[Cite as *State v. Foster*, 2021-Ohio-1155.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- DAVID BRADLEY FOSTER Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P. J. Hon. John W. Wise, J. Hon. Earle E. Wise, Jr., J. Case No. 2020 CA 00133 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 2019 CR 02295
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 1, 2021

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
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Wise, John, J.

{¶1} Appellant David Bradley Foster appeals his convictions on one count of assault and one count of kidnapping, following a jury trial in the Stark County Court of Common Pleas.

{¶2} Appellee is the State of Ohio.

STATEMENT OF THE FACTS

{¶3} Appellant David Foster was indicted by the Stark County Grand Jury for one count of assault [M1] and one count of kidnapping [F1].

{¶4} The matter proceeded to a jury trial. At trial the State presented the testimony of three witnesses, including the victim, M.K., Jackie Robinson, and the responding officer, Officer Keith Foster from the Canton Police Department. At trial, the jury heard the following testimony:

{¶5} On September 24, 2019, the victim, M.K., a registered respiratory nurse, went to Appellant's home to replace a CPAP machine. After installing the machine, Appellant escorted M.K. to the front door of his apartment and said he would open and close the door to prevent his cat from getting outside. (T. at 173). On this occasion, M.K. was able to leave without incident.

{¶6} Appellant then made numerous calls to M.K.'s employer complaining that the machine was broken and requesting M.K. for a maintenance check of the machine. (T. at 174).

{¶7} On November 11, 2019, M.K. returned to Appellant’s home to examine the CPAP machine. M.K. determined that there was nothing wrong with the machine and became suspicious about Appellant’s motivation for requesting that she return for a home

visit. After switching out the CPAP with a new machine and getting the required signatures for the service call, M.K. walked toward the front door to leave. Appellant walked with her and upon reaching the door, Appellant locked the door, reached up and put his arms around M.K.'s neck, punched her in the face, and dropped himself to the floor, landing on top of her. (T. at 176).

{¶8} When M.K. began screaming, Appellant told her to shut up, grabbed her hair and began to repeatedly bang her head onto the floor. (T. at 177). M.K. saw blood dripping onto the floor and stated that she knew she had to get out of the apartment. M.K. was wearing a coat and tried to pull her cell phone from the coat pocket to call 9-1-1. Appellant grabbed the phone and threw it across the room. M.K. then tried to grab her work bag for her work phone, but Appellant kicked the bag away. (T. at 177-178).

{¶9} M.K. testified that because Appellant was a large man, weighing approximately 500 pounds, she asked him to get off of her, and Appellant told her to "shut up". (T. at 177).

{¶10} Using her coat, M.K. managed to wiggle out from under Appellant, losing her shoes in the process. She then managed to get up and jump up onto a freezer which was in the foyer area. Appellant got up and started hitting M.K. with the handle of a broom or mop. The front door had two locks and as M.K. would get one unlocked, Appellant would quickly relock the door. M.K. was eventually able to get both locks unlocked at the same time, jerk the door slightly open, push her shoulder into the opening and escape from the apartment. (T. at 178). She then ran to a nearby house, and the neighbor called 911. M.K. told the jury, "I thought I was going to die". (T. at 198).

{¶11} Officer Keith Foster from the Canton Police Department responded to the scene. Officer Foster spoke with both M.K. and Appellant. Office Foster observed that M.K. appeared to be in shock. He observed that she was bleeding from the mouth and wasn't wearing shoes.

{¶12} Officer Foster found Appellant sitting on his front porch. Appellant told the officer that he thought he had a stroke. Officer Foster testified that Appellant did not appear to be suffering from any signs of a medical emergency.

{¶13} Officer Foster also observed and photographed Appellant's knuckles, which had injuries consistent with striking something or someone. Officer Foster then went into the apartment and found M.K.'s two phones and her bag. He also observed what appeared to be a broom laying on the floor. Finding the victim's statements to be consistent with the condition of the scene and the physical injuries, the officer placed Appellant under arrest and transported M.K. to the hospital. (T. at 123-140).

