UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1612

September Term, 2014

BYRON ELLIOTT PRATT

v.

STATE OF MARYLAND

Krauser, C.J.,
Graeff,
Friedman,

JJ.

Opinion by Krauser, C.J.

Filed: June 18, 2015

Convicted by a jury in the Circuit Court for Anne Arundel of second-degree assault and unauthorized removal of property, Byron Elliot Pratt, appellant, presents a single question for our review: Did the evidence support his conviction for unauthorized removal of property? Because we conclude that it did not, we reverse.

BACKGROUND

Appellant was the boyfriend of Breanna Gereau, the purported victim of the crimes charged. At trial, she testified that on February 26, 2014, she had an argument with appellant in an apartment that they shared. The argument was over whether she should, as appellant demanded, quit her job at the Anne Arundel County Police Department and sell life insurance with him. The argument reached a climax when appellant, after throwing a bottle across the room, grabbed Gereau by the collar of her jacket and threw her repeatedly against the wall of their apartment. When Gereau demanded that appellant leave, he responded, "Now I get to really hurt you," and hurled Gereau into the living room, where she fell to the floor. The appellant straddled Gereau, punched her repeatedly and attempted to choke her. The assault finally ended when Gereau told appellant she would quit her job as he demanded. Moments later, Gereau ran out of the apartment and, using her cell phone, called the police. When appellant caught up with her, he took her phone, and left.

When the police arrived at her apartment, Gereau gave them the make and model of appellant's vehicle. They advised her, however, that appellant's vehicle was still in the parking lot. She responded, "If he's not in his car, he's in mine," that is, the automobile which she co-owned with her mother, and that vehicle was missing.

Gereau further testified that a couple of weeks prior to the day of the assault, she had revoked her permission for appellant to use her vehicle:

[PROSECUTOR]: Now, during the time that you [and appellant] were together, did [appellant] have access to your car?

GEREAU: Yes.

[PROSECUTOR]: Now, at a certain point, did you tell him that he couldn't have access to your car anymore?

GEREAU: Yes.

[PROSECUTOR]: And about when was that?

GEREAU: Probably, a couple weeks prior to the domestic incident.

[PROSECUTOR]: And by the domestic incident, are you referring to the incident that occurred on February 26th of 2014, that brings us here today?

GEREAU: Yes.

[PROSECUTOR]: And why is it that you told him a couple weeks before that incident that he could not use your car anymore?

GEREAU: Because we had been arguing, and a lot of the arguments stemmed from using my car.

[PROSECUTOR]: And in order to stop that, you said, you can't drive - -

GEREAU: Correct - -

[PROSECUTOR]: - - my car anymore?

GEREAU: Correct.

Gereau also asserted that she had taken back the set of keys to her car that she had previously given to appellant, and, under further questioning, she made it clear that she had completely revoked appellant's permission to use her vehicle following an unspecified incident:

> [DEFENSE COUNSEL]: Okay. And so, you didn't tell him, he couldn't use your car; you told him, he needed to let you know that he had your car?
>
> GEREAU: No, I told him that he could not use my car anymore after the incident that occurred previously—that has nothing to do with this, but I'm not allowed to speak of it, obviously—but it's—
>
> [DEFENSE COUNSEL]: So, you told him mid-February, he couldn't use your car at all?
>
> GEREAU: Yes, I did.

Gereau testified, moreover, that there was a spare key to her vehicle on an end table in the apartment. But, contrary to what is claimed in the State's brief, Gereau never said that the spare key was missing after appellant left the apartment after the assault:

> [PROSECUTOR]: Did [appellant] have access to the keys?
>
> Gereau: Not by my choice, should I say. The spare—
>
> [PROSECUTOR]: What do you mean by that?
>
> Gereau: —the spare key was on the end table in the apartment; it was sitting on the end table.
>
> [PROSECUTOR]: And had you given [appellant] any other key to the car?

Gereau: No, I hadn't—no, I didn't.

Finally, no evidence was presented that appellant was ever seen in the car after the assault, nor was there any testimony regarding how and under what the circumstances the vehicle was recovered.

After the State rested, appellant moved for a judgment of acquittal. The grounds for that motion were summarized by defense counsel as follows:

> Your honor, I mean, I move for Judgment of Acquittal as to the unauthorized removal of property. Under the statute, it's the taking of a vehicle or property of the owner without the[ir] permission.
>
> And there was testimony by Ms. Gereau that she owns the car with her mother, but there wasn't any—there wasn't any indication that the mother did not give Mr. Pratt permission to use the vehicle. And so, I move for Judgment of Acquittal as to that count, and submit as to the other two counts.

The court denied the motion, stating:

> I believe it's been a factual issue. I think there's testimony that - - there is testimony that Ms. Gereau is a co-owner of the vehicle. It was in her possession and control—from the testimony—at the apartment complex, where she resided. And so, I think the issue's been generated, and I'm going to allow it to go to the jury.

The jury subsequently convicted appellant of second-degree assault and unauthorized removal of property.

