

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff - Appellee

-vs-

MICHAEL ALLEN BISHOP

Defendant - Appellant

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JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. Patricia A. Delaney, J.

Hon. Craig R. Baldwin, J.

Case No. 2014CA00190

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court
of Common Pleas, Case No.
2014CR1095

JUDGMENT:

Affirmed in part; Vacated and
remanded in part

DATE OF JUDGMENT:

July 27, 2015

APPEARANCES:

For Plaintiff-Appellee

JOHN D. FERRERO

Prosecuting Attorney

By: RONALD MARK CALDWELL

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For Defendant-Appellant

EUGENE CAZANTZES

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Baldwin, J.

{¶1} Appellant Michael Allen Bishop appeals a judgment of the Stark County Common Pleas Court convicting him of felonious assault (R.C. 2903.11(A)(2)) with a repeat violent offender (RVO) specification (R.C. 2941.49). Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} At approximately 4:00 p.m. on June 27, 2014, Sherry Griffith called 911 to report that she had been stabbed multiple times. Patrol Officer Joshua Tanner of the Canton Police Department responded to the call at 401 McKinley Avenue S.W., in downtown Canton. He found Griffith sitting outside a building holding her neck. Griffith told Officer Tanner that Michael Bishop had stabbed her. She gave the officer a description of Bishop and told him in what direction Bishop had fled. Officer Tanner broadcast the information over police channels, and stayed with Griffith to wait for the paramedics to arrive.

{¶3} Detective Zachary Taylor was standing outside the Canton Police Department when he heard the call reporting the stabbing. Because he was only a few blocks away, he immediately proceeded to the scene of the stabbing. He briefly spoke to Griffith as the paramedics were tending to her. She told Det. Taylor that Michael Bishop had stabbed her. The officer searched the surrounding area after Griffith was transported to the hospital, but they were not able to locate appellant.

{¶4} The officers proceeded to Aultman Hospital where they were able to speak to Griffith before she was taken into surgery. She told the officers that the knife

appellant used to stab her was a black and silver Sheffield knife, which she had previously purchased for appellant.

{¶5} Det. Taylor later contacted Griffith by phone to interview her more extensively about the stabbing. She was not cooperative, and explained that she feared for her life because of appellant. She refused to tell the detective where she was staying, refused to arrange for an interview at the police station, would not answer further calls from Det. Taylor, and did not appear at trial to testify.

{¶6} On July 2, 2014, Griffith went to the Mercy Medical Center where she was examined by Shawanna Musick, a forensic nurse. Musick noted six lacerations to the left side of Griffith's abdominal area, and one laceration to her neck. The abdominal lacerations included bruising around the sites, indicating use of force. Griffith told Musick the identity of the perpetrator without hesitation.

{¶7} Appellant was charged by indictment with attempted murder and felonious assault, each with a repeat violent offender specification. He elected to have the repeat violent offender specifications bifurcated and decided by the court, so as to preclude the prosecution from introducing evidence of his prior convictions at his jury trial. The jury found appellant guilty of felonious assault, but not guilty of attempted murder. The court found appellant guilty of the repeat violent offender specification. The trial court imposed a sentence of eight years incarceration for felonious assault and eight years incarceration for the RVO specification, to be served consecutively.

{¶8} Appellant assigns four errors to this Court on appeal:

{¶9} "I. THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO A PRISON TERM FOR THE REPEAT VIOLENT OFFENDER SPECIFICATION.

{¶10} "II. THE TRIAL COURT ERRED BY PERMITTING A NON-EXPERT WITNESS TO GIVE AN OPINION OUTSIDE THE SCOPE OF EVID. R. 701.

{¶11} "III. THE TRIAL COURT'S FINDING OF GUILTY WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

{¶12} "IV. THE TRIAL COURT DENIED THE APPELLANT DUE PROCESS WHEN IT IMPOSED A SENTENCE PUNISHING HIM FOR EXERCISING HIS RIGHT TO A JURY TRIAL."

