

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

State of Ohio

Court of Appeals No. F-09-019

Appellee

Trial Court No. 09CRB00329W

v.

Thomas J. Radabaugh

DECISION AND JUDGMENT

Appellant

Decided: September 30, 2010

* * * * *

Eric K. Nagel, Wauseon City Prosecutor, for appellee.

Thomas S. Moliterno, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the December 11, 2009 judgment of the Fulton County Court, Western Division, which sentenced appellant, Thomas J. Radabaugh, after he was convicted by the court of violating R.C. 2929.25(A), domestic violence. Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellant asserts the following assignments of error on appeal:

{¶ 2} "FIRST ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN FINDING HIM GUILTY OF DOMESTIC VIOLENCE WHERE THE COURT FOUND HE WAS ACTING IN SELF-DEFENSE WHEN HE PUSHED THE VICTIM.

{¶ 3} "SECOND ASSIGNMENT OF ERROR: HIS CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 4} On July 10, 2009, appellant was charged by complaint with domestic violence, a violation of R.C. 2929.25(A). On December 11, 2009, appellant was found guilty of the charge by the court and sentenced. The following evidence was admitted at trial.

{¶ 5} The victim testified that she had lived with appellant for approximately nine months until the incident at issue occurred. That night they had gone to a small party around 8:00 p.m. or 9:00 p.m. After a few hours, the two began to verbally fight. Both had been consuming alcohol. At one point, appellant removed the victim's bracelet from her wrist and threw it across the room. The two separated for awhile until appellant threw beer into her face. She fell to her knees and was wiping the liquid off her face when appellant dumped a bottle of beer on her head. When she stood up, she recalled appellant grabbing her right hand that was up in the air and throwing her over a couch and onto the floor causing her injury. She could not remember hitting appellant, but may have been about to because her arm was up in the air. She could not remember exactly what happened after that except that she left the apartment and saw the others were arguing with appellant. The victim tried to intervene, but appellant spit on her. The

victim returned to the apartment with the host of the party, but the victim became frightened by what had happened and decided to climb out the window and go back to her own apartment. The police arrived shortly afterward and took her to the hospital. Photographs of her injuries, which were taken a few days after the assault, were submitted into evidence. In her written statement to the police