[Cite as *State v. Collier*, 2010-Ohio-4039.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22686
v.	:	T.C. NO. 07CRB2364
COLBY L. COLLIER	:	(Criminal appeal from Municipal Court)
Defendant-Appellant	:	
	:	

. . . .

OPINION

Rendered on the 27th day of August, 2010.

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DONOVAN, P.J.

{¶ 1} Defendant-appellant Colby L. Collier appeals his conviction and sentence for one count of criminal mischief, in violation of R.C. 2909.07(A)(1), a misdemeanor of the third degree.

{¶ 2} On November 8, 2007, Collier was charged by complaint with one count of

criminal mischief. Collier pleaded not guilty at his arraignment of November 29, 2007. After a bench trial held on January 30, 2008, the court found Collier guilty of the single count of criminal mischief in a written decision filed on February 6, 2008.[1]

{¶ 3} On March 12, 2008, Collier was sentenced to serve 60 days in jail and ordered to pay $200.00 in fines and court costs. On the condition that Collier complete five years of community control, the court suspended the jail sentence, as well as $100.00 of the fines imposed. The court also granted a stay of execution of Collier's sentence pending the outcome of his appeal on March 20, 2008. Collier filed a timely notice of appeal with this Court on March 24, 2008.

I

{¶ 4} The incident which forms the basis for the instant appeal occurred on November 6, 2008, when Linda and John Adkins of Trotwood, Ohio, discovered an eight by ten inch piece of paper which had been placed on top of their trash receptacle. A stick had been placed on top of the paper. The paper was a handwritten note, which read as follows:

{¶ 5} "Grey's and my chicken legs. Don't worry about my business! Worry about that $300.00 + check you bounced and the late charge by the credit union. You make $500/per pay. Peanuts 15 years on the job/no education. Close your blinds. Watchin [sic] you and that hippo have sex is repulsive. You need to detox and go to AA, drunk."

{¶ 6} Recognizing the handwriting on the note to be that of her neighbor, Collier,

[1]We note that according to the bailiff for the trial court, no transcript exists of the bench trial because the "machine 'did not record' the trial." However, on April 13, 2010, the trial court approved an App. R. 9(C) statement of the evidence which has been utilized by this Court on appeal.

Linda Adkins contacted the Trotwood Police Department. Officer Mary A. Vance responded to the report, spoke to both Linda and John Adkins, and filed a complaint against Collier for criminal mischief. Officer Vance also ran a fingerprint analysis on the note. The results of the analysis established that Collier's fingerprints were on the paper.

{¶ 7} After a bench trial, Collier was subsequently found guilty of one count of criminal mischief, and the court sentenced him accordingly. It is from this judgment which Collier now appeals.

II

{¶ 8} Collier's first assignment of error is as follows:

{¶ 9} "COLBY COLLIER'S CONVICTION WAS BASED ON INSUFFICIENT EVIDENCE."

{¶ 10} In his first assignment of error, Collier argues that his conviction for criminal mischief was not supported by sufficient evidence. The State did not file a responsive brief.

{¶ 11} If the evidence that supports a material element of an offense is insufficient, the defendant must be acquitted of that offense. In reviewing a claim of insufficient evidence, the relevant inquiry is whether, after reviewing 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. Britton*, 181 Ohio App.3d 415, 2009-Ohio-1282.

{¶ 12} R.C. 2909.07(A)(1)describes the offense of criminal mischief as follows:

{¶ 13} "(A) No person shall

{¶ 14} "(1) Without privilege to do so, knowingly move, deface, damage, destroy, or otherwise improperly tamper with the property of another."

{¶ 15} Specifically, Collier contends that he did not "move, deface, damage, destroy, or tamper" with the Adkins' trash receptacle. Collier asserts that all he did was place a piece of paper on top of the trash can and lay a stick on top of the paper so that it would not blow away. Thus, Collins claims that there is no evidence which supports his conviction for criminal mischief.

{¶ 16} In its written decision, the trial court found that Collier "improperly tampered" with the Adkins' trash receptacle by placing the note on top of it. The facts however do not support this finding.

{¶ 17} Appellant relies upon *State v. Maxwell* (April 13, 1988), Medina App. No. 1646, 1988 WL 38075. In *Maxwell*, Appellant looked inside serval cars' windows, and placed his hands on the cars' handles while at the Medina County Courthouse. Id. at *1. Maxwell was convicted of committing criminal mischief under 2909.07(A)(1). Id. The court of appeals reversed, stating, "'(O)therwise improperly tamper' is not specifically defined by statute, as the terms pertain to R.C. 2909.07. Although the Committee Comment to the statute appears to indicate that the legislature intended the statute to be a 'comprehensive prohibition,' criminal statutes defining offenses are generally to be 'strictly construed against the state.' " Id. at *2. "'Words and phrases' contained in the Ohio Revised Code must be construed in accordance with their common usage." Id.; citing *State v. Carroll* (1980), 62 Ohio St.2d 313. Webster's Ninth New Collegiate Dictionary (1984, page 1204) defines the verb "tamper" to mean "to interfere so as to weaken or change for the

worse" or "to try foolish or dangerous experiments" with an object. See *Maxwell,* at *2. Black's Law Dictionary (8 Ed. 2004, page 1494) defines "tamper" as, "To meddle so as to alter (a thing); esp., to make changes that are illegal corrupting, or perverting."

{¶ 18} "In R.C. 2909.07(A)(1), the general words 'otherwise improperly tamper' are proceeded by the much more specific terms 'move, deface, damage, destroy.' Consequently, the rule of statutory construction known as *ejusdem generis* applies." *Maxwell*, at *3. "In explaining this rule the Supreme Court of Ohio has stated:

{¶ 19} " '* * *.

{¶ 20} " 'Under the rule of *ejusdem generis*, where in a statute terms are first used which are confined to a particular class of objects having well-known and definite features and characteristics, and then afterwards a term having perhaps a broader signification is conjoined, such latter term is, as indicative of legislative intent, to be considered as embracing only things of a similar character as those comprehended by the preceding limited and confined terms.'

{¶ 21} " '* * *.' "

{¶ 22} Id.; quoting *State v. Aspell* (1967), 10 Ohio St.2d 1, paragraph two of the syllabus. See, also, *Light v. Ohio University* (1986), 28 Ohio St.3d 66, 68.

{¶ 23} The court, applying *ejusdem generis* to R.C. 2909.07(A)(1), concluded "that a showing of some change in either the physical location or physical condition of the property is necessary to sustain a conviction under the statute." Id.

{¶ 24} Upon analysis of R.C. 2909.07(A)(1) and the facts of the instant case, we conclude that no evidence was adduced that Collier in any way "tampered" with the Adkins'

trash receptacle. The Adkins' trash can was not altered nor rendered "unfit" for use as found by the trial court. The trash can was not permanently altered or otherwise defaced. While Collier should have utilized a more appropriate and tactful approach to resolve any dispute with his neighbors, the record does not support Collier's conviction for criminal mischief pursuant to R.C. 2909.07(A)(1).

{¶ 25} Collier's first assignment of error is sustained.

III

{¶ 26} Collier's second assignment of error is as follows:

{¶ 27} "THE TRIAL JUDGE ERRED IN SENTENCING COLBY COLLIER."

{¶ 28} In light of our disposition regarding Collier's first assignment, his second assignment of error is rendered moot.

IV

{¶ 29} Collier's first assignment of error having been sustained, his conviction and sentence for criminal mischief will be reversed and vacated, and he will be ordered discharged as to the offense with which he was charged.

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BROGAN, J. and GRADY, J., concur.

Copies mailed to:

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