

[Cite as *State v. Graham*, 2009-Ohio-6691.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2009 CA 81
v.	:	T.C. NO. 09 CRB 03299
SHIRLEY GRAHAM	:	(Criminal appeal from Municipal Court)
Defendant-Appellant	:	
	:	

OPINION

Rendered on the 18th day of December, 2009.

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FROELICH, J.

{¶ 1} Shirley Graham appeals from a judgment of the Clark County Municipal Court, which found her guilty, after a bench trial, of obstructing official business, in violation of R.C. 2921.31(A), a second degree misdemeanor. The court sentenced Graham to 90 days in

jail and a \$500 fine plus court costs.

{¶ 2} On appeal, Graham asserts that her conviction was against the manifest weight of the evidence, that the court erred in sentencing her to the maximum term of 90 days in jail, and that the court erred in admitting faxed correspondence over objection. For the following reasons, the trial court's judgment will be reversed.

I

{¶ 3} A bench trial on Graham's obstructing official business charge was held on August 28, 2009. The evidence at trial established the following facts:

{¶ 4} Graham's two granddaughters, ages six and seven, were in the custody of the Chatham County, Georgia, Department of Family and Children Services ("the Chatham County agency") and had been placed by that agency with Graham for several years. The Clark County Department of Jobs and Family Services ("CCDJFS") monitored that placement. In October 2007, Megan Brown, an ongoing social worker for CCDJFS, began courtesy supervision of the children for the Chatham County agency by conducting monthly visits and reviews.

{¶ 5} On June 4, 2009, a hearing was held in Chatham County during which the Georgia court ordered the children to be returned to their mother's custody on June 19, 2009. Afterwards, Brown arranged with Graham that Graham would take the children to the airport on June 19.

{¶ 6} On approximately June 12, the Chatham County agency contacted CCDJFS and asked CCDJFS to pick up the children and place them in foster care. The Chatham County agency expressed to CCDJFS that it was concerned about threats made during the

court hearing by the children's father, Everett Arnett, Jr., that the mother would never see the children again. CCDJFS responded that they needed something in writing to provide to law enforcement.

{¶ 7} On June 15, 2009, the Chatham County court entered a written judgment, ordering the children be returned to their mother "not later than June 19th, 2009." The same day, CCDJFS received faxed correspondence from the Chatham County agency requesting that CCDJFS place the children in foster care pending transportation to Georgia. The letter stated, in part:

{¶ 8} "Due to the lack of cooperation by both the paternal grandmother and father of the girls in addition to the violent nature of the father, the Chatham County Department of Family and Children Services is requesting assistance from your agency in picking up both children and placing them in a foster home until they are picked up by their case manager, Denise Black, on Thursday, June 18th, 2009. It is felt that placing them in a foster home will ensure their safety and well being. Chatham County DFCS is further requesting assistance in transporting [T.A.] and [S.A.] to the airport on Thursday, June 18th, 2009."

{¶ 9} A copy of the faxed correspondence was admitted at trial over defense counsel's objection.

{¶ 10} CCDJFS received a copy of the Chatham County court's June 15, 2009, judgment at 8:49 a.m. on June 16. At approximately 10:00 a.m., Faith McDonald, a supervisor for the CCDJFS, and Brown went to Graham's home in Springfield, Ohio, to pick up the children. They knocked on the door and asked Graham to come outside so they could discuss the children. Graham responded that she was on the way to her attorney's

office, and she asked them to follow her. McDonald told her that they could not, and she began to explain to Graham that the Chatham County agency had asked them to place the children in foster care pending transportation arrangements. Graham became very upset, as did the children, who were sitting inside the door and began kicking and screaming that they were not going to go.

{¶ 11} Graham started calling people on her telephone, including her attorney, Linda Cushman, and the children's therapist at Rocking Horse Center. While she talked, Graham went in and out of her home. McDonald informed Graham that she did not want to call the police because she did not want to upset the children any further. Graham responded that the children were already upset and "to just do that." McDonald called law enforcement, and she and Brown waited for them on the sidewalk in front of the home.

{¶ 12} As they waited, Graham brought her telephone to Brown and had the social worker speak with Graham's ex-husband, the paternal grandfather. At that point, one child was in the house while the other was on the porch, crying that she did not want to live with her mother. McDonald talked with the child on the porch, trying to calm her down.

{¶ 13} As McDonald spoke with the child, McDonald heard a van driven by Arnett, the children's father, "screech up the street." The children ran to him from the porch screaming, "Daddy! Daddy!" Arnett grabbed the children, told the agency workers that they "were placing these children with an abusive mother and [about] all the mistakes [they] were making." He ordered them off the property and took the children inside the house. According to McDonald, Graham was also inside her home. McDonald again called the police to inform them that the father had arrived and had the children in the home.

