

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94463

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM WYLAND

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART AND REVERSED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-528409

BEFORE: Sweeney, J., Rocco, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: February 3, 2011

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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant William Wyland (“defendant”) appeals his convictions for two counts of assault of a peace officer. After reviewing the facts of the case and pertinent law, we affirm in part and reverse in part.

{¶ 2} On August 29, 2009, a security guard at Embassy Suites in downtown Cleveland, Sergeant Gannon,¹ detained defendant for disorderly conduct, public intoxication, and urinating outside of the hotel. Gannon handcuffed defendant and had him sit on a stack of tables in a small hallway off the lobby while the police were called. When Cleveland

Police Officer Patrick Bishop arrived in the hallway, defendant was “loud and obnoxious.” According to Gannon, Officer Bishop told defendant to “keep it down,” and defendant kicked the officer in the hip area, then stood up and spit in the officer’s face. Gannon testified that he never saw Officer Bishop put his hands on defendant, other than to put him into the back of the police car.

{¶ 3} Officer Bishop testified that when he arrived at the hotel, he could hear defendant yelling obscenities. He walked to the hallway where defendant was being detained and told defendant to calm down. Defendant continued to yell and Officer Bishop repeatedly told defendant to calm down. According to Officer Bishop, defendant “lunged with his right leg and kicked me just in my shin barely grazing me.” Officer Bishop testified about the events that followed:

{¶ 4} “I grabbed him by his right — his left shoulder with my right arm to grab ahold of him, let him — you know, to pick him up. He pulled away from me, yanked away, fell back on the table, handcuffed, leaned forward, and I said, ‘You’re kicking a police officer. What are you doing?’

{¶ 5} “He lunged forward and spit in my face. After he spit in my face, I took my right hand opened and pushed his whole face and struck him in the face to get him away from me, probably hit him right about through here. And he went down.”

¹ Sergeant is security guard Gannon’s first name.

{¶ 6} Defendant was arrested and taken to the police station, where a spit sock was put over his face. Later that day, Officer Bishop was tested at St. Vincent Hospital for communicable diseases as a result of “exposure to bodily fluid.”

{¶ 7} Defendant testified and admitted to being intoxicated and urinating in front of the hotel. Defendant also stated he was cussing loudly, but to no one in particular. Defendant testified that in 2006, he was raped by a Cleveland police officer, and the interaction with Officer Bishop caused defendant to have flashbacks of the incident. Defendant testified that he was under psychiatric care for post traumatic stress disorder because of the rape.

{¶ 8} Defendant further testified that he did not kick Officer Bishop, nor did he spit in the officer’s face. According to defendant, after he explained to the officer about being raped, Officer Bishop struck him in the face.

{¶ 9} On September 9, 2009, defendant was charged with two counts of assault of a peace officer in violation of R.C. 2903.13(A). The case was tried to the court from December 9 — 11, 2009, and defendant was found guilty as indicted. The court sentenced defendant to 18 months in prison for each count, to run concurrently.

{¶ 10} Defendant appeals and raises two assignments of error for our review.

{¶ 11} “I. Mr. Wyland’s conviction for assault on a peace officer was against the manifest weight of the evidence.”

{¶ 12} Specifically, defendant argues that he accidentally, rather than intentionally, kicked Officer Bishop as defendant fell backward after the officer struck him. Defendant also argues that he inadvertently spit as he was yelling, or, in the alternative, that there was no potential for harm caused by the spitting.

{¶ 13} The proper test for an appellate court reviewing a manifest weight of the evidence claim is as follows:

{¶ 14} “The appellate court sits as the ‘thirteenth juror’ and, reviewing the entire record, weighs all the reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in 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.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541.

{¶ 15} Defendant was convicted of assault in violation of R.C. 2903.13(A), which states that “[n]o person shall knowingly cause or attempt to cause physical harm to another * * *,” with a furthermore clause which states that “the victim of the offense was a peace officer * * *.”

{¶ 16} Gannon and Officer Bishop’s testimony were consistent that defendant intentionally kicked Officer Bishop, albeit only “grazing” him, before Officer Bishop touched defendant and defendant fell backward. Additionally, these two witnesses testified consistently that defendant intentionally spit in Officer Bishop’s face. Although defendant

denies this, we cannot say that the court lost its way when it found Gannon and Officer Bishop's recollection of events more credible than defendant's.

{¶ 17} Although this assignment of error references the weight of the evidence, defendant's next argument challenges the sufficiency of the evidence. When reviewing sufficiency of the evidence, an appellate court must determine, "after reviewing the evidence in a light most favorable to the prosecution, whether any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492.

{¶ 18} Defendant argues that "there is a complete lack of evidence that [his] sputum had any potential bacterial or viral physical harm * * * [or] that he intended to cause physical harm to the officer." To support this argument, defendant cites to *State v. Bailey* (1992), 83 Ohio App.3d 544, 615 N.E.2d 322, which held that there was insufficient evidence in the record to prove that potential harm could result from a defendant spitting on the two police officers who arrested him. The court stated that "the critical issue for determination is whether the evidence presented by the city of Dayton was sufficient to prove beyond a reasonable doubt that Bailey knowingly attempted to cause any injury, illness, or physiological impairment when he spit on the officers." *Id.* at 545. Asked how he was harmed, one of the officers testified as follows: "I consider it being harmed, if you will, when [a] person spits on another person and I have to wash up and I have to take my clothes off and get them

cleaned. I've got family at home. I don't want to carry that — any kind of a disease to my kids.” Id. at 547.