DISCUSSION

Appellant contends on appeal, and for the first time since proceedings in this matter began, that because there was no testimony that appellant actually took the vehicle, the

evidence was insufficient to support his conviction for unauthorized removal of property. It was speculative, appellant claims, for the jury to conclude that he took Gereau's vehicle based solely on Gereau's assumption that he must have, because his car was still in the parking lot after he left their apartment and her vehicle was gone.

We shall, however, decline to address this claim as it is not properly before us. "A defendant may not argue in the trial court that the evidence was insufficient for one reason, then urge a different reason for the insufficiency on appeal in challenging the denial of a motion for judgment of acquittal." *Tetso v. State*, 205 Md. App. 334, 384, *cert. denied*, 428 Md. 545 (2012) (citation omitted). As noted, in moving for a judgment of acquittal at trial, the *only* ground asserted by appellant was the lack of any evidence that the co-owner, Gereau's mother, had not given appellant permission to use the car. The defense never advanced the claim that the State had failed to prove that the appellant had actually taken the car.

We therefore turn to appellant's next claim, and that is that his conviction for unauthorized removal of property must be reversed because, as he argued below, there was no evidence that Gereau's mother, the co-owner of the vehicle, did not consent to his use of the vehicle. We agree.

The standard for reviewing the sufficiency of the evidence is "whether, after reviewing the evidence in the light most favorable to the State, a rational trier of fact could have found each element of the crime beyond a reasonable doubt." *Rodriguez v. State*, 221

Md. App. 26, 35, *cert. denied*, __ Md. __ (2015) (citation and internal quotation marks omitted). It is the State's burden to prove each and every element of a criminal offense. *See Hoey v. State*, 311 Md. 473, 490 (1988); Maryland Criminal Pattern Jury Instruction 2:02.

Appellant was charged with unauthorized removal of property under Maryland Code (2012 Repl. Vol.), Criminal Law Article ("CL"), § 7-203, which provides that, "[*w*]*ithout the permission of the owner*, a person may not take and carry away from the premises or out of the custody of another or the use of the other . . . any property, including . . . a vehicle[.]" (Emphasis added.) The term "owner" is defined in CL § 7-101(h) as: "a person, other than the offender: (1) who has an interest in or possession of property regardless of whether the person's interest or possession is unlawful; and (2) without whose consent the offender has no authority to exert control over the property."

At trial, Gereau testified that she and her mother owned the vehicle appellant purportedly removed. Although she said that appellant did not have *her* permission to use the vehicle, no evidence was presented, direct or circumstantial, as to whether or not appellant had Gereau's mother's permission to use the vehicle. The jury could do no more than speculate as to whether Gereau's mother had consented to appellant's use of the vehicle.

Neither party cites any case law in support or in opposition, for that matter, to appellant's argument that the evidence was insufficient because the State failed to prove lack of consent by the co-owner of the vehicle. Indeed, the State's brief focuses entirely on the

unpreserved issue of whether there was sufficient evidence that appellant took the vehicle in question and not whether he did so without the consent of both owners.

Although there is no Maryland case law directly on point, *Prior v. State*, 10 Md. App. 161 (1970), provides some guidance as to this issue. Prior was convicted of the common law crime of larceny. He appealed that conviction, contending that, because the indictment alleged that the stolen goods were owned by one person, but the evidence adduced at trial showed that the goods were actually jointly owned by two individuals, the evidence was insufficient to sustain the conviction. *Id.* at 166-67. This Court reversed the conviction, holding that there was a "fatal variance" between the allegations in the indictment and the proof at trial relative to the ownership of the stolen goods, noting:

> It is settled that since larceny is a crime against possession an allegation of the ownership of the property alleged to have been stolen is a necessary requisite in a larceny indictment and proof of ownership as laid in the indictment is an essential factor to justify a conviction.

Id. at 167.

Although *Prior* does not directly address the issue of the sufficiency of the evidence with respect to the element of the co-owner's consent, the case is analogous to the instant case to the extent that the statement of charges here alleged that the vehicle was owned by Gereau, but the evidence presented at trial established that the vehicle was owned jointly by

Gereau and her mother. Moreover, as in the common law crime of larceny, the owner's lack of consent is an essential element of the crime of unauthorized removal of property.[1]

Accordingly, we hold that the State had the burden of proving that neither owner had permitted appellant to use the vehicle.[2] To hold otherwise would impermissibly shift the burden of proof to the accused to prove that the use was authorized. Here, the State proved only that Gereau did not consent to appellant's use of the vehicle, but the State failed to introduce any evidence as to whether appellant had Gereau's mother's permission to use the vehicle. Thus, the evidence was insufficient to support appellant's conviction for unauthorized removal of property.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY FOR UNAUTHORIZED REMOVAL OF PROPERTY REVERSED. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID BY ANNE ARUNDEL COUNTY.

[1] *See, e.g., State v. Gover*, 267 Md. 602, 606 (1973) ("Larceny is the fraudulent taking and carrying away of a thing without claim of right with the intention of converting it to a use other than that of the owner without his consent.") (italics omitted).

[2] *Accord, Adams v. State*, 211 S.W.2d 228 (Tex. 1948) (conviction for theft reversed because prosecution failed to prove lack of consent of co-owner).