[Cite as *State v. Floyd*, 2009-Ohio-6823.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 08CA33
	:	
vs.	:	**Released: December 21, 2009**
	:	
TIMOTHY FLOYD,	:	DECISION AND JUDGMENT
	:	ENTRY
Defendant-Appellant.	:	

APPEARANCES:

David Reid Dillon, South Point, Ohio, for Appellant.

J.B. Collier, Jr, Lawrence County Prosecuting Attorney, and Brigham M. Anderson, Lawrence County Assistant Prosecuting Attorney, Ironton, Ohio, for Appellee.

McFarland, J.:

{¶1} Appellant appeals from his conviction and sentence entered by the Ironton Municipal Court, finding him guilty of disorderly conduct and sentencing him to six months probation, a one-hundred dollar fine and costs. On appeal, Appellant asserts that (1) the trial court erred in finding him guilty of disorderly conduct when there was no showing of any misconduct on the part Appellant, himself; and (2) the trial court committed error in finding him guilty of disorderly conduct, with a required mens rea of recklessness, when the manifest weight of the evidence was that he was

attempting to take steps to ameliorate any problems caused by his barking dogs. Because we conclude that Appellant's conviction was supported by sufficient evidence and was not against the manifest weight of the evidence, we overrule both of Appellant's assignments of error. However, because the trial court failed to indicate the degree of crime or additional elements enhancing Appellant's conviction from minor misdemeanor disorderly conduct to fourth degree misdemeanor disorderly conduct in its journal entry, we vacate Appellant's sentence and remand this matter to trial court with instructions to sentence Appellant on the least serious form of the offense contained in R.C. 2917.11.

{¶2} Accordingly, Appellant's conviction is affirmed but his sentence is vacated and the matter is remanded.

FACTS

{¶3} Appellant, Timothy Floyd, has been a resident of Lawco Lake, which is a membership-only, gated community in Lawrence County, Ohio, since 1985. Over the years, Appellant has become the owner of several stray dogs that have been dropped off in the neighborhood. At one time, Appellant had approximately fifty dogs; however, during the time at issue, Appellant had approximately two dozen dogs, which he kept on his property. Appellant has a kennel license and although the dog warden has visited his

house several times, there is no evidence that he has been cited for any violations.

{¶4} Beginning in the spring of 2007, several residents of Lawco Lake began to complain of the noise caused by Appellant's barking dogs. When complaints made directly to Appellant failed to address the problem, some of the residents addressed the issue to the Lawco Lake board of directors during a board meeting. On May 6, 2008, at the request of the Lawco Lake board, the Lawrence County Prosecuting Attorney's office sent Appellant a letter requesting that he correct the barking dog problem, or else a criminal complaint would be filed.

{¶5} Subsequently, a criminal complaint was filed against Appellant on July 8, 2008, charging Appellant with disorderly conduct, in violation of R.C. 2917.11, a misdemeanor of the fourth degree. Specifically, the complaint alleged that Appellant recklessly caused inconvenience, annoyance, or alarm to another by making unreasonable noise, after being warned to desist. A bench trial was held on October 16, 2008, at which Appellant and several other residents of Lawco Lake provided testimony.

{¶6} Larry Frische was the first resident to testify on behalf of the state. Frische testified that he was the president of the Lawco Lake board of directors and that he had lived at Lawco Lake for seven years, residing three

cabins down the road from Appellant. He testified that Appellant had twenty dogs that continually bark morning, noon and night. He testified that Appellant had been asked to control his dogs several times and that finally the issue was brought to Appellant's attention at a board meeting. He testified that Appellant has ignored the complaints. Frische testified that he asked the prosecuting attorney to send a letter to Appellant. Frische further testified that there had been no other problems of this kind at the lake in the past, but that as a result of the current problem, the lake board recently passed a ruling stating that dogs barking at night violate the quiet hours of the lake. He further testified that the new lake ordinance only permits ownership of two dogs and two cats.

{¶7} Sue Ellen McMillan testified next for the state. McMillan testified that while her primary residence is in Ironton, she has a temporary address at Lawco Lake, where she visits on the weekends and when she has time off from work. She testified that her cabin is located directly across the lake from Appellant and that Appellant's dogs bark every hour or two throughout the entire day, which causes her annoyance. She testified that complaints have been made to Appellant over the last three to five years. McMillan further testified that the Appellant only comes out to quiet the dogs when she starts screaming at them to shut up; however, McMillan

testified that even then, Appellant does not come out immediately to quiet his dogs.

{¶8} The State's final witness was Gary Lynd. Lynd testified that he lives directly across the street from Appellant, which is about four or five hundred feet away. He testified that the barking dogs have caused him annoyance and that they cause unreasonable noise. He testified that he cannot finish a conversation with guests due to the noise and that the dogs bark at night also. Lynd testified that he has recorded the dogs barking and a tape was played for the court.

{¶9} At the close of the state's evidence, Appellant moved for judgment, arguing that there were no barking dog statutes or noise ordinances at issue, that the disorderly conduct statute was not appropriate in this case and that the proper procedure to address the problem would be to evict Appellant from Lawco Lake. The trial court reserved ruling on the motion and the case continued with presentation of evidence by Appellant.

{¶10} Appellant testified on his own behalf at trial, stating that he had been a resident of Lawco Lake in since 1985. He testified that Lawco Lake is a very popular drop off area for strays and that over the years; he has accumulated a collection of stray dogs. He stated that he has a kennel license and has never been cited for any problems. He admitted that he had fifty

dogs at one point but that he now has a couple dozen dogs. He indicated that he does nothing to encourage the dogs bark, but rather that he has taken steps to discourage the dogs from barking. Some of these steps included putting tarps up around his deck and in between the cabins, to keep the dogs from seeing people and barking. He further testified that he had been working with several animal rescues but had been unable to find anyone to take the remaining dogs.

{¶11} Appellant testified that he leaves only four dogs out at night and puts the rest of them in an enclosed sunroom in his house. He stated that he had not ignored the complaints that have been made and that when he received the letter from the prosecutor's office, he put up the tarps. He further testified that he purchased a training device three weeks prior to the trial, which had been recommended by a veterinarian, but that while it worked well with the older dogs, it didn't affect the younger dogs' barking.

{¶12} At the conclusion of trial, both parties made arguments to the court regarding their respective positions. The State contended that Appellant had a duty to control the barking dogs and to remedy the situation, arguing that his role in owning so many dogs which were causing unreasonable noise to the residents of Lawco Lake was reckless. The State analogized the situation to one in which a defendant had control over a loud

radio, television, or shotgun, which caused unreasonable noise. The State argued that Appellant had control over the dogs, that they were disturbing the peace and that there was no other way for the residents to remedy the problem.

{¶13} Appellant argued to the contrary, claiming that absent a noise ordinance by a municipality, a dog owner has no duty to keep his dogs quiet. Appellant argued that the situation at hand was different than one involving a television or firearm in that he did not really have control over the dogs. Appellant further argued that while the barking created an unpleasant situation, it was not a criminal violation and that the proper procedure to remedy to the problem would have been to revoke his membership in the community by filing a civil petition to evict him.

{¶14} The trial court acknowledged that the case was different from the usual disorderly conduct case but nevertheless found Appellant guilty of disorderly conduct. In reaching this result, the trial court reasoned that Appellant was the owner of the dogs, which were the instruments causing a disturbance, and, as such, he was responsible. The trial court further stated that it believed disorderly conduct had been proven due to the number of dogs at issue that were creating a nuisance. Thus, the trial court found Appellant guilty of fourth degree misdemeanor disorderly conduct, which

included an enhancement as a result of Appellant's continuing conduct after receiving a warning letter from the prosecutor.[1] As a result, the trial court sentenced Appellant to six months of probation and imposed a fine and costs. It is from this conviction and sentence that Appellant brings his timely appeal, assigning the following errors for our review:

ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT ERRED IN FINDING DEFENDANT-APPELLANT GUILTY OF RC2917.11 (SIC) WHEN THERE WAS NO SHOWING OF ANY MISCONDUCT ON THE PART OF THE DEFENDANT HIMSELF.

