[Cite as *State v. Marrero*, 2009-Ohio-2430.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellee v. STANLEY MARRERO Appellant	C.A. No. 08CA009467 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 07CR074486

DECISION AND JOURNAL ENTRY

Dated: May 26, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Stanley Marrero, appeals from the decision of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} Appellant, Stanley Marrero, became a City of Lorain Police Officer in 1990. At all times relevant to this case, Marrero was a police officer. Beginning in March of 2003, Marrero maintained a sexual relationship with Tammy Kwilecki. Both Marrero and Kwilecki were married to other people during their relationship.

{¶3} In 2006, Kwilecki learned that Marrero was also involved with Angela Mehallick, and briefly ended the relationship. In August or September of 2006, Marrero and Kwilecki resumed their sexual relationship. On January 31, 2007, Kwilecki noticed Marrero's vehicle in

Mehallick's sister's driveway. Kwilecki watched as Marrero exited the home and then pulled in behind Marrero, blocking his vehicle. As Kwilecki spoke with Marrero, Mehallick exited the home, ran over to Kwilecki and began punching her. Eventually, Kwilecki left the home and went to the Lorain Police Department to submit a report. She did not press charges, nor did she reveal Marrero's name. The parties stipulated that as a result of the assault, Kwilecki suffered a broken nose.

{¶4} In the summer of 2006, Marrero was friendly with Kimberly Pawlowski. The parties disagree as to whether this relationship was sexual. Donna Haller, Pawlowski's neighbor and friend, met Marrero through Pawlowski. Marrero denied knowing Haller. Haller testified that some time at the end of June 2006, while on duty, Marrero visited her home in the middle of the night. She explained that he was wearing his uniform and gun belt and that he told her he was there to talk about Pawlowski. Haller left Marrero in the living room while she put her dog in another room. When she returned, Marrero had removed his pants and underwear, and was sitting on her couch holding his semi-erect penis. He asked her to perform oral sex on him. She refused. Haller testified that she and Marrero then discussed the incident and Marrero informed her that if she told Pawlowski, Pawlowski would not believe her and that if she ever needed the police, they would not help her. Finally, he threatened to tell her boyfriend and to otherwise make her life "a living hell."

{¶5} As a result of these incidents, as well as others not relevant to this appeal, Marrero was indicted on one count of intimidation, in violation of R.C. 2921.04(B), two counts of theft in office, in violation of R.C. 2921.41(A)(1), two counts of menacing by stalking, in violation of R.C. 2903.211(A)(1), two counts of dereliction of duty, in violation of R.C. 2921.44(A)(2), one count of public indecency, in violation of R.C. 2907.09(A)(1) and one count of public indecency,

in violation of R.C. 2907.09(A)(3). A supplemental indictment was filed, but was severed and assigned an individual case number. Marrero pled not guilty to the charges in the indictment and waived his right to a jury trial.

{¶6} Prior to trial, the State dismissed without prejudice one count of menacing by stalking. At the close of the State's case, the trial court granted Marrero's Crim.R. 29 motion with regard to the two counts of theft in office and the remaining menacing by stalking charge. At the close of all evidence, the trial court found Marrero guilty of one count of intimidation, in violation of R.C. 2921.04(A), the lesser included offense of the charge, one count of dereliction of duty, and one count of public indecency. He was found not guilty of the remaining charges.

{¶7} The trial court sentenced Marrero to a total of six months of incarceration, with four months of his sentence suspended. He has timely appealed from his convictions and sentence. Marrero has raised three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION FOR INTIMIDATION OF A VICTIM AND THE TRIAL COURT ERRED IN OVERRULING THE MOTION FOR ACQUITTAL PURSUANT TO CRIM.R. 29, AND THE CONVICTION VIOLATED [MARRERO'S] RIGHT TO DUE PROCESS."
>
> "THE GUILTY VERDICT FOR INTIMIDATION OF A VICTIM WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶8} In his first assignment of error, Marrero contends that his conviction for intimidation was against the manifest weight of the evidence and based on insufficient evidence. As these are two separate and distinct arguments, we will address them accordingly.

