[Cite as *State v. Jackson*, 2011-Ohio-3079.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-461 (C.P.C. No. 09CR-03-1869)
John T. Jackson,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 23, 2011

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon*, for appellee.

Tyack, *Blackmore & Liston Co.*, *L.P.A.*, and *Thomas M. Tyack*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, John T. Jackson ("appellant"), appeals from a judgment of conviction entered by the Franklin County Court of Common Pleas following a bench trial in which the court found appellant not guilty of inducing panic as charged in the indictment, but guilty of a lesser included offense of disorderly conduct as a misdemeanor of the fourth degree. For the reasons that follow, we affirm.

{¶2} On March 21, 2009, at approximately 9:00 p.m., appellant called 911 seeking assistance with mental health and substance abuse issues. The 911 operator

who answered the call, Laura Davisson, engaged in conversation with appellant, who seemed to be very intoxicated, while he advised her of his problems with alcohol and his plans to enter a detoxification facility in the near future. While Ms. Davisson was on the phone with appellant, another 911 operator contacted the Westerville police department. Three officers were sent to appellant's address at 82 Keethler Drive North, in Franklin County, Ohio to check on the well-being of appellant.

{¶3} Upon arrival at the residence, the officers knocked on the front door. They did not receive a response. One of the officers, Dave Lammert, went to the back of the residence. Through the rear sliding door, the officer observed appellant sitting on the couch talking on the phone. Officer Lammert knocked on the back window. Appellant continued to talk on the phone and did not respond. Officer Lammert used his flashlight to light up his uniform and then flashed the flashlight in the window to signal to appellant that he was present. Officer Lammert testified he heard appellant state: "The next police officer I see with a flashlight in my yard, I'm going to shoot him." (Tr. 21.) Upon hearing that statement, Officer Lammert put away his flashlight, drew his weapon, and backed off the deck into a position of concealment. Officer Lammert also notified his supervisor and additional officers were sent to the scene.

{¶4} While Officer Lammert was at the rear of the house, Ms. Davisson was still on the phone talking to appellant. A portion of the recorded 911 call was played for the trial judge during the trial. Several minutes into the call, the ringing of a doorbell and the barking of a dog can be heard. Appellant indicates that someone is ringing his doorbell. Ms. Davisson explains it may be an officer. At that point, appellant becomes upset and instructs Ms. Davisson to send the officers away and states that he will not answer the door. On the recorded call, appellant can be heard stating: "I tell you what, if I see one

more person in my backyard shining flashlights through my door, I'm going to shoot them. I am a concealed carried permit owner." (Tr. 73.) Ms. Davisson then advises appellant that she will let the officers know that he does not want help and also tells appellant that the officers should be leaving now.

{¶5} Officer Stacy Kenney remained at appellant's front door while Officer Lammert went to the rear of the residence. Officer Kenney testified he was advised of the situation that Officer Lammert had encountered in the rear of the house. As a result of that advisement, Officer Kenney backed away from the front door and took cover. Some time later, appellant opened his front door but did not come out on to the porch. Officer Kenney was positioned approximately 20 feet away, behind a tree in the front yard. Officer Kenney asked appellant to come outside on to the porch to talk, but appellant refused. Appellant had his arms crossed across his chest and refused to show the officer his hands. After a few minutes, appellant remarked, "I'm going to shoot any police officer I see in my yard." (Tr. 53.) Then appellant shut the door and went inside.[1]

{¶6} In response to all of appellant's actions, Corporal Bryan Spoon, a patrol supervisor, testified that he sent out a page to all commanding officers to let them know what was happening. As part of this critical incident response, he set up a command post, mobilized the Delaware Tactical Unit, and put the hostage negotiators on stand-by. The tactical unit brought an armored vehicle, along with all of their tactical equipment. Additional street officers were also summoned to the area to assist in executing containment procedures, such as cordoning off the neighborhood in order to keep traffic

[1] This statement was not on the recorded 911 call provided to the trial court. It is unclear whether appellant was still on the phone with the 911 operator at that time, although Officer Kenney testified appellant had his arms crossed and he could not see appellant's hands. In reaching its decision, the trial court stated it had "concerns about whether or not there was a conversation at the front door, or an observation at the front door." (Tr. 199.)

from getting too close to appellant's residence. Officers also notified neighbors in the area of the situation by going house to house. In addition, the local electric company was contacted to shut down certain grids to reduce the amount of light in the area and increase the safety level of the officers.

{¶7} During the course of the incident, Officer Lammert observed appellant move to various rooms throughout the house, turning lights on or off as he did so. The lights in the lower level of the residence were turned off and then the lights in the upper level were activated. Eventually those lights went off too. After that, the tactical team arrived with its equipment, including bullhorns and spotlights and the armored vehicle. Ultimately, appellant was taken into custody. A search of the residence failed to produce any firearms.

{¶8} Lieutenant John Petrozzi testified that he was the command staff person on call the night of the incident. He observed the officers, the EMTs, the fire department, and the different tactical units that responded and testified that they were all summoned according to policy and protocol for the situation at hand. Lieutenant Petrozzi also provided testimony regarding the overtime summaries submitted for the various units that responded to appellant's residence. The summaries were admitted into evidence and set forth approximately $10,000 in costs incurred by the city of Westerville in responding to the incident at appellant's residence.

{¶9} Appellant called three witnesses to testify on his behalf. All three witnesses were neighbors who lived across the street from appellant. Collectively, these witnesses testified they observed officers positioned behind cars and trees in the area of appellant's residence. At some point during the night, the witnesses observed appellant come out onto his front porch to let his dog out to do its business. Appellant then went back into the

house and turned out the lights. None of the officers approached appellant at that time. At a later point, one of the witnesses observed a SWAT vehicle pull into appellant's driveway. The witness observed a spotlight come on and heard an officer call out for appellant to make contact. Appellant eventually came out of the residence and was taken into police custody.

{¶10} After hearing the evidence in the case, the trial judge found appellant not guilty of inducing panic. However, the trial judge found appellant guilty of the lesser included offense of disorderly conduct as a misdemeanor of the fourth degree. Specifically, the trial judge found appellant committed the offense while in the presence of the police. The trial court imposed a sentence of three days, suspended for time served, as well as a $250 fine and court costs. The trial court also ordered restitution to the city of Westerville in the amount of $2,087.20, which was essentially half of the amount attributable to costs incurred due to the response of the tactical and negotiations teams. The trial court declined to impose the remainder of the restitution requested by the state of Ohio.

{¶11} Appellant filed a timely appeal and asserts the following two assignments of error for our review:

> ASSIGNMENT OF ERROR NO. I:
>
> I. THE TRIAL COURT ERRED IN FINDING THE DEFENDANT GUILTY OF THE LESSER INCLUDED OFFENSE OF DISORDERLY CONDUCT PURSUANT TO 2917.11 OF THE OHIO REVISED CODE AS A FOURTH DEGREE MISDEMEANOR BECAUSE OF THE ADDITIONAL ELEMENT THAT THE OFFENSE WAS COMMITTED IN THE PRESENCE OF ANY LAW ENFORCEMENT OFFICER[.]

ASSIGNMENT OF ERROR NO. II:

II. THE TRIAL COURT ERRED IN IMPOSING AN ORDER OF RESTITUTION PREMISED ON THE CONVICTION OF DISORDERLY CONDUCT IN THE AMOUNT OF $2,087.20[.]

{¶12} In his first assignment of error, appellant argues that, pursuant to the facts submitted in this case, disorderly conduct is not a lesser included offense of inducing panic as found by the trial court. Appellant cites to the test for lesser included offenses set forth in *State v. Deem* (1988), 40 Ohio St.3d 205, and *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, and argues that the test has not been met. Appellant asserts the inducing panic statute does not have an element which requires the offense to be committed in the presence of a law enforcement officer. Appellant further argues that, unlike the inducing panic statute, the disorderly conduct statute does not include threatening to commit an offense of violence as an element.

{¶13} In *Deem*, the Supreme Court of Ohio set forth a three-part test for determining whether one offense is a lesser included offense of another. Under the *Deem* test, "[a]n 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." Id. at paragraph three of the syllabus.

{¶14} The Supreme Court of Ohio clarified the second part of *Deem* test in *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260 (*Smith* I). The court held that "[i]n determining whether an offense is a lesser included offense of another when a statute sets forth mutually exclusive ways of committing the greater offense, a court is required to

apply the second part of the test established in *State v. Deem* * * * to each alternative method of committing the greater offense." *Smith* I at paragraph one of the syllabus.

{¶15} Later, in *Evans*, the Supreme Court of Ohio further clarified the second part of the *Deem* test by deleting the word "ever." Id. at ¶25. With this modification, the test for determining whether one offense is a lesser included offense of another requires a court to consider "whether one offense carries a greater penalty than the other, whether some element of the greater offense is not required to prove commission of the lesser offense, and whether the greater offense as statutorily defined cannot be committed without the lesser offense as statutorily defined also being committed." Id. at paragraph two of the syllabus.

{¶16} In applying the *Deem* test as clarified, we find the trial court did not err in finding appellant guilty of the lesser included offense of disorderly conduct as a misdemeanor of the fourth degree, based upon our analysis as set forth below.

{¶17} Appellant was indicted on one count of inducing panic, pursuant to R.C. 2917.31. The indictment alleged that appellant caused serious public inconvenience or alarm by threatening to commit an offense of violence, and the violation resulted in economic harm of $500 or more. R.C. 2917.31 reads as follows:

> (A) No person shall cause the evacuation of any public place, or otherwise cause serious public inconvenience or alarm, by doing any of the following:
>
> * * *
>
> (2) Threatening to commit any offense of violence[.]

{¶18} The statute further provides that inducing panic is a felony of the fifth degree if the violation results in economic harm of $500 or more but less than $5,000. See R.C. 2917.31(C)(4)(a).

{¶19} The offense of disorderly conduct can be committed in numerous ways pursuant to R.C. 2917.11. As argued here, R.C. 2917.11 defines disorderly conduct as follows:

> (A) No person shall recklessly cause inconvenience, annoyance, or alarm to another by doing any of the following:
>
> (1) Engaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior[.]

{¶20} In another provision of the statute, R.C. 2917.11 further provides:

> (E)(1) Whoever violates this section is guilty of disorderly conduct.
>
> * * *
>
> (3) Disorderly conduct is a misdemeanor of the fourth degree if any of the following applies:
>
> * * *
>
> (c) The offense is committed in the presence of any law enforcement officer, firefighter, rescuer, medical person, emergency medical services person, or other authorized person who is engaged in the person's duties at the scene of a fire, accident, disaster, riot, or emergency of any kind.

{¶21} In analyzing the first prong of the clarified *Deem* test, and in comparing the penalties of the two offenses, disorderly conduct, as a misdemeanor of the fourth degree, clearly provides for a lesser penalty than does inducing panic, a felony of the fifth degree. Therefore, we find the first part of the test has been met.

{¶22} The third part of the test requires an examination of the elements of the two offenses in order to determine whether some element of the greater offense is not required to prove the commission of the lesser offense. We note that the inducing panic statute requires "*serious* public inconvenience or alarm" (emphasis added), while the disorderly conduct statute merely requires "inconvenience, annoyance, or alarm to

another." We further note that while inducing panic requires "threatening to commit any offense of violence," disorderly conduct only requires "threatening harm to persons or property." Therefore, we find inducing panic requires an additional element not required to prove disorderly conduct, and as a result, we find the third prong of the test has been met.

{¶23} We now turn to the second prong of the modified *Deem* test, which requires illustration that the greater offense cannot, as statutorily defined, be committed without the lesser offense, as statutorily defined, also being committed. Appellant argues that this prong has not been met because the offense of inducing panic does not contain an element requiring proof that the offense took place in the presence of a law enforcement officer, unlike the fourth degree misdemeanor offense of disorderly conduct, and thus, the greater offense (inducing panic) can be committed without committing the lesser offense (disorderly conduct). However, based upon the rationale set forth by the Supreme Court of Ohio in *Smith* I and *State v. Smith*, 121 Ohio St.3d 409, 2009-Ohio-787 (*Smith* II), we reject appellant's argument.

{¶24} In the *Smith* cases, the defendant was indicted for the offense of robbery by force, pursuant to R.C. 2911.02(A)(3), for shoplifting $1,600 in merchandise and attacking the security personnel who tried to apprehend her. After a bench trial, Smith was found guilty of theft as a lesser included offense of robbery and as a felony of the fifth degree. On appeal, Smith argued theft was not a lesser included offense of robbery because robbery could be committed without committing a theft. Smith also argued a fifth-degree felony theft was different from a robbery because theft required the prosecution to prove the items stolen were valued at $500 or more and less than $5,000, while robbery did not require proof as to value.

{¶25} In deciding *Smith* I, the Supreme Court of Ohio, as noted above, modified the *Deem* test. The court determined that where a statute provides alternative methods of committing the greater offense, the second prong of the test must be applied to each alternative method of committing the greater offense. As a result, the court determined theft was a lesser included offense of robbery. More importantly for our purposes here, the court rejected the defendant's contention that the elements of a theft offense include value. Instead, the court found value was a "special finding to determine the degree of the offense, but [it] is not part of the definition of the crime." *Smith* I at ¶31.

