[Cite as *State v. Vargas*, 2010-Ohio-3184.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93306

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

VERKO VARGAS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-513610

BEFORE: Boyle, J., Gallagher, A.J., and Stewart, J.

RELEASED: July 8, 2010

JOURNALIZED:

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MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Verko Vargas, appeals his conviction for criminal damaging. He raises one assignment of error for our review, that is, that his conviction was against the manifest weight of the evidence. Finding no merit to the appeal, we affirm.

{¶ 2} Vargas was indicted for assault on a peace officer, in violation of R.C. 2903.13(A), and vandalism, in violation of R.C. 2929.05(B)(2). At the close of the state's case, the trial court granted Vargas's Crim.R. 29 motion with respect to vandalism, but allowed the state to proceed on the lesser-included misdemeanor offense of criminal damaging. The jury found Vargas not guilty of assault on a peace officer, but guilty of criminal damaging.

{¶ 3} The trial court sentenced Vargas to 90 days in jail, and then gave him credit for 180 days of time served in jail. The trial court further waived costs because Vargas was indigent and did not sentence him to any probation. The trial court then immediately discharged Vargas.

{¶ 4} In a recent en banc decision from this court, we explained that generally,

{¶ 5} "'[u]nless one convicted of a misdemeanor seeks to stay the sentence imposed pending appeal or otherwise involuntarily serves or satisfies it, the case will be dismissed as moot unless the defendant can demonstrate a particular civil disability or loss of civil rights specific to him arising from the

conviction.'" (Internal citations omitted.) *Cleveland Heights v. Lewis*, 8th Dist. No. 92917, 2010-Ohio-2208, ¶10. Vargas did not request a stay of his sentence. His appeal, however, is not moot because he did not voluntarily complete his sentence. Id. at ¶11 (appeal can survive mootness if defendant involuntarily served sentence).

{¶ 6} Here, Vargas served 180 days in jail before his trial. At the close of the trial, the trial court only sentenced him to 90 days in jail. He could not have voluntarily served his sentence while awaiting his trial. The trial court immediately discharged him without probation and waived all costs. Vargas could not have moved for a stay of his sentence — as there was nothing to stay. We will therefore address the merits of his appeal.[1]

Manifest Weight of the Evidence

{¶ 7} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the jury clearly lost its way and created such a manifest miscarriage of justice

[1]All three panel members on this case also concurred with Judge Christine T. McMonagle's concurring opinion in *Lewis* that "any criminal conviction creates collateral

that the conviction must be reversed and a new trial ordered." (Internal quotes and citations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 67, 2004-Ohio-6235, 818 N.E.2d 229.

{¶ 8} Vargas maintains that when convicting him of criminal damaging, the jury lost its way when it "relied solely upon the testimony of Bonilla and Boddy." He argues that the state failed to provide any direct evidence that the door was "in a working and undamaged condition prior to [his] being arrested."

{¶ 9} To convict an offender of criminal damaging under R.C. 2909.06(A)(1), the state must prove either that the offender knowingly caused physical harm to property or that the offender created a substantial risk of physical harm to property. Here, the state only proceeded on the first theory, that is, that Vargas knowingly caused physical harm to property.

{¶ 10} "Physical harm to property" means any damage to property that "in any degree, results in loss to its value or interferes with its use or enjoyment." R.C. 2901.01(A)(4).

{¶ 11} The pertinent facts presented at trial were as follows: In July 2008, officers Rosa Bonilla and Charles Boddy responded to a radio call to assist an off-duty police officer, Officer Mathias Varga, with an arrest at a gas station.

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disabilities and *** should be reviewed by appellate courts." Id. at ¶44.

When they arrived, Officer Varga had already handcuffed Vargas, but Vargas was not cooperating; he was yelling profanities at Officer Varga and spitting at him. It took all three officers to get Vargas in the back of the police car. Once Vargas was in the back seat, he "was irate, screaming, [and] yelling." Vargas threatened the officers that he "was going to have [their] jobs."

{¶ 12} Vargas also became physical once in the back of the police car. He stuck his head through a divider between the front and back seats and refused to remove it. The officers had to physically pull him back in the rear of the vehicle to close the divider. He began to bang his head on the window and ram his shoulders into the door. Vargas then began kicking the police car door with both of his feet.

{¶ 13} All three officers testified that Vargas damaged the door when he kicked it. Officer Bonilla stated Vargas caused the door to be "separated *** from the car a few inches off the top of the door." Officer Boddy said that "after [Vargas] kicked the door, *** it was out about a half inch or so and it was off the track of the door." Officer Varga stated that when Vargas kicked the door, he saw the door "buckle out a little bit," and after that, he "could see a gap between the rubber and metal of the door frame." Pictures of the door, showing a small gap at the top of the door, were admitted into evidence.

{¶ 14} After reviewing the officers' testimony, we disagree that the jury "lost its way" when it convicted Vargas of criminal damaging. This is clearly not the

"exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541. Indeed, we find the evidence supports Vargas's conviction.

Judgment affirmed.

It is ordered that appellee recover of 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.

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

MARY J. BOYLE, JUDGE

SEAN C. GALLAGHER, A.J., and
MELODY J. STEWART, J., CONCUR