{¶14} Jackie Robinson, Appellant's neighbor and friend, came to the apartment after he heard a woman screaming for help saying "'stop, don't do that, help me". When he arrived, he saw M.K. trying to get out and observed her running from Appellant's residence. (T. at 159-162).

{¶15} M.K. testified that she had two black eyes, a split lip, swollen cheek bones, bruises over her entire body, ongoing hip pain, and a hairline fracture to her left rib. (T. at 182). Her physical injuries were documented by photographs and medical records. The medical records indicated that M.K. was treated for head and face abrasions and bruising. An x-ray revealed that M.K. suffered a hairline fracture in her left rib. Photographs of the

injuries and hospital records were provided to the jury. (T. at 183-187). The jury also received into evidence body-cam footage of the scene.

{¶16} Appellant did not present any evidence or testify in his own defense but did request, and was granted, a jury instruction on kidnapping's lesser included offense of abduction.

{¶17} The jury deliberated for a little over one hour, reaching a verdict of guilty of assault and kidnapping.

{¶18} The trial court sentenced Appellant to an indefinite prison term of eight (8) to twelve (12) years.

{¶19} Appellant now appeals, raising the following errors for review:

ASSIGNMENTS OF ERROR

{¶20} "I. THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT THE APPELLANT'S CRIMINAL RULE 29, MOTION FOR ACQUITTAL.

{¶21} "II. THE TRIAL COURT'S FINDING OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

I., II.

{¶22} As Appellant's assignments of error are interrelated, we shall address them together.

{¶23} In his two assignments of error, Appellant claims the trial court erred in denying his Crim.R. 29 motion for acquittal, and that his convictions are against the sufficiency and manifest weight of the evidence. We disagree.

{¶24} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in 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.' " *State v. Thompkins*, 78 Ohio St. 3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, *quoting State v. Martin*, 20 Ohio App. 3d 172, 175, 485 N.E.2d 717 (1983).

{¶25} An appellate court's function when reviewing the sufficiency of the evidence is to determine 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, 574 N.E.2d 492, paragraph two of the syllabus (1991).

{¶26} A Crim.R. 29(A) motion for acquittal tests the sufficiency of the evidence presented at trial. *State v. Blue*, 5th Dist. Stark No. 2001CA00250, 2002-Ohio-351, *citing State v. Williams*, 74 Ohio St.3d 569, 576, 1996-Ohio-91, 660 N.E.2d 724; *State v. Miley*, 114 Ohio App.3d 738, 742, 684 N.E.2d 102 (4th Dist.1996). Crim.R. 29(A) allows a trial court to enter a judgment of acquittal when the state's evidence is insufficient to sustain a conviction. A trial court should not sustain a Crim.R. 29 motion for acquittal unless, after viewing the evidence in a light most favorable to the state, the court finds no rational finder of fact could find the essential elements of the charge proven beyond a reasonable doubt. *State v. Franklin,* 5th Dist. Stark No. 2007-CA-00022, 2007-Ohio-4649 at ¶ 12, *citing State v. Dennis*, 79 Ohio St.3d 421, 1997-Ohio-372, 683 N.E.2d 1096.

{¶27} Appellant herein was convicted of assault and kidnapping.

{¶28} R.C. §2903.13(A) defines assault in pertinent part as follows:

(A) "No person shall knowingly cause or attempt to cause physical harm to another."

{¶29} R.C. §2905.01(B)(2) sets forth the elements of kidnapping pertinent to his case as follows:

***

(B) No person, by force, threat, or deception, *** shall knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim:

***

(2) Restrain another of the other person's liberty.

{¶30} R.C. §2901.01(A) defines both serious physical harm and substantial risk as follows.

(A) As used in the Revised Code:

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(5) "Serious physical harm to persons" means any of the following:

(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

(b) Any physical harm that carries a substantial risk of death;

(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

***

(8) "Substantial risk" means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist.

