[Cite as *State v. Hilleary*, 2015-Ohio-2782.]

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 26426
	:	
v.	:	Trial Court Case No. 2014-CR-435/1
	:	
DRU HILLEARY	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 10th day of July, 2015.

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HALL, J.

{¶ 1} Dru Hilleary appeals from his conviction for violating Ohio's open-dumping

statute, R.C. 3734.03, by abandoning scrap tires outside. Finding no error, we affirm.

I. Facts

{¶ 2} Hilleary lived with his mother, Gwendolyn Bridget, in her apartment at 955 Webster Street in Dayton. They were notified on August 14, 2013, that they had to vacate their apartment within three days, by August 17. On August 19, David Radominski, the landlord, went to the apartment building. When he arrived, he saw around 45 scrap tires stacked along the fence line behind the building. Radominski also found around 200 tires in the basement. Radominski saw Hilleary and asked him who owned all the tires. Hilleary told him that he did, that he had been storing the tires until the next Montgomery County tire buy back.

{¶ 3} On August 22, the apartment building's owner filed a complaint for forcible entry and detainer against Hilleary's mother, and any other occupants of the apartment, and on September 13, obtained an order regarding restitution of the premises. A forcible eviction was set for September 25. Sometime before then, Hilleary (and his mother) left the apartment and left all the tires in the basement and outside along the fence. Radominski later hired another tenant, Robert Greer, to remove the basement tires, which Greer also placed along the fence.

{¶ 4} In January 2014, an environmental enforcement officer investigated a complaint concerning scrap tires behind the apartment building. The investigation led to Hilleary being charged with violating Ohio's open-dumping statute, R.C. 3734.03, which prohibits a person from disposing of scrap tires by putting them onto "the surface of the ground" at an unapproved location, R.C. 3734.01(I)(defining "open dumping").

{¶ 5} Hilleary waived his right to a jury and was tried to the court. Two days before

trial, Hilleary filed a motion to dismiss the indictment, arguing that the open-dumping statute is vague, overbroad, and was selectively applied to him. After a one-day trial, the trial court told the parties that it would take the motion to dismiss and the verdict under advisement.

{¶ 6} When the trial recommenced, the court overruled Hilleary's motion to dismiss. The court concluded that the open-dumping statute is not vague or overbroad nor was it selectively applied to Hilleary. The court found that Hilleary had violated the open-dumping statute by placing 45 or so tires behind the apartment building along the fence line and abandoning them. But the court found that the tires in the basement did not violate the statute, because the basement floor does not constitute "the surface of the ground." The trial court sentenced Hilleary to community control.

{¶ 7} Hilleary appealed.

II. Analysis

{¶ 8} Hilleary assigns two errors to the trial court. The first challenges the court's overruling of his motion to dismiss. And the second challenges the sufficiency and manifest weight of the evidence.

A. The constitutionality of the open-dumping statute

{¶ 9} The first assignment of error alleges that the trial court erred by overruling Hilleary's motion to dismiss.

{¶ 10} Hilleary contends that the open-dumping statute does not make it clear to a person of ordinary intelligence what qualifies as "ground." In particular, Hilleary contends that the law as applied to the scrap tires in a basement is unclear and subject to arbitrary

or discriminatory application.

{¶ 11} The open-dumping statute prohibits a person from "dispos[ing] of solid wastes by * * * open dumping," except as authorized. R.C. 3734.03. "Disposal" is defined in R.C. 3734.01 as, inter alia, "the discharge, deposit, * * * dumping, * * * or placing of any solid wastes * * * into or on any land or ground," with certain exceptions not relevant here. R.C. 3734.01(F). "Open dumping" is defined, in part, as "the depositing of solid wastes that consist of scrap tires onto the surface of the ground" at an unapproved site. R.C. 3734.01(I). Also, an administrative regulation provides that the meaning of "open dumping" includes "the final deposition of scrap tires on or into the ground" other than at an approved site. Ohio Adm.Code 3745-27-01.

{¶ 12} Hilleary acknowledges that because his conviction was not based on the tires in the basement the scope of the word "ground" is "moot here." (Appellant's Brief, 9). But he says that the trial court's reasoning for excluding the basement tires should have been because "this 'ground' portion of the statute" is unconstitutionally vague, (*Id*.), not because the basement tires were excluded because they were not on the ground.

{¶ 13} "It has long been established 'that where the judgment is correct, a reviewing court is not authorized to reverse such judgment merely because erroneous reasons were assigned as the basis thereof.' " *State v. Allen*, 77 Ohio St.3d 172, 173, 672 N.E.2d 638 (1996), quoting *Agricultural Ins. Co. v. Constantine*, 144 Ohio St. 275, 284, 58 N.E.2d 658 (1944); *see also In re G.T.B.*, 128 Ohio St.3d 502, 2011-Ohio-1789, 947 N.E.2d 166, ¶ 7 (saying that the Court "will not reverse a correct judgment simply because it was based in whole or in part on an incorrect rationale"). Hilleary concedes that the trial court's judgment on this matter is correct. Thus, even if we were to disagree with the trial

court's rationale, we are not permitted to consider its implication because the judgment is correct in any event.

{¶ 14} Hilleary also asserts that "no one addressed the question of whether the 'openly' phrase was also unconstitutionally vague as applied to this case." (Appellant's Brief, 9). But Hilleary does not appear to have raised this issue in his motion to dismiss, nor does he elaborate on this assertion in his brief. We will not consider this issue for the first time here.

{¶ 15} The first assignment of error is overruled.

B. The sufficiency and weight of the evidence

{¶ 16} The second assignment of error alleges that there is insufficient evidence to support Hilleary's conviction and alleges that the conviction is contrary to the manifest weight of the evidence.

{¶ 17} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing 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*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. The test used to evaluate a manifest-weight challenge is different: " '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.' " *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1983).

{¶ 18} Hilleary points out that the trial court said that "the record is not clear" as to when he vacated the apartment. (Tr. 70). He says that ambiguities and contradictions in the witnesses' testimony about who moved the tires from the basement to the backyard and when they were moved "lack[] the certainties needed to prove a violation to the beyond-reasonable-doubt standard and justify a conviction." (Appellant's Brief, 11). Hilleary also says that there is no direct evidence that shows who put the tires in the backyard. The evidence presented at trial, says Hilleary, "fail[s] to unambiguously and credibly identify anyone[,] including Hilleary[,] as the person who placed the critical set of forty-five scrap tires in the backyard of this property." (*Id*. at 12).

{¶ 19} The trial court reasonably found that Hilleary left the apartment sometime on or before September 25, the date on which Hilleary would have been forcibly evicted. Hilleary testified that he and his mother vacated the apartment within a few days of receipt of the notice to vacate and that he never went back. But his mother testified that she left about two weeks after receiving the eviction notice. The landlord, David Radominski, testified that they did not move out within three days. Also, the trial court found that the apartment building's owner filed a complaint for forcible entry and detainer against them on August 22, and obtained an order regarding restitution of the premises on September 13 with forcible eviction set for September 25.

{¶ 20} As to who moved the tires to the backyard, Hilleary testified that when he left all of his tires were still in the basement and none were in the yard. Hilleary's mother

said that there were no tires in the back yard when she left. And Hilleary's brother-in-law testified that Hilleary was gone before any tires appeared in the backyard. But Radominski testified that on August 19 he saw stacks of tires outside. He took photographs of the tires, which the State presented as exhibits. The trial court described one (State's Exhibit 4) as "show[ing] a few tires, in fact, three tires stacked against the back of the dwelling and then a number of tires stacked along a fence line." (Tr. 29-30). The admitted photos show over 40 tires at the fence line. Radominski testified that he asked Hilleary that day who owned the tires outside and that Hilleary said that the tires outside and in the basement were his. Greer testified that when he began to stack the tires from the basement along the fence there were already some tires along the fence.

{¶ 21} Hilleary is correct that there is no direct evidence that he put the tires along the fence—for example, testimony from someone who saw him do it. But direct evidence is not necessary. " ' "[P]roof of guilt may be made by circumstantial evidence as well as by real evidence and direct or testimonial evidence. All three classes have equal probative value, and circumstantial evidence has no less value than the others." ' " *Jenks*, 61 Ohio St.3d at 272, 574 N.E.2d 492, quoting *State v. Nicely*, 39 Ohio St.3d 147, 151, 529 N.E.2d 1236 (1988), quoting *State v. Griffin*, 13 Ohio App.3d 376, 377, 469 N.E.2d 1329 (1st Dist.1979).

{¶ 22} The meaning of "open dumping" in R.C. 3734.03 includes "the final deposition of scrap tires on or into the ground at any place" (other than an approved site). Ohio Adm.Code 3745-27-01(O)(4)(b). The circumstantial evidence here is sufficient to allow a rational trier of fact to find, beyond a reasonable doubt, that Hilleary put scrap tires along the fence and, when he did not return for them, that this became the tires' "final

deposition." As to the weight of the evidence, "[t]his court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict." *State v. Parrish*, 2d Dist. Montgomery No. 21206, 2006-Ohio-4161, ¶ 27. It is not patently apparent to us that the trial court here lost its way. We cannot say that the trial court should have believed the testimony of Hilleary and the other defense witnesses over the State's witness and exhibits.[1]

{¶ 23} The second assignment of error is overruled.

III. Conclusion

{¶ 24} We have overruled the two assignments of error presented by Hilleary. Therefore the trial court's judgment is affirmed.

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FROELICH, P.J., and FAIN, J., concur.

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[1] [1] At oral arguments, Hilleary contended that he was unable to move the tires because he was not allowed back onto the property. Hilleary testified at trial that the apartment's owner had barred him from the property after the eviction. While this testimony might raise an affirmative defense of impossibility, the defense had not been raised before. It was not argued by Hilleary at trial, nor did the trial court consider the defense in its explanation of the basis for its verdict. Hilleary also did not raise an impossibility defense in his appellate brief and we need not consider it. Regardless, a sufficiency of evidence review does not apply to an affirmative defense . (The sufficiency-of-the-evidence standard " 'does not implicate affirmative defenses, because proof supportive of an affirmative defense cannot detract from proof beyond a reasonable doubt that the accused had committed the requisite elements of the crime.' " *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 37, quoting *Caldwell v. Russell*, 181 F.3d 731, 740 (6th Cir.1999).) And if we were to consider a manifest weight review of an impossibility defense we would determine the trial court's verdict is not against the manifest weight.

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