[Cite as *State v. Legg*, 2010-Ohio-5399.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-T-0111**
- vs -	:	
RICHARD LEGG,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 09 CR 311.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Richard Legg, appeals from the September 30, 2009 judgment entry of the Trumbull County Court of Common Pleas, in which he was sentenced for vandalism.

{¶2} On May 4, 2009, appellant was indicted by the Trumbull County Grand Jury on one count of vandalism, a felony of the fifth degree, in violation of R.C.

2909.05(B)(1)(a) and (E). Appellant entered a not guilty plea at his arraignment on May 6, 2009.

{¶3} The matter proceeded to a jury trial which commenced on September 8, 2009.

{¶4} At the trial, Corrections Officer Higley, with the Trumbull Correctional Institution, testified for appellee, the state of Ohio. Officer Higley indicated that on February 14, 2009, appellant was serving time at the institution and he was assigned to monitor the segregation unit. Officer Higley stated that he heard a loud bang and discovered appellant and his cellmate, Anthony Clemens, throwing chunks of a destroyed porcelain toilet at the door of cell No. 133. He specifically observed appellant throw at least one piece of porcelain at the cell door which contained several glass window panes.

{¶5} Both appellant and Clemens were removed from the cell. Officer Higley said that appellant was yelling, using profanity, and appeared to be intoxicated. He explained that although alcoholic beverages are not permitted at the institution, inmates periodically manufacture a home brew called “hooch” which is a fermented combination of juice, sugar, bread, and chunks of fruit. Officer Higley discovered an odor as well as cups and bags in the cell consistent with items necessary for in-cell “hooch” manufacturing.

{¶6} Officer Higley activated a video camera trained on both inmates, who were now in separate cells, and documented the damage to cell No. 133. According to Officer Higley, the damage included the broken toilet which had been completely removed from the wall, as well as five broken window panes.

{¶7} Officer Higley also testified that appellant continued on a tirade while he was secured in the "strip cell." He maintained that appellant made references to the prison warden's race and admitted to destroying cell No. 133 out of anger of being denied a transfer to another facility. In addition to Officer Higley's testimony, some of appellant's outbursts and injuries are contained in state's Exhibit 1, a redacted DVD, which was played for the jury.

{¶8} In addition, Louis Savric, Maintenance Department Superintendent with the Trumbull Correctional Institution, testified for the state that he was provided an assessment of the damage that occurred in cell No. 133. Savric stated that the five panes of broken glass have a total replacement cost of $1,875.

{¶9} Following the trial, the jury returned a guilty verdict.

{¶10} Pursuant to its September 30, 2009 judgment entry, the trial court sentenced appellant to 12 months in prison. It is from that judgment that appellant filed a timely appeal, asserting the following assignments of error for our review:

{¶11} "[1.] The trial court abused its discretion by admitting state's Exhibit 1, over objection, where the danger of unfair prejudice substantially outweighed any probative value.

{¶12} "[2.] Appellant's conviction is not supported by sufficient evidence.

{¶13} "[3.] The appellant's conviction is against the manifest weight of the evidence.

{¶14} "[4.] The trial court's imposition of a sentence greater than the minimum term permitted by statute based upon findings not made by a jury nor admitted by appellant is contrary to law and violates appellant's right to a trial by jury and due

process, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution."

{¶15} For ease of discussion, we will address appellant's last assignment of error first.

{¶16} In his fourth assignment of error, appellant takes issue with his sentence, alleging that because it is greater than the minimum, it is contrary to law and violates his constitutional rights.

{¶17} "An appeal of a sentence is moot if the party challenging the *sentence* has served the imposed time." (Emphasis added.) *State v. Boczek*, 11th Dist. Nos. 2005-L-008 and 2005-L-009, 2006-Ohio-3767, at ¶20, citing *State v. Smith* (Mar. 22, 2002), 11th Dist. No. 2000-L-195, 2002-Ohio-1330, at 9.