I.

{¶13} Appellant argues that the court erred in sentencing him to an additional eight years incarceration on the RVO specification. He argues that because the jury did not make a finding that the offense involved serious harm, the trial court could not make sentence him on the specification.

{¶14} Appellant was found to be a repeat violent offender pursuant to R.C. 2929.14(B)(2)(a)(ii), which provides in pertinent part:

(2)(a) If division (B)(2)(b) of this section does not apply, the court may impose on an offender, in addition to the longest prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a

sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

{¶15} Appellant was convicted of felonious assault in violation of R.C. 2903.11(A)(2):

{¶16} "(A) No person shall knowingly do either of the following:

{¶17} "(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶18} While subsection (A)(1) defines felonious assault as causing serious physical harm, appellant was not charged or convicted under that subsection, and the question of whether appellant inflicted serious physical harm on the victim was not submitted to the jury. R.C. 2941.149(B) specifically states that the court shall determine the issue of whether an offender is a repeat violent offender. Therefore, the question before this Court is whether the "trier of fact" for purposes of determining whether the offense involved serious physical harm under R.C. 2929.14(B)(2)(a)(ii) is the jury or the trial court.

{¶19} In *State v. Smith*, 8th Dist. Cuyahoga No. 82710, 2004-Ohio-3479, the court of appeals held that Ohio's statutory scheme for RVO specifications for second-degree felony offenses requires the trial court make a finding of guilt relative to the RVO specification, including the fact-finding relative to the "serious physical harm" component of R.C. 2929.14(B)(2)(a)(ii) at issue in the instant case. However, this holding was overturned in a federal habeas corpus proceeding, in which the federal district court held that the statutory requirement that the trial court, rather than the jury, make the "serious physical harm" finding violates the Sixth Amendment:

The holding in *Apprendi* established that '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' 530 U.S. at 489, 120 S.Ct. 2348. Mr. Smith received the statutory maximum of eight years for felonious assault. That the trial court then resorted to judicial fact-finding to establish a separate additional sentence of nine years predicated on the Petitioner's repeat offender status and the assignment of the eight year statutory maximum for felonious assault, clearly marks the additional sentence as unconstitutional under *Apprendi*. Accordingly, Mr. Smith's independent nine-year sentence is contrary to clearly established federal law and he is entitled to habeas relief on the merits.

{¶20} *Smith v. Petkovich*, 562 F. Supp. 2d 912, 922 (N.D. Ohio 2008).

{¶21} Based on the decision of the federal district court in *Smith*, the trial court erred in finding that appellant's crime resulted in serious physical harm without submitting the issue to the jury. The first assignment of error is sustained.¹

II.

{¶22} In his second assignment of error, appellant argues that the court erred in admitting the testimony of Shawanna Musick, the forensic nurse, concerning self-mutilation. Appellant argues that she was not qualified as an expert regarding knife or laceration wounds.

{¶23} On cross-examination, counsel for appellant asked Musick, "In your experience as a registered nurse and a forensic nurse examiner, you have encountered individuals that have engaged in self-mutilation, have you not?" Tr. 184. She answered in the affirmative. On redirect, the prosecutor asked her if there was any indication from Griffith of self-mutilation. Musick answered that there was not. The prosecutor then asked, "In your experience as a nurse and forensic examiner, in looking at these injuries would those be consistent with self-mutilation?" Tr. 186. Counsel for appellant objected on the basis that she had not been qualified as an expert witness. The court overruled the objection, and Musick answered, "No." Tr. 188.

{¶24} Appellant argues that admission of Musick's statement that Griffith's injuries were not consistent with self-mutilation violates Evid. R. 702(A), as she was not qualified as an expert witness and the information is beyond the knowledge or experience of lay persons. Evid. R. 702(A) provides:

¹ We note that in *Smith*, the federal district court gave the State the option to elect to re-sentence the defendant on the repeat violent offender specification.

