[Cite as *State v. Johnson*, 2015-Ohio-1110.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
BARBARA E. JOHNSON AND	:	Case No. 14-CA-54
STEVEN A. JOHNSON	:	
	:	
Defendants-Appellants	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Municipal Court, Case Nos. 14-CRB-00242 and 14-CRB-00243
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	March 17, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendants-Appellants
CAROLINE J. CLIPPINGER 40 West Main Street Newark, OH 43055	JAMES R. KINGSLEY 157 West Main Street Circleville, OH 43113

Farmer, J.

{¶1} On February 7, 2014, appellants, Steven and Barbara Johnson, were charged with animal cruelty in violation of R.C. 959.13(A)(3) and obstructing official business in violation of R.C. 2921.31. Said charges arose from the transport of sixty-two dogs in several cages in a Dodge Caravan minivan. Appellants alleged they were transporting unwanted dogs that were to be euthanized from a "puppy mill" (County Boys, LLC) in Indiana to a meeting place in Pennsylvania so they could turn the dogs over to a dog rescue facility, Animal Rescue Fund, located in New York. Appellants were paid $300.00 for the transport. Authorities became involved after appellants' minivan broke down on U.S. Route 70 near Newark, Ohio and the minivan had been towed to a Red Roof Inn.

{¶2} A jury trial commenced on June 12, 2014. The jury found appellants guilty of animal cruelty and not guilty of the obstruction charge. By judgment of conviction filed June 13, 2014, the trial court sentenced appellants to ninety days in jail with sixty days suspended. Affiliated with County Boys, LLC was appellants' co-defendant, Jonas Fisher. He pled guilty to complicity to cruelty to animals and obstructing official business and received community control.

{¶3} Each appellant filed an appeal. The appeals were consolidated and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "DID THE TRIAL COMMIT PREJUDICIAL ERROR WHEN IT DENIED DEFENDANTS' MOTION TO DECLARE RC §959.13(A)(3) UNCONSTITUTIONALLY VAGUE OR OVERBROAD?"

II

{¶5} "DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR WHEN IT REFUSED TO CHARGE THE JURY ON DEFENDANTS' JURY INSTRUCTION SETTING FORTH THE DEFENSE SET FORTH IN RC §1717.13?"

III

{¶6} "DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR WHEN IT REFUSED TO CHARGE THE JURY IN ACCORDANCE WITH DEFENDANTS' JURY INSTRUCTION ON THE DEFENSE OF NECESSITY?"

IV

{¶7} "DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR WHEN IT ALLOWED INTO EVIDENCE USDA TRANSPORTATION OF ANIMAL STANDARDS?"

V

{¶8} "WERE THE CONVICTIONS FOR ANIMAL CRUELTY BY TRANSPORT AGAINST THE SUFFICIENCY AND/OR THE MANIFEST WEIGHT OF THE EVIDENCE?"

VI

{¶9} "DID THE TRIAL JUDGE VIOLATE DEFENDANTS' CONSTITUTIONAL RIGHTS BY IMPOSING A PUNITIVE SENTENCE ONLY BECAUSE DEFENDANTS ELECTED TO GO TO JURY TRIAL?"

I

{¶10} Appellants claim the trial court erred in not declaring R.C. 959.13(A)(3) unconstitutional as vague and overbroad. We disagree.

{¶11} When examining legislative enactments, a strong presumption of constitutionality must be afforded. *Cincinnati v. Langan,* 94 Ohio App.3d 22 (1st Dist.1994). The legislation must, if possible, be construed in conformity with the Ohio and United States Constitutions. *Id.* "In order to prevail, the party asserting that an ordinance is unconstitutional must prove his assertion beyond a reasonable doubt." *Id.* at 30.

{¶12} In *State v. Collier,* 62 Ohio St.3d 267, 269-270 (1991), the Supreme Court of Ohio set forth a void-for-vagueness test:

> A tripartite analysis must be applied when examining the void-for-vagueness doctrine. See *Papachristou v. City of Jacksonville* (1972), 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110; *Grayned v. City of Rockford* (1972), 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222; *Kolender v. Lawson* (1983), 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903. In *Tanner, supra* [*State v.* (1984), 15 Ohio St.3d 1], Justice Locher instructed that "[t]hese values are first, to provide fair warning to the ordinary citizen so behavior may comport with the dictates of the statute; second, to preclude arbitrary, capricious and generally discriminatory enforcement by officials given too much authority and too few constraints; and third, to ensure that fundamental constitutionally protected freedoms are not unreasonably impinged or inhibited. Proper constitutional analysis necessitates a review of each of these rationales with respect to the challenged statutory language." *Id.,* 15 Ohio St.3d at 3, 15 ORB at 3, 472 N.E.2d at 691.

{¶13} In *Akron v. Rowland,* 67 Ohio St.3d 374, 387, 1993-Ohio-222, the Supreme Court of Ohio discussed the overbreadth doctrine as follows:

> In considering an overbreadth challenge, the court must decide "whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." *Id.,* 408 U.S. at 115, 92 S.Ct. at 2302, 33 L.Ed.2d at 231.
>
> "Only a statute that is substantially overbroad may be invalidated on its face." *Houston v. Hill* (1987), 482 U.S. 451, 458, 107 S.Ct. 2502, 2508, 96 L.Ed.2d 398, 410. In order to demonstrate facial overbreadth, the party challenging the enactment must show that its potential application reaches a significant amount of protected activity. Nevertheless, criminal statutes "that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *Id.* at 459, 107 S.Ct. at 2508, 96 L.Ed.2d at 410. A statute is substantially overbroad if it is "susceptible of regular application to protected expression." *Id.* at 467, 107 S.Ct. at 2512, 96 L.Ed.2d at 415.

{¶14} Appellants claim R.C. 959.13(A)(3) is so unclear they could not reasonably understand what is prohibited. The specific statute states: "(A) No person shall: (3) Carry or convey an animal in a cruel or inhuman manner."

{¶15} The state concedes that R.C. 959.13 does not define "cruelty." However, R.C. 1717.01 under "Humane Societies" provides definitions for "animal" and "cruelty" and specifically states the definitions pertain to "every law relating to animals":

> As used in sections 1717.01 to 1717.14, inclusive, of the Revised Code, and in every law relating to animals:
>
> (A) "Animal" includes every living dumb creature;
>
> (B) "Cruelty," "torment," and "torture" include every act, omission, or neglect by which unnecessary or unjustifiable pain or suffering is caused, permitted, or allowed to continue, when there is a reasonable remedy or relief;

{¶16} R.C. 959.13(A)(3) specifically applies to the transport of animals. "Animal" includes dogs as R.C. 1701.01(A) defines "animal" as "every living dumb creature." The same statute under subsection (B) then defines "cruelty." In reading the two statutes in pari materia, we find the scope of R.C. 959.13(A)(3) to neither be vague or overbroad.

{¶17} We note in *State v. Hafle,* 52 Ohio App.2d 9, 12 (1977), our brethren from the First District, in examining the predecessor statute to R.C. 959.13 with substantially identical language, found the statute as a whole to be constitutional. The *Hafle* court concurred with language quoted from *Mulhauser v. State* (1900), 1 Ohio Cir.Ct.R., N.S., 273, 280:

> "***(I)t was charged that these laws had been so carelessly and bunglingly framed as to render their meaning uncertain and their enforcement difficult. Upon a pretty careful examination of our statutes upon this subject, we are inclined to think that such criticism is unjust and that these laws were framed with reasonable certainty and can be enforced without any serious difficulty."

{¶18} Appellants argue they were without notice that transporting several dogs together in one cage would be in violation of the statute. Appellants were transporting sixty-two dogs in several cages in a Dodge Caravan minivan. The call to authorities regarding the transport issue was made by a lay person, a clerk at the Red Roof Inn, who recognized the inhumaneness of the situation. T. at 24-30.

{¶19} We find the definition of "cruelty" not to be overbroad such that a reasonably situated person would not know transporting sixty-two dogs in several cages in a small confined area of a minivan would be cruel.

{¶20} Upon review, we find the trial court did not err in not declaring R.C. 959.13(A)(3) unconstitutional as vague and overbroad.

{¶21} Assignment of Error I is denied.

II, III

{¶22} Appellants claim the trial court erred in refusing to charge the jury on "animal rescue defense" under R.C. 1717.13 and common law "necessity." We disagree.

{¶23} The giving of jury instructions is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Martens,* 90 Ohio App.3d 338 (3rd Dist.1993). In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore,* 5 Ohio St.3d 217 (1983). Jury instructions must be reviewed as a whole. *State v. Coleman,* 37 Ohio St.3d 286 (1988).