{¶18} In *State v. Orr*, 11th Dist. No. 2008-G-2861, 2009-Ohio-5515, at ¶12-13, quoting *Smith*, supra, this court stated the following:

{¶19} "'*** [A]n appeal of a felony *conviction* is not rendered moot even though the defendant has completed his or her sentence because "(a) person convicted of a felony has a substantial stake in the judgment of conviction which survives the satisfaction of the judgment imposed upon him or her."' Id. at ¶11, quoting *State v. Golston* (1994), 71 Ohio St.3d 224, ***, syllabus. (Emphasis sic.) This court continued, holding:

{¶20} "'However, "this logic does not apply if appellant is appealing solely on the issue of (***) his sentence and not on the underlying conviction. If an individual has already served his sentence, there is no collateral disability or loss of civil rights that can be remedied by a modification of the length of that sentence in the absence of a

reversal of the underlying conviction.'" Id., quoting *State v. Beamon* (Dec. 14, 2001), 11th Dist. No. 2000-L-160, *** 2001 Ohio App. LEXIS 5655, at *4. (Secondary citation omitted.)" (Parallel citations omitted.)

{¶21} We note here that in his first, second, and third assignments of error, appellant is challenging his underlying conviction. Thus, we will provide a merit analysis as to those assignments. However, in the fourth assignment of error, appellant only takes issue with his sentence. Again, appellant was sentenced on September 30, 2009, to 12 months in prison. Our research indicates that appellant has served his sentence and has been released from prison.

{¶22} Appellant's fourth assignment of error is moot.

{¶23} In his first assignment of error, appellant argues that the trial court abused its discretion by admitting state's Exhibit 1, over objection, where the danger of unfair prejudice substantially outweighed any probative value.

{¶24} A "trial court has broad discretion in the admission and exclusion of evidence." *State v. Hymore* (1967), 9 Ohio St.2d 122, 128. The trial court's decision on whether to admit or exclude evidence will be upheld absent an abuse of discretion. *Shull v. Itani*, 11th Dist. No. 2002-L-163, 2004-Ohio-1155, at ¶39. An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶25} "All relevant evidence is admissible, except as otherwise provided by [federal and state law.]" Evid.R. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination

of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Nevertheless, "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A). Also, it is within the trial court's discretion to exclude relevant evidence "if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence." Evid.R. 403(B).

{¶26} In the instant case, appellant filed a motion in limine on September 2, 2009, indicating that the DVD of himself and his cellmate after the incident regarding cell No. 133 should be excluded from evidence. The state filed an answer in opposition on September 8, 2009. Prior to the beginning of the jury trial, appellant objected to the playing of the DVD. The state responded by explaining that the original hour-long DVD had been redacted to under 13 minutes. After viewing the redacted version, the trial judge indicated that he believed the DVD corroborated the testimony of the state's witnesses. The trial judge stated that although all 13 minutes of the DVD were probably admissible based on the state's arguments, he ordered that it be further redacted before being played for the jury.

{¶27} The redacted DVD (state's Exhibit 1) played for the jury reveals appellant making derogatory comments about the warden, which corroborates Officer Higley's testimony that appellant was upset because the warden did not move him to another facility. The DVD shows appellant's extremely agitated and turbulent demeanor, which could facilitate the amount and type of damage that was done to cell No. 133. Appellant complains to his cellmate on the DVD about blood in his strip cell, and someone is later

shown tending to wounds on appellant's hand, which corroborates Officer Higley's testimony about appellant's cut hand and the damage done to the cell. Appellant acknowledges on the DVD the damage to his cell, claiming that the toilet jumped off the wall like in "Harry Potter," which corroborates Officer Higley's testimony that appellant was intoxicated on "hooch." Also, the DVD shows the actual damage done to cell No. 133.

{¶28} Based on the record, we hold that the trial court did not abuse its discretion by admitting state's Exhibit 1, as the redacted DVD contained relevant evidence which was not unfairly prejudicial to appellant. The DVD was corroborative, not cumulative of other evidence.

{¶29} Appellant's first assignment of error is without merit.

{¶30} In his second assignment of error, appellant contends that his conviction is not supported by sufficient evidence.

{¶31} As this court stated in *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at 13-14:

{¶32} "'Sufficiency' challenges whether the prosecution has presented evidence on each element of the offense to allow the matter to go to the jury, while 'manifest weight' contests the believability of the evidence presented.

