

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2010-08-075
 :
 - vs - : OPINION
 : 1/10/2011
 :
 KONRAD KUCZAK, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM WARREN COUNTY COURT
Case No. 2010CRB00709

Rachel A. Hutzel, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Konrad Kuczak, 130 West Second Street, Suite 1010, Dayton, Ohio 45402, defendant-appellant, pro se

RINGLAND, J.

{¶1} Defendant-appellant, Konrad Kuczak, appeals from his conviction in the Warren County Court for operating a powercraft that was not carrying a properly functioning fire extinguisher. Based on the reasons outlined below, we reverse and appellant is discharged.¹

{¶2} On the evening of June 25, 2010, Officer Chad Cruset and Officer Dawn

1. Pursuant to Loc.R. 6(A), we sua sponte remove this case from the accelerated calendar and place it on the regular calendar for purposes of issuing this opinion.

Potter of the Ohio Department of Natural Resources, Division of Watercraft, conducted a safety inspection on a powercraft located on Caesar Creek Lake in Warren County, Ohio. After conducting the safety inspection of the powercraft, which, in this case, was a 19-foot Mercruiser [sic] Sea Ray, appellant was cited for operating the vessel without a properly functioning fire extinguisher in violation of R.C. 1547.27(C), a minor misdemeanor. Following a bench trial, appellant was found guilty and ordered to pay a fine of \$125.

{¶3} Appellant now appeals from his conviction, raising three assignments of error for review.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR FINDING THE APPELLANT GUILTY WITHOUT PROOF BEYOND A REASONABLE DOUBT THAT THE VESSEL WAS THE CLASSIFICATION TO WHICH ORC § 1547.27 IS APPLICABLE."

{¶6} In his first assignment of error, appellant argues that the state provided insufficient evidence to support his conviction for operating a powercraft without a properly functioning fire extinguisher. In support of this claim, appellant argues that the state provided insufficient evidence to prove the powercraft he occupied that evening was required to carry a fire extinguisher as prescribed by R.C. 1547.27(A).² We agree.

{¶7} Whether the evidence presented is legally sufficient to sustain a verdict is

2. The state argues that appellant waived his sufficiency of the evidence arguments on appeal because he failed to make a Crim.R. 29 motion for acquittal during his bench trial. However, while there seems to be some inconsistency in the application of the law, the prevailing view indicates that in the absence of a Crim.R. 29 motion for acquittal, "a not-guilty plea preserves sufficiency for purposes of appeal after a bench trial * * *." *State v. Pepin-McCaffrey*, 186 Ohio App.3d 548, 2010-Ohio-617, ¶52, citing *Dayton v. Rogers* (1979), 60 Ohio St.2d 162, 163; see, also, *State v. Jones*, 91 Ohio St.3d 335, 346, 2001-Ohio-57; *State v. McGhee*, Seneca App. No. 13-08-12, 2009-Ohio-4259, ¶8; *State v. Rochowiak*, Miami App. No. 2008 CA 12, 2009-Ohio-2550, ¶24; *State v. Evans*, Cuyahoga App. No. 85396, 2005-Ohio-3847, ¶11; but, see, *State v. Watts*, Wayne App. No. 05CA0028, 2005-Ohio-6745, ¶9.

a question of law. *State v. Lazier*, Warren App. No. CA2009-02-015, 2009-Ohio-5928, ¶9; *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. In reviewing the sufficiency of the evidence, "[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. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶113, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Carroll*, Clermont App. Nos. CA2007-02-030, CA2007-03-041, 2007-Ohio-7075, ¶117. Proof beyond a reasonable doubt is "proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs." R.C. 2901.05(D).

{¶8} Pursuant to R.C. 1547.27(A), "all powercraft" shall carry fire extinguishers as prescribed by that section, "[e]xcept those powercraft propelled by an electric motor *and* those less than twenty-six feet in length designed for use with an outboard motor, of open construction, and not carrying passengers for hire * * *."³ (Emphasis added.) Any person who "operate[s] or permit[s] to be operated" any powercraft that does not comply with that section is guilty of a minor misdemeanor. R.C. 1547.27(C); R.C. 1547.99(C). A "powercraft," as defined by R.C. 1547.01(B)(4), means "any vessel propelled by machinery, fuel, rockets, or similar device."

{¶9} After a thorough review of the record, including an extensive review of the language found in R.C. 1547.27, we find the state failed to provide any evidence as to whether the powercraft appellant occupied was one required to carry a fire extinguisher as prescribed by R.C. 1547.27(A). In fact, besides noting the make, model, and length of the powercraft, the state provided no evidence as to how the powercraft was

propelled, whether it was designed for use with an outboard motor, its type of construction, or whether it was carrying any passengers for hire. Without this evidence, the state failed to prove that the powercraft appellant occupied was of the type required to carry a fire extinguisher as prescribed by R.C. 1547.27(A). Therefore, based on the facts and circumstances of this case, the trial court erred by finding appellant guilty of operating a powercraft without a properly functioning fire extinguisher in violation of R.C. 1547.27(C). Accordingly, appellant's first assignment of error is sustained, his conviction is reversed, and he is discharged.

{¶10} Assignment of Error No. 2:

{¶11} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR FINDING THE APPELLANT GUILTY WITHOUT ANY EVIDENCE THAT APPELLANT WAS OPERATING THE VESSEL ON THE DAY IN QUESTION."

{¶12} Assignment of Error No. 3:

{¶13} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO PROVE THAT THE FIRE EXTINGUISHER ON BOARD THE VESSEL FAILED TO CONFORM TO ORC § 1547.27."

{¶14} Having found appellant's conviction was not supported by the sufficiency of the evidence, appellant's second and third assignments of error are rendered moot.

{¶15} Judgment reversed and appellant discharged.

POWELL, P.J., and HENDRICKSON, J., concur.

3. The state concedes that the language found in R.C. 1547.27(A) exempts two types of powercraft; namely, (1) those propelled by an electric motor, and (2) those less than 26 feet in length designed for use with an outboard motor, of open construction, and not carrying passengers for hire.