[Cite as *State v. Tvaroch*, 2012-Ohio-5836.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2012-T-0008**
- vs -	:	
ANTHONY SCOTT TVAROCH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 10 CR 557.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, 112 South Water Street, Suite C, Kent, OH 44240 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from a judgment of the Trumbull County Court of Common Pleas. Appellant, Anthony Tvaroch, appeals his conviction and sentence for aggravated burglary and abduction. Appellant challenges the trial court's instruction to the jury concerning "consciousness of guilt" evidence and further argues that his convictions are against the manifest weight of the evidence. We disagree with appellant and affirm the judgment of the trial court.

{¶2} The facts are disputed. The testimony of the victim, Jacqueline Orr ("Jackie"), and the testimony of appellant differ substantially regarding key aspects of the events giving rise to the underlying charges. Nonetheless, based on the record before us, the essential facts are as follows.

{¶3} Appellant and Jackie, a single mother of an eight-year old girl, had been involved in a romantic relationship since early 2009. Both parties admitted that the relationship was turbulent at times, due in large part to appellant's drinking problem. Appellant was also a Warren Township Police Officer. In early 2010, Jackie moved into a rental home at 8345 Anderson Dr., Howland Township, Trumbull County, Ohio. Though appellant kept some personal belongings there, he assisted Jackie with maintaining the home, and often spent the night there, he lived with his parents.

{¶4} The couple became engaged in early April, 2010. On April 29, 2010, following a disagreement over appellant's drinking and crude comments to her, Jackie summoned the Howland Township Police to her home in an effort to have appellant removed from the residence. The officers advised Jackie that she would have to file a formal eviction and did not take appellant into custody. The following day, on April 30, 2010, Jackie filed for and obtained a protection order to keep appellant away from her. Appellant's clothing and personal property were removed from Jackie's home, and appellant took up residence with Alan Fields, a fellow police officer, at a home in Weathersfield Township, Trumbull County. Appellant and Fields signed a rental agreement for the premises, and according to Jackie, appellant did not have a key to her home.

{¶5} Jackie dismissed the protection order on July 1, 2010 because during the time that the protection order was in place, appellant, his friends, and family harassed

her. Jackie hoped that by dismissing the protection order, the retaliation would cease. Also, she was aware that appellant had a pending court case involving his employment and did not want the protection order to be the reason he lost his job. Jackie merely wanted appellant to leave her alone.

{¶6} Shortly after the dismissal of the protection order and with the intervention of a friend, appellant and Jackie resumed a romantic relationship, but maintained separate residences. Appellant continued to live with Fields, while also spending significant time with Jackie at her Anderson Dr. residence. However, Jackie conditioned her continued relationship with appellant on his commitment to curtail his drinking. Shortly afterwards, appellant planned a barbecue at Field's home for July 25, 2010. He invited Jackie as well as several of his friends and family. Though Jackie had to work that day, at appellant's request she picked up some beer after her shift ended and arrived at the party around 6:30 p.m. Appellant had begun consuming alcohol around 2:00 p.m., and by his own estimation, had consumed approximately eight beers by 8:00 p.m.

{¶7} As the evening wore on, Jackie grew increasingly angry with appellant's consumption of alcohol and began to send him text messages expressing her discontent. Nonetheless, appellant continued to drink. Around 12:30 a.m., Jackie told appellant through a text message that she was going home to walk her dog. At the time, appellant was engaged in a game of corn hole and admitted to being drunk. After being informed that Jackie was leaving, appellant shouted profanities at her and began calling her vulgar names. When Jackie left, appellant decided to follow her home. He also sent her several vulgar text messages, criticizing her for leaving the party and

containing profanities. Two of appellant's friends, Eric and Ashley, were concerned about appellant driving while drunk, and insisted on following him to Jackie's home.

{¶8} Jackie arrived at her home around 1:00 a.m. She spoke on the phone with another woman that had attended the party and who warned Jackie that appellant had left the party and was on his way to her house. Five to ten minutes later, Jackie heard the sound of squealing tires and saw that appellant had pulled into her driveway and hit the back of her car. Appellant then started banging on Jackie's kitchen door. Without opening the door, Jackie told appellant he had to leave, but he refused to do so. Instead, he kept pounding on the door. Jackie then cracked the door and told him that he needed to leave.

