[Cite as *State v. Jackson*, 2009-Ohio-6226.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-L-147**
- vs -	:	
DOUGLAS JACKSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Painesville Municipal Court, Case No. 08 CRB 01666.

Judgment: Affirmed.

Edward C. Powers, Painesville City Prosecutor, 270 East Main Street, #360, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Douglas Jackson, appeals his conviction following a jury trial in the Painesville Municipal Court of obstructing official business. At issue is whether the jury's verdict was supported by sufficient evidence and whether the trial court erred in instructing the jury. For the reasons that follow, we affirm.

{¶2} On July 8, 2008, Officer Michael Slocum of the Painesville City Police Department responded to 504 Elm Street on an "ongoing noise" complaint. The

complainant, Terrence Beller, reported to dispatch that appellant was repeatedly putting his music on full blast and then turning it off.

{¶3} As Officer Slocum was walking up the driveway to Mr. Beller's house, he saw appellant, who is a fifty-year-old male, ride his bicycle down the driveway and toward the street. The officer recognized appellant from a previous encounter with him. He knew appellant had been staying in the other half of the duplex in which Mr. Beller resides. Mr. Beller came outside and told Officer Slocum that appellant was the person who had been playing his music at excessive levels. He said appellant had just left his apartment and was on his bicycle. The officer decided to stop appellant to further investigate the noise complaint before he left the area.

{¶4} Officer Slocum walked down the driveway toward the street to see if appellant was still in the area. When the officer reached the sidewalk in front of Mr. Beller's house, he saw appellant riding his bicycle toward him on the sidewalk about two houses down from Mr. Beller's house. The officer, who was in uniform, said, "Douglas, come here. I need to talk to you." He also waved for him to come over. Appellant then stopped riding toward Officer Slocum; said, "no;" and started to move his bicycle in the opposite direction away from the officer. At that point Officer Slocum said, "stop or you'll be under arrest." In response, appellant said, "nope." Appellant then got on his bicycle and started riding across the street and away from the officer. Officer Slocum yelled, "stop, you're under arrest," and appellant replied, "no."

{¶5} At that point Officer Slocum called for other units as backup. Appellant got off his bicycle on the other side of the street, and Officer Slocum ran toward him. As the officer got close to appellant, he turned around, saw the officer, got on his bicycle again, and rode it down the street away from the officer.

{¶6} When Officer Slocum was 10 to 15 feet away from appellant, the officer yelled to him, "stop, you're under arrest or you'll be tased." Appellant ignored the officer and continued to ride his bicycle away from him. Officer Slocum deployed his taser and shot it at appellant, who then fell off his bicycle. The officer, who is certified in the use of the taser, testified that upon impact, the taser locks the muscles of the subject so he is immobile for five seconds. According to department guidelines, tasers are to be used to reduce the risk of injury to the suspect or the officer. The officer testified he used the taser because appellant's actions were preventing him from investigating the noise complaint, and it was obvious he would not be able to catch appellant who was on his bicycle while the officer was on foot.

{¶7} Officer Slocum told appellant to put his hands out and showed him how to do it. However, appellant did not follow the officer's instructions so he tased appellant again. The officer then told him to lay flat and put his hands out. This time appellant complied and another officer, who had arrived as backup, handcuffed him. The officers then stood appellant up and Officer Slocum asked him why he ran since he only wanted to ask him about a noise complaint, and appellant responded, "it's all about the music." Officer Slocum advised appellant he was under arrest.

{¶8} Mr. Beller testified that when he came home the evening of July 8, 2008, before he entered his apartment, appellant turned his music up full blast. After playing it at this level for five minutes, he turned if off. He then cranked it back up all the way for several minutes, and then turned it off again. This continued throughout the evening until Mr. Beller called the police. Shortly after he made his report, Mr. Beller heard appellant's door slam, and he saw appellant get on his bicycle and ride down the driveway. At that time Mr. Beller went outside and saw Officer Slocum walking up the

driveway. After Mr. Beller told the officer that appellant was the person causing the noise, the officer went after him.

{¶9} Appellant testified he has been diagnosed as schizophrenic. He takes medication to stop the voices and music he hears in his head. He said that evening he was playing video games when he decided to go to the store on his bicycle. He said that when he got to the corner, he thought he was having a seizure because he could not move and fell off his bicycle. He said he heard an officer say, "put your arms behind your back," but he was unable to do so due to the effects of the taser and he was handcuffed. He said that after he was handcuffed, the officer tased him again. He said that before he was stopped, he was just listening to the music in his head and for this reason he did not hear the officer talking to him.

{¶10} Appellant testified that everything Officer Slocum testified to was a "lie." He said he never rode his bicycle toward the officer. He said the officer never ordered him to stop and he never responded to him. He also denied crossing the street on his bicycle. He testified, "I know he was having fun tasering me."

{¶11} Appellant was charged in a two-count complaint in the Painesville Municipal Court with obstructing official business, in violation of R.C. 2921.31(A), and resisting arrest, in violation of R.C. 2921.33(A), both misdemeanors of the second degree. Appellant entered his plea of not guilty and the case was tried before a jury. Following the presentation of the evidence, the jury returned a verdict of guilty of obstructing official business and not guilty of resisting arrest. The court sentenced appellant to 90 days in jail, 80 of which were suspended, and placed him on probation for one year. The court stayed appellant's sentence pending appeal.

{¶12} Appellant appeals his conviction, asserting two assignments of error. For his first assigned error, appellant contends:

{¶13} "The trial court erred to the prejudice of the defendant-appellant when it denied his motion for acquittal made pursuant to Crim.R. 29(A)."

{¶14} A Crim.R. 29 motion tests the sufficiency of the state's evidence. *State v. Coughlin*, 11th Dist. No. 2006-A-0026, 2007-Ohio-897, at ¶13. When examining a claim that there was insufficient evidence to sustain a conviction, the "inquiry is, after viewing the evidence in a light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 273. Whether evidence is sufficient to sustain a verdict is a question of law that we review de novo. *State v. Williams* (Dec. 6, 2001), 8th Dist. No. 78932, 2001 Ohio App. LEXIS 5418, *10.

{¶15} R.C. 2921.31(A), obstructing official business, provides: "No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's official capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties."

{¶16} Appellant challenges the sufficiency of the evidence concerning each of the elements of this offense. First, he argues Officer Slocum was not performing an "authorized act" because the officer did not have authority to stop or probable cause to arrest him.

{¶17} However, we note that when Officer Slocum initially attempted to stop appellant, he did so pursuant to his authority to make an investigatory stop under *Terry v. Ohio* (1968), 392 U.S. 1. An investigatory stop allows a police officer to stop an

individual for a short period of time if the officer has a reasonable suspicion that criminal activity has occurred or is about to occur. *State v. Lett*, 11th Dist. No. 2008-T-0116, 2009-Ohio-2796, at ¶14; *State v. McDonald* (Aug. 27, 1993), 11th Dist. No. 91-T-4640, 1993 Ohio App. LEXIS 4152, *10. "To justify the stop, the officer must be able to point to specific and articulable facts that would warrant a person of reasonable caution in the belief that the action taken was appropriate." Id., citing *State v. Klein* (1991), 73 Ohio App.3d 486, 488. The stop and inquiry must be reasonably related in scope to the justification for their initiation. *United States v. Brignoni-Ponce* (1975), 422 U.S. 873, 881, citing *Terry*, supra, at 29. "Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Berkemer v. McCarty* (1984), 468 U.S. 420, 439.

{¶18} Officer Slocum was dispatched to the scene on an ongoing noise complaint under the city's ordinance. Mr. Beller had reported to dispatch that appellant had repeatedly played his music at excessive levels that evening. Upon his arrival, Mr. Beller told Officer Slocum that appellant was the person playing the music and said he had just left on his bicycle. Officer Slocum attempted to stop and talk to appellant to complete his investigation concerning Mr. Beller's complaint. In these circumstances, when the officer asked appellant to come over to him, he had a reasonable suspicion appellant was engaged or about to be engaged in criminal activity by subjecting Mr. Beller to ongoing excessive noise, in violation of the city's ordinance.

