

[Cite as *In re Yoho*, 2005-Ohio-4468.]

STATE OF OHIO, BELMONT COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

IN RE:)
)
 DAVID YOHO, II)
)
 Alleged Delinquent Child) CASE NO. 05 BE 5
) OPINION
)

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas, Juvenile Division, of Belmont County, Ohio
Case No. 04 JA 1149

JUDGMENT: Reversed.
Adjudication Vacated.

APPEARANCES:

For Appellant: Atty. Thomas M. Ryncarz
3814 Central Avenue
Shadyside, Ohio 43947

For Appellee: Atty. Christopher Berhalter
Belmont County Prosecutor
Atty. Scott A. Lloyd
Assistant Prosecuting Attorney
147-A West Main Street
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JUDGES:

Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: August 26, 2005

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VUKOVICH, J.

{¶1} Appellant David J. Yoho, II appeals from his delinquency adjudication which was entered in the Belmont County Common Pleas Court, Juvenile Division. Two issues are raised in this appeal. The first issue is whether criminal trespass, a violation of R.C. 2911.21, is a lesser included offense of criminal damaging, a violation of R.C. 2909.06. The second issue is whether Yoho's adjudication is against the manifest weight of the evidence. For the reasons provided below, Yoho's adjudication of delinquency is reversed and vacated.

STATEMENT OF FACTS

{¶2} In the early evening hours of October 27, 2004, a mutual altercation occurred between two juveniles, Luke Nice, age 14, and David J. Yoho, II, age 15. (Tr. 6, 13, 46). The altercation occurred in the alley between the Nice residence and Joseph Bencur's residence. (Tr. 13, 47). Luke's father, Louis Nice, witnessed the very end of the altercation and called the police. Statements were taken from Louis, Luke and Yoho.

{¶3} Later that evening, Bencur arrived at his residence and noticed a large dent in his garage door. (Tr. 5, 32). He then called the police; Officer Trigg responded to the call. (Tr. 5). Officer Trigg informed Bencur that earlier that evening in the alley next to his garage, a fight occurred between Luke and Yoho. (Tr. 12).

{¶4} As a result of the altercation and damage to the garage door, on November 11, 2004, a two count complaint was filed against Yoho. The first count alleged that Yoho assaulted Luke in violation of R.C. 2903.13(A). The second count alleged that Yoho knowingly damaged Bencur's garage in violation of R.C. 2911.21.

{¶5} On February 1, 2005, the aforementioned complaint was the subject of an adjudication hearing wherein the state dismissed the assault count and introduced evidence relative to the remaining criminal damaging count. (Tr. 3).

{¶6} After hearing all the evidence, the juvenile court found Yoho not guilty on the criminal damaging. (02/01/05 J.E., Tr. 58). However, the juvenile court found him guilty of criminal trespass. (02/01/05 J.E., Tr. 58). Yoho objected to this finding. (02/01/05 J.E., Tr. 58) on the ground that he was never charged with that offense and

criminal trespass is not a lesser included offense of criminal damaging. As such, he contended that he could not be found guilty of criminal trespass. The juvenile court noted the objection for the record.

{¶17} The parties then agreed to proceed directly to the dispositional hearing. (Tr. 58). At the end of the dispositional hearing, the court ordered Yoho committed to the Belmont Harrison Juvenile District for 90 days for care and rehabilitation. (02/01/05 J.E., Tr. 61). However, the sentence was suspended on the conditions that Yoho: 1) obey all laws; 2) not be in or around Bencur's property; and, 3) pay restitution and court costs. (02/01/05 J.E., Tr. 61). Yoho appeals from the foregoing adjudication and disposition and raises two assignments of error.

ASSIGNMENT OF ERROR NUMBER ONE

{¶18} "THE TRIAL COURT COMMITTED ERROR IN FINDING THE APPELLANT GUILTY OF CRIMINAL TRESPASS BECAUSE CRIMINAL TRESPASS IS NOT A LESSER INCLUDED OFFENSE OF CRIMINAL DAMAGING."