{¶26} On reconsideration in *Smith* II, the Supreme Court of Ohio affirmed its "special finding" determination. "While the special findings identified in R.C. 2913.02(B)(2) affect the punishment available upon conviction for the offense, they are not part of the definition of the crime of theft set forth in R.C. 2913.02(A)." *Smith* II at ¶7. "[W]e hold that the value of stolen property is not an essential element of the offense of theft but, rather, is a finding that enhances the penalty of the offense. As such, it is submitted to a factfinder for a special finding in order to determine the degree of the offense." Id. at ¶13.

{¶27} The *Smith* II court further noted that where an indictment charges a greater offense, the accused is simultaneously charged with the lesser included offense as well. *Smith* II at ¶15, citing *State v. Lytle* (1990), 49 Ohio St.3d 154, 157. "Thus, because theft is a lesser included offense of robbery, the indictment for robbery necessarily included all of the elements of all lesser included offenses, together with any of the special, statutory findings dictated by the evidence produced in the case." *Smith* II at ¶15.

{¶28} The rationale in the *Smith* cases has also been followed by at least one appellate district in deciding a somewhat similar case involving different offenses.

{¶29} In *State v. McPherson*, 8th Dist. No. 92481, 2010-Ohio-64, the defendant was charged with felonious assault with a peace officer specification and kidnapping. Following a bench trial, he was found not guilty of kidnapping but guilty of the lesser included offense of assault. The trial court made a finding that the assault occurred on the grounds of a correctional facility, which elevated the assault offense from a misdemeanor to a felony of the fifth degree. McPherson appealed his conviction, arguing he could not be convicted of the elevated offense because it required the finding of an additional element that had not been included in the indictment.

{¶30} The Eighth District Court of Appeals rejected this argument, based upon the rationale of *Smith* II. "[T]he special finding (occurring on the grounds of a correctional facility) set forth in R.C. 2903.13(C)(2)(b) only affected the punishment available upon conviction, and is not part of the crime of assault as set forth in R.C. 2903.13(B); therefore, the finding is not an essential element of the offense. Since McPherson was charged with felonious assault, he was put on notice that he could be found guilty of all lesser included offenses, together with any of the special, statutory findings dictated by the evidence produced in the case." *McPherson* at ¶11.

{¶31} Based upon the foregoing, we find the rationale in the *Smith* cases to be applicable to the case at bar. We find the elements of disorderly conduct do not include an element that the offense be committed in the presence of a law enforcement officer. Instead, we find the "committed in the presence of any law enforcement officer" language constitutes a special finding which is not an essential element of the offense of disorderly conduct and which enhances the penalty of the offense. This special finding must be submitted to a fact finder in order to determine the degree of the offense, but it is not part

of the definition of the crime and does not preclude a determination that disorderly conduct is a lesser included offense of inducing panic.

{¶32} Accordingly, appellant's first assignment of error is overruled.

{¶33} In his second assignment of error, appellant argues the trial court erred in imposing an order of restitution.

{¶34} Appellant argued in his first assignment of error that the trial court erred in finding him guilty of the lesser included offense of disorderly conduct and in determining that the crime was committed in the presence of a law enforcement officer. It was this "in the presence of any law enforcement officer" determination that elevated the offense from a minor misdemeanor to a misdemeanor of the fourth degree. Appellant argues, without conceding, that, at worst, appellant's conduct could only constitute that of a minor misdemeanor disorderly conduct offense. Under those circumstances, and pursuant to R.C. 2929.28, which governs financial sanctions and court costs, appellant argues the trial court is without authority to impose restitution as a sanction. Thus, appellant argues the trial court erred in imposing an order of restitution.

{¶35} R.C. 2929.28(A)(1) provides in relevant part as follows:

> * * * The court may not impose restitution as a sanction pursuant to this division if the offense is a minor misdemeanor or could be disposed of by the traffic violations bureau serving the court under Traffic Rule 13.

{¶36} We acknowledge that the trial court would be unable to impose restitution if it had found appellant guilty of disorderly conduct as a minor misdemeanor. However, for the reasons set forth in our analysis of appellant's first assignment of error, we find the trial court did not err in finding appellant guilty of disorderly conduct as a misdemeanor of the fourth degree, and therefore, the trial court did not err in imposing restitution.

{¶37} Accordingly, we overrule appellant's second assignment of error.

{¶38} In conclusion, we overrule appellant's first and second assignments of error. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN and FRENCH, JJ., concur.