II. THE TRIAL COURT COMMITTED ERROR IN FINDING DEFENDANT-APPELLANT GUILTY OF DISORDERLY CONDUCT, WITH A REQUIRED MENS REA OF RECKLESSNESS WHEN THE MANIFEST WEIGHT OF THE EVIDENCE WAS THAT DEFENDANT-APPELLANT WAS ATTEMPTING TO TAKE STEPS TO AMELIORATE ANY PROBLEMS CAUSED BY HIS BARKING DOGS."

LEGAL ANALYSIS

{¶15} Although Appellant sets forth two separate assignments of error, because both assignments challenge the sufficiency and weight of the evidence supporting Appellant's conviction for disorderly conduct, we will analyze the arguments in conjunction with one another. Appellant first

[1] Because the trial court's journal entry simply states that Appellant was found guilty of "dis. conduct," we had to search the record to determine whether Appellant was found guilty of minor misdemeanor or fourth degree misdemeanor disorderly conduct. A review of the trial transcript indicates that the trial court found Appellant guilty of fourth degree misdemeanor disorderly conduct, an enhancement of the offense based upon Appellant's continued conduct after receiving a warning, or cease and desist letter from the prosecutor's office.

argues that he should not have been convicted of disorderly conduct because the evidence presented at trial indicated that it was his dogs, not he, who were creating unreasonable noise, and that there was no evidence that he encouraged his dogs to bark. Thus, Appellant challenges his conviction based upon the sufficiency of the evidence. Appellant next argues that the State failed to prove the required mens rea element of disorderly conduct, which is recklessness. Specifically, Appellant argues that because the evidence indicated he had taken numerous steps to ameliorate the problem, it could not be shown that his conduct was reckless. As such, he argues that his conviction for disorderly conduct was against the manifest weight of the evidence.

{¶16} When reviewing a case to determine whether the record contains sufficient evidence to support a criminal conviction, our function "is to examine the evidence admitted 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." *State v. Jenks* (1991), 61 Ohio St.3d

259, 574 N.E.2d 492, paragraph two of the syllabus; See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781.

{¶17} This test raises a question of law and does not allow us to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. Rather, the test "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson* at 319. We reserve the issues of the weight given to the evidence and the credibility of witnesses for the trier of fact. *State v. Thomas* (1982), 70 Ohio St.2d 79, 79-80, 434 N.E.2d 1356; *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

{¶18} Even when sufficient evidence supports a verdict, we may conclude that the verdict is against the manifest weight of the evidence, because the test under the manifest weight standard is much broader than that for sufficiency of the evidence. *State v. Banks* (1992), 78 Ohio App.3d 206, 214, 604 N.E.2d 219; *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. In determining whether a criminal conviction is against the manifest weight of the evidence, we must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the

trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial granted. *State v. Garrow* (1995), 103 Ohio App.3d 368, 370-71, 659 N.E.2d 814; *Martin* at 175. "A reviewing court will not reverse a conviction where there is substantial evidence upon which the court could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." *State v. Eskridge* (1988), 38 Ohio St.3d 56, 526 N.E.2d 304, paragraph two of the syllabus.

{¶19} Here, the State alleged that Appellant violated R.C. 2917.11, which governs disorderly conduct, and provides in relevant part that:

(A) *No person* shall *recklessly* cause inconvenience, annoyance, or alarm to another by doing any of the following:

* * *

(2) *Making unreasonable noise* or an offensively coarse utterance, gesture, or display or communicating unwarranted and grossly abusive language to any person;

* * *

(3) Disorderly conduct is a misdemeanor of the fourth degree if any of the following applies:

(a) The offender persists in disorderly conduct after reasonable warning or request to desist. * * *" (Emphasis added).

