

[Cite as *State v. Harrison*, 2010-Ohio-2135.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 23431
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-3970
v.	:	
	:	(Criminal Appeal from
JEFFERY W. HARRISON	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 14th day of May, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant Jeffery W. Harrison appeals from his conviction and sentence, following a no-contest plea, for Disrupting Public Services, in violation of R.C. 2909.04(A)(1). He contends that the indictment and bill of particulars did not allege sufficient facts to make out the offense. We conclude that the facts alleged in

the indictment and bill of particulars are sufficient to make out the offense. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 2} Harrison was charged by indictment with Disrupting Public Services, in violation of R.C. 2909.04(A)(1). He moved for a bill of particulars. The State filed a bill of particulars setting forth the following:

{¶ 3} “On or about May 28, 2008, in Montgomery County, Ohio Jeffery Wade Harrison, did purposely, by any means, or knowingly, by damaging or tampering with any property, interrupt or impair telephone service, to wit: did purposely or knowingly damage an operable cell phone, thereby rendering it inoperable, contrary to the form of the statute, in violation of Section 2909.04(A)(1) of the Ohio Revised Code.”

{¶ 4} Harrison tendered a no-contest plea, but contended that the facts set forth in the bill of particulars do not, as a matter of law, make out an offense under the Code, because rendering a single cell phone inoperable does not amount to the disruption of a public service. The trial court held otherwise, found Harrison guilty on his no-contest plea, and sentenced him accordingly. From his conviction and sentence, Harrison appeals.

II

{¶ 5} Harrison’s sole assignment of error is as follows:

{¶ 6} “THE TRIAL COURT ERRED IN FINDING THAT KNOWINGLY OR PURPOSELY DAMAGING THE CELL PHONE AND RENDERING IT INOPRABLE

[sic] CONSTITUTES A VIOLATION OF R.C. 2909.04, DISRUPTING PUBLIC SERVICES.”

{¶ 7} In his brief, Harrison relied upon *State v. Robinson*, 177 Ohio App.3d 560, 2008-Ohio-6813, a decision of the Ohio 3rd District Court of Appeals, which held that rendering a single cell phone inoperable could not be the basis for finding a violation of R.C. 2909.04(A)(3), which provides as follows:

{¶ 8} “No person, purposely by any means or knowingly by damaging or tampering with any property, shall do any of the following:

{¶ 9} “(3) Substantially impair the ability of law enforcement officers, firefighters, rescue personnel, emergency medical services personnel, or emergency facility personnel to respond to an emergency or to protect and preserve any person or property from serious physical harm.”

{¶ 10} Unfortunately for Harrison, after his brief was filed, but before the oral argument of this appeal, the Supreme Court of Ohio, in a unanimous decision, has reversed the authority upon which he relies, holding that rendering a single cell phone inoperable can constitute a violation of R.C. 2909.04(A)(3). *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937.

{¶ 11} At oral argument, Harrison contended that *State v. Robinson*, supra, is distinguishable, because that case involved an alleged violation of R.C. 2909.04(A)(3), whereas his case involves an alleged violation of R.C. 2909.04(A)(1). That division of the statute provides, in pertinent part:

{¶ 12} “No person, purposely by any means or knowingly by damaging or

tampering with any property, shall do any of the following:

{¶ 13} “(1) Interrupt or impair television, radio, telephone, telegraph, or other mass communications service * * * .”

{¶ 14} Harrison argues that unlike division (A)(3), which implicates interference with the ability of designated persons to respond to emergencies, division (A)(1) implicates interference with a mass communications service, meaning an entire mass communications service system, rather than interference with a single user’s communication device – in this case, a cell telephone.