{¶19} In *State v. Dillon*, 10th Dist. No. 04AP-1211, 2005-Ohio-4124, discretionary appeal not allowed at 2006-Ohio-179, 2006 Ohio LEXIS 178, a police officer saw the defendant jaywalking. The officer approached him to issue a citation

and the defendant ran in the opposite direction. The officer drove his cruiser in pursuit and finally arrested the defendant when he fell. The Tenth District held that under *Terry*, the officer had a reasonable suspicion to stop the defendant for jaywalking. Id. at ¶28. Likewise, in the instant case, Officer Slocum had a reasonable suspicion that appellant engaged in a noise violation, justifying his stop of appellant under *Terry*. Appellant's argument that Officer Slocum was not authorized to arrest him for a noise violation pursuant to R.C. 2935.26(A), which prohibits arrest for a minor misdemeanor, is therefore inapposite.

{¶20} Next, appellant argues his refusal to talk to Officer Slocum did not give the officer authority to arrest him. However, appellant ignores his affirmative acts, which gave the officer probable cause to arrest him for obstructing official business.

{¶21} While Ohio courts have concluded that the mere refusal to answer questions does not constitute an "act" necessary to support a conviction of obstructing official business, it is well-established that where an individual also takes affirmative actions to hamper or impede the police, such conduct may support a conviction of obstructing official business. *State v. Justice* (Nov. 16, 1999), 4th Dist. No. 99CA631, 1999 Ohio App. LEXIS 5779, *13.

{¶22} In *State v. Davis* (2000), 140 Ohio App.3d 751, two police officers saw the defendant cross an intersection against the light. They decided to cite him. They pulled the cruiser over and one of the officers told him to stop but he did not. The other officer began to follow him on foot and yelled at him to stop, but he kept walking. The other officer also ordered him to stop. The defendant turned to face the officer, and then turned around and continued walking, quickening his pace. The officers continued

telling him to stop and, eventually, he did stop. In concluding the evidence was sufficient to convict him of obstructing official business, the First District held:

{¶23} "*** [U]nder the circumstances of this case, the arrest was lawful. The officers had the right to detain Davis to issue a citation for the alleged pedestrian violation, even though they were prohibited under state law from arresting him for the minor misdemeanor. *** But the evidence shows that Davis became aware that the officers were trying to detain him and continued to walk away from them. His refusal to stop gave the officers probable cause to believe that he was impeding the performance of their duty in violation of R.C. 2921.31. At that point, the officers had probable cause to arrest him." Id. at 752-753.

{¶24} Appellant's attempt to distinguish *Davis* on the ground that Davis was unknown to the officers is unavailing because there was no evidence in that case that Davis was unknown to the officers and the First District did not base its holding on such fact. In any event, the fact that Officer Slocum recognized appellant from one prior encounter hardly distinguishes this case from *Davis*. Officer Slocum had the right to detain appellant to issue a citation whether he recognized him or not.

{¶25} In *State v. Lohaus*, 1st Dist. No. C-020444, 2003-Ohio-777, the First District held "that Lohaus's actions in fleeing across several lawns after being told to stop--and in forcing the investigating officer to physically restrain him--fell squarely within [R.C. 2921.31's] proscriptions." Id. at ¶12.

{¶26} In *State v. Dice*, 3rd Dist. No. 9-04-41, 2005-Ohio-2505, police wanted to stop Dice in connection with an ongoing investigation. After a witness pointed him out to police, Dice started to walk away and the police told him to stop. When Dice saw the officers coming after him, he started to run away and officers pursued him for several

minutes. The Third District held that by ignoring the officers' orders and running away from them, Dice acted with the specific intent to prevent, obstruct, or delay the officers from an ongoing investigation, which is part of their official duties. This fulfilled the statutory element of purposefulness. Id. at ¶22. The Third District further held that because the police wanted Dice in connection with their investigation, this was official police business, and Dice's running from the police "did hinder the officers' performance of their lawful duty ***." Id. at ¶23.

{¶27} In *State v. Brickner-Latham*, 3d Dist. No. 13-05-26, 2006-Ohio-609, discretionary appeal not allowed at 2006-Ohio-2998, 2006 Ohio LEXIS 1905, the officer saw the defendant crossing the street and being loud. The officer decided to tell him to desist from his disorderly conduct and, when he approached the defendant in his cruiser, he told him to stop multiple times, but the defendant kept ignoring him and walking away from him. The officer then grabbed the defendant and arrested him. In upholding the sufficiency of the evidence for the defendant's conviction of obstructing official business, the Third District held:

{¶28} "*** Brickner-Latham's walking away from Officer O'Connor was an affirmative act that hindered or impeded Officer O'Connor in the performance of his official duties. Further, Brickner-Latham's persistence in disregarding Officer O'Connor's requests to stop was sufficient evidence for a rational trier of fact to conclude that Brickner-Latham acted with the specific intent to prevent, obstruct, or delay Officer O'Connor's lawful duties." Id. at ¶28.

{¶29} In *State v. Harris*, 10th Dist. No. 05AP-27, 2005-Ohio-4553, the Tenth District held that "fleeing from a police officer who is lawfully attempting to detain the suspect under the authority of *Terry*, is an affirmative act that hinders or impedes the

officer in the performance of the officer's duties as a public official and is a violation of R.C. 2921.31, obstructing official business." Id. at ¶16.

{¶30} Appellant's reliance on *State v. Gillenwater* (Mar. 27, 1998), 4th Dist. No. 97 CA 0935, 1998 Ohio App. LEXIS 1426, is misplaced since the Fourth District expressly overruled *Gillenwater* in *State v. Certain*, 180 Ohio App.3d 457, 2009-Ohio-148. The Fourth District in *Certain* held: "We overrule *Gillenwater* to the extent that it conflicts with this opinion and hold that flight may *** constitute a violation of R.C. 2921.31." Id. at 466.

{¶31} Based on the foregoing authority, Officer Slocum had the right to stop appellant to investigate the noise-violation complaint under *Terry*; to detain him to issue a citation for that offense, *Davis*, supra; and to arrest him for his affirmative acts hindering or impeding the officer in the performance of his lawful duties. We therefore hold the evidence was sufficient to prove that Officer Slocum was engaged in the performance of his lawful duties. Appellant takes great pains to address the method used by the officer to stop him. While this raises serious concerns, since this issue does not impact the appeal, this is not the appropriate forum for us to address it.

{¶32} Second, appellant argues his Crim.R. 29 motion should have been granted because the state failed to prove he was not privileged to hamper Officer Slocum in the performance of his duties. Privilege is defined as "a right, power, *** or immunity held by a person or class. *** That which releases one from the performance of a duty or exempts one from a liability which he would otherwise be required to perform ***." Black's Law Dictionary (4 Ed.Rev.1968) 1359-1360. Appellant fails to support his argument on appeal with any pertinent authority that he had a privilege allowing him to hamper or impede Officer Slocum in the performance of his duties. His

argument therefore lacks merit. App.R. 16(A)(7). His sole argument is that he did not commit any act that hampered Officer Slocum in the performance of his duties. However, because we hold that Officer Slocum had the right to stop appellant under *Terry* and that appellant's subsequent refusal to stop and flight authorized his arrest, the evidence was sufficient to demonstrate appellant had no privilege to hamper Officer Slocum in the performance of his duties.

{¶33} Third, appellant argues the state failed to present sufficient evidence that he acted "with purpose to obstruct, prevent, or delay" the officer in the performance of his duties. In support he argues that, due to his mental condition, he did not hear the officer asking him to stop or, if he did hear him, he was "not necessarily" required to stop. However, as the trier of fact, the jury was entitled to discredit appellant's testimony and to believe Officer Slocum's testimony that appellant said "no" in response to his orders to stop and therefore heard the officer's commands. Based on appellant's repeated refusal to stop and his efforts to flee from the officer, the evidence was sufficient to prove that appellant acted with the intent to obstruct Officer Slocum's investigation of the noise-violation complaint. *Brickner-Latham*, supra; *Dice*, supra.

