[Cite as *Euclid v. Sorrell*, 2009-Ohio-3903.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91542

CITY OF EUCLID

PLAINTIFF-APPELLEE

vs.

TAMMIE SORRELL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Euclid Municipal Court
Case No. 08 CRB 00229

BEFORE: Dyke, J., Cooney, A.J., and Rocco, J.

RELEASED: August 6, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Albert A. Giuliani, Esq.
John J. Spellacy, Esq.
1540 Leader Building
526 Superior Avenue
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

L. Christopher Frey, Esq.
Patrick J. Gallagher, Esq.
Michael A. Brown, Esq.
585 East 222nd Street
Euclid, Ohio 44123-2099

ANN DYKE, J.:

{¶ 1} Defendant Tammie Sorrell appeals from her conviction for resisting arrest. For the reasons set forth below, we affirm.

{¶ 2} On March 12, 2008, defendant was charged with criminal trespass, disrupting school activities, resisting arrest, and disorderly conduct in connection with an incident that occurred at Euclid High School during a basketball game. Defendant pled not guilty, and the charge of disorderly conduct was later dismissed. The matter proceeded to a jury trial on May 19, 2008.

{¶ 3} The evidence presented by the prosecuting attorney for the city indicated that on March 1, 2008, Mentor High School and Glenville High School teams were playing a basketball game at Euclid High School. Euclid police officers and auxiliary police were retained by Euclid Schools Athletic Director Thomas Banc to provide security. Due to a past incident at the school and concerns for safety, Banc instructed that no spectators would be admitted following halftime, and that the doors would be locked. Signs were later posted advising that the game had been sold out and that no one would be admitted. Defendant's son, Brandon Rollins, and a friend knocked on the locked door and tried to get in. Euclid Police Officer Michael Knack told them that the game was sold out. The young men then left. A few minutes later, they returned with defendant, who was talking on a cell phone, and asked if they could come in. Defendant then said, "thank you," and left.

{¶ 4} A few minutes later, Officer Knack observed defendant and the young men in a school hallway. Knack informed the group that they were not allowed in and had to go outside. Brandon and defendant began to speak with the officer and

the third individual tried to walk past him. Officer Knack got his hat and indicated that they would speak outside. The third individual then left; Brandon slowed his gait to a shuffle, and Officer Knack put his hand on Brandon's back to escort him out. At this point, defendant got on her cell phone and turned to the right and away from the door.

{¶ 5} Officer Knack informed defendant that if she did not leave he would arrest her for trespassing. Defendant then moved away from the officer and remained inside the building. Officer Knack informed defendant that she was under arrest. At this point, Brandon struck the officer from behind. The officer testified that he punched Brandon in the mouth in order to get Brandon off of him. Auxiliary Officer Walter Keene then took Brandon to the ground and Brandon was then handcuffed.

{¶ 6} After Brandon was secured, Euclid Police Detective Paul Wittreich and Officer Knack went outside to arrest defendant. According to three witnesses, defendant was yelling and screaming and forcibly resisting being arrested. The officers then forced her against a wall in order to handcuff her. According to Officer Knack, during the incident, no one in the group informed him that they were attempting to meet a college coach or recruiter, and had they done so, he would have allowed them in.

{¶ 7} Security cameras in the building recorded portions of the incident. Video depicted the group in the hall; Officer Knack gesturing for them to leave and the group attempting to "speak their piece" to the officer; the officer getting his hat,

and the third person in defendant's and Brandon's company leaving. Defendant talked on her cell phone and remained in the building. She remained in the building for approximately two minutes before being arrested.

{¶ 8} For her case, defendant presented evidence that Brandon was at the game with Euclid Basketball Coach Sean O'Toole. The head coach of Wilberforce College was also at the game, and Coach O'Toole suggested that Brandon call defendant in order for her to meet the Wilberforce coach. Brandon called defendant at around 7:00 p.m. She arrived about one hour later. Brandon testified that he went to the lobby doors to let his mother inside. She and Brandon's friend, Donny Fletcher, then entered the building. According to defendant, they informed Officer Knack that they were going to meet the college coach, but the officer stated that he did not care and that they had to leave. Defendant attempted to call Coach O'Toole on her cell phone and also spoke with parents from the Booster Club, who were working the concession stand, to have them inform O'Toole that she needed him. Defendant's evidence also indicated that the group was complying with the officer's instruction as they approached the door and continued to try to explain their presence in the building, but Officer Knack pushed defendant.

{¶ 9} Brandon testified that he touched the officer on the shoulder and attempted to tell the officer that he did not need to push his mother. Thereafter, the officer punched him in the mouth and someone else threw him to the ground. Brandon further testified that the police beat him in the building and again outside. At this time, defendant was outside and had never been informed that she was

under arrest. Defendant and Brandon denied yelling, spitting, or striking the officer and denied being uncooperative.

{¶ 10} The jury subsequently convicted defendant of resisting arrest but acquitted her of the other charges. She now appeals and assigns two errors for our review.

{¶ 11} Defendant's first assignment of error states:

{¶ 12} "The conviction of appellant for resisting arrest was against the manifest weight of the evidence where appellant was acquitted of all other underlying charges and where no reasonable police officer would have placed appellant under arrest under the circumstances."

{¶ 13} In evaluating a challenge to the verdict based on manifest weight of the evidence, a court sits as the thirteenth juror and intrudes its judgment into proceedings that it finds to be fatally flawed through misrepresentation or misapplication of the evidence by a jury which has "lost its way." *State v. Thompkins,* 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. As the Ohio Supreme Court explained:

{¶ 14} "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established

before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.' * * *

{¶ 15} "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id. at 387.

{¶ 16} In addition, it is well-established that each count of an indictment charges a complete offense and that the separate counts of an indictment are not interdependent. *State v. Lovejoy,* 79 Ohio St.3d 440, 1997-Ohio-371, 683 N.E.2d 1112. "[A]n inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count." Id. Thus, because the separate counts are not interdependent, the conviction of one of the charges and acquittal of another charge does not demonstrate that the conviction is against the manifest weight of the evidence. See *State v. Curran,* 166 Ohio App.3d 206, 2006-Ohio-773, 850 N.E.2d 81; *State v. Vazquez,* Montgomery App. No. 21050, 2006-Ohio-4142.

{¶ 17} R.C. 2921.33(A) sets forth the offense of resisting arrest and provides that "[n]o person, recklessly or by force, shall resist or interfere with a lawful arrest of the person or another."

{¶ 18} In *State v. Dumas,* Cuyahoga App. No. 89070, 2007-Ohio-5724, this Court further explained the offense as follows:

{¶ 19} "A 'lawful arrest' is an element of the offense of resisting arrest, and the prosecution must prove beyond a reasonable doubt that the arrest allegedly resisted was lawful. * * * *State v. Raines* (1997), 124 Ohio App.3d 430, 706 N.E.2d 414; *State v. Thompson* (1996), 116 Ohio App.3d 740, 689 N.E.2d 86; *State v. Alley* (Apr. 28, 1999), Pike App. No. 97CA603. In order to show a 'lawful arrest' the state must prove not only that there was a reasonable basis to believe an offense was committed, but also that the offense was one for which the defendant could be lawfully arrested. See id.; *State v. Maynard* (1996), 110 Ohio App.3d 6, 10, 673 N.E.2d 603 (holding that in order to prove a 'lawful arrest,' there must be 'probable cause by the evidence of reasonable grounds for the arrest'). However, the state need not prove beyond a reasonable doubt the elements of the underlying offense for which the arrest was originally being made. See id.; see, also, *Warren v. Patrone* (1991), 75 Ohio App.3d 595, 600 N.E.2d 344 (holding that a defendant is not required to be convicted of the charge for which he was arrested in order to be convicted of resisting arrest); *State v. Gilchrist,* Athens App. No. 02CA26, 2003-Ohio-2601."

{¶ 20} By application of all of the foregoing, we cannot conclude that defendant's conviction is against the manifest weight of the evidence. The acquittals on the charges of criminal trespass and disrupting school activities does not render the conviction for resisting arrest against the manifest weight of the evidence as the

counts are separate and not interdependent. Moreover, upon review of the entire record, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice in convicting defendant of resisting arrest. The state presented clear, consistent, and compelling evidence that defendant by force, resisted her arrest. The evidence further indicated that the arrest was lawful as there was a reasonable basis to believe that she had committed criminal trespass by entering after she had been told that she could not do so, refusing to leave, and wilfully remaining on the premises after being repeatedly told to leave. The state was not required to separately convict her of this offense. Accord *City of Columbus v. Harbuck* (Nov. 30, 2000), Franklin App. No. 99AP-1420. This assignment of error is without merit.

{¶ 21} Defendant's second assignment of error states:

{¶ 22} "Trial court committed reversible error by not permitting appellant to introduce the 9-1-1 tape into evidence, by refusing to permit testimony of the witness who made the 9-1-1 call while observing the actions of Officer Knack, and by refusing to permit testimony concerning the actions of the police officers in tasering, pepper spraying, and beating another individual at the same time appellant was being arrested."

{¶ 23} All relevant evidence is admissible, unless the probative value of that evidence is substantially outweighed by its prejudicial effect. Evid.R. 403. Relevant evidence is defined as evidence having any tendency to make a fact of consequence

to the determination of the action more or less probable than it would be without the evidence. See Evid.R. 401.

{¶ 24} Moreover, the admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343. An abuse of discretion is more than an error of judgment, but instead demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.,* 66 Ohio St.3d 619, 621, 1993-Ohio-122, 614 N.E.2d 748. In short, the trial court has broad discretion in the admission of evidence and, unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere. *State v. Cooper,* Cuyahoga App. No. 86437, 2006-Ohio-817, citing *State v. Hymore* (1967), 9 Ohio St.2d 122, 128, 224 N.E.2d 126.

{¶ 25} In this matter, we find no abuse of discretion. As to the claim that the trial court erred in refusing to permit the declarant to testify, the record indicates that the witness was unavailable for a portion of the trial and that she further indicated that she was under a doctor's care and could not testify. The defense then suggested that the court simply admit the tape.

{¶ 26} As to the trial court's determination that the tape was not admissible, we note that the defense offered the tape as an excited utterance under Evid.R. 803(2). The trial court reviewed the tape, which has not been included within our record, and determined that the contents of the tape were in the nature of a "present-sense impression" and that it was not relevant. On the basis of the record that has been

provided, we presume regularity in connection with this ruling. In any event, we note that during the cross-examination of Thomas Keene, the defense attorney presented evidence that one of the Booster Club workers said that she was going to call the police and that the officers had used too much force.

{¶ 27} As to whether other individuals, such as Coach O'Toole, should have been permitted to testify as to tasering and pepper spraying of other individuals in connection with this incident, we also find no abuse of discretion. The record fully supports the trial court's determination that the tasering and pepper spraying occurred later and "doesn't have anything to do with the charges [against defendant.]"

{¶ 28} This assignment of error is without merit.

Judgment affirmed.

It is ordered that appellee recover from appellant its 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 Euclid Municipal 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.

ANN DYKE, JUDGE

COLLEEN CONWAY COONEY, A.J., CONCURS;
KENNETH A. ROCCO, J., CONCURS IN JUDGMENT ONLY