[Cite as *State v. Guterba*, 2023-Ohio-2899.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

LEE E. GUTERBA,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 CO 0013

Criminal Appeal from the
Columbiana County Municipal Court, Columbiana County, Ohio
Case No. 2020 CRB 1206

BEFORE:
Mark A. Hanni, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Reversed and Vacated.

Atty. Vito J. Abruzzino, Columbiana County Prosecutor, and *Atty. Shelley M. Pratt*, Assistant Prosecuting Attorney, Columbiana County Prosecutor's Office, 135 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee and

Atty. Scott C. Essad, 5500 Market Street, Suite 99, Youngstown, Ohio 44512, for Defendant-Appellant.

Dated: August 18, 2023

HANNI, J.

{¶1} Defendant-Appellant, Lee E. Guterba (Appellant), appeals from a Columbiana County Municipal Court judgment convicting him of criminal damaging, a second-degree misdemeanor. Appellant was sentenced to 90 days in jail and a $200 fine, with the jail sentence suspended and probation for two years. For the following reasons, we reverse the trial court's judgment and vacate Appellant's conviction.

{¶2} Before addressing this appeal, it is noted that we have issued prior Opinions on civil matters between Appellant and Cherie and Michael Urbania (Urbanias), the complaining victims in this case. In our most recent Opinion, we alluded to ongoing hostilities and litigation between Appellant and the Urbanias. *Beatty v. Urbania*, 7th Dist. Columbiana No. 19 CO 0036, 2020-Ohio-3361, ¶ 2. That case concerned a limited remand order we issued as to the same property discussed in the instant case, which is owned by the Martha Joan Beatty Trust (Trust). Martha Joan Beatty is Appellant's mother. Appellant is the trustee and manager of the property. The Urbanias have an irrevocable license to portions of the Trust property. The limited remand order stemmed from a complaint and counterclaims which included competing claims for trespass, invasion of privacy, and defamation.

{¶3} Important to this case, each order in the prior cases held that while the Urbanias enjoyed an irrevocable license on the Trust real property, they "shall not erect permanent structures on the property." (2017 J.E. reinstated with modifications by *Beatty, supra*). The State in this case agrees that the Trust owns the real property and the Urbanias have an irrevocable license to portions of the Trust property.

{¶4} In the instant case, a complaint was filed against Appellant on November 2, 2020 charging him with criminal damaging in violation of R.C. 2909.06(A)(1), a second-degree misdemeanor. The deputy sheriff who filed the complaint responded to the Urbanias' report and they informed him that they saw Appellant kick an electrical junction box on a light pole that they had installed on the property. The deputy sheriff observed damage to the box.

{¶5} On December 14, 2020, Appellant through counsel, filed a motion to dismiss the complaint. He asserted that the junction box and light pole are located on the Trust property and the Urbanias had no right to erect the pole. He acknowledged that they had a license to portions of the Trust land, but indicated that the license and prior court orders did not permit them to erect permanent structures. He also asserted that he could not commit criminal damage because he owned the pole and lights as they became permanent fixtures on the property that the Trust owned.

{¶6} On March 24, 2021, the court held a hearing and overruled the motion to dismiss. The court found that the motion requested that the court make evidentiary findings that would nullify an element of the criminal damaging charge, which is that Appellant damaged "any property of another."

{¶7} On May 4, 2021, the parties filed the following written trial stipulations:

> The Martha Joan Beatty Trust Dated November 11, 2005 is the owner of the real property where the light pole at issue is erected. [Defendant's Exhibits A, B, C].
>
> Lee Guterba manages the Beatty Trust's real property, is her agent in this regard, and is empowered to act for her in matters of property management and maintenance.
>
> Were it up to Mrs. Beatty, she would have never pressed any charges.

{¶8} Appellant withdrew his jury demand and on June 7, 2021, the court held a bench trial, where Cherie and Michael Urbania testified on behalf of the State, and John Davis, a construction project manager, testified on behalf of Appellant.