{¶9} Instead of leaving, appellant reached in and grabbed Jackie by the throat and started strangling and screaming at her. Appellant threw her to the floor, bounced her head against the kitchen floor, kneeled on her chest, and continued to strangle her with his hands. Appellant kicked Jackie several times in her back and head and jammed the legs of a kitchen chair into her back several times. Jackie was able to escape the kitchen briefly but could not call for help because her phone was upstairs. Appellant followed Jackie into the family room, cornered her on the couch, and continued to strangle her. After a successful attempt to calm appellant down, Jackie managed to break free momentarily and run back into the kitchen. However, appellant followed her and grabbed her by the ponytail, jerking her head. Shortly afterwards, Jackie freed herself and ran to the next door neighbor's home for help.

{¶10} The neighbor, Tom Johnson, and his wife, Lori, responded to Jackie's knocking on their door. After Jackie explained what happened, and upon noticing that Jackie was shaken, out of breath, and appeared to be upset, Mr. Johnson called the

police and invited her into his residence. Mr. Johnson noticed that Jackie had red marks around her neck. Patrolmen Jonathan Coleman and Jeffery Edmundson of the Howland Police responded to the scene and interviewed Jackie outside the Johnson's home.

{¶11} The officers proceeded to enter Jackie's home, looking for appellant. Upon discovering a locked bedroom door, Patrolman Coleman identified himself and asked appellant to come out of the bedroom, but he did not come out. Patrolman Coleman forcibly entered the room and discovered appellant sleeping on the bed. The room smelled of alcohol. Patrolman Coleman placed appellant under arrest for assault and violation of the protection order.[1]

{¶12} During the booking process, appellant said "Yes, I want to kill myself. I need medication" in response to the officer's inquiry into his mental state. Based on that statement, the jail refused to admit him, and appellant was transported to Trumbull Memorial Hospital ("TMH") by the Howland Fire Department with instructions to inform the police when he was discharged.

{¶13} On August 6, 2010, appellant began to text Jackie again. Appellant admitted that he called her twenty-three times that day between 11:00 p.m. and 12:00 a.m., insisting he was trying to reach Jackie's eight-year old daughter, Celia, in order to apologize for "what happened."

{¶14} In September, 2010, appellant was indicted on one count of abduction, a felony of the third degree in violation of R.C. 2905.02(A)(2) and (C); and one count of aggravated burglary, a felony of the first degree in violation of R.C. 2911.11(A)(1) and

1. Patrolman Coleman found out the next day that the protection order had been dropped prior to the incident in question. However, when he contacted the Warren City Prosecutor's Office on the night of the arrest, he was informed that the protection order was still in effect.

(B). The matter proceeded to a jury trial in November, 2011 and appellant was found guilty of both charges. Appellant received a sentence of three years on the aggravated burglary charge and 30 months on the abduction charge, with the sentences to be served concurrently.

{¶15} Appellant timely appeals and raises the following two assignments of error for our review:

{¶16} "[1] The trial court erred and abused its discretion by admitting evidence and giving a 'consciousness of guilt' jury instruction concerning Appellant's alleged statement that he was suicidal and that Appellant had attempted to apologize to the purported victim for 'what happened.'

{¶17} "[2] The Appellant's convictions are against the manifest weight of the evidence."

{¶18} Turning to appellant's first assignment of error, he contends that the record evidence does not sufficiently support the trial court's "consciousness of guilt" instruction. Over the objection of appellant's counsel, the court gave the following instruction to the jury regarding "consciousness of guilt":

{¶19} "Now testimony has been admitted that the defendant threatened to commit suicide and/or apologized for his actions. You are instructed that threatening to commit suicide and/or apologizing for his actions alone or together do not raise a presumption of guilt, but either or both may tend to indicate the defendant's consciousness of guilt. If you find that the facts do not support that defendant threatened to commit suicide and/or apologize for his actions, or if you find that some other conduct prompted defendant's conduct or if you are unable to decide what the defendant's motivation was, then you should not consider this evidence for any

purpose. However, if you find that the facts support that the defendant engaged in such conduct and if you decide that the defendant was motivated by a consciousness of guilt, you may, but are not required to consider the evidence in deciding whether the defendant is guilty of the crimes charged. You alone will decide what weight, if any, to give to this evidence."

