[Cite as *State v. Breidenbach*, 2010-Ohio-4335.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

State of Ohio,	:	
Plaintiff-Appellee,	:	Case No: 10CA10
v.	:	
	:	**DECISION AND**
Frederick Breidenbach,	:	**JUDGMENT ENTRY**
Defendant-Appellant.[1]	:	File-stamped date: 9-10-10

APPEARANCES:

Adam J. Baker, Athens, Ohio, for Appellant.

Patrick J. Lang, Athens City Law Director, and Lisa A. Eliason, Chief Athens City Prosecutor, Athens, Ohio, for Appellee.

Kline, J.:

{¶1} Fredric S. Breidenbach (hereinafter "Breidenbach") appeals the judgment of the Athens County Municipal Court. After a bench trial on Breidenbach's assault charge, the trial court convicted him of the lesser included offense of disorderly conduct. On appeal, Breidenbach contends that disorderly conduct is not a lesser included offense of assault. For that reason, Breidenbach argues that his disorderly-conduct conviction is improper. We disagree. This court has repeatedly held that disorderly conduct *is* a lesser included offense of assault, and Breidenbach has not persuaded us that our prior decisions are in error. Therefore, we find that the trial court acted properly. Breidenbach also contends that his disorderly-conduct conviction is against

[1] Breidenbach appeals from a Journal Entry that calls him "Frederick Breidenbach." However, based on the vast majority of filings, it is apparent that the appellant's name is actually "Fredric S. Breidenbach."

the manifest weight of the evidence. Because there is substantial evidence upon which the trial court could have reasonably concluded that all the elements of disorderly conduct were proven beyond a reasonable doubt, we disagree. Accordingly, we overrule Breidenbach's assignments of error and affirm the judgment of the trial court.[2]

I.

{¶2} Breidenbach is a partner in a corporation that leases residential property. As part of his duties, Breidenbach collects rental payments from the corporation's various tenants. Melissa and Dennis McCartney (individually, "Melissa" and "Dennis"; collectively, the "McCartneys") had leased a trailer home from Breidenbach's corporation. As of August 12, 2009, Breidenbach had not received the August rental payment from the McCartneys. So that afternoon, Breidenbach visited the McCartneys to discuss the situation. Breidenbach arrived at the McCartneys' trailer at approximately 4:00 p.m., and Melissa answered the door. As they stood on the porch, Breidenbach told her that he had not received that month's rent. Melissa countered that she had mailed the rent check on August 3, 2009. To prove it, Melissa asked Breidenbach if he would like to see her check register. Breidenbach replied that, yes, he would.

{¶3} Melissa went back inside the trailer and told Dennis what was happening. After some discussion, they called their lawyer for advice. The McCartneys' lawyer suggested writing a new check for the August rent and giving that check to Breidenbach.

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[2] The trial transcript is missing pages thirty-five through thirty-seven. We do not believe that the missing pages affect our resolution of this appeal. But if they did, we note that "[i]t is the appellant's duty to transmit the [record] to the court of appeals." *State v. Bailey*, Scioto App. No. 09CA3287, 2010-Ohio-2239, at ¶57 (citations omitted) (alterations sic). Therefore, if Breidenbach believed that the missing pages were particularly important, he should have provided us with a complete transcript.

{¶4} Melissa wrote a new check and returned to the porch area where Breidenbach was waiting. Melissa testified that she tried to give Breidenbach the new check, but he would not take it. Then, according to the McCartneys, Breidenbach swung his hand at Melissa and knocked the check out of her hand. After that, Breidenbach produced an envelope that contained an eviction notice. Both Melissa and Dennis testified that Breidenbach threw the envelope at Melissa and that the envelope hit Melissa in the face.

{¶5} It is undisputed that Melissa suffers from various wrist injuries. And according to Melissa, Breidenbach swung his hand at her injured wrist. Furthermore, as the following testimony demonstrates, Breidenbach was aware of Melissa's wrist injuries.

{¶6} "Q: Were, were you aware that Mrs. McCartney had swelling in her, uh, surgery on her right wrist?

