[Cite as *Middleburg Hts. v. Lasker*, 2016-Ohio-5522.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103903

CITY OF MIDDLEBURG HEIGHTS

PLAINTIFF-APPELLEE

vs.

BENJAMIN G. LASKER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; VACATED IN PART; REMANDED FOR RESENTENCING

Criminal Appeal from the
Berea Municipal Court
Case No. 15-CRB-00194

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

RELEASED AND JOURNALIZED: August 25, 2016

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Defendant-appellant, Benjamin Lasker ("appellant"), brings this appeal challenging his convictions for resisting arrest and disorderly conduct. Specifically, appellant argues that (1) the trial court erred by permitting Deputy David Rowe to testify at trial, (2) his convictions are against the manifest weight of the evidence, and (3) his statements made in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), should not have been admitted into evidence. After a thorough review of the record and law, this court affirms in part, modifies appellant's resisting arrest conviction, vacates the trial court's sentence for resisting arrest, and remands for resentencing consistent with this opinion.

I. Factual and Procedural History

{¶2} The instant matter arose from an incident at Babe's Sports Grille ("Babe's") in Middleburg Heights, Ohio. On February 7, 2015, a birthday party for appellant was held at Babe's. David Rowe ("Rowe"), a Cuyahoga County Sheriff's Deputy and part-time security guard at Babe's, was working at the time of the incident. After observing appellant pull down his pants and expose his rear end, Rowe escorted appellant out of Babe's and instructed him not to return.

{¶3} Later in the evening, appellant got into a physical altercation with another patron outside of Babe's. Officer Ryan Nagy ("Nagy") and Lieutenant Kevin Hoover ("Hoover") of the Middleburg Heights Police Department were dispatched to Babe's after the altercation. Upon arrival, Nagy and Hoover met with Rowe. Nagy spoke with appellant and Hoover spoke with the other patron involved in the fight. Nagy advised appellant to calm down, however, appellant began shouting profanities at the officers. While the officers were sorting the matter out, appellant got into another altercation with a different patron. The officers continued to

implore appellant to calm down. Appellant did not comply with the officers' requests. As a result, the officers placed appellant under arrest.

{¶4} The officers were able to handcuff appellant after a brief struggle. Appellant asserted that he "was not going anywhere" and dropped to his knees. The officers were eventually able to place appellant in the police car. After being placed inside the police car, appellant became belligerent. He was screaming, banging on the inside of the police cruiser, kicking the windows, and banging his head on the cage between the front and back seats. Hoover ordered appellant to calm down. Appellant continued to be uncooperative and unruly. Hoover turned appellant onto his stomach to prevent him from kicking the windows and banging his head. Hoover testified that he detected a strong odor of alcohol on appellant throughout the incident.

{¶5} Appellant was charged in a criminal complaint with resisting arrest, a first-degree misdemeanor in violation of R.C. 2921.33(B), and disorderly conduct, a fourth-degree misdemeanor in violation of R.C. 2917.11(B)(1). At his arraignment, appellant pled not guilty to the charges and the matter proceeded to trial.

{¶6} Rowe, Nagy, and Hoover testified on behalf of the prosecution at trial. At the close of the prosecution's case, appellant moved for a Crim.R. 29 judgment of acquittal. The trial court denied appellant's motion. Appellant's wife, appellant's friend, and appellant testified on behalf of the defense.

{¶7} At the close of trial, the trial court found appellant guilty of both charges. The trial court ordered a presentence investigation report and set the matter for sentencing. On November 13, 2015, the trial court sentenced appellant to five days in jail, a $250 fine and court costs, and basic probation for one year for the resisting arrest charge. Furthermore, for the

disorderly conduct charge, the trial court sentenced appellant to basic probation for one year, imposed a $10 fine and court costs, and ordered appellant to complete a substance abuse assessment. The trial court ordered the sentences to run consecutively.

{¶8} Appellant filed the instant appeal assigning four errors for review:

> I. The trial court erred in allowing Deputy Rowe to testify in the trial of this matter as it violated the appellant's constitutional right to a fair trial.
>
> II. The trial court erred in denying the appellant[']s Criminal Rule 29 motion for acquittal and finding the appellant guilty of resisting arrest as the conviction was against the manifest weight of the evidence.
>
> III. The trial court erred in finding the appellant guilty of disorderly conduct as the conviction was against the manifest weight of the evidence.
>
> IV. Counsel for the appellant failed to object to the admission of the [appellant's] statements at the peril of the appellant.

