[Cite as *State v. Sullivan*, 2010-Ohio-5357.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94269

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

VINCENT SULLIVAN

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND VACATED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-525306

BEFORE: Blackmon, P.J., Dyke, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: November 4, 2010

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PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Vincent Sullivan appeals his conviction for vandalism and assigns the following two errors for our review:

> **"I. The defendant's conviction of vandalism was not supported by sufficient evidence, in violation of defendant's right to due process of law under Article I,**

Section 14 of the Ohio Constitution, and the 14th Amendment to the United States Constitution."

"II. The defendant was denied effective assistance of counsel, in violation of defendant's right to counsel under Article I, Section 10 of the Ohio Constitution, and the 6th and 14th Amendments to the United States Constitution."

{¶ 2} Having reviewed the record and relevant law, we reverse and vacate Sullivan's conviction. The apposite facts follow.

{¶ 3} The Cuyahoga County Grand Jury indicted Sullivan for one count of felonious assault under R.C. 2923.11(A)(2), causing or attempting to cause physical harm with a deadly weapon, and one count of vandalism under R.C. 2909.05(B)(1)(b), causing harm to property that was "necessary in order for its owner or possessor to engage in the owner's or possessor's profession, business, trade, or occupation." The counts were unrelated as they occurred on different days and involved different facts; however, both offenses were tried jointly. Because Sullivan is not appealing his assault conviction, we will only relate the facts that are relevant to his vandalism charge.

Facts

{¶ 4} During the early morning hours of June 8, 2009, a window at the Goodrich and Gannett Neighborhood Center was broken. The center is located at 1400 East 55th Street in Cleveland and operates a licensed childcare center and also provides programs for senior citizens.

{¶ 5} Officer Crites responded to the scene at 2:00 a.m., after receiving a report that someone was attempting to break into the center. When he arrived at the scene, he observed Sullivan standing in the parking lot about ten feet away from a broken window. No one else was present. Sullivan had a canvas bag containing a hammer, a chisel, and gloves. The officer placed Sullivan under arrest and transported him to the police station. At the station, officers found shards of glass in the cuff of Sullivan's pants.

{¶ 6} At 4:00 a.m., Lee DeAngelis, the operations director of the center, received a call from the center's alarm company, informing him that there had been an attempted break-in at the center. When DeAngelis arrived at the scene around 4:45 a.m., he observed the damaged window. The size of the window was approximately 3' by 3' and faced the parking lot. DeAngelis stayed at the scene for security reasons until staff arrived. He later called a company to replace the glass. The window was not repaired until two weeks later because the glass had to be ordered. However, in the meantime, the glass replacement company installed a wood covering where the window had been. The total cost of the repairs was approximately $571.

{¶ 7} The jury found Sullivan guilty of vandalism. The trial court sentenced him to nine months in prison.

Sufficiency of the Evidence

{¶ 8} In his first assigned error, Sullivan argues his conviction for vandalism pursuant to R.C. 2909.05(B)(1)(b) was not supported by sufficient evidence. Specifically, Sullivan claims that the evidence provided at trial was insufficient to prove that the center's window was necessary to conduct business.

{¶ 9} The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus as follows:

> **"Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."**

{¶ 10} See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394; *State v. Davis* (1988), 49 Ohio App.3d 109, 113, 550 N.E.2d 966.

{¶ 11} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, in which the Ohio Supreme Court held:

> **"An appellate court's 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. (*Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)"

{¶ 12} R.C. 2909.05(B)(1)(b) provides:

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

"(a) * * *

"(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."

{¶ 13} In the instant case, there was no evidence presented that the window was necessary for the center to conduct business. In fact, the evidence showed that the broken window had no effect on the center's ability to conduct business. A board was installed over the window to secure it until

the glass was replaced two weeks later. There was no evidence that the center had to remain closed during this two week period.

{¶ 14} The Committee Comment to R.C. 2909.05(B)(1)(b) gave examples of the type of vandalism that would impede the ability to conduct business as follows:

> **"Examples of this type of violation include rifling and scattering current case files of an attorney, damaging samples of a traveling salesman, or destroying a plumber's tools. When the property is merely used in its owner's or possessor's occupation, as opposed to its being necessary to carry on his occupation, then the value of the property or the amount of damage done must be $150 or more [the current requirement is $500 or more] for there to be a violation of this part of the section."**

{¶ 15} Here, the evidence did not indicate the window was "necessary" for the center to operate. While securing the premises was a concern, once the wooden board was installed, security was no longer an issue.[1]

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[1]The state cites to this court's decision in *State v. Stewart*, Cuyahoga App. No. 81157, 2002-Ohio-6855, in which the defendant who damaged a door to a bar was convicted pursuant to R.C. 2909.05(B)(1)(b). However, in that case, we did not discuss the element of whether the property damaged was necessary to conduct business. Instead, we focused on whether "serious physical harm" was proven,

{¶ 16} The state did present evidence to prove vandalism under R.C. 2909.05(B)(1)(a), which only requires showing damages in excess of $500. Evidence presented showed that the repair of the window cost over $500. However, the fact that sufficient evidence was presented under (B)(1)(a) does not support Sullivan's conviction under (B)(1)(b) because Sullivan was not indicted under (B)(1)(a) nor was the jury instructed regarding this section.

{¶ 17} This court in *State v. Hart*, Cuyahoga App. No. 79564, 2002-Ohio-1984 and *State v. Hamley* (2001), 142 Ohio App.3d 615, 756 N.E.2d 702, had the converse situation. That is, sufficient evidence was presented to support a conviction that the damaged property was "necessary" to conduct business, but the evidence was not sufficient to support a conviction that the damage was in excess of $500. In those cases, we concluded that because the indictment specifically recited the section of the vandalism statute that applied, and because the state did not seek to amend the indictment to refer to the other section, the defendant could not be convicted of the section not set forth in the indictment. Additionally, the trial court only instructed the jury on the section contained in the indictment.

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requiring an instruction thereon.

{¶ 18} We have the identical situation here. Sullivan's indictment recited verbatim section (B)(1)(b), and the state did not attempt to amend the indictment. The trial court also only instructed the jury regarding section (B)(1)(b). Accordingly, because the state failed to present evidence on an essential element of the vandalism offense, insufficient evidence existed to support the vandalism conviction. Sullivan's sole assigned error is well-taken. Sullivan's vandalism conviction is reversed and vacated. Although Sullivan requests to be discharged he has already served his sentence.

{¶ 19} Due to our disposition of the first assigned error, the second assigned error is moot and need not be addressed. App.R. 12(A)(1)(c).

Judgment is reversed and vacated.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS; ANN DYKE, J., DISSENTS (SEE ATTACHED DISSENTING OPINION.)

ANN DYKE, J., DISSENTING:

{¶ 20} I respectfully dissent. I would conclude that there is sufficient evidence to support the vandalism conviction. I would find that a rational jury could conclude that the window was "necessary in order for its owner or possessor to engage in the owner's or possessor's profession, business, trade or occupation," under R.C. 2909.05(B)(1)(b), as the child care center and senior center require safe and secure premises. I also would apply this court's decision in *State v. Stewart,* Cuyahoga App. No. 81157, 2002-Ohio-6855. In *Stewart*, this court considered the sufficiency of the evidence of defendant's conviction for vandalism where he shot a door to a bar and determined that the state established that defendant knowingly caused physical harm to property that is necessary in order for its owner or possessor to engage in the owner's or possessor's profession, business, trade, or occupation.