

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 23868
Plaintiff-Appellee	:	
	:	Trial Court Case No. 09-CRB-3619
v.	:	
	:	(Criminal Appeal from
SHAWN HERRON	:	Dayton Municipal Court)
	:	
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 14th day of January, 2011.

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FAIN, J.

{¶ 1} Defendant-appellant Shawn Herron appeals from her conviction and sentence for Obstructing Official Business and Resisting Arrest. Herron contends that the trial court should have granted her motion for a judgment of acquittal, under Crim.R. 29, because the State failed to present evidence sufficient to sustain her

conviction for Obstructing Official Business, and the arrest she was resisting was not a lawful arrest.

{¶ 2} We conclude that the evidence presented by the State would permit a reasonable mind to find, beyond reasonable doubt, that Herron, by screaming obscenities, from a distance of seven feet, at a police officer who was dealing with an accident scene, a criminal investigation, at least one injured police officer, and possibly more, and an injured civilian, distracted the police officer from the performance of her duties, thereby hindering or impeding her, with the purpose to do so. The evidence also supports a conclusion that defendant thereafter resisted a lawful arrest. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} On April 1, 2009, members of the Dayton Police Department were investigating a shooting that took place on North Main Street. As part of that investigation, officers were told to look for a red Toyota that had been observed in the area of the shooting. Thereafter, Officer Susan Benge responded to Parkwood Avenue to aid Officer Matthew Heiser, who had located a vehicle matching the description given out to the patrol cars. There were four men in the vehicle.

{¶ 4} When Benge arrived on the scene on Parkwood Avenue, Heiser already had one of the men seated in his cruiser. Benge requested back-up, began a pat-down of the remaining three men and instructed Heiser to place one of the men into her cruiser. As Heiser was putting the man into Benge's cruiser, Benge noticed a man in a white SUV speaking to the man in Heiser's custody. Benge informed Heiser that

he should talk to the man in the SUV, in order to determine whether he had any connection to the shooting. Bengé then turned back to complete the pat-down of the other two men detained with the red Toyota.

{¶ 5} Bengé then heard Heiser yell for her and noticed Heiser struggling with the driver of the SUV. Bengé left the two men on the sidewalk and went to assist Heiser, who was standing on the running board of the SUV, with the door open. The two officers tried to remove the driver from the SUV, but were unable to do so. They then used a Taser, and after that failed to achieve the driver's compliance, pepper spray in an attempt to subdue him. The driver then began to drive away. Heiser was unable to get off of the running board of the vehicle, on which he was standing. Bengé began to run after the SUV. She noticed another cruiser with two officers arrive on the scene. At that time, the SUV drove onto the top of that cruiser. The SUV flipped sideways, landing on its side in the street next to the cruiser. Heiser was thrown into the air and landed in the street. Eventually Bengé saw Heiser crawl to the grassy area between the sidewalk and the street curb. Bengé then requested medical personnel on her radio.

{¶ 6} Bengé attempted to extricate the driver of the SUV from his vehicle. Before she was able to do so, however, she noticed Herron approaching the SUV. Herron was, in fact, the mother of the driver of the SUV, but Bengé did not discover this relationship until later, after Herron had been arrested and removed from the scene. When Herron was about "three to four feet" away from Bengé, she began to scream and call Bengé a "fucking bitch." Herron also accused Bengé of causing the accident by "beating," and using the taser on, the driver.

{¶ 7} Once it became apparent that Herron was not offering to assist the officers, Sergeant Daniel Williger told Herron “to get back up on the sidewalk and get out of the scene and let [Benge] do [her] job.” Herron complied. Benge then noticed Herron walk into a nearby house.

{¶ 8} Benge broke out the window of the SUV and was able to extract the driver and handcuff him. During this time, Benge noticed Herron return to the area and stand about seven feet away from where she was extracting the driver. Herron began yelling again. Benge warned Herron “five different times,” to “get back up on the sidewalk, let [her] deal with the injured officers * * * [and that she would be] arrested for obstructing official business.” Within “thirty to forty-five seconds” of cuffing the driver and getting another officer to watch him, Benge informed Herron that she was under arrest. At that point, Herron ran away. Benge ran after Herron and followed her into a residence. In the house, Ronald E. Gustwiller, another officer, who had joined the chase, overtook Herron as Herron turned and faced him, in the kitchen. Gustwiller’s momentum resulted in Herron falling over a chair, with Gustwiller on top of her. In short order, Gustwiller was able to get Herron on her stomach, handcuff her, and help her up. Gustwiller took Herron into custody.