{¶31} Appellant argues that no "substantial risk or physical harm" occurred to the victim M.K. as a result of his actions in falling on her. Appellant further argues that her liberty was not restrained as a result of his fall.

{¶32} At trial, the jury heard testimony from the victim detailing how Appellant deliberately prevented her from leaving the apartment, how he purposely wrapped his arms around her neck, dropped to the floor and fell on top of her, punched her in the face, banged her head on to the floor repeatedly, and then hit her with a mop handle. On cross-examination, the victim stated that she did not believe that Appellant was suffering from a medical emergency when he deliberately locked the door and grabbed her around the neck. She stated that if it had been a true medical emergency, he would have simply fallen toward her. (T. at 204).

{¶33} The responding officer testified that the victim's injuries were consistent with her story, and that the wounds he observed on Appellant’s hands were consistent with punching someone or something. Additionally, the officer testified that he observed

victim's cell phones and bag in Appellant's home and what appeared to be a broom laying in the foyer, all consistent with her account of what happened.

{¶34} In addition to the victim's own testimony with regard to her injuries, the State also presented the victim's medical records which established that the victim's injuries included multiple bumps on her head, a black eye, a split lip, swollen cheekbones, bruising on her entire body, a hip injury and a hairline fracture in her left rib. The victim testified that she received medical attention on the day of the incident and suffered ongoing pain in her hips, back and muscle pain throughout her body for 4-6 weeks with some lingering pain in her right hip even at the time of trial. (T. at 182-193). The victim testified that when she was under the weight of Appellant's 500-pound body she was unable to breathe and thought she was going to die. (T. and198).

{¶35} Upon review, we find that not only was there a substantial risk of serious physical harm, but that the victim did suffer serious physical harm.

{¶36} " ' Where injuries to the victim are serious enough to cause him or her to seek medical treatment, a jury may reasonably infer that the force exerted on the victim caused serious physical harm as defined by R.C. 2901.01(A)(5).' *State* v. *Wilson* (Sept. 21, 2000), Cuyahoga App. No. 77115 (Sept.21, 2000) (citations omitted)." *State v. Jones,* 8th Dist. Cuyahoga No. 80841, 2002-0hio-6635, ¶16. In *State* v. *Plemmons-Greene,* Cuyahoga App. No. 92267, 2010-0hio-655, the Eighth District Court of Appeals found that the State presented sufficient evidence of serious physical harm where, as a result of the defendant's attack, the victim suffered a black eye, bruising and swelling to the right side of her face, scratches on her neck, and bruising on her thighs and buttocks. *State* v. *Bootes,* 2d Dist. Montgomery No. 23712, 2011-Ohio-874, ¶19 (finding serious physical

harm where the victim suffered two black eyes and other bruising on her face and chest, a broken nose and a mild concussion).

{¶37} While Appellant argues that his actions were the result of a medical condition, we defer to the trier of fact as to the weight to be given the evidence and the credibility of the witnesses. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), at paragraph one of the syllabus. The jury as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witnesses' credibility. "While the trier of fact may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Johnson*, 2015-Ohio-3113, 41 N.E.3d 104, ¶ 61 (5th Dist.), citing *State v. Nivens*, 10th Dist. Franklin No. 95APA09–1236, 1996 WL 284714 (May 28, 1996). The jury need not believe all of a witness' testimony, but may accept only portions of it as true. *Id*.

{¶38} Based on the foregoing, we find the judgment herein is supported by sufficient evidence, and the trial court did not err in failing to direct a verdict on this issue. We further find the jury did not lose its way in finding Appellant guilty of assault and kidnapping, and the judgment is not against the manifest weight of the evidence.

{¶39} Appellant's assignments of error are overruled.

{¶40} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

By: Wise, John, J.

Gwin, P. J., and

Wise, Earle, J., concur.

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