[Cite as *State v. Porozynski*, 2010-Ohio-5122.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93827

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANNETTE POROZYNSKI

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-512152-A

BEFORE: Dyke, J., Rocco, P.J., and McMonagle, J.

RELEASED AND JOURNALIZED: October 21, 2010

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ANN DYKE, J.:

{¶ 1} Defendant-appellant, Annette Porozynski ("appellant"), appeals her convictions for involuntary manslaughter and abduction. For the reasons provided below, we affirm.

{¶ 2} On June 20, 2008, the Cuyahoga County Grand Jury indicted appellant on one count of involuntary manslaughter, in violation of R.C. 2903.04(A), and one count of abduction, in violation of R.C. 2905.02(A)(2). Appellant pled not guilty to the charges and the case proceeded to a jury trial on June 29, 2009.

{¶ 3} At trial, the state presented nine individuals for examination:

Charlotte Shoff, Detective Frank Costanzo, Dr. Dan Galita, Shannon McWilliams, Officer Jeff Weaver, Detective Tom Armelli, James Drake, Ronda Majors, and Detective Joselito Sandoval. Their testimony established the following facts.

{¶ 4} On November 11, 2007, Ronda Majors ("Majors") was at her house located at 8403 Beaman Road in Cleveland with her roommate, Charlotte Shoff ("Shoff"), James Drake ("Drake"), her boyfriend, and Audrey Lawrence, a.k.a. Audrey Tannert ("Audrey"), Shoff's 24 year-old daughter. During that evening, appellant, an acquaintance of Majors, entered the house carrying beer. Shoff testified that upon arrival, appellant seemed to be very intoxicated. This was the first time appellant met Audrey.

{¶ 5} Shortly after appellant's arrival, Shoff noticed that Audrey was not present. Shoff suggested that appellant check if her car keys were missing, indicating that Audrey may have taken them. Appellant was unable to locate her keys and went outside. There, she witnessed Audrey pulling away in appellant's 1992 Mazda SUV. Appellant attempted to halt Audrey from leaving but was unsuccessful and she drove away.

{¶ 6} Appellant quickly returned to the house while Shoff and Drake attempted to contact Audrey. Shoff testified that appellant was very angry that Audrey took her vehicle and threatened that "she's going to teach Audry [sic] a lesson and beat the fuck out of her." Unable to contact Audrey initially, appellant telephoned the police and reported that Audrey had stolen her vehicle. Shortly thereafter, Drake reached Audrey via her cell phone, who informed him she was

returning the vehicle to the house.

{¶ 7} Not convinced that Audrey would return, appellant recruited Drake and Majors to assist her in a search for Audrey and the vehicle. The three individuals got into Majors' car, a black Bonneville, and drove around the neighborhood.

{¶ 8} In their pursuit, Majors, Drake, and appellant encountered a police vehicle. They flagged the police over and informed them again of the appellant's missing vehicle. Officers Jeff Weaver and his partner Nathan Goble, confirmed they received the call and were searching for the vehicle.

{¶ 9} Shortly after their encounter with police, Majors, Drake, and appellant spotted Audrey in the Mazda SUV. Per the directives of Majors, Drake pulled in front of Audrey as she was stopped at a traffic signal. Within seconds, Majors and appellant exited their vehicle and approached Audrey in the Mazda. Majors entered the driver's side of the vehicle and pushed Audrey onto the passenger seat. Appellant entered the passenger side and pushed Audrey in between the two front seats. Drake testified that appellant said to Audrey, "How dare you, bitch, take my car."

{¶ 10} Once inside, appellant began tussling with Audrey. Majors testified that during the altercation, appellant was on top of and punching Audrey. Also, appellant's knee was pressed into Audrey's chest. Drake confirmed that he witnessed appellant push her knee into Audrey's chest. Additionally, both Drake and Majors provided that Audrey was pleading with appellant to "get off of me."

Thereafter, Drake drove Majors' Bonneville back to the house on Beaman and waited for Majors to return with Audrey.