{¶9} Cherie Urbania testified that she and her husband, Michael, had lived on the property since 1995 and difficulties existed between them and Appellant. (Tr. at 9). She stated that on October 18, 2020, she and Michael had an electrician install "landscaping lights" at their home around 7:00 pm. (Tr. at 10). She testified that they had entertained company that evening and after they left, she and Michael sat around a bonfire relaxing. (Tr. at 10). She testified that Michael observed Appellant on the side of the property with his phone pointed up toward their lights. (Tr. at 10). She stated that

Michael yelled to Appellant, and Appellant walked aggressively toward the lights, kicked the junction box, "knocked it all out of whack," yelled an obscenity, and left. (Tr. at 10).

{¶10} Mrs. Urbania further testified that they had an exclusive irrevocable license to the land upon which the light and junction box were located. (Tr. at 11). She explained the prior court order which held that they could use the land and Appellant was barred from the licensed land. (Tr. at 11). She testified that the light pole was not cemented into the ground and was removable. (Tr. at 12). She presented pictures of the damaged box and Appellant kicking the box. (Tr. at 13-14). She testified that the cost to repair the box and wiring was $285. (Tr. at 14).

{¶11} On cross-examination, Mrs. Urbania agreed that they did not own the property. (Tr. at 16). She also agreed that they were not permitted to erect permanent structures on the property and this part of the court order had remained constant. (Tr. at 18, 27). Mrs. Urbania disagreed that the light pole was a permanent structure. (Tr. at 19). She testified that the pole was installed four feet into the ground and was 19 or 20 feet in height. (Tr. at 19). She stated that they did not consult anyone before erecting the pole and she had no current plans to remove it. (Tr. at 21-22).

{¶12} Michael Urbania testified that they had lived at the home for the last 25 years and they had difficulties with Appellant. (Tr. at 30). He stated that on October 18, 2020, Appellant came onto the property and kicked the junction box. (Tr. at 30). He testified that the light pole was not cemented into the ground and was removable. (Tr. at 30). He stated that Appellant lacked permission to kick the box and a court order prohibited him from coming onto the property. (Tr. at 33).

{¶13} On cross-examination, Michael testified that the light pole was delivered by flatbed truck and he erected the pole by lifting it with his tractor and placing it into the hole. (Tr. at 33-34). He had no plans to remove the pole. (Tr. at 35).

{¶14} John Davis testified on behalf of Appellant as an expert. He stated that he has been a project manager for the last 20 years doing mainly commercial construction, but some residential. (Tr. at 37). He testified that he was familiar with poles like the one in this case because every job site he works on uses a pole for temporary or permanent electricity. (Tr. at 37). He testified that based upon the pictures he saw of the pole in this case, it looked like a permanent utility pole with lighting. (Tr. at 38).

{¶15} Mr. Davis opined that the pole would be called a permanent structure under the Ohio Building Code as well because it was affixed to the ground, had no outriggers that would make it moveable about the land, and it appeared to exceed the average height for a temporary pole. (Tr. at 38). He explained that a temporary pole is 10-14 feet high with 2-400 amp service on it. (Tr. at 39).

{¶16} Mr. Davis stated that it was irrelevant that the pole was not cemented into the ground because most permanent power poles are not. (Tr. at 39). He explained that the height and the depth of the installation determined whether a pole was permanent. (Tr. at 39). He testified that most poles that he used in his business were easily handled by two or three workers and the poles could be wiggled loose to transport them to the next site. (Tr. at 39). He opined that the pole in this case was a permanent structure because it would require a crane truck and an excavator to remove it from the ground, the ground itself would need to be loosened, and a lasso would have to be attached to the pole to extract and lift it from the ground. (Tr. at 40).

{¶17} Mr. Davis also reviewed the 2019 International Building Code (IBC), which provided the principles, means, and methods of construction. (Tr. at 40). He stated that he looked up the definition of a permanent structure in the IBC and the pole in this case met its definition of a permanent structure. (Tr. at 41).

{¶18} On cross-examination, Mr. Davis testified that he did not actually measure the pole in this case, but the paperwork he received from Appellant's counsel indicated that it was over 20 feet high. (Tr. at 42). He also observed that the Urbanias confirmed this height in their statements to police. (Tr. at 43). Mr. Davis further testified that industry standards dictated that a truck should be used to hoist this pole and to lower it into the hole. (Tr. at 44). He stated that it would be unsafe to use a tractor as Michael did, but it would be possible. (Tr. at. 44).

{¶19} When asked by the prosecution about permanent structures, Mr. Davis opined: "As it sits right now, this is 100 percent permanent structure, and just because you can remove it doesn't eliminate the fact that it's permanent. It doesn't transfer that over to temporary power." (Tr. at 46). Mr. Davis stated that it was his opinion and that of the IBC that the pole was permanent. (Tr. at 46).

{¶20} On June 18, 2021, the municipal court found Appellant guilty of criminal damaging. The court noted the 20-year dispute between Appellant and the Urbanias. The court also noted that the Urbanias had an irrevocable license on the Trust property, the property was owned by the Trust, and Appellant managed the land.

{¶21} The court ruled that the issue of whether the Urbanias had permission to install the light pole on the property was not for it to resolve. The court held that the evidence was uncontroverted that Appellant damaged the electrical system on the light pole and the Urbanias owned the light pole and electrical system. The court held that if Appellant had an issue regarding placement of the pole, he should have raised it before the court that issued the 2017 civil order concerning the property. The court held that the State had proven its case against Appellant beyond a reasonable doubt.

{¶22} At the sentencing hearing held on April 14, 2022, the court sentenced Appellant to 90 days in jail with a $200 fine, suspended the 90 days in jail, and placed Appellant on probation for two years.

{¶23} Appellant filed this appeal, asserting the following two assignments of error:

> **The trial court erred in finding Lee Guterba guilty of criminal damaging. As soon as the light pole was placed in the ground, it became a fixture → fixtures are affixed to and part of the real property → the real property is owned by the Guterba family → and Ohio law (including this Court) holds that a person cannot criminally damage his or her own property.**
>
> **The trial court erred when it held that the "light pole and electrical system attached thereto is the property of the Urbanias.**"

{¶24} Appellee presumes that Appellant is presenting a sufficiency of the evidence argument on appeal and contends that all elements of criminal damaging have been met. Appellant replies that his argument on appeal is:

> a legal error/question of law: the law is that the right of possession alone is a sufficient property interest to protect one against the crime of criminal damaging; the fact that Lee Guterba was charged with damaging property

> that he held an equitable right or ownership in (or alternatively, the trust that owns the property is on record as not wanting to prosecute) constitutes error in and of itself.

(Reply Br. at 1).

{¶25} In either case, this Court applies a de novo review. A de novo review requires that this Court independently consider the trial court's judgment without any deference to the trial court's determination. *In re J.R.P*., 2018-Ohio-3938, 120 N.E.3d 83, ¶ 24 (7th Dist.), citing *Matasy v. Youngstown Ohio Hospital Company, LLC*, 2017-Ohio-7159, 95 N.E.3d 744, ¶ 17 (7th Dist.), citing *Mayhew v. Massey*, 2017-Ohio-1016, 86 N.E.3d 758, ¶ 12 (7th Dist.).

{¶26} Sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient as a matter of law to support the verdict. *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997); *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins, supra* at 386.

{¶27} In reviewing the record for sufficiency, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements proven beyond a reasonable doubt. *Smith*, 80 Ohio St.3d at 113. A sufficiency of the evidence challenge tests the burden of production while a manifest weight challenge tests the burden of persuasion. *State v. K.A.T.,* 7th Dist. Mahoning No. 20 MA 0097, 2021-Ohio-4293, ¶ 14. Therefore, when reviewing a sufficiency challenge, the court does not evaluate witness credibility. *State v. Yarbrough*, 95 Ohio St.3d 516, 543, 2002-Ohio-2126, 747 N.E.2d 216, ¶ 79. Instead, the court looks at whether the evidence is sufficient if believed. *Id*. at ¶ 82.

{¶28} R.C. 2909.06 provides in relevant part that:

> (A) No person shall cause, or create a substantial risk of physical harm to any property of another without the other person's consent:
>
> (1) Knowingly, by any means.

{¶29} R.C. 2909.01(A)(4) defines "[p]hysical harm to property" as "any tangible or intangible damage to property that, in any degree, results in loss to its value or interferes with its use or enjoyment." R.C. 2909.01(A)(10)(a) defines "property" as "any property, real or personal, tangible or intangible, and any interest or license in that property."

{¶30} Appellant seeks to apply R.C. 5701.02 relating to real property to define the light pole and junction box as permanent structures. If they are permanent structures, Appellant contends that they became part of the property owned by the Trust, and therefore by him as Trustee, and he cannot damage his own property. Appellant alternatively asserts that even if he does not own the property, the criminal damaging offense could not be sustained because of the trial stipulation that the Trust would not have him charged with criminal damaging for kicking the junction box.

{¶31} The relevant part of R.C. 5701.02 states:

> (C) "Fixture" means an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the realty and not the business, if any, conducted by the occupant on the premises.
>
> (D) "Improvement" means, with respect to a building or structure, a permanent addition, enlargement, or alteration that, had it been constructed at the same time as the building or structure, would have been considered a part of the building or structure.
>
> (E) "Structure" means a permanent fabrication or construction, other than a building, that is attached or affixed to land, and that increases or enhances utilization or enjoyment of the land. "Structure" includes, but is not limited to, bridges, trestles, dams, storage silos for agricultural products, fences, and walls.

{¶32} Appellant submits that the only expert witness in the case, Mr. Davis, opined that the pole was a permanent fixture. Appellant notes Michael Urbania's testimony that a flatbed truck delivered the pole, it was rolled off of the tilt bed, and he used a tractor to lift and install the pole. (Tr. at 33-35). Mr. Davis opined that the pole was a permanent

structure because it was affixed to the ground, lacked outriggers to allow mobility about the land, and it exceeded the typical height for a temporary pole. (Tr. at 38). Appellant also notes Mr. Davis' opinion that a crane truck and an excavator would be required to remove the light pole from the ground in this case. (Tr. at 40). He quotes Mr. Davis' explanation that "[w]hat makes it permanent is the height and the ratio. For every so many feet that's above the ground, they drive so many feet into the ground." (Tr. at 39). Appellant also cites Mr. Davis' testimony that the IBC would deem the pole a permanent structure as well.

{¶33} Appellee points to the uncontroverted testimony that Appellant performed an act causing physical harm when he angrily kicked the junction box and damaged it. Appellee notes that the only argument is whether sufficient evidence was presented to show that Appellant did not own the property that he harmed. Appellee asserts that Appellant does not own the property because the Trust owns it. Appellee also contends that the Urbanias possess the property under the license and have the right to solely possess the property. Appellee notes that Appellant is prohibited from even stepping foot onto the part of the property that the Urbanias were licensed to use.

{¶34} Appellee cites cases where possession was considered an adequate property interest for purposes of criminal damaging and criminal mischief, including *State v. Garber*, 125 Ohio App.3d 615, 618, 709 N.E.2d 218 (9th Dist. 1998) (Lessee and leasing agency of truck both had property interests in the truck for purposes of criminal damaging as right of possession alone was sufficient property interest"); *State v. Russell*, 67 Ohio App.3d 81, 85, 585 N.E.2d 995 (4th Dist. 1990) (possession of a vehicle is sufficient property interest to protect one against the crime of criminal mischief where the offense also has property of another as an element); *State v. Gray*, 7th Dist. No. 99 BA 35 (June 8, 2001)(tenant can consent to damage of rental property); and *State v. Maust,* 4 Ohio App.3d 187, 189, 447 N.E.2d 125 (5th Dist. 1982); *State v. Young*, 7th Dist. Mahoning No. 07 MA 120, 2008-Ohio-5046, at ¶ 42.

{¶35} Appellee discusses *Garber*, *supra,* as analogous to the instant case. In that case, the wife hit her husband's truck with a tire iron and was charged with criminal damaging. She asserted that because they were married, the truck was also hers and she could not criminally damage her own property. The trial court denied the wife's motion

to dismiss on this ground. The appellate court held that "the property interests in the truck belonged to Mr. Garber, as the exclusive lessee * * * Appellant did not have any property interest in the truck. Any 'marital interest' that could possibly be awarded to her at some indefinite time in the future, if the parties might divorce, is irrelevant." *Id*. at 618.

{¶36} Appellee contends that the instant case is similar in that the Trust owns the property and Appellant does not own or even possess the property, since the Urbanias have a license. Appellee concludes that any interest that Appellant may have in the future pertaining to the real estate is irrelevant.

{¶37} Appellee also cites *State v. Baldwin*, 9th Dist. Medina No. 10CA0078–M, 2011-Ohio-4988, where the Ninth District Court of Appeals cited *Garber, supra* and held that a father's permission for his son to drive his truck constituted sufficient possession of the truck to the son and therefore the son had a property interest in the truck to protect against criminal damaging. Appellee distinguishes *Baldwin* by stating that the son had possession of the truck and Appellant in this case lacked possession of the property, the pole, and the lights. Appellee posits that since the Urbanias were the only ones with possession of this part of the property, only they could give consent to damage the pole and junction box, and they did not give such consent.

{¶38} We disagree with Appellee and find the cases cited by Appellee to be distinguishable. The uncontroverted evidence in this case was from Appellant's expert, Mr. Davis, who opined that the 20-foot light pole that the Urbanias erected was a permanent structure. The electricity for the lights came from wiring buried in a four-foot underground trench. The junction box attached to the light pole housed the wiring. The wiring, lights, and junction box became fixtures, improvements, or structures of the pole and benefitted the pole, a permanent structure, and the property. They therefore became permanent structures as well. R.C. 5701.02.

{¶39} The parties stipulated at trial that the Trust was the record owner of the property, Appellant was Trustee of that property, and that "[w]ere it up to Mrs. Beatty, she would have never pressed any charges" against Appellant. Since the Trust would never have charged Appellant for kicking the permanent structures on its property, this negates the lack of consent element required for criminal damaging.

{¶40} Appellee correctly asserts that the Urbanias had an irrevocable license and that license created a possessory right in the property. We have held that there are two types of licenses: those that are revocable and those that are coupled with an interest and generally irrevocable. *See Schlabach v. Kondik*, 7th Dist. Harrison No. 2017-Ohio-8016, ¶ 30, citing *Varjaski v. Pearch*, 7th Dist. Mahoning No. 04MA235, 2006-Ohio-5268, ¶ 13 (citing *Kamenar Railroad Salvage, Inc. v. Ohio Edison Co*., 79 Ohio App.3d 685, 691, 607 N.E.2d 1108 (11th Dist. 1992); *Cambridge Village Condo. Assn. v. Cambridge Condo. Assn*., 139 Ohio App.3d 328, 333, 743 N.E.2d 954 (2000). We further held that, "once a license is coupled with an interest, it becomes irrevocable and is a right to act on the land of another rather than a mere privilege." *Schlabach, supra*, citing *Varjaski*, 2006-Ohio-5268 (citing *Kamenar*, 79 Ohio App.3d at 691).

{¶41} Again, however, the settlement agreement and prior court orders specifically barred the Urbanias from erecting permanent structures on the licensed land. Since they erected the pole in violation of those orders, they could not lawfully possess or own that which they were barred from installing. The pole and the fixtures attached to it became permanent structures owned by the Trust.

{¶42} Further, Appellant was the Trustee for the Trust property. R.C. 5808.15(A)(1) confers general powers to trustees, including "all powers over the trust property that an unmarried competent owner has over individually owned property." Thus, Appellant, as a legal owner of the property, could not criminally damage his own property. While subsections in R.C. 5805.15 also curtail trustee powers and impose duties such as the duty to protect the Trust property, Appellant still has legal title to the property. As such, the criminal damaging element of "the property of another" is also negated.

{¶43} The trial court applied the criminal damaging statute in its basic terms and did not address the issue of whether the pole and junction box were permanent fixtures. The court held that the Urbanias owned the pole and junction box and Appellant damaged their property by kicking it and causing damage to the box. The court acknowledged Appellant's argument that the pole and box were permanent structures, but held that Appellant should have raised this matter before the court that issued the orders relating to the civil matter and the property. The trial court erred in this regard.

{¶44} For these reasons, the Court finds merit to Appellant's assignments of error. The trial court judgment is reversed and Appellant's conviction is vacated.

Waite, J., concurs.

D'Apolito, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the Court finds merit to Appellant's assignments of error. The trial court judgment is reversed and Appellant's conviction is vacated. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.