{¶ 9} Herron was charged with one count of Obstructing Official Business and one count of Resisting Arrest. Following a jury trial, Herron was convicted of both offenses. The trial court sentenced Herron to serve ninety days in jail on both counts, to be served concurrently, but suspended seventy-nine days and gave Herron credit for one day served. Thus, Herron served ten days in jail. The trial court also placed Herron on one year of community control, fined her \$250, and assessed court costs.

{¶ 10} From her conviction and sentence, Herron appeals.

II

{¶ 11} As a preliminary matter, the State contends that this appeal is moot, because Herron has completed her sentence, and the fines and court costs imposed were suspended. The record does not bear out the State's contention. The last entry we have found in the record is a hand-written entry, apparently signed by the trial judge, dated February 1, 2010:

{¶ 12} "Def having served the required jail time – Def is released from probation – fine & costs to collections if not paid in 30 days."

{¶ 13} Because nothing has been presented to this court to demonstrate either that Herron has paid the fine and costs, or that the fine and costs have been suspended or waived, we cannot conclude that this appeal is moot.

III

{¶ 14} Herron's sole assignment of error states as follows:

{¶ 15} "THE COURT ERRED WHEN IT OVERRULED DEFENDANT-APPELLANT'S MOTION FOR ACQUITTAL AT THE CLOSE OF THE STATE'S CASE."

{¶ 16} A motion for a judgment of acquittal pursuant to Crim. R. 29 tests the sufficiency of the evidence presented by the State. *State v. Miley* (1996), 114 Ohio App.3d 738, 742. "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. 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. A guilty verdict will not be disturbed on appeal unless “reasonable minds could not reach the conclusion reached by the trier-of-fact.” *Id.*

A – Obstructing Official Business

{¶ 17} Obstructing Official Business is proscribed by R.C. 2921.31(A):

{¶ 18} “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.”

{¶ 19} “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).

{¶ 20} “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.

{¶ 21} During trial, Benge testified that Herron impeded her ability to perform her duties. Her testimony, in pertinent part, is as follows:

{¶ 22} "Q: Is [Herron] hindering you in any way from dealing with the person in the SUV?

{¶ 23} "A: Yes.

{¶ 24} "Q: And why is it hindering?

{¶ 25} "A: Because I need to get [the driver] medical attention; I need to get at least three officers medical attention, and still have somebody in my cruiser that Heiser put in there and Heiser still has someone in his cruiser that he put in there and we don't have anybody watching these two cruisers.

{¶ 26} "Q: Is there anyone else besides [Herron] the second time she comes out?

{¶ 27} "A: No.

{¶ 28} "Q: And when she's yelling at you the second time, is she actually standing in the street?

{¶ 29} "A: Yes.

{¶ 30} "Q: You said that she was screaming at that point, so does she stand there the whole time before you decide you're going to arrest her?

{¶ 31} "A: She keeps walking towards the vehicle; towards the Tahoe that turned over and I'll be honest with you the last thing in the world that I wanted to do was to arrest this woman. Any other time, fine, let's to jail. I don't have time or space for one more prisoner. I didn't net it; I didn't want it. So finally, I'm like that is it, I've had it, the only thing, way I'm going to be able to attend to these is to handcuff her and put her in the back of my cruiser. She can sit there with this other guy that I don't know who he is.

{¶ 32} “Q: Before you made the decision to arrest her for obstructing official business, did you, how many times did you tell her to get back from the scene?

{¶ 33} “A: I must have [told] this lady five different times because ideally when there's something that serious, you would like to get your hat out of the police car, put your hat on, put your scene tape up, do it the way that we're trained to do it, but that wasn't the case.

{¶ 34} “Q: And during those five times that you told the defendant to get back had you pulled the driver of the Tahoe out yet?

{¶ 35} “A: Yes.

{¶ 36} “Q: And what exactly are you doing with the driver of the Tahoe, her son?

{¶ 37} “A: He's proned [sic] out on the ground, and he's handcuffed. He's lying on his stomach and he's handcuffed.

{¶ 38} “Q: And at this point were you able to observe any injuries to the driver of the Tahoe?

{¶ 39} “A: Not visible, but your vehicle turns over and you don't have a seatbelt on you could have some serious internal injuries.

{¶ 40} “Q: Ok, was he complaining of any injuries at that point?

{¶ 41} “A: I never got a chance to talk to him.

{¶ 42} “Q: Were you able to, before you made the decision to arrest the defendant were you able to get her son, the driver of the Tahoe, into handcuffs?

{¶ 43} “A: Yes, yes, I got him cuffed.

{¶ 44} “Q: Alright, so how much time between getting him cuffed and making your decision to [inaudible] the defendant, how much time passed?

{¶ 45} “A: probably 30 to 45 seconds long enough for me to have [two other officers] watch this guy.”

{¶ 46} Bengé described the multiple urgent tasks upon which she was attempting to focus while Herron was “still yelling and screaming at [her]”:

{¶ 47} “Q: Obviously[,] there are multiple things going on at this time, if let’s say you get the person in handcuffs, the person that you are trying to arrest, the driver of the SUV. Is that all that you’re trying to do there? I mean as soon as you get that accomplished do you pack up and go home?

{¶ 48} “A: No, that certainly wouldn’t be the case that day. We still had to figure out who was responsible for the homicide. We still had to tend to Officer Hiser. Find out exactly how bad he was injured because you have to remember something, when a police officer gets injured it is much more serious than a civilian getting injured because when a police officer gets injured they’ve got a gun. And you’ve got to secure their weapon before some citizen comes along[,] grabs their gun[,] and shoots them[.] [A]nd that does happen. You’ve got to get their gun secured; you’ve got to get them secured. Then I need to find out who these two officers¹ are in the car[,] which no way in my mind did I think they could survive a two[-]ton Tahoe landing on top of it.

{¶ 49} “Q: Are all of these things duties you would have while dealing with the driver of the SUV?

{¶ 50} “A: Yes.”

{¶ 51} Bengé differentiated, in her testimony, between the two different times that

¹As it happened, these two officers escaped injury, and, at some point, were assisting at the scene. But Bengé did not know that at this time.

Herron was yelling and screaming at her:

{¶ 52} “A: So I can see where she’s at. She [Herron] goes into a house and OK, fine, problem resolved. A couple minutes later, she comes back out and starts the same old thing again. So, Sgt. Willinger [sic] is yelling at her. I’m yelling at her. So then finally, I told her; she wouldn’t quit. The louder he’s getting the more people were coming out of the house. So finally I told her, I’m going to arrest; I have no medics on scene yet, and I will arrest you for obstructing official business. I have got to tend to these officers that are injured and the person in the car that is injured. I told her, you will sit in the back of my crusier [sic] until everything is squared away and we get the medics here.

{¶ 53} “ * * * *

{¶ 54} “Q: When she comes out that second time after she’s been in the house for a couple minutes, what is her demeanor at this point?

{¶ 55} “A: She’s still yelling and screaming at me. Now I’m even more concerned because I’m thinking this lady just went inside a house and she’s not going to stay inside. Did she arm herself?

{¶ 56} “ * * * *

{¶ 57} “Q: You said she’s about seven feet away when she did this?

{¶ 58} “A: Yes.”

{¶ 59} Benge had testified that Herron was three feet away during the first episode of yelling and screaming, before Herron retreated to the sidewalk and then went into the house.

{¶ 60} We conclude that a reasonable jury could find from Benge’s testimony, as

this jury evidently did, that Herron's persistent screaming and yelling at Benge from a distance of seven feet, while Benge was attempting to focus on multiple urgent tasks requiring her attention, impaired or hindered Benge in the performance of her duties.

