[Cite as *State v. Moore*, 2010-Ohio-509.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91464

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HAROUN MOORE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-494281

BEFORE: Celebrezze, J., Dyke, P.J., and Sweeney, J.

RELEASED: February 18, 2010

JOURNALIZED:

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Haroun Moore, appeals his convictions for abduction and domestic violence on numerous grounds. After a thorough review of the record, and for the following reasons, we affirm.

{¶ 2} On the night of March 21, 2007, Ms. Iquial Morgan was home with her two-year old son. On this night, appellant, who had been living with Ms. Morgan, came to the apartment to retrieve several of his personal items remaining there. Three days prior, Ms. Morgan had changed the locks to the apartment. Shortly after appellant arrived, a fight ensued. Ms. Morgan threatened to call the police, and appellant tackled her and took her sole means of doing so, her cell phone. The fight continued into Ms. Morgan's bedroom, where she was repeatedly punched, hit, pushed, and held down. Ms. Morgan testified that appellant assaulted her for 45 minutes to an hour, including punching her, pulling her hair, ramming her head into a door, and preventing her from leaving the bedroom by physical force.

{¶ 3} Appellant left the apartment after a neighbor called the police. When the Cleveland police officers arrived, appellant was gone. Patrolman Vincent Lucarelli testified that he arrived at Ms. Morgan's apartment to find a badly bruised woman close to hysteria. Patrolman Lucarelli testified that, after calming her down, Ms. Morgan told him what happened. Patrolman Lucarelli also testified that Ms. Morgan had a large bump on her forehead, cuts on the back of her head, swelling under both eyes, and a fat lip. Emergency Services

were called and treated Ms. Morgan on-scene because she refused to go to the hospital. No pictures were taken of the injuries. Ms. Morgan did not give an official statement to the police, but patrolman Lucarelli filed a report about the incident from what he remembered being told by Ms. Morgan about what happened that night.

{¶ 4} Appellant was indicted on March 6, 2007 on charges of kidnapping in violation of R.C. 2905.01, and domestic violence in violation of R.C. 2929.25.[1] Trial commenced on January 30, 2008, resulting in a guilty verdict for abduction in violation of R.C. 2905.02(A)(2), a lesser included offense of kidnapping, and domestic violence. Appellant was sentenced to two years incarceration for abduction and six months for domestic violence, and informed of three years of postrelease control.

Law and Analysis

{¶ 5} Appellant argues five errors on appeal, which we address out of order for ease of discussion.

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[1] In a separate criminal case, appellant was indicted for domestic violence and felonious assault on June 26, 2006 from an incident involving appellant's daughter. Appellant was arrested on March 26, 2007 pursuant to a capias warrant issued in that case, and the case was dismissed on October 29, 2007 after the victim failed to appear to testify a third time.

I. Sufficiency

{¶ 6} In appellant's third assigned error, he asserts that "The Trial Court Erred as a Matter of Law in Denying the Appellant's Request Under Criminal Rule 29."[2] Under Crim.R. 29, a trial court "shall not order an entry of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus. "A motion for judgment of acquittal under Crim.R. 29(A) should be granted only where reasonable minds could not fail to find reasonable doubt." *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394.

{¶ 7} Thus, the test an appellate court must apply in reviewing a challenge based on a denial of a motion for acquittal is the same as a challenge based on the sufficiency of the evidence to support a conviction. See *State v. Bell* (May 26, 1994), Cuyahoga App. No. 65356. In *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, the Ohio Supreme Court set forth the test an appellate court should apply when reviewing the sufficiency of the evidence in support of a conviction: "[T]he relevant inquiry on appeal is whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. In other

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[2] Appellant cites differing assignments of error in his "supplemental brief," which states: "The trial court erred in not granting appellant's motion for judgment of acquittal as to the count of kidnapping and any lesser included offenses of said count." Because the assignment of error as stated in appellant's original brief is more broad, we will address this assigned error as challenging both the abduction and domestic violence convictions.

words, an appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial and determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. " Id. at 273, citing *State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132. See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct 2781, 61 L.Ed.2d 560.