{¶ 19} Although the court concluded that Bailey's spitting on the officers was “disgusting,” it reversed Bailey's assault conviction, holding that there was no evidence that the saliva “had any potential for bacterial or viral physical harm to the officers.” Id.

{¶ 20} In the instant case, Officer Bishop testified that he was not injured by the spitting, but he was tested for communicable diseases:

{¶ 21} “Q: Now, did you have — based on — did you get treated that day?

{¶ 22} “A: Yes, I did.

{¶ 23} “* * *

{¶ 24} “Q: What did you go * * * for?

{¶ 25} “A: Exposure to bodily fluid.

{¶ 26} “Q: Okay. And were you treated there?

{¶ 27} “A: Yes.

{¶ 28} “Q: What type of treatment did you receive?

{¶ 29} “A: I believe they drew blood, things like that. * * * And then after that I had to follow up and — you know, you take a series of tests. They draw blood then, which mine came back negative, and then you go months later and they do it again because some communicable diseases or sexually transmitted diseases, whatever you want to call them, don't

show up until later on down the road.”

{¶ 30} The state argues that the evidence of physical harm is that Officer Bishop “sought medical treatment and submitted to blood testing.” However, we find that being tested for harm as a result of being spit on does not amount to evidence of “physical harm” as required under R.C. 2903.13(A).

{¶ 31} There was no evidence in the record that Officer Bishop suffered physical harm. Nothing in the record suggests that defendant’s saliva was tainted, that it was tested, or that defendant carried or believed he carried a disease that could have been transferred to Officer Bishop via bodily fluids.

{¶ 32} We intend that this holding apply narrowly to the facts of the instant case. Pursuant to R.C. 2901.01(A)(3), “[p]hysical harm * * * means any injury, illness, or other physiological impairment, regardless of its gravity or duration.” Additionally, it is generally acknowledged that seeking medical treatment for injuries results in a reasonable inference “that the force exerted on the victim caused serious physical harm,” which is required to prove assault in violation of R.C. 2903.13(B). *State v. Wilson* (Sept. 21, 2000), Cuyahoga App. No. 77115. In the instant case, defendant was indicted for assault in violation of R.C. 2903.13(A), which requires proof of physical harm, rather than serious physical harm. Nonetheless, Officer Bishop did not seek medical *treatment* for injuries; he sought medical *testing* to see if there was a potential for injuries to exist or develop.

{¶ 33} The state need not show that a person contracted a communicable disease as a result of being exposed to an offender's saliva to uphold an assault conviction. Rather, the state must show that the offender who spit had or believed he had the potential to harm another person as a result. As there was no evidence of this in the instant case, we sustain defendant's first assignment of error in part. The assault conviction involving kicking is affirmed and the assault conviction regarding spitting is reversed based on insufficient evidence.

{¶ 34} In defendant's second assignment of error, he argues as follows:

{¶ 35} "II. The trial court erred by not granting Mr. Wyland's motion to dismiss for a violation of his speedy trial rights."

{¶ 36} When an appellate court reviews an allegation of a speedy trial violation, it "should apply a de novo standard of review to the legal issues but afford great deference to any findings of fact made by the trial court." *State v. Barnes*, Cuyahoga App. No. 90847, 2008-Ohio-5472, ¶17.

{¶ 37} R.C. 2945.71(C)(2) requires the State to bring a defendant accused of committing a felony to trial within 270 days after his arrest. "[E]ach day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days." R.C. 2945.71(E). However, this triple-count provision "is applicable only where the accused is detained in jail [solely] under the indictment from which he seeks a discharge." *State v.*

Thieshen (1977), 55 Ohio App.2d 99, 103, 379 N.E.2d 622. Additionally, various events toll speedy trial days, including for example, defense requested continuances and requests for discovery. R.C. 2945.72(E) and (H).

{¶ 38} In the instant case, defendant was arrested on August 29, 2009, and he was brought to trial on December 9, 2009, 102 days later. Defendant filed a motion to dismiss based on speedy trial violations on November 30, 2009, which the court denied on December 9, 2009.

{¶ 39} Although defendant remained incarcerated during the pendency of this case, he was indicted in Cuyahoga County Common Pleas Case No. CR-482859 on September 3, 2009, for community control sanctions violations. On September 9, 2009, he was sentenced to six months in jail. Subsequently, the triple-count provision did not apply to defendant because he was not imprisoned in lieu of bail; he was imprisoned on another conviction. Additionally, defendant filed a discovery request on September 16, 2009 and requested five continuances between September 17, 2009 and December 1, 2009.

{¶ 40} In denying defendant's motion to dismiss, the court noted that defendant had two active arrest warrants at the time he committed the offenses in the instant case. The court found that defendant was serving "one-for-one" time for the majority of his incarceration, and without taking into consideration any of the tolling events, 161 of the allotted 270 days elapsed.

{¶ 41} Accordingly, we do not find that defendant's right to a speedy trial was violated and his second assignment of error is overruled.

Judgment affirmed in part and reversed in part.

It is ordered that appellee and appellant split the 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 in part, 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

KENNETH A. ROCCO, P.J., and
MARY J. BOYLE, J., CONCUR