[Cite as *State v. Quiles*, 2005-Ohio-388.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 84293

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
FABIAN QUILES	:	
	:	
Defendant-Appellant	:	
	:	
	:	
DATE OF ANNOUNCEMENT	:	
OF DECISION	:	February 3, 2005
	:	
CHARACTER OF PROCEEDINGS	:	Criminal appeal from
	:	Common Pleas Court
	:	Case No. CR-445034
	:	
JUDGMENT	:	AFFIRMED.
	:	
	:	
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee

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SEAN C. GALLAGHER, J.:

{¶ 1} Appellant Fabian Quiles ("Quiles") appeals his conviction in the Cuyahoga County Court of Common Pleas for misdemeanor assault and intimidation. For the reasons stated below, we affirm.

{¶ 2} On or about October 23, 2003, Quiles went to the home of Angela Vanadia ("Vanadia"). Quiles had been out drinking that night at Harry Buffalo's and had an earlier altercation with Vanadia.

{¶ 3} Vanadia's eleven-year-old daughter (identified herein as "MC") was home sleeping in her room when Quiles arrived. MC testified she woke up because Quiles was screaming. MC went downstairs and saw Quiles holding her mother down while they were screaming at each other. MC stated Quiles and Vanadia went up to Vanadia's room and MC went back to her bedroom. MC then heard her mom screaming "Get off of me," and MC went to her mother's room. She saw Quiles hitting or slapping her mother in the face. She stated her mother scratched Quiles.

{¶ 4} MC called 911; she was crying and scared because Quiles was hitting her mother. Quiles grabbed the phone and hung up the phone. MC called 911 a second time, and Quiles hung up the phone again. The police called back. On the 911 tape, MC was recorded saying "a boy's hitting my mom," referring to Quiles.

{¶ 5} Before the police arrived, Quiles told MC to tell the police everything was fine and not to tell them what happened. MC stated she was upset with Quiles for what he did to her mother and

was frightened for her mother "because they were yelling at each other and it seemed like it hurt because he kept on slapping her or hitting her in the face, and then I just felt sad for her."

{¶ 6} MC also testified that her neck was hurt. She was in her room on her bed and was upset about what had happened. Quiles kept telling her to look at him. MC stated she was holding onto bars on the bed and that Quiles grabbed her head and turned it to the other side. MC also stated that when Quiles brought her head to the other side of the bed, he hurt her. MC testified that after Quiles turned her head, he told her that he loved her.

{¶ 7} Lieutenant Margaret Foley testified she responded to the incident and found Vanadia's demeanor to be angry and fearful. She also observed MC's demeanor to be scared and frightened. She stated MC told her that her neck hurt because Quiles had twisted her head.

{¶ 8} Officer Michael Kovach and his partner were the first to arrive on the scene. Officer Kovach testified that Vanadia appeared nervous and shaken and had redness on the sides of her face. Vanadia indicated that nothing was going on; however, the officer did not believe her. Officer Kovach further testified that Quiles appeared intoxicated. When Officer Kovach asked to speak to MC, Quiles got agitated and would not permit the officer to speak to her. Officer Kovach also heard Quiles state to Vanadia "you don't know the law. If they speak to her, I'm going to jail."

{¶ 9} Vanadia testified that when Quiles arrived at her home that night, he was knocking, banging and kicking the door. She stated after she let him in, the two argued. She further testified: "I think I hit him. I think that's what happened. * * * We hit each other, okay?" In a statement made to police, Vanadia stated Quiles was drunk, walking around her home screaming, and the two of them were arguing. She also said in the statement that Quiles slapped her in the face several times and that she hit his head up against the door, but that she did not know who struck the first blow.

{¶ 10} Quiles was charged with domestic violence with a prior conviction specification and intimidation. At trial, testimony was provided that Quiles did not reside with Vanadia and was not MC's father, having been excluded by a DNA test. The court permitted the state to amend the charge to misdemeanor assault. Quiles moved for acquittal, but the motion was denied by the trial court.

{¶ 11} Quiles was convicted of misdemeanor assault and intimidation. He has appealed his conviction, raising four assignments of error for our review.

{¶ 12} Quiles' first assignment of error provides:

{¶ 13} "The trial court erred by granting the state's oral motion to amend count one of the indictment after the close of the state's case in chief which deprived appellant of a fair trial and violated his due process rights."

{¶ 14} Quiles argues the domestic violence charge was amended to misdemeanor assault in violation of Crim.R. 7(D) and he was prejudiced by the amendment because it was made after the state had presented evidence of Quiles' prior conviction for domestic violence.

{¶ 15} Crim.R. 7(D) permits amendment of the complaint at any time before, during, or after a trial with respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. This court has previously held that an original indictment can be amended during trial if the amended charge is a lesser included offense of the original charge. *State v. Wheatt* (Jan. 31, 2002), Cuyahoga App. No. 70197, citing *State v. Briscoe* (1992), 84 Ohio App.3d 569. This holding is consistent with the rule that when an indictment charges an offense, the jury may be instructed and may find the defendant guilty of an offense of an inferior degree or a lesser included offense of the crime charged. R.C. 2945.74; see, also, Crim.R. 31(c).

{¶ 16} The Supreme Court of Ohio has set forth a three-prong test to determine whether a criminal offense is a lesser included offense of another. "An offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the

greater offense is not required to prove the commission of the lesser offense." *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph three of the syllabus.

{¶ 17} R.C. 2903.13(A) defines assault as "no person shall knowingly cause or attempt to cause physical harm to another * * *." R.C. 2919.25 defines domestic violence as "no person shall knowingly cause or attempt to cause physical harm to a family or household member." These statutes are identical, except that under the domestic violence statute the offense must be committed against a family or household member. Further, a misdemeanor assault carries a lesser penalty than domestic violence. Under the test set forth above, the misdemeanor assault charge constitutes a lesser included offense of domestic violence.

{¶ 18} Quiles also argues he was prejudiced because the indictment was amended after the introduction of a prior conviction for domestic violence. We do not agree. Quiles was originally indicted on a charge of domestic violence with a prior conviction specification. The state could have proceeded on this charge and did not need to amend the indictment for Quiles to have been convicted of a lesser included offense. Because the prior conviction was admissible as an element of the original charge and Quiles was convicted of a lesser offense, we find no error in the admission of the prior conviction. Further, in light of the overwhelming evidence against Quiles, we find that there was no

reasonable possibility that the prior conviction contributed to the present conviction.

{¶ 19} Quiles' first assignment of error is overruled.

{¶ 20} Quiles' second assignment of error provides:

{¶ 21} "The trial court erred by denying appellant's motion to review a witness police officer's notes for inconsistencies pursuant to Crim.R. 16."

{¶ 22} At trial, Quiles called Officer McPike as a witness. Officer McPike had questioned Quiles at the police station after his arrest. Quiles asked Officer McPike if he had prepared a written statement or report to which Officer McPike responded he had taken some brief notes. Officer McPike also testified that he did not remember discussing a paternity test with Quiles. When Quiles asked Officer McPike where his notes were, the trial court sustained an objection.

{¶ 23} Under this assignment of error, Quiles argues that he should have been permitted to review the officer's notes pursuant to Crim.R. 16(B)(1)(g). The rule provides in relevant part: "Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement." Id.

{¶ 24} We have previously held that an officer's notes do not constitute discoverable statements under Crim.R. 16. *State v. Valentine* (Jul. 17, 1997), Cuyahoga App. No. 71301; see also, *State v. Gray*, Cuyahoga App. No. 82045, 2003-Ohio-4670. We recognize

that Quiles was attempting to establish that the police and prosecutor were aware prior to trial that he was not the father of Vanadia's son. We find nothing in the record to support this claim. Although we agree with Quiles that if the state had this knowledge, then the charge should have been amended prior to trial, we nonetheless find that no prejudicial error occurred, since Quiles was convicted of the lesser included offense.

{¶ 25} Quiles' second assignment of error is overruled.

{¶ 26} Quiles' third and fourth assignments of error provide:

{¶ 27} "The trial court erred by denying appellant's motion for acquittal under Crim.R. 29 because the state presented insufficient evidence."