{¶7} "A: Uh, yes, I was. When, when they first moved in and were, uh, signing the lease, and you have to initial every page. And, uh, by the time she got done signing, there's, I don't know, there's twelve or fifteen page[s] of initialing, she was almost in tears it hurt so much." Transcript at 130.

{¶8} Breidenbach testified in his own defense and offered a different version of events. He agreed that Melissa returned to the porch while holding something that looked like a check. However, Breidenbach denied knocking the check out of Melissa's hand. He also denied throwing the envelope that contained the eviction notice. Instead, Breidenbach claimed that he handed the envelope to Melissa.

{¶9} On August 28, 2009, Melissa filed an assault complaint against Breidenbach. The complaint alleges that Breidenbach violated R.C. 2903.13(A), which states that

"[n]o person shall knowingly cause or attempt to cause physical harm to another or to another's unborn." Melissa claimed that Breidenbach caused her physical harm when he knocked the check out of her hand.

{¶10} After a bench trial, the trial court found Breidenbach guilty of the lesser included offense of disorderly conduct. As the trial court explained, "I do believe that you knocked the check out of her hand. I don't believe that you intended to hurt her * * * by doing so. [A]nd for that reason, I am going to find you guilty of the minor misdemeanor * * * disorderly conduct." Transcript at 164.

{¶11} Breidenbach appeals and asserts the following assignments of error: I. "The trial court committe[d] reversible error by subjecting Defendant/Appellant to double jeopardy by finding Defendant/Appellant guilty of disorderly conduct as a lesser included offense of misdemeanor assault." And, II. "The trial court committed reversible error in finding Defendant/Appellant guilty of disorderly conduct with a required mens rea of recklessness when the manifest weight of the evidence showed that Defendant/Appellant was attempting to serve a three-day eviction notice to the tenants."

II.

{¶12} In his first assignment of error, Breidenbach contends that disorderly conduct is not a lesser included offense of assault. For that reason, Breidenbach argues that his disorderly-conduct conviction is improper. We disagree and find that the trial court acted properly. As a result, we need not address Breidenbach's "double jeopardy" argument. See, generally, *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, at ¶9 ("It is well settled that [appellate courts] will not reach constitutional issues unless absolutely necessary.").

{¶13} "When the indictment, information, or complaint charges an offense including degrees, or if lesser offenses are included within the offense charged, the defendant may be found not guilty of the degree charged but guilty of an inferior degree thereof, or of a lesser included offense." Crim.R. 31(C). See, also, R.C. 2945.74; see, generally, *State v. Dandridge*, Butler App. No. CA2003-12-330, 2005-Ohio-1077, at ¶3 (convicting defendant of a lesser included offense following a bench trial); *State v. Juarez*, Montgomery App. No. 20256, 2004-Ohio-6879, at ¶10 (same). "[A] criminal offense may be a lesser included offense of another if (1) the offense carries a lesser penalty than the other; (2) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (3) some element of the greater offense is not required to prove the commission of the lesser offense." *State v. Barnes*, 94 Ohio St.3d 21, 25-26, 2002-Ohio-68, citing *State v. Deem* (1988), 40 Ohio St.3d 205, at paragraph three of the syllabus.

{¶14} On numerous occasions, this court has found that disorderly conduct is a lesser included offense of assault. See *State v. Rice*, Ross App. No. 03CA2717, 2003-Ohio-6515, at ¶13; *State v. Walton*, Ross App. No. 03CA2716, 2003-Ohio-6514, at ¶13; *State v. Ault* (Aug. 31, 2000), Athens App. No. 99 CA 56; *State v. Lemley* (Nov. 27, 1996), Gallia App. No. 95CA24 (relying on *State v. Roberts* (1982), 7 Ohio App.3d 253); *State v. Hughes* (Sept. 26, 1985), Ross App. No. 1158 (relying on *Roberts*). We acknowledge that some other courts have reached a different conclusion. See, e.g., *State v. Ocasio*, Montgomery App. No. 19859, 2003-Ohio-6240, at ¶20 (concluding "that Disorderly Conduct is not a lesser included offense of Assault"); *State v. Neal* (Sept. 1, 1998), Franklin App. No. 97APA12-1676 (applying the *Deem* test and finding that "the

inconvenience element does not qualify disorderly conduct as a lesser-included offense of assault"). Regardless, Breidenbach has not persuaded us that our prior decisions are in error. As a result, we choose to rely on this court's clear precedent and, once again, find that disorderly conduct is a lesser included offense of assault.