{¶ 15} We have upheld a conviction, under R.C. 2909.04(A)(1), based upon the ripping from a wall and removal of a single telephone, so that an occupant of the premises could not use it. We reasoned:

{¶ 16} “The statute prohibits purposeful or knowing damaging or tampering with property that interrupts or impairs telephone service. Telephone service includes the initiation of telephone calls. *State v. Brown* (1994), 97 Ohio App.3d 293, 301, 646 N.E.2d 838. As previously noted, the evidence indicates that after Thomas entered the apartment on June 15, he was told to leave. When he did not leave, Peterson attempted to call the police. At that point, Thomas ripped the phone from the wall. After assaulting Peterson, Thomas left the apartment with the telephone in his possession. At that point, Peterson was forced to contact the police from a pay phone. This is sufficient to sustain the conviction.” *State v. Thomas*, Montgomery App. No. 19435, 2003-Ohio-5746, ¶62.

{¶ 17} We followed *State v. Thomas*, supra, as recently as 2007, in *State v. White*, Montgomery App. No. 21795, 2007-Ohio-5671.

{¶ 18} Harrison argues that *State v. Thomas*, supra, and *State v. White*, supra, are wrongly decided. He contends that such a broad construction of the statute would encompass the mere changing of a channel on a television set. Although we need not decide hypothetical cases, we note that the mere changing of a channel does not constitute the sort of interruption or impairment of service present in *State v. Thomas*, supra, since the user could simply change the channel right back. In other words, the changing of channels is part of the normal operation of television service.

{¶ 19} In any event, we are not persuaded that we should depart from the precedents established in the *State v. Thomas* and *State v. White* cases, cited supra.

{¶ 20} In the case before us, we do not know what particular actions Harrison took to render a cell phone inoperable. We do know that whatever he did was sufficient to interrupt or impair telephone service – i.e., to interrupt or impair the ability of someone in a position to use the cell phone to make a telephone call, or to receive a call, from doing so. We know this because the bill of particulars, to which Harrison pled no contest, included an allegation that he did “interrupt or impair telephone service,” which are the very words used in R.C. 2909.04(A)(1).

{¶ 21} So long as the facts alleged in the indictment or bill of particulars would, if proven, support a conviction of the offense charged, the trial court’s acceptance of a no-contest plea to the charged offense requires a finding of guilty. *State v. Lowe* (March 24, 1995), Miami App. Nos. 93-CA-54 and 93-CA-55.

{¶ 22} Harrison’s sole assignment of error is overruled.

{¶ 23} Harrison's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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FROELICH, J., concurring separately.

{¶ 24} While ambiguity and the rule of lenity might produce a different result, I am not as convinced as the dissent, given our precedent and especially since the Supreme Court held in *Robinson* that the destruction of a single cell phone can be a violation of R.C. 2909.04(A)(3), that the legislature intended that a violation of (A)(1) [which is the same level felony as (A)(3)] requires the interruption of an entire mass communications service by, for instance, damaging the electrical grid or perhaps a television station's broadcast tower. Further, other than the catch-all provisions of criminal damaging and criminal mischief, the Revised Code does not provide any prohibition against damage specifically to a cell phone, telecommunications device, or mass communications service other than in R.C. 2909.04. In fact, when the Supreme Court accepted the Third District's decision in *Robinson*, it explicitly noted that such decision, which held the destruction of a single cell phone is not a violation of R.C. 2904.04(A)(3), was in conflict with our decision in *Thomas*, supra [which held that destruction of a single cell phone was a violation of R.C. 2909.04(A)(1)]. *State v. Robinson*, 120 Ohio St.3d 1451, 2008-Ohio-6813.

{¶ 25} Most importantly, the appellant pled no contest and thereby did not dispute that, as alleged in the indictment and the bill of particulars, he knowingly, by damaging and rendering inoperable a cell phone, interrupted or impaired telephone service. With the facts before the trial court, and thus before us, the finding of guilty

was appropriate.

