[Cite as *Cleveland v. Hall*, 2015-Ohio-2698.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101820

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

CURTIS B. HALL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2013 CRB 034650

BEFORE: Blackmon, J., Keough, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: July 2, 2015

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Curtis B. Hall ("Hall") appeals his convictions for disorderly conduct and petty theft and assigns the following three errors for our review.

> I. The trial court erred in denying appellant's motion for acquittal as to the charges when the state failed to present sufficient evidence to sustain a conviction.
>
> II. Appellant's convictions are against the manifest weight of the evidence.
>
> III. The trial court erred by finding appellant guilty of disorderly conduct although that is not a lesser included offense of domestic violence in this case.

{¶2} Having reviewed the record and pertinent law, we affirm Hall's convictions. The apposite facts follow.

{¶3} On November 5, 2013, a complaint was filed in the Cleveland Municipal Court charging Hall with one count of domestic violence and petty theft. The matter proceeded to a bench trial.

{¶4} The victim in the instant case testified that she had two children with Hall. At the time of the incident, the parties' relationship had recently ended. The victim stated that she has "always" lived separate from Hall. While the victim was at work, usually her mother or Hall watched the children.

{¶5} According to the victim, while she was at work on November 1, 2013, Hall had sent her violent and aggressive text messages accusing her of dating other men. He was watching their five-year old daughter at the time. Hall stated that she texted him that she was "done with him" and that she was coming to pick up their daughter. This was about 11:00 a.m.

{¶6} The victim testified that when she arrived at Hall's house, he immediately charged out of the house. She told him to send their daughter outside. In response, he kicked the side door of her car, causing a dent. He then pulled her out of the car and started hitting her until they both fell to the ground. Once she was on the ground, Hall went inside her car and locked the doors. He then went through her belongings, tearing up personal papers, and stealing $100 from her purse.

{¶7} The victim told Hall that she was going to call the police because he stole her money. In response, he threatened to call the police because she was the one who came to his house. He then yelled to his father to call the police. The victim retrieved her daughter and left. When she returned home, she called the police and went to the emergency room. A photograph was presented showing an injury on her arm consistent with being rubbed on cement.

{¶8} Officer Timothy Hannon responded to the victim's 911 call. He stated that when he arrived at the victim's house, the victim's mother and five-year old daughter were present. Officer Hannon stated that the victim was upset and crying. She told the officer that she had gone to Hall's house to retrieve their daughter, and he pulled her out

of the car and repeatedly hit her. She told the officer that he also ripped papers in the car and stole her money. The officer stated that he did not see the damaged property inside the car, but did see a dent on the outside of the car and the injury on the victim's arm. After completing the victim's statement, the officer proceeded to Hall's home, which was located a few blocks away.

{¶9} Officer Samuel Feldman testified that he responded to Hall's 911 call. He stated that when he arrived, he was told Hall's father had called. At first, Hall refused to make a statement. However, when Officer Hannon appeared and told them that the victim had made a statement, Hall decided it was in his best interest to also make a statement. He stated that the victim was upset with him because he had a new girlfriend and came over and confronted him outside the house. He told Officer Feldman that the victim punched him first and that he received a scratch on his arm when he tried to restrain her. Although the father had said on his 911 call that the victim tried to run his son over with a car, the son denied that the victim tried to run him over.

{¶10} Hall testified in his own defense. He stated that the victim was angry with him because he had a new girlfriend. According to Hall, the night before the incident, the victim texted him constantly because she was upset he was with another woman. He denied that he was watching their daughter that day; therefore, the victim did not come to reclaim their daughter. He stated that he had just returned home from his new girlfriend's house, when the victim came into the home and attacked him. He stated that he was able to push her back outside and locked the door. He only went outside when he

saw she was throwing things at the cars parked in the driveway. He stated she then backed out of the driveway in her car, almost hitting him. He denied that he dragged her out of the car, tore up papers, or stole her money.

{¶11} Hall's father testified that he shared a duplex with Hall and that Hall lived in the upstairs unit. He did not see the altercation because he was at the credit union when it occurred. However, his son showed him the scratch on his arm. The father's girlfriend also told him that she had let the victim into the home, not knowing that the victim and Hall were not getting along. The father stated when he came home, the victim was outside of the house, throwing things at the cars parked in the driveway. The father called the police because she was banging on the door. She then left, so he told the police "never mind." However, when she returned, he called the police again. According to the father, his granddaughter was not at his son's house that day.

{¶12} The trial court found Hall guilty of petty theft and minor misdemeanor disorderly conduct, as a lesser included offense of the domestic violence charge. The trial court sentenced Hall to pay a fine of $60 for the disorderly conduct and $1,000 for the petty theft. The trial court also sentenced him to 180 days in jail, but suspended 178 of the days and credited him for two days time served. He was placed on one year of inactive probation.

Sufficiency of the Evidence

{¶13} In his first assigned error, Hall argues the trial court erred by not granting his motion for acquittal because the evidence was insufficient to support the convictions.

{¶14} Hall does not make a specific argument as to why there was insufficient evidence to support his convictions. Instead, his argument relates to why the court's judgment is against the manifest weight of the evidence. "A claim that a conviction is against the manifest weight of the evidence is qualitatively different from a claim that a conviction is not supported by sufficient evidence." *State v. Sparent*, 8th Dist. Cuyahoga No. 96710, 2012-Ohio-586, citing *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997), paragraph two of the syllabus. The failure to present a separate argument on each claim of an appeal is a violation of App.R. 16(A)(7); therefore, we disregard this assigned error so far as it concerns the sufficiency of the evidence. *State v. Cassano*, 8th Dist. Cuyahoga No. 97228 , 2012-Ohio-4047, ¶ 2; *Sparent* at ¶ 11. *State v. Brown*, 8th Dist. No. 87932, 2007-Ohio-527, ¶ 13. However, the issues relating to the manifest weight of the evidence, will be addressed in Hall's second assigned error. Hall's first assigned error is overruled.

Manifest Weight of the Evidence

{¶15} In his second assigned error, Hall contends his convictions are against the manifest weight of the evidence.

{¶16} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> 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.

Id. at ¶ 25.

{¶17} An appellate court may not merely substitute its view for that of the jury, but must find that "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." *Thompkins* at 387. Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶18} Hall argues that his convictions are against the manifest weight of the evidence because his testimony that the victim was the aggressor was more credible than her testimony that Hall was the aggressor. When there are two versions of events, neither of which is unbelievable, it is not our province to choose which one should be believed. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999). Rather, we defer to the factfinder who was best able to weigh the evidence and judge the credibility of witnesses by viewing the demeanor, voice inflections, and gestures of the

witnesses testifying. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1994); *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967). The court obviously believed the victim's version of events.

{¶19} Hall argues that there was no evidence to corroborate the victim's claim that she went to Hall's house to retrieve their daughter; therefore, she was not credible. Both Hall and his father testified that the daughter was not at Hall's house at the time. However, Hall and his father are not neutral witnesses. Although the daughter was not questioned, she was only five years old. Police officers did state that the daughter was present at the victim's home when they responded to her 911 call. Whether the child was at Hall's house as claimed by the victim was for the trier of fact to determine.

{¶20} Hall also argues that the victim failed to bring her cell phone showing the aggressive, violent text messages that she claimed Hall had sent her. However, Hall likewise did not show the text messages that he claimed that the victim had sent to him. Therefore, the absence of this evidence was not critical to the victim's credibility.

{¶21} Hall argues that the victim's version of what occurred was not credible, because the police officer stated he did not see torn up papers, and no photographs were taken depicting the torn up papers in the victim's car. However, no photographs were taken of the outside of the car even though the officer stated he saw the side of the car was dented, and it is unclear if the officer even looked inside the car. Moreover, because there was evidence that the victim sustained an injury, the torn up papers were inconsequential.

{¶22} Hall contends that as pertinent to his theft conviction, the fact that the officers did not take photographs of the inside of her car was crucial to his theft conviction in order to show from where the money was taken. However, Hall's father had testified that he saw an opened purse on the front seat of the victim's car as he walked into the house. The victim's inability to recall the exact amount of money stolen goes to her credibility. She stated that it was "one hundred something dollars." It was up to the fact-finder whether to believe her. Moreover, "petty theft" does not require proof of an exact amount of money. The amount only needs to be less than $1,000 to constitute an offense under Cleveland Codified Ordinances 635.05.

{¶23} Although Hall had a photograph of a scratch on his arm showing that he suffered injury during the altercation, the victim also submitted a photograph depicting an injury to her arm consistent with "gravel burn" from being dragged on the cement driveway. Therefore, the fact that Hall was injured does not affect the victim's credibility because she was also hurt and had, in fact, admitted to struggling with Hall on the ground after he dragged her out of the car.

{¶24} Hall also claims that the victim did not call 911 until her mother prodded her to do so when she returned home. The responding officer testified that the victim lived a few blocks away from Hall. Therefore, it is not as if she waited a long time to call 911. Also, the fact that the victim waited until she was in a safe environment prior to calling 911 does not damage her credibility.

{¶25} Finally, there were inconsistencies in Hall's testimony when compared with his statement to the police. Hall told the police the confrontation occurred outside the home and stated that in spite of his father's 911 call, the victim did not try to run him over. At trial, however, Hall testified that the altercation occurred inside the home and that the victim tried to run him over. Moreover, although Hall used his father's testimony to corroborate his claims, the father admitted that he never saw the altercation between Hall and the victim because that occurred while he was not at home. The father's girlfriend, who allegedly witnessed the incident, did not testify.

