

COURT OF APPEALS  
FAIRFIELD COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

DUSTIN ELIZONDO

## Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 14-CA-20

## OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common  
Pleas, Case No. 13-CR-194

**JUDGMENT:**

Affirmed

DATE OF JUDGMENT:

March 16, 2015

APPEARANCES:

For Plaintiff-Appellee

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Suite 101  
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For Defendant-Appellant

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*Farmer, J.*

{¶1} On October 18, 2013, the Fairfield County Grand Jury indicted appellant, Dustin Elizondo, on three counts of attempted murder in violation of R.C. 2903.02 and 2923.02, three counts of felonious assault in violation of R.C. 2903.11, five counts of kidnapping in violation of R.C. 2905.01, one count of abduction in violation of R.C. 2905.02, three counts of domestic violence in violation of R.C. 2912.25, and one count of assault in violation of R.C. 2903.13. Said charges arose from incidents involving appellant and his live-in girlfriend, M.S., over a four hour period.

{¶2} A bench trial commenced on January 29, 2014. At the conclusion of the trial, the trial court found appellant guilty as charged. The trial court's decision was journalized via entry of verdict filed February 7, 2014. By judgment entry of sentence filed February 19, 2014, the trial court determined the three counts of attempted murder were not allied offenses, determined the felonious assault counts, the kidnapping counts, the abduction count, and two of the domestic violence counts merged with each other and with the attempted murder counts, and merged the remaining domestic violence count and the assault count, but did not merge them with the other counts. The state elected sentencing on the three attempted murder counts and the merged domestic violence/assault count. The trial court sentenced appellant to seven years on each of the attempted murder counts, to be served consecutively, and one hundred thirty days in jail on the domestic violence/assault count, to be served consecutively, for a total sentence of twenty-one years in prison plus one hundred thirty days in jail.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "THE CONVICTION OF THE DEFENDANT-APPELLANT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED."

I

{¶5} Appellant claims his convictions on the three counts of attempted murder were against the manifest weight of the evidence as two of the three counts were not supported by the evidence. Also, appellant claims he legally could not have been convicted of three separate counts of attempted murder in a single course of conduct. We disagree.

{¶6} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶7} Appellant was convicted of three counts of attempted murder in violation of R.C. 2903.02 and 2923.02 which state the following, respectively: "No person shall purposely cause the death of another or the unlawful termination of another's pregnancy" and "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

{¶8} The three counts of attempted murder set forth in the indictment filed October 18, 2013, stated the following:

COUNT ONE - ATTEMPT TO COMMIT MURDER, F1

On or about the 8th day of October, 2013, at the County of Fairfield, State of Ohio aforesaid, DUSTIN J. ELIZONDO, unlawfully, did purposely, engage in conduct which, if successful, would cause the death of another, to-wit: M.S., a violation of §2903.02(A) of the Ohio Revised Code, to-wit: Murder, in violation of §2923.02(A) & (E)(1), and §2903.02(A) of the Ohio Revised Code.

COUNT TWO - ATTEMPT TO COMMIT MURDER, F1

And the Jurors of the Grand Jury aforesaid, on their oaths aforesaid, do further present and find, that the said DUSTIN J. ELIZONDO, on or about the 8th day of October, 2013, but at a different time than Count One and Count Three, at the County of Fairfield, State of Ohio, aforesaid, unlawfully, did purposely, engage in conduct which, if successful, would cause the death of another, to-wit: M.S., a violation of §2903.02(A) of the Ohio Revised Code, to-wit: Murder, in violation of §2923.02(A) & (E)(1), and §2903.02(A) of the Ohio Revised Code.

COUNT THREE - ATTEMPT TO COMMIT MURDER, F1

And the Jurors of the Grand Jury aforesaid, on their oaths aforesaid, do further present and find, that the said DUSTIN J. ELIZONDO, on or about the 8th day of October, 2013, but at a different

time than Count One and Count Two, at the County of Fairfield, State of Ohio, aforesaid, unlawfully, did purposely, engage in conduct which, if successful, would cause the death of another, to-wit: M.S., a violation of §2903.02(A) of the Ohio Revised Code, to-wit: Murder, in violation of §2923.02(A) & (E)(1), and §2903.02(A) of the Ohio Revised Code.

{¶9} In finding appellant guilty on these three counts of attempted murder, the trial court acknowledged the following (T. at 432-434):

For the attempts to commit murder, the State has to prove beyond a reasonable doubt that the Defendant, Dustin J. Elizondo, on October 8, 2013, in Fairfield County, Ohio, did purposely engage in conduct, which, if successful, would have caused the death of MS. In other words, would have caused the offense of murder to take place.

The underlying offense of murder, without getting into - - well, the underlying offense of murder basically occurs when a person purposely causes the death of another.

A defendant's actions in attempt to commit murder are not criminally punishable unless the defendant had the intent - - in other words, the purpose or purposely - - to commit the crime of murder. The defendant must have the specific intent to engage in conduct and take steps towards the commission of the offense.

In this case, the Defendant claims in part that the State's evidence is insufficient to prove beyond a reasonable doubt that the Defendant had the intent to purposely cause the death of the complaining witness; i.e., that he assaulted her, but did not have the intent to murder her, in part, since that was not successful; and that, had he wanted to murder her, he would have successfully completed that act.

The Court must look at all of the evidence, not just the outcome of the evidence, when determining whether or not any offense has been committed, including an attempt to commit murder.

The Defendant also claims that the Defendant abandoned any attempt to murder the complaining witness because he stopped before there was a murder. Abandonment is an affirmative defense and must be proved by the Defense, proving the defense by a preponderance of the evidence. The trier of fact, which is the Court in this case, must review all of the evidence, regardless of who submitted it. An abandonment must occur before a substantial step is taken for the commission of the crime.

Again, there's other law that is applicable, clearly, in this case, and the Court has considered all of the law that is applicable to the Court's determination of this case, generally, and to the specific charges contained in each of the counts of the indictment.

{¶10} It is appellant's position that he never had the intent to murder the victim or he "abandoned the effort" to murder the victim. T. at 410-411. Appellant argues there

were repeated incidents of choking the victim to unconsciousness and yet she did not die; therefore, he never intended to murder the victim or the affirmative defense of abandonment was established by a preponderance of the evidence. Appellant's Brief at 8-9. Appellant concedes there "is sufficient evidence to warrant a single conviction for Attempted Murder." *Id.* at 7.

{¶11} R.C. 2923.02(D) provides for the affirmative defense of abandonment as follows: "It is an affirmative defense to a charge under this section that the actor abandoned the actor's effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of the actor's criminal purpose."

{¶12} The crux of appellant's abandonment defense is (1) the murder attempts were unsuccessful and (2) he revived the victim by slapping and shaking her back to consciousness. T. at 410-411.

{¶13} In order to properly address these claims of abandonment, it is necessary to discuss the reign of physical abuse and terror during the four hour period on the morning of October 8, 2013.

{¶14} The background of these incidents is that appellant, by his own admission, believed the victim was having an affair, and the victim testified appellant was upset with her because she had not talked to him the night before. T. at 51, 262-263; State's Exhibit 82. The victim has two children, ages eight and five. T. at 33. All three lived with appellant in an apartment. T. at 34. After waking up on the morning of October 8, 2013, appellant confronted the victim with the statement " ' You didn't care about me last night. You didn't care about how I was feeling last night. I hope you enjoyed the

last night with your boys, because today is it.' " T. at 38. During the course of the next four hours, appellant reiterated " 'Yeah, today's it. Today's the day. This is it. It's over.' " T. at 153-154. At one point, appellant even threw the dog on the ground and said " 'She's next.\*\*\*' " T. at 105. The entire time, the victim was in fear for her life. T. at 152-153.

{¶15} A fair reading of the strangulation incidents could lead one to the conclusion that there were actually six incidents of strangulation.

#### Incident I

{¶16} While in the bedroom, appellant strangled the victim with both hands, squeezing her neck. T. at 40. It was hard enough that she could not breathe and her nose started to bleed. T. at 40-41. She "farted" and appellant let her go, saying " 'Do you realize how close you are to death? Do you realize how close - - the reason why your nose is bleeding is because the pressure of me squeezing you is popping the vessels in your nose. And the reason why you farted is because you're going to lose your bowels.' " T. at 41-42.

