[Cite as *State v. Wellington*, 2017-Ohio-8596.]

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

STATE OF OHIO,	:	Case No. 17CA1
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
STEVEN E. WELLINGTON,	:	**RELEASED: 10/26/2017**
Defendant-Appellant.	:	

APPEARANCES:

Timothy P. Gleeson, Gleeson Law Office, Logan, Ohio, for appellant.

Jason D. Holdren, Gallia County Prosecuting Attorney, Gallipolis, Ohio, for appellee.

Harsha, J.

{¶1} After the jury convicted Steven E. Wellington of inducing panic, the court sentenced him to three years of community control. Wellington asserts that the trial court erred in denying his motion for judgment of acquittal at the close of the state's case. He claimed that the state did not establish the crime of inducing panic because it had not proven that he committed any predicate offense. In response to the motion, the state argued that Wellington had committed the underlying offense of criminal trespass.

{¶2} The state now concedes that the trial court erred by denying Wellington's motion, and our review of the record confirms that the evidence was insufficient to establish that Wellington committed any predicate offense because there was no evidence that Wellington had entered property without privilege to do so. We sustain Wellington's second assignment of error, reverse his conviction and sentence, and remand the cause to the trial court for entry of a judgment of acquittal.

I. FACTS

{¶3} The Gallia County Grand Jury returned an indictment charging Steven Wellington with one count of inducing panic in violation of R.C. 2917.31(A)(3), a fifth-degree felony. The indictment stated that "on or about the 26th day of August, 2016, at Gallia County, Ohio, STEVEN E. WELLINGTON, did cause the evacuation of a public place, to-wit: the First Baptist Church (Ohio Valley Christian School), or otherwise cause serious public inconvenience or alarm, by committing an offense, with reckless disregard of the likelihood that its commission will cause serious public inconvenience or alarm, said offense resulted in economic harm of one thousand dollars or more but less than seven thousand five hundred dollars, in violation of Section 2917.31(A)(3) of the Ohio Revised Code." The indictment did not identify the predicate offense required to establish the crime.

{¶4} Wellington pleaded not guilty to the charge and requested a bill of particulars. The state's response merely reiterated the language of the indictment and thus did not identify the predicate offense to the charge of inducing panic.

{¶5} At the jury trial the state introduced evidence that Wellington entered the property of First Baptist Church in Gallipolis at night to place a sign near one of the church entrances. The sign included the following language, as summarized in the testimony of one of the church's pastors:

> Hear ye, hear ye, I told you, you are not saved until we are in Heaven actually and you threw me out physically. For that it is time to condemn this building (church) by order, order of my Heavenly Father in Heaven for as Jesus said whatever you do to the least of these you do unto me. So by order of all who enter risk death for my Heavenly Father shall destroy this building and all that enter in and for him that touched * * * he may Hell warm his soul for Heaven is closed to him. Thus sayeth the Lord. Amen. If any remove this sign, * * * any innocent soul is lost then he who removes it will burn before morning.

{¶6} The church contacted the police, and after concluding that the sign included a legitimate threat, sent a memorandum to parents documenting the threat. The police received information pointing to Wellington, who admitted placing the sign on the church property.

{¶7} At the conclusion of the state's case-in-chief, Wellington moved for a judgment of acquittal under Crim.R. 29, arguing that the state had failed to establish the element requiring that a predicate offense had been committed. The state countered that "[t]he underlying offense, I mean there's been testimony that he came in at night uh, put the sign there and left. So there was trespass on the property, there's been testimony as to that." Wellington's counsel replied that there had been no testimony that Wellington had trespassed on church property.

{¶8} The trial court denied the motion, and the case was submitted to the jury without the trial court identifying a predicate offense in its instructions. The jury returned a verdict finding Wellington guilty of inducing panic; the trial court entered the conviction upon the jury verdict and sentenced him to community control.

II. ASSIGNMENTS OF ERROR

{¶9} Wellington assigns the following errors for our review:

> I. THE TRIAL COURT PROCEEDINGS WERE PREJUDICIALLY FLAWED FROM BEGINNING (THE INDICTMENT) TO END (THE JURY INSTRUCTIONS) IN FAILING TO IDENTIFY THE PREDICATE OFFENSE TO THE INDUCING PANIC CHARGE, AN ESSENTIAL ELEMENT.
>
> II. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION OF INDUCING PANIC.

LAW AND ANALYSIS

A. Motion for Judgment of Acquittal

{¶10} For ease of analysis we initially consider Wellington's second assignment of error, which contests the trial court's denial of his motion for judgment of acquittal. Under Crim.R. 29(A), "[t]he court on motion of a defendant * * *, after the evidence on either side is closed, shall order the entry of acquittal * * *, if the evidence is insufficient to sustain a conviction of such offense or offenses." "A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence." *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37; *State v. Wolfe*, 2017-Ohio-6876, __ N.E.3d __, ¶ 12 (4th Dist.).

{¶11} "When a court reviews the record for sufficiency, '[t]he 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. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 146, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶12} "A sufficiency assignment of error challenges the legal adequacy of the state's prima facie case, not its rational persuasiveness." *State v. Koon*, 4th Dist. Hocking No. 15CA17, 2016-Ohio-416, ¶ 17. "That limited review does not intrude on the jury's role 'to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " *Musacchio v. United States*, __ U.S. __, 136 S.Ct. 709, 715, 193 L.Ed.2d 639 (2016), quoting *Jackson* at 319, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶13} The trial court convicted Wellington upon the jury verdict finding him guilty of inducing panic, in violation of R.C. 2917.31(A)(3), which provides that "[n]o person shall * * * cause serious public inconvenience or alarm, by * * * [c]ommitting any offense, with reckless disregard of the likelihood that its commission will cause serious public inconvenience or alarm." "Thus, 'committing any offense' is an essential element of inducing panic that must be proven beyond a reasonable doubt." *State v. Geary*, 2016-Ohio-7001, 72 N.E.3d 153, ¶ 5 (1st Dist.).

{¶14} Wellington asserts that the trial court erred by denying his Crim.R. 29 motion for judgment of acquittal because the state failed to establish that he had committed any predicate offense. At trial the state responded to Wellington's motion by arguing that it had proven that he committed the predicate offense of criminal trespass by entering church property at night to place a sign on the property.

{¶15} R.C. 2911.21(A)(1) defines criminal trespass and provides that "[n]o person, without privilege to do so, shall * * * [k]nowingly enter or remain on the land or premises of another." R.C. 2901.01(A)(12) defines "privilege" as "an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity." "'Privilege is the distinguishing characteristic between unlawful trespass and the lawful presence on the land or premises of another.' " *State v. Petit*, 12th Dist. Madison No. CA2016-01-005, 2017-Ohio-633, ¶ 17, quoting *State v. Bradford*, 12th Dist. Warren No. CA2010-04-032, 2010-Ohio-6429, ¶ 27.

{¶16} Here the state failed to introduce any evidence that Wellington's entry onto church property was "without privilege." Consequently, as the state concedes on

appeal, it did not establish the predicate offense of criminal trespass or any other predicate criminal offense that constituted an essential element of the charged offense of inducing panic. As the parties both acknowledge, the trial court erred in denying Wellington's motion for judgment of acquittal because after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could not have found the essential elements of the crime of inducing panic proven beyond a reasonable doubt. We sustain Wellington's second assignment of error.

B. Remaining Assignment of Error

{¶17} In his first assignment of error Wellington contends that the trial court proceedings were prejudicially flawed because of the failure of the state to identify the predicate offense to the inducing panic charge. Because we have sustained Wellington's second assignment of error, our holding renders the state's remaining assignment of error moot so we need not address its merits. *See State v. Brigner*, 4th Dist. Athens No. 14CA19, 2015-Ohio-2526, ¶ 16, citing App.R. 12(A)(1)(c).

IV. CONCLUSION

{¶18} Having sustained Wellington's second assignment of error, we reverse the judgment of the trial court and remand the cause for entry of a judgment of acquittal.

JUDGMENT REVERSED

AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Gallia County Court of Common Pleas 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.

McFarland, J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

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.