{¶19} Under this assignment of error, Yoho contends that since the complaint only charged him with criminal damaging and not criminal trespass, he could not be found guilty of criminal trespass because it is not a lesser included offense of criminal damaging. The state rebuts this argument by claiming that the juvenile court impliedly amended the complaint from criminal damaging to criminal trespass. It contends that the juvenile court had the authority to do this by Juv.R. 22(B) because criminal trespass is a lesser included offense of criminal damaging.

{¶10} At the end of all the evidence, the juvenile court stated the following:

{¶11} "Okay. Thank you. The Court has reviewed the matter and at this time will make a finding of not guilty on the criminal damaging however, Mr. Lloyd [prosecutor] you have shown beyond a reasonable doubt the offense of criminal trespass, so based upon the evidence the Court is going to find David [appellant] guilty of criminal trespass a violation of 2911.21. Testimony from the officer, testimony from Luke Nice, and testimony from Louis Nice all corroborated that proof and the Court is satisfied that that has been proven beyond a reasonable doubt." (Tr. 58).

{¶12} The state insists that since the juvenile court never specifically stated that it was finding Yoho "guilty of criminal trespass, a lesser included offense of

criminal damaging,” the above colloquy of the juvenile court shows that it was actually amending the complaint from criminal damaging to criminal trespass, rather than finding him guilty of the lesser included offense.

{¶13} While the state’s contention may be plausible, it is nonetheless based on speculation and assumption. It is just as plausible to assume that since the juvenile court did not state that it was amending the complaint, it was finding him guilty of a lesser included offense. The foregoing statement of the court no more indicates that the juvenile court was amending the complaint than it does that the juvenile court was finding Yoho guilty of a lesser included offense. That said, regardless of how the statement is viewed (as amending the complaint or as a finding of guilt of a lesser included offense), as is explained below, the juvenile court would have no authority to amend the complaint pursuant to Juv.R. 22(B) if criminal trespass is not a lesser included offense of criminal damaging.

{¶14} Juv.R. 22(B) states:

{¶15} “(B) Amendment of pleadings:

{¶16} “Any pleading may be amended at any time prior to the adjudicatory hearing. After the commencement of the adjudicatory hearing, a pleading may be amended upon agreement of the parties or, if the interests of justice require, upon order of the court. *A complaint charging an act of delinquency may not be amended unless agreed by the parties, if the proposed amendment would change the name or identity of the specific violation of law so that it would be considered a change of the crime charged if committed by an adult.* Where requested, a court order shall grant a party reasonable time in which to respond to an amendment.” (Emphasis added).

{¶17} The Eighth Appellate District, in addressing this rule and whether an amendment changed the identity of the crime originally charged, stated the following:

{¶18} “In the comment following Juv.R. 22(B), the Supreme Court Rules Advisory Committee has explained that the court can change the charge only to a ‘lesser included offense.’ It stated as follows: ‘The revision to Juv.R. 22(B) prohibits the amendment of a pleading after the commencement or termination of the adjudicatory hearing unless the amendment conforms to the evidence presented *and also amounts to a lesser included offense of the crime charged.* Because juveniles

can be bound over as adults and become subject to the jurisdiction of the criminal division of the common pleas courts, it is important that Juv.R. 22(B) conform with Crim.R. 7(D), which similarly prohibits any amendment which would result in a change in the identity of the crime charged.’ Juv.R. 22(B) 1994 Staff Note.” *In re Reed*, 147 Ohio App.3d 182, 2002-Ohio-43, ¶21.

{¶19} Thus, it is clear that if the juvenile court amended the complaint, it could have only done so if criminal trespass was a lesser included offense of criminal damaging. *Id.* See, also, *State v. Burdine-Justice* (1998), 125 Ohio App.3d 707, 711, citing *State v. Briscoe* (1992), 84 Ohio App.3d 569, 572 (stating under Crim.R. 7(D), the original indictment can be amended during trial if the amended charge is a lesser included offense of the original charge); *State v. Quiles*, 8th Dist. No. 84293, 2005-Ohio-388, ¶15 (stating that an original indictment can be amended during trial if the amended charge is a lesser included offense of the original charge).

