[Cite as *State v. Bonton*, 2016-Ohio-700.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102918

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DARIUS D. BONTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-591799-A

BEFORE: Blackmon, J., Keough, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: February 25, 2016

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Darius D. Bonton ("Bonton") appeals his convictions for receiving stolen property and aggravated menacing and assigns the following three errors for our review:

> I. Counsel was ineffective in neglecting to request at sentencing to waive defendant's costs.
>
> II. It was error to convict Darius Bonton for menacing by stalking.[1]
>
> III. The conviction lacked sufficient evidence, and it was against the manifest weight of the evidence.

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

{¶3} The Cuyahoga County Grand Jury indicted Bonton for domestic violence, receiving stolen property, assault, and aggravated menacing. The matter proceeded to a jury trial.

{¶4} On July 10, 2014, a 911 call was placed by the victim's sister. A recording of the 911 call was played. On the recording, the sister is heard telling the dispatcher that her sister's boyfriend, Bonton, is "trying to fight" her sister. She asks the dispatcher

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[1] We note that Bonton's appellate attorney mislabeled the conviction as menacing by stalking instead of aggravated menacing. In resolving the assigned error, our discussion will address the argument as related to aggravated menacing. Bonton's argument was that there was no evidence that the victim felt threatened. Whether the victim felt threatened is an element of aggravated menacing.

to “please hurry up.” She tells the dispatcher that the boyfriend has a gun and that he has it out, but because she was not in the room she did not know if he was pointing it at her sister. She then again asked the dispatcher to “hurry up” and said that she thought “he just hit” her sister. In the background a man’s voice is heard yelling loudly.

{¶5} Officer Christopher Faunce was one of the responding officers. He stated that when he arrived on the scene, the victim’s sister was waiting in the doorway of the apartment building. She looked “frantic” and “scared” and refused to accompany him to the apartment. After verifying the apartment number, he proceeded to the apartment. Because a weapon was reportedly involved in the altercation, the officer ordered everyone out of the apartment. He observed that the victim had a red mark on the right side of her face. A photograph of the victim was presented showing a red mark on the side of the victim’s face. Officer Faunce stated that he and the victim went into her bedroom where he asked her where the gun was. She would not verbally tell him where it was, but nodded with her head in the direction of the closet. He found a gun under a bag in the closet.

{¶6} A check of the serial number on the gun revealed that it had been stolen on May 14, 2014 from a car that was parked a half-mile from the apartment. The owner of the gun testified that he recognized Bonton from the neighborhood and did not give him permission to have his gun.

{¶7} The victim’s mother was declared to be a court witness due to the fact her testimony was in conflict with the statement she gave to police. On the stand, she

testified that she heard noises coming from the bedroom. When she went into the room, she saw Bonton had the victim pinned on the bed. She pulled him off of the victim, but the victim and Bonton continued to argue. She denied seeing Bonton hit the victim. When the victim asked Bonton, "What are you going to do? Shoot me?" the mother noticed that Bonton had a gun pointed at the floor. She said that Bonton replied, "No, but I am going to whoop your ass." She was not concerned that Bonton would really beat her daughter because he was on the other side of the room. She also testified that Bonton was acting calmly in spite of the yelling heard on the 911 call.

{¶8} The mother's testimony was then compared with her written police statement. In her statement, she stated that when she went into the room, she saw Bonton on top of the victim, and he was hitting her. She also stated that the victim was standing on the bed with scissors in her hand and that once Bonton noticed, he pulled a gun out of the closet and then cocked it and asked the victim if she was going to stab him because he would shoot her. He then stated he would not shoot her but would "whoop her ass."

{¶9} The victim testified that she had been dating Bonton for five-and-a-half years, and that they had an 18-month old son. She stated that her son, mother, and sister lived together and that Bonton had only lived with them for two months when the incident happened. She stated at the time of the incident, although they lived together, she and Bonton were no longer dating.

{¶10} According to the victim, on the night in question, she and Bonton got into an argument regarding their living situation. She wanted him to move. She stated that the argument was not physical and that her son caused the red mark on her cheek. She ordered her sister to call the police because she was "aggravated" with Bonton, not because she was afraid. She admitted that he did state he was going to "whoop her ass" but said that she did not feel threatened. She claimed that the gun fell out of the closet when she was trying to remove his belongings. She stated that when Bonton picked up the gun, she asked him if he was going to shoot her, and he said "no" and emptied the clip. She claimed he never cocked the gun or pointed it at her.

{¶11} Officer Darryn Zupancic testified that he was one of several officers who responded to the call. When he went up to the apartment, he saw Bonton with his shirt off. Bonton was "sweaty," "highly agitated," and "uncooperative." The officer observed an injury to the victim's right cheek. He did not believe that a baby could have caused the injury. He stated that Bonton refused to give a statement. The victim's mother also did not want to speak, but did so hesitantly. The victim seemed scared, but did cooperate with police.

{¶12} After the state rested, it dismissed the assault charge against Bonton. The jury concluded that Bonton was guilty of aggravated menacing and receiving stolen property and not guilty of domestic violence. The trial court sentenced Bonton to two years of community control sanctions and ordered him to pay court costs.

Ineffective Assistance of Counsel

{¶13} In his first assigned error, Bonton argues that his trial counsel was ineffective for failing to file an affidavit of indigency or a motion to waive costs.

{¶14} To succeed on a claim of ineffective assistance, a defendant must establish that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Counsel will only be considered deficient if his or her conduct fell below an objective standard of reasonableness. *Strickland* at 688.

{¶15} When reviewing counsel's performance, this court must be highly deferential and "must indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Id*. at 689. To establish resulting prejudice, a defendant must show that the outcome of the proceedings would have been different but for counsel's deficient performance. *Id*. at 694.

{¶16} R.C. 2947.23(A)(1) governs the imposition of court costs and provides in pertinent part: "In all criminal cases * * * the judge * * * shall include in the sentence the costs of prosecution * * * and render a judgment against the defendant for such costs."

{¶17} "R.C. 2947.23 does not prohibit a court from assessing costs against an indigent defendant; rather it requires a court to assess costs against all convicted defendants." *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8. In *White*, the court held that "a trial court may assess court costs against an indigent defendant convicted of a felony as part of the sentence." *Id*. at paragraph one of the

syllabus. Therefore, a "defendant's financial status is irrelevant to the imposition of court costs." *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, 871 N.E.2d 589, ¶ 3.

{¶18} Bonton's counsel was not ineffective for failing to file an affidavit of indigency or file a motion to waive court costs. A review of the sentencing entry shows that the trial court found Bonton to be indigent for purposes of appointing appellate counsel. However, the court nonetheless required Bonton to pay the court costs. Therefore, the fact that Bonton is indigent was not a factor the trial court found relevant to imposing the court costs. *See State v. Minifee*, 8th Dist. Cuyahoga No. 99202, 2013-Ohio-3146 (trial court's imposition of court costs in spite of the fact that defendant was indigent was not an abuse of discretion); *State v. Vanderhorst*, 8th Dist. Cuyahoga No. 97242, 2012-Ohio-2762 (the fact that the court found defendant indigent for purposes of appointing appellate counsel, yet still imposed court costs, shows the court would not have waived court costs even if motion was filed.)

{¶19} In fact, at sentencing, the trial court, stated:

> And also as part of the punishment here, you're going to have to pay the costs of the prosecution, the cost of the attorney fees. You're going to have to pay the supervision fee. All right. That's part of my gig here. It's part of your punishment.
>
> You pay all the costs of everything involved, you successfully complete probation, you won't see me. You'll be done. Are you with me?

Tr. 498.

{¶20} Because the trial court viewed the payment of court costs as part of Bonton's punishment, counsel's failure to file an affidavit of indigency for purposes of waiving court costs did not result in prejudice. As this court held in *Vanderhorst*, 8th Dist. Cuyahoga No. 97242, 2012-Ohio-2762:

> A claim of ineffective assistance of counsel in conjunction with the imposition of costs will be rejected on appeal where the defendant makes "no demonstration that a 'reasonable probability' exists that the lower court would have waived payment of the costs" if such motion had been filed.

Id. at ¶ 78, citing *State v. Maloy*, 6th Dist. Lucas No. L-10-1350, 2011-Ohio- 6919, ¶ 12. Therefore, because no prejudice resulted, Bonton's counsel was not ineffective. Bonton's first assigned error is overruled.

Insufficient Evidence and Manifest Weight of the Evidence

{¶21} We will address Bonton's second and third assigned errors together because both argue that Bonton's convictions were not supported by sufficient evidence. In his third assigned error, Bonton also argues that his convictions were against the manifest weight of the evidence.

{¶22} We will first address Bonton's argument that his convictions were not supported by sufficient evidence. 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. Crim.R. 29(A) and sufficiency of evidence review require the same analysis. *State v. Mitchell*, 8th Dist. Cuyahoga No. 95095, 2011-Ohio-1241, 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, citing *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

{¶23} 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, citing *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶24} Bonton was convicted of aggravated menacing, a first-degree misdemeanor, pursuant to R.C. 2903.21(A). R.C. 2903.21(A) provides in pertinent part:

> (A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family. * * *.

