[Cite as *State v. Kister*, 2019-Ohio-3583.]

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

STATE OF OHIO,	:	Case Nos. 18CA10
	:	18CA11
Plaintiff-Appellee,	:	18CA12
	:	
vs.	:	
	:	DECISION AND JUDGMENT
CHAD KISTER,	:	ENTRY
	:	
Defendant-Appellant.	:	
	:	**Released: 08/27/19**

APPEARANCES:

Lisa A. Eliason, Athens City Law Director, and Jessica L. Branner, Athens City Prosecutor, Athens, Ohio, for Appellee.

Timothy Young, Ohio Public Defender, and Allen M. Vender, Assistant Ohio Public Defender, Columbus, Ohio, for Appellant.

McFarland, J.

{¶1} This is an appeal from an Athens Municipal Court judgment entry convicting Chad Kister of aggravated menacing, obstructing official business, and abuse of the 911 system. Because we overrule Appellant's assignments of error, the judgment of the trial court is affirmed.

FACTS

{¶2} The State charged Appellant with aggravated menacing under R.C. 2903.21, obstructing official business under R.C. 2921.31, and abuse of

the 911 system under R.C. 128.32(F). The trial court appointed an assistant public defender to represent Appellant. Subsequently, however, the trial court permitted Appellant's counsel to withdraw, and then appointed "advisory counsel" to Appellant, who represented himself pro se through the trial. The trial court ordered Appellant to have a mental examination to consider his competency. After Appellant was deemed competent, the case went to trial.

{¶3} In its opening statement, the State contended the evidence would show that Appellant made thirty 911 calls over a period of five hours even though there was no ongoing emergency. The State further asserted that Appellant became so upset that the Sheriff's Office would not respond to the 911 calls, he verbally threatened to kill two dispatchers. Finally, the State asserted that when deputies arrived to take Appellant for a mental examination, he made it difficult for the deputies to get him to the cruiser to the degree that they eventually had to carry him.

{¶4} Appellant, in his opening statement, asserted that he owned a hostel and one of his guests, Ryan Caywood, physically assaulted and injured him. He testified that the Nelsonville Police removed Caywood, but he later returned and that's why he called 911, claiming it was "a life or death issue."

{¶5} The State's first witness, Captain Brain Cooper, was a deputy with the Athens County Sheriff's Office. He testified that on November 12, 2017, the Sheriff's Office received a call of a possible ongoing assault. Captain Cooper further testified that because all the deputies were busy, the Sheriff's Office asked for the Nelsonville Police to respond. Captain Cooper testified that the Nelsonville Police had indicated that Appellant and Caywood each alleged being assaulted by the other, but the police declined to file charges because there was insufficient evidence to charge either of them. Captain Cooper testified that the Nelsonville Police removed Caywood from Appellant's premises and dropped him off near Nelsonville.

{¶6} Captain Cooper testified that Appellant contacted the Sheriff's Office several times later that day asking why Caywood was not charged. Captain Cooper testified that Appellant sent a video to the Sheriff's Office that purportedly showed Caywood's assault of Appellant, but he testified that the video had been altered. He further testified that he informed Appellant that until he received the entire video, the investigation would go no further.

{¶7} The State's next witness, Michele Hutchison, was a dispatcher for Athens County Emergency Communications Center. Hutchinson testified that part of her job is answering 911 calls. Hutchinson testified that

the office received approximately thirty 911 calls from Appellant on November 12, 2017. She testified that at times Appellant was calling 911 from multiple phone numbers at the same time with up to three dispatchers answering his calls simultaneously. Hutchison explained that a true emergency is considered a life threatening situation and occasionally one involving property. Hutchison testified that the 911 calls from Appellant that day were in her opinion not emergencies because the person, who was the purported threat, was across the street from Appellant. Hutchison testified that as the day went on Appellant became "more agitated, more aggressive" during his calls. Hutchison further testified that Appellant was using expletives and he threatened "that [she] would be executed with the rest of them." In all his previous 911 calls Appellant had never threatened her. Hutchison testified that because of Appellant's behavior she filed a formal complaint with her boss.

{¶8} On cross examination, Appellant asked if Hutchison could understand why he continued to call because Caywood had assaulted him and then returned to Appellant's property. Hutchison responded that during the 911 call Appellant stated that Caywood "was across the road." When Appellant asked Hutchison if she though he was in fear of his safety when he called, she responded "No."

{¶9} The State's next witness, Adam Kasler, was a deputy sheriff with the Athens County Sheriff's office. On November 12, 2017 at 4:00 p.m., Deputy Kasler was dispatched to Appellant's house because of what was believed to be a scream from a woman who called 911 and then hung up. Deputy Kasler testified that when he arrived he encountered Appellant who related that he was very unhappy with how the Sheriff's Office had handled a call from him earlier in the day. Deputy Kasler testified that he told Appellant that he should have raised those concerns with the deputy who responded to that call. Deputy Kasler testified that once it was evident there was no emergency, he resumed his patrol.

{¶10} The State's next witness, Stacy Stalder, was a dispatcher who works for Athens County 911 Call Center. Stalder testified that she received a call from Appellant on November 12, 2017 at 3:17 p.m. asking for a portable x-ray unit, but not emergency services, claiming that he had been assaulted earlier in the day. Stalder testified that she informed him that they did not have portable x-ray units. Stalder testified that she received another call later that day from Appellant who was screaming and yelling because he wanted someone to respond, but deputies had responded earlier. Stalder confirmed that Appellant made about thirty 911 calls that day. Stalder testified that during those calls Appellant threatened to kill her if she did not

kill Ryan Caywood. Stalder testified that at no time during his calls did Appellant claim that he was being assaulted or harmed in anyway. Stalder testified that when she had dealt with Appellant before he was never as distraught as he was on November 12, 2017, and it scared her. She testified as a consequence she filed a formal complaint with her boss.

{¶11} The State's next witness, James Heater, was the shift lieutenant for the Athens County Sheriff's Department. Lieutenant Heater testified dispatchers referred Appellant's calls to him to determine if there was an active emergency. He testified that Appellant called at least several times in the evening of November 12, 2017, but none were deemed to be an emergency. Lieutenant Heater testified that eventually he reached the point where he decided to file charges against Appellant for his excessive calls and threats. He conferred with Captain Cooper by phone and dispatched deputies to charge Appellant and to take him into custody for a physical and mental evaluation at a hospital, called a "blue slip," which is permitted by R.C. 5122.10. Lieutenant Heater determined that Appellant needed the evaluation pursuant to Crisis Intervention Training, which provides methods to deescalate situations.

{¶12} Lieutenant Heater testified that he and Deputy McCollister arrived and informed Appellant that he was going to be taken into custody

for a mental examination because of all the 911 calls he had been making that day. Lieutenant Heater testified that Appellant threw himself onto the ground, went limp, and closed his eyes. Lieutenant Heater testified that he was concerned Appellant was going to hit his head on an exposed brick so he requested Appellant to get up, but Appellant refused. Lieutenant Heater testified that he used a pressure point maneuver to make Appellant stand up and then Deputies Kasler and McCollister handcuffed Appellant. Lieutenant Heater testified that Appellant continued to try to throw himself on the ground until eventually the two deputies had to pick him up and carry him in the cruiser.

{¶13} The State's final witness was Donald McCollister, a deputy with the Athens County Sheriff's Office. Deputy McCollister explained that there are four options for issuing a "blue slip" (mental evaluation): (1) the person is suicidal, (2) the person is homicidal, (3) the person is not caring for themselves, and (4) the person would benefit from mental treatment. Deputy McCollister testified that in making out the blue slip for Appellant, he marked boxes 2 (homicidal) and 4 (would benefit from mental treatment) because of the threats Appellant made to the dispatchers.

{¶14} Deputy McCollister testified that the Sheriff's Office is only capable of taking four 911 calls at a time, so when Appellant was making

multiple 911 calls at once it was possible that others trying to reach 911 at that time could not get immediate help.[1]

{¶15} After the deputies took Appellant into custody, the Sheriff's Office charged him with misuse of the 911 system for tying up the system with non-emergency calls, aggravated menacing for threatening the dispatchers, and obstruction of official business for impeding the deputies' attempts to take Appellant into custody for the mental exam. The State then rested its case.

{¶16} Appellant testified on his own behalf. He asserted that Ryan Caywood was a guest in his hostel on November 11, 2017. Appellant testified that early on November 12th he noticed from his video surveillance equipment that Caywood was agitated, so Appellant decided to talk to him. He testified that Caywood admitted he was mentally unstable, and that he was not sure what to do with Caywood. He then testified that about noon he was leaving when Caywood broke through Appellant's fence and cornered Appellant in a courtyard. And, he testified that he tried unsuccessfully to push Caywood out of the way, and then attempted to throw water on him, which resulted in Caywood assaulting Appellant, breaking several bones.

[1] Deputy McCollister testified that when the 911 system for the Sheriff's Office was busy, calls would roll over to the Athens Police Department, but they cannot dispatch medical or fire services, and cannot assist on police matters outside the county. In this situation, the Athens Police Department would take a message and relay it to the Sheriff's Office when they were able.

The jury apparently watched some video provided by Appellant that purported to show Caywood's assault of Appellant.

{¶17} Appellant testified that he called 911 and the Nelsonville Police arrived. He testified that the police took Caywood from his property about 12:00 p.m. and told him not to return. He testified that Caywood returned about 3:00 p.m. However, Appellant testified that he left and remained across the street.

{¶18} Appellant testified that Caywood told Appellant he was going to kill him. He called 911 and deputies came, but Caywood was nowhere in sight at the time. He went on to say that after the deputies left, he saw Caywood on his surveillance systems several times. Appellant began calling 911 again and yelling at dispatchers because he was afraid Caywood was going to kill him, not to threaten the dispatchers.

{¶19} On cross examination, Appellant admitted that he had never received a medical diagnosis of any broken bones. He also admitted that he was the one who initiated physical contact with Caywood.

{¶20} The jury returned a verdict finding Appellant guilty of all three charges. The trial judge issued three separate entries: (1) the first sentenced him to 90 days in jail and a $500 fine for the aggravated menacing, (2) the second sentenced him to 30 days in jail and a $500 fine for obstructing

official business, and (3) the third sentenced him to 30 days in jail and a $250 fine for abuse of the 911 system.

{¶21} It is from these three judgments that Appellant appealed. This court consolidated all three cases into a single appeal. The court also appointed a public defender to represent Appellant on appeal. Finally, Appellant, acting pro se, also filed a supplemental Appellant brief.

ASSIGNMENTS OF ERROR - SUPPLEMENTAL BRIEF

{¶22} We will address Appellant's pro se supplemental brief first. In his first assignment of error, Appellant alleges that he should have been able to be a "co-attorney, dual attorney" rather than having to be his own attorney or having the public defender represent him.

{¶23} "[A] criminal defendant has the right to representation by counsel or to proceed pro se with the assistance of standby counsel. However, these two rights are independent of each other and may not be asserted simultaneously." *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, ¶ 32, citing *Parren v. State*, 309 Md. 260, 269, 523 A.2d 597 (1987).

{¶24} Appellant chose to represent himself pro se with advisory counsel. Under *Martin* he had no right to anything more. Accordingly, we overrule Appellant's first assignment or error.

{¶25} In his second assignment of error, Appellant claims that had he had a public defender as back-up counsel, he or she would have raised Appellant's brain implant issue, which the trial court refused to admit. Appellant had an assistant public defender appointed as advisory counsel. Therefore, we overrule Appellant's second assignment of error.

{¶26} In his third assignment of error, Appellant asserts that he should have been able to present photos of the no trespassing signs from his property. A trial court's decision to exclude evidence "cannot be reversed absent an abuse of discretion." *State v. Rudolph*, 4th Dist. Lawrence No. 17CA12, 2019-Ohio-468, ¶ 42. A no trespassing sign is not probative to the offenses of disrupting official business or abusing the 911 system under these facts. Therefore, because the trial court did not abuse its discretion in refusing to admit evidence of the no trespassing sign, we overrule Appellant's third assignment of error.

{¶27} In his fourth assignment of error, Appellant asserts "the necessity defense." Generally the defense of necessity permits a person to avoid criminal liability when "[t]he pressure of natural physical forces sometimes confronts a person in an emergency with a choice of two evils: either he may violate the literal terms of the criminal law and thus produce a harmful result, or he may comply with those terms and thus produce a

greater or equal or lesser amount of harm." *City of Dayton v. Thornsbury*, 2nd Dist. Montgomery No. 16744, 1998 WL 598124, at *2.

{¶28} The defense of necessity is not applicable in this case. Therefore, we overrule Appellant's fourth assignment of error.

{¶29} In his fifth assignment of error, Appellant asserts the officers lied that they are not biased against him. Whether officers were biased or not is for the jury to determine from the evidence. Therefore, we overrule Appellant's fifth assignment of error.

{¶30} In the brief prepared by Appellant's public defender, Appellant asserts six assignments of error.

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT VIOLATED CHAD KISTER'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN, IN THE ABSENCE OF SUFFICIENT EVIDENCE, IT ENTERED A JUDGMENT OF CONVICTION FOR OBSTRUCTING OFFICIAL BUSINESS.

II. THE TRIAL COURT VIOLATED CHAD KISTER'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN, IN THE ABSENCE OF SUFFICIENT EVIDENCE, IT ENTERED A JUDGMENT OF CONVICTION FOR ABUSE OF A 911 SYSTEM.

III. THE TRIAL COURT VIOLATED CHAD KISTER'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN, IN THE ABSENCE OF SUFFICIENT EVIDENCE, IT ENTERED A JUDGMENT OF CONVICTION FOR OBSTRUCTING OFFICIAL

BUSINESS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

IV. THE TRIAL COURT VIOLATED CHAD KISTER'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT ENTERED A JUDGMENT OF CONVICTION FOR ABUSE OF A 911 SYSTEM AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

V. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DID NOT ALLOW KISTER TO INTRODUCE RELEVANT AND ADMISSIBLE EVIDENCE.

ASSIGNMENTS OF ERROR III & IV

{¶31} For convenience, we will review Appellant's assignments of error out of order. In his third and fourth assignments of error, Appellant asserts that his convictions for obstructing official business and the abuse of the 911 system are against the manifest weight of the evidence. Because both issues involve the same standard of review, we will review these assignments of error first.

{¶32} In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. A reviewing

court may not reverse a conviction when there is substantial evidence upon which the trial court could reasonably conclude that all elements of the offense have been proven beyond a reasonable doubt. (Citations Omitted) *State v. Barnhart*, 4th Dist. Meigs Nos. 18CA8, 18CA15, 2019-Ohio-1184, ¶ 34.

{¶33} R.C. 2921.31(A) provides "[n]o 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." (Emphasis added.)

{¶34} Appellant argues that merely "refusing to cooperate alone is not sufficient to prove the crime of obstruction of official business." The State agrees, as does this court. *See State v. Certain*, 180 Ohio App.3d 457, 2009-Ohio-148, 905 N.E.2d 1259, ¶ 12 (4th Dist.) (R.C. 2921.31 "criminalize[s] only affirmative acts, not the failure to act.").

{¶35} The question is whether collapsing is an affirmative act. Because the term "act" is not defined in R.C. 2921.31, we must resort to its common and ordinary meaning, which may be derived from a dictionary. *See State v. Erskine*, 4th Dist. Highland No. 14CA17, 2015-Ohio-710, 29 N.E.3d 272, ¶ 28. An act is defined as "1, a: *the doing of a thing* : DEED

an *act* of courage; b : *law*: something done *voluntarily*." (Emphasis added.) https://www.merriam-webster.com/dictionary/act. Further, in *State v. Certain* we found the language of R.C. 2921.31 was "broad," prohibiting " 'any act' that obstruct[ed] official business." *State v. Certain*, 180 Ohio App.3d 457, 2009-Ohio-148, 905 N.E.2d 1259, ¶ 13 (4th Dist.). In *State v. Dunn*, Pickaway App. No. 06CA6, 2006-Ohio-6550, 2006 WL 3575807, at ¶ 47, we held that defendant's placing his knee in a manner that prevented officers from closing a police cruiser door was sufficient evidence to support a conviction for obstructing official business.

{¶36} In considering the law aforementioned, we reject Appellant's argument that he merely refused to cooperate. We find that collapsing is an affirmative act within R.C. 2921.31, absent some involuntary cause such as a medical condition, which is not an issue in this case. Similar to defendant's placement of his knee in *Dunn* to prevent officers from closing the door of their cruiser, Appellant's collapsing could be found to be an affirmative act that impeded the deputies from conducting their official business of taking Appellant into custody for a mental examination.

{¶37} Consequently, we find that there is substantial evidence upon which the jury could reasonably conclude that all elements of obstructing official business have been proven beyond a reasonable doubt. Accordingly,

after reviewing the entire record, weighing the evidence and all reasonable inferences, considering the credibility of witnesses and determining and resolving conflicts in the evidence, we find that the jury did not lose its way so as to create such a manifest miscarriage of justice justifying a new trial. We overrule Appellant's third assignment of error.

{¶38} Appellant also asserts that his conviction for abuse of the 911 system was against the manifest weight of the evidence. Numerous witnesses for the State testified that Appellant made approximately thirty 911 calls on November 12, 2017. Appellant argues that he called 911 for the purpose of obtaining emergency services because "he wanted Caywood removed from his property."

{¶39} The 911 calls at issue were made after Caywood had been removed from Appellant's property by the Nelsonville police. Hutchison, the dispatcher who answered a 911 call from Appellant that afternoon, testified that during the 911 call Appellant informed her that Caywood "was across the road." When asked if she thought Appellant was in fear of his safety when he called, she responded "No." Hutchison's testimony was effectively corroborated by Appellant's own testimony when he testified that Caywood returned in the afternoon, but left when requested and went across the street.

{¶40} The evidence indicates that Appellant made approximately thirty 911 calls that afternoon even though there is no evidence indicating that there was an ongoing emergency during any of the calls. Consequently, we find there is substantial evidence upon which the jury could reasonably conclude that Appellant abused the 911 system beyond a reasonable doubt.

{¶41} Therefore, after reviewing the entire record, weighing the evidence and all reasonable inferences, considering the credibility of witnesses and determine and resolving conflicts in the evidence, we find that the jury did not lose its way so as to create such a manifest miscarriage of justice warranting a new trial. Accordingly, we overrule Appellant's fourth assignment of error.

ASSIGNMENTS OF ERROR I & II

{¶42} In his first and second assignments of error, Appellant asserts that there is insufficient evidence to support his convictions for obstructing official business and the abusing the 911 system.

{¶43} "When an appellate court concludes that the weight of the evidence supports a defendant's conviction, this conclusion necessarily also includes a finding that sufficient evidence supports the conviction." *State v. Adkins*, 4th Dist. Lawrence No. 13CA17, 2014-Ohio-3389, ¶ 27. Having already determined that Appellant's convictions for obstructing official

business and abusing the 911 system were not against the manifest weight of the evidence, we also necessarily reject Appellant's assignments of error that claim these convictions were not supported by sufficient evidence.

{¶44} Therefore, we overrule Appellant's third and fourth assignments of error.

ASSIGNMENT OF ERROR V

{¶45} In his fifth assignment of error, Appellant asserts that the trial court abused its discretion when it did not allow him to introduce relevant admissible evidence.

{¶46} "[T]he admission or exclusion of evidence is within the sound discretion of the trial court, and the trial court's decision to admit or exclude such evidence cannot be reversed absent an abuse of discretion." *Rudolph*, 4th Dist. Lawrence No. 17CA12, 2019-Ohio-468, ¶ 42, citing *State v. Craft*, 4th Dist. Athens No. 97CA53, 1998 WL 255442, *7. An abuse of discretion is more than an error, it means that the trial court acted in an "unreasonable, arbitrary, or unconscionable" manner. *State v. Reed*, 110 Ohio App.3d 749, 752, 675 N.E.2d 77 (4th Dist.), citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). "When applying the abuse of discretion standard, a reviewing court is not free merely to substitute its judgment for that of the trial court." *Id.*, citing *In re Jane Doe 1*, 57 Ohio

St.3d 135, 566 N.E.2d 1181 (1991).

{¶47} Appellant argues that the trial court abused its discretion in refusing to admit Appellant's testimony that he was taken to the hospital "where he had needles jabbed into his arm against his will." Appellant argues the testimony was relevant to the injuries he suffered from Caywood's assault, and to his belief that there was an ongoing emergency, thereby justifying his 911 calls.

{¶48} " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of action more probable or less probable than it would be without the evidence." *State v. Fannon*, 4th Dist. Athens Nos. 17CA24, 17CA26, 2018-Ohio-5242, 117 N.E.3d 10, ¶ 80, citing Evid.R. 401.

{¶49} We find that the testimony of a hospital visit fails to make it more or less probable that Appellant obstructed official business by collapsing when the deputies tried taking Appellant into custody for a mental examination. By Appellant's own admission, Caywood was not on Appellant's property at the time of the 911 calls.

{¶50} Accordingly, we find the trial court's decision not allowing Appellant to testify about the hospital visit was within the gatekeeper role of the trial court. We find excluding this information was not unreasonable,

arbitrary, or unconscionable and not an abuse of discretion. Therefore, we overrule Appellant's fifth assignment of error.

CONCLUSION

{¶51} Having overruled all Appellant's assignments of error in his brief and supplemental brief, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens 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.

Smith, P.J. & Hess, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland, 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.