{¶24} Appellants requested the excluded jury instructions in their proposed jury instructions filed May 5, and June 13, 2014. The trial court denied the request, stating the following (T. at 417):

> THE COURT: The Court takes note of the objections and this matter was determined earlier but I can't remember if we put it on the record. The Court found as a matter of law that the Revised Code section referred to by the Defendant's is inapplicable to the situation in that it provides for a defense against any civil liability for the taking of an animal in order to prevent it from being neglected. In as far as a general necessity defense the Court declined to provide that instruction on the authority of the City of Kettering vs. Barry, et al. along with State of Ohio v. Ronald Crosby, 6th District and State v. Mogel out of the 11th District which stood for the proposition that in order for a necessity defense to be applicable the first element is that the harm must be committed under the threat of physical or nature force rather than human force and the Court

found that the testimony that the dogs would have been euthanized in absence of the Johnsons actions was human force not physical or natural. That's the reason why I overruled the objection and declined to submit the proposed jury instruction but the record should be clear that the objection should be preserved.

{¶25} R.C. 1717.13 states the following:

When, in order to protect any animal from neglect, it is necessary to take possession of it, any person may do so. When an animal is impounded or confined, and continues without necessary food, water, or proper attention for more than fifteen successive hours, any person may, as often as is necessary, enter any place in which the animal is impounded or confined and supply it with necessary food, water, and attention, so long as it remains there, or, if necessary or convenient, he may remove such animal; and he shall not be liable to an action for such entry. In all cases the owner or custodian of such animal, if known to such person, immediately shall be notified by him of such action. If the owner or custodian is unknown to such person, and cannot with reasonable effort be ascertained by him, such animal shall be considered an estray and dealt with as such.

{¶26} We disagree with the trial court's decision that the requested jury instructions only applies to civil liability because the majority of the cases reference issues of trespass and search and seizure implying criminal liability. However, we find the facts sub judice do not qualify appellants to claim they were rescuers. First, appellants were paid to transport the animals and secondly, they did not act against the wishes of the owner or person in possession of the animals (Jonas Fisher). T. at 302, 314-315, 340, 355, 373.

{¶27} Appellants also claim their transport of the animals was a necessity. Our brethren from the Fourth District in *State v. Prince,* 71 Ohio App.3d 694, 699 (4th Dist.1991) listed the elements of necessity as follows:

> (1) the harm must be committed under the pressure of physical or natural force, rather than human force; (2) the harm sought to be avoided is greater than, or at least equal to that sought to be prevented by the law defining the offense charged; (3) the actor reasonably believes at the moment that his act is necessary and is designed to avoid the greater harm; (4) the actor must be without fault in bringing about the situation; and (5) the harm threatened must be imminent, leaving no alternative by which to avoid the greater harm.

{¶28} The trial court correctly found the elements of necessity were not met. As noted by the trial court, the proposed threat to euthanize the dogs was a "human force" and therefore the defense of necessity was inapplicable.

{¶29} Upon review, we find the trial court did not abuse its discretion in refusing to charge the jury on "animal rescue defense" under R.C. 1717.13 and common law "necessity."

{¶30} Assignments of Error II and III are denied.

IV

{¶31} Appellants claim the trial court erred in permitting testimony as to the federal forms of the United States Department of Agriculture relative to the transport of animals (State's Exhibits 8 and 9). We disagree.

{¶32} The admission or exclusion of relevant evidence lies in the trial court's sound discretion. *State v. Sage,* 31 Ohio St.3d 173, (1987); *Blakemore, supra*. Under Evid.R. 104(A), questions of relevancy are preliminary matters to be determined by the trial court. Evid.R. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A).

{¶33} Appellants argue "[e]xtreme prejudice occurred when federal transportation of animal rules were admitted in trial as if they were Ohio standards." Appellants' Brief at 19.

{¶34} As part of the state's case-in-chief, federal transportation forms were testified to by Shannon Sebera, animal care inspector for the U.S.D.A., and Paula Evans, a Licking County Humane Society agent, as being required for interstate

transport of animals (State's Exhibits 8 and 9). T. at 224, 244. Ms. Sebera was called to the Licking County Humane Society because of the incident involving County Boys, LLC, a licensee of the U.S.D.A. T. at 215. Ms. Sebera's job is to inspect animal transport i.e., "the actual size of the enclosure that the animals are transported in and the number of animals versus the size of the animals that are transported in those enclosures." T. at 214. Ms. Sebera testified to the federal regulations regarding the primary enclosures and transport of animals. T. at 219-224. Ms. Sebera observed the animals at the Licking County Humane Society, spoke to witnesses, looked through photographs, and opined there was no way sixty-two dogs could be transported humanely in appellants' minivan. T. at 231-232.