A. Abduction

{¶ 8} In Ohio, abduction, as it relates to this case, requires that one "[b]y force or threat, restrain the liberty of another person under circumstances that create a risk of physical harm to the victim or place the other person in fear[.]" R.C. 2905.02(A)(2).

{¶ 9} Ms. Morgan testified that appellant prevented her from leaving her bedroom by pushing her, holding her down, and hitting her. After vigorous cross-examination, Ms. Morgan's testimony remained clear that appellant impeded her egress from the bedroom by force. This certainly creates a risk of physical harm and fear. The state met its burden of establishing the necessary elements under R.C. 2905.02 for the crime of abduction.

B. Domestic Violence

{¶ 10} Appellant also argues that his conviction for domestic violence cannot stand because appellant was not a household member at the time of the incident, a necessary element of the crime.

{¶ 11} R.C. 2919.25(A) prohibits a person from "knowingly caus[ing] or attempt[ing] to cause physical harm to a family or household member." As used in this section, family or household member means "[a]ny of the following who is residing or has resided with the offender: (i) A spouse, a person living as a spouse, or a former spouse of the offender[.]" R.C. 2919.25(F)(1)(a)(i).

{¶ 12} A person living as a spouse is further defined to mean one "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).

{¶ 13} In discussing cohabitation, this court has previously noted that "it is not necessary for the offender and victim to live together in order to determine that they are 'cohabiting' under the statute. The relationship between the offender and victim is crucial, as domestic violence is not a crime between strangers." *Cleveland v. Schill*, 147 Ohio App.3d 239, 2002-Ohio-1263, 769 N.E.2d 907, at ¶30, citing *State v. Williams* (1997), 79 Ohio St.3d 459, 683 N.E.2d 1126. "The essential elements of 'cohabitation' are (1) sharing of familial or financial responsibilities and (2) consortium." *Williams* at the syllabus.

{¶ 14} In the instant case, Ms. Morgan testified that she lived with appellant, who was her boyfriend, for eight months prior to the incident. Appellant periodically paid rent and contributed to the expenses of the household. Although Ms. Morgan testified that she had changed the locks and did not give

appellant a key, the statute does not require one to presently be cohabiting with another to be convicted of domestic violence, only that one has done so within the previous five years. The nature of the relationship at issue here was clearly one of cohabitation, and thus appellant fit within the domestic violence statute.

{¶ 15} Sufficient evidence exists in the record to establish each of the elements of the crimes for which appellant was convicted; therefore, appellant's third assignment of error is overruled.

II. Manifest Weight

{¶ 16} In appellant's first and second assigned errors, he claims his convictions for abduction and domestic violence are against the manifest weight of the evidence.[3]

{¶ 17} The Ohio Supreme Court has distinguished the standards to be applied in challenges relating to sufficiency of the evidence and manifest weight of the evidence, stating: "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[,] * * * [where] 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

[3] Appellant's first and second assigned errors read: "The Appellant's Conviction of Abduction was Against the Manifest Weight of the Evidence Presented at Trial" and "The Appellant's Conviction of Domestic Violence was Against the Manifest Weight of the Evidence Presented at Trial."

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." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, at ¶25.

{¶ 18} A reviewing court will not reverse a verdict where the trier of fact could reasonably conclude from substantial evidence that the state has proved the offense beyond a reasonable doubt. *State v. Eley*, supra.

A. Abduction

{¶ 19} Appellant argues that the testimony was contradictory and the jury lost its way in convicting him of abduction. Appellant's counsel tried to create ambiguity in the record by confusing the events about which Ms. Morgan testified. Appellant cites to the following exchange between appellant's attorney and Ms. Morgan:

{¶ 20} "Q. You're angry the entire time, correct? Whatever you're doing. Were you following him around?

{¶ 21} "A. No. I was in my room.

{¶ 22} "Q. You stayed in your room. Were you laying down [a]sleep or what were you doing?

{¶ 23} "A. I was in my bed lying down.

{¶ 24} * *

{¶ 25} "Q. You didn't tell the police that he forced you into your bedroom?

{¶ 26} "A. He didn't force me into nowhere. I was already in my room."

{¶ 27} This passage pertains to when appellant first arrived; however, Ms. Morgan testified that after appellant wrestled her cell phone from her in the dining room, the altercation continued back into the bedroom where appellant repeatedly prevented her from leaving by force. When questioned by the state, she testified as follows:

{¶ 28} "A. Yeah. He just walked in the room, and then when I was trying to get up and get out, that's when he stood up to block the door so I couldn't get out.

{¶ 29} "Q. Did you try to get out?

{¶ 30} "A. Oh, yeah. I mean every time I tried to get out, he would push me back down, you know. Push me (indicating) so I couldn't get out the door. And like I said, he's a big guy, so —

{¶ 31} "Q. And when you say every time you try to get out, is that door the only way out of that room?

{¶ 32} "A. Yes. And the window — we're on the second floor, and I wasn't trying to break any bones, so I just said a couple prayers to myself, and it was over with after some time."

{¶ 33} This is a restraint of liberty by force that put Ms. Morgan in fear for her safety. From a thorough reading of the transcript, it is clear that this testimony is uncontradicted. Appellant acted to restrain Ms. Morgan's freedom of movement through force, and the jury did not lose its way in finding appellant guilty of abduction for doing so.

B. Domestic Violence

{¶ 34} Appellant also argues that his conviction for domestic violence is against the manifest weight of the evidence. The testimony that appellant sustained significant injury was uncontradicted. Patrolman Lucarelli and Ms. Morgan testified to the extent of the injuries inflicted at the hands of appellant. While appellant argues that the length of the encounter could not possibly be accurate because the injuries sustained would have necessarily been much more severe, this does not demonstrate that there has been a miscarriage of justice. The trier of fact is in the best position to judge the credibility of witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

{¶ 35} The evidence on the record is clear and uncontradicted. Ms. Morgan sustained injuries at the hands of appellant, and appellant was a household member, as clarified above. Therefore, appellant's conviction for domestic violence is not against the manifest weight of the evidence.

{¶ 36} Appellant has made no showing of how his convictions are against the manifest weight of the evidence. Mischaracterizing a few lines of trial testimony is not sufficient to show a manifest miscarriage of justice. Appellant's first and second assignments of error are overruled.

III. Speedy Trial

{¶ 37} In appellant's fourth assignment of error he argues that "The Trial Court Erred As a matter of Law in Failing to Dismiss this Case on the Grounds of Speedy Trial." The Sixth and Fourteenth Amendments to the United States Constitution, as well as Section 10, Article I of the Ohio Constitution, guarantee a criminal defendant the right to a speedy trial by the state. *State v. O'Brien* (1987), 34 Ohio St.3d 7, 516 N.E.2d 218. In *Barker v. Wingo* (1972), 407 U.S. 514, 523, 92 S.Ct. 2182, 2188, 33 L.Ed.2d 101, 112-113, the Supreme Court declared that, with regard to fixing a time frame for speedy trials, "[t]he States * * * are free to prescribe a reasonable period consistent with constitutional standards * * *." To that end, the Ohio General Assembly enacted R.C. 2945.71 in order to comply with the *Barker* decision. See, also, *State v. Lewis* (1990), 70 Ohio App.3d 624, 591 N.E.2d 854.

{¶ 38} R.C. 2945.71 states in pertinent part:

{¶ 39} "(C) A person against whom a charge of felony is pending:

{¶ 40} "(1) Notwithstanding any provisions to the contrary in Criminal Rule 5(B), shall be accorded a preliminary hearing within fifteen consecutive days after this person's arrest if the accused is not held in jail in lieu of bail on the pending charge or within ten consecutive days after this person's arrest if the accused is held in jail in lieu of bail on the pending charge;

{¶ 41} "(2) Shall be brought to trial within two hundred seventy days after the person's arrest.

{¶ 42} "* * *

{¶ 43} "(E) For purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. This division does not apply for purposes of computing time under division (C)(1) of this section."