{¶ 11} After entering the Mazda, Majors drove off while appellant continued to restrain and press her knee into Audrey. Majors testified that some time during the altercation, Audrey became unresponsive. In response, Majors stopped the vehicle around Broadway and Harvard Avenue. While appellant dragged Audrey from the vehicle, Majors telephoned 911 and appellant began resuscitation efforts upon Audrey per the directives of the operator. An ambulance arrived shortly thereafter and provided assistance.

{¶ 12} Shannon McWilliams, a paramedic who responded to the scene, testified that she witnessed appellant on top of Audrey and that the firefighters had to pull appellant off Audrey. She further provided that appellant seemed agitated and was stating "that bitch, she stole my car." Once inside the ambulance, McWilliams noticed that Audrey had a line of demarcation, meaning that her skin was a darker blue from the neck up. Resuscitation efforts proved futile and Audrey was ultimately pronounced dead at Marymount Hospital.

{¶ 13} Detective Joselito Sandoval with the Cleveland Police Department testified that he interviewed appellant following her arrest. After providing her with Miranda rights, appellant told Det. Sandoval of the events of the evening. The detective testified that appellant admitted she engaged in a physical altercation with Audrey upon entering the vehicle and she was "on top of Audrey" and putting her "knee on her chest."

{¶ 14} Dr. Dan Galita, a forensic pathologist and deputy coroner with the Cuyahoga County Coroner's Officer, testified that he performed the autopsy of Audrey. He first discovered scleral petechiae or pinpoint hemorrhages on the white part of Audrey's eye. He also found scleral petechiae on her face. He explained that these injuries commonly occur due to increased blood pressure to those areas. The increased pressure can result from mechanical pressure on the chest or neck that slows down or stops the return of the blood flow to the heart.

{¶ 15} Additionally, Dr. Galita discovered a fresh contusion on the bridge of Audrey's nose, a nose bleed, a number of small fresh contusions on her right forearm and hand, and two abrasions on her upper back. Dr. Galita also found multiple contusions between Audrey's scalp and skull. He further provided that there was no bruising or abrasions to Audrey's chest, nor did she suffer from any broken ribs. Finally, a toxicology report revealed that Audrey had significant amounts of alcohol and cocaine in her system at the time of death.

{¶ 16} In light of the foregoing, coupled with the information from the investigation, Dr. Galita ruled Audrey's death a homicide and opined to a reasonable degree of medical certainty, that "Audrey [sic] died as a result of mechanical asphyxia while acutely intoxicated by cocaine and ethanol." He explained that mechanical asphyxia is compressing on the top of someone where they can no longer breathe.

{¶ 17} During cross-examination, Dr. Galita admitted that Audrey's levels of

intoxication were of significant levels, meaning that she could have died as a result of those levels alone. However, Dr. Galita provided that in his opinion and based on the information provided to him, he believed Audrey more accurately died of mechanical asphyxiation coupled with acute intoxication.

{¶ 18} Following presentation of the aforementioned evidence, the state rested its case and appellant moved for acquittal pursuant to Crim.R. 29(A). After careful consideration of the parties' arguments, the trial court denied appellant's request. She then rested her case and renewed the Crim.R. 29 motion but the trial court affirmed its prior denial.

{¶ 19} On July 2, 2009, the jury returned a verdict of guilty on both counts as charged in the indictment. On August 5, 2009, the trial court sentenced appellant to five years imprisonment on each count and ordered both five year terms to run concurrent to each other. Finally, the court imposed five years of postrelease control.

{¶ 20} Appellant now appeals and presents three assignments of error for our review. In the interests of clarity, we will first consider her third assignment of error, which provides:

{¶ 21} "The trial court erred by failing to instruct the jury on the affirmative defense of making a citizen's arrest."

{¶ 22} Here, appellant argues that the trial court erred in denying her request to instruct the jury on the affirmative defense of making a citizen's arrest. After conducting a de novo review of the trial court's determination, we find

appellant's argument without merit. See *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828 (appellate court reviews de novo a trial court's determination on whether an instruction is required.)

{¶ 23} "The standard for determining whether a criminal defendant has successfully raised an affirmative defense under R.C. 2901.05 is to inquire whether the defendant has introduced sufficient evidence which, if believed, would raise a question in the minds of reasonable people concerning the existence of that defense. *State v. Melchior* (1978), 56 Ohio St.2d 15, 381 N.E.2d 195, paragraph one of the syllabus. R.C. 2901.05(A) provides that the burden of going forward with the evidence of an affirmative defense, as well as the burden of proving the existence of that defense by a preponderance of the evidence, lie with the accused. * * * The trial court, as matter of law, cannot give a jury instruction on an affirmative defense if the defendant fails to meet this initial burden. *State v. Reedy* (Dec. 11, 1996), Jackson App. No. 96CA782, unreported." *State v. Powell* (Sept. 29, 1997), Ross App. No. 96CA2257.

{¶ 24} Ohio law has recognized that making a citizen's arrest is an affirmative defense. *State v. Rogers* (1975), 43 Ohio St.2d 28, 330 N.E.2d 674, paragraph two of the syllabus. R.C. 2935.04 governs the defense of making a citizen's arrest and provides:

{¶ 25} "When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense,

and detain him until a warrant can be obtained."

{¶ 26} In this case, we agree with the trial court that the evidence was insufficient to warrant an instruction on making a citizen's arrest. The actions of appellant were inconsistent with this defense. Upon discovering Audrey in her Mazda, appellant should have detained her and waited for the police's arrival. Instead, she entered the vehicle, got on top of Audrey, and continued to punch her while Majors drove around the neighborhood. As Majors testified during the trial, her destination was the Beaman house, not a police station. Additionally, there is no evidence in the record indicating that appellant ever informed Audrey or anyone else that she was effectuating an arrest. Rather, appellant's actions were more consistent with inflicting revenge upon Audrey for taking her vehicle. Such a conclusion is also supported by Shoff's testimony that appellant stated to her that "she's going to teach Audry [sic] a lesson and beat the fuck out of her."

{¶ 27} Furthermore, appellant did not allege facts establishing that she was entitled to make a citizen's arrest. In order to make a citizen's arrest, the arrest must be based upon either the commission of a felony or reasonable cause to believe a felony has been committed. *Jackson v. Gossard* (1989), 48 Ohio App.3d 309, 311, 549 N.E.2d 1234. Appellant claims Audrey stole appellant's Mazda, and thus, committed grand theft of a motor vehicle in violation of R.C. 2913.02, a fourth-degree felony. This statute requires a culpable mental state of intent to permanently deprive the owner of the vehicle. At trial, Drake testified that when he spoke with Audrey she indicated that she was returning to the

Beman house with the vehicle. Appellant is unable to point to any evidence in the record to indicate anything different. Without the element of intent, Audrey merely would have committed the misdemeanor offense of unauthorized use of a vehicle under R.C. 2913.03(A). "[A] misdemeanor cannot be the basis for a citizen's arrest." *Jackson*, supra at 310. Thus, we find that appellant's actions did not rise to the standard of attempting to effect a lawful arrest. In light of the foregoing, we find the trial court did not error in denying appellant's request for an instruction regarding the affirmative defense of making a citizen's arrest. Accordingly, her third assignment of error is overruled.

{¶ 28} Appellant's first assignment of error states:

{¶ 29} "The trial court erred in denying Appellant's motion for acquittal as to the charges when the state failed to present sufficient evidence to sustain a conviction."

{¶ 30} Within this assignment of error, appellant argues the trial court erred in denying her motion for acquittal because the evidence is legally insufficient to support her convictions for abduction and involuntary manslaughter. We find appellant's argument without merit.

{¶ 31} Crim.R. 29(A) governs motions for acquittal and provides for a judgment of acquittal if the evidence is insufficient to sustain a conviction. Pursuant to Crim.R. 29, a court shall not order an entry of judgment 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. A Crim.R. 29(A) motion for acquittal "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; *State v. Jordan*, Cuyahoga App. Nos. 79469 and 79470, 2002-Ohio-590.