The trial court stayed appellant's sentences pending our disposition of the appeal.

II. Law and Analysis

A. Deputy Rowe's Testimony

{¶9} In his first assignment of error, appellant argues that the trial court erred by permitting Rowe to testify at trial. Specifically, appellant argues that (1) Rowe should not have been permitted to testify because the prosecution did not file a witness list, and (2) Rowe's testimony about appellant's conduct inside Babe's is "irrelevant and inflammatory" because the resisting arrest and disorderly conduct charges arose from appellant's conduct outside Babe's.

{¶10} During trial, appellant's counsel objected when the prosecution called Rowe to testify, claiming that she "was not notified of [the] witness and had no idea that [Rowe] was involved in the case." Appellant's counsel acknowledged that she learned that the prosecution planned to call Rowe to testify on the day before trial commenced. Appellant's counsel further

argued that the prosecution violated Crim.R. 16(I) by failing to file a witness list.

{¶11} The prosecutor asserted that defense counsel did not submit a discovery request and that Rowe's name was in the police report that was made available to defense counsel. The trial court overruled defense counsel's objection, concluding that Rowe was permitted to testify because his name was in the police report.

{¶12} Crim.R. 16 governs discovery matters in a criminal proceeding. The purpose of this rule is "to provide the parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system, the rights of defendants, and the well-being of witnesses, victims, and society at large." Crim.R. 16(A). Crim.R. 16(I), which governs the disclosure of witnesses, provides, "[e]ach party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal."

{¶13} Under Crim.R. 16(E)(3), the trial court is vested with discretion in determining the sanction to be imposed for a party's nondisclosure of discoverable material. Specifically, the rule provides that where it is brought to the court's attention that a party has failed to properly disclose evidence, the court may order the party to permit the discovery or inspection, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or make any other order it deems just under the circumstances. Thus, our review is limited to whether the trial court's action in this case constituted an abuse of discretion. *State v. Parson*, 6 Ohio St.3d 442, 445, 453 N.E.2d 689 (1983). In situations where the prosecution fails to disclose a witness prior to trial, the Supreme Court of Ohio has held "the testimony of the undisclosed witness can be admitted if it can be shown that the failure to provide discovery was not willful, foreknowledge of the statement would not have benefitted the defendant in the preparation of the

defense, and the defendant was not prejudiced by the admission of the evidence." *State v. Heinish*, 50 Ohio St.3d 231, 236, 553 N.E.2d 1026 (1990), citing *Parson* at 445-446.

{¶14} In the instant matter, the prosecutor concedes that he did not provide a witness list to defense counsel. The prosecutor explained to this court that he did not think he was required to submit a witness list because defense counsel had not filed a Crim.R. 16 demand for discovery. The prosecutor acknowledged that he reviewed Crim.R. 16(I) after the fact, and that the rule requires parties to provide a witness list to opposing counsel even if counsel did not file a demand for discovery. Nevertheless, the prosecutor argues that Rowe was permitted to testify at trial because the police report, which he provided to defense counsel during pretrial proceedings, contained Rowe's name, badge number, and a description of his observations on the night of the incident.

{¶15} After reviewing the record, we cannot say that the trial court abused its discretion by permitting Rowe to testify at trial. Although the prosecutor's failure to file a witness list was a violation of Crim.R. 16(I), the record does not reflect that the prosecutor willfully kept Rowe's name from defense counsel. Rather, the prosecutor mistakenly believed that he had no obligation to file a witness list because defense counsel had not filed a discovery demand. Furthermore, defense counsel was notified that Rowe would testify on the day before trial commenced. However, after learning that Rowe would testify at trial, defense counsel did not request a continuance to prepare for Rowe's testimony. Defense counsel was able to cross-examine Rowe at trial. Before permitting Rowe to testify, the trial court considered appellant's objection to his testimony. Finally, we note that appellant's counsel did not object to the testimony of Nagy or Hoover, who also testified on behalf of the prosecution and were identified in the police report, despite the fact that the prosecution did not file a witness list

pursuant to Crim.R. 16(I).

{¶16} Assuming arguendo that the trial court improperly permitted Rowe to testify at trial, we find that any resulting error was harmless pursuant to Crim.R. 52(A). Crim.R. 52(A) provides, "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Rowe's testimony about appellant's conduct at Babe's was merely cumulative to the testimony of Hoover and Nagy. Also, appellant had notice through the police report of the nature of Rowe's testimony. Accordingly, we find that Rowe's testimony was neither unfairly prejudicial to appellant nor affected his substantial rights. There is no reasonable probability that the trial court's error — if any — contributed to the outcome of the trial.

