

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-09-1138

Appellee

Trial Court No. CR0200803805

v.

Anthony Bishop

**DECISION AND JUDGMENT**

Appellant

Decided: May 14, 2010

\* \* \* \* \*

Julia R. Bates, Lucas County Prosecuting Attorney, and  
Ian B. English, Assistant Prosecuting Attorney, for appellee.

Dan M. Weiss, for appellant.

\* \* \* \* \*

COSME, J.

{¶ 1} Anthony Bishop appeals from the judgment of the Lucas County Court of Common Pleas following a jury trial in which the jury found him guilty of domestic violence. Appellant asserts that his conviction is against the manifest weight of the evidence because the jury acquitted him of the first charge of felonious assault,

deadlocked on the second charge of felonious assault, and the victim's testimony was not credible. The fact that appellant was found guilty of domestic violence but not guilty of felonious assault did not result in inconsistent verdicts. Accordingly, appellant's sole assignment of error is not well-taken.

## I. BACKGROUND

{¶ 2} On December 2, 2008, appellant was indicted on two counts of felonious assault, domestic violence, kidnapping, and abduction. The indictment asserted that appellant, who had previously been convicted of domestic violence in 1997, had beat his girlfriend, Jessica Napier, over the course of six days. Prior to commencement of trial, the kidnapping and abduction charges were dismissed at the state's request.

{¶ 3} At trial, the state presented evidence that, on Sunday, November 30, 2008, at approximately 6:30 p.m., Toledo Police were dispatched to 1312 Nevada Street following a 911 call. The caller, Jessica Napier, informed the officers that she had been beaten by appellant - her boyfriend. Napier alleged that the beating began several days earlier, on Monday, when appellant received a letter from her 13-year-old son's father.

{¶ 4} Napier testified that appellant tied her hands behind her back, placed a sock in her mouth, tied a sock around her mouth, choked her, struck her in the head with brass knuckles, stomped on her, and then put her in the closet, blocking the doors with a dresser. She alleges that for six days, she was struck, stomped on, urinated on, hit with a cable wire, and held in the closet without food or medicine, and was not permitted to use the bathroom.

{¶ 5} Napier further testified that she was allowed out of the closet several times during that period in order to get her young children (ages eight, six, and five) ready for school, help with their homework, help them pack for a visit to their cousins for Thanksgiving, and take a shower. She stated that the children did not see the beatings but would have heard them.

{¶ 6} On Sunday, November 30, 2008, Napier alleged that appellant let her out of the closet and told her that he was sorry - that they should go for a ride. He took her outside to the car and tried to convince her to get in the trunk of the car. After she refused, he locked her out of the house and told her to leave. He then drove around the block several times, stopping only to ask her why she was still there. When he left again, she saw him turn to go downtown. At that time, she retrieved a hidden house key and called 911. She also called her church and asked someone to come to the house.

{¶ 7} Officer Mannebach, from the Toledo Police Department, testified that when she met Napier, she observed cuts and bruises, but that those injuries did not appear to be fresh. Napier went to the YWCA shelter and received treatment for her injuries at St. Vincent's Hospital. She had a cut to her forehead, a cut to her scalp, bruises on her thighs, arms and face. She also had a fractured wrist and a dislocated finger.

{¶ 8} At trial, one of appellant's former girlfriends testified that appellant had told her of an argument between him and Napier during the week of Thanksgiving where Napier fell to the ground.

{¶ 9} At the conclusion of the trial, the jury found appellant guilty of domestic violence, not guilty of the first charge of felonious assault, and could not reach a verdict on the second charge of felonious assault.

## II. ASSIGNMENT OF ERROR

{¶ 10} Appellant, in his sole assignment of error, asserts that:

{¶ 11} "The trial court's decision was against the manifest weight of the evidence and it erred in finding appellant guilty of domestic violence."

{¶ 12} Appellant contends his conviction is against the manifest weight of the evidence because of an inconsistency between verdicts. He also contends that Napier's testimony was not credible and was not supported by the testimony of the officer who responded to the 911 call.

{¶ 13} We disagree

### A. Inconsistent Verdicts

{¶ 14} Although appellant's sole assignment of error is primarily a manifest weight of the evidence argument, we first address the issue of inconsistent verdicts.

{¶ 15} Appellant argues that because the verdicts both contain the essential element of physical harm, to find him guilty of domestic violence and not guilty of felonious assault is illogical and shows that the jury either misunderstood its job and instructions, or made its findings on reasons other than the evidence.

{¶ 16} Accordingly, we begin our analysis with a review of the charged offenses. We do not find any support for appellant's claims that the jury was operating under any misunderstanding or that it based its decisions on anything other than the evidence.

{¶ 17} Domestic violence, R.C. 2919.25(A) provides: "No person shall knowingly cause or attempt to cause physical harm to a family or household member." "Physical harm" is defined as "any injury, illness, or other physiological impairment, regardless of severity or duration." R.C. 2901.01(A)(3).

