

[Cite as *State v. Ogletree*, 2009-Ohio-6634.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92507

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

NAKAI OGLETREE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-514115

BEFORE: Gallagher, P.J., Boyle, J., and Jones, J.

RELEASED: December 17, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

SEAN C. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant, Nakai Ogletree, appeals his conviction from the Cuyahoga County Court of Common Pleas.

{¶ 2} On July 17, 2008, Ogletree and his wife, Kim Austin, were in an argument. During the argument, Ogletree choked his wife and punched her in the face. Austin called 911. Ogletree was arrested.

{¶ 3} Ogletree was charged with kidnapping and domestic violence with two furthermore specifications. He waived a jury and was tried to the bench. The kidnapping charge was dismissed by the court at the Crim.R. 29 hearing. Ogletree was found guilty of domestic violence with the two furthermore specifications, making it a felony of the third degree. He was sentenced to two years in prison.

{¶ 4} Ogletree appeals, advancing three assignments of error for our review. His first assignment of error states the following:

{¶ 5} “The trial court erred to the prejudice of the appellant when it denied Ms. Austin’s 5th Amendment right against self-incrimination.”

{¶ 6} Ogletree argues that the trial court erred when it forced the victim to testify, knowing the victim was going to assert her Fifth Amendment privilege against self-incrimination. He contends that the victim’s testimony was “deeply prejudicial.”

{¶ 7} “We review the assertion of a Fifth Amendment privilege against self-incrimination and its grant or denial for abuse of discretion.” *State v. Poole*, Ashtabula App. No. 2009-A-0010, 2009-Ohio-5634, quoting *United States v. Boothe* (C.A.6, 2003), 335 F.3d 522, 525, certiorari denied (2004), 541 U.S. 975.

{¶ 8} The Fifth Amendment declares that “[n]o person * * * shall be compelled in any criminal case to be a witness against himself * * *.” This right, or privilege, ensures that a person is not compelled to produce evidence that may tend to incriminate him. The privilege, however, is not unlimited. A person may decline to answer specific questions “only when the danger of incrimination is real and appreciable, rather than imaginary and insubstantial,” or when the answer could reasonably “[furnish] a link in the chain of evidence” against him. *State v. Jenkins* (1984), 15 Ohio St.3d 164, 228; see, also, *United States v. Apfelbaum* (1980), 445 U.S. 115; *Hoffman v. United States* (1951), 341 U.S. 479, 486.

{¶ 9} When a witness asserts a privilege against self-incrimination, a court may not rely upon the witness’s claim alone. *State v. Landrum* (1990), 53 Ohio St.3d 107, 120. The court has a duty to determine if the witness’s refusal to answer is justified. *Id.* If the court determines that a witness is mistaken about the danger of incrimination, then the court must require the witness to answer the question. *Hoffman*, 341 U.S. at 486.

{¶ 10} Ogletree argues that the victim could not testify truthfully because the state threatened to prosecute her for making a false police report.

Ogletree asserts that the victim lied to the police when she said Ogletree punched and choked her. He contends that by forcing the victim to testify and repeatedly assert her Fifth Amendment right, the court allowed the state to draw inferences that were prejudicial to Ogletree. He insists that *State v. Oldham*, Cuyahoga App. No. 88656, 2007-Ohio-3907, supports his argument.

{¶ 11} In *Oldham*, the defendant was charged with felonious assault with firearm specifications. There was no evidence of a gun or gunshot residue at the scene, and there was no mention of a gunshot wound in the medical records. The state called the defendant's son to testify against his father, knowing that the son was under indictment for allegedly hiding the gun. In addition, the court was informed that the son would assert his Fifth Amendment privilege, and the son's attorney was unavailable for trial. The court allowed the son to testify; he asserted his Fifth Amendment privilege during direct examination. This court found that the jury was able to infer that the son invoked his Fifth Amendment right because he had hidden the gun that his father used to shoot at the victim. Further, in the closing arguments, the state inferred that the son had hidden the gun used by the defendant. This court reversed, concluding that the defendant did not receive a fair trial. *Id.*

{¶ 12} We find that *Oldham* is distinguishable from the case at hand. First, the witness asserting her Fifth Amendment privilege is the victim in this case and is not an alleged accomplice. Second, the victim's attorney was present. Third, the state did not draw any inferences from the victim's assertion of her Fifth Amendment privilege.

{¶ 13} We find that the trial court did not abuse its discretion when it allowed the victim to testify and addressed each assertion of her Fifth Amendment right and instructed the victim to answer when it was clear she was not in jeopardy of incriminating herself.

{¶ 14} Further, we disagree with Ogletree's claim that the victim lied to the police. The record reveals that the victim called 911 and told the operator that Ogletree had punched and choked her. When the officers arrived, the victim repeated her accusation. Also, during a recorded jailhouse telephone conversation between Ogletree and the victim, Ogletree stated that he choked her for only 30 seconds. Although the victim did not want to press charges, it does not mean that she lied to the police. It is clear that the victim did not want to testify against her husband and wanted to recant her statement because she did not want him to go to prison.

{¶ 15} Since the trial court did not abuse its discretion when it allowed the victim to testify, Ogletree's first assignment of error is overruled.

{¶ 16} Ogletree's second assignment of error states the following:

{¶ 17} “Whether the trial court erred when it entered a guilty verdict without sufficient evidence to sustain each and every element of the conviction.”

{¶ 18} When an appellate court reviews a claim of insufficient evidence, “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. Leonard*, 104 Ohio St.3d 54, 67, 2004-Ohio-6235, 818 N.E.2d 229, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 19} Ogletree argues that the state did not prove that he knowingly caused or attempted to cause physical harm to a family or household member pursuant to R.C. 2919.25(A) and R.C. 2919.25(F)(1)(a)(i). He contends that there is no evidence that he is the spouse of the victim because the state did not provide a marriage certificate or license or evidence of cohabitation.

{¶ 20} R.C. 2919.25(F)(1)(a)(i) defines “family or household member” as a spouse, a person living as a spouse, or a former spouse of the offender, who is residing with or has resided with the offender.

{¶ 21} The victim testified at trial that Ogletree was her husband, and that they had been married for two years and resided together at the location of the incident. We find that there was sufficient evidence to sustain a conviction for domestic violence. Ogletree’s second assignment of error is overruled.

{¶ 22} Ogletree’s third assignment of error states the following:

{¶ 23} “Whether the trial court erred when it entered a verdict that was inconsistent with the manifest weight of the evidence.”

{¶ 24} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether “there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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.” (Internal citations and quotations omitted.) *Leonard*, 104 Ohio St.3d at 68.

{¶ 25} Ogletree contends that there is no evidence that he choked and punched the victim. He asserts that the victim did not have any visible injuries and thus his conviction is against the manifest weight of the evidence.

{¶ 26} We disagree. The victim testified that she called 911. The 911 recording provides that Ogletree punched and choked the victim. Further in the jailhouse tapes, Ogletree admits that he choked the victim “only for like 30 seconds.” We find that Ogletree’s conviction is not against the manifest weight. Accordingly, his third assignment of error is overruled.

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 conviction 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.

SEAN C. GALLAGHER, PRESIDING JUDGE

MARY J. BOYLE, J., and
LARRY A. JONES, J., CONCUR