{¶17} Based on the foregoing analysis, appellant's first assignment of error is overruled.

B. Resisting Arrest

{¶18} Appellant's second assignment of error pertains to his conviction for resisting arrest. Appellant argues that the trial court erred by denying his Crim.R. 29 motion for a judgment of acquittal and that his conviction was against the manifest weight of the evidence. Since this assignment of error encompasses both sufficiency and manifest weight issues, we will apply both standards.

1. Sufficiency

{¶19} First, appellant argues that the trial court erred by denying his Crim.R. 29 motion for a judgment of acquittal regarding the resisting arrest charge.

{¶20} Crim.R. 29 mandates that the trial court issue a judgment of acquittal where the prosecution's evidence is insufficient to sustain a conviction for the offense. *Cleveland v. Pate*, 8th Dist. Cuyahoga No. 99321, 2013-Ohio-5571, _ 12. Crim.R. 29(A) and sufficiency of

evidence review require the same analysis. *State v. Mitchell*, 8th Dist. Cuyahoga No. 95095, 2011-Ohio-1241, _ 18, citing *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386. A challenge to the sufficiency of the evidence supporting a conviction requires the court to determine whether the prosecution has met its burden of production at trial. *State v. Givan*, 8th Dist. Cuyahoga No. 94609, 2011-Ohio-100, _ 13, citing *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997).

{¶21} 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. Vickers*, 8th Dist. Cuyahoga No. 97365, 2013-Ohio-1337, _ 17, citing *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶22} Appellant was convicted of resisting arrest, a first-degree misdemeanor in violation of R.C. 2921.33(B). R.C. 2921.33(B) provides, "[n]o person, recklessly or by force, shall resist or interfere with a lawful arrest of the person or another person and, during the course of or as a result of the resistance or interference, cause physical harm to a law enforcement officer."

{¶23} Appellant argues that the prosecution failed to present evidence of injury to the officers. The prosecution concedes that there was insufficient evidence to establish that appellant injured the officers. Accordingly, we must address appellant's conviction for resisting arrest in violation of R.C. 2921.33(B), in relation to the lesser included offense of resisting arrest in violation of R.C. 2921.33(A). *See State v. Fussell*, 8th Dist. Cuyahoga No. 95906, 2011-Ohio-4815, _ 20.

{¶24} In *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889, the Ohio Supreme Court explained the proper analysis for 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.

Id. at _ 26. In *Fussell*, this court held that resisting arrest, in violation of R.C. 2921.33(A), is a lesser included offense of resisting arrest in violation of R.C. 2921.33(B), explaining that "[t]he only difference between R.C. 2921.33(A) and (B) is that subsection (B) adds an element that in the course of resisting, the law enforcement officer is injured, which increases the offense from a misdemeanor of the second degree, to one of the first." *Id*. at _ 21.

{¶25} After reviewing the record, we find that the prosecution presented sufficient evidence to support appellant's conviction for resisting arrest in violation of R.C. 2921.33(A). First, Rowe testified that he observed Nagy and Hoover arrest appellant. Rowe testified that during the arrest, appellant tried to "pull away" from the officers, and that Nagy, Hoover, and appellant ended up on the ground during the struggle. Rowe explained that he assisted Nagy and Hoover as they picked appellant up off of the ground and took him to the police cruiser. Rowe testified that appellant was trying to pull away from him, and that he ordered appellant to "stop resisting[.]" Rowe testified that appellant refused to put his head down in order to get into the cruiser.

{¶26} Second, Hoover testified that appellant struggled when he attempted to handcuff him. Hoover testified that as he and Nagy were walking appellant to the police cruiser, appellant asserted "I'm not going anywhere" and struggled by going limp, refusing to walk, and falling to the ground. Hoover testified that appellant refused to put his head down to get into the cruiser and that he was banging and screaming.

{¶27} Third, Nagy testified that appellant "went limp" when officers attempted to walk him to the police cruiser. Nagy testified that the officers had to push appellant into the police cruiser and that appellant proceeded to bang on the inside of the cruiser and kick the window.

{¶28} Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have determined beyond a reasonable doubt that appellant was guilty of resisting arrest pursuant to R.C. 2921.33(A).

{¶29} "It is well established that this court has the authority to reduce a conviction to that of a lesser included offense when it is supported by the record, rather than ordering an acquittal or a new trial." *State v. Reddy*, 192 Ohio App.3d 108, 2010-Ohio-5759, 948 N.E.2d 454, _ 35 (8th Dist.), citing *State v. Davis*, 8 Ohio App.3d 205, 207, 456 N.E.2d 1256 (8th Dist.1982). Thus, based on our conclusion — and the prosecution's admission — that there is insufficient evidence establishing the necessary elements that appellant caused injury to the officers, we modify appellant's conviction of resisting arrest to one in violation of R.C. 2921.33(A).

2. Manifest Weight of the Evidence

{¶30} Second, appellant argues that his conviction for resisting arrest was against the manifest weight of the evidence.

{¶31} 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 *[Thompkins*, 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.

{¶32} 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*.

{¶33} In the instant matter, appellant argues that there was conflicting testimony regarding whether Nagy and Hoover fell to the ground as they attempted to arrest appellant. Appellant contends that Rowe, Nagy, and Hoover provided different accounts of what transpired during the arrest, and that none of the officers testified that they suffered pain as a result of appellant's conduct.

{¶34} We initially note that in light of our modification of appellant's resisting arrest conviction, appellant's manifest weight challenge is moot to the extent that it pertains to his conviction for resisting arrest under R.C. 2921.33(B). At trial, the defense presented three witnesses: (1) appellant's wife, (2) appellant's friend, and (3) appellant.

{¶35} First, appellant's wife testified that appellant was not fighting with the officers and that he neither argued with the officers nor yelled obscenities at them. She testified that appellant did not struggle with the officers and that the officers dropped him to the ground as they were walking to the police cruiser. She testified that the officers did not fall to the ground when they arrested appellant. Second, appellant's friend testified that although a lot of people outside of Babe's were yelling, appellant did not yell obscenities at the officers. Third, appellant testified that he suffered injuries after falling during the arrest. He testified that he did not hit the door of the police cruiser with his head, but he admitted to hitting the door with his knee. He testified that he did not yell obscenities at the arresting officers.

{¶36} After reviewing the record, we cannot say that this is "an exceptional case" in which the trial court clearly lost its way and created such a manifest miscarriage of justice that appellant's conviction for resisting arrest was against the manifest weight of the evidence. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. The trial court, as trier of fact, was in the best position to assess credibility and clearly found the testimony of Rowe, Nagy, and Hoover to be credible. We cannot say that the trial court clearly lost its way creating such a manifest miscarriage of justice simply because it found the prosecution's version of the incident to be more credible than the testimony of appellant's wife, appellant's friend, and appellant. Accordingly, appellant's conviction for resisting arrest is not against the manifest weight of the evidence.

{¶37} Based on the foregoing analysis, appellant's second assignment of error is sustained in part and overruled in part. Appellant's conviction for resisting arrest is modified to one in violation of R.C. 2921.33(A). The trial court's sentence for resisting arrest is vacated and the matter is remanded to the trial court for resentencing on the conviction as modified.

C. Disorderly Conduct

{¶38} In his third assignment of error, appellant argues that his conviction for disorderly conduct was against the manifest weight of the evidence. However, because appellant raises issues pertaining to sufficiency of the evidence in support of his manifest weight challenge, we will apply both standards.

1. Sufficiency

{¶39} First, appellant argues that his disorderly conduct conviction was not supported by sufficient evidence. Specifically, appellant argues that the state failed to present sufficient evidence to establish that his conduct was disorderly and that he was intoxicated. In reviewing appellant's sufficiency challenge, we apply the aforementioned standard of review from *Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541.

{¶40} Appellant was convicted of disorderly conduct in violation of R.C. 2917.11(B)(1), which provides:

> [n]o person, while voluntarily intoxicated, shall * * * [i]n a public place or in the presence of two or more persons, engage in conduct likely to be offensive or to cause inconvenience, annoyance, or alarm to persons of ordinary sensibilities, which conduct the offender, if the offender were not intoxicated, should know is likely to have that effect on others[.]

{¶41} Appellant contends that the prosecution failed to present sufficient evidence to establish that (1) his conduct was disorderly and (2) he was intoxicated. We disagree.

{¶42} After reviewing the record, we find that the prosecution presented sufficient

evidence to support a conviction of disorderly conduct in violation of R.C. 2917.11(B)(1). First, Hoover testified that appellant was yelling obscenities at the officers and that appellant failed to comply with the officers' orders to calm down. Specifically, Hoover explained that appellant, referring to Hoover and Nagy, shouted, "[y]ou guys are a bunch of assholes." Hoover testified that appellant was banging on the police cruiser and screaming when the officers attempted to place him inside. Hoover testified that he detected an odor of alcohol on appellant, appellant's speech was slurred, and appellant was staggering.

{¶43} Second, Nagy testified that he heard appellant yelling before Hoover attempted to handcuff him. Nagy testified that appellant was banging on the police cruiser and kicking the window. Nagy testified that he believed that appellant was under the influence of alcohol based on the manner in which he was yelling and screaming.

{¶44} Third, Rowe testified that appellant had been at Babe's "the majority of the night" and that he had been drinking. Rowe testified that he escorted appellant out of Babe's earlier in the evening after appellant exposed his rear end. Rowe testified that appellant continued to hang around outside of Babe's. Later in the evening, Rowe explained that appellant was "quite agitated," and that Nagy was trying to calm him down. Rowe testified that appellant was "very vocal and loud" when Nagy and Hoover attempted to arrest him. Rowe asserted that appellant proceeded to kick and bang his head on the police cruiser's window.

{¶45} Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have determined beyond a reasonable doubt that appellant was guilty of disorderly conduct under R.C. 2917.11(B)(1).

2. Manifest Weight of the Evidence

{¶46} Second, appellant argues that his disorderly conduct conviction was against the

manifest weight of the evidence. In reviewing appellant's manifest weight challenge, we apply the aforementioned standard of review from *Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264. In support of his manifest weight challenge, appellant argues that the evidence presented at trial neither demonstrates that his conduct was disorderly nor that he was intoxicated. We disagree.

{¶47} The trial court heard conflicting testimony regarding whether appellant was yelling and screaming. Appellant's wife, appellant's friend, and appellant testified that appellant was neither yelling in general nor yelling obscenities at the officers. Both appellant's friend and appellant acknowledged that a lot of people were yelling outside of Babe's, but appellant insisted that he was not involved. Appellant's wife corroborated the testimony of Hoover and Nagy by acknowledging that appellant kicked the police cruiser and was yelling from the inside of the cruiser.

{¶48} The trial court also heard conflicting testimony regarding whether appellant was intoxicated. Appellant's friend testified that appellant was not intoxicated. Furthermore, appellant argues that the video that captured the events transpiring outside of Babe's demonstrates that he was not staggering at any time.

{¶49} After reviewing the record, we cannot say that this is "an exceptional case" in which the trial court clearly lost its way and created such a manifest miscarriage of justice that appellant's conviction for disorderly conduct was against the manifest weight of the evidence. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. The trial court did not lose its way simply because it found the prosecution's version of the events to be more credible than the defense's. Thus, appellant's conviction for disorderly conduct is not against the manifest weight of the evidence.

{¶50} Based on the foregoing analysis, we find that appellant's disorderly conduct conviction was supported by sufficient evidence and was not against the manifest weight of the evidence. Accordingly, appellant's third assignment of error is overruled.

D. Post-Arrest Statements

{¶51} In his fourth assignment of error, appellant argues that Hoover's testimony regarding his post-arrest statements should not have been admitted into evidence because officers did not advise him of his *Miranda* rights. Specifically, appellant challenges the admission of the following four statements: (1) "I'm not going anywhere"; (2) "Take me to jail"; (3) "Thank you, [y]ou saved me from getting my ass kicked"; and (4) his response of "no" when Hoover asked if he wanted medical attention. Appellant concedes that his trial counsel did not object to Hoover's testimony at trial. Thus, we review Hoover's recitation of appellant's statements for plain error.

{¶52} An alleged error is plain error only if the error is "obvious," *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002), and "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph two of the syllabus. We take notice of "plain error" with the "utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id*. at paragraph three of the syllabus.

{¶53} It is well-settled that a suspect must be advised of his constitutional right against self-incrimination before being questioned by law enforcement. *Miranda*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.E.2d 694. In *Miranda*, the United States Supreme Court held that the Fifth Amendment privilege against self-incrimination prohibits admitting statements given by a suspect during "custodial interrogation" without prior warning. *Id*. at 444.