Appellant's argument focuses on the fact that the statute prohibits any "person" from making unreasonable noise, arguing that there was no

evidence that Appellant, himself, made unreasonable noise or caused the dogs to make unreasonable noise. Appellant further contends that the State failed to prove the required mens rea element of disorderly conduct, which is recklessness. The State claims that because Appellant owns the dogs that are making the unreasonable noise, he is responsible for the noise and therefore guilty of disorderly conduct, likening the situation to one where a person controls a television, radio, or firearm which creates an unreasonable noise.

{¶20} For ease of analysis, we will address both of Appellant's contentions in conjunction with one another. A review of the records indicates that, in finding Appellant guilty, the trial court stated that "[y]es the dogs caused the noise but that is just the instrument. And he is the owner of the dogs and therefore I feel that he is responsible for the dogs. Now I just feel that it meets the elements there. * * * I think there is a common sense approach and I just feel that he is responsible for these dogs." We agree with the reasoning and common sense approach of the trial court, with respect to the unique facts of this case. While Appellant did not make the noise himself, as the keeper of over twenty barking dogs in a residential neighborhood, he is responsible for their actions, whether he encouraged them in their barking or not. Although the Ohio barking dog cases we have

located have all been pursued as violations of noise ordinances, rather than as disorderly conduct, we did find a very persuasive case from Texas, upon which we rely in reaching this result.

{¶21} In *Laur v. The State of Texas*, a Texas Court of Appeals upheld Laur's conviction after a Texas jury found him guilty of disorderly conduct as a result of his keeping thirty to forty barking dogs on his property, which created unreasonable noise, resulting in several complaints from his neighbors. (Jan. 7, 1988), Houston App. No. 01-87-0345-CR. Notably, Texas' disorderly conduct statute requires that a defendant act intentionally or knowingly, which is a stricter mens rea requirement than Ohio's statute, which only requires that the defendant act recklessly. Id. In upholding Laur's conviction, the court reasoned that "[a]lthough appellant argued that he did nothing to incite his dogs to bark, the jury could have inferred that because appellant knowingly confined an excessive number of dogs on his property, he was aware of the frequent barking, and that he was therefore responsible for making the unreasonable noise." Id. We find the reasoning of the *Laur* court to be persuasive and note that it is exceptionally factually similar to the case presently before us.

{¶22} Thus, like the *Laur* court and based upon the unique facts before it, we conclude that the trial court could have found that Appellant

acted recklessly in keeping an excessive number of barking dogs in a residential area and that he, therefore, was responsible for their unreasonable noise. As such, we conclude that Appellant's conviction was supported by sufficient evidence. Further, in light of our discussion above, we cannot conclude that Appellant's conviction was against the manifest weight of the evidence. As such we overrule Appellant's first and second assignments of error and affirm his conviction for disorderly conduct.

{¶23} However, our analysis does not end here. In reviewing the record before us, we identified a discrepancy with the trial court's journal entry, which we raise sua sponte, in the interests of justice.[2] Although it was not raised by Appellant, we note that the trial court did not specify the degree of the offense or state the additional elements enhancing the offense from a minor misdemeanor to a fourth degree misdemeanor in its judgment of conviction. As noted above, we had to consult the trial transcript to determine whether Appellant was found guilty of minor misdemeanor or fourth degree misdemeanor disorderly conduct.

{¶24} R.C. 2945.75(A)(2) requires that a guilty verdict state either the degree of the offense of which an offender is found guilty, or that the additional elements that make an offense one of a more serious degree are

[2] We raise this issue in accordance with our prior reasoning in *State v. Hoover*, Scioto App. No. 07CA3164, 2008-Ohio-6136, wherein we raised the identical issue sua sponte, despite the appellant's failure to raise the issue at the trial court or appellate level.

present. If neither is included, R.C. 2945.75(A)(2) directs that "a guilty verdict constitutes a finding of guilty of the least degree of the offense charged." In *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, at ¶ 14, the Supreme Court of Ohio held that under the "clear language" of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense. Interpreting R.C. 2945.75(A), the Supreme Court held further that an unspecified guilty verdict can only constitute a finding of guilty as to the least degree of the offense charged. Id.

