[Cite as *State v. Benson*, 2010-Ohio-5977.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- MARVIN BENSON Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. Sheila G. Farmer, J. Hon. Patricia A. Delaney, J. Case No. 09CA000026 O P I N I O N
CHARACTER OF PROCEEDING:	Appeal from the Cambridge Municipal Court, Case No. 09CRB0394
JUDGMENT:	Afirmed
DATE OF JUDGMENT ENTRY:	December 3, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
WILLIAM H. FERGUSON 134 Southgate Parkway Cambridge, OH 43725	CHARLES E. MCKNIGHT 121 West Eighth Street Cambridge, OH 43725

Farmer, J.

{¶1} On March 21, 2009, Patrolman Jason Schwark and Auxiliary Patrolman Nicholas Davis of the Byesville Police Department were conducting a routine patrol when they observed a vehicle owned by appellant, Marvin Benson, parked at the Lakeview Terrace apartment complex. A week prior, appellant had been arrested at the apartment complex, and Patrolman Schwark had personal knowledge of a no trespass notice barring appellant from being on the premises.

{¶2} The patrolmen approached the apartment complex and knocked on the door of the apartment belonging to appellant's girlfriend, Danielle Valentine. The officers observed appellant inside the apartment, advised him of the no trespass notice in effect, and requested he leave the premises.

{¶3} Ms. Valentine told the patrolmen she had a paper indicating the no trespass notice had been cancelled. However, the patrolmen could not confirm the authenticity of the document, as they did not have personal knowledge of the same. The patrolmen informed appellant they would travel to the Byesville Police Department and obtain the no trespass notice.

{¶4} Later, when the patrolmen returned to the apartment, appellant's tone and actions escalated after he was shown the no trespass notice and was told it remained in effect. Appellant used profanity and a loud voice toward the patrolmen. A number of individuals residing in the apartment complex came outside to observe the situation.

{¶5} The patrolmen told appellant numerous times to desist with his loud voice and profane language, but he refused to do so. Ms. Valentine joined in the argument. Appellant then clenched his fists and told the patrolmen to "[b]ack the fuck away." The

patrolmen felt threatened by these actions, and knew appellant had been previously arrested for the assault of two other officers.

{¶6} As a result, appellant was immediately placed under arrest and charged with disorderly conduct in violation of R.C. 2917.11(A)(3). A bench trial commenced on May 22, 2009. The trial court found appellant guilty of the charge, and sentenced him to ten days in jail, all ten days suspended under the conditions that he obey all laws and ordinances and pay all fines and costs as ordered.

{¶7} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶8} "THE TRIAL COURT COMMITTED PLAIN ERROR IN PROCEEDING TO TRIAL WHEN THE STATE OF OHIO FAILED TO COMPLY WITH C.R. 3 AND CRIM. R. 4(E)(2)."

II

{¶9} "THE TRIAL COURT COMMITTED PLAIN ERROR WHICH DENIED APPELLANT A FAIR TRIAL WHEN IT ALLOWED TESTIMONY REGARDING AN ALLEGED CRIMINAL TRESPASS BY APPELLANT."

III

{¶10} "THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT ALLOWED EVIDENCE THAT WAS OBTAINED IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE U.S. AND OHIO CONSTITUTIONS."

IV

{¶11} "DEFENDANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF CONVICTION [SIC] AND THE STATE OF OHIO PRESENTED INSUFFICIENT EVIDENCE TO CONVICT APPELLANT OF VIOLATING R.C. 2917.11(A)(3). DISORDERLY CONDUCT."

V

{¶12} "APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL."

VI

{¶13} "THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT STATED ON THE RECORD THAT ITS DECISION TO CONVICT APPELLANT WAS 'JUST LIKE AN UMPIRE IN A BASEBALL GAME' AND INDICATED ON THE RECORD THAT IT DID NOT PRESUME APPELLANT INNOCENT UNTIL PROVEN GUILTY BEYOND A REASONABLE DOUBT."

I

{¶14} Appellant claims the trial court committed plain error in proceeding to trial when the state failed to comply with Crim.R. 3 and 4(E)(2). We disagree.

{¶15} In order to prevail under a plain error analysis, appellant bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. *State v. Long* (1978), 53 Ohio St.2d 91. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id. at paragraph three of the syllabus.