{¶26} Accordingly, Hall's convictions are not against the manifest weight of the evidence. Hall's second assigned error is overruled.

Lesser Included Offense

{¶27} In his third assigned error, Hall argues that the trial court erred in concluding that disorderly conduct was a lesser included offense of domestic violence.

{¶28} When a lesser offense is included within the offense charged in a complaint or indictment, the defendant may be found guilty of the lesser included offense even though the lesser included offense was not separately charged in the complaint or the indictment. Crim.R. 31(C); R.C. 2945.74; *State v. Lytle*, 49 Ohio St.3d 154, 551 N.E.2d 950 (1990). Lesser included offenses need not be separately charged because when an indictment or complaint charges a greater offense, "'it necessarily and simultaneously charges the defendant with lesser included offenses as well.'" *State v. Smith*, 121 Ohio St.3d 409, 2009-Ohio-787, 905 N.E.2d 1511, ¶ 15, quoting *Lytle* at 157.

{¶29} When determining whether an offense is a lesser included offense of another,

> a court shall consider whether one offense carries a greater penalty than the other, whether some element of the greater offense is not required to prove commission of the lesser offense, and whether the greater offense as statutorily defined cannot be committed without the lesser offense as statutorily defined also being committed.

State v. Evans, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889, ¶ 26, clarifying *State v. Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294 (1998), paragraph three of the syllabus.

{¶30} Hall was charged with domestic violence pursuant to R.C. 2919.25(A) that provides as follows: "(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member."

{¶31} The trial court found Hall guilty of disorderly conduct pursuant to Cleveland Codified Ordinances 605.03, which states:

> (a) No person shall recklessly cause inconvenience, annoyance or alarm to another, by doing any of the following:
>
> (1) Engaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior * * *.

{¶32} Domestic violence pursuant to R.C. 2919.25(A) is a first-degree misdemeanor. Disorderly conduct pursuant to Cleveland Codified Ordinances 605.03 is a fourth-degree misdemeanor. Thus, disorderly conduct satisfies the first prong of the *Evans* test.

{¶33} Domestic violence requires that the harm be done to a family or household member. Disorderly conduct does not require that there be any type of relationship between the perpetrator and the victim. Therefore, disorderly conduct satisfies the second prong of the *Evans* test.

{¶34} The third prong requires a determination of whether committing domestic violence under R.C. 2919.25(A) also results in committing disorderly conduct pursuant to Cleveland Codified Ordinances 605.03. Hall, relying on the Ohio Supreme Court's decision in *State v. Mosley*, 113 Ohio St.3d 329, 2007-Ohio-2072, 865 N.E.2d 859, argues that committing domestic violence in violation of R.C. 2919.25(A) does not always result in committing disorderly conduct pursuant to Cleveland Codified Ordinances 605.03.

{¶35} *Mosley* determined that disorderly conduct pursuant to R.C. 2917.11(A)(1)[1] was a lesser included offense of domestic violence pursuant to R.C. 2919.25(C). In dicta, however, *Mosley* acknowledged that while some districts found disorderly conduct to be a lesser included offense of domestic violence pursuant to R.C. 2919.25(A), other districts did not. The districts that found it was not a lesser included offense concluded it was possible for the defendant to attempt to cause physical harm without the victim's knowledge, in which case the victim will not have suffered "inconvenience, annoyance, or alarm" required for disorderly conduct. The Supreme Court explained:

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[1]The language in R.C. 2917.11(A)(1) is identical to the language in Cleveland Codified Ordinances 605.03.

> The cases that have adopted this reasoning cite to a scenario in which the perpetrator throws an object at the victim who is not looking at the perpetrator, but misses the target, and thus the victim suffers no inconvenience, annoyance, or alarm. *State v. Blasdell*, 155 Ohio App.3d 423, 2003-Ohio-6392, 801 N.E.2d 853, ¶ 21, citing *State v. Schaefer*, Greene App. No. 99 CA 88, 2000 Ohio App. LEXIS 1828, 2000 WL 492094.

Id. at ¶ 16.

{¶36} *Mosley* was decided prior to the Ohio Supreme Court's decision in *Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889. *Mosley* and the Second District decision in *Schaefer*, which the *Blasdell* decision relied upon, used the lesser included offense test as set forth in *Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294. In *Evans*, the Supreme Court clarified the second step of the lesser included offense test that was originally set forth in *Deem* by deleting the term "ever" that was used in comparing whether the greater offense could "ever" be committed without committing the lesser offense. The court in *Evans* explained:

> [T]o ensure that such implausible scenarios will not derail a proper lesser included offense analysis, we further clarify the second part of the *Deem* test to delete the word "ever." This clarification does not modify the *Deem* test, but rather eliminates the implausible scenarios advanced by parties to suggest the remote possibility that one offense could conceivably be committed without the other also being committed. *Deem* requires a comparison of the elements of the respective offenses in the abstract to determine whether one element is the functional equivalent of the other. If so, and if the other parts of the test are met, one offense is a lesser included offense of the other.

