any event, we conclude that the strength of the evidence against appellant weighs against a conclusion that he was prejudiced by the prosecutor's comment.

{¶106} Appellant's fifth assignment of error is overruled.

{¶107} For the reasons stated in this opinion, it is the judgment and order of this court that the judgment of the Ashtabula County Court of Common Pleas is affirmed in part and reversed in part; and this case is remanded for further proceedings as set forth in this opinion.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.