

[Cite as *State v. Buerki*, 2011-Ohio-321.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94338

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID W. BUERKI

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-527093-A

BEFORE: Jones, J., Stewart, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: January 27, 2011

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, David Buerki (“David”), appeals his convictions for domestic violence and intimidation of a crime victim or witness. Finding no merit to the appeal, we affirm.

{¶ 2} In 2009, David was charged with two counts each of felonious assault and kidnapping and one count each of domestic violence and intimidation of a crime victim or witness. The felonious assault and kidnapping charges were accompanied by repeat violent offender specifications and notices of prior conviction.

{¶ 3} The matter proceeded to a jury trial at which the following evidence was adduced.

{¶ 4} In July 2009, Jennifer Buerki (“Jennifer”) was at home with her husband, the appellant, and their two young children. The couple began arguing over a web page they were viewing on their computer. They began yelling at each other. David called his wife a “stupid b****” and backed her into a corner threatening to kill her. The two were standing nose to nose when Jennifer bit David’s lip in an attempt to get away from him. David went into the bathroom to look at his lip, then returned to the kitchen, grabbed a meat cleaver and swung it at Jennifer. She moved and the knife missed her.

{¶ 5} The couple continued arguing with Jennifer running throughout the house and David following her, grabbing her and making four or five attempts to choke her. At one point, Jennifer grabbed the baby and took her into the older child’s room for safety. David continued yelling at Jennifer and broke a lamp and a ceiling fan in the kitchen. Jennifer ran into the master bedroom and tried to call her mother on her cell phone. David pushed his way into the bedroom, grabbed Jennifer and her phone, and took the phone from her. David told Jennifer that he was going to kill her and that she was not to call the cops. Jennifer ran into the living room, opened a window, and yelled for help. David caught up with her, covered her mouth, threw her on the couch, and began choking her. She passed out.

{¶ 6} Eventually Jennifer regained consciousness and David was standing over her, looking scared. Jennifer got up and went to find her children.

{¶ 7} The next morning, David told Jennifer that he could not promise that he would not hurt her again. Jennifer said she would call the cops if he did it again, and David responded that he would not let that happen.

{¶ 8} Jennifer testified that she did not call the cops after the assault because David said he would kill her if she did and she was terrified of him.

{¶ 9} A week later, the police came to the house to conduct a welfare check on Jennifer, in response to a call from one of Jennifer's friends about the assault. The police separated David and Jennifer. The police noted Jennifer still had bruises on her neck, arm, and leg. One officer testified that Jennifer was sobbing and appeared fearful of her husband. David was arrested and Jennifer moved out of state.

{¶ 10} The jury convicted David of domestic violence and intimidation of a crime victim or witness and acquitted him of all other charges. The trial court sentenced him to a total of three years in prison.

{¶ 11} David appeals, raising the following two assignments of error for our review:

{¶ 12} "I. Appellant's conviction of intimidation of crime victim or witness is not supported by sufficient evidence because the state failed to present any evidence that appellant made an unlawful threat of harm.

{¶ 13} “II. Appellant’s conviction of intimidation of crime victim or witness is in violation of appellant’s right to jury unanimity pursuant to Rule 31(A) of the Ohio rules of criminal procedure and his due process right to [have] each element of the offense be proven beyond a reasonable doubt.”

{¶ 14} In the first assignment of error, David argues that the state failed to show sufficient evidence to support his conviction for intimidation.

{¶ 15} The state is required to prove each of the elements of a charged offense beyond a reasonable doubt. *State v. Jenks* (1991) 61 Ohio St.3d 259, 272-273, 574 N.E.2d 492. When reviewing the sufficiency of the evidence to support a criminal conviction, “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, 818 N.E.2d 229, quoting *Jenks*, *supra*, at paragraph two of the syllabus. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. Tenace*, 109 Ohio St.3d 255, 260, 2006-Ohio-2417, 847 N.E.2d 386. David was charged with intimidation of a crime victim or witness in violation of R.C. 2921.04(B), which states:

“No person, 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 or an attorney or witness involved in a criminal action or proceeding in the discharge of the duties of the attorney or witness.”

{¶ 16} David argues that the state failed to show that he made an unlawful threat of harm to his wife. But the state presented evidence that David threatened Jennifer by telling her that he would kill her if she called the police.