{¶16} Crim.R. 3 governs complaint and states the following:

{¶17} "The complaint is a written statement of the essential facts constituting the offense charged. It shall also state the numerical designation of the applicable statute or ordinance. It shall be made upon oath before any person authorized by law to administer oaths."

{¶18} Crim.R. 4 governs warrant or summons and arrest. Subsection (E)(2) states the following:

{¶19} "*(2) Arrest without warrant.* Where a person is arrested without a warrant the arresting officer shall, except as provided in division (F), bring the arrested person without unnecessary delay before a court having jurisdiction of the offense, and shall file or cause to be filed a complaint describing the offense for which the person was arrested. Thereafter the court shall proceed in accordance with Crim.R. 5."

{¶20} Appellant failed to file any challenge to the sufficiency of the complaint prior to the commencement of trial thereby waiving this argument on appeal. Further, we note appellant did not request a Bill of Particulars from the state.

{¶21} Upon review, we do not find appellant has demonstrated a manifest injustice rising to the level of plain error.

{¶22} Assignment of Error I is denied.

II, III

{¶23} Appellant claims the trial court committed plain error in allowing the state to introduce testimony as to an alleged criminal trespass committed by appellant. Specifically, appellant claims allowing the testimony with regard to his failing to leave the premises led to a confusion of the issues. In addition, appellant claims he had the

right to be secure in his own home as guaranteed by the United States and Ohio constitutions.

{¶24} As set forth above, this matter was before the trial court for a bench trial, not a jury trial. The testimony as to the no trespass notice was relevant to the matter as it established the background for why the patrolmen approached the apartment. The patrolmen had personal knowledge of the no trespass notice filed by the apartment owner/manager. Accordingly, the no trespass notice and the patrolmen telling appellant to leave the apartment were part of the res gestae of the case.

{¶25} As to the right to be secure in his own home, appellant argues the fact that the patrolmen covered the peep hole when knocking on Ms. Valentine's door violated his constitutional right to be secure in his home. Appellant cites no case law in direct support of this assertion. While arguably deceptive, we find no constitutional prohibition to this practice.

{¶26} Assignments of Error II and III are denied.

IV

{¶27} Appellant claims his conviction for disorderly conduct was against the sufficiency and manifest weight of the evidence. We disagree.

{¶28} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. "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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307. On

review for manifest weight, a reviewing court is to examine 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 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. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶29} Appellant was charged with disorderly conduct, in violation of R.C. 2917.11(A)(3), which states:

{¶30} "(A) No person shall recklessly cause inconvenience, annoyance, or alarm to another by doing any of the following:

{¶31} "(3) Insulting, taunting, or challenging another, under circumstances in which that conduct is likely to provoke a violent response."

{¶32} Pursuant to subsection (E)(1) and (2), whoever violates this section is guilty of disorderly conduct, a minor misdemeanor. However, it is a misdemeanor of the fourth degree if "[t]he offender persists in disorderly conduct after reasonable warning or request to desist." R.C. 2917.11(E)(3)(a).

{¶33} In interpreting R.C. 2917.11(A)(2), Ohio courts have held the mere use of profane language in the presence of a police officer is not sufficient to constitute disorderly conduct. *State v. Robison* (1992), 83 Ohio App.3d 337. However, when the statements are made in such a manner that a crowd could easily be incited, the courts have reached the opposite conclusion. *State v. Dickey* (1991), 75 Ohio App.3d 628.

{¶34} Patrolman Schwark testified to the following:

{¶35} "A. Ah, he started arguing with us and didn't want to leave. Ah, was out by the car.

{¶36} "Q. What time of day was this? Do you remember?

{¶37} "A. Ah, this was around ah, it was around eleven at night I believe.

{¶38} "Q. Okay, it was in the evening?

{¶39} "A. Yeah. It was somewhere right around ten to eleven thirty I suppose.

{¶40} "Q. And this is a residential area?

{¶41} "A. Sir, it is in ah, apartment complex ah, the police show up generally ah, nine out of ten times several people come out and see what is going on.

{¶42} "Q. Okay, these are, these are apartment buildings close together?

{¶43} "A. Yes, Sir.

{¶44} "Q. They house a number of occupants?

{¶45} "A. Yes, they do.

{¶46} "Q. And most of them are all in a very close proximity to each other?

{¶47} "A. Yes.

{¶48} "Q. They are all in Lakeview Terrace? Okay, so describe what he was doing exactly.

{¶49} "A. Ah, he kept on using profanity towards us. He stated that he's, a warrant officer went towards him and told him he needs to leave, he told him to back the F off and we noticed he had his fist clenched. We knew that he had just been charged with assault a week prior before this.

{¶50} "Q. What warning, what warning did you give?

{¶51} "A. Well, he is giving us warning signs. I seen pictures of the assault that happened before this and I knew he capable of something of that ah…

{¶52} "Q. Well, let me ask you directly, did any one of the Byesville Policemen warn him, stop it, knock it off, or just warn him.

{¶53} "A. Told him more than numerous times. I mean, we told him to leave in fact, ah, I could have arrested him for criminal trespass at that point. I still had the grounds for it but I wanted to give him the benefit of the doubt to get out of there. And ah, he didn't seem to want to listen to me that way.

{¶54} "Q. How loudly was he, was he?

{¶55} "A. Not screaming but ah, being ah, very loud ah, talking very loud. (inaudible).

{¶56} "Q. I was going to ask, did it attract the attention of any of the neighbors?

{¶57} "A. It attracted the attention of the neighbors, ah…

{¶58} "Q. How many were out there?

{¶59} "A. Over a handful.

{¶60} "Q. What is your, what is your, what is your concern when the neighbors start coming out?

{¶61} "A. Well, the concern is somebody else getting involved because we had ah, his girlfriend ah, starting to argue with us also. Ah, I was trying to talk to him and this guy keeps saying his name was on this trespass order. Ah, he had said he didn't know anything about it. Ah, I was trying to talk to so many people at once. Ah, we just wanted to get him out of there. Ah…

{¶62} "Q. Just to calm the situation?

{¶63} "A. Yes, Sir.

{¶64} "Q. Then what happened?

{¶65} "A. Ah, after so many times of giving him warnings ah, Officer Eubanks ah, placed him in custody.

{¶66} "Q. For disorderly?

{¶67} "A. Yes, Sir." T. at 10-13.

{¶68} Auxiliary Patrolman Nicholas Davis testified to the following:

{¶69} "Q. Was there profanity used that you could hear?

{¶70} "A. Yes, yes, Mr. Benson used profanity ah, the female that came to the door used profanity. Ah, I actually had my attention directed towards the female.

{¶71} "THE COURT: Officer, pardon me for interrupting. Do you, do you remember what they said? Do you remember as far as the profanity?

{¶72} "THE WITNESS: Ah…

{¶73} "THE COURT: If you don't remember, that is understandable.

{¶74} "THE WITNESS: No, I can't say.

{¶75} "THE COURT: All right, okay.

{¶76} "Q. And at some point then, did the attention of other residents at Lakeview Terrace?

{¶77} "A. Yes, I, I believe we drew quite a crowd that evening.

{¶78} "Q. All right, now, what, if any concern did you have at that time?

{¶79} "A. At that point ah, like I said, we were just concerned, myself and Patrolman Schwark, Eubanks, were just wanting Mr. Benson to leave the residence there.

{¶80} "Q. Did you observe anything done by Mr. Benson to cause you to believe that there may be, that you had a bigger problem?

{¶81} "A. Well, when he was asked to leave and he kept ah, delaying ah, hesitating, he was not, he was not getting in his vehicle and leaving. Ah, Officer Eubanks did approach Mr. Benson, ah, at that time, that is when Mr. Benson ah, kind of clenched up and you could tell, held his fists and he told Officer Eubanks he had better back up.

{¶82} "Q. Did you believe there would be a conflict at that time?

{¶83} "A. I did believe so, yes.

{¶84} "Q. Did you guys encourage, did the police encourage, tell Mr. Benson to leave on a number of occasions, any number of occasions?

{¶85} "A. Several times. Several times he was asked to leave and he kept insisting he was allowed to stay there and arguing with officers.

{¶86} "Q. Okay, what happened that lead to his arrest? When finally that happened?

{¶87} "A. Ah, When Mr. Benson ah, did clinch up and he told Officer Eubanks to back up, Officer Eubanks stated that, that he was going to arrest him. Ah, at that time he did place the hand cuffs on Mr. Benson beside his vehicle and then he was, he was put in the back of Patrolman Schwarck and the cruiser that I was riding in, that is the ah, vehicle he was put in back of." T. at 37-40.