{¶54} In the instant matter, appellant made the first and second challenged statements outside of Babe's, and he made the third challenged statement at the police station. Hoover testified that appellant made the first statement after he handcuffed appellant and began walking him towards the police cruiser. Hoover testified that appellant made the second statement when he was banging and kicking in the back seat of the police cruiser and after Hoover ordered him to relax. Hoover testified that appellant made the third statement during the booking process. After reviewing the record, it is evident that appellant was in custody when he made the first, second, and third statements — he was handcuffed and being escorted to the police cruiser when he made the first statement, he was handcuffed and sitting inside the police cruiser when he made the second statement, and he had been placed under arrest and was being booked by officers at the police station when he made the third statement. However, we find that the officers were not required to advise appellant of his *Miranda* rights at the time he made the first, second, and third statements because appellant was not subjected to an interrogation.

{¶55} *Miranda* defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id*. at 444. In the instant matter, the officers had not initiated any questioning when appellant made the first, second, and third statements. Appellant made these statements freely and voluntarily. "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *Rhode Island v. Innis*, 446 U.S. 291, 299-300, 100 S.Ct. 1682, 64 L.E.2d 297 (1980). Accordingly, no reason exists to suppress appellant's first, second, and third statements.

{¶56} Appellant made the fourth challenged statement at the police station. Hoover testified that appellant made the fourth statement during the booking process. After reviewing

the record, it is evident that appellant was in custody when he made the fourth statement — he had been placed under arrest and was being booked by officers at the police station. However, we find that the officers were not required to advise appellant of his *Miranda* rights at the time he made the fourth statement. Hoover testified that during the booking process, he asked appellant if he wanted any medical attention.

{¶57} Not every question in a custodial setting requires *Miranda* warnings. *State v. Delaboin*, 8th Dist. Cuyahoga No. 90406, 2008-Ohio-4093, _ 15, citing *United States v. Booth*, 669 F.2d 1231, 1237 (9th Cir.1981). "Many sorts of questions do not, by their very nature, involve the psychological intimidation that *Miranda* is designed to prevent." *Booth* at *id*. Routine booking questions fall within this category and are exempt from *Miranda's* coverage. *Pennsylvania v. Muniz*, 496 U.S. 582, 601, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990). In order for this exemption to apply, the booking questions must be reasonably related to the administrative concerns of the law enforcement agency. *Id*. The questions must be part of the routine process normally attendant to arrest, custody, and record keeping, and not intended to elicit incriminating responses. *Id*.

{¶58} In the instant matter, Hoover was not required to preface the medical attention question with *Miranda* warnings. The medical attention question was a routine booking question that was reasonably related to the police's administrative concerns. Throughout the course of the evening at Babe's, appellant was engaged in two altercations, fell to the ground after being handcuffed, repeatedly banged his head on the inside of the police cruiser, and exhibited signs of intoxication. Thus, it was not unreasonable for Hoover to be concerned about appellant's well-being and to ask him if he wanted medical attention. Furthermore, the question was neither designed to elicit an incriminatory admission nor to elicit information for

investigatory purposes. *See Muniz* at 601-602. Accordingly, no reason exists to suppress appellant's fourth statement.

{¶59} After thorough review, we find that the challenged statements were properly admitted at trial. Appellant was not "interrogated" within the meaning of *Miranda* when he made the first, second, and third statements. Appellant made these statements freely and voluntarily, and thus, these statements are not barred by the Fifth Amendment. Furthermore, because Hoover's medical attention question was a routine booking question that was reasonably related to the police's administrative concerns, Hoover was not required to preface the question with *Miranda* warnings. No reason exists to suppress the challenged statements. Accordingly, the trial court did not commit plain error by admitting appellant's post-arrest statements at trial.

{¶60} Appellant's fourth assignment of error is overruled.

III. Conclusion

{¶61} The trial court did not abuse its discretion by permitting Rowe to testify at trial. Appellant's resisting arrest conviction is not against the manifest weight of the evidence. However, because there is insufficient evidence to support a conviction for resisting arrest under R.C. 2921.33(B), we modify the conviction to one in violation of R.C. 2921.33(A). The trial court's sentence for resisting arrest is vacated and the matter is remanded to the trial court for resentencing on the conviction as modified.

{¶62} Appellant's disorderly conduct conviction is supported by sufficient evidence and is not against the manifest weight of the evidence. The trial court did not commit plain error by admitting appellant's post-arrest statements at trial.

{¶63} Judgment affirmed in part, vacated in part, and remanded to the trial court for resentencing consistent with this opinion.

It is ordered that appellant and appellee share 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 municipal court to carry this judgment into execution. The defendant's convictions having been affirmed as modified, 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.

FRANK D. CELEBREZZE, JR., JUDGE

LARRY A. JONES, SR., A.J., and
MELODY J. STEWART, J., CONCUR