[Cite as *State v. Sudderth*, 2009-Ohio-3363.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 24448
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
BRIAN KEVIN SUDDERTH	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 07 09 2911

DECISION AND JOURNAL ENTRY

Dated: July 8, 2009

DICKINSON, Judge.

INTRODUCTION

{¶1} While coming home from a bowling alley, Brian Sudderth allegedly pinned Michelle Miller down in the front seat of a pickup truck and began striking her in the face. His blows broke Ms. Miller's nose and pushed her left eyeball down through the bone that forms the bottom of the eye socket. The Grand Jury indicted him for domestic violence and felonious assault, and a jury convicted him of domestic violence and aggravated assault. The trial court sentenced him to seventeen months in prison. Mr. Sudderth has appealed, arguing that the State failed to prove venue or that he and Ms. Miller were household members and that the evidence shows he only hit Ms. Miller in self defense. This Court affirms because there was sufficient evidence to convict Mr. Sudderth of aggravated assault and domestic violence, and his convictions are not against the manifest weight of the evidence.

FACTS

{¶2} On the evening of August 27, 2007, Mr. Sudderth and Ms. Miller went out to a bar then to a bowling alley. They drank throughout the evening and, because they were heavily intoxicated when they left the bowling alley, one of Mr. Sudderth's friends drove them home. By the time they got to the apartment building where they lived, Ms. Miller had two black eyes and a broken nose. A neighbor who learned of her condition took her into his house and called 911.

{¶3} Officer Joseph Storad was the first officer dispatched to the neighbor's house. He said he spoke to Ms. Miller, who told him that Mr. Sudderth and she had started arguing at the bowling alley. She told him that, on the way home, she was sitting in the front passenger seat of a pickup truck and Mr. Sudderth was in the back seat. She said that, as they were driving, their argument got heated. Mr. Sudderth climbed over the back seat, pinned her against the front passenger door, and punched her in the face multiple times. Ms. Miller later told a different officer and an emergency medical technician that Mr. Sudderth had hit her numerous times. A doctor who treated her at the hospital testified that it was unlikely that a single punch could have done so much damage to her face.

{¶4} At trial, Ms. Miller testified that she provoked Mr. Sudderth. She said she got angry at him because he was ignoring her at the bowling alley. According to her, she started nagging him, leading to their argument. Because she had been drinking, she started "acting crazy" during the drive home. She said she tried to climb into the back seat where Mr. Sudderth was sitting to slap and bite him. She bit the driver of the truck when he tried to separate them. She said she had bitten Mr. Sudderth in the past, sometimes so hard that she caused scarring. She also said that, after Mr. Sudderth punched her one time in the face, she let go of him and

went back to the front seat. According to Ms. Miller, one punch was enough for her to get the point. She further said that she could not remember exactly what she said the night of the incident, but knew that she was angry, hurt, and "wanted the wors[t] to happen to [Mr. Sudderth]."

{¶5} The Grand Jury indicted Mr. Sudderth for felonious assault and domestic violence. At trial, the court also gave an instruction on aggravated assault, and the jury convicted Mr. Sudderth of aggravated assault and domestic violence. Mr. Sudderth has appealed his convictions, assigning two errors.

SUFFICIENCY

{¶6} Mr. Sudderth's first assignment of error is that there was insufficient evidence to convict him of aggravated assault and domestic violence. He has argued that the State failed to prove that the offenses occurred in Summit County or that he and Ms. Miller were "family or household member[s]." He has also argued that the court should have granted his motions for acquittal.

{¶7} Under Rule 29(A) of the Ohio Rules of Criminal Procedure, a defendant is entitled to acquittal on a charge against him "if the evidence is insufficient to sustain a conviction . . . ." Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶33. This Court must determine whether, viewing the evidence in a light most favorable to the prosecution, it could have convinced an average juror of Mr. Sudderth's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991).

{¶8} Regarding Mr. Sudderth's argument that the State failed to prove the offenses occurred in Summit County, Section 2901.12(A) of the Ohio Revised Code provides that venue lies "in the territory of which the offense or any element of the offense was committed." "Although it is not a material element of the offense charged, venue is a fact which must be proved in criminal prosecutions unless it is waived by the defendant." *State v. Headley*, 6 Ohio St. 3d 475, 477 (1983). "The standard of proof is beyond a reasonable doubt, although venue need not be proved in express terms so long as it is established by all the facts and circumstances in the case." *Id.* "[V]enue, like any other fact, can be established by direct or circumstantial evidence." *State v. Smoot*, 9th Dist. No. 16210, 1994 WL 30493 at *3 (Feb. 2, 1994).

