

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio

Court of Appeals No. S-05-010

Appellee

Trial Court No. CRB 0400287 A

v.

Barry A. Rutherford

DECISION AND JUDGMENT ENTRY

Appellant

Decided: December 9, 2005

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney, and
Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Reese M. Wineman, for appellant.

* * * * *

PARISH, J.

{¶ 1} This is an appeal from a judgment of the Sandusky County Court #1, following a bench trial, in which appellant, Barry A. Rutherford, was found guilty of criminal mischief, i.e., defacing public buildings in Clyde Municipal Park, after which appellant was ordered to pay a fine and serve 180 days in jail. On appeal, appellant sets forth the following as his sole assignment of error:

{¶ 2} "Whether based upon the evidence provided at trial before the trial court on January 20th, 2005, constituted proof beyond a reasonable doubt of the defendant

appellant's guilt or whether purely circumstantial evidence was presented with direct evidence of the defendant denying involvement in the alleged criminal acts."

{¶ 3} The undisputed relevant facts are as follows. On September 25, 2004, someone reported seeing graffiti-style writing on the door and floor of the park's shelter house, and on the walls of the concession stand and men's and women's restrooms in Clyde Municipal Park. The writing, made with a black marker, contained graphic remarks of a sexual nature. The subject of the remarks was appellant's estranged wife and a male individual. Upon investigation, police found two park security tapes showing an individual, bearing a physical resemblance to appellant, leaving one of the restrooms and walking through the park. The tapes were recorded between 11 p.m. and midnight on September 24, 2004.

{¶ 4} A criminal complaint was filed against appellant on October 4, 2004, in which he was charged with four counts of criminal mischief in violation of R.C. 2909.07(A)(1). Appellant entered a not guilty plea on October 26, 2004, and a bench trial was held on January 20, 2005. At trial, testimony was presented by Officer James Snell and Sergeant Mark Roach of the Clyde Police Department. Appellant, acting as his own defense counsel, cross-examined the witnesses.

{¶ 5} Officer Snell testified that appellant denied writing on the park buildings. Snell further testified appellant claimed he was at work in Fremont, Ohio, until 11:15 p.m. on September 24, 2004; however, appellant could not account for his whereabouts between leaving work and arriving at a friend's home at midnight. Snell further testified

he could not positively identify appellant as the person on the security tapes; however, the individual on the tapes appeared to be a male, with the same build as appellant, and, like appellant, had "distinctly long hair." On cross-examination, Snell testified that, due to the placement and timing of the security cameras, someone could have been in the park at an earlier time and not been recorded on the tapes.

{¶ 6} Sergeant Roach testified as to the authenticity of the tapes, after which they were played for the court. Roach testified the tapes showed someone leaving the restroom at 11:46 p.m. and passing the shelter house at 11:53 p.m. Roach stated the person on the tapes had "many similarities" to appellant, whom Roach has known for "numerous years." Roach stated he could not tell the exact height, age, ethnicity, or sex of the individual on the tapes; however, both appellant and the person on the tapes had a long, dark ponytail.

{¶ 7} On cross-examination, Roach testified all the graffiti was written in a similar style. Roach stated park employees did not see any graffiti when the park buildings were cleaned on the afternoon of September 24, 2004. Roach further testified the park's digital security cameras are motion-activated.

{¶ 8} At the close of the all the evidence, the trial court found appellant guilty, as charged in the complaint. Sentencing was continued, pending preparation of a presentence investigation and report. On February 24, 2005, the trial court ordered appellant to serve 4 concurrent 180-day sentences, with 60 days of each sentence suspended and 90 days to be served at home with electronic monitoring. Appellant was

also ordered to submit to a psychological evaluation and counseling, and to pay restitution, court costs, and a fine for each violation. Imposition of appellant's sentence was suspended pending the outcome of this appeal.

{¶ 9} Appellant asserts on appeal that his conviction was against the "manifest weight" of the evidence. In support, appellant claims evidence that he was the individual on the tapes is "circumstantial" and therefore insufficient to sustain his conviction, and the trial court ignored testimony that he was at work when the graffiti was written on the park buildings.

{¶ 10} Upon close inspection, appellant's arguments go to both the sufficiency and the weight of the evidence presented at trial. The Supreme Court of Ohio has found that such claims are legally distinguishable. Specifically, the Supreme Court has held that, "[w]hile the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390, superceded by constitutional amendment on other grounds as stated in *State v. Smith* (1997), 80 Ohio St.3d 89.

