[Cite as *State v. Stewart*, 2002-Ohio-6855.]

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81157

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
DAVID STEWART	:	
	:	
Defendant-Appellant	:	
	:	

DATE OF ANNOUNCEMENT OF DECISION:	DECEMBER 12, 2002
CHARACTER OF PROCEEDING:	Criminal appeal from Common Pleas Court Case No. CR-408832
JUDGMENT:	Affirmed.
DATE OF JOURNALIZATION:	
APPEARANCES:	
For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor MATTHEW T. NORMAN Assistant Prosecuting Attorney The Justice Center, 9th Floor 1200 Ontario Street Cleveland, Ohio 44113
For Defendant-Appellant:	ANTHONY A. GEDOS

815 Superior Avenue, N.E.
Suite 2010
Cleveland, Ohio 44114

PATRICIA ANN BLACKMON, J.:

{¶1} This appeal is before the court on the accelerated docket pursuant to App.R. 11.1 and Loc.App.R. 11.1. David Stewart appeals from a judgment entered by the Cuyahoga County Common Pleas Court finding him guilty of vandalism in violation of R.C. 2909.05(B)(1)(b). On appeal, he assigns the following as error for our review:

{¶2} "*The trial court's decision finding that the appellant was guilty of the vandalism count which contained the essential element of "serious physical harm" was not proven beyond a reasonable doubt and the evidence thereon was insufficient as a matter of law and against the manifest weight of the evidence.*"

{¶3} Having reviewed the arguments of the parties and the pertinent law, we affirm the judgment of the trial court.

{¶4} During a bench trial, the State called three witnesses: Ricky Kinney, Cleveland Police Officer Kwan, and Detective Russell.[1] Kinney testified he and his brother, Claude Carson, are co-owners of the "Mix", a nightclub and beverage store located at 14201 Harvard Road in Cleveland. Kinney and Stewart have known each other since grade school, and Stewart was a frequent patron of

[1] Only the testimony of Ricky Kinney was submitted to this court.

the "Mix". On the Saturday prior to April 11, 2001, a private party was being held at the club and Kinney required a dress code to enter. Kinney testified Stewart's attire that evening did not comply with the dress code, and Kinney and his brother asked Stewart to leave. After exchanging words with Kinney and Carson, Stewart was escorted off the premises by an off-duty police officer.

{¶5} Kinney next saw Stewart on April 11, 2001 when Kinney drove past Stewart and a group of people sitting outside on a porch. According to Kinney, Stewart yelled a derogatory comment towards Kinney, and Kinney stopped his vehicle to confront Stewart. Evidently, Stewart was still upset about being denied entrance into the club. Approximately two hours later, Kinney drove past the same house and again saw Stewart outside. The two made eye contact and Stewart got into his truck and followed Kinney to the club.

{¶6} Once Kinney arrived at his club, he parked his car and went inside. From there, he saw Stewart pull up, stop in front of the club, and taunt him by honking his horn and calling for him to come outside. As Kinney started to push the door open to go outside, he heard and felt a bullet fly across his face. Kinney saw Stewart shooting a gun from inside his truck, approximately 25 feet from where Kinney was standing. Stewart fired a second time, and Kinney warned the patrons inside the club and in the store

attached to the club. One of the bullets struck the door to the club. A fragment of that bullet struck a jukebox located just inside the door. Kinney testified that at the time of the shooting, approximately twelve people sat at the bar. Stewart fired a third time; this bullet shot out the windows of Kinney's car.

{¶7} The evidence adduced at trial showed the gun fire damaged the door to the club, the jukebox, and Kinney's vehicle. Kinney explained the door to the club had just been installed one month before the incident and it is the only entrance or exit to the club.

{¶8} Stewart was arrested and ultimately indicted with two counts of felonious assault, one count of vandalism, and one count of carrying a concealed weapon. Additionally, he was indicted with one and three year firearm specifications as to the felonious assault and vandalism counts. Stewart waived his right to a jury, and a trial to the bench was held. The trial court found Stewart guilty of vandalism, including the three year firearm specification, and of carrying a concealed weapon. Stewart's appeal deals solely with his vandalism conviction; he does not challenge the remainder of his conviction or the sentences imposed by the trial court.