{¶33} """(***) The test (for sufficiency of the evidence) is whether after viewing the probative evidence and the inference drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *The claim of insufficient evidence invokes an*

inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence. ***"'

{¶34} "In other words, the standard to be applied on a question concerning sufficiency is: when viewing the evidence 'in a light most favorable to the prosecution,' *** '(a) reviewing court (should) not reverse a jury verdict where there is substantial evidence upon which the jury could reasonably conclude that all of the elements of an offense have been proven beyond a reasonable doubt.' ***" (Emphasis sic.) (Citations omitted.)

{¶35} "*** [A] reviewing court must look to the evidence presented *** to assess whether the state offered evidence on each statutory element of the offense, so that a rational trier of fact may infer that the offense was committed beyond a reasonable doubt." *State v. March* (July 16, 1999), 11th Dist. No. 98-L-065, 1999 Ohio App. LEXIS 3333, at 8. The evidence is to be viewed in a light most favorable to the prosecution when conducting this inquiry. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Further, the verdict will not be disturbed on appeal unless the reviewing court finds that reasonable minds could not have arrived at the conclusion reached by the trier of fact. *State v. Dennis* (1997), 79 Ohio St.3d 421, 430.

{¶36} In the case at bar, appellant was convicted of vandalism, pursuant to R.C. 2909.05(B)(1)(a), which provides in part:

{¶37} "No person shall knowingly cause physical harm to property that is owned or possessed by another, when *** [t]he property is used by its owner or possessor in the owner's or possessor's profession, business, trade, or occupation, and the value of the property or the amount of physical harm involved is five hundred dollars or more[.]"

{¶38} The culpable mental state of "knowingly" provides: "[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶39} R.C. 2901.01(A)(4) states: "'Physical harm to property' means any tangible or intangible damage to property that, in any degree, results in loss to its value or interferes with its use or enjoyment. 'Physical harm to property' does not include wear and tear occasioned by normal use."

{¶40} Again, Officer Higley testified that he heard a loud bang and discovered appellant and his cellmate throwing chunks of a destroyed porcelain toilet at the door of cell No. 133. Officer Higley specifically observed appellant throw at least one piece of porcelain at the cell door which contained several glass window panes. He indicated that appellant was in a highly-agitated state and was likely intoxicated. According to Officer Higley, the damage included the broken toilet which had been completely removed from the wall, as well as five broken window panes. Also, Savric testified that he was provided an assessment of the damage that occurred in cell No. 133. Savric stated that in addition to the destruction of the cell's plumbing, the five panes of broken glass have a total replacement cost of $1,875.

{¶41} Contrary to appellant's argument in his appellate brief, the state proved that the property belonged to someone other than the vandal and that it is used in a profession, business, trade, or occupation, as Trumbull Correctional Institution is a facility used for the business of housing convicted criminals.

{¶42} Pursuant to *Schlee*, supra, considering the evidence in a light most favorable to the prosecution, the jury could have found appellant guilty of vandalism beyond a reasonable doubt.

{¶43} Appellant's second assignment of error is without merit.

{¶44} In his third assignment of error, appellant alleges that his conviction is against the manifest weight of the evidence.

{¶45} As this court stated in *Schlee*, 1994 Ohio App. LEXIS 5862, at 14-15:

{¶46} "*** '[M]anifest weight' requires a review of the weight of the evidence presented, not whether the state has offered sufficient evidence on each element of the offense.

{¶47} "'In determining whether the verdict was against the manifest weight of the evidence, "(***) the court reviewing the entire record, *weighs the evidence* and all reasonable inferences, considers the credibility of 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. (***)'" (Citations omitted.) ***" (Emphasis sic.)

{¶48} A judgment of a trial court should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶49} With regard to the manifest weight of the evidence, we note that the jury is in the best position to assess the credibility of witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Here, the jury chose to believe the

state's witnesses. Based on the evidence presented, pursuant to *Schlee* and *Thompkins*, supra, we cannot say that the jury clearly lost its way in finding appellant guilty of vandalism.

{¶50} Appellant's third assignment of error is without merit.

{¶51} For the foregoing reasons, appellant's first, second, and third assignments of error are not well-taken, and his fourth assignment of error is moot. The judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.