{¶ 17} In *State v. Ball*, Erie App. No. E-02-024, 2004-Ohio-2586, appeal not allowed by 103 Ohio St.3d 1478, 2004-Ohio-5405, 816 N.E.2d 254, the court upheld an intimidation conviction where the appellant threatened to harm the victim, whom he had just raped. The victim testified she was scared and repeatedly promised the appellant during the course of the rape that she would not report the rape because, she testified, she was afraid of what he might do to her. *Id.* The court also noted that it took the victim an hour to report the rape after it happened. *Id.* In *State v. Sessler*, Crawford App. No. 3-06-23, 2007-Ohio-4931, judgment affirmed by 119 Ohio St.3d 9, 2008-Ohio-3180, 891 N.E.2d 318, in a case similar to the one at bar, the court upheld an intimidation conviction where the victim testified that after the defendant hit her several times, she tried to go get the phone. The defendant then jumped on top of her, had her by her throat, and told the victim if she tried to call the police or anybody, he would kill her. *Id.* at ¶6. The victim testified that she was afraid the defendant would kill her if she went for help. *Id.*

{¶ 18} Recently, the Ohio Supreme Court clarified that “[a]s far as a victim is concerned, R.C. 2921.04(B) makes clear that it applies immediately upon the commission of the underlying crime, prior to the involvement of legal authorities; under R.C. 2921.04(B), it is illegal for anyone to attempt to influence, intimidate,

or hinder the victim of a crime in the filing or prosecution of criminal charges.”

State v. Malone, 121 Ohio St.3d 244, 2009-Ohio-310, 903 N.E.2d 614.

{¶ 19} We note that the *Malone* court stated that R.C. 2921.04(B) applies immediately upon the *commission* of the underlying crime, not immediately upon the *completion* of the predicate crime. Thus, we find no merit to David’s argument that there must be a certain or set period of time that elapses between the predicate crime and the crime of intimidation.

{¶ 20} In the case at bar, Jennifer testified that her husband threatened to harm her if she called the police after he assaulted her by grabbing her and waving the meat cleaver at her. He then grabbed her again and choked her until she was unconscious. Jennifer did not report the assault until the police came to her house and questioned her about it and the police noted she was emotional and fearful of her husband. She testified that she did not report the assault because she thought her husband would kill her if she did.

{¶ 21} Therefore, viewing the evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have determined that David was guilty of intimidation. The first assignment of error is overruled.

{¶ 22} In the second assignment of error, David argues that the state should have been required to elect the particular act, i.e. influencing, intimidating, or hindering, upon which it chose to rely in showing that David committed the crime of intimidation. He further maintains that the trial court should have instructed the jury that they must agree that the same underlying criminal act had

been proved beyond a reasonable doubt. We review this assignment under the plain error standard as David failed to object to this at trial.

{¶ 23} Crim.R. 31(A) requires that a jury verdict be unanimous. The Ohio Supreme Court addressed the issue of jury unanimity in *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, and found that the critical inquiry is whether the case involves “alternative means” or “multiple acts.” The court, quoting *State v. Jones* (2001), 96 Hawaii 161, 170, 29 P.3d 351, stated:

“In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged. Unanimity is not required, however, as to the means by which the crime was committed so long as substantial evidence supports each alternative means. In reviewing an alternative means case, the court must determine whether a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt.

“In multiple acts cases, on the other hand, several acts are alleged and any one of them could constitute the crime charged. In these cases, the jury must be unanimous as to which act or incident constitutes the crime. To ensure jury unanimity in multiple acts cases, we require that either the State elect the particular criminal act upon which it will rely for conviction, or that the trial court instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt.” *Id.* at 189.

{¶ 24} The case at bar is an alternative means case. Thus, there is no requirement that the state show by which means—intimidation, hindrance, or influence—David employed in his attempt to prevent Jennifer from filing charges against him. Contrary to David’s assertions, we do not find that the state had to elect the particular act David committed to support his conviction for intimidation

or that the trial court erred in instructing the jury. The second assignment of error is overruled.

{¶ 25} Accordingly, judgment is affirmed.

It is ordered that appellee recover of 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 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.

LARRY A. JONES, JUDGE

MELODY J. STEWART, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR.