

[Cite as *State v. Kilpatrick*, 2009-Ohio-5555.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92137

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LYNETTE KILPATRICK

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-503251

BEFORE: Kilbane, J., Rocco, P.J., Sweeney, J.

RELEASED: October 22, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, J.:

{¶ 1} Appellant, Lynette Kilpatrick (“appellant”), appeals her convictions on one count of felonious assault and one count of domestic violence. After a review of the record and pertinent law, we affirm.

{¶ 2} Appellant was indicted on one count of felonious assault, pursuant to R.C. 2903.11(A)(2), a felony of the second degree, and one count of domestic violence, pursuant to R.C. 2919.25, a misdemeanor of the first degree. The charges stemmed from an incident that occurred on September 30, 2007, when appellant was alleged to have driven a van into her husband, Thomas Kilpatrick (“Kilpatrick”), who was standing outside of his home. Appellant was found to be indigent and appointed counsel. On March 31, 2008, appellant pled guilty to an amended indictment that consisted of one count of aggravated assault, a felony of the fourth degree, and one count of domestic violence, a misdemeanor of the first degree.

{¶ 3} Shortly after her plea, with assistance from her family, appellant retained new counsel. On May 5, 2008, appellant’s newly retained counsel filed a motion with the trial court to withdraw her previously entered guilty plea. Appellant’s basis for the motion was that she did not have a congenial relationship with her prior counsel and felt pressured to enter into the plea agreement. On May 23, 2008, the trial court held a hearing on the matter and ultimately granted appellant’s motion to withdraw her plea. On August 26, 2008, the matter

proceeded to a jury trial.

{¶ 4} The following testimony was elicited at trial.

{¶ 5} At the time of the alleged incident, appellant and Kilpatrick were in the process of a divorce. The couple had been married for approximately 16 years. On September 18, 2003, Kilpatrick was sentenced to four years in prison for drug possession. He was released on September 27, 2007, and returned to the home he had previously shared with appellant, located at 10902 Almira Avenue, in Cleveland, Ohio. (Tr. 299-300.)

{¶ 6} The day after Kilpatrick returned to their home, appellant decided she no longer wanted to reside with Kilpatrick and asked him to leave. Kilpatrick left and stayed at a rental property he owned on Clinton Avenue in Cleveland. On September 29, 2007, Kilpatrick returned to the marital home to retrieve a van. The van did not have a battery, so Kilpatrick had the van towed to a nearby repair shop. (Tr. 304-305.)

{¶ 7} Kilpatrick testified that either that same day or the following day, appellant called him several times, screaming, demanding to know where Kilpatrick had taken the van. Appellant stated that she was coming over to Kilpatrick's residence on Clinton Avenue.

{¶ 8} At that point, Kilpatrick went outside to move his car from the street into the driveway. He parked his car far up the driveway, and then proceeded to walk up the driveway toward the front door. (Tr. 308.) Kilpatrick stated that he was on the walkway near his front door when appellant arrived and drove her van

over the curb and front lawn, directly toward him. (Tr. 310.)

{¶ 9} Kilpatrick turned around in time to see the van coming at him. He testified that the impact knocked him over, and he fell into the bushes and his mailbox. (Tr. 314.) He suffered abrasions to his arm and leg. Kilpatrick retrieved a camera from the house and began taking pictures of the scene. He testified that appellant attempted to lock him out of the Clinton Avenue house, and then struck him several times with her hand. He responded by grabbing her and striking her head into the van. Kilpatrick then called 911, and while he was on the phone, appellant left the scene and did not return. (Tr. 319-323.)

{¶ 10} Cleveland police officer, Antonia Montijo (“Officer Montijo”), responded to the scene. Montijo was on the scene for approximately 40 minutes, during which time she interviewed Kilpatrick and summoned a supervisor who took several photographs of the area. (Tr. 271-274.) The photographs were introduced into evidence and depicted bruising to Kilpatrick’s arm, as well as skid marks on the sidewalk. (Tr. 275-276.)

{¶ 11} At the conclusion of the evidence, the jury convicted appellant of both felonious assault and domestic violence, as charged in the indictment.

{¶ 12} Appellant asserts two assignments of error for our review.

ASSIGNMENT OF ERROR NUMBER ONE

“THE TRIAL COURT DEPRIVED APPELLANT OF A FAIR TRIAL BY ERRONEOUSLY GIVING A JURY INSTRUCTION ON FLIGHT.”

{¶ 13} Appellant argues that the trial court erred in providing the jury with an

instruction regarding her flight from the scene. We disagree.

{¶ 14} The trial court provided the following instruction to the jury:

“Flight of the defendant. Testimony has been admitted indicating that the defendant fled the scene. You are instructed that defendant’s flight alone does not raise presumption of guilt but it may tend to indicate the defendant’s consciousness or awareness of guilt. If you find that the facts do not support defendant’s flight from the scene, or if you find that some other motive prompted the defendant’s conduct, or if you are unable to decide what the defendant’s motivation was, then you should not consider this evidence for any purpose. However, if you find that the facts support the defendant engaged in such conduct and if you decide that the defendant was motivated by a consciousness or an awareness of guilt, you may, but are not required to, consider that evidence in deciding whether the defendant is guilty of the crime charged. You alone will determine what weight if any to give to this evidence.” (Tr. 421-422.)