{¶25} "A witness may testify as an expert if all of the following apply:

{¶26} "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons[.]"

{¶27} Appellant opened the door to this topic of examination by his question to Musick, which implied without supporting evidence that the injuries may have been the result of self-mutilation. However, even if the court erred in admitting Musick's testimony, any error is harmless.

{¶28} Crim. R. 52(A) defines harmless error: "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." The test for determining whether the admission of erroneous evidence is harmless requires the reviewing court to look at the whole record, leaving out the disputed evidence, and then to decide whether there is other substantial evidence to support the guilty verdict. *State v. Riffle*, Fifth Dist. Muskingum No.2007–0013, 2007–Ohio–5299 at ¶ 36–37 (Citing *State v. Davis*, 44 Ohio App.2d 335, 347, 338 N.E.2d 793 (1975)).

{¶29} There is no evidence in the record to support appellant's suggestion that Griffith's wounds may have been self-inflicted. Musick noted six lacerations to the left side of Griffith's abdominal area, and one laceration to her neck. The abdominal lacerations included bruising around the sites, indicating use of force. Griffith called 911 to report the attack on a public street in downtown Canton, during daylight hours. She named her attacker to police and to Musick without hesitation. She knew appellant and had in fact purchased the knife used in the attack for him. Any error in admitting Musick's statement that the wounds were not consistent with self-mutilation was

therefore harmless, as there was other substantial evidence to support the guilty verdict, and no evidence to support appellant's implication through his questioning of Musick that the wounds were self-inflicted.

{¶30} The second assignment of error is overruled.

III.

{¶31} Appellant argues that the judgment is against the manifest weight and sufficiency of the evidence.

{¶32} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and “in reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in 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. Thompkins*, 78 Ohio St. 3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App. 3d 172, 175, 485 N.E.2d 717 (1983).

{¶33} An appellate court's function when reviewing the sufficiency of the evidence is to determine 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. Jenks*, 61 Ohio St. 3d 259, 574 N.E.2d 492, paragraph two of the syllabus (1991).

{¶34} Appellant was convicted of felonious assault in violation of R.C. 2903.11(A)(2):

{¶35} "(A) No person shall knowingly do either of the following:

{¶36} "(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶37} Appellant argued that he was only identified as the assailant through the hearsay statements of the officers, and therefore the evidence was not sufficient to identify him as the perpetrator, and the judgment was against the manifest weight and sufficiency of the evidence.

{¶38} At approximately 4:00 p.m. on June 27, 2014, Griffith called 911 report that she had been stabbed multiple times. Patrol Officer Joshua Tanner of the Canton Police Department testified that he responded to the call at 401 McKinley Avenue S.W., in downtown Canton. He found Griffith sitting outside a building holding her neck. Griffith told Officer Tanner that Michael Bishop had stabbed her. She gave the officer a description of Bishop and told him in what direction Bishop had fled. Officer Tanner testified that he broadcast the information over police channels, and stayed with Griffith to wait for the paramedics to arrive.

{¶39} Canton Detective Zachary Taylor testified that he was standing outside the Canton Police Department when he heard the call reporting the stabbing. As he was only a few blocks away, he immediately proceeded to the scene of the stabbing. He briefly spoke to Griffith as the paramedics were tending to her. He testified that Griffith told him that Michael Bishop had stabbed her. The officers searched the surrounding area after Griffith was transported to the hospital, but they were not able to locate appellant.

{¶40} The officers proceeded to Aultman Hospital where they were able to speak to Griffith before she was taken into surgery. She told the officers that the knife

appellant used to stab her was a black and silver Sheffield knife, which she had previously purchased for appellant.

{¶41} Det. Taylor later contacted Griffith by phone to interview her more extensively about the stabbing. She was not cooperative, and explained that she feared for her life because of appellant. She refused to tell the detective where she was staying, refused to arrange for an interview at the police station, and would not answer further calls from Det. Taylor.

