

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
WASHINGTON COUNTY

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, : Case No. 09CA30  
 :  
 vs. : **Released: September 8, 2010**  
 :  
 GARY E. LUKE, : DECISION AND JUDGMENT  
 : ENTRY  
 Defendant-Appellant. :

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APPEARANCES:

Teresa D. Schnittke, Lowell, Ohio, for Appellant.

Roland Riggs, Marietta City Law Director, and Amy Brown Thompson,  
Marietta City Assistant Law Director, Marietta, Ohio, for Appellee.

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McFarland, P.J.:

{¶1} This is an appeal from Marietta Municipal Court jury verdict finding Appellant guilty of obstructing official business, in violation of R.C. 2921.31, and resisting arrest, in violation of R.C. 2921.33, both second degree misdemeanors. On appeal, Appellant raises a single assignment of error, contending that his convictions were not supported by the evidence. Because we conclude that Appellant’s convictions were supported by sufficient evidence, we cannot conclude that the trial court erred in denying

Appellant's Crim.R. 29 motion for acquittal.<sup>1</sup> As such, we overrule Appellant's sole assignment of error. Accordingly, the judgment of the trial court is affirmed.

### FACTS

{¶2} On February 20, 2009, Appellant was arrested and charged with domestic violence against his wife, Twila "Susie" Luke, in violation of R.C. 2919.25(A), a first-degree misdemeanor, as well as obstructing official business and resisting arrest, both second degree misdemeanors, in violation of R.C. 2921.31 and 2921.33, respectively. Appellant pled not guilty to the charges and the matter proceeded to a jury trial on June 23, 2009.

{¶3} The State presented several witnesses at trial including Deputies Lockhart and Holbert, who were dispatched to Appellant's residence, and Susie Luke. The State began its case by playing the 911 tape which resulted in the deputies being dispatched. The tape included the voice of the caller, Thomas Tidd<sup>2</sup>, stating that he was at the Fox Den bar and that Appellant had picked his wife Susie up, thrown her into a wall and made her get into a jeep. He advised that the couple was headed to Marietta and that he was afraid Appellant was going to hurt her.

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<sup>1</sup> A review of the record reveals that Appellant's Crim.R. 29 motion was made only with respect to the charges for domestic violence and resisting arrest.

<sup>2</sup> It appears from the record that Thomas Tidd is Susie Luke's ex brother-in-law, who had been interested in having a relationship with Susie fourteen years prior.

{¶4} Deputy Lockhart testified that he was dispatched to Appellant's residence due to a report of domestic violence, which began as an altercation at the Fox Den bar. Deputy Lockhart testified that he and Deputy Holbert went to Appellant's front door and that Appellant answered. He testified that he advised Appellant they were there to investigate an altercation at the Fox Den. He testified that he saw Susie Luke standing in the living room and that she was visibly upset, was crying and that her wrist was bleeding. He testified that he asked Susie to step outside and that she said okay and started to walk towards the doorway. Deputy Lockhart testified that at that point Appellant stuck out his right hand, said "Fuck you, goodnight," pushed Susie back and tried to slam the door. Deputy Lockhart testified that he had to force the door open and grab Appellant because he was trying to shut the door on the deputies. He testified that a physical altercation ensued, that he put Appellant on the ground, and that when Appellant refused to put his hands behind his back he told him he was under arrest and then tasered him so that he would comply. Deputy Lockhart further testified that he then spoke with Susie Luke and that while she refused to give a written statement, she gave a verbal statement.

{¶5} Deputy Holbert also testified on behalf of the State. He testified that he responded, along with Deputy Lockhart, to Appellant's residence.

He testified that he helped subdue Appellant, who was resisting. He testified that Appellant was given the opportunity to comply before he was tasered. He also testified that he heard Appellant say “F\*\*k you, goodnight,” and then try to shut the door so that they could not speak to Susie Luke, the alleged domestic violence victim.

{¶6} Finally, Susie Luke testified, although unwillingly. Mrs. Luke essentially recanted on her earlier verbal statement that was given to Deputy Lockhart on the night of the incident, claiming that she had no recollection of the events and that her husband had never hit her. After refreshing her recollection by reading the statement she had earlier provided, she acknowledged that she had told the deputies that Appellant had thrown her up against a wall at the bar and that the cuts on her hand were from holding her hands up to her face to keep from getting hit in the face. She also acknowledged that in her earlier verbal statement she said that Appellant pushed her away from the door in the residence when she attempted to go outside to speak with the deputies and told her not to tell them anything.

{¶7} At the close of the State’s evidence, Appellant made a Crim.R. 29 motion for acquittal as to the domestic violence and the resisting arrest charges. The court denied the motion and Appellant presented several witnesses, including his nephew, who was at the residence babysitting, his

oldest son, who was also a witness, himself and his brother. Appellant essentially testified that he had taken his wife out drinking, at her request. He testified that he played pool and had two drinks while his wife drank and sat with some other guys. He testified that his wife was being a “smart ass” and that he told her it was time to leave more than once. He testified that he eventually told her he was leaving with or without her, at which point she cooperated. He testified that he helped her to the door and propped her up against the wall of the bar while he tried to open the door, which had been damaged and was hard to open. He testified that when getting into their Jeep his wife scratched her hand on the rain guard on the window and that she went back into the bar. He testified that he went in after her and then they left and went home.

{¶8} Appellant further testified that upon arriving at home, the couple went into their bedroom where he only had time to take his shirt off and answer his ringing cell phone when the deputies knocked on his door. He testified that he spoke with Deputy Lockhart at his door and told him there had been no domestic violence and offered to let him speak to his wife, Susie. He testified that Susie told him there had been no domestic violence and as such, Appellant said goodnight and closed the door. Appellant

testified that the next thing he knew he was face down on his front porch being tasered.

{¶9} Appellant's nephew and eldest son, who were both present on the night in question, testified as well. Their testimony essentially supported Appellant's testimony, claiming that neither Appellant nor his wife seemed upset when they returned home and that when Appellant answered the door he was cooperative and simply said goodnight and tried to close the door. Neither of these witnesses offered any information about the verbal statement given by Susie to the deputies.

{¶10} After hearing the evidence, the jury acquitted Appellant of the domestic violence charge but returned guilty verdicts for obstructing official business and resisting arrest. Appellant now brings his timely appeal, setting forth one assignment of error for our review.

#### ASSIGNMENT OF ERROR

"I. APPELLANTS CONVICTIONS WERE NOT SUPPORTED BY THE EVIDENCE."

{¶11} In his sole assignment of error, Appellant contends that his convictions for obstructing official business and resisting arrest were not supported by the evidence. Specifically, Appellant argues that the trial court erred in failing to grant his Crim.R. 29 motion for acquittal.

{¶12} The standard of review for a Crim.R. 29(A) motion is generally the same as a challenge to the sufficiency of the evidence. See *State v. Hairston*, Scioto App. No. 06CA3081, 2007-Ohio-3880, at ¶ 16; *State v. Brooker*, 170 Ohio App.3d 570, 2007-Ohio-588, 868 N.E.2d 683, at ¶8. Appellate courts must determine whether the evidence adduced at trial, if believed, supports a finding of guilt beyond a reasonable doubt. See *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492.

{¶13} In other words, when reviewing a case to determine if the record contains sufficient evidence to support a criminal conviction, we must “examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is 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. Smith*, Pickaway App. No. 06CA7, 2007-Ohio-502, at ¶ 33, quoting *State v. Jenks* at paragraph two of the syllabus. See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781.

{¶14} The sufficiency of the evidence test “raises a question of law and does not allow us to weigh the evidence.” *Smith* at ¶ 34, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. Instead, the

sufficiency of the evidence test “ ‘gives full play to the responsibility of the trier of fact [to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts .’ ” *Smith* at ¶ 34, quoting *Jackson* at 319. This court will “reserve the issues of the weight given to the evidence and the credibility of witnesses for the trier of fact.” *Smith* at ¶ 34, citing *State v. Thomas* (1982), 70 Ohio St.2d 79, 79-80, 434 N.E.2d 1356; *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

{¶15} Appellant was convicted of obstructing official business in violation of R.C. 2921.31(A), which states:

“No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's official capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties.”

Under R.C. 2921.31, if a defendant specifically intends a particular obstructing effect and accomplishes his or her purpose, the statute is violated. *State v. Dunn*, Pickaway App. No. 06CA6, 2006-Ohio-6550 at ¶ 45, citing *City of Dayton v. Peterson*, 56 Ohio Misc. 12, 15, 381 N.E. 2d 1154. A violation of R.C. 2921.31 does not require the accused to be successful in preventing officers from doing their job; the statute is clearly phrased in the alternative. *State v. Daily* (Jan. 15, 1998), Athens App. No. 97CA25, 1998 WL 18139.



{¶16} “ ‘Privilege’ in the context of R.C. 2921.31 refers to a positive grant of authority entitling one to deliberately obstruct or interfere with a police officer performing his lawful duty. [*State v. Williams*, Cuyahoga App. No. 83574, 2004-Ohio-4476 at ¶38], citing *State v. Stayton* (1998), 126 Ohio App.3d 158, 163, 709 N.E.2d 1224. The burden of proof is on the defendant to establish a privilege. See *Williams*, citing *State v. Foster* (Sept. 17, 1997), Seneca App. No. 13-97-09, 1997 Ohio App. LEXIS 4280, 1997 WL 576353.” *Middleburg Hts. v. Szewczyk*, Cuyahoga App. No. No. 89930, 2008-Ohio-2043 at ¶24. See, also, *State v. Gordon* (1983), 9 Ohio App.3d 184, 458 N.E.2d 1277 (where the court held that “the absence of privilege is not an essential element of obstructing official business that the state must prove beyond a reasonable doubt[,]” analogizing such to “a justifying circumstance precluding conviction, similar to a mitigating circumstance that reduces a greater homicide to a lesser one.”).

{¶17} In his brief, Appellant argues that his attempt to close his door to the deputies was a privileged exercise of his constitutional right to privacy and cannot be the basis for a criminal conviction of trespassing, reasoning that his arrest, therefore, was not supported by probable cause. Thus, Appellant further argues that absent a legal arrest, he could not be convicted of resisting arrest, citing R.C. 2921.33, which requires as an element, a

lawful arrest. While Appellant concedes that he did not argue privilege as a defense below, he contends that the State's failure to prove that he did not act with privilege was a fatal flaw which should have been clear to the trial court.

{¶18} Appellant's argument essentially hinges on his assertion that by virtue of his constitutional right to privacy, he possessed a privilege to close the door to his house when the officer sought to speak with his wife, claiming that the existence of such privilege barred a conviction for obstructing official business. In making this argument, Appellant relies on *State v. Sloan*, Medina App. No. 05CA0019-M, 2005-Ohio-5191 (holding that "in closing the door, appellant asserted his privilege to refuse entry to the officer, and the officers lacked probable cause to arrest appellant for obstructing official business.").

{¶19} However, Appellant has conceded in his brief that he failed to argue or assert any such privilege below and raises it for the first time on appeal. He further suggests that such privilege was an element of the offense that had to be proven by the State, which was not, and urges us to review the issue as one involving plain error. Based on the caselaw and reasoning set forth above, we decline to do so. Instead, we agree with the prior reasoning of *Williams* and *Gordon*, *supra*, which have reasoned that the

existence of privilege is not an element required to be proven by the State. In the absence of Appellant's assertion of such privilege below, we decline to address for the first time on appeal. However, we do note that the cases cited by Appellant in support of his theory that he was entitled to close the door on the deputy are factually distinguishable from the facts presently before us.

{¶20} For instance, although Appellant heavily relies on *State v. Sloan*, supra, we note that *Sloan* involved a reversal of a defendant's conviction for closing the door on an officer that was investigating a noise complaint. Unlike *Sloan*, the facts sub judice involve Appellant's interference with law enforcement's attempt to investigate a reported domestic violence call. As set forth above, Appellant interfered with law enforcement's ability to interview his wife, who was crying and injured, and based on the officer's testimony, had agreed to step outside to speak with the officer.

{¶21} Further, as argued by the state, law enforcement had authority to enter the residence with or without a warrant in light of the fact that they were responding to a domestic violence call, and that upon arriving at the residence possessed probable cause to believe that the crime had occurred. As set forth above, when the deputies arrived they observed Appellant's

wife crying and bleeding from an apparent injury to her wrist. See, generally *State v. DeLong*, Ross App. No.06CA2920, 2007-Ohio-2330;<sup>3</sup> See, also, *State v. May*, Highland App. No. 06CA10, 2007-Ohio-1428 (noting that “[g]enerally speaking, when law enforcement possesses reasonable grounds to believe that an emergency exists, they have a legal duty to enter premises and to investigate.”). Thus, despite the arguments advanced by Appellant, we find sufficient evidence to support Appellant’s conviction for obstructing official business.

{¶22} Appellant was also convicted of resisting arrest in violation of R.C. 2921.33, which states in (A) that:

“[n]o person, recklessly or by force, shall resist or interfere with a lawful arrest of the person or another.”

Thus, a lawful arrest is an essential element of resisting arrest. As set forth above, the thrust of Appellant’s argument, as it relates to his conviction for resisting arrest is that his underlying arrest for obstructing official business was unlawful, and that absent a “legal” arrest, he could not be convicted for resisting arrest. However, in light of our determination that Appellant’s arrest for obstructing official business was lawful, we conclude that

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<sup>3</sup> In *DeLong*, we held that law enforcement did not possess authority to enter the appellant’s home under R.C. 2935.03(B)(1) & (3) which provides for the arrest and detention of a suspect whom the police have reasonable cause to believe has committed domestic violence, where they responded to a domestic violence call and did not observe any acts of domestic violence and were expressly told by the alleged victim that the appellant never struck her.

Appellant's argument with respect to his conviction for resisting arrest is without merit.

{¶23} As such, after reviewing the foregoing evidence in a light most favorable to the State, we believe that any rational trier of fact could have found the essential elements of obstruction of official business and resisting arrest proven beyond a reasonable doubt. Thus, we find sufficient evidence to support Appellant's convictions and, as a result, conclude that the trial court did not err in denying Appellant's Crim.R. 29 motion for acquittal. Accordingly, we overrule Appellant's sole assignment of error.

**JUDGMENT AFFIRMED.**

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of 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 Marietta Municipal Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.  
Exceptions.

Harsha, J. and Kline, J.: Concur in Judgment and Opinion.

For the Court,

BY: \_\_\_\_\_  
Matthew W. McFarland  
Presiding Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**