{¶9} Officer Storad testified that Ms. Miller told him the argument started at a bowling alley in Springfield Township. From his conversations with Ms. Miller and Mr. Sudderth, he learned the incident "happened inside a truck on State Route 224 and 77 and continued back to the house." Officer Chris Rhoades said he responded to the 911 call as backup and drove to the house where Ms. Miller was located. When the prosecutor asked Officer Rhoades where the house was located in Summit County, the officer answered "Coventry Township."

{¶10} The State presented sufficient circumstantial evidence that the aggravated assault and domestic violence offenses occurred in Summit County. Furthermore, even if there is a question about where the offenses occurred, Section 2901.12(B) provides that, "[if] the offense . . . was committed in [a] . . . motor vehicle, and it cannot reasonably be determined in which jurisdiction [it] was committed, the offender may be tried in any jurisdiction through which the . . . motor vehicle . . . passed." The evidence established, at the very least, that the offenses occurred in a truck and that the truck eventually dropped Ms. Miller and Mr. Sudderth off at an apartment building in Coventry Township, which Officer Rhoades identified as in Summit

County. Accordingly, there was sufficient evidence presented to establish venue. See *State v. Reinhardt*, 9th Dist. No. 08CA0012-M, 2009-Ohio-1297, at ¶19 ("R.C. 2901.12(B) does not require the State to prove the location of the vehicle when the offense itself was committed.").

{¶11} Regarding Mr. Sudderth's argument that there was no evidence that Ms. Miller and he were family or household members, Section 2919.25(A) provides that "[n]o person shall knowingly cause . . . physical harm to a family or household member." The section defines "[f]amily or household member," in part, as "[a] spouse, a person living as a spouse, or a former spouse of the offender" "who is residing or has resided with the offender." R.C. 2919.25(F)(1)(a)(i). It defines "[p]erson living as a spouse" as "a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question." R.C. 2919.25(F)(2). "The essential elements of 'cohabitation' are (1) sharing of familial or financial responsibilities and (2) consortium." *State v. Williams*, 79 Ohio St. 3d 459, paragraph two of the syllabus (1997). "Possible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets. Factors that might establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations." *Id*. at 465.

{¶12} Officer Storad testified that Mr. Sudderth told him that Ms. Miller and he were living together and that she had been his girlfriend for three years. Ms. Miller confirmed that she was Mr. Sudderth's girlfriend and that she was on the lease where Mr. Sudderth and another man lived. She said she got upset with Mr. Sudderth at the bowling alley because other couples "were all together being cozy, and he's all up running around wanting to talk to everybody."

Accordingly, there was sufficient evidence to establish the elements of cohabitation and, therefore, that Mr. Sudderth and Ms. Miller were family or household members under Section 2919.25(A). Mr. Sudderth's first assignment of error is overruled.

MANIFEST WEIGHT

{¶13} Mr. Sudderth's second assignment of error is that his convictions were against the manifest weight of the evidence. When a defendant argues that his convictions are against the manifest weight of the evidence, this Court "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction[s] must be reversed and a new trial ordered." *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986).

{¶14} Mr. Sudderth has argued that the evidence showed that Ms. Miller was the primary aggressor and that he struck her in self-defense. He has also argued that the police should have done more investigation. In particular, he has argued that they should have taken photographs of the truck in which the incident occurred and followed up with Ms. Miller about whether what she said while she was intoxicated was accurate.

{¶15} Although Ms. Miller testified at trial that she attacked Mr. Sudderth, the jury could have found that the physical evidence correlated more closely with what she told the police on the night of the incident. While Ms. Miller said at trial that Mr. Sudderth hit her one time, the doctor who treated her at the hospital opined that he could not have generated enough force to cause a blowout fracture to the floor of Ms. Miller's eye socket and break the bones in her nose with only one punch. The jury, therefore, reasonably could have determined that what Ms. Miller told police after the incident was more credible than what she said at trial. It did not lose

its way and create a manifest miscarriage of justice when it convicted Mr. Sudderth of aggravated assault and domestic violence. Mr. Sudderth's second assignment of error is overruled.

CONCLUSION

{¶16} Mr. Sudderth's convictions of aggravated assault and domestic violence are supported by sufficient evidence and are not against the manifest weight of the evidence. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
MOORE, P. J.
CONCUR

APPEARANCES:

RONALD T. GATTS, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and RICHARD S. KASAY, assistant prosecuting attorney, for appellee.