{¶42} On July 2, 2014, Griffith went to the Mercy Medical Center where she was examined by Shawanna Musick, a forensic nurse. Musick testified that she noted six lacerations to the left side of Griffith's abdominal area, and one laceration to her neck. The abdominal lacerations included bruising around the sites, indicating use of force. Griffith told Musick the identity of the perpetrator without hesitation.

{¶43} The evidence presented at trial was sufficient to convict appellant of felonious assault, and the jury did not lose its way in finding appellant guilty based on the evidence presented at trial.

{¶44} The third assignment of error is overruled.

IV.

{¶45} In his final assignment of error, appellant argues that the court retaliated against him in sentencing for exercising his right to a jury trial. He had rejected a plea offer from the state of an eight-year sentence.

{¶46} It is axiomatic that “a defendant is guaranteed the right to a trial and should never be punished for exercising that right [.]” *State v. O'Dell*, 45 Ohio St.3d 140, 147, 543 N.E.2d 1220, 1227(1989). Thus, the augmentation of sentence based upon a

defendant's decision to stand on his right to put the government to its proof rather than plead guilty is improper. *United States v. Araujo*, 539 F.2d 287(2nd Cir.1976), *certiorari denied sub. nom. Rivera v. United States*, 429 U.S. 983, 97 S.Ct. 498, 50 L.Ed.2d 593(1979). This rule applies regardless of the overwhelming evidence of the defendant's guilt. *Id.* at 3.

{¶47} If the court makes statements that give rise to an inference that the defendant may have been punished more severely because of his assertion of the right to trial by jury, the sentence must be vacated unless the record also contains an unequivocal statement that the defendant's decision to go to trial was not considered in imposing the sentence. *State v. Morris*, 159 Ohio App.3d 775, 2005–Ohio–962, 825 N.E.2d 637, ¶13 (8th 2005).

{¶48} During pretrial proceedings, the trial court communicated to appellant that the State made an offer with a recommendation of eight years in prison in exchange for a guilty plea. The trial court informed appellant that if he was convicted, he was looking at a total of eleven years in prison. The court informed appellant, "And I'm not saying that if you go to trial that you would get those 11 years. I'm only saying that so that you are able to evaluate the offer made by the State of Ohio in light of the maximum term that you are looking at." Tr. (Sept. 3, 2014), at 5.

{¶49} On the day before trial, the court conducted a final pretrial concerning motions. The court asked appellant if there was anything more he wished to discuss concerning the plea offer. He responded that he was prepared to go to trial.

{¶50} On the morning of trial, the trial court again returned to the issue of the plea offer, noting that the maximum sentence was now 21 years because of the addition

of the repeat violent offender specifications via a superseding indictment. The trial court informed appellant that she could not tell him at that time what her sentence would be after trial, because that's something she needed to determine after listening to the evidence. She offered appellant additional time to talk to his attorney concerning the offer, to which appellant responded, "I'm good." Tr. (I) 11-12.

{¶51} At the sentencing hearing, the trial court specifically stated, "In calculating the sentence the Court has taken steps to ensure that the sentence is not based upon any impermissible purpose[.]" Tr. (Sent.) 15.

{¶52} None of the court's statements inferred that appellant was punished for standing trial. The court made it clear to appellant on several occasions that the eight-year offer was the State's offer and not the court's offer. The trial court ensured that appellant understood the maximum sentence so that he could evaluate the offer at several stages of the proceedings, and made it clear to appellant that she would not be able to tell him what her sentence would be because she would not make that determination until after she listened to the evidence.

{¶53} The fourth assignment of error is overruled.

{¶54} The judgment of the Stark County Common Pleas Court is affirmed as to the conviction and sentence for felonious assault, and vacated as to the judgment sentencing appellant to eight years incarceration on the repeat violent offender specification. This case is remanded to the Stark County Common Pleas Court for further proceedings according to law. Costs are split evenly between the parties.

By: Baldwin, J.

Gwin, P.J. and

Delaney, J. concur.