{¶ 32} The standard for a Rule 29 motion is virtually identical to that employed in testing the sufficiency of the evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. In *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, the Ohio Supreme Court set forth the following standard of review to be applied by an appellate court when reviewing a claim of insufficient evidence:

{¶ 33} "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 to determine whether such evidence, if believed, would convince the average mind of a 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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)"

{¶ 34} With regard to appellant's conviction for abduction, R.C. 2905.02(A)(2) provides that "[n]o person, without privilege to do so, shall knowingly * * * [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."

{¶ 35} The essential elements of involuntary manslaughter are found in R.C. 2903.04(A), which states "No person shall cause the death of another * * * as a proximate result of the offender's committing or attempting to commit a felony."

{¶ 36} In the instant case, the evidence adequately demonstrates that appellant abducted Audrey without privilege to do so. The evidence is indisputable that appellant applied "force" when she entered the Mazda, pushed Audrey to the center of the vehicle, got on top of her, tussled with her, repeatedly punched her, and pressed her knee into Audrey's chest. By being restrained by appellant's knee in her chest, Audrey was not free to leave the vehicle as demonstrated by the testimony of Drake and Majors that Audrey was pleading with appellant to "get off of me."

{¶ 37} Furthermore, the restraint of the victim was accomplished under circumstances that created a risk of physical harm to Audrey or in the least placed her in fear. As a result of appellant punching Audrey and applying pressure to her chest, Audrey sustained injuries to her nose, arm, hand, head, and ultimately resulted in her death. Also notable in this regard is Shoff's testimony that shortly before the restraint, appellant threatened that "she's going to teach Audry [sic] a lesson and beat the fuck out of her."

{¶ 38} Moreover, appellant's actions were undoubtedly knowingly as anyone could conclude placing a knee in someone's chest as they lay in between

two seats would restrain them against their will. Finally, as established above, appellant did not perform a citizen's arrest, and thus, did not have any privilege to commit an abduction upon Audrey. Considering the foregoing in a light most favorable to the state, we find sufficient evidence establishing the elements for the offense of abduction.

{¶ 39} In addition to sustaining appellant's conviction for abduction, we next conclude that the state presented adequate evidence proving that appellant committed involuntary manslaughter in that she caused the death of Audrey and such death was the proximate result of appellant committing the abduction. As previously noted, after getting on top of Audrey and restraining her by applying pressure to her chest, Audrey passed out and became unresponsive. She never regained consciousness and was pronounced dead shortly thereafter.

{¶ 40} The coroner, Dr. Galita, ruled Audrey's death a homicide and opined that, to a reasonable degree of medical certainty, "Audrey [sic] died as a result of mechanical asphyxia while acutely intoxicated by cocaine and ethanol." The doctor defined mechanical asphyxia as used in this context as "applying high pressure on the chest which impairs the normal expansion of the chest." Accordingly, despite appellant's assertion to the contrary, we find that Dr. Galita's opinion as to the cause of death, coupled with the temporal proximity between the restraint and the death, adequately established the causal link required to sustain a conviction for involuntary manslaughter. Appellant's first assignment of error is overruled.

{¶ 41} Her second assigned error provides:

{¶ 42} "Appellant's convictions are against the manifest weight of the evidence."

{¶ 43} In *State v. Thompkins*, supra, the Ohio Supreme Court illuminated its test for manifest weight of the evidence as follows:

{¶ 44} "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.' [Black's Law Dictionary (6 Ed.1990),] at 1594."

{¶ 45} The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, 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. See *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. Id.

{¶ 46} Here, appellant challenges Dr. Galita's testimony and argues that the

manifest weight of the evidence establishes that the drugs and alcohol were the proximate cause of Audrey's death and not appellant pressing her knee into Audrey's chest. In support of this argument, appellant directs this court to the cross-examination of Dr. Galita in which he admitted that Audrey's levels of intoxication were significant enough that she could have died as a result of those levels alone. He explained that when mixed together, cocaine and alcohol become a very dangerous by-product called cocaethylene, which can be fatal by itself. Despite this testimony, however, Dr. Galita clarified that he classified Audrey's death as a homicide, not an accident or suicide. Furthermore, at the end of his testimony, Dr. Galita explained that it is his opinion, based on the information provided to him including appellant's own statements to Det. Sandoval that she pressed her knee into Audrey's chest, that he believed Audrey more accurately died of mechanical asphyxiation than merely the combination of the drugs and alcohol. Finally, Dr. Galita concluded his testimony by stating that Audrey died of "mechanical compression in a very vulnerable moment."

{¶ 47} Additionally, appellant complains that proximate cause is lacking in this instance because the autopsy report did not mention any bruising, broken ribs, abrasions, or other injuries to Audrey's chest. Dr. Galita, however, clarified that because of Audrey's level of intoxication, very little pressure would have to be applied to her chest to cause mechanical asphyxiation. He explained that it would be as if a police officer put their arms across their assailant's chest and then that person died as a result. Accordingly, we find appellant's argument in

this regard without merit and find that the manifest weight of the evidence established that appellant caused the death of Audrey. Appellant's second 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.

ANN DYKE, JUDGE

KENNETH A. ROCCO, P.J., CONCURS;
CHRISTINE T. MCMONAGLE, J., DISSENTS. (SEE ATTACHED DISSENTING OPINION.)

CHRISTINE T. McMONAGLE, J., DISSENTING:

{¶ 48} Respectfully, I dissent from the majority's resolution of the first and second assignments of error.

{¶ 49} The majority opinion states that "Dr. Galita ruled Audrey's death a homicide and opined that, to a reasonable degree of medical certainty,

'Audrey died as a result of mechanical asphyxia while acutely intoxicated by cocaine and ethanol.'" That statement by the majority is an accurate portrayal of the coroner's *direct examination* by the State. But the majority ignores the testimony of this same coroner elicited upon *cross- examination*:

{¶ 50} "Q. So there's nothing to suggest, Doctor, that pressure on the chest, if there was, would have caused the death in and of itself?

{¶ 51} "A. That's correct.

{¶ 52} "* * *

{¶ 53} "Q: So again, just to be clear, there's nothing to suggest that any amount of force that was placed on the young lady's chest in of itself would cause death?

{¶ 54} "A: That's right.

{¶ 55} "Q: However, the combination of cocaine at this level, alcohol at this level and the byproduct of cocaethylene[1] in and of itself was toxic enough to have caused the lady's death. Correct?

{¶ 56} "A: Yes. It's toxic enough." (Tr. 243.)

{¶ 57} This same coroner concluded his cross-examination in the following manner:

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[1] Dr. Galita testified: "[C]ocaethylene is the chemical compound which results from the combination of cocaine and alcohol, and is very dangerous. Q: Okay. It may be fatal in itself? A. It can be fatal by itself, yes." (Tr. 241.)

{¶ 58} "Q: Let me back up once more. We know that the voluntary ingestion of cocaine and alcohol and the byproduct of cocaethylene caused her death?

{¶ 59} "A: It is true.

{¶ 60} "Q: That is true?

{¶ 61} "A: Yes.

{¶ 62} "Q: Okay. We don't know to what effect any pressure may — to a reasonable degree of scientific certainty, we don't know to what degree any pressure may or may not have further facilitated that, do we?

{¶ 63} "A: No, we don't.

{¶ 64} "Q: So we know the combination was lethal, and caused her death, of cocaine and alcohol, and we do not know to a reasonable degree of medical certainty whether or not pressure on the chest played any role in that, do we?

{¶ 65} "A: No, we don't."

{¶ 66} Dr. Galita's testimony on direct was wholly inconsistent with his testimony on cross-examination and therefore had no evidentiary value whatsoever. Insofar as the only witness to testify as to cause of death was Dr. Galita, I would hold that there was insufficient evidence with which to convict Ms. Porozynski of involuntary manslaughter. Without any evidence whatsoever as to what caused the victim's death, there was insufficient

evidence to find that defendant caused the victim's death.

{¶ 67} Accordingly I would reverse and remand the matter to the trial court with orders to vacate the conviction for involuntary manslaughter.