{¶20} "The giving of jury instructions is within the sound discretion of the trial court and will not be disturbed on appeal unless an abuse of discretion is shown. *State v. Trevino* (Mar. 20, 1992), Seneca App. No. 13-91-23, unreported, 1992 Ohio App. LEXIS 1444, 1992 WL 63285. See, also, *State v. Guster* (1981), 66 Ohio St.2d. 266." *State v. Martens*, 90 Ohio App.3d 338, 343 (3rd Dist.1993). The law requires that jury instructions must fairly and correctly state the law applicable to the evidence presented at trial. *Wozniak v. Wozniak*, 90 Ohio App.3d 400, 410 (9th Dist.1993). Specifically, "a court's instructions to the jury should be addressed to the actual issues in the case as posited by the evidence and the pleadings." *State v. Guster*, 66 Ohio St.2d, 266, 271 (1981).

{¶21} If taken in their entirety, the instructions fairly and correctly state the law applicable to the evidence presented at trial, reversible error will not be found merely on the possibility that the jury may have been misled. *Wozniak* at 410. Rather, the appellate court must determine whether the jury charge in its entirety resulted in prejudice. *State v. Jackson*, 92 Ohio St.3d 436, 446 (2001). If the jury instructions incorrectly state the law, then an appellate court will conduct a de novo review to determine whether the incorrect jury instruction probably misled the jury in a matter materially affecting the complaining party's substantial rights. *State v. Kovacic*, 11th Dist. No. 2010-L-018, 2010-Ohio-5663, ¶17.

{¶22} In *State v. Williams*, 79 Ohio St.3d 1 (1997), the Ohio Supreme Court addressed the issue of the "consciousness of guilt" instruction:

{¶23} "'It is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, *and related conduct,* are admissible as evidence of consciousness of guilt, and thus of guilt itself.'" *Id*. at 11, quoting *State v. Eaton*, 19 Ohio St.2d 145, 160. (Emphasis added). It is the state's contention that appellant's threat of suicide upon admittance to the county jail and his unsolicited apology just 12 days after the conduct in question qualifies as the "related conduct" contemplated by *Williams*.

{¶24} Based on this court's research, Ohio courts have yet to weigh in specifically on whether a threat of suicide constitutes a "consciousness of guilt" sufficient to support a jury instruction on that element. However, other jurisdictions have addressed the issue in general. *See People v. O'Neil*, 18 Ill.2d 461, 465 (1960) (threat of suicide, as does flight, tends to show a consciousness of guilt); *State v. White*, 649 S.W. 2d 598, 601 (Tenn.Crim.App.1982) (testimony admissible that an accused sex offender threatened to kill himself and his wife because he was facing a possible forty years in prison and that this circumstance tended to show a consciousness of guilt); *Commonwealth v. Sanchez*, 416 Pa. Super. 160, 175 (1992) (jury can reasonably infer consciousness of guilt from fact that accused made threats to commit suicide or expressed suicidal thoughts.)

{¶25} On the other hand, courts in Ohio, including this one, have affirmed that apologies constitute a "consciousness of guilt." *See, e.g.*, *State v Tichaona*, 11th Dist. No. 2010-P-0090, 2011-Ohio-6001, ¶42; *State v. Sims*, 12th Dist. No. 2007-11-300,

2009-Ohio-550, ¶24; *People v. Grathler*, 368 Ill.App.3d 802, 808 (5th Dist.2006); *Commonwealth v. Martin*, 59 Mass App. Ct. 1109 (2003).

{¶26} First, the consciousness of guilt instruction given to the jury here accurately reflects the record evidence presented at trial. Appellant expressed suicidal thoughts while being processed at the jail. Such an expression could be interpreted as consciousness of guilt. Accordingly, appellant's expression of suicidal thoughts fall within the ambit and contemplation of "related conduct" under the definition of "consciousness of guilt" pursuant to *Williams*, 79 Ohio St.3d at 11.

{¶27} Second, appellant maintains that there was no evidence his apology for "what happened" made during his phone calls and texts on August 6, 2010 had anything to do with the incident on July 25th. The record demonstrates otherwise. During appellant's testimony on direct examination, the following colloquy took place between appellant and his counsel regarding the events of July 25, 2010:

{¶28} "Q: [Ms. Hanni]: Okay. On the night of the, or the morning of the 25th of July, 2010, did you force your way into Jackie Orr's house?

{¶29} "A: [Appellant]: No.

{¶30} "Q: [Ms. Hanni]: Did you break into the door to get through it?

{¶31} "A: [Appellant]: No. She opened the door. I walked in, shut it, and went up to the bedroom.

{¶32} "Q: [Ms. Hanni]: Okay. Did you put your hands around her throat and strangle her that morning of the 25th?

{¶33} " * * *

{¶34} "Q: [Ms. Hanni]: Did you strike [Jackie] at all?

{¶35} "A: [Appellant]: Never.

{¶36} "Q: [Ms. Hanni]: In the early morning of July 25th?

{¶37} "A:[Appellant]: Never.

{¶38} "Q: [Ms. Hanni]: Did you make a phone call to her on August 6th?

{¶39} "A: [Appellant]: Yes, I did.

{¶40} "Q: [Ms. Hanni]: Did you say you were sorry?

{¶41} "A: [Appellant]: I wanted to speak to her daughter and let her know that I was sorry for *what happened* ***." (Emphasis added).

{¶42} When appellant testified that he wanted to say he was "sorry for what happened," he did not identify a specific event or situation. However, that statement occurred during the portion of his testimony when he was being questioned about the events that took place between him and Jackie in the early morning of July 25, 2010. Thus, the jury could reasonably infer that appellant's attempts to apologize for "what happened" pertained to whatever happened on that date. Jackie also testified that when she did eventually answer appellant's telephone call on August 6, 2010, he said he was sorry, but that he could not recall the events of the evening of July 25, 2010.

{¶43} In sum, based on the record evidence, the jury instructions were supported by the facts presented in the case and were not misleading. In fact, the trial court's instructions contained a cautionary instruction that the evidence could be completely disregarded if not believed, and even if believed, the evidence would not rise to a presumption of guilt. The jury was further instructed that even if they found the evidence credible, the jury was not required to consider the apology and suicide threat in deciding appellant's guilt.

{¶44} Accordingly, based on the foregoing, we find nothing in the record here indicating that the court abused its discretion by giving the consciousness of guilt

charge to the jury, nor were appellant's substantial rights affected by the reading of this instruction. Appellant's first assignment is without merit.

{¶45} We turn now to appellant's second assignment of error in which appellant argues that his convictions are against the manifest weight of the evidence. A court reviewing the manifest weight of the evidence observes 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. *State v. Schlee*, 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *14-15. (Dec. 23, 1994). Hence, the role of a reviewing 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." *State v. Brown*, 11th Dist. No. 2002-T-0077, 2003-Ohio-7183, ¶52. However, an appellate court must defer to the factual findings of the jury regarding the weight to be given the evidence and credibility of the witnesses. *Id*., citing *State v. DeHass*, 10 Ohio St.2d 230, paragraph two of the syllabus (1967).

{¶46} "As a general proposition, we have consistently indicated that questions of witness credibility are primarily for the trier of fact to decide. [State v. *Johnson*, 11th Dist. No. 2009-T-0042, 2010 Ohio 1970, at ¶17,] citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The basis of this proposition is that the trier of fact is in a much better position to observe the body language, demeanor, and voice inflections of the witnesses. *Id*." *State v. Meeks*, 11th Dist. No. 2011-L-066, 2012-Ohio-4098, ¶37.

{¶47} Regarding the abduction charge, R.C. 2905.02(A)(2) and (C) provide:

{¶48} "(A) No person, without privilege to do so, shall knowingly do any of the following:

{¶49} "* * *

{¶50} "(2) By 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;

{¶51} "* * *

{¶52} "(C) Whoever violates this section is guilty of abduction. A violation of division (A)(1) or (2) of this section or a violation of division (B) of this section involving conduct of the type described in division (A)(1) or (2) of this section is a felony of the third degree. * * *."

{¶53} Appellant contends that the overwhelming evidence presented at trial shows that Jackie, rather than appellant, committed the assault. In support of his argument, Appellant maintains that certain witnesses contradicted Jackie's testimony and that Jackie's own testimony was at times inconsistent. Appellant also contends that the state merely preferred to have a felony conviction rather than a misdemeanor assault conviction, and that at no time was there a separate basis for the alleged abduction. We disagree.

{¶54} First, at best, appellant had a scratch on his nose, which in light of Jackie's testimony the jury could infer was inflicted by the victim in her attempt to escape appellant's attack. Furthermore, the nurse who treated appellant at TMH stated in her notes that appellant denied being in any pain. He further denied being abused, threatened, or injured by another.

{¶55} Second, appellant does not cite specifically to any conflicts in the testimony or any issues of credibility with respect to the witnesses presented by the state regarding the elements of abduction, which are the hallmarks of a manifest-weight challenge and the crux of his argument. Additionally, Jackie testified that appellant restrained and/or threatened to harm her at least three times during the episode in question: on the kitchen floor, on the couch, and by pulling her ponytail to prevent her from leaving. The testimonial and photographic evidence supports the fact that Jackie was not only placed at a great risk of harm, but actually harmed while being attacked by appellant and prevented from leaving her home. It was the province of the jury to weigh and determine the credibility of the evidence, and it chose to believe the state's evidence.

{¶56} This case is similar to another case emanating from this court, *State v. Keener*, 11th Dist. No. 2005-L-182, 2006-Ohio-5650. In *Keener*, appellant's longtime girlfriend left him over his alcohol abuse and he showed up drunk and uninvited at her home. After she told him to leave, he forced his way into her home, grabbed her by the hair, pushed her to the floor and choked her. The jury convicted appellant on several counts, including abduction. In affirming appellant's conviction, this court stated:

{¶57} "Here, evidence showed that appellant knowingly restrained the liberty of [the victim] by grabbing her hair and forcing her to the ground and standing over her while choking her. Clearly, appellant's actions were such that [the victim] was placed at risk of physical harm. Moreover, [the victim] explicitly testified she was in fear for her safety. Accordingly, we hold the state put forward sufficient evidence to sustain the conviction for abduction." *Id*. at ¶57. Based on the similarity between the instant case

and *Keener*, an affirmation is equally warranted here on appellant's abduction conviction.

{¶58} Regarding the aggravated burglary charge, R.C. 2911.11(A)(1) and (B) provide as follows:

{¶59} "(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:

{¶60} "(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

{¶61} "* * *

{¶62} "(B) Whoever violates this section is guilty of aggravated burglary, a felony of the first degree."

{¶63} Appellant contends that his conviction was the result of some sort of agenda on the part of the prosecution because he was a police officer at the time of the underlying offenses. Appellant fails to cite to any record evidence in support of his claim. App. R. 16(A)(7).

{¶64} Second, appellant argues that the state failed to demonstrate the he was a trespasser for purposes of aggravated burglary, and therefore, not legally permitted to be on Jackie's property. Again, we disagree.

{¶65} The record evidence demonstrates that on the date of the underlying offenses, July 25th, appellant was not residing at Jackie's Anderson Dr. home. In fact,

following the filing of the protection order, appellant's belongings were removed from Jackie's home; appellant did not have a key to the home; and appellant moved in with Fields. Appellant testified that he and Fields executed a rental agreement for the home. Furthermore, if, as appellant contended, he possessed a key to Jackie's home, he did not produce the same at trial. Further, the fact that he banged on Jackie's door in an effort to gain entrance on July 25th leads to the reasonable inference that he did not possess a key. Accordingly, the jury did not lose its way in concluding that appellant was an uninvited intruder rather than a household member entitled to enter the home.

{¶66} Based on the foregoing, appellant's second assignment of error is without merit and is overruled.

{¶67} The judgment of the Trumbull County Common Pleas Court is hereby affirmed.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.