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GRADY, J., dissenting:

{¶ 26} R.C. 2909.04, "Disrupting Public Services," states, in pertinent part:

{¶ 27} "(A) No person, purposely by any means or knowingly by damaging or tampering with any property, shall do any of the following:

{¶ 28} "(1) Interrupt or impair television, radio, telephone, telegraph, or other mass communications service; police, fire, or other public service communications; radar, loran, radio, or other electronic aids to air or marine navigation or communications; or amateur or citizens band radio communications being used for public service or emergency communications;

{¶ 29} "(2) Interrupt or impair public transportation, including without limitation school bus transportation, or water supply, gas, power, or other utility service to the public;

{¶ 30} "(3) Substantially impair the ability of law enforcement officers, firefighters, rescue personnel, emergency medical services personnel, or emergency facility personnel to respond to an emergency or to protect and preserve any person or property from serious physical harm.

{¶ 31} "(B) No person shall knowingly use any computer, computer system, computer network, telecommunications device, or other electronic device or system or the internet so as to disrupt, interrupt, or impair the functions of any police, fire, educational, commercial, or governmental operations.

{¶ 32} "(C) Whoever violates this section is guilty of disrupting public services, a felony of the fourth degree."

{¶ 33} The Legislative Service Commission comment to R.C. 2909.04 states:

{¶ 34} "This section covers any substantial interference with utility or emergency services, including mass communications, public service communications, navigational aids, transportation, water supply, gas, power, and other utility services.

{¶ 35} "The section also includes serious interference with police, firemen or rescue personnel in answering an emergency call or protecting life, limb, or property.

Examples of violations include cutting fire hoses, pouring water into fire hydrants in freezing weather, deflating the tires of emergency vehicles, or forming a human cordon around a fire for the purpose of keeping firemen from putting it out. The section is not intended to include simple misconduct at an emergency, covered under new section 2917.13 of the Revised Code. To be a violation of this section, the interference must either be purposeful, regardless of the means employed, or must involve knowingly damaging or tampering with property." (Emphasis supplied.)

{¶ 36} As it appears in R.C. 2909.04(A), the phrase "knowingly by damaging or tampering with any property" is a gerund phrase, functioning as a noun, the object of which, in paragraph (A)(1), is the purposeful interruption or impairment of a mass communications service. It is that object that R.C. 2909.04(A)(1) criminalizes. The LSC comment reflects a correlative legislative intention that the particular means used or damage inflicted must be "substantial" in order that the prohibited object be accomplished.

{¶ 37} Destruction of a telephone substantially impairs or interferes with the capacity of that single instrument to provide access to telephone service. However, in and of itself, that destruction does not substantially impair or interfere with the mass communications service of which that telephone service is but a small part. Both the title to R.C. 2909.04 and paragraph (C) of that section confirm that it is the purposeful interruption or impairment of "public services," and not the particular means used to do it, that R.C. 2909.04(A)(1) criminalizes.

{¶ 38} In *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, the Supreme Court held that destruction of a single cell phone demonstrates a violation of R.C. 2909.04(A)(3), because that act of destruction "substantially impair[ed] the ability of law enforcement officers . . . [and] emergency services personnel . . . to respond to an emergency . ." *Id.* The present case, as well as our prior holdings in *State v. Thomas*, Montgomery App. No. 19435, 2003-Ohio-5746, and *State v. White*, Montgomery App. No. 21795, instead involves a violation of R.C. 2909.04(A)(1), which requires proof of a wholly different form of harm; interrupting or impairing a mass communications service. The opinion of the Eighth District Court of Appeals in *State v. Brown* (1994), 97 Ohio App.3d 293, doesn't identify which of those two subsections of R.C. 2909.04(A) formed the basis of the defendant's conviction, but nevertheless finds that the defendant could have violated both when he pulled a phone connection from a wall. It is not reasonable to assume that two related sections of the Revised Code which were enacted together were intended to criminalize the very same conduct.

{¶ 39} On this record, the operative facts set out in the bill of information, that

Defendant Harrison "did purposely or knowingly damage an operable cell phone, thereby rendering it inoperable," fail to demonstrate a violation of R.C. 2909.04(A)(1).

Defendant's conviction on his plea of no contest to the charged offense is therefore void. I would reverse and vacate the conviction.

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