[Cite as *State v. Bezak*, 2004-Ohio-5864.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

Nos. 84103 and 84104

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
BRIAN BEZAK	:	
	:	
Defendant-Appellant	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	NOVEMBER 4, 2004
	:	
CHARACTER OF PROCEEDINGS	:	Criminal appeal from
	:	Common Pleas Court
	:	Case Nos. CR-434460
	:	and CR-435254
	:	
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee: WILLIAM D. MASON, ESQ.
Cuyahoga County Prosecutor
BY: JOHN SMERILLO, ESQ.
Assistant Prosecuting Attorney
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For defendant-appellant: BRITTA M. BARTHOL, ESQ.
P.O. Box 218
Northfield, Ohio 44067

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} This appeal arises from consolidated case numbers CR-434460 (obstructing justice, R.C. 2921.32[1]) and CR-435254 (possession of drugs, R.C. 2929.11) in the common pleas court, criminal division. Appellant, Brian Bezak, pleaded no contest to the possession charge but, after a jury trial, was convicted of obstructing justice in count three of the original indictment. Appellant was then sentenced to nine months on each of the convictions, to be served concurrent to each other. Appellant raises one assignment of error, pertinent only to the obstruction conviction.

{¶ 2} The prosecution presented four witnesses: Joseph Schwarm, parole officer; Timothy Clark, Cleveland Police Department detective; Andrew Deserto, Deputy U.S. Marshall; and Andrew Ezzo, Cleveland Police Department detective. The defense presented the testimony of Michael Viccaro and appellant's girlfriend, Emily Kerrigan.

{¶ 3} The relevant facts of the case are as follows. Witnesses for the prosecution testified that appellant allowed Michael Viccaro, a parolee who failed to report to his parole officer, to reside with him, his girlfriend and his father in a third-floor apartment on West 105th Street. When the police arrived to search the premises pursuant to a warrant, Viccaro was arrested as he approached the building. Viccaro had several packets of heroin in his possession when he was arrested. Inside the apartment, police located a telephone bill in the name of Michael Viccaro and a photo of a headstone on the wall of what is purported to be Viccaro's bedroom. When questioned by police, appellant

[1] Appellant was charged with violation of R.C. 2921.32(A)(5): "(A) No person, with purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of another for crime, or to assist another to benefit from the commission of a crime, shall do any of the following: *** (5) communicate false information to anyone."

stated that he did not know a "Michael Viccaro" and failed to identify Viccaro when presented with his photograph.[2]

{¶ 4} At trial, Viccaro testified that he previously lived in the apartment, but that he could no longer afford the rent payment. The residence was then rented by the appellant and his family; they had agreed to allow Viccaro to leave his possessions in a back bedroom until he got settled somewhere else. He also testified that he is known by his middle name, "Dino," and that the appellant and his girlfriend know him only by this name and were unaware that there was a warrant out for his arrest. Appellant's girlfriend testified that Viccaro did not reside with them at West 105th Street and that she was unaware that he was a parole violator.

{¶ 5} Appellant presents one assignment of error for our review and challenges the sufficiency of the evidence presented.

{¶ 6} In *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, the Ohio Supreme Court reexamined the standard of review to be applied by an appellate court when reviewing a claim of insufficient evidence:

{¶ 7} "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 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

[2] The police officers also encountered Jack Bezak, a co-defendant in the lower court matter. His appeal, Case No. 84008 remains pending.

beyond a reasonable doubt. (*Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)" Id. at paragraph 2 of the syllabus.

{¶ 8} More recently, in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, the Ohio Supreme Court stated the following with regard to "sufficiency" as opposed to "manifest weight" of the evidence:

{¶ 9} "With respect to sufficiency of the evidence, '"sufficiency" is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.' Black's Law Dictionary (6 Ed.1990) 1433. See, also, Crim.R. 29(A) (motion for judgment of acquittal can be granted by the trial court if the evidence is insufficient to sustain a conviction). In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 55 Ohio Op. 388, 124 N.E.2d 148. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 2220, 72 L.Ed. 2d 652, 663, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560." Id. at 386-387.

{¶ 10} Finally, we note that a judgment will not be reversed upon insufficient or conflicting evidence if it is supported by competent credible evidence which goes to all the essential elements of the case. *Cohen v. Lamko* (1984), 10 Ohio St.3d 167, 462 N.E.2d 407.

{¶ 11} Appellant was convicted of obstructing justice pursuant to R.C. 2921.32(A)(5), which states in pertinent part:

{¶ 12} "(A) No person, with purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of another for crime, or to assist another to benefit from the commission of a crime, shall do any of the following:

{¶ 13} "***

{¶ 14} "(5) Communicate false information to any person."

{¶ 15} The oral misdirection of police officers in pursuit of suspected felons has been held to be a verbal act constituting obstructing official business and a violation of R.C. 2921.32(A)(5). *State v. Bailey*, (1994), 71 Ohio St.3d 443, 644 N.E.2d 314; *State v. Lazzaro* (1996), 76 Ohio St. 3d 261, 264; *State v. Bolyard* (1990), 68 Ohio App.3d 1, 3; *State v. Gordon* (1983), 9 Ohio App.3d 184, 458 N.E.2d 1277.

{¶ 16} As discussed above, witnesses for the prosecution attest that appellant denied knowing Michael Viccaro and failed to identify him from a photograph shown to him by police on the morning in question. Appellant's witnesses testified that Viccaro was merely a departing tenant of the apartment they had rented and that they had no acquaintance with him past allowing him to store his belongings until he got settled in a new place. Police, however, found possessions, a phone bill, and Viccaro himself returning to the apartment with drugs on the morning he was apprehended. Finally, the testimony of the appellant's girlfriend and Viccaro conflicted on several key points, including how often Viccaro had stayed in the apartment with her and appellant. Indeed, Viccaro himself testified that he had known the appellant for years, that he had a key to appellant's apartment, and that he gave the police the address of appellant's home as his own home address upon being arrested.

{¶ 17} Viewing the evidence presented in the light most favorable to the prosecution, it appears that a reasonable trier of fact could find beyond a reasonable doubt that the appellant lied to

the police in order to protect Viccaro from apprehension. It seems likely that the appellant was aware of Viccaro's status as a parolee and that he was trying to mislead police in their search, and there exists competent, credible evidence to support this assertion. Therefore, appellant's sole assignment of error lacks merit and his conviction must be affirmed.

Judgment affirmed.

It is ordered that appellee recover from appellant 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.

FRANK D. CELEBREZZE, JR.
JUDGE

SEAN C. GALLAGHER, J., CONCURS.

ANNE L. KILBANE, P.J., DISSENTS
WITH SEPARATE DISSENTING OPINION.

COURT OF APPEALS OF OHIO EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NOS. 84103, 84104

STATE OF OHIO,	:	
	1. :	
Plaintiff-Appellee	:	
	2. :	
ii. -vs-	:	
	1. :	D I S S E N T I N G
	2. :	
BRIAN BEZAK,	:	O P I N I O N
	3. :	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT
OF DECISION: NOVEMBER 4, 2004

ANNE L. KILBANE, P.J., DISSENTING:

{¶ 18} On this appeal from a judgment of conviction entered by Judge Jose A. Villanueva, I respectfully dissent and would vacate Brian Bezak's conviction on charges of obstruction of justice[3] and remand CR-435254 for correction of the sentencing journal entry.

{¶ 19} The record reflects that Michael "Dino" Viccaro had lived in the apartment at 3032 W. 105th Street for several months until, in either November or December of 2002, he informed the landlord he was unable to pay the rent and would be leaving. The landlord was a friend, and he allowed Viccaro to store some of his belongings in the back room of the apartment, which he then sublet to Bezak's father, Jack, who also approved of this storage. Viccaro had known the Bezak

[3]CR-434460

family from the neighborhood and Jack Bezak, not Brian Bezak, had apparently permitted him to sporadically stay at the apartment while looking for other housing. Bezak and his girlfriend, Emily Kerrigan, did not move into the apartment until approximately December or January, or in other words, *after* Viccaro had moved out the majority of his belongings.

{¶ 20} Bezak has consistently maintained that he was not familiar with the name "Michael Viccaro" or "Mike" and that he only knew the person that was in the process of moving out of the apartment as "Dino," and the State has failed to prove otherwise. Viccaro's own testimony supported Bezak's contention by stating that his full name was Michael Dino Viccaro, but that the residents only knew him as Dino.

{¶ 21} Although Viccaro admittedly kept some belongings in the back room of the apartment and slept there on many occasions, including the night before his arrest,[4] the record contains no indication that Bezak knew him by his full name, and while there are several references to a photograph that Bezak was shown prior to the search, it was not introduced into evidence.

{¶ 22} The State claims that, when Bezak was asked if he knew a "Michael Viccaro" or "Mike" and was shown a photograph, he responded that he did not and, by doing so, he knowingly communicated false information in an effort to harbor or aid Viccaro. This claim fails for two reasons: (1) the State has failed to prove that Brian Bezak knew Viccaro as anything other than "Dino," and (2) the State has failed to provide sufficient proof that Brian Bezak was shown a recent photograph of Viccaro and that he nonetheless denied knowledge of this person.

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[4]Tr. at 495.

{¶ 23} The majority cites to *State v. Bailey*[5], where the Ohio Supreme Court held that making unsworn, false oral statements to a law enforcement officer with the purpose to hinder the officer's investigation of a crime constitutes conduct punishable within the meaning of R.C. 2921.32(A)(5). In the instant case, however, the State failed to show that Bezak acted with the purpose to hinder the officers' investigation in apprehending Viccaro.