{¶17} The victim told appellant to calm down and that she needed to walk her older child to school. T. at 42. Appellant stated she was not leaving and he would make sure the child left for school. T. at 42. He told her " 'Don't fucking move. Don't get up. Don't go anywhere. You stay right here.' " T. at 44. He then left the bedroom. *Id.*

#### Incident II

{¶18} The victim was attempting to unlock her cell phone to call for help when appellant re-entered the bedroom, grabbed the phone, and said " 'Oh, no, you're not



calling anybody for help.' " T. at 45. He then began strangling the victim again with both hands around her neck. T. at 45, 46-47. Because the bedroom door was open, the victim pointed to the door, suggesting the children were at the door to get him to stop. T. at 45-46. She could only point because she could not breathe, let alone talk. T. at 47. Appellant let go to check, and left the bedroom to send the older child off to school. T. at 46, 48. During this incident, appellant told the victim he was willing to do twenty-five years to life. T. at 50. The victim believed appellant was going to strangle her "until I didn't wake up any more." *Id.*

#### Incident III

{¶19} Appellant returned to the bedroom (the youngest child was still in the apartment, in his own bedroom), closed the door, and assaulted the victim by punching her legs and lower body so "I couldn't go to work and that I'd lose my job." T. at 49, 51-53. Appellant then told the victim he was going to hang her, and grabbed a chin-up bar, tied a towel around it to form a noose, and placed the bar in the doorway of the closet. T. at 61-63. Because the noose was too short, appellant picked up the victim and attempted to place her head in the noose, but she resisted. T. at 64. He then threw her to the floor and attempted to strangle her with the chin-up bar pressed against her neck, but again she resisted, and he gave up. T. at 69-71.

#### Incident IV

{¶20} After the unsuccessful chin-up bar hanging and strangulation, appellant placed the victim in front of a full length mirror and while both were kneeling, he strangled her with his hands from behind until her face turned purple, her eyes rolled back in her head, and she could not breathe. T. at 73-75. She thought she was going

to die. T. at 75. The victim passed out and woke up in the closet with appellant smacking her face. T. at 74, 76-77.

#### Incident V

{¶21} Eventually appellant and the victim go to the kitchen to obtain ice for a black eye the victim had incurred. T. at 92, 96-97. The victim got the ice and laid down on the couch. T. at 100. Appellant had calmed down at this point. T. at 103-105. All of a sudden, appellant "snapped" and threatened the dog and punched three holes in the wall. T. at 105. He dragged the victim back to the bedroom by the back of her hair, pulling her across the floor. T. at 107-109. Once in the bedroom, appellant punched the victim and strangled her until she passed out. T. at 110, 112. The victim woke up with appellant smacking her face, shaking her hard, and "sternum rubbing" her. T. at 112-113, 115-116.

#### Incident VI

{¶22} Appellant thought he had broken his hand, so he started stomping the victim with his bare feet. T. at 117-119. Sometime thereafter, he grabbed a t-shirt and used it to strangle the victim until she passed out. T. at 124-126. When she came to, he was tying the t-shirt around her wrists. T. at 127. The victim did not think she was going to make it out alive. T. at 129. Appellant then carried the victim downstairs and placed her on the dining room table, telling her "he could beat me easier on the table." T. at 134. Appellant started crying, laid on the floor, and fell asleep/passed out. T. at 136-137. The victim crawled to a hidden cell phone and called police. T. at 138, 140, 144.

{¶23} Appellant concedes the facts sub judice are sufficient to warrant a single conviction for attempted murder. Appellant's Brief at 7. From our review of the evidence, we find the trial court was correct in finding three counts of attempted murder.

{¶24} Incident I was a separate and distinct act. Appellant's statement to the victim, "Do you realize how close you are to death?" demonstrates his intent, and the conduct of strangulation, if successful, would have resulted in the victim's death.

{¶25} In Incident II, appellant's act of strangulation was not stopped by his abandonment, but by the victim suggesting that the children were watching. Appellant's statement to the victim that he was willing to do twenty-five years to life demonstrates his intent, and the conduct of strangulation, if not interrupted by the victim, would have resulted in the victim's death.

{¶26} In Incident III, appellant's act of attempting to hang the victim with the chin-up bar and towel was not stopped by his abandonment, but because the victim struggled and the methodology was faulty (towel noose too short). Appellant's statement to the victim that he was going to hang her demonstrates his intent, and this method, if successful, would have resulted in the victim's death.

{¶27} Although the trial court's general findings are legally sufficient, they are not specific as to what acts the trial court perceived as separate acts of attempted murder. Nevertheless, in our review, we have found, at a minimum, three acts of attempted murder demonstrating that the three guilty verdicts for attempted murder were not against the manifest weight of the evidence. We do not find a manifest miscarriage of justice.

{¶28} The sole assignment of error is denied.

{¶29} The judgment of the Court of Common Pleas of Fairfield County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Wise, J. concur.

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