{¶15} Accordingly, we overrule Breidenbach's first assignment of error.

III.

{¶16} In his second assignment of error, Breidenbach argues that the state did not prove, beyond a reasonable doubt, that he (1) acted recklessly or (2) engaged in violent or turbulent behavior. For these reasons, Breidenbach contends that his disorderly-conduct conviction is against the manifest weight of the evidence.

{¶17} When determining whether a criminal conviction is against the manifest weight of the evidence, we "will not reverse a conviction where there is substantial evidence upon which the [trier of fact] could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." *State v. Eskridge* (1988), 38 Ohio St.3d 56, at paragraph two of the syllabus. See, also, *State v. Smith*, Pickaway App. No. 06CA7, 2007-Ohio-502, at ¶41. We "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial granted." *Smith* at ¶41, citing *State v. Garrow* (1995), 103 Ohio App.3d 368, 370-371; *State v. Martin* (1983), 20 Ohio App.3d 172, 175. But "[o]n the trial of a case, * * * the weight to be given the evidence and the credibility of the

witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, at paragraph one of the syllabus.

{¶18} Under the disorderly conduct statute, "[n]o person shall recklessly cause inconvenience, annoyance, or alarm to another by * * * [e]ngaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior." R.C. 2917.11(A)(1). "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." R.C. 2901.22(C). And the Supreme Court of Ohio "has held that 'turbulent' as used in the disorderly conduct statute 'refers to tumultuous behavior or unruly conduct characterized by violent disturbance or commotion.'" *State v. Walton* (1993), 89 Ohio App.3d 799, 802, quoting *State v. Reeder* (1985), 18 Ohio St.3d 25, 27.

{¶19} Here, we find that Breidenbach's conviction is not against the manifest weight of the evidence. First, there is substantial evidence that Breidenbach engaged in turbulent behavior. Both Melissa and Dennis testified that Breidenbach angrily knocked the check out of Melissa's hand and then threw an envelope at her. In our view, this qualifies as turbulent behavior. We recognize that Breidenbach testified to a different version of events. However, "the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness. * * * Accordingly, [t]his court will not substitute its judgment for

that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict." *State v. Rhines*, Montgomery App. No. 23486, 2010-Ohio-3117, at ¶39 (internal citations omitted) (alteration sic). And here, we will defer to the trial court's judgment regarding witness credibility. Therefore, based on the McCartneys' testimony, the trial court could have reasonably concluded that Breidenbach engaged in turbulent behavior.

{¶20} Furthermore, there is substantial evidence that Breidenbach acted recklessly. Breidenbach testified that he was aware of Melissa's wrist injury, and Melissa testified that Breidenbach swung his hand towards her injured wrist. Based on this testimony, the trial court could have reasonably concluded that Breidenbach perversely disregarded the known risk that his conduct would cause Melissa to become alarmed. Certainly, any injured person would become alarmed by a sudden, aggressive movement directed towards his or her injury. And here, there is substantial evidence that Breidenbach swung his hand towards Melissa's wrist with heedless indifference to her potential alarm.

{¶21} For the foregoing reasons, we find that the trial court did not lose its way and create such a manifest miscarriage of justice that Breidenbach's conviction must be reversed and a new trial be granted. We find substantial evidence upon which the trial court could have reasonably concluded that all the elements of disorderly conduct were proven beyond a reasonable doubt.

{¶22} Accordingly, we overrule Breidenbach's second assignment of error. Having overruled both of his assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED. Appellant shall pay the 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 Athens County Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Harsha, J. and Abele, J.: Concur in Judgment and Opinion.

For the Court

BY:_____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.