[Cite as *State v. Povroznik*, 2018-Ohio-1516.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105870

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANATOLY POVROZNIK

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTIONS AFFIRMED; REMANDED
FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-613724-A

BEFORE: McCormack, J., E.A. Gallagher, A.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: April 19, 2018

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TIM McCORMACK, J.:

{¶1} Defendant-appellant Anatoly Povroznik ("Povroznik") appeals his convictions and sentence, arguing that his convictions were both against the manifest weight of the evidence and supported by insufficient evidence and that the court erred in sentencing him separately for felonious assault, domestic violence, and child endangering. For the reasons that follow, we affirm Povroznik's convictions and remand for resentencing.

Procedural and Substantive History

{¶2} On January 13, 2017, Povroznik was driving on Interstate 480 in Cleveland, Ohio. His wife, Dorothy, was in the passenger seat and their then-13-year-old son, D.P., was in the backseat.

{¶3} Povroznik and Dorothy began arguing. According to Dorothy and D.P., Povroznik looked at her, said "I'm going to kill you," and then swerved and flipped the vehicle. According to Povroznik's testimony, the vehicle flipped when he abruptly swerved to avoid another vehicle on the road. Povroznik also testified that Dorothy was swearing at him and hitting him and this caused him to grab the steering wheel in such a way that the vehicle swerved and flipped.

{¶4} Ultimately, Povroznik's vehicle landed upside down on the interstate. Povroznik, Dorothy, and D.P. all sustained injuries as a result of the incident. Several individuals in nearby vehicles witnessed the accident, but no other vehicles were involved.

{¶5} Povroznik was indicted on February 6, 2017, on two counts of felonious assault, in violation of R.C. 2903.11(A)(2), with a furthermore clause; two counts of domestic violence, in violation of R.C. 2919.25(A), with a furthermore clause; and one count of endangering children, in violation of R.C. 2919.22(A).

{¶6} A jury trial began on March 28, 2017. The state called Dorothy, D.P., and one of the family's other children as witnesses in addition to several individuals who witnessed the incident, responding law enforcement officers, and the detective assigned to the case. Povroznik testified on his own behalf, and the defense also called his sister as a witness, although her testimony was ultimately stricken.

{¶7} On March 30, 2017, the jury returned guilty verdicts for all five counts of the indictment.

{¶8} On April 17, 2017, the trial court held a sentencing hearing. The court heard from the prosecutor, two of Povroznik's daughters, defense counsel, and Povroznik himself. The court sentenced Povroznik to seven years each on the felonious assault counts, to run consecutive to each other. For the domestic violence and endangering children counts, the court sentenced Povroznik to sentences of 15 months, 15 months, and 180 days, respectively, to run concurrent to the felonious assault sentences, for an aggregate term of 14 years.

{¶9} Povroznik now appeals, presenting two assignments of error for our review.

Law and Analysis

{¶10} In his first assignment of error, Povroznik argues that his convictions were against the manifest weight of the evidence and was not supported by sufficient evidence. Because these claims require different standards of review, we will address them separately.

{¶11} In Povroznik's second assignment of error, he asserts that the trial court erred by not merging his offenses for sentencing.

Sufficiency

{¶12} Povroznik argues that the state failed to produce sufficient evidence to support his convictions. Specifically, he asserts that the state failed to present evidence to establish that the act of flipping his vehicle was committed with the requisite intent.

{¶13} A sufficiency challenge requires a court to determine whether the state has met its burden of production at trial and to consider not the credibility of the evidence but whether, if credible, the evidence presented would support a conviction. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). 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. Jenks*, 61 Ohio St.3d 259, 273, 574 N.E.2d 492 (1991), citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶14} We find that the state clearly met its burden with respect to establishing Povroznik's criminal intent. The two passengers in the car at the time of the accident both testified that Povroznik was angry and swearing. They also testified that immediately before the car flipped, he stated that he was going to kill Dorothy. Further, there was testimony from Povroznik's passengers and other drivers on the road at the time that there was no vehicle near Povroznik's vehicle that cut him off before the crash. The only evidence at trial that would suggest that the car flipping was an accident is Povroznik's own testimony. After viewing all of the evidence in the light most favorable to the state, we find that any rational trier of fact could have found Povroznik guilty of felonious assault, domestic violence, and child endangering beyond a reasonable doubt.

Manifest Weight

{¶15} Unlike a challenge to the sufficiency of evidence, a manifest weight challenge attacks the quality of the evidence and questions whether the state met its burden of persuasion at trial. *State v. Hill*, 8th Dist. Cuyahoga No. 99819, 2014-Ohio-387, ¶ 25, citing *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13. When reviewing a manifest weight challenge, a court reviews the entire record, weighing all evidence and reasonable inferences and considering the credibility of the witnesses, to determine whether the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *Thompkins* at 387.

{¶16} After a thorough review of the record, we conclude that the jury did not clearly lose its way, because Povroznik's conviction was not against the manifest weight of the evidence. The only element in dispute here is Povroznik's intent. We established above that the state presented sufficient evidence that Povroznik flipped the car intentionally. Given the totality and nature of the evidence, we must also conclude that the evidence was credible and persuasive.

{¶17} Povroznik essentially asserts now, and asserted at sentencing, that his wife and child were lying. We are not persuaded by this assertion. It is clear that Anatoly and Dorothy Povroznik had a confrontational marriage, but even considering this context, we find Dorothy's testimony relative to her husband's was credible. This finding is supported by the consistency between Dorothy's testimony and D.P.'s testimony, the fact that the testimony of other witnesses supported Dorothy's and D.P.'s version of events, and the credibility of other evidence put forth by the state.

{¶18} Specifically, we note that the state presented evidence in the form of photographs of text messages between Povroznik and D.P. exchanged after the accident. In the messages, Povroznik repeatedly stated that he loves D.P. and he repeatedly apologized, stating "I am so

sorry that happened while you was in the car." Povroznik also asks D.P. for forgiveness for what happened that day, stating "that does not have anything to do with you" and "this issue is between me and your mother." He further stated via text message, and confirmed in his testimony, that if Dorothy had "kept her mouth shut," the accident would never have happened. All of this further supports a conclusion that Povroznik acted intentionally when his vehicle flipped.

{¶19} Finally, and perhaps most importantly, we must note internal inconsistencies in Povroznik's own testimony and his admission that he lied to a police officer. Povroznik told the officer who responded to the scene that he had swerved to avoid another vehicle, lost control, and his car flipped. At trial, Povroznik testified that Dorothy was swearing at him, hitting him, and at some point reached across him, causing him to lean back and then grab the wheel. Povroznik ultimately admitted in his testimony that he lied to the police officer who initially responded to the scene, omitting any details about Dorothy hitting him or otherwise interfering with his operation of the vehicle, in order to protect her. A minor inconsistency is not necessarily fatal to a witness's credibility. However, an inconsistency concerning a fundamental aspect of the case, coupled with Povroznik's admission that he lied to a law enforcement officer, critically undermines the weight of his testimony. Therefore, this assignment of error is without merit.

Merger

{¶20} In his second assignment of error, Povroznik argues that he was subjected to multiple punishments, in violation of the double jeopardy clause of the U.S. Constitution and R.C. 2941.25, because the trial court did not merge his offenses.

{¶21} R.C. 2941.25 states:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶22} When considering whether offenses are allied offenses of similar import under R.C. 2941.25, courts must first take into account the conduct of the defendant. *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 25. Courts employ a three-part test in determining whether offenses must be merged for sentencing under R.C. 2941.25, considering whether the offenses were dissimilar in import or significance, whether they were committed separately, and whether they were committed with separate animus or motivation. *State v. McKinney*, 8th Dist. Cuyahoga No. 105136, 2017-Ohio-7075, ¶ 3, quoting *Ruff* at ¶ 20. An affirmative answer to any of the three inquiries is sufficient to impose separate sentences. *State v. Esner*, 8th Dist. Cuyahoga No. 104594, 2017-Ohio-1365, ¶ 6. The conduct, the animus, and the import must all be considered. *Ruff* at ¶ 31. In explaining when offenses have a similar "import," the Ohio Supreme Court has focused on the harm caused, finding that when the defendant's conduct put more than one individual at risk, that conduct could support multiple convictions because the offenses were of dissimilar import. *Ruff* at ¶ 23, citing *State v. Jones*, 18 Ohio St.3d 116, 118, 480 N.E.2d 408 (1985).

{¶23} Here, it cannot be said that all of the offenses were of dissimilar import. Because there were two separate victims, it is clear that the two felonious assault convictions were not

allied offenses of similar import. The same is true of the two domestic violence convictions. Examining the convictions as they relate to each victim, however, we find that the felonious assault and domestic violence counts are allied offenses as to each respective victim.

{¶24} The origin of our analysis here is the offenses of which Povroznik was convicted. Povroznik was convicted of domestic violence in violation of R.C. 2919.25(A), which makes it a crime to "knowingly cause or attempt to cause physical harm to a family or household member." He was also convicted of felonious assault in violation of R.C. 2903.11(A)(2), which makes it a crime to "knowingly * * * cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance." Because both offenses relate to physical harm, our analysis of Povroznik's conduct and the harm he caused is likewise constrained.

{¶25} With the respect to the conduct, it is undisputed here that the offenses were not committed separately. The same conduct — flipping a vehicle — was the basis for all five counts of the indictment. The physical injuries sustained constituted the harm caused by both offenses committed against D.P. With respect to the import, or harm, the felonious assault and domestic violence offenses committed against D.P. did not cause separate and distinct harms. The same is true as to the harm caused by the felonious assault and domestic violence charges committed against Dorothy.

{¶26} We turn next to the endangering children offense. The state asserts in its brief that the endangering children and assault charges do not merge. In support of this assertion, the state cites a case for its holding that because felonious assault and child endangering have different culpable mental states, they are not allied offenses of similar import. *State v. Clark*, 8th Dist. Cuyahoga No. 96207, 2016-Ohio-2825, ¶ 39. However, this court recognized in *Clark*

that at the time of the convictions in that case, the controlling law regarding allied offenses was different, and the controlling law at the time of the appeal was not retroactive. *Id*. Further, the controlling law has continued to evolve since *Clark*. Therefore, in determining whether felonious assault and endangering children are allied offenses of similar import, we must apply the controlling law from *Ruff*.

{¶27} Under *Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, we consider whether the offenses were committed with separate conduct, import, or animus. Nothing in the record indicates that conduct in addition to flipping the car constituted endangering children. At no point during trial did the state point to separate conduct by which Povroznik recklessly created a substantial risk to D.P.'s health or safety. Therefore, we must conclude that the offenses were committed with the same conduct.

{¶28} Similarly, there is no additional, compounding evidence in the record that D.P. suffered separate harms as a result of Povroznik's commission of felonious assault and endangering children. Therefore, we must conclude that the offenses had a similar import.

{¶29} Finally, nothing in the record indicates that Povroznik acted with a separate animus or motivation with respect to each offense. For the foregoing reasons, we find that the trial court erred by failing to merge Povroznik's offenses as to each victim and sustain Povroznik's second assignment of error. This case is remanded for resentencing.

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 common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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TIM McCORMACK, JUDGE

EILEEN A. GALLAGHER, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR