[Cite as *State v. Avery*, 2004-Ohio-5226.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon: W. Scott Gwin, P.J.
	:	Hon: William B. Hoffman, J.
Plaintiff-Appellee	:	Hon: Sheila G. Farmer, J.
	:	
-vs-	:	
	:	Case No. 2004-CA-00010
MACK AVERY	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Stark County Court of Common Pleas, Case No. 2003CR1443
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 27, 2004

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
MARK CALDWELL Stark County Prosecutor's Office 110 Central Plaza S., 5th Fl. Canton, OH 44702	BARRY T. WAKSER Stark County Public Defender 200 Tuscarawas St. W., Ste. 200 Canton, OH 44702

Gwin, P.J.

{¶1} Defendant-appellant Mack Avery appeals from his convictions and sentences in the Stark County Court of Common Pleas on one count of domestic violence, a felony of the fifth degree in violation of R.C. 2919.25 (A), and one count of resisting arrest, a misdemeanor of the second degree in violation R.C. 2921.33 (A). Plaintiff-appellee is the State of Ohio.

{¶2} On October 10, 2003, appellant and his girlfriend, Karla Konicki, walked to a drive-thru to purchase beer and cigarettes. The couple began to argue loudly on their way back from the drive-thru.

{¶3} Lawrence Wheeler was home at his 9th Street N.W., Canton, Ohio, residence when he heard the yelling and screaming outside. He looked out his window and saw appellant and Ms. Konicki walking down the alley, arguing with each other. Mr. Wheeler testified that he heard Ms. Konicki tell the appellant to go home and she started to move away from him. Mr. Wheeler further testified he then saw appellant hit Ms. Konicki. Mr. Wheeler told the appellant, whom he knew from the neighborhood, to leave Ms. Konicki alone. Appellant replied that she was drunk and that he was going to get her home to the kids. Appellant tried to pick Ms. Konicki up but he dropped her. He then swung and hit her on the side of her face, knocking her out. Mr. Wheeler informed the appellant that he was going to call the police and he left the window to do so. When Mr. Wheeler returned to window, he saw appellant dragging Ms. Konicki down the alley towards 8th Street.

{¶4} The couple eventually arrived home. Shortly thereafter, the police arrived at the home. Officer Broucker had Ms. Konicki step outside while her partner talked to

the appellant inside the residence. The officer observed an injury to Ms. Konicki's elbow which looked like road rash. Ms. Konicki admitted to the officer that she had been dragged down the street by the appellant. She was upset and crying as she spoke with the officer. Officer Broucker then went over the domestic violence forms with Ms. Konicki who agreed to sign them. Officer Broucker then notified her partner to arrest the appellant for that offense. The appellant resisted the officer's attempts to handcuff him and pulled away from the officer. After finally getting the handcuffs on the appellant, he refused to get inside the patrol car, kicked at the car door and yelled and screamed at the officer. Officer Frazone had to spray appellant with a mace-like substance in order to subdue him and get him into the cruiser.

{¶5} On the morning of trial, the State informed the trial court that Ms. Konicki had changed her version of the offense that night just before the trial. She was now claiming appellant did not strike her. This prompted the trial court to have her testify as the court's witness per Evid. R. 614.

{¶6} Ms. Konicki reluctantly testified at trial and claimed that her injuries were caused by her stumbling and falling down in the alley as appellant was attempting to help her get home. She further testified that she had consumed two 40-ounce malt liquor beverages, plus had taken her prescription medication that day (Thorazine and Prozac).

{¶7} Appellant also testified at trial. He stated that he was helping his landlord that day do some roof construction. Afterward, he and the others who were helping him started drinking some beer. Ms. Konicki joined them and later went with appellant to get some more beer. They then got into an argument as Ms. Konicki was stumbling and

staggering. Appellant tried to lift her up, but Ms. Konicki did not want to get up. He grabbed Ms. Konicki by her arm and the back of her shirt and attempted to lift her up off the ground.