McDonald and Brown continued to wait on the sidewalk.

{¶ 14} The police arrived approximately ten minutes later. The officers talked to Graham and then informed the agency employees that the children had been taken out the back door while they had been waiting for law enforcement to arrive. Brown assumed that Arnett had left in another vehicle; the car in which Arnett had arrived was still in front of the house.

{¶ 15} After the police came, McDonald and Brown showed their paperwork to Graham and her attorney, who had arrived shortly thereafter, and discussed the situation. Prior to that time, however, the CCDJFS employees “really didn’t get an opportunity to talk to her about what was going on.”

{¶ 16} In her defense, Graham testified that, when CCDJFS employees arrived at her home, she had last heard that she was supposed to return the children on June 19th. Graham stated that her ex-husband, the children’s paternal grandfather, “happened to call my phone when I got disconnected from Linda Cushman’s secretary *** and he wanted to talk to them [meaning CCDJFS] and I took the phone to Megan.”

{¶ 17} Graham denied calling her son, the children’s father. She said that Arnett had come because they were going to go Cushman’s office to get records and then they had an appointment with an attorney in Dayton at noon. She testified that, when her son took the children into the house, she took the phone to Brown so her former husband could talk to her (Brown) and then she (Graham) went into the house and called Cushman’s office again. Graham indicated that she then texted to Cushman’s secretary that she did not see the children and noticed that the back door was open. She surmised that her son had left with

the children on foot. Graham denied telling her son to take the children, talking to him about him leaving with the children, or knowing what he had done. She also denied that she, her son, and her two granddaughters had been in the house together.

{¶ 18} At the conclusion of the trial, the trial court found Graham guilty of obstructing official business. The court reasoned:

{¶ 19} “*** The question is whether or not this Defendant acted in a way that impeded the persons from Children and Family Services in the performance of their duty. When you hear the evidence that was presented here today, and you hear the descriptions of how everything played out, there can’t be any doubt that she clearly impeded them in the performance of their duty. There’s no question about that. The father of these children got word, either through the ex-husband or other ways and pulled up there racing hell-bent-for-leather to get there while she stalled by making phone calls to whoever she talked to and it would not have happened but for her doing that, so clearly her act of stalling and not allowing them to show the paperwork and take the children, is the act that impeded them in the performance of their duty.

{¶ 20} “So, forget about whether she was shown paperwork. It was explained to her why she was there. She would have been able to see all the paperwork if she cooperated and sat down with them, but she clearly, for whatever motivation, being upset after having custody for that long, but she was aware of the father’s attitudes that were expressed about statements that he would not let them go back and you’d never see these children again, and clearly, as this played out, that was done, so your actions in this are inexcusable to allow him to get involved in whatever it is he did. You don’t have to sit down and write out a game

plan and say I'll stall them while you take them out the back. You knew he would do something. You certainly didn't have these children prepared to be transported back to Georgia under any circumstances in a couple days and Georgia was probably very correct in needing to get these children out of the home earlier, because they wouldn't be ready to go and now you have children on the lamb [sic] being taught disrespect for Court Orders and disrespect for Law and a father who's going to face felony charges and go to prison and rightfully so, when he is brought to justice, all because you wouldn't just cooperate with people who were there just following the law, which is what we have to have or we have chaos. *** I'm fining you \$500 plus Court costs and I'm sentencing you to 90 days in jail. I'll review the jail sentence if you find those children. That's it."

{¶ 21} A written judgment imposed 90 days in jail and a \$500 fine plus court costs was entered on the same day. Graham immediately sought a stay of her sentence with this Court, indicating that she had filed a motion to stay in the municipal court, which had been denied. The same day, we stayed Graham's sentencing during the pendency of this appeal.

{¶ 22} Graham appeals, raising three assignments of error.

II

{¶ 23} Graham's first assignment of error states:

{¶ 24} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FINDING THE DEFENDANT-APPELLANT GUILTY BEYOND A REASONABLE DOUBT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 25} In her first assignment of error, Graham claims that her conviction was against the manifest weight of the evidence. Although Graham has captioned her

assignment as one based on manifest weight, her argument is that the State failed to present sufficient evidence to prove obstructing official business beyond a reasonable doubt.

{¶ 26} “A sufficiency of the evidence argument disputes whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law.” *State v. Wilson*, Montgomery App. No. 22581, 2009-Ohio-525, at ¶10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. When reviewing whether the State has presented sufficient evidence to support a conviction, the relevant inquiry is whether any rational finder of fact, after viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 430, 1997-Ohio-372, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d. 560. A guilty verdict will not be disturbed on appeal unless “reasonable minds could not reach the conclusion reached by the trier-of-fact.” *Id.*

{¶ 27} In contrast, “a weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive.” *Wilson* at ¶12. When evaluating whether a conviction is contrary to the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact “clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *Thompkins*, 78 Ohio St.3d at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 28} Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288. However, we may determine which of several competing inferences suggested by the evidence should be preferred. *Id.*

{¶ 29} The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence. *Wilson* at ¶14. A judgment of conviction should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *Martin*, 20 Ohio App.3d at 175.

{¶ 30} Graham was convicted of obstructing official business, in violation of R.C. 2921.31(A), which provides: "No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's official capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties." "A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." R.C. 2901.22(A).

{¶ 31} In order to commit the offense of obstructing official business, "a defendant must engage in some affirmative or overt act or undertaking that hampers or impedes a public official in the performance of the official's duties, as opposed to merely failing or refusing to cooperate or obey a police officer's request." *State v. Harrell*, Montgomery

App. No. 21736, 2007-Ohio-4550, at ¶12, quoting *State v. Prestel*, Montgomery App. No. 20822, 2005-Ohio-5236, at ¶16 (citing examples). “The proper focus in a prosecution for obstructing official business is on the defendant’s conduct, verbal or physical, and its effect on the public official’s ability to perform the official’s lawful duties.” *State v. Wellman*, 173 Ohio App.3d 494, 2007-Ohio-2953, at ¶12.

{¶ 32} The State asserts that Graham’s actions were sufficient to support a conviction for obstructing official business. It emphasizes that Graham ignored McDonald and Brown while she made telephone calls to others, that she handed her telephone to Brown and had Brown speak with the children’s paternal grandfather about removing the children, and that she retreated back into her home. The State asserts that “[a]ll of the acts separately or combined were intended to delay Ms. McDonald and Ms. Brown and those acts did impede and/or hamper them from performing their lawful duties.” The State further notes that Graham was calm when the police officers came to the door, by which time her son had left with the children, and that Graham did not alert anyone to her son’s exit with the children. That State asserts that “[c]alling her son to pick up and remove the children certainly impeded and hampered CCJFS from picking up the children. [Graham] accomplished what she set out to do.” The State claims that Graham “was upset CCDJFS showed up before she took steps to make sure the children weren’t around on the 19th.”

{¶ 33} Construing the evidence in the light most favorable to the State, we do not find sufficient evidence to support Graham’s conviction for obstructing official business. According to McDonald, she and Brown went to Graham’s home unannounced on the morning of June 16, at the request of the Chatham County agency, in order to take custody

of Graham's two granddaughters. Graham responded that the judge in Georgia had told her that the children were to be returned on June 19. McDonald acknowledged that CCDJFS had made arrangements with Graham that she (Graham) would go to the airport with the children on June 19, when the girls would be placed on an airplane and returned to their mother. McDonald stated that Graham was surprised to see them on the 16th, and Brown also testified that she (Brown) was surprised by the change in plans.

{¶ 34} In response to McDonald and Brown's unexpected appearance and request for the children, Graham became very upset and began to make a series of telephone calls, including calls to her attorney, Linda Cushman, and to the children's therapist. At some point, Graham was on the telephone with her former husband, the children's grandfather, and she handed the phone to Brown so that Brown could speak to him. During this time, the children were by the front door of the home or on the porch. While Graham took no actions to calm the children or to get their belongings, there is no evidence that Graham took any affirmative steps during this time to abscond with the children or to otherwise prevent CCJFS from taking the children from her home. We note that CCDJFS's decision not to forcibly take the children was also due, in part, to Brown and McDonald's reasonable attempts to obtain Graham's cooperation and their commendable desire not to unduly upset the children.

{¶ 35} Graham's actions in calling her attorney, the therapist, and others contributed to a delay in CCDJFS's efforts to obtain custody of the children. However, the question is not solely whether Graham acted in a way that impeded the performance of CCDJFS's lawful duties, as the trial court suggested. Rather, the hindering conduct must have been

done with the purpose to impede. See R.C. 2921.31(A). Graham's attempts to contact her attorney, presumably to ascertain her legal options, as well as her telephone call to the children's therapist were a reasonable reaction to CCDJFS's unanticipated appearance at her home. Even construing the evidence in the light most favorable to the State, the evidence does not support a reasonable inference that Graham acted *with the purpose* to prevent, obstruct, or delay McDonald and Brown in their duties when she went in and out of her home while talking on the telephone and asked Brown to speak with her former husband.

{¶ 36} Moreover, the evidence does not support a reasonable inference that Graham's telephone calls were made for the purpose of delaying CCDJFS long enough for her son, the children's father, to arrive at her home and take the children. Although her son later appeared at the scene, there is no evidence that Graham called him or directed another person, such as her former husband, to call him so that he could remove the girls from her home. In short, even though Graham's repeated telephone calls delayed McDonald and Brown and demonstrated that Graham failed to cooperate with CCDJFS, there is insufficient evidence to establish that Graham made various telephone calls with the intention to obstruct official business.

{¶ 37} Additionally, Graham's failure to permit McDonald and Brown to show her their paperwork and to otherwise cooperate with them by bringing the children to them cannot form a basis for her conviction. R.C. 2921.31(A) imposed no legal duty to cooperate with CCDJFS, to sit down with them, or to do anything to assist CCDJFS in retrieving the children. The statute simply prohibited Graham from engaging in any affirmative conduct with the purpose of hindering the agency in the performance of its duties.

{¶ 38} Graham's conviction was also premised on Graham's presence inside her home when Arnett absconded with the children. Based on the manner of his arrival at the house, the trial court could have reasonably found that someone had notified Arnett that CCDJFS was at his mother's home to remove the children. And, although Graham denied being in her home with Arnett and the children, the trial court could have credited McDonald's and Brown's testimony that Graham was inside her home when Arnett arrived and remained inside until the police arrived approximately ten minutes later. It is undisputed that Arnett and the children were gone when the police spoke with Graham.

{¶ 39} Even assuming that Graham was with Arnett in the home, the evidence is insufficient to support a finding, beyond a reasonable doubt, that Graham obstructed official business. As stated above, to support such a conviction, there must be evidence that Graham committed an overt or affirmative act with the purpose to hinder CCDJFS in the performance of its duties; merely failing or refusing to cooperate with McDonald and Brown is insufficient to support a conviction. Here, there is no evidence of what transpired in the home upon Arnett's arrival. Graham could have been talking or texting with her attorney's secretary, as she suggests; she could have been sitting passively by while Arnett left through the back door with the girls; or she could have been actively encouraging Arnett to leave with the girls. In finding her guilty, the trial court stated that Graham "knew he [Arnett] would do something" and her "actions in this are inexcusable to allow him to get involved in whatever it is he did." However, merely allowing Arnett to leave with the children, however inexcusable, does not constitute an overt act under R.C. 2921.31, and there is no evidence that Graham took any affirmative steps to assist him. In the absence of such

evidence, there was insufficient evidence to convict Graham of obstructing official business.

{¶ 40} The first assignment of error is sustained.

III

{¶ 41} Graham's second and third assignments of error state:

{¶ 42} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND AN ABUSE OF DISCRETION IN SENTENCING THE DEFENDANT-APPELLANT TO THE MAXIMUM TERM OF 90 DAYS IN JAIL. THIS IS A VIOLATION OF SECTIONS 2929.21 AND 2929.22 OF THE OHIO REVISED CODE."

{¶ 43} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT ADMITTED OVER OBJECTION THE FAXED LETTER FROM THE SOCIAL WORKERS IN GEORGIA."

{¶ 44} In light of our disposition of the first assignment of error, the second and third assignments of error are overruled as moot.

{¶ 45} With respect to the second assignment of error, however, we note that the court's statement that he would "review the jail sentence if you find those children" may suggest a misapprehension of his sentencing authority. Since the repeal of R.C. 2929.51, effective January 1, 2004, a sentence of "90 days in jail" is not modifiable by the sentencing court. See *State v. Sharp*, Montgomery App. No. 21958, 2008-Ohio-1618, at ¶5 (noting that, since the repeal of R.C. 2929.51, "the trial court may not amend a defendant's sentence after the sentence has been carried into execution").

IV

{¶ 46} The judgment of the trial court will be reversed.

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FAIN, J., concurs.

GRADY, J., dissenting:

{¶ 47} I respectfully dissent from the majority’s decision. I would find that the evidence offered at trial was sufficient as a matter of law to prove a violation of R.C. 2921.31(A), and that Defendant Graham’s conviction for that offense is not against the manifest weight of the evidence.

{¶ 48} R.C. 2921.31(A) prohibits any act that hampers or impedes a public officer’s performance of the official’s lawful duties when (1) the actor’s purpose is to prevent, obstruct, or delay the official’s performance of any act the official is authorized by law to perform and (2) the person acts “without privilege to do so.”