{¶ 18} Felonious assault, R.C. 2903.11(A)(1) provides a higher standard, that: "No person shall knowingly \* \* \* Cause serious physical harm to another \* \* \*."

{¶ 19} "Serious physical harm to persons' means any of the following: (1) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment; (2) Any physical harm which carries a substantial risk of death; (3) Any physical harm which involved some permanent incapacity, whether partial or total, or which involves some temporary, substantial incapacity; (4) Any physical harm which involves some permanent disfigurement, or which involves some temporary, serious disfigurement; (5) Any physical harm which involves acute pain of such duration as to result in substantial suffering, or which involves any degree of prolonged or intractable pain." R.C. 2901.01(5).

{¶ 20} Unlike domestic violence, which provides for physical harm, felonious assault provides for serious physical harm. During trial, Napier testified as to the extent

of her injuries, her hospital records were admitted into evidence, but there was no testimony by the treating physician of the type, extent or severity of those injuries.

{¶ 21} A finding of guilty as to the element of felonious assault is not necessary for a finding of guilty as to the domestic violence. *State v. Wilson*, 6th Dist. No. L-01-1196, 2002-Ohio-5920, ¶ 38. See *State v. Hicks* (1989), 43 Ohio St.3d 72, 78; *State v. Adams* (1978), 53 Ohio St.2d 223, 228, vacated on other grounds (1978), 439 U.S. 811, 99 S.Ct. 69, 58 L.Ed.2d 103; *United States v. Powell* (1984), 469 U.S. 57, 68, 105 S.Ct. 471, 83 L.Ed.2d 461. That rule applies here. Appellant need not have been convicted of either count of felonious assault to have his conviction for domestic violence stand. See, e.g., *State v. Ryder* (Aug. 30, 2000), 9th Dist. No. 99CA007337.

{¶ 22} Here, the jury clearly found that there was evidence that appellant had knowingly caused or attempted to cause physical harm to Napier. However, the jury then found that the evidence was insufficient to show that the physical harm rose to the level of "serious physical harm" as provided under R.C. 2903.11(A)(1). Based on the foregoing, we find that there was no inconsistency of verdicts in this case and, accordingly, appellant's claim of an inconsistent verdict is not well-taken.

#### B. Manifest Weight of the Evidence

{¶ 23} The manifest weight of the evidence indicates that the greater amount of credible evidence supports one side of an issue more than the other. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶ 24} The appellate court considers all of the evidence, sits as a "thirteenth juror," and decides whether a greater amount of credible evidence supports an acquittal such that the jury "clearly lost its way" in convicting the appellant. *Thompkins*, 78 Ohio St.3d at 387. See *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652. See, also, *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 25} The appellate court, "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Id.* at 387, quoting *Martin*, 20 Ohio App.3d at 175.

{¶ 26} In *State v. York*, 6th Dist. No. WD-03-017, 2003-Ohio-7249, we observed, "Questions regarding the weight of evidence and credibility of witnesses are matters for the trier of fact. The factfinder can observe the body language, evaluate voice inflections, observe hand gestures, perceive the interplay between the witness and the examiner, and watch the witness's reaction to exhibits and the like. Determining credibility from a sterile transcript is far more difficult. A reviewing court must, therefore, accord due deference to the credibility determinations made by the factfinder. *State v. DeHass* (1967), 10 Ohio St.2d 230, at paragraph one of syllabus."

{¶ 27} A review of the record supports the jury's finding of domestic violence as defined in R.C. 2919.25(A). See R.C. 2901.01(A)(3) "physical harm." Napier had a cut to her forehead, a cut to her scalp, bruises to her thighs, arms and face, a fractured wrist and dislocated finger. Appellant hit Napier with brass knuckles, stomped on her with steel-tipped boots, bound her hands behind her back, gagged her by putting a sock into her mouth, and hit her with cable wire. Officer Mannebach testified that the injuries were not fresh, consistent with Napier's testimony that she had been hit and kicked several days earlier. Appellant threatened Napier with physical harm by stating, "Bitch, die." Later, appellant tried to convince Napier to get into the trunk of the car and go for a ride.

{¶ 28} Although appellant questions Napier's credibility by asking why she did not run away or break out of the closet, Napier testified that she could not be sure that appellant was not still at home. Appellant failed to demonstrate that Napier's testimony was inconsistent or discredited by the testimony of other witnesses. A witness for appellant testified that appellant admitted to arguing with Napier that week, and that Napier had fallen to the ground during the argument. Appellant's witnesses lacked credibility. The discrepancies in Napier's actions alleged by appellant are immaterial to the charge of domestic violence. Finally, appellant had a previous conviction for domestic violence. The elements of domestic violence were present.

{¶ 29} Based on the entire record, we find appellant's conviction is supported by the manifest weight of the evidence. Appellant's assignment of error is not well-taken.

{¶ 30} Wherefore, based upon the foregoing, this court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Keila D. Cosme, J.  
CONCUR.

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JUDGE

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