{¶8} The couple eventually arrived home. The kids, however, were arguing as the police arrived. Appellant did not think the police had a right to be in his house, so he resisted their attempts to arrest him. He denied however, kicking at the cruiser and refusing to get in. Appellant claimed instead that the police slammed the door on his foot and he attempted to kick it open with his other foot. He denied ever assaulting Ms. Konicki.

{¶9} At the conclusion of a one-day jury trial, the appellant was found guilty of domestic violence and resisting arrest. The trial court conducted a sentencing hearing. The court proceeded to impose the maximum sentence for the domestic violence conviction, a prison term of 12 months, and a concurrent 10-day jail sentence for the resisting arrest conviction.

{¶10} Appellant timely filed the instant appeal and raises the following two assignments of error for our consideration:

{¶11} "I. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S REQUEST THAT THE JURY BE INSTRUCTED ON THE LESSER INCLUDED OFFENSE OF DISORDERLY CONDUCT.

{¶12} "II. THE TRIAL COURT ERRED IN IMPOSING THE MAXIMUM SENTENCE UPON THE APPELLANT."

I.

{¶13} In his first assignment of error, appellant argues that the trial court erred by not giving the jury an instruction on the lesser offenses of disorderly conduct. We disagree.

{¶14} Appellant argued at trial that he did not strike the complaining witness. Rather, she was intoxicated and he was simply attempting to walk her home. Her injuries were the result of her stumbling and falling as she attempted to make her way home.

{¶15} In *State v. Hunt* (March 18, 1996), 5th Dist. No. 95CA0226, this court noted: "disorderly conduct may be a lesser included offense of domestic violence, because one cannot engage in domestic violence without also engaging in disorderly conduct, but domestic violence requires an additional element be proved, namely, that the victim was a family or household member. Thus, the jury could find appellant not guilty of domestic violence but guilty of disorderly conduct if it found the State had not proven the complaining witness was a family or household member, but had proven the other elements."

{¶16} In *State v. Keenan*(1998), 81 Ohio St.3d 133, 1998-Ohio-459, 689 N.E.2d 929, the Ohio Supreme Court stated: "[o]rdinarily, where a defendant presents a complete defense to the substantive elements of the crime, such as an alibi, an instruction on a lesser included offense is improper. See, *e.g., State v. Strodes* (1976), 48 Ohio St.2d 113, 117, 2 O.O.3d 271, 273, 357 N.E.2d 375, 378, vacated on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3135, 57 L.Ed.2d 1154. In such a case, the

defendant is entitled to a lesser included offense instruction only 'if, based on the evidence adduced by the state, the trier of fact can find for the defendant * * * on some element of the greater offense which [*sic*] is not required to prove * * * the lesser offense and for the state on the elements required to prove * * * the lesser offense.' *State v. Solomon* (1981), 66 Ohio St.2d 214, 20 O.O.3d 213, 421 N.E.2d 139, paragraph two of the syllabus." Id. at 139, 689 N.E.2d at 938-39. Hence, appellant was entitled to disorderly conduct instruction only if the jury, viewing the evidence in the light most favorable to the defense, could have had a reasonable doubt as to whether the complaining witness was a family or household member, but had proven the other elements.

{¶17} There was in this case no evidence at all to permit such a finding. R.C. 2919.25(F) provides:

{¶18} "(1) "Family or household member" means any of the following:

{¶19} "(a) Any of the following who is residing or has resided with the offender:

{¶20} "(i) A spouse, a person living as a spouse, or a former spouse of the offender;

{¶21} "(2) "Person living as a spouse" means 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."

{¶22} Although the appellee claims appellant admitted that the complaining witness was his live-in girlfriend, the appellee does not point to any portion of the transcript to support this assertion. In fact, neither the appellee, nor defense counsel,

ever asked appellant the status of his relationship with the complaining witness. (T. at 153-167).

{¶23} The only evidence relative to the question of whether the complaining witness was a "family or household member" came from the complaining witness herself. She testified as follows:

{¶24} "[Q.] Okay. Now, how long have you known Mack Avery for approximately?

{¶25} "[A.] Almost four years.

{¶26} ***

{¶27} "[Q.] Okay. Did you develop a relationship during that time period?