{¶ 61} A closer question is presented as to whether a reasonable jury could find that Herron acted with the purpose to hinder or impede Benge in the performance of her duties, but even here we conclude that a reasonable jury could find, on this evidence, that Herron had the requisite purpose.

{¶ 62} Yelling and screaming at someone, from a distance of seven feet, ordinarily constitutes a demand that the person addressed give their attention. The jury in this case could reasonably have inferred that Herron intended to demand Benge's attention by persistently yelling and screaming at Benge.

{¶ 63} Although Benge's testimony is not perfectly clear on this point, a reasonable jury could find that Benge told Herron ("at least five different times") that Herron needed to leave her alone so that she could concentrate on her tasks. But, despite these warnings and requests, Herron continued to yell and scream at Benge. On these facts, the jury could reasonably conclude that Herron had the intention of distracting Benge from her tasks, thereby hindering and impeding her in the performance of her duties.

{¶ 64} In her brief, Herron argues that a conviction for Obstructing Official Business cannot be based upon taunts, insults and epithets. In general terms, we agree that police officers, by the nature of their work, can ill afford to be thin-skinned, but should enure themselves to coarse criticisms of their work. But in this case, we doubt that Officer Benge, as a 27-year veteran of the Dayton Police Force, was

unfamiliar with any of the derogatory terms that Herron yelled at her; the problem was not the content of Herron's remarks, but the volume and intensity with which they were persistently uttered, after Herron was warned, which interfered with Officer Bengé's concentration on her tasks. See *State v. Grooms*, Franklin App. No. 03AP-1244, 2005-Ohio-706, ¶¶ 19-21.

B – Resisting Arrest

{¶ 65} Herron does not dispute that she resisted her arrest, but argues that she could not be convicted of the offense of Resisting Arrest, proscribed by R.C. 2921.33(A), because her arrest was not lawful, which is an element of the offense. In making this argument, she contends that her arrest for Obstructing Official Business was unlawful because the evidence presented by the State was not sufficient to support a conviction on that charge. She concedes that if we reject her predicate argument, and find that the evidence presented by the State was sufficient to support her conviction for Obstructing Official Business, then her argument on the Resisting Arrest charge must fail, as well.

{¶ 66} Because we have, in fact, rejected Herron's argument that the evidence was insufficient to support her Obstructing Official Business conviction, it follows that we must also reject her argument that the evidence was insufficient to support her Resisting Arrest conviction. But we want to remind counsel, in future cases, that these arguments will not always be entirely congruent.

{¶ 67} In order to find that the evidence in the record is sufficient to support a conviction for Obstructing Official Business, a court must find that a reasonable jury

could find from that evidence, beyond reasonable doubt, that the defendant hampered or impeded a police officer in the performance of her official duties, with the purpose to do so. In order to find that an arrest for Obstructing Official Business was lawful, a court need only find that the police officer effecting the arrest, based upon the facts known to the officer, or known to the police in general and transmitted to the arresting officer, had probable cause to believe that the person arrested committed the offense.

{¶ 68} There are, then, two classes of cases where there might not be sufficient evidence to convict a defendant of Obstructing Official Business, and yet an arrest for that offense would have been lawful, and could be used to support a charge of Resisting Arrest. One of these classes is where the facts known to the officer at the time of the arrest and the facts in evidence at the trial for Obstructing Official Business are materially different. Perhaps the evidence adduced at trial would establish reasonable doubt, at least, that the actor was acting with the requisite intent (the actor had la Tourette's Syndrome, for example), but the officer effecting the arrest was unaware of those facts.

{¶ 69} The second class of cases is where there is some evidence that the defendant acted with the requisite intent, but it falls short of proof beyond reasonable doubt, and yet, that same evidence, known to the arresting police officer, was sufficient to support a finding of probable cause.

{¶ 70} We conclude that in this case the evidence presented by the State at trial, in the form of Officer Bengé's testimony, was sufficient to persuade the average mind, beyond reasonable doubt, that Herron was guilty of both the Obstructing Official Business and Resisting Arrest charges. Herron's sole assignment of error is overruled.

IV

{¶ 71} Herron's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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GRADY, P.J., and DONOVAN, J., concur.

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