{¶9} The crux of Stewart's argument is that the State failed to prove beyond a reasonable doubt the "serious physical harm"

element contained in the vandalism statute, and therefore his conviction for that offense is against the manifest weight of the evidence and the sufficiency of the evidence.

{¶10} The original indictment reads as follows:

{¶11} "David Stewart, on or about April 11, 2001, unlawfully and knowingly caused serious physical harm to property owned or possessed by Ricky Kinney and Claude Carson and such property or its equivalent is necessary in order for Ricky Kinney and Claude Carson to engage in their profession, business, trade or occupation."

{¶12} The trial court, however, found Stewart "[k]nowingly caused physical harm to property owned or possessed by Ricky Kinney and Claude Carson, and regardless of the value of the property or amount of the damage done, the property or its equivalent was necessary in order for Ricky Kinney and Claude Carson to engage in their profession business, trade or occupation. R.C. Section 2909.05(B)(1)(b)."

{¶13} Stewart did not object at the time of trial or during sentencing to the trial court's failure to find that Stewart caused "serious" physical harm. However, Stewart filed a motion for reconsideration which raised this issue. The trial court then entered its sentencing order containing the language quoted above. The State responded to Stewart's motion to reconsider and moved the trial court to amend the indictment so that the word "serious"

would be deleted from the language contained in the vandalism count. The State maintained that during the trial of this matter, all parties proceeded as if the word "serious" was erroneously placed in the language of count three.

{¶14} The trial court denied the motion as moot because it did not find Stewart guilty of causing "serious" physical harm.

{¶15} Stewart's assigned error is two-fold: first, he challenges the sufficiency of the evidence against him and second, he argues his conviction is against the manifest weight of the evidence. Because these are two distinct legal concepts, we will address them separately.

{¶16} Regarding the sufficiency of the evidence against Stewart, Crim.R. 29(A) states, "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. ***."

{¶17} The test for sufficiency of the evidence raises a question of law to be decided by the court before the jury may receive and consider the evidence of the claimed offense. In *State v. Jenks,*[2] the Ohio Supreme Court stated, "An appellate court's

[2] (1991), 61 Ohio St.3d 259.

function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted 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."[3]

{¶18} In this case, the State assumed the burden of proving Stewart's guilt beyond a reasonable doubt for the crime of vandalism. The vandalism statute, as applied to Stewart, states that no person shall knowingly cause physical harm to property that is owned or possessed by another, when, 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.[4]

{¶19} In its case-in-chief, the State offered the testimony of three witnesses; however, this court can only consider the testimony presented in the transcript filed with this court.[5] The transcript filed by Stewart only contains the testimony given by

---

[3]Id. at paragraph two of the syllabus.

[4] R.C. 2909.05(B)(1).

[5] See App.R. 9(B).

Kinney. At trial, Kinney testified he witnessed Stewart shoot at him and the club while Stewart sat in the driver's seat of his truck. Kinney further testified the door to the club was hit by a bullet. It is the only entrance or exit to the club and the damage could be seen by a passerby traveling on Harvard Road. Kinney also testified one of the bullets struck the jukebox located just inside the doorway.

{¶20} Based on this testimony and the photographs of the damage admitted at trial and included in the appellate record, a reasonable trier of fact could conclude Stewart knowingly caused physical harm to property owned by Kinney and Carson and that the property was necessary for Kinney and Carson to engage in their business. Accordingly, Stewart's conviction was supported by sufficient evidence.

{¶21} Regarding the manifest weight of the evidence, the court in *State v. Martin*[6] stated, "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."[7]

---

[6] (1983), 20 Ohio App.3d 172.

[7] Id. at 175.

{¶22} The weight of the evidence concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them.[8] Further, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact.[9]

{¶23} After reviewing the entire record, weighing the evidence and all reasonable inferences and considering the credibility of the sole witness whose testimony was provided to this court, we cannot conclude that in resolving conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice. Accordingly, this assigned error is overruled and the judgment of the trial court is affirmed.

Judgment affirmed.

---

[8] *State v. Thompkins* (1997), 78 Ohio St.3d 380.

[9] *State v. DeHass* (1967), 10 Ohio St.2d 230.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES D. SWEENEY, P.J., and

JAMES J. SWEENEY, J., CONCUR.

PATRICIA ANN BLACKMON
JUDGE