{¶ 24} "Purpose" is defined as a specific intention to cause a certain result.[6] To be found guilty of obstructing justice, therefore, the State had to prove that Bezak acted with the specific intention of hindering the discovery or apprehension of Viccaro, regardless of the veracity of his statements.

{¶ 25} Officer Schwarm testified that he had no specific recollection of showing Bezak a photo of Viccaro and noted that, although he wrote a report of the arrest, he did not include any photographs used during the execution of the arrest warrant. Moreover, he testified that nothing Bezak did hindered discovery of Viccaro. When questioned about when the photograph was actually shown to Bezak, Officer Schwarm stated that Bezak and his girlfriend were not immediately shown Viccaro's photograph after being questioned, and when he was asked for specifics regarding the viewing of the photograph, the following exchange took place:

{¶ 26} "A. I can't recall a time where I've searched a house where we haven't shown a picture.

{¶ 27} So you are testifying based on your general mode of operation?

{¶ 28} That's correct.

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[5](1994), 71 Ohio St.3d 443, 644 N.E.2d 314.

[6]R.C. 2901.22(A)

{¶ 29} You have no specific recollection in this case of having shown any photograph; isn't that correct?

{¶ 30} I'm not a hundred percent sure.

{¶ 31} And it doesn't appear in your report.

{¶ 32} No."

{¶ 33} Officer Tim Clark of the Cleveland Police Fugitive Unit was the only State witness to testify that Bezak was shown a photograph, yet he could not attest to the condition of the photograph or the subject's appearance. Although Kerrigan stated that she was shown a photograph, she testified that the photograph she examined for approximately sixty seconds was "fuzzy" and that of a bald man, and the man she knew as Dino had a full head of hair. Kerrigan testified that she knew that Dino occasionally slept in the apartment, but neither she nor Bezak were questioned about other occupants and were under no obligation to disclose that information.

{¶ 34} Another of the State's witnesses, U.S. Marshall Andrew Deserto, testified that he only assisted in the search and asked Bezak no direct questions. He could not recall Bezak's responses to questions regarding his knowledge of Michael Viccaro or his response when allegedly shown a photograph, only recalling that there was a significant amount of confusion.

{¶ 35} Further, the State's fourth witness, Cleveland Police Department Detective Andrew Ezzo, testified that he had no contact with Brian Bezak, but remained outside the apartment the entire time and ultimately arrested Viccaro.

{¶ 36} Testimony throughout the trial alternated between claims that: (1) Bezak was not shown a photograph, (2) he failed to answer after seeing a photograph, (3) when asked if he knew Michael Viccaro, Bezak was unclear on whether he knew him or not, or (4) he was shown a

photograph that may or may not have been a former prison photo, which may or may not have shown Viccaro with a bald head.

{¶ 37} The majority assigns great weight to the phone bill found in the apartment and the photograph of Mary Ann Viccaro's tombstone in the back family room, however, such weight is misplaced, as no one disputed that the artifacts belonged to "Dino." Officer Schwarm testified that, contrary to Detective Clark's testimony, he personally found a phone bill addressed to Michael Viccaro on a table in the back room of the apartment, with a billing date of December 2002, presumably the month he had moved out of the apartment. The phone bill was found in the same room with Viccaro's other belongings, however, there was never a dispute that Dino had stored some of his belongings in the back room of the apartment. The only dispute centered around Brian Bezak's knowledge of the proper legal name of the person storing his belongings in the apartment, and the State has failed to provide sufficient evidence to prove that he had such knowledge and, nonetheless, knowingly communicated false information to the officers.

{¶ 38} Therefore, I cannot say that "the evidence is legally sufficient to support the jury verdict as a matter of law,"[7] and would sustain Bezak's sole assignment of error.

{¶ 39} I also note that the judge failed to advise Bezak during the sentencing hearing that post-release control may be part of his sentences, of sanctions that could be imposed if he violated any terms or conditions of such control, or of his driver's license suspension; yet, language imposing such sentences appear on the two journal entries.[8] Reference in the sentencing journal is insufficient to

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[7]*State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

[8]Despite the fact that post-release control for up to three years for felonies of the fifth degree is within the discretion of

qualify as notification to an offender of post-release control or other provisions of a sentence.[9] I would remand CR-435254 for a journal entry that correctly reflects what was pronounced at the sentencing hearing. I would vacate the conviction in CR-434460, or at the very least correct that sentencing journal entry.

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the parole authority, the journal entries contain the boilerplate language used so often by the judges of the common please court: "Post release control is a part of this prison sentence for the maximum period allowed for the above felony(s) under R.C. 2967.28."

[9]See *State v. Stell* (May 16, 2002), Cuyahoga App. No. 79850; *State v. Dunaway* (Sept. 13, 2001), Cuyahoga App. No. 78007; *State v. Finger* (January 29, 2003), Cuyahoga App. No. 80691, 2003-Ohio-402.