[Cite as *State v. Hill*, 2010-Ohio-709.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-004**
- vs -	:	
BERNARD M. HILL,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 000316.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Christopher P. Tucci, Attorney Tucci, L.L.C., 3 South State Street, #1, Painesville, OH 44077 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Bernard M. Hill, a.k.a. Bishop Hill, appeals from the judgment of the Lake County Court of Common Pleas, entered upon a jury verdict, sentencing him to a total of ten years imprisonment for aggravated burglary, felonious assault, domestic violence, and endangering children. We affirm.

{¶2} Mr. Hill and Victoria Cooney had been friends for many years. In January 2006, they took a lease of a condominium or apartment located at 1519 Ridgewick Drive in the city of Wickliffe, Ohio. August 31, 2007, Ms. Cooney gave birth to their son,

Trey Edward Hill. At some point in the spring of 2008, Mr. Hill began to disappear from the residence for extended periods. Eventually, Ms. Cooney became aware that Mr. Hill had married another woman, Stacey Hill. Ms. Cooney obtained the return of Mr. Hill's keys to 1519 Ridgewick Drive, and disposed of his possessions remaining in the apartment. Ms. Cooney began to send frequent text messages to Mr. Hill, many of them harassing.

{¶3} About 6:00 p.m., a driver passing 1519 Ridgewick Drive called the Wickliffe police, to report a woman with a bloody face standing in front of the apartment. This was Ms. Cooney, who also called the police to report that Mr. Hill had entered her apartment unannounced, and beat her. At trial, a neighbor, Jeremy Bosher, also testified seeing Ms. Cooney bleeding and shaken in front of her apartment. He further testified to spotting Mr. Hill running from the rear of 1519 Ridgewick Drive toward Gabriel Brothers, a nearby clothing store.

{¶4} At trial, Ms. Cooney testified that she was sitting on the couch in her front room, with Trey on the floor in front of her, and her daughter, upstairs. Her daughter called down for help in doing something; she got up to respond, and saw Mr. Hill standing in the archway between the front room and the kitchen. Ms. Cooney testified that the rear door to the kitchen was locked, but that the kitchen window was open, so she believed he entered through it. Evidently they exchanged words, and possibly pushed each other; whereupon she claimed Mr. Hill grabbed her by the throat, and began hitting her in the face, knocking her down. She testified that he continued to hit her, fifteen to twenty times, while straddling her, before she managed to cry out. She

testified that he then stopped hitting her; she got up and went toward the front door, and he exited through the kitchen, by unlocking the back door.

{¶5} Patrolman Shum of the Wickliffe police was first to arrive on the scene, finding Ms. Cooney bleeding from a laceration to her forehead, her left eye nearly shut from swelling. She advised him of the direction Mr. Hill had fled, and stated he would be driving a green Ford Expedition, or a blue Buick. Patrolman McCaffery of the Wickliffe police also responded. Patrolman Shum then noticed a green Ford Expedition driving through the parking lot of the mall where Gabriel Brothers is located. Patrolman McCaffery followed the Expedition, and stopped it. It was driven by Mrs. Stacey Hill; Mr. Hill was in the back seat. Both were arrested. In a written statement given to police, Mr. Hill failed to mention ever going to Ms. Cooney's apartment.

{¶6} A striped polo shirt, of the sort Ms. Cooney described Mr. Hill wearing at the time of the alleged assault was in the Expedition. Later, investigators determined it had a spot of Mr. Hill's blood on it. Surveillance videos obtained from Gabriel Brothers from May 6, 2008, show Mr. Hill running toward Gabriel Brothers, dressed in shorts and a striped polo shirt; Mrs. Hill, exiting Gabriel Brothers, with a package in hand; and, Mr. Hill emerging from the store, in shorts and a white tank top.

{¶7} At trial, defense counsel expertly elicited that Ms. Cooney's description of the alleged assault varied in the reports she made to Patrolman Shum on scene, hospital personnel, and at trial. He further elicited that there were no scuff marks from shoes on the white plastic window frame of the kitchen window, where Mr. Hill allegedly entered the apartment, and that his fingerprints were not found on the window or the rear door. Though testimony and pictures show that Ms. Cooney was bleeding

profusely, her blood was not found on Mr. Hill's shirt, or around the scene of the alleged assault.

{¶8} The Lake County Grand Jury returned an indictment in four counts against Mr. Hill August 22, 2009: Count 1, aggravated burglary, a first degree felony in violation of R.C. 2911.11(A)(1), with a repeat violent offender specification pursuant to R.C. 2941.149; Count 2, felonious assault, a second degree felony in violation of R.C. 2903.11(A)(1), with a repeat violent offender specification pursuant to R.C. 2941.149; Count 3, domestic violence, a fourth degree felony in violation of R.C. 2919.25(A); and, Count 4, endangering children, a first degree misdemeanor in violation of R.C. 2919.22(A). September 5, 2008, Mr. Hill filed a written waiver of his right to be present at arraignment, and a written plea of "Not Guilty" to all the charges. Jury trial commenced November 24, 2008. November 25, trial concluded, and the jury returned verdicts of guilty on all counts that same day. The trial court's judgment entry of sentence was filed December 2, 2008, imposing consecutive terms of five years imprisonment on Mr. Hill for the aggravated robbery and felonious assault convictions, to be served concurrently with concurrent eighteen and six month terms for the domestic violence and endangering children convictions.

{¶9} January 9, 2009, Mr. Hill noticed this appeal, pro se. January 16, 2009, he filed his affidavit of indigency, and moved the trial court to appoint him appellate counsel, which motion the trial court granted January 26, 2009. March 4, 2009, Mr. Hill's counsel moved for an extension of time to file his brief and assignments of error with this court, which motion we granted through our magistrate by a judgment entry

filed March 9, 2009. Mr. Hill thereafter timely filed his brief April 9, 2009. April 21, 2009, the state moved this court for an extension of time to file its brief.

{¶10} April 27, 2009, we filed a judgment entry, dismissing this appeal as untimely. April 30, 2009, Mr. Hill moved this court to file a delayed appeal pursuant to App.R. 5(A). By a judgment entry filed May 22, 2009, we granted this motion. June 5, 2009, the state again moved this court for an extension of time to file its brief; which motion we granted through our magistrate by a judgment entry filed June 12, 2009. The state filed its brief July 10, 2009.

{¶11} On appeal, Mr. Hill assigns three errors:

{¶12} "[1.] THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT-APPELLANT'S MOTION FOR ACQUITTAL UNDER CRIMINAL RULE 29(A) [.]

{¶13} "[2.] THE JURY VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHT TO DUE PROCESS OF LAW [.]

{¶14} "[3.] THE TRIAL COURT ERRED IN REFUSING TO EXCUSE JUROR BLAKEMORE IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHT TO AN IMPARTIAL JURY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND SECTIONS 10 AND 16 OF ARTICLE I OF THE OHIO CONSTITUTION [.]"

{¶15} By his first and second assignments of error, Mr. Hill challenges the trial court's denial of his Crim.R. 29(A) motion, and the manifest weight of the evidence used to convict him. A Crim.R. 29(A) motion questions the sufficiency of the evidence, whether the state has introduced evidence on each element of a crime sufficient to

prove guilt beyond a reasonable doubt. *State v. Patrick*, 11th Dist. Nos. 2003-T-0166 and 2003-T-0167, 2004-Ohio-6688, at ¶18. A finding of sufficiency being required to submit a case to the jury, determination that the conviction is supported by the weight of the evidence is also dispositive of its sufficiency. *State v. Thomas*, 9th Dist. Nos. 22990 and 22991, 2006-Ohio-4241, at ¶6. Mr. Hill raises the same arguments in support of each of these assignments of error. Consequently, we consider the assignments together, under the manifest weight standard.

{¶16} Mr. Hill takes issue regarding both the sufficiency and weight of the evidence used to convict him on all four crimes. We deal with each crime in order.

{¶17} Mr. Hill was charged and convicted for aggravated burglary, pursuant to R.C. 2911.11(A)(1), which provides:

{¶18} "(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

{¶19} "(1) The offender inflicts, or attempts or threatens to inflict physical harm on another[.]"

{¶20} Mr. Hill argues the state failed to introduce appropriate evidence he entered the apartment at 1519 Ridgewick by "force, stealth, or deception." In support, he cites to the fact that Ms. Cooney could not actually identify how he entered the apartment, but assumed it was by her open kitchen window, since she further testified

her back door was locked. Mr. Hill further notes that neither his fingerprints, nor any scuff marks from shoes, were found upon the window sill in the kitchen.

{¶21} When reviewing a claim that a judgment was against the manifest weight of the evidence, an appellate court must review the entire record, weigh both the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that a new trial must be ordered. *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶22} "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." *Martin* at 175. The role of the appellate court is to engage in a limited weighing of the evidence introduced at trial in order to determine whether the state appropriately carried its burden of persuasion. *Thompkins* at 390 (Cook, J., concurring). The reviewing court must defer to the factual findings of the trier of fact as to the weight to be given the evidence and the credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, at paragraph one of the syllabus.

{¶23} When assessing witness credibility, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. "Indeed, the factfinder is free to believe all, part, or none of the testimony of each witness appearing before it." *Warren v. Simpson* (Mar. 17, 2000), 11th Dist. No. 98-T-0183, 2000 Ohio App. LEXIS 1073, at 8.

Furthermore, if the evidence is susceptible to more than one interpretation, a reviewing court must interpret it in a manner consistent with the verdict. Id.

{¶24} Application of the foregoing principles requires us to find that Mr. Hill's conviction for aggravated robbery was not against the manifest weight of the evidence. The *absence* of certain types of physical evidence – fingerprints and scuff marks on the window frame where he allegedly entered the apartment, or fingerprints on the door where he allegedly exited – was fully explored by defense counsel, evidently with the purpose of showing that Ms. Cooney may have invited Mr. Hill in to the residence. However, she testified that he appeared uninvited, and that the only manner of ingress was through the kitchen window. Under the manifest weight standard, the jury was entitled to believe her testimony, which necessarily established that Mr. Hill entered the apartment by force or stealth.

{¶25} This issue lacks merit.

{¶26} Next, Mr. Hill asserts the state failed to prove he knowingly caused serious physical harm to Ms. Cooney, as required to convict for felonious assault under R.C. 2903.11(A)(1); or, that he knowingly caused or attempted to cause her physical harm, as required to convict for domestic violence under R.C. 2919.25(A). He bases these assertions upon discrepancies in the various descriptions of her beating that Ms. Cooney gave to the responding officers and her testimony in court.

{¶27} Again, we must reject these arguments. While giving differing accounts of the exact sequence and events in her beating, Ms. Cooney consistently reported being attacked by Mr. Hill. Most of the differences in her accounts of the beating are semantic – different words or phrases describing, essentially, the same things.

{¶28} These issues lack merit.

{¶29} Mr. Hill also contends the state failed to carry its burden regarding his misdemeanor conviction for child endangering. The charge was based on Ms. Cooney's testimony that their infant child, Trey, was lying on the floor about two inches from her head while Mr. Hill pummeled her. The statute, R.C. 2919.22(A), provides, in relevant part: "No person, who is the parent *** of a child under eighteen years of age *** shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support." Mr. Hill argues that his beating of Ms. Cooney did not create a "substantial risk" to his son, Trey. For support, he cites to R.C. 2901.01(A)(8), which provides: "'Substantial risk' means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist."

{¶30} As the state points out, the culpable mental state for misdemeanor child endangering pursuant to R.C. 2919.22(A) is recklessness. *State v. Schaffer* (1998), 127 Ohio App.3d 501, 503. R.C. 2901.22(C) provides:

{¶31} "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

{¶32} "'Perverse' has been defined as 'turned away from what is right and good (.)' Webster's Third New International Dictionary (1986) 1688." *Schaffer* at 503.

{¶33} Accepting Ms. Cooney's testimony (as the jury obviously did), we agree that Mr. Hill's actions were reckless, regarding the safety of Trey. His son was inches away from Ms. Cooney's head as Mr. Hill punched her repeatedly. One slip – one missed blow – and he could have struck Trey, who was barely eight months old at the time.

{¶34} This issue lacks merit.

{¶35} None of Mr. Hill's convictions are against the manifest weight of the evidence. Consequently, none are against the sufficiency of the evidence, and his first and second assignments of error lack merit.

{¶36} By his third assignment of error, Mr. Hill asserts he was denied his right to trial by an impartial jury. The assignment is founded upon an event occurring early during his trial, after the state had presented two witnesses. It was brought to the trial court's attention that one of the jurors had recognized a friend from work entering the courtroom. It transpired this man was a relative of the victim. The juror was brought into chambers.

{¶37} "THE COURT: The bailiff explained that apparently you recognized some people in the courtroom.

{¶38} "JUROR BLAKEMORE: During one of the dispatcher's testimony there was a group of four people that walked in and one of the gentlemen I worked with for two years.

{¶39} "THE COURT: Oh, you work with the one person?

{¶40} "JUROR BLAKEMORE: Yeah.

{¶41} "THE COURT: And apparently those people are related to the victim in the case, so I'm sure the lawyers would want to ask you about any relationship that you have with these people and whether or not that would influence you in the decision making process. Would in fact that influence you in the decision that you know someone that's related to the victim?

{¶42} "JUROR BLAKEMORE: I don't believe so.

{¶43} "THE COURT: Do you know the victim?

{¶44} "JUROR BLAKEMORE: I do not, no. I don't recognize the name either.

{¶45} "THE COURT: And how close of a relationship do you have with this person that you work with?

{¶46} "JUROR BLAKEMORE: We were pretty close, you know, you have a group of friends at work so we would go out to lunch often. We keep in touch, we still work for the same company in different offices.

{¶47} "THE COURT: Mr. Talikka.

{¶48} "MR. TALIKKA: Well, how frequently would you have lunch with him?

{¶49} "JUROR BLAKEMORE: If we didn't go out to lunch we are (sic) lunch in the cafeteria.

{¶50} "MR. TALIKKA: Was that on a daily basis?

{¶51} "JUROR BLAKEMORE: I would, in a cube world just become friends with the people around you so there is a group of us.

{¶52} "MR. TALIKKA: Were you aware of this incident having taken place?

{¶53} "JUROR BLAKEMORE: Not at all.

{¶54} "MR. TALIKKA: Well, what about, you know, that if you're on this jury and you come up with a defense verdict here and you have to have lunch with this person how would it feel?

{¶55} "JUROR BLAKEMORE: I'm not sure.

{¶56} "MR. TALIKKA: You know that's a question. We have a man on trial and that's an important answer. You think you ca (sic) be fair here?

{¶57} "JUROR BLAKEMORE: I'm definitely a fair person and I guess it would be, you know, a repercussion on my end how that would affect our relationship. I wouldn't be unfair to your client or you know to the state.

{¶58} "MR. TALIKKA: Are you concerned about the repercussions that may have on you?

{¶59} "JUROR BLAKEMORE: I don't know to be completely honest.

{¶60} "MR. TALIKKA: Well, here you have to go back, you see this individual on a daily basis and you have to go back, you know, on a daily basis and you see this individual and here you decide that hey, that's not the way the facts were like the prosecutor indicated and you say repercussions, what are you talking about then?

{¶61} "JUROR BLAKEMORE: I guess just, you know, my character, you know, I guess from my situation, you know, how he would take that then, you know, if I decided one way or the another (sic) would he take that personally or not, I don't know.

{¶62} "MR. TALIKKA: I don't have anything else, Judge.

{¶63} "THE COURT: Well ma'am, the question is knowing that you have this relationship with these people and that you may have to face them in the future based on what it is that you do in this case, so what both sides and what I'm interested in

knowing is whether or not you can maintain fairness and impartiality regarding your objectivity of being on the jury –

{¶64} "JUROR BLAKEMORE: I can.

{¶65} "THE COURT: -- or are you going to allow the fact that you may have problems in the future with this person that you know, is that going to govern what it is that you do on the jury?

{¶66} "JUROR BLAKEMORE: I know myself and like I said I'm a very fair person, I wouldn't let or (sic) relationship affect my decision either way.

{¶67} "MR. CONDON: And I just want to make sure that the record's clear, you're Juror Number 1, Cassandra Blakemore?

{¶68} "JUROR BLAKEMORE: Yes.

{¶69} "MR. CONDON: And there is a group of four that came in and there was one gentleman that you saw come in, that's who you work with –

{¶70} "JUROR BLAKEMORE: Yes.

{¶71} "MR. CONDON: -- at the insurance company?

{¶72} "JUROR BLAKEMORE: Progressive, yeah, correct.

{¶73} "MR. CONDON: I don't have anything else.

{¶74} "THE COURT: All right. You can go back to the jury pool and do not talk to anybody about what it is that we discussed here –

{¶75} "JUROR BLAKEMORE: Okay.

{¶76} "THE COURT: -- it's not their business.

{¶77} "JUROR BLAKEMORE: Okay. Thank you."

{¶78} Defense counsel moved to exclude Juror Blakemore, which motion the trial court overruled.

{¶79} A trial court has discretion to determine juror impartiality when challenged for cause. *State v. Hamilton*, 11th Dist. No. 2004-L-042, 2005-Ohio-4907, at ¶21. "'The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Regarding this standard, we recall the term "abuse of discretion" is one of art, essentially connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. Insofar as a defendant asserts a constitutional violation regarding an impartial jury, "the defendant must have used all of his peremptory challenges and, further, demonstrate that one of the jurors actually seated lacked impartiality. *** This is because reviewing courts must determine '"'whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error.'"' ***" *Hamilton*, supra, at ¶25. (Footnotes omitted.) (Emphasis sic.)

{¶80} In support of his assignment of error, Mr. Hill cites to the decision of the United States Court of Appeals for the Sixth Circuit in *Wolfe v. Brigano* (C.A.6, 2000), 232 F.3d 499, wherein that court affirmed the grant of habeas corpus to Mr. Wolfe by the United States District Court for the Southern District of Ohio. Id. at 500. Mr. Wolfe had been sentenced to life imprisonment for murder following jury trial in the Gallia County Court of Common Pleas. Id. The trial court refused to remove four jurors for cause, and the Ohio Court of Appeals found no abuse of discretion. Id. at 502. In

reviewing the Southern District's grant of habeas relief, the Sixth Circuit noted that one of the jurors challenged had an ongoing business relation with the victim's parents, had spoken with them, and doubted his own impartiality. Id. The second juror claimed impartiality, but admitted she and her husband were friends of the victim's parents, and that her husband, having spoken with the victim's parents about their theory of the case, had relayed their opinion to her. The third juror admitted she would have difficulty putting aside what she had gleaned from media reports in deciding the case. Id. at 502-503. The fourth juror doubted his ability to require the state to prove its case beyond a reasonable doubt. Id. at 503. Ultimately, the Sixth Circuit concluded:

{¶81} "From the record before us, it appears that the trial judge based his findings of impartiality exclusively upon each juror's tentative statements that they would try to decide this case on the evidence presented at trial. Such statements, without more, are insufficient. See *McKeen v. Goins*, 605 F.2d 947, 953 (6th Cir. 1979). The Sixth Amendment guarantees Wolfe the right to a jury that will hear his case impartially, not one that tentatively promises to try. Failure to remove biased jurors taints the entire trial, and therefore, Wolfe's conviction must be overturned." *Wolfe* at 503.

{¶82} The situation regarding the challenged juror in this case, while troubling, simply does not rise to the level of not merely potential bias, but admitted bias, found by the Sixth Circuit in *Wolfe*. Juror Blakemore was concerned about prejudicing her relationship with the relative of Ms. Cooney's with whom she worked – but maintained that she would do so, rather than decide the case unfairly. She did not know Ms. Cooney prior to the trial; she had not discussed the case with her friend from work; there were no indications she had read media reports on the case; she did not assert

that she would not require the state to prove its case beyond a reasonable doubt. In this situation, we cannot find the trial court abused its discretion in failing to excuse her. Further, it appears a constitutional challenge is unavailable, as Mr. Hill did not make a showing Juror Blakemore was, in fact, not impartial. Consequently, we cannot determine if the jury as a whole was affected by the alleged error. *Hamilton*, supra, at ¶25.

{¶83} The third assignment of error lacks merit.

{¶84} The assignments of error lacking merit, the judgment of the Lake County Court of Common Pleas is affirmed.

{¶85} The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.