{¶34} Fourth, appellant argues his refusal to stop was insufficient to prove he hampered or impeded Officer Slocum's performance of his duties because, he argues, the officer had enough information from Mr. Beller about appellant's noise violation. As a result, he argues it was not necessary for the officer to stop him to investigate further. However, having determined that Officer Slocum had the authority to stop him under *Terry*, it is irrelevant that the officer had already obtained some information from the complainant. In fact, in order for his stop to be justified under *Terry*, Officer Slocum had to point to specific and articulable facts supporting his suspicion, which were provided

by Mr. Beller. Further, the case law outlined above establishes that flight from police while they are attempting to stop a suspect under *Terry* is an affirmative act that hinders or impedes the officers' performance of their lawful duties. *Dice*, supra; *Harris*, supra.

{¶35} Appellant also argues the state was required to prove his acts "substantially" hampered Officer Slocum. Although appellant cites several cases in which courts held the defendants' actions had "substantially" or "severely" hampered the police, we note the elements of the offense do not require that the defendant's acts "substantially hamper or impede" the officer. In any event, while the record does not reveal the exact amount of time that elapsed between Officer Slocum's initial order to appellant to stop and his arrest, based on appellant's multiple refusals to stop and his flight, which forced the officer to run after him, the evidence was sufficient to prove appellant substantially hampered the officer in the performance of his duties.

{¶36} Appellant's first assignment of error is not well taken.

{¶37} For his second assignment of error, appellant alleges:

{¶38} "The trial court erred when it refused to submit the defendant-appellant's proposed jury instructions in violation of the defendant-appellant's rights to due process and fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution."

{¶39} Appellant argues the trial court erred in refusing to submit two of his requested instructions to the jury. This court has held a trial court commits prejudicial error in a criminal case by failing to give a proposed instruction "when: (1) the instruction is relevant to the facts of the case; (2) the instruction gives a correct statement of the relevant law; and (3) the instruction is not covered in the general charge to the jury." *Mentor v. Hamercheck* (1996), 112 Ohio App.3d 291, 296. When considering whether a

trial court should have provided a requested jury instruction, an appellate court views the instructions as a whole. *Buehler v. Falor*, 9th Dist. No. 20673, 2002-Ohio-307, 2002 Ohio App. LEXIS 261, *2. An appellate court respects the judgment of the trial court absent an abuse of discretion. Id.

{¶40} First, appellant argues the trial court should have included the word "substantially" in the jury charge to explain the state was required to prove appellant "substantially hampered or impeded" the officer in the performance of his duties. We observe the court instructed the jury concerning all the essential elements of obstructing official business according to the Ohio Jury Instructions, which do not include the word "substantially" to modify the hampering element of the offense. The court also instructed the jury that they could not find appellant guilty unless they found his conduct involved a "voluntary" act. Further, we note appellant has failed to cite any authority holding a trial court is required to include the word "substantially" in its charge. As a result, the trial court did not abuse its discretion in not including the word "substantially" to qualify the hampering element.

{¶41} Next, appellant argues the trial court erred in not instructing the jury on "probable cause to arrest" and that a person may not be arrested for a minor misdemeanor. We observe that these issues are purely questions of law, which could only have been decided by the trial court. Appellant never asked the trial court to rule on these issues either by way of a motion to suppress or motion in limine. Further, in *State v. Mills*, 9th Dist. Nos. 02CA0037-M and 02CA0038-M, 2002-Ohio-7323, the defendant asked the court to instruct the jury that obstructing official business can only be committed when there is probable cause to arrest the defendant. The Ninth District held the trial court did not abuse its discretion in not giving the jury this instruction

because "probable cause to arrest is not an element of obstructing official business." Id. at ¶42.

{¶42} We therefore hold the trial court did not abuse its discretion in not instructing the jury on these issues.

{¶43} Appellant's second assignment of error is not well taken.

{¶44} For the reasons stated in the Opinion of this court, the assignments of error are without merit. It is the judgment and order of this court that the judgment of the Painesville Municipal Court is affirmed.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.