{¶ 28} "Appellant's convictions are against the manifest weight of the evidence."

{¶ 29} Crim.R. 29(A) governs motions for acquittal and provides for a judgment of acquittal "if the evidence is insufficient to sustain a conviction * * *." When an appellate court reviews a record upon a sufficiency challenge, "the relevant inquiry is 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. Leonard*, 104 Ohio St.3d 54, 67, 2004-Ohio-6235, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. After reviewing the record in this case, we find that

the evidence is legally sufficient for a jury to have found the elements of the crimes proven beyond a reasonable doubt.

{¶ 30} On the misdemeanor assault charge evidence was introduced that MC saw Quiles holding her mother down and hitting or slapping her mother in the face. As a result MC called 911. Vanadia also gave a statement that Quiles had slapped her in the face several times. The officers observed red marks on Vanadia's face.

{¶ 31} Although Quiles claims he was only defending himself and that Vanadia was the aggressor, we find after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found Quiles knowingly caused or attempted to cause physical harm to Vanadia.

{¶ 32} With respect to the intimidation charge, R.C. 2941.04(B) provides: "[n]o person shall knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder the victim of a crime in the filing or prosecution of criminal charges * * *." MC testified that when she called 911, Quiles grabbed the phone and hung up the phone. She also stated she was in her room after the incident and Quiles kept telling her to look at him. He eventually grabbed MC's head and turned it to the other side, hurting her neck. Before the police arrived, Quiles told MC to tell the police everything was fine and not to tell them what happened. Viewing this evidence in a light most favorable to the prosecution, we find any rational

trier of fact could have found the essential elements of intimidation proven beyond a reasonable doubt.

{¶ 33} Next, in reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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." *Leonard*, 104 Ohio St.3d at 68 (internal quotes and citations omitted). Upon our review of the instant case, we find substantial evidence existed to support the convictions on both counts.

{¶ 34} Quiles' third and fourth assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution. The defendant's conviction having been

affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANTHONY O. CALABRESE, JR., J., CONCURS;

JOSEPH J. NAHRA, J.*, DISSENTS
WITH SEPARATE DISSENTING OPINION.

SEAN C. GALLAGHER
PRESIDING JUDGE

*Sitting by assignment: Judge Joseph J. Nahra, retired, of the Eighth District Court of Appeals.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

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COUNTY OF CUYAHOGA

NO. 84293

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee	:	
	:	D I S S E N T I N G
vs.	:	
	:	O P I N I O N

FABIAN QUILES, :
:
Defendant-Appellant :

DATE: February 3, 2005

JOSEPH J. NAHRA, J., DISSENTING:

{¶ 35} I respectfully dissent because I believe that the court should have granted a mistrial on grounds that the jury's exposure to Quiles' prior domestic violence conviction irreparably tainted the jury's consideration of the later-amended count of assault.

{¶ 36} Although the state had to prove Quiles' prior conviction as an element of the offense of domestic violence under R.C. 2919.25(D), once it became apparent that Quiles neither resided with the victims nor was in a familial relationship with the child, a conviction for domestic violence became an impossibility and the court should have immediately dismissed the domestic violence count. Thus, I disagree with the majority's assertion that the state could have proceeded with the domestic violence count with the hope that the court would amend it to a lesser included offense at the close of evidence. This statement is tantamount to admitting that the state could proceed on an offense for which a conviction is impossible for the sole reason of presenting evidence which would otherwise be inadmissible on the lesser included charge.

{¶ 37} Once the existence of the prior conviction became a dead issue for purposes of proving the domestic violence count, its

presence before the jury prejudiced Quiles' right to a fair trial. Evidence of the prior conviction would have been inadmissible under Evid.R. 404(B) because the state failed to make the required showing that it was being offered for the purpose of showing any of the purposes set forth in the rule. Moreover, the court failed to give the jury a cautionary instruction on the use of the prior conviction. Without an instruction, I cannot believe that the jury, on its own devices, ignored the evidence of the prior conviction when considering Quiles' guilt or innocence on the misdemeanor assault charge. For these reasons, I would sustain the first assignment of error and remand for a new trial.