Id. at ¶ 25. In fact, in *In re S.W.*, 2d Dist. Montgomery No. 24525, 2011-Ohio-5291, the Second District in discussing its decision in *Schaefer* held,

> [O]ur holding in *Schaefer* preceded the Supreme Court's decision in *Evans*. We believe that the holding in *Evans* undermines our rationale in *Schaefer*, to the extent that we relied on the possibility that a victim may, in some instances, be wholly unaware of an attempt to cause physical harm. Unless the evidence in a particular case demonstrates that the victim was unaware, there is now no basis to hold that the minor misdemeanor form of domestic violence that R.C. 2917.11(A)(1) prohibits cannot be a lesser included offense of domestic violence, in violation of R.C. 2919.25(A) under the second prong of *Deem.*

Id. at ¶ 37.

{¶37} Thus, reliance on the reasoning set forth in *Schaefer* is no longer valid for concluding that disorderly conduct is not a lesser included offense of domestic violence pursuant to R.C.2919.25(A). To satisfy the third step of the *Evans* test, we must compare the statutory elements "in the abstract to determine whether one element is the functional equivalent of the other."

{¶38} This court in *Cleveland Heights v. Cohen*, 8th Dist. Cuyahoga No. 101349, 2015-Ohio-1636, recently engaged in the same analysis as above, and concluded:

> We believe that the unaware victim and did-not-take-threat-seriously hypotheticals are the very types of "implausible scenarios" and "remote possibilit[ies]" that the *Evans* court sought to address in clarifying the *Deem*

> test. We, therefore, conclude that the existence of such possibilities does not preclude disorderly conduct under [the ordinance] from being a lesser included offense of domestic violence under R.C. 2919.25(A). * * *
>
> We find that the language used in R.C. 2919.25(A) provides sufficient notice to an offender that a charge for that offense could also result in prosecution for disorderly conduct under [the ordinance]. As a general matter, a person cannot knowingly cause or attempt to cause physical harm to a family member or a member of one's household without at the same time recklessly causing that family member or household member inconvenience, annoyance or alarm by engaging in fighting, by threatening harm to person or property or by violent or turbulent behavior. "'[I]t is not significant that the common elements of these two offenses were not stated in identical language * * * because these common elements are implicit in the conduct that constitutes the offenses."' *Mosely*, 113 Ohio St.3d 329, 2007-Ohio-2072, 865 N.E.2d 859, at ¶ 19, quoting *State v. Burgess*, 79 Ohio App.3d 584, 588, 607 N.E.2d 918 (12th Dist.1992); *see also Berry*, 2007-Ohio-7082 at ¶ 19 (applying *Mosely* to find that disorderly conduct under R.C. 2917.11(A)(1) is a lesser included offense of domestic violence under R.C. 2919.25(A)).
>
> Further, this court has previously held that disorderly conduct in violation of [the ordinance] as defined in the [ordinance] is a lesser included offense of assault as statutorily defined in R.C. 2903.13. *State v. Lynch*, 8th Dist Cuyahoga No. 95770, 2011-Ohio-3062, ¶ 11-13; *see also State v. Miller*, 8th Dist. Cuyahoga No. 96781, 2012-Ohio-1191, ¶ 16 (disorderly conduct in violation of R.C. 2917.11(A)(1) is a lesser included offense of assault), citing *State v. Young*, 8th Dist. Cuyahoga No. 79779, 2002-Ohio-1274. The similarities between domestic violence as defined under R.C. 2919.25(A) and assault as defined under R.C. 2903.13 provide further support for our conclusion that disorderly conduct under [the ordinance] is a lesser included offense of domestic violence under R.C. 2919.25(A). See *Maynard*, 2012-Ohio-786, ¶ 27.

Id. at ¶ 44-46.

{¶39} Thus, we likewise, conclude the statutory elements of domestic violence pursuant to R.C. 2919.25(A) are the functional equivalent of the elements of disorderly conduct pursuant to Cleveland Codified Ordinances 605.03.

{¶40} In the instant case, the evidence supports the trial court's finding Hall guilty of disorderly conduct. He engaged in "violent or turbulent behavior" by pulling the victim out of the car and "tussling" with her on the ground, thereby "recklessly causing inconvenience, annoyance, or alarm" to the victim as prohibited by the disorderly conduct ordinance. Accordingly, Hall's third assigned error is overruled.

{¶41} Judgment 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 be sent to the Cleveland 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.

PATRICIA ANN BLACKMON, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
MELODY J. STEWART, J., CONCUR