

[Cite as *State v. Key*, 2010-Ohio-775.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92846

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KEVIN KEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-512803

BEFORE: Sweeney, J., Dyke, P.J., and Celebrezze, J.

RELEASED: March 4, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Kevin Key (“defendant”), appeals following his convictions for felonious assault, kidnapping, domestic violence, and intimidation.

In this appeal, defendant contends that his convictions were based upon insufficient evidence or were against the manifest weight of it. For the reasons that follow, we affirm.

{¶ 2} At trial, the court dismissed Counts 3, 4, and 7 of the indictment pursuant to Crim.R. 29. Accordingly, our discussion of the facts will be limited to those pertinent to the convictions that are the subject of this appeal.

{¶ 3} The charges against defendant stemmed from two incidents involving a 67-year-old woman, Ruth, with whom defendant was residing. Ruth testified at trial as follows:

{¶ 4} Defendant had lived with her for two years and was a good friend. Defendant helped Ruth with household chores in exchange for room and board. Ruth also described defendant as her care giver. According to Ruth, she takes 17 different pills daily for a variety of medical conditions, including a seizure disorder. Reportedly, Ruth has seizures about twice a week.

{¶ 5} The charges against defendant related to incidents occurring on June 2, 2008 and June 14, 2008. Ruth’s trial testimony differs greatly from what she reported to her neighbor, the police, and medical professionals on June 14, and June 19, 2008.

{¶ 6} At trial, Ruth said she drank a cup of tea the evening of June 1, 2008, stood up, and fell to the floor, crushing her arm beneath her. Defendant

called EMS the following day, and Ruth was transported by ambulance to Fairview Hospital. On June 2, 2008, Ruth informed the triage nurse that she had fallen. No pictures were taken of her injuries at that time. Ruth was transferred to St. John West Shore Hospital, where she remained until June 5, 2008. Defendant visited Ruth two or three times until she was released into his care on June 5. Defendant cooked her meals, cleaned the house, and fed her.

{¶ 7} Ruth then testified that between June 5th and 14th, she took between 160 to 180 Vicodin pills, mixed with her 17-pills-a-day regime. This, she said, affected her memory to the point she was unable to recall why she became hysterical and ran (clothed in a nightgown) to her neighbor's house the afternoon of June 14, 2008. Although she remembered running across the street to Sheila's house and talking to Sheila, she does not know what she said to her. Ruth recalled crying. Ruth knew she was scared but not why. She remembered going to the hospital but claims she only did so because the police encouraged it. At trial, Ruth said, "a lot of these charges that they've got against Mr. Key are trumped up charges."

{¶ 8} Ruth identified photographs of her injuries that were taken on June 14, 2008 that included: bruises and swelling on her arm, a back rash, and bruises on her chest and shoulder areas. She also authenticated her medical records from June 3, 2008 and June 14, 2008. The June 14, 2008 medical records documented "multiple injuries" from "domestic assault."

{¶ 9} Ruth reviewed the statement she made to police on June 19, 2008, which alleged defendant had slapped her on June 14, 2008, and that she had lied about how her previous injuries had occurred. In her statement to police, Ruth said defendant had slammed her to the floor during an argument on June 1, 2008. They stayed up all night rehearsing what she would say to EMS in the morning. She had lied because defendant threatened to snap her neck. Ruth's statement went on to indicate that on June 14, 2008, defendant began drinking early in the morning. By 4:30 p.m., he "was getting riled up." He began poking his finger around her eyes, telling her to watch what she was saying, and then he slapped her across the right cheek. Ruth just wanted to get away but she could not. When defendant passed out, Ruth got out of the house and went to the neighbor's house, where the police were called. Ruth told police that defendant had been her boyfriend since July 2007.

{¶ 10} At trial, Ruth said she did not tell police the things that are contained in her June 19th statement and they were not true. Ruth said the Vicodin made her hallucinate and remained in her system until August. The State inquired when Ruth changed her story, asking "[i]t's probably when you started to miss him, right?" To which Ruth responded, "Probably." Probing further, the State asked, "[i]t was probably when your yard work started to pile up, when you became a little lonely, and you decided you wanted him back in, is that right?" And, she said, "Could be."

{¶ 11} Since defendant's arrest, Ruth stated things had become hard for her at home. Since he was not there, things got "let go." She has no one to shovel her driveway or help her around the house and she missed him. Ruth had spoken with defendant weekly by phone and visited him every time she possibly could, totaling about 50 visits since his incarceration.