{¶20} Accordingly, our analysis turns to whether criminal trespass is a lesser included offense of criminal damaging. In determining whether an offense is a lesser included offense of another offense, we are to follow the test set out by the Ohio Supreme Court in *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph three of the syllabus:

{¶21} “An offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense.”

{¶22} Yoho admits that the first and third prongs of the *Deem* test are met. Yoho is clearly correct that the first prong of *Deem* is met. Criminal damaging is a second-degree misdemeanor, while criminal trespass is a fourth-degree misdemeanor. R.C. 2909.06(B); R.C. 2911.21(D). Thus, criminal trespass carries a lesser penalty than criminal damaging.

{¶23} Yoho is also correct that the third prong of *Deem*, that criminal damaging requires the proof of an element that criminal trespass does not, is also met. The elements of criminal trespass are set forth in R.C. 2911.21(A)(1)-(4). The juvenile

court did not specify which subsection of (A) Yoho violated. However, it appears that it would most likely be (A)(4). This subsection is defined as:

{¶24} “(A) No person, without privilege to do so, shall do any of the following:

{¶25} “* * *

{¶26} “(4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified by signage posted in a conspicuous place or otherwise being notified to do so by the owner or occupant, or the agent or servant of either.”

{¶27} Criminal damaging under R.C. 2909.06(A)(1) is defined as:

{¶28} “(A) No person shall cause, or create a substantial risk of physical harm to any property of another without the other person’s consent:

{¶29} “(1) Knowingly, by any means.”

{¶30} Accordingly, as can be seen by comparing the offenses, criminal damaging requires that the state prove that the offender caused or created a substantial risk of physical harm to another’s property. This element is not found in criminal trespass.

{¶31} Thus, Yoho is correct that the first and third prongs of *Deem* are met. Accordingly, whether or not criminal trespass is a lesser included offense of criminal damaging hinges on the second prong of *Deem*.

{¶32} As stated above, the second prong of *Deem* is that the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed. In determining whether the second prong of *Deem* is met, we must look to the elements of the offenses as *statutorily defined and not with reference to specific factual scenarios*. *State v. Blasdell*, 155 Ohio App.3d 423, 2003-Ohio-6392, citing *State v. Barnes*, 94 Ohio St.3d 21, 26, 2002-Ohio-68. Thus, if criminal damaging cannot, as *statutorily defined*, ever be committed without criminal trespass, as *statutorily defined*, also being committed, then criminal trespass is not a lesser included offense of criminal damaging.

{¶33} In examining the offenses as statutorily defined, we find that criminal damaging can be committed without committing criminal trespass. A person can knowingly cause or create a substantial risk of harm to another’s property without entering or remaining on the land or premise of another. For example, a person can

damage another person's automobile that is parked on a public street. Or a person could damage the car while it is parked on a third party's property that the person has permission to be on. Another example, is that one roommate could damage the other roommate's personal property that is in a common area of the room. Accordingly, the second prong of *Deem* is not met.

{¶34} While it is noted that in the factual scenario of the matter at hand, if criminal damaging was proven then criminal trespass was also proven, it must be remembered that the elements of the offenses must be examined as statutorily defined, i.e. in the abstract. The elements are not to be examined in reference to a specific factual scenario. When the elements of criminal trespass and criminal damaging are examined in the abstract, it must be concluded that criminal trespass is not the lesser included offense of criminal damaging.

{¶35} Accordingly, since Yoho was not charged with criminal trespass, the juvenile court could not find him guilty of that offense. As such, his adjudication of delinquency must be vacated.

ASSIGNMENT OF ERROR NUMBER TWO

{¶36} "THE TRIAL COURT COMMITTED ERROR IN FINDING THE APPELLANT GUILTY OF CRIMINAL TRESPASS BECAUSE THE TRIAL COURT'S VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶37} Due to our disposition of the first assignment of error, the second assignment of error is rendered moot. App.R. 12(A)(1)(c). Hence, it will not be addressed.

{¶38} For the foregoing reasons, the decision of the juvenile court is reversed. Yoho's adjudication of delinquency is vacated.

Waite, J., concurs.

DeGenaro, J., concurs.