Sufficiency:

{¶9} When considering a challenge to the sufficiency of the evidence, the court must determine whether the prosecution has met its burden of production, while a manifest weight challenge requires the court to examine whether the prosecution has met its burden of persuasion. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). To determine whether the evidence in a criminal case was sufficient to sustain a conviction, an appellate court must view that evidence in a light most favorable to the prosecution:

> "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 the 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 crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶10} Marrero was convicted of intimidation of a crime victim, in violation of R.C. 2921.04(A). R.C. 2921.04(A) states that "[n]o person shall knowingly attempt to intimidate or hinder the victim of a crime in the filing or prosecution of criminal charges or a witness involved in a criminal action or proceeding in the discharge of the duties of the witness." R.C. 2901.22(B) provides that "[a] person acts knowingly *** when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶11} Marrero contends that the State did not present evidence that he knowingly attempted to hinder or intimidate Haller from reporting the indecent exposure incident to the police. Notably, Marrero contends that because there was no evidence that Haller filed or attempted to file a criminal charge against Marrero, he could not have knowingly hindered her. Marrero would have this Court conclude that because his act of hindering or intimidating Haller

from reporting the crime was successful that he could not be found guilty of intimidation. This argument defies logic and is without merit.

{¶12} Although R.C. 2921.04(A) does not require proof of a threat to be convicted of intimidation, the Ohio Supreme Court has stated:

> "Both R.C. 2921.04(A) and (B) prohibit knowing attempts to intimidate a witness. We cannot hypothesize an instance in which the act of threatening a witness would not also constitute intimidation. The term 'threat' represents a range of statements or conduct intended to impart a feeling of apprehension in the victim, whether of bodily harm, property destruction, or lawful harm, such as exposing the victim's own misconduct. See *Planned Parenthood League of Massachusetts, Inc. v. Blake* (1994), 417 Mass. 467, 474 [] (defining 'threat' as 'the intentional exertion of pressure to make another fearful or apprehensive of injury or harm'). To 'intimidate' means to 'make timid or fearful: inspire or affect with fear: frighten ***; esp.: to compel to action or inaction (as by threats).' (Emphasis added and capitalization omitted.) Webster's Third New International Dictionary at 1184.
>
> "'Intimidation' by definition involves the creation of fear in a victim, and the very nature of a threat is the creation of fear of negative consequences for the purpose of influencing behavior. We simply do not discern a meaningful difference between intimidation of a witness and the making of a threat to a witness. Accordingly, both R.C. 2921.04(A) and (B) prohibit the threatening of witnesses." *State v. Cress*, 112 Ohio St.3d 72, 2006-Ohio-6501, ¶39-40.

{¶13} We conclude that after viewing the evidence in the light most favorable to the State, the trial court could reasonably find that the State met its burden of production and presented sufficient evidence that Marrero knowingly threatened and intimidated Haller, which led Haller to not report the incident. *Jenks*, 61 Ohio St.3d at paragraph two of the syllabus.

{¶14} Haller testified that late one night, Marrero came to her home. Marrero was in his police uniform, wearing his gun belt. He had parked his police cruiser down the street. She believed he was there to discuss her neighbor, with whom Marrero had a relationship. Haller went to put her dog away and when she came back to the living room, she discovered Marrero, sitting on her couch, with his pants and underwear down, holding his semi-erect penis. She

stated that he asked her for oral sex and that she said no. Haller testified that she found Marrero threatening, so she let her dog out of the kitchen. Haller and Marrero then discussed what had occurred. Haller testified that Marrero told her, "[i]f anything was to be said to Kim about it, that she wouldn't believe me; and that if I ever needed help from the police, don't expect any." She further testified that Marrero threatened to tell her boyfriend about the incident and on cross-examination, she stated that Marrero informed her that he would make her life "a living hell."

{¶15} Haller stated that she did not report the incident to the police because she believed Marrero's threats. She stated that after the incident occurred, in the middle of the night, Marrero "started circling my house, looking in my windows." She explained that this made her feel threatened, as she was afraid that Marrero was going to try to find something to charge her with just to scare her.