{¶ 49} “The proper focus in a prosecution for obstructing official business is on the defendant’s conduct, verbal or physical, and its effect on the public official’s ability to perform the official’s lawful duties.” *State v. Wellman*, 173 Ohio App.3d 494, 2007-Ohio-2953, ¶12. The evidence admitted at trial was sufficient as a matter of law to prove that when the two officials from CCDJFS appeared at Defendant’s door and made Defendant Graham aware of the lawful duties they were there to perform, Defendant Graham thereafter hampered or impeded their performance of those official duties, acting with a purpose to obstruct or delay acts those officials were authorized by law to perform. The further question is whether Defendant acted “without privilege.”

{¶ 50} The Georgia court awarded custody of Defendant’s two granddaughters to the public agency in Georgia, which then committed them to Defendant’s care. The Georgia

court, in its most recent judgment, identified Defendant as the children's "physical custodian" and expressed its satisfaction with Defendant's discharge of her custodial role. That court indicated that Defendant's role as physical custodian of the children could continue until June 19, 2009. Defendant's status as physical custodian conferred a special legal right, which is a form of privilege.

{¶ 51} R.C. 2921.31(A) contemplates an official's performance of a lawful duty and an actor's privilege to resist the performance of that duty that may both exist, at the same time and in tension with each other. The fact that an official is performing a lawful duty doesn't necessarily deprive the actor of a privilege to oppose performance of that duty. R.C. 2921.31(A) requires the State to prove that a defendant instead acted "without privilege."

{¶ 52} Defendant reasonably expected that, pursuant to the Georgia court's most recent order, she had the right to have the two grandchildren for whom she had cared for several years remain with her a few more days, which were no doubt precious to her. Defendant was confronted suddenly and without notice with a loss of that expectation, through no fault or misconduct on her part. Defendant therefore did not act "without privilege" in making telephone calls to determine just what her duties might require of her.

{¶ 53} Defendant testified that she called her attorney, but was unable to reach her attorney. The record permits a finding that Defendant called her son, but she denied that. Even if she did, Defendant did not thereby act "without privilege" to protect her status. Defendant testified that she and her son had plans to meet with another attorney later that day. In any event, there is no basis to infer that Defendant called her son in order to allow

or encourage him to take the children away.

{¶ 54} Defendant's particular privilege was a two-edged sword, however. Her status as physical custodian of her grandchildren which Georgia authorities had granted likewise imposed on Defendant a particular duty not to employ her status to prevent compliance with the Georgia court's orders. In that respect, Defendant was not a mere bystander who owes no duty of cooperation.

{¶ 55} Defendant violated her duty when, after her son had absconded with the two girls out the back door, Defendant failed to promptly report that matter to the two CCDJFS officials who were there at the direction of the Georgia agency, because her son's conduct prevented compliance with the Georgia court's order. Reasonable minds could find that the ensuing delay resulting from Defendant's conduct was "any act" that hampered those officials' performance of their lawful duties, that Defendant's purpose was to prevent their performance of their lawful duties, and that Defendant was without privilege to act as she did.

{¶ 56} I would find the evidence sufficient to prove a violation of R.C. 2921.31(A), and would overrule the first assignment of error on that basis. I would overrule the third assignment of error on a finding that the document concerned was not offered to prove the truth of its contents, and therefore is not hearsay. Evid.R. 802. However, I would sustain the second assignment of error.

{¶ 57} The trial court imposed a ninety-day jail sentence and stated that it would "review the jail sentence if you find those children." A court's sentencing authority is wholly statutory. R.C. 2929.21(A) states that "[t]he overriding purposes of misdemeanor

sentencing are to protect the public from future crime by the offender and to punish the offender.” R.C. 2929.26(B) permits early release for certain purposes, including community service. However, neither that section nor R.C. 2929.24, which authorizes imposition of definite jail sentences for misdemeanor offenses, contemplates the kind of coercive and conditional sentence the court imposed. Though its purposes were positive, the court abused its discretion when it imposed Defendant’s sentence. I would sustain the second assignment of error and remand for resentencing.

{¶ 58} We are told that following Defendant’s conviction her two grandchildren were located and returned to Georgia, but are now in a foster home there because their mother again proved unable to care for them. If so, that is a tragic outcome. One would hope that, Defendant’s ill-considered conduct notwithstanding, the Georgia authorities will seek a reunification between these children and the one family member who has cared for and loved them, Defendant Graham.

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