{¶88} Upon review of the testimony, we find appellant's conviction for disorderly conduct as a misdemeanor of the fourth degree is supported by sufficient credible evidence. We further find no manifest miscarriage of justice.

{¶89} Appellant persisted in his conduct after reasonable warnings and requests to desist. His conduct that precipitated his arrest was the continued use of profanity and his arguing about his right to be on the premises. T. at 11-12, 48. The patrolmen testified appellant was cautioned numerous times to calm down. T. at 13, 48. Despite these warnings, appellant persisted, clenched his fists at the patrolmen, and told them to "[b]ack the fuck away." T. at 23, 49. Furthermore, appellant's conduct incited Ms. Valentine as she too began to argue with the patrolmen, and a crowd started to form which concerned the patrolmen.

{¶90} Appellant's actions before being advised to calm down as well as his continued actions after being advised were sufficient to support the trial court's decision.

{¶91} Assignment of Error IV is denied.

V

{¶92} Appellant claims he was denied the effective assistance of counsel as counsel failed to argue the police officers lacked a judicially authorized warrant to order appellant to leave the premises. We disagree.

{¶93} The standard this issue must be measured against is set out in *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011. Appellant must establish the following:

{¶94} "2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623;

Strickland v. Washington [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

{¶95} "3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

{¶96} Upon review of the arguments and the facts, appellant has not demonstrated prejudice as a result of defense counsel's alleged error. The patrolmen had knowledge of the no trespass order in effect. They observed appellant's vehicle in the parking lot of the apartment complex, knocked on the girlfriend's door, and informed appellant they would return with the no trespass order. The patrolmen later showed appellant the order and requested he leave the premises, at which point appellant engaged in the conduct underlying the charge. Appellant was not charged with criminal trespass, and the trial court acknowledged appellant did not commit criminal trespass. As noted supra, evidence of the patrolmen's belief appellant was trespassing was part of the res gestae of the incident. Therefore, appellant has not demonstrated prejudice as a result of any alleged error.

{¶97} Assignment of Error V is denied.

VI

{¶98} Appellant claims the trial court committed plain error in stating on the record its decision to convict appellant was "just like an umpire in a baseball game." We disagree.

{¶99} Upon review of the record in its entirety and contrary to appellant's assertion, the trial court did not indicate it did not presume appellant to be innocent until

proven guilty. We find the trial court's statement does not indicate bias or an inability to apply the legal standard in this matter.

{¶100} Assignment of Error VI is denied.

{¶101} The judgment of the Cambridge Municipal Court of Guernsey County, Ohio is hereby affirmed.

By Farmer, J.

Delaney, J. concurs and

Hoffman, P.J. concurs in part and dissents in part.

_s/ Sheila G. Farmer_____

_s/ Patricia A. Delaney_____

_____

JUDGES

SGF/db 1104

Hoffman, P.J., concurring in part and dissenting in part

{¶102} I concur in the majority's analysis and disposition of Appellant's first, second, third, fifth and sixth assignments of error.

{¶103} I respectfully dissent from the majority's analysis and disposition of Appellant's fourth assignment of error.

{¶104} Upon review of the record, I find the testimony does not demonstrate the onlookers were anything but curious in viewing the commotion. There is no direct evidence they were inconvenienced, annoyed or alarmed. None of the bystanders were provoked to a violent response, or incited to violence. As noted by the majority, Appellant's use of profanity and being loud is not sufficient to support a finding such conduct was likely to provoke a violent response from the police officers, despite their repeated requests for Appellant to calm down and/or leave the premises.

{¶105} When Appellant clenched up, held his fists and told Officer Eubanks to "back the fuck away," such conduct was sufficient to constitute disorderly conduct. The officers felt threatened thereby and Appellant's taunting or challenging conduct towards the police officers was likely to provoke a violent response.

{¶106} Because no further additional warning to desist was issued to Appellant after his threatening conduct towards the officers, I find Appellant's conviction for disorderly conduct as a fourth degree misdemeanor is not supported by sufficient evidence. I would find the evidence only supports a conviction for disorderly conduct as a minor misdemeanor, and sustain Appellant's fourth assignment of error, in part.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MARVIN BENSON	:	
Defendant-Appellant	:	CASE NO. 09CA000026

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Cambridge Municipal Court of Guernsey County, Ohio is affirmed. Costs to appellant.

s/ Sheila G. Farmer

s/ Patricia A. Delaney

JUDGES