{¶ 44} It is well established that the Ohio speedy trial statute constitutes a rational effort to enforce the constitutional right to a public speedy trial of an accused charged with the commission of a felony or misdemeanor and shall be strictly enforced by the courts of this state. *State v. Pachay* (1980), 64 Ohio St.2d 218, 416 N.E.2d 589.

{¶ 45} R.C. 2945.71(E) explains that each day a defendant is held in jail in lieu of bail shall be counted as three; however, this provision applies only when a defendant is held *solely* on the pending charges in a case. *State v. Kaiser* (1978), 56 Ohio St.2d 29, 381 N.E.2d 633, paragraph two of the syllabus. See,

also, *State v. Dankworth,* 172 Ohio App.3d 159, 2007-Ohio-2588, 873 N.E.2d 902, at ¶35 ("[b]ecause Dankworth was arrested for numerous unrelated charges, he was not held in jail in lieu of bail on a single 'pending charge.' To the contrary, Dankworth was held in jail in lieu of bail on several unrelated charges. * * * Under the circumstances presented, the fact that he was arrested on the same date for each of the unrelated criminal incidents is inconsequential.") Also, delay that results from actions of a defendant tolls the time the state has for bringing them to trial. R.C. 2945.72(D).

{¶ 46} In this case, appellant was held in jail on two separate criminal cases. Both involved domestic violence charges, but each had two separate victims and stemmed from two distinct incidents. Therefore, according to *Kaiser* and *Dankworth*, supra, the days are counted one-for-one until the concurrent second case was dismissed on October 29, 2007. There were numerous continuances, which the record reflects were at appellant's request. Appellant also filed several motions, both pro se and through his attorney, which also tolled the speedy trial time to give the state an opportunity to respond.

{¶ 47} Taking these delays into consideration, and the fact that days are counted one-for-one until October 29, 2007, appellant was brought to trial within 270 days. The trial court did not err in refusing to grant appellant's motion for dismissal on speedy trial grounds.

IV. Allied Offenses

{¶ 48} In his final assignment of error, appellant argues that abduction and domestic violence are allied offenses of similar import, and the trial court erred in sentencing him on both counts.[4]

{¶ 49} R.C. 2941.25 provides:

{¶ 50} "(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.

{¶ 51} "(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."

{¶ 52} It is well established that a two-step analysis is required to determine if two offenses are allied offenses of similar import. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, at ¶14. "'In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the

[4]Appellant's fifth assignment of error states: "The trial court erred in not merging the offenses of abduction and domestic violence into a conviction for domestic violence."

commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.' (Emphasis sic.)" Id., quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.

{¶ 53} The crimes of domestic violence and abduction as set forth above have discrete elements. Domestic violence does not include a restraint of liberty, while abduction does not include causing physical harm to a household member. The commission of one does not necessarily result in the commission of the other. See *State v. Dunbar*, Cuyahoga App. No. 87317, 2007-Ohio-3261, at ¶154-155 (holding abduction and domestic violence are not allied offenses).

{¶ 54} The crimes of abduction and domestic violence are not allied offenses in this case. A separate animus existed for each crime. In order to prolong the abuse inflicted upon Ms. Morgan, appellant prevented her from leaving the bedroom. She testified that each time she tried to leave the bedroom, he would stop her through force. The trial court did not err when it sentenced appellant to incarceration on both charges after the jury found him guilty of both. Appellant's fifth assignment of error is overruled.

V. Conclusion

{¶ 55} Appellant's convictions for abduction and domestic violence are supported by competent, credible evidence in the record going to each element of those crimes. The jury did not lose its way in so finding because the testimony in the record weighed in favor of conviction. Appellant was brought to trial within the time set forth in R.C. 2945.71, once the delays that resulted from appellant's actions are considered along with the fact that appellant was in jail on another pending case, which means his time in jail is counted one-for-one, not three-for-one, as appellant argues. Finally, abduction and domestic violence are not allied offenses. All of appellant's assigned errors lack sufficient merit to overturn his convictions.

Judgment affirmed.

It is ordered that appellee recover from appellant 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. The defendant's convictions 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.

FRANK D. CELEBREZZE, JR., JUDGE

ANN DYKE, P.J., and
JAMES J. SWEENEY, J., CONCUR