{¶35} Michelle Forrester, Director of Operations of the Animal Rescue Fund, was on the scene and testified to her observations, the ASPCA guidelines for transporting animals, and her personal opinion as to the inhumane transport. T. at 63, 72-74, 79-80, 82, 97-98. Dr. JoAnna Reen, a veterinarian that examined thirty-six of the dogs at the humane society, opined the thirty-six dogs could not have been transported in appellants' minivan humanely let alone all sixty-two because "[t]here's simply not enough room." T. at 103-104, 128-129.

{¶36} We agree most of Ms. Sebera's testimony was irrelevant. However, we find any error to be harmless. Harmless error is described as "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Crim.R. 52(A). Overcoming harmless error requires a showing of undue prejudice or a violation of a substantial right.

{¶37} As explained in Assignment of Error 5, the evidence was staggering as to the conditions of the dogs, cages, minivan, and size of the van. Any evidence as to federal regulations was so minute that it could not have reasonably affected the outcome of the trial.

{¶38} Assignment of Error IV is denied.

V

{¶39} Appellants claim their conviction was against the sufficiency and manifest weight of the evidence as the evidence failed to establish that they loaded the minivan or knew the number of dogs they were transporting. We disagree.

{¶40} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks,* 61 Ohio St.3d 259 (1991). "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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia,* 443 U.S. 307 (1979). On review for manifest weight, a reviewing court is to examine 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 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. Martin,* 20 Ohio App.3d 172, 175 (1st Dist.1983). See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶41} R.C. 959.13(A)(3) and the definition of "cruelty" in R.C. 1717.01(B) have been set forth above.

{¶42} Appellants' defense was that they did not pack the cages, did not load their minivan, did not have any idea how many dogs they were transporting, and did not observe any of the dogs in the cages until they began to off-load them at the Red Roof Inn. T. at 302-305, 307-308, 341-342, 346-348, 367. Appellants were driving a Dodge Caravan minivan with the back seats taken out, but admitted the cages were stacked in such a fashion that they could not use the rearview mirror and could not see beyond the first row of cages which were stacked to the ceiling. T. at 305, 343, 360, 370. Despite this "see no evil, hear no evil" defense, appellants admitted the minivan they were driving was smaller than the original one they had intended to use, they had made "rescue runs" before, and were paid $300. T at 302-304, 314-315, 318-319, 339-340, 342. Appellant Barbara Johnson conceded no food or water was provided to the dogs for the 7 to 8 hour trip, and the way the dogs were transported was wrong, but in her own words, they were rescuers and the "end justifies the means." T. at 343, 348.

{¶43} This defense is contradicted by the testimony of various witnesses. Robert Wess, the tow truck driver, observed that the minivan was full of dogs in cages stacked one on top of the other to the ceiling. T. at 52-53. Brie Manning, the Red Roof Inn clerk, observed the van was filled and the cages were stacked "on top each other, side by side, all the way from ceiling to floor, side to side." T. at 29. She testified some of the dogs looked dirty and mangy and some of them were barking and whining. T. at 30.

{¶44} Dr. Reen examined thirty-six of the dogs and testified that many of the dogs had matting on their feet which were encrusted with feces and urine. T. at 124. There were fresh wounds on an injured Shar-Pei. T. at 126-127. She reviewed photographs of the cages and the minivan and opined in her professional opinion, such a transport would be inhumane. T. at 128-132.

{¶45} Ms. Evans, Jessica Laris, animal care giver for the Licking County Humane Society, and Tyler Moore, Deputy Dog Warden for the Licking County Animal Shelter, were all at the scene when the dogs were seized. Each testified they observed cages with too many animals. T. at 142, 166, 252-255. One cage contained "a full sized Rottweiler, a full sized Lab, a Cavalier King Charles Spaniel and a Boston Terrier puppy." T. at 254. The condition of the minivan reeked of feces, urine, and vomit. T. at 143, 166, 179, 257-258. All totaled, sixty-two dogs were being transported in several cages stacked to the ceiling and side to side in the back seat area of the minivan. T. at 166, 185-187, 252-255, 263-264.

{¶46} Ms. Forrester and Ms. Sebera were also present and they opined as to the improper transport of the animals. T. at 97-98, 231-232.

{¶47} Presented to the jury were four poster boards of photographs of the dogs, dogs in cages, and injured dogs. T. at 116; State's Exhibits 1-4. Also presented were photographs of the conditions of the dogs in the minivan and in the hotel room. State's Exhibits 22, 23, 27-33.

{¶48} Given the photographs and the observations of the lay and professional witnesses, we find sufficient credible evidence to establish the elements of R.C. 959.13(A)(3), and find no manifest miscarriage of justice

{¶49} Assignment of Error V is denied.

VI

{¶50} Appellants claim the trial court erred in imposing a jail sentence for going to trial as their co-defendant, Jonas Fisher, was given community control after he plead to the charges. We disagree.

{¶51} Misdemeanor sentencing rests in the sound discretion of the trial court. R.C. 2929.22(A); *Blakemore.* R.C. 2929.22 governs sentencing on misdemeanors and states the following:

> (B)(1) In determining the appropriate sentence for a misdemeanor, the court shall consider all of the following factors:
>
> (a) The nature and circumstances of the offense or offenses;
>
> (b) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender has a history of persistent criminal activity and that the offender's character and condition reveal a substantial risk that the offender will commit another offense;
>
> (c) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender's history, character, and condition reveal a substantial risk that the offender will be a danger to others and that the offender's conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences;

(d) Whether the victim's youth, age, disability, or other factor made the victim particularly vulnerable to the offense or made the impact of the offense more serious;

(e) Whether the offender is likely to commit future crimes in general, in addition to the circumstances described in divisions (B)(1)(b) and (c) of this section;

(f) Whether the offender has an emotional, mental, or physical condition that is traceable to the offender's service in the armed forces of the United States and that was a contributing factor in the offender's commission of the offense or offenses;

(g) The offender's military service record.

(2) In determining the appropriate sentence for a misdemeanor, in addition to complying with division (B)(1) of this section, the court may consider any other factors that are relevant to achieving the purposes and principles of sentencing set forth in section 2929.21 of the Revised Code.

(C) Before imposing a jail term as a sentence for a misdemeanor, a court shall consider the appropriateness of imposing a community control sanction or a combination of community control sanctions under sections 2929.25, 2929.26, 2929.27, and 2929.28 of the Revised Code. A court may impose the longest jail term authorized under section 2929.24 of the Revised Code only upon offenders who commit the worst forms of the offense or upon offenders whose conduct and response to

> prior sanctions for prior offenses demonstrate that the imposition of the longest jail term is necessary to deter the offender from committing a future crime.

{¶52} The sentence of ninety days in jail with sixty days suspended is clearly within the statutory frame work and there is no indication that a lesser sentence was offered prior to trial. R.C. 2929.24(A)(2). As the record established, Mr. Fisher loaded the minivan, but the actual transport was done by appellants, thereby placing their actions in a light of greater culpability.

{¶53} In sentencing appellants, the trial court stated the following (T. at 425):

> Jail is not being imposed as a result of the Defendants exercising their constitutional rights to Trial. This Court enjoys a reputation of never imposing Trial tax and in fact encouraging the resolution of cases by Trial. There are a whole number of reasons why the Court feels that jail is appropriate not the least of which is the Defendants' prior record as well as the facts and circumstance of this case which are just appalling in the barbarity and the abject misery that these animals were subjected to.

{¶54} Upon review, we find the trial court did not abuse its discretion in imposing a jail sentence.

{¶55} Assignment of Error VI is denied.

{¶56} The judgment of the Municipal Court of Licking County, Ohio is hereby affirmed.

By Farmer, J.

Wise, J. concurs and

Hoffman, P.J. concurs separately.

SGF/sg 219

Hoffman, P.J., concurring

{¶57} I concur in the majority's analysis and disposition of Appellant's first, third, fifth and sixth assignments of error.

{¶58} I further concur, in part, in the majority's analysis of Appellant's second assignment of error. Unlike the majority, I agree with the trial court the necessity defense articulated in R.C. 1717.13 only applies to civil liability. Accordingly, I join the majority's decision to overrule this assignment of error.

{¶59} Finally, I concur in the majority's disposition of Appellant's fourth assignment of error. While I likewise find the evidence as to the conditions of the dogs, cages, minivan and size of the minivan was staggering, I do not find the evidence as to federal regulation was so minute it could not have reasonably affected the outcome of the trial. I find such evidence was both relevant and admissible. Accordingly, I join the majority's decision to overrule this assignment of error.