{¶25} Bonton argues there was insufficient evidence to support his conviction for aggravated menacing because although he and the victim were arguing, there was no

actual physical harm or threat of physical harm and no evidence that the victim believed that Bonton would cause serious physical harm.

{¶26} The evidence supported that Bonton made two threats. He threatened to beat the victim and, also, according to the mother's written statement, picked up the gun and cocked it while threatening to shoot the victim. Although the victim testified that she did not feel threatened by Bonton, the responding officers testified that the victim seemed scared when they arrived and was reluctant to talk. Also, the fact that the mother saw her with scissors while standing on the bed shows she was frightened.

{¶27} Moreover, although the victim stated that she told her sister to call the police because she was "aggravated," she admitted on cross-examination that she did not normally call the police when aggravated. The 911 call was played at trial and indicated that the victim's sister was scared that Bonton was going to hurt the victim. This supports the state's contention that the call to the police was due to more than aggravation. Additionally, the officers testified that when they arrived on the scene, the sister was "frantic," "hysterical," "shaking," and "crying." She also refused to accompany the officers to the apartment because she was scared. Therefore, there was sufficient evidence to support Bonton's conviction for aggravated menacing.

{¶28} Bonton was also convicted of receiving stolen property, a fourth-degree felony. R.C. 2913.51(A), prohibiting receiving stolen property, provides that "no person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft

offense." Bonton contends that the state failed to produce evidence that he knew or had reasonable cause to believe the gun was stolen.

{¶29} Absent an admission by a defendant, whether there was reasonable cause for a defendant to know if an item was stolen can only be shown by circumstantial evidence. *See State v. Hankerson*, 70 Ohio St.2d 87, 92, 434 N.E.2d 1362 (1982). In *State v. Woods*, 8 Ohio App.3d 56, 455 N.E.2d 1289 (8th Dist.1982), we held:

> It has long been established in Ohio that the unexplained possession by a defendant of recently stolen property may give rise to a permissive inference from which a jury may conclude, beyond a reasonable doubt, that the accused is guilty of theft.

{¶30} Factors to be considered in determining whether reasonable minds could conclude whether a defendant knew or should have known property has been stolen include: (a) the defendant's unexplained possession of the merchandise; (b) the nature of the merchandise; (c) the frequency with which such merchandise is stolen; (d) the nature of the defendant's commercial activities; and, (e) the relatively limited time between the theft and the recovery of the merchandise. *See State v. Davis*, 49 Ohio App.3d 109, 112, 550 N.E.2d 966 (8th Dist.1988), quoting *State v. Brooks*, 8th Dist. Cuyahoga No. 50384, 1986 Ohio App. LEXIS 5735 (Feb. 27, 1986).

{¶31} No evidence was presented regarding where Bonton obtained the gun. Therefore, reliance on circumstantial evidence is necessary. The officers testified that two months before the incident, the gun was stolen a half-mile from the victim's

apartment. The owner of the gun testified that he did not give Bonton permission to possess the gun. Additionally, the victim's testimony established that Bonton obtained the gun around the time the gun was stolen from the car. Pursuant to this circumstantial evidence, the jury could have inferred Bonton's knowledge that the gun was stolen.

{¶32} Bonton also argues his convictions were against the manifest weight of the evidence. 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.

{¶33} 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.*

{¶34} Bonton contends the victim's testimony that she was not afraid of Bonton's threats constituted credible evidence. However, the victim's testimony loses credibility when the 911 tape of the sister's call to the police is played. The sister's plea for help and her emotional state upon the arrival of the police showed this was more than a simple verbal argument and that she believed that the victim was in danger of being harmed. Moreover, the officers stated that the victim seemed scared when they arrived. The victim testified that the gun just fell out of the closet and that Bonton had the gun in his hand because he was picking it up to put away. However, in the mother's written statement, she told police that Bonton purposely retrieved the gun from the closet and cocked it. This indicates he intended to use it, not put it away.

{¶35} Bonton also contends that his receiving stolen property conviction is against the manifest weight of the evidence. However, he merely reiterates his arguments from his sufficiency argument that we have found to be without merit. Accordingly, Bonton's second and third assigned errors are overruled.

{¶36} 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 Cuyahoga County Court of Common Pleas 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
EILEEN T. GALLAGHER, J., CONCUR
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