[Cite as *In re J.H.*, 2013-Ohio-632.]

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

In re J.H.

Court of Appeals No. E-11-038

Trial Court No. 2010 JM 536

DECISION AND JUDGMENT

Decided: February 22, 2013

* * * * *

Beverly Newell Hancock, for appellant.

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals his adjudication as delinquent by the Erie County Court of Common Pleas, Juvenile Division. Because we conclude that there was sufficient evidence to find appellant committed what would have been the offense of attempted vandalism, had he been an adult, we affirm.

{¶ 2} On July 18, 2010, then 16-year-old appellant, J.H., was being watched in a cell at the Erie County Juvenile Detention Center because he had attempted to harm himself. According to the correction officer watching appellant, at some point the youth became agitated and began to "rant and rave." Later, appellant stood on his bed and began to repeatedly strike the fire sprinkler in his cell with a book. He continued this behavior for some time until the book disintegrated. The sprinkler was undamaged.

{¶ 3} On August 6, 2010, authorities file a delinquency complaint against appellant, alleging that his behavior on July 18 constituted the offense of attempted vandalism in violation of R.C. 2909.05(B)(1)(b) and 2923.02, a misdemeanor of the first degree if committed by an adult. A hearing on the complaint was tried before a magistrate.

{¶ 4} At the hearing, the correction officer testified to appellant's mistreatment of the fire sprinkler. The administrator of the detention center testified that, if the sprinkler head had been broken, the water to the system would need to be shut off and a contractor engaged to replace the sprinkler. During the time it took to get someone to replace the sprinkler head, the operation of the facility would be disrupted as staff would be required to stand fire watch and the fire department would need to be on standby. The administrator testified that the detention center is a governmental function.

{¶ 5} At the conclusion of the state's evidence, appellant moved to dismiss the complaint. Appellant argued that appellant had been charged under the portion of the statute that dealt with business entities rather than governmental facilities. The

magistrate took the motion under advisement. Appellant rested without presenting any evidence.

{¶ 6} When the magistrate issued his decision, he was persuaded by appellant's argument that the section of the vandalism statute under which appellant was charged was inapplicable on these facts. Nonetheless, the magistrate recommended that appellant be adjudicated delinquent, finding he violated the lesser included offense of criminal damaging.

{¶ 7} Appellant filed objections to the magistrate's decision. On review, the court concluded that the magistrate erred in finding that R.C. 2909.05(B)(1)(b) did not apply to government property. On the facts developed in the magistrate's hearing, the court found that the state proved the elements of attempted vandalism. The court overruled appellant's objections to the magistrate's decision and adjudicated appellant delinquent.

{¶ 8} From this judgment, appellant now brings this appeal. Appellant sets forth the following two assignments of error:

> I. The trial court erred in finding that magistrate's finding that criminal damaging in violation of R.C. 2909.05(A)(1) is lesser [sic] included offense of attempted vandalism in violation of R.C. 2909.05(B)(1)(b) was permissible and using improper finding as a basis to find the youth delinquent for the initial offense[.]
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> II. The juvenile trial court's finding that one "sprinkler" in one cell that was not broken was necessary in order for Erie County to engage in its

business to run a juvenile detention center was against the manifest weight of the evidence and insufficient as a matter of law and the court erred in finding that the juvenile was delinquent for violating R.C. 2909.05(B)(1)(b)[.]

I. Magistrate's Decision

{¶ 9} As nearly as we can interpret appellant's first assignment of error, appellant argues: 1) criminal damaging is not a lesser included offense of vandalism, 2) the magistrate acted improperly in finding a lesser included offense, and 3) the finding of criminal damaging was an improper basis to find appellant delinquent.

{¶ 10} Criminal damaging is a lesser included offense of vandalism. *In re J.W.*, 12th Dist. Nos. CA2004-02-036, CA2004-03-061, 2004-Ohio-7139, ¶ 14-15. A trier of fact may consider lesser included offenses. *State v. Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988), paragraph one of the syllabus. Any child, except a juvenile traffic offender, may be adjudicated delinquent if he or she violates a state or federal law or local ordinance and such violation would be an offense if committed by an adult. R.C. 2152.02(F)(1). Moreover, none of this is material because the juvenile court modified the magistrate's decision, deleting reliance on any lesser included offense. It is this judgment from which this appeal comes.

{¶ 11} Accordingly, appellant's first assignment of error is not well-taken.

II. Sufficiency/Weight of the Evidence

{¶ 12} A verdict or finding may be overturned on appeal if it is either against the manifest weight of the evidence or because there is an insufficiency of evidence. In the former, the appeals court acts as a "thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In the latter, the court must determine whether the evidence submitted is legally sufficient to support all of the elements of the offense charged. *Id.* at 386-387. Specifically, we must determine whether the state has presented evidence which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime proven beyond a reasonable doubt. *Id.* at 390 (Cook, J., concurring); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. *See also State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978); *State v. Barnes*, 25 Ohio St.3d 203, 495 N.E.2d 922 (1986).

{¶ 13} In material part, R.C. 2909.05(B)(1) provides:

> (B) (1) No person shall knowingly cause physical harm to property that is owned or possessed by another, when either of the following applies:
>
> * * *

(b) Regardless of the value of the property or the amount of damage done, the property or its equivalent is necessary in order for its owner or possessor to engage in the owner's or possessor's profession, business, trade, or occupation.

{¶ 14} This provision is applicable to damages inflicted upon property used in governmental operations. *State v. Dunfee*, 177 Ohio App.3d 239, 2008-Ohio-3615, 894 N.E.2d 359, ¶ 28 (2d Dist.).

{¶ 15} One acts knowingly "when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature * * *." R.C. 2901.22(B). The attempt statute, R.C. 2923.02(A), prohibits any person from "purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, [engaging] in conduct that, if successful, would constitute or result in the offense."

{¶ 16} In this matter, construing the evidence in a light most favorable to the prosecution, reasonable minds could conclude that appellant repeatedly struck the fire sprinkler in his cell with a book, knowing that this act would likely damage the sprinkler. There was no suggestion that appellant lacked the intelligence or comprehension to appreciate this likelihood. It appears that, if the book had not fallen apart, he would have succeeded.

{¶ 17} The detention center administrator testified that had appellant been successful in damaging the sprinkler in his cell, the water would need to be turned off to

the whole system and a contractor summoned to repair the sprinkler. Until that repair, certain extraordinary measures would be required to permit the facility to remain in operation. This is sufficient evidence for reasonable minds to conclude that the sprinkler was necessary to engage in the operation of the detention center. Consequently, a rational trier of facts could have found all of the essential elements of the offense proven beyond a reasonable doubt. Accordingly, there was sufficient evidence to prove appellant guilty of attempted vandalism had he been an adult.

{¶ 18} With respect to the weight of the evidence, we have carefully reviewed the record of these proceedings and find nothing to suggest that the trier of fact lost his way or any manifest injustice resulted. Appellant's second assignment of error is not well-taken.

{¶ 19} On consideration whereof, the judgment of the Erie County Court of Common Pleas, Juvenile Division, is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, P.J.

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JUDGE

Stephen A. Yarbrough, J.
CONCUR.

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JUDGE