{¶ 11} In determining whether the evidence against appellant was sufficient to sustain his conviction, we must inquire as to whether, after reviewing the evidence in a light most favorable to the prosecution, 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, paragraph two of the syllabus, superceded by constitutional

amendment on other grounds as stated in *State v. Smith*, supra. It is well-settled that the probative values of direct evidence and circumstantial evidence are identical. *Jenks*, supra at 272. Accordingly, appellant's attempt to disparage the circumstantial evidence against him is irrelevant, since a conviction can be supported with sufficient evidence either through direct evidence, circumstantial evidence, or both. *State v. Waddy* (1992), 63 Ohio St.3d 424, 430, superceded by constitutional amendment on other grounds as stated in *State v. Smith*, supra.

{¶ 12} R.C. 2909.07 states, in pertinent part, that:

{¶ 13} "(A) No person shall:

{¶ 14} "(1) Without privilege to do so, knowingly move, deface, damage, destroy, or otherwise improperly tamper with the property of another; * * *."

{¶ 15} Unrefuted evidence was presented at trial that on September 24, 2005, the shelter house and men's and women's bathrooms of the Clyde Municipal Park were defaced by graffiti written with a black magic marker. As to whether the evidence presented at trial was sufficient to identify appellant as the individual who defaced the buildings, a thorough review of the record reveals the following. First, as set forth above, Roach testified he knew appellant; the individual on the park security tapes resembled appellant in body type and mannerisms; and the writing in the park was similar to appellant's handwriting. It was undisputed at trial that appellant had a very long, dark ponytail. Our own review of the park security tapes confirms that the individual filmed in the park on September 24, 2005 between 11:30 p.m. and 12 midnight did, indeed, have

a long, dark ponytail. Second, appellant admitted leaving work at 11:15 p.m. on September 24; however, he offered no explanation as to his whereabouts between 11:15 p.m. and midnight. Finally, the content of the writing in the park was of a graphic sexual nature and was directed mainly at appellant's estranged wife.

{¶ 16} On consideration, we find the evidence presented at trial was sufficient to enable any rational trier of fact to find the essential elements of the crime of criminal mischief were proved beyond a reasonable doubt. Appellant's argument is without merit.

{¶ 17} In determining whether appellant's conviction was against the manifest weight of the evidence, "an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact 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. Otten* (1986), 33 Ohio App.3d 339, 340. On appeal, we are guided by the principle that "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230. Reversal of a conviction based on the weight of the evidence should be done only in exceptional cases, when the evidence presented weighs heavily in favor of the defendant. *State v. Martin* (1983), 20 Ohio App.3d 172.

{¶ 18} As stated previously, both officers identified appellant as the individual on the tapes, and the images on the tapes were recorded at a time when appellant could not account for his whereabouts. After hearing the officers' testimony, viewing the park

security tapes, and considering the other evidence presented, the trial court was free to believe or disbelieve appellant's statement that he was at work during the time in question. Since the trial court was in the best position to view all the witnesses and observe appellant throughout the trial, its determination as to his and the officers' credibility will not be disturbed by this court on appeal. *State v. Haas*, supra.

{¶ 19} This court has reviewed the entire record of proceedings and, upon consideration thereof, finds no indication that the trial court clearly lost its way or otherwise created such a manifest miscarriage of justice that appellant's conviction must be reversed and a new trial ordered. Accordingly, appellant's conviction was not against the manifest weight of the evidence. Appellant's assignment of error is not well-taken.

{¶ 20} Having disposed of appellant's sole assignment of error, we note that the issue of the length of appellant's sentence was raised in the state's appellate brief. Accordingly, in the interest of justice, and for the reasons expressed below, we elect to address the sentence imposed by the trial court, sua sponte.

{¶ 21} Appellant was found guilty of multiple violations of R.C. 2909.07(A)(1), which is a third degree misdemeanor. R.C. 2909.07(C). Pursuant to R.C. 2929.24(A)(3), the maximum sentence for a third degree misdemeanor is 60 days. As set forth above, the trial court sentenced appellant to serve 4 concurrent 180-day jail terms¹.

¹Since the underlying sentences are excessive as a matter of law, they are not made less so by the trial court's suspension of a portion of each sentence for 60 days, and the imposition of electronic home monitoring for an additional 90 days.

Accordingly, the trial court erred when it sentenced appellant in excess of the statutory maximum for each violation.

{¶ 22} On consideration of the foregoing, the judgment of the Sandusky County Court #1 is affirmed as to appellant's conviction. *However*, the judgment is reversed as to the sentence imposed and remanded to the trial court for resentencing in accordance with this decision. Appellant is ordered to pay the costs of this appeal for which sum judgment is rendered against appellant on behalf of Sandusky County and for which execution is awarded. See App.R. 24.

JUDGMENT AFFIRMED IN PART
AND REVERSED IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Dennis M. Parish, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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