{¶ 15} “When reviewing a trial court’s jury instructions, the proper standard of review for an appellate court is whether the trial court’s issuance of the instruction constituted an abuse of discretion under the facts and circumstances of the case.” *State v. Williams*, Cuyahoga App. No. 90845, 2009-Ohio-2026, at ¶50, citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. For a trial court to abuse its discretion there must be “more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140, citing *Steiner v. Custer* (1940), 137 Ohio St.448, 31 N.E.2d 855.

{¶ 16} This court has previously defined flight as “some escape or affirmative attempt to avoid apprehension.” *State v. Wesley*, Cuyahoga App. No.

80684, 2002-Ohio-4429, at ¶19. It has long been recognized that it is not an abuse of discretion for a trial court to provide a jury instruction on flight if there is sufficient evidence presented at trial to support that the defendant attempted to avoid apprehension. *State v. Benjamin*, Cuyahoga App. No. 80654, 2003-Ohio-281, at ¶31, citing *United States v. Dillon* (C.A.6, 1989), 870 F.2d 1200, 1207.

{¶ 17} We conclude that the testimony elicited at trial provided a sufficient basis for the jury instruction on flight.

{¶ 18} Kilpatrick specifically testified that while he and appellant were in the midst of a physical altercation outside, he dialed 911. Kilpatrick stated that appellant heard him make the phone call. Further, appellant could be heard yelling in the background in the 911 tape that was played to the jury. (Tr. 323.) Prior to Kilpatrick calling 911, appellant had gotten out of her van, attempted to lock Kilpatrick out of his house, and had engaged in a physical altercation with Kilpatrick. Appellant only left the scene after Kilpatrick had called 911.

{¶ 19} Appellant urges this court to follow *Wesley*, supra, which concluded the trial court erred in providing an instruction on flight to the jury. However, *Wesley* is easily distinguishable, and therefore, inapplicable to this case.

{¶ 20} In *Wesley*, the defendant was accused of breaking down his girlfriend's front door, entering her apartment, assaulting her, and taking some of her belongings. Sometime during the incident, a neighbor overheard yelling and called the police. The defendant left the scene, never knowing the police had

been called. Later the defendant was apprehended while driving 50 miles per hour on a road with a 35 miles per hour speed limit. The state requested a flight instruction based on the speed of the car. Here, unlike *Wesley*, appellant was present when the phone call to the police was placed, and she was aware that police would be responding to the scene. Further, appellant had the opportunity, and did in fact argue during closing arguments, that she left the scene in order to escape physical assault and not to flee from police. However, pursuant to the flight instruction provided by the trial court, the jury was allowed to consider appellant's escape argument, but was not required to.

{¶ 21} Finding no merit to this argument, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

“THE JURY’S VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE.”

{¶ 22} Appellant contends that her convictions are against the manifest weight of the evidence, because the jury should not have given any weight to Kilpatrick's testimony, as he had previously admitted to lying during the course of the investigation. We disagree.

{¶ 23} When determining if the convictions are against the manifest weight of the evidence, this court must look to “the inclination of the greater amount of credible evidence offered in a trial, to support one side of the issue rather than the other.” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d

541. When an appellate court conducts such a review, it serves as the thirteenth juror and reevaluates the evidence. In order to reverse the convictions, this court must determine that the jury clearly lost its way, and the convictions were a manifest miscarriage of justice. *Id.* at 388.

{¶ 24} Appellant argues that the jury was improperly prejudiced by the instruction on flight and that Kilpatrick's testimony was not credible. As we have already concluded that the jury instruction on flight was proper, the only issue left to determine is whether Kilpatrick's testimony was adequate to support the convictions.

{¶ 25} Kilpatrick was the victim and the sole witness to the incident. Appellant maintains that Kilpatrick's testimony lacked credibility because, during his testimony, Kilpatrick admitted that he lied numerous times throughout the investigation. However, Kilpatrick explained that he initially recanted and told prosecutors that the incident never happened in order to protect his children. It was not unreasonable for the jury to believe Kilpatrick's motive for lying during the investigation and consider his testimony regarding appellant's assault to be credible.

{¶ 26} Additionally, Officer Montijo testified that when she arrived on scene just moments after the incident, Kilpatrick was in shock and affirmatively stated appellant hit him with her van. Photographs taken shortly after the incident document bruising and scraping on Kilpatrick's arm. Tire marks at the scene also corroborated Kilpatrick's version of events. (Tr. 273-276.)

{¶ 27} Finally, appellant contends that even if Kilpatrick's testimony is deemed credible, his testimony was wavering as to whether he was actually struck by the van. Appellant maintains that if Kilpatrick was not actually struck by the van, the conviction must be reversed. This argument is without merit.

{¶ 28} Appellant was charged with felonious assault, in violation of R.C. 2903.11(A)(2), which states no person shall knowingly "cause or attempt to cause physical harm to another * * * by means of a deadly weapon." Whether appellant actually struck Kilpatrick is not the question; there is ample evidence that appellant drove the van directly at Kilpatrick, causing him to fall and sustain injuries. Whether the van made actual physical contact with the victim is irrelevant. See *State v. Brooks*, Mahoning App. No. 02-CA-251, 2004-Ohio-3216.

Kilpatrick saw the van careening towards him and stated that he would have been run over had he not fallen into the bushes to get out its path.

{¶ 29} This assignment of error is without merit and is 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 be sent to said court to carry this judgment into execution.

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

MARY EILEEN KILBANE, JUDGE

KENNETH A. ROCCO, P.J., and
JAMES J. SWEENEY, J., CONCUR