{¶25} Here, Appellant was convicted of disorderly conduct, in violation of R.C. 2917.11. R.C. 2917.11 provides that disorderly conduct is a minor misdemeanor; however, the statute contains a degree-enhancing provision causing the offense to be elevated to a fourth degree misdemeanor if certain other conditions are present. Relevant here would be the provision in section (E)(3)(a) which elevates the offense to a fourth degree misdemeanor if a defendant "persists in disorderly conduct after reasonable warning or request to desist."

{¶26} The trial court found Appellant guilty of fourth degree misdemeanor disorderly conduct, which is not the least degree of the offense

charged. Appellant's case was tried to the bench. As recently recognized by the Eighth District Court of Appeals, in *State v. Sims*, Cuyahoga App. No. 89261, 2007-Ohio-6821:

"[A] court's journal entry memorializing its judgment of conviction is functionally equivalent to a 'verdict form' as contemplated by *Pelfrey*. Nothing in the Rules of Criminal Procedure requires a court sitting without a jury to complete a verdict form. Instead, the court issues a 'judgment of conviction' which must set forth 'the plea, the verdict or findings, and the sentence.' See Crim.R. 32(C)[;]" See, also, *State v. Glass*, Cuyahoga App. No. 89485, 2008-Ohio-450.

{¶27} Here, the trial court's judgment of conviction simply stated that it found Appellant guilty of "dis. conduct." Because it failed to either set forth either the degree of offense or the aggravating element enhancing the degree of the offense from minor misdemeanor to fourth degree misdemeanor disorderly conduct, the judgment entry below was not in compliance with R.C. 2945.75. Accordingly, we vacate Appellant's sentence and remand this matter to the trial court with instructions to sentence Appellant on the least serious form of the offense contained in R.C. 2917.11.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

Harsha, J., dissenting:

{¶28} I conclude that the state failed to introduce sufficient evidence to convict Floyd of disorderly conduct under R.C. 2917.11(A)(2). I reach this result based in large part upon R.C. 2901.04(A), which requires us to construe the sections of the Revised Code that define offenses strictly against the state and liberally in favor of the accused. In my view, such a construction requires the accused to have taken an affirmative action that resulted in making the unreasonable noise. Using the state's examples of a loud stereo or a noisy car, it is obvious that an accused in those situations either turned up the volume or turned on the engine. But the act of owning a dog that barks is too attenuated to qualify as the type of affirmative conduct that results in the person making an unreasonable noise in the criminal context. Doing some act that encourages or causes the barking, like teasing, would be an act of the accused's own volition that caused the disorder. But there is no such evidence in this case.

{¶29} Nor is Floyd charged with violating a noise ordinance, which might occasion a different result. The criminal sanction of disorderly conduct is not a catchall for every act that annoys peaceful citizens. See *Commonwealth of Pennsylvania v. Koch* (1981), 208 PA.Super. 290, 431 A.2d 1052. For instance, if a landlord rents an apartment to a tenant who

continuously plays loud music at all hours, is the landlord guilty of disorderly conduct? One could say "but for" the landlord's execution of the lease, the quiet neighbors would not be disturbed. Yet surely the remedy in that instance is civil and not criminal when addressed to the landlord (rather than the tenant). There are ample remedies available to abate nuisances such as continuously loud neighbors or their barking pets. The disorderly conduct criminal sanction is not one of them.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED IN PART, VACATED IN PART AND THE CAUSE REMANDED and that the Appellant and the Appellee split the 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 Ironton Municipal Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, J.: Concurs in Judgment and Opinion.
Harsha, J.: Dissents with Dissenting Opinion.

For the Court,

BY: _____
Judge Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.