{¶ 12} During cross-examination, Ruth stated that some of her medications cause her to bruise easily. She reviewed a record of her prescription refills from CVS pharmacy for Vicodin between June 5, 2008 and June 21, 2008 as follows: June 5th for 24 pills, June 7th for 40 pills, June 11th for 30 pills, June 15th for 40 pills, and June 21st for 10 pills. She maintained that Walgreens also filled a prescription for Vicodin during this time frame. Ruth said she took all 174 of the pills, which she said made her paranoid and hysterical. She does not know why she said that defendant slammed her to the ground. When the defense inquired whether she left because defendant had been drinking and passed out and it was her opportunity to leave, Ruth said, "[m]ay have been." But ultimately, she could not remember.

{¶ 13} On redirect, Ruth confirmed that her Vicodin abuse stopped when defendant was arrested.

{¶ 14} Ruth's neighbor, Sheila, also testified. She and Ruth were good friends and the women were close. Sheila felt she knew Ruth "very well." On June 14, 2008, Sheila had not seen Ruth for about three days, which Sheila found unusual. The afternoon of the 14th, Sheila heard Ruth screaming and

yelling hysterically at Sheila's side door. Sheila was in the midst of entertaining guests at this time in her backyard. Ruth was shaking and in a state of panic. Sheila brought Ruth into her home as Ruth yelled, "Hide me, hide me, he's going to kill me." Ruth appeared distraught, "so sad," she was screaming and crying. Ruth had a robe on and was holding her arm. Ruth said defendant hurt her, that he was sleeping, and that she snuck out of the house. The robe was draped over Ruth; she was wearing a thin nightgown underneath and a pair of socks, and her arm was in a sling. Ruth was scared as defendant would not let her out of the house; she could not get out of the house for days. Sheila called 911. Ruth spoke with the operator. Defendant was then arrested. Beyond Ruth's hysteria, she appeared normal to Sheila. Sheila was aware that Ruth changed her story several months later.

{¶ 15} The State rested and the defense did not present any witnesses. The jury returned its verdict and defendant's sentence included a five-year prison term. Defendant now appeals, raising one assignment of error for our review:

{¶ 16} "I. The jury's verdict was not supported by sufficient evidence, and was against the manifest weight of the evidence in violation of defendant's right to due process of law, as guaranteed by the 14th Amendment to the United States Constitution."

{¶ 17} "The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and

manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. *Id.* at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. *Id.* at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive — the State's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. *Id.* at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony.' *Id.* at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶25.

{¶ 18} Defendant makes a generalized attack of his convictions by arguing Ruth's statement to police on June 19, 2008 was not enough to support his convictions because she repudiated it and because he believes it is essentially uncorroborated.

{¶ 19} While Ruth testified differently at trial, the substance of her prior statement to police was admitted through her testimony without objection. Further, Ruth repeatedly testified that she could not remember what she said that

day or why she was scared and went running to her neighbor's house in hysterics. Also, Sheila corroborated the fact that Ruth was scared because defendant had assaulted her, threatened her, and would not let her leave the house. Sheila said she knew Ruth very well and that she appeared normal except for being so upset. Sheila had not seen Ruth for about three days prior, which she found unusual. The jury also heard the 911 tape and evidence from the medical records, which reflected Ruth had sustained multiple injuries from a domestic assault.

{¶ 20} The record aptly established that Ruth filled an inordinate amount of prescriptions for Vicodin between June 5th and 21st of 2008. Ruth claimed at times she took 160-180 pills in a nine-day period. She also claimed that she took approximately 90 pills up through August 2008. She sometimes said defendant put the few remaining pills in his pocket when he realized she was overdosing, and other times Ruth speculated that defendant held pills for her in his pocket in case she needed them while they were out. At best, Ruth's testimony was confused. Nonetheless, there was other evidence presented that defendant and another man took all of Ruth's pain medications.¹ Ruth admitted that she stopped filling the Vicodin prescriptions after defendant's arrest. While Ruth adamantly maintained she must have lied to police about the June 2, 2008 incident as a result of her alleged Vicodin abuse, she also said she could not

¹Ruth told Sheila that defendant "and whoever was staying there was taking all her pain medications." Sheila said Ruth changed her story a few months later by claiming she took 180 Vicodin in this time period.

remember many of the events relating to June 14, 2008. She never denied telling Sheila that defendant was going to kill her, she just said she could not remember what she had said.

{¶ 21} During cross-examination, Ruth conceded she may have run out of the house that day once defendant had passed out from drinking. Ruth readily expressed her desire for defendant to return to her home and that she clearly missed him. Ruth even acknowledged during her testimony that her story changed around the time she began to miss defendant's presence in her home. Ruth proffered that this coincided with when the effects of her Vicodin abuse subsided.

{¶ 22} Clearly there were conflicts in the testimony; however, we cannot say the jury clearly lost its way in resolving them such that a miscarriage of justice occurred. Defendant's convictions were supported by sufficient evidence and were not against the manifest weight of it.

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 Court of Common Pleas to carry this judgment into execution. The defendant's convictions 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.

JAMES J. SWEENEY, JUDGE

ANN DYKE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR