

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

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| STATE OF OHIO, | : | APPEAL NO. C-160510 |
| Plaintiff-Appellee, | : | TRIAL NO. 14CRB-27546 |
| vs. | : | <i>JUDGMENT ENTRY.</i> |
| TIMOTHY KEMPF, | : | |
| Defendant-Appellant. | : | |

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

After a jury trial, defendant-appellant Timothy Kempf was convicted of criminal mischief in the Hamilton County Municipal Court. He now appeals, and we affirm.

The evidence at trial demonstrated that Kempf, without permission to do so, dug up several metal survey markers on the boundary line of his neighbor's yard. The licensed professional land surveyor who performed the survey for the neighbor and installed the markers had warned Kempf not to remove them.

In his first assignment of error, Kempf argues that the trial court erred by not excluding at trial the testimony of Douglas Spreen, the surveyor and the state's expert witness with respect to the boundary line. Kempf claims that Spreen's testimony should have been excluded due to the state's failure to comply with Crim.R. 16(K). This rule provides in relevant part that an expert witness's report must be disclosed at least 21 days before trial.

But the record demonstrates that the state provided Spreen's report to the defense 72 days before trial. Thus, Kempf cannot show the rule violation that he claims necessitated the exclusion of Spreen's testimony. Because Kempf failed to demonstrate the error assigned, we overrule it.

In his second assignment of error, Kempf argues that the trial court's bias in favor of the state was a structural error that violated his due-process rights, as well as Evid.R. 611 and 614. Kempf cites five interjections by the trial court during the jury trial. To determine if Spreen is entitled to a new trial, "[t]he threshold inquiry is whether, with reference to a range of acceptable, though not necessarily model, judicial behavior, the [trial] court's conduct falls demonstrably outside this range so as to constitute hostility or bias.'" *State v. Cepec*, 149 Ohio St.3d 438, 2016-Ohio-8076, 75 N.E.3d 1185, ¶ 74, quoting *McMillan v. Castro*, 405 F.3d 405, 410 (6th Cir.2005).

After reviewing the challenged conduct, we find no evidence of judicial hostility or bias against Kempf. Although Kempf contends that the court's interjections were one-sided, we note that one interjection reminded defense counsel to object to Spreen's testimony on the grounds that he had not yet been qualified as an expert. Ultimately, the conduct cited by Kempf does not rise to the level of the impartial tone "permeat[ing] the trial" that we can characterize as "bias." (Internal citations omitted.) *Cepec* at ¶ 76, internal citations omitted.

Moreover, the trial court issued a curative instruction at the close of the evidence, telling the jury, "do not infer from any ruling or statement that the Court has made during the course of the trial, or any facial expression or anything else[,] that the Court has any conclusion on any factual question. Factual questions are the sole province of the jury." The jury was presumed to follow this instruction, which was designed to eliminate any perceived improper influence by the trial judge on the jury. *See id.* at ¶ 77.

Because the record does not support Kempf's claim of bias, we overrule the second assignment of error.

In his third assignment of error, Kempf argues that his conviction was not supported by the evidence and was against the manifest weight of the evidence. Kempf was convicted of criminal mischief, in violation of R.C. 2909.07(A)(3), which provides in relevant part that “[n]o person shall * * * without privilege to do so[] knowingly move * * * or otherwise improperly tamper with a * * * boundary marker[] or other survey station, monument, or marker.”

Kempf first argues that the objects he removed from the ground were not the type of markers contemplated by the criminal-mischief statute because they were not installed on the corner of the property. But the metal pins marking the property boundary line were installed by a licensed professional land surveyor and were intended to be permanent. The statute does not limit the reach of the statute to markers at the corner of the property, and we do not read such a restriction into the statute, which is broadly written.

Kempf next argues that the state failed to establish that he had the requisite mens rea to commit the crime. But both Spreen and Kempf's neighbor testified that they had told Kempf not to remove the markers installed on the boundary line pursuant to the survey, and Kempf admits that he dug up the markers because he disagreed with the boundary line that Spreen had established. Thus, the state presented sufficient evidence of the requisite mens rea to support the conviction.

In sum, we hold that the state presented sufficient evidence on all the elements of the crime of criminal mischief. *See State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. Further, we hold there is no basis to conclude that the jury lost its way or committed a manifest miscarriage of

OHIO FIRST DISTRICT COURT OF APPEALS

injustice in resolving the factual issues against Kempf. *See State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). Accordingly, we overrule the third assignment of error.

Therefore, we affirm the trial court's judgment.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., MYERS and MILLER, JJ.

To the clerk:

Enter upon the journal of the court on July 21, 2017
per order of the court _____.
Presiding Judge