{¶28} "[A.] Yes.

{¶29} "[Q.] All right. Was that as a boyfriend-girlfriend?

{¶30} "[A.] Yes.

{¶31} "[Q.] Okay. And during that time period, did you guys ever live together?

{¶32} "[A.] Yes.

{¶33} "[Q.] Okay. Approximately how long would you guys live together?

{¶34} "[A.] About a year.

{¶35} "[Q.] About a year? Okay. Did you share the bills at that time?

{¶36} "[A.] Yes.

{¶37} "[Q.] All right. Have sexual relations?

{¶38} "[A.] Yes."

{¶39} (T. at 99).

{¶40} The couple parted ways, but had resumed living together about a week before the incident in question. (Id. at 99-100).

{¶41} R.C. 2919.25(F) encompasses a person who has cohabited with the offender within the past five years. Accordingly, the testimony establishes that the parties were presently living together at the time of the offenses and further, that the parties had cohabitated within the past five years. We find the unrefuted testimony is sufficient to establish the complaining witness was appellant's family or household member at the time of the October 10, 2003 offense, and therefore the trial court did not err by failing to instruct the jury on the lesser offense of disorderly conduct.

{¶42} Appellant's first assignment of error is overruled.

II.

{¶43} In his second assignment of error, appellant argues that the trial court erred by imposing the maximum sentence of twelve months for his conviction on one count of domestic violence. We disagree.

{¶44} In *State v. Comer*, 99 Ohio St. 3d 463, 2003-Ohio-4165, the Supreme Court held a trial court is required to make its statutorily enumerated findings and give reasons supporting those findings at the sentencing hearing. Comer dealt with R.C. 2929.14 (B) and (E) (4), and R.C. 2929.19 (B) (2) (c). This case deals with R.C.2929.14 (C). However, the Supreme Court's opinion indicates its holding is not limited to cases like Comer, but rather, applies generally to all sentencing.

{¶45} R.C. 2929.14 (C) requires the trial court to make certain findings when it imposes a maximum sentence. The trial court may impose a maximum sentence only upon offenders who have committed the worst forms of the offense, upon offenders who

pose the greatest likelihood of committing future crimes, upon certain major drug offenders, and upon certain repeat violent offenders. This court has interpreted the statute to be in the disjunctive, see *State v. Comersfords* (June 3, 1999), Delaware Appellate No. 98CA01004. Thus, the trial court may impose the maximum sentence if it finds any one of the listed offender categories applies.

{¶46} In the case at bar, the trial court found:

{¶47} "While I acknowledge on the record that this is not the worst form of the offense that I have seen in the Court, however, it was significant.

{¶48} "You slugged a woman in the face. You dragged her down the street like a bag of potatoes. You had absolutely no regard for her well-being whatsoever.

{¶49} "So I find that if you take that into context of all your other prior domestic violence's and you take that in the context of your felony record that only a maximum penalty is of anything significant.

{¶50} "To give you anything less than 12 months would be ridiculous, demean the seriousness of your conduct and others wouldn't protect the public; and in sense, Mr. Avery, you rolled the dice.

{¶51} "I mean you have been through the system so many times …"

{¶52} (T. at 229).

{¶53} The record establishes that this is appellant's fifth conviction for domestic violence. (Id. at 224). Appellant additionally has five prior felony convictions. (Id. at 225-226).

{¶54} Accordingly, we find the trial court sufficiently explained its reasons for imposing a maximum sentence in appellant's case. We further find that that the trial

court made the requisite findings pursuant to R.C. 2929.14(C). Specifically, that because of appellant's prior criminal history of similar offenses, as well as the fact that he has previously served prison sentences, appellant posed the greatest likelihood of re-offending.

{¶55} Appellant's second assignment of error is overruled.

{¶56} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Farmer, J., concur

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JUDGES

WSG:clw 0920

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MACK AVERY	:	
Defendant-Appellant	:	CASE NO. 2004CA00010

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Stark County, Ohio, is affirmed. Costs to appellant.

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JUDGES