{¶16} We conclude that the State presented sufficient evidence on the charge of intimidation pursuant to R.C. 2921.04(A). Haller testified that Marrero was wearing both his uniform and his gun belt when he warned her not to tell her friend what he had done and that she should not expect any help from the police. Haller believed that he would attempt to charge her with something if she told anyone about the incident. There is also sufficient evidence that Marrero threatened her safety by telling her that he could make her life "a living hell." The trial court could reasonably infer that Marrero knew that by making the threats under circumstances where he was armed and in full uniform that Haller would not attempt to pursue charges against him. Accordingly, this portion of Marrero's first assignment of error is overruled.

Manifest Weight:

{¶17} A determination of whether a conviction is against the manifest weight of the evidence does not permit this Court to view the evidence in the light most favorable to the State

to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

> "an appellate court must review 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 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 ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶18} Marrero contends that his testimony that he did not know Haller and that he did not expose himself or threaten her was more credible than Haller's testimony because Haller had previously been convicted of identity fraud, theft, and misuse of a credit card. He further argues that the State did not offer any evidence to corroborate Haller's testimony.

{¶19} In considering the credibility of the witnesses, we cannot conclude that the trial court clearly lost its way when it chose to believe Haller's testimony rather than Marrero's. See Id. The State presented Marrero's telephone records from June of 2006, when this incident occurred. Marrero testified at trial that he did not know Haller. When confronted with cell phone records showing several calls to her phone during the days surrounding this incident, Marrero maintained that he thought he was calling Kimberly Pawlowski when he was in fact calling Haller. The phone records, however, indicate that Marrero called *both* Haller and Kimberly Pawlowski several times. According to the records, Marrero called Haller's phone 37 times from June 23 to the 25. The calls to Haller and Pawlowski were intermixed and about ten, fifteen, or twenty minutes apart. The trial court could infer from this evidence that Marrero knew Haller and that his testimony that he did not know her and did not expose himself or threaten her was not credible. Further, we note that these telephone records bolster Haller's contentions that she knew Marrero through Pawlowski and that he called her several times after

the incident occurred. Accordingly, we cannot conclude that the trial court clearly lost its way when it convicted Marrero of intimidation of a witness. Id.

{¶20} Marrero's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION FOR PUBLIC INDECENCY AND THE TRIAL COURT ERRED IN OVERRULING [MARRERO'S] MOTION FOR ACQUITTAL PURSUANT TO CRIM.R. 29, AND THE CONVICTION VIOLATED [MARRERO'S] RIGHT TO DUE PROCESS."
>
> "THE GUILTY VERDICT FOR PUBLIC INDECENCY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶21} In his second assignment of error, Marrero contends that his conviction for public indecency was against the manifest weight of the evidence and not based on sufficient evidence. We do not agree. We will again address each portion of this assignment of error separately. We refer to our standards of review as stated above.

Sufficiency:

{¶22} Marrero was convicted of public indecency, in violation of R.C. 2907.09(A)(3). This section states:

> "(A) No person shall recklessly do any of the following, under circumstances in which the person's conduct is likely to be viewed by and affront others who are in the person's physical proximity and who are not members of the person's household:
>
> "***
>
> "(3) Engage in conduct that to an ordinary observer would appear to be sexual conduct or masturbation."

{¶23} Marrero contends that the State failed to show that he was engaged in conduct that to an ordinary observer would appear to be masturbation. Specifically, he contends that Haller's testimony that Marrero pulled down his pants and underwear and that she observed him holding

his semi-erect penis does not constitute masturbation because her testimony did not reveal that he was manipulating his penis. He further contends that because he asked her for oral sex while holding his semi-erect penis, he clearly sought sexual gratification through oral sex, not masturbation. We do not agree.

{¶24} The term "masturbation" is not defined in the Ohio Revised Code. Therefore, courts must look to the ordinary meaning of the word. Masturbation is defined as

> "'the manipulation of genital organs for sexual gratification by means other than sexual intercourse.' Neither that definition nor the common, ordinary meaning of the term masturbation requires any expressed or observed sexual gratification that indicates the individual is finding pleasure. Rather, sexual gratification is the motivation for engaging in that behavior. That motive reasonably can be inferred whenever a person engages in that conduct, as Defendant did here." *State v. Johnson*, 2d Dist. No. 21335, 2006-Ohio-4935, at ¶20, quoting *Columbus v. Heck* (Nov. 9, 1999), 10th Dist. No. 98AP-1384, at *5.

{¶25} Further, "masturbation" has been defined to include the stimulation *or* the manipulation of one's genital organs. *Heck*, supra, at *5. We conclude that after viewing the evidence in the light most favorable to the State the trial court could have found that it would appear to an ordinary observer that Marrero had stimulated his genital organs. Haller testified that when she came back into the living room, Marrero was holding his semi-erect penis, indicating that he had been stimulating himself. At this point, Marrero's conduct was such that an ordinary observer would believe that Marrero was masturbating, regardless of the fact that he requested oral sex from Haller. The fact that he requested oral sex from Haller does not preclude a conclusion that he was masturbating as well. The trial court could have reasonably inferred that it appeared to an ordinary observer that Marrero was seeking sexual gratification by holding his semi-erect penis. *Johnson*, supra, at ¶20. Accordingly, this portion of Marrero's second assignment of error is overruled.

Manifest Weight:

{¶26} Marrero has argued that his conviction for public indecency was against the manifest weight of the evidence. He presents the same argument here that he did in his first assignment of error, i.e., that Haller's testimony was not credible and that when balanced with his testimony denying knowing Haller, the conviction was against the manifest weight of the evidence. As we disposed of this argument in our discussion of his first assignment of error, we similarly dispose of it here. Marrero's contention that his conviction for public indecency was against the manifest weight of the evidence is therefore overruled based on our discussion above.

{¶27} Marrero's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> "THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION FOR DERELICTION OF DUTY AND THE TRIAL COURT ERRED IN OVERRULING [MARRERO'S] MOTION FOR ACQUITTAL PURSUANT TO CRIM.R. 29, AND THE CONVICTION VIOLATED [MARRERO'S] RIGHT TO DUE PROCESS."
>
> "THE GUILTY VERDICT FOR DERELICTION OF DUTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶28} In his third assignment of error, Marrero contends that his conviction for dereliction of duty was against the manifest weight of the evidence and based on insufficient evidence. We do not agree. Again, we will address these arguments separately and refer to our standards of review as set forth above.

Sufficiency:

{¶29} Marrero was convicted of dereliction of duty, in violation of R.C. 2921.44(A)(2), which states:

> "(A) No law enforcement officer shall negligently do any of the following:
>
> "***

> "(2) Fail to prevent or halt the commission of an offense or to apprehend an offender, when it is in the law enforcement officer's power to do so alone or with available assistance."

Further,

> "A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist." R.C. 2901.22(D).

{¶30} Marrero contends that his conviction for dereliction of duty was not based on sufficient evidence because the State failed to show that he negligently failed to halt the initial assault. This argument is without merit.

{¶31} With regard to a City of Lorain Police Department Officer's duty, the State presented the testimony of Lt. James Rohner. Rohner testified that at the time of the incident, the policies and procedures of the Lorain Police Department stated that:

> "'Within the City of Lorain, officers shall at all times take appropriate action to[;] A, protect life and property; B, preserve the peace; C, prevent crime; D, detect and arrest violators of the law; E[,] enforce all federal, state and local laws and ordnances coming within the departmental jurisdiction.'"

{¶32} Tammy Kwilecki testified that on January 31, 2007, she had a sexual relationship with Marrero. On this date, she observed Marrero's vehicle at another woman's home. She suspected that Marrero was having an affair with another woman, Angela Mehallick, and that his car was parked in her sister's driveway. Kwilecki testified that she waited in front of the home until she observed Marrero exit the home. She then pulled her vehicle behind his, blocking his car in the driveway. As she got out of her car and approached Marrero, Marrero told her to leave as he was taking Mehallick to a doctor's appointment. She testified that they were standing outside the driver's side of Marrero's vehicle. Kwilecki testified that as she was talking to

Marrero, Mehallick came outside, quickly walked over to Kwilecki and Marrero, and exchanged some words with Kwilecki. Mehallick then pulled Kwilecki's hair and attacked her, punching her several times, particularly in the nose, which resulted in bleeding. Kwilecki testified that there was nothing preventing Marrero from stopping the attack. Kwilecki testified that she fell to the ground and Mehallick kept punching her, and then suddenly left. Kwilecki stated that Marrero did not physically get between the two women or try to grab Mehallick. Kwilecki stated that she tried to call 911, but Marrero stopped her from completing the call, informing her that if she called, "[b]ecause of who I am, you're going to lose everything that you worked so hard to get. You'll lose it all." Kwilecki testified that Mehallick approached her again. At this point, Marrero stopped Mehallick and Kwilecki left.

{¶33} Kwilecki testified that as she left, a man, Robert Bring, stopped her and informed her that he observed the entire incident. She went to the Lorain Police Department to file a report. She informed them that an off-duty officer was involved, but she refused to give his name at that time. She further opted not to press charges. Kwilecki later met up with Marrero and informed him that she had reported the incident and told them that an off-duty officer was involved. She testified that Marrero got mad at her and "told me that he's a policeman 24 hours a day, 7 days a week, and there would be an investigation. How naïve was I?" Kwilecki did not seek medical attention until February 13. The parties stipulated at trial that she had a broken nose.

{¶34} The State further presented the testimony of Robert Bring. Bring testified that he was parked across the street and observed the incident. He stated that Mehallick came out of her home, ran towards Kwilecki and start "pounding" on her. He testified that Kwilecki and Marrero were standing outside the vehicle and that Marrero was about a foot away from Kwilecki. He

stated that Marrero did nothing to stop the fight. Bring testified that after the assault, Kwilecki's nose was pushed over to the side and was badly bleeding, and that she had black around her eyes.

{¶35} Viewing the evidence in the light most favorable to the State, we conclude that the trial court could have found that Marrero was negligent when he failed to halt the commission of the assault or apprehend Mehallick. The testimony indicated that nothing prevented Marrero from intervening, that he clearly observed Mehallick assault Kwilecki, that Kwilecki was badly injured, and that he failed to apprehend Mehallick. Accordingly, this portion of Marrero's third assignment of error is overruled.

Manifest Weight:

{¶36} Marrero contends that his conviction for dereliction of duty was against the manifest weight of the evidence because there was testimony that he was sitting in his car when the assault occurred and he could not have stopped it. He further contends that there was testimony that he stopped the attack as soon as he was able and that he could not have anticipated that the confrontation would result in physical confrontation. This argument is without merit.

{¶37} Mehallick and Marrero both testified that Marrero was in his car when the assault took place. Mehallick stated that Marrero was not in a position to stop her from hitting Kwilecki. On cross-examination, Mehallick admitted that she "cared for [Marrero]. I still do." She further admitted that Marrero had the opportunity to apprehend her but did not. Marrero testified that he was in the vehicle the whole time and observed the altercation in his rear view mirror. He explained that Kwilecki was the aggressor. He stated that he exited his vehicle, separated the women, and grabbed and dragged Mehallick away from Kwilecki. Marrero admitted that he did not want Kwilecki to report the assault because "this is ugly." On cross-examination, he admitted that he had to hold Mehallick back, but not Kwilecki. He further

admitted that he was aware of his duty to report crimes and apprehend suspects, even when off duty. He admitted that he did not perform that duty.

{¶38} After weighing the evidence, we cannot conclude that this is a case where the trial court clearly lost its way. *Otten*, 33 Ohio App.3d 340. Robert Bring, an unbiased observer, bolstered Kwilecki's testimony that Mehallick was the aggressor and that Marrero was standing outside his vehicle within a foot of the assault. Further, both Marrero and Mehallick testified that Marrero had the opportunity to apprehend Mehallick, but he opted not to as he did not want the crime reported. Accordingly, we conclude that Marrero's conviction for dereliction of duty was not against the manifest weight of the evidence.

{¶39} Marrero's third assignment of error is overruled.

III.

{¶40} Marrero's assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

DANIEL G. WIGHTMAN, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and MARY R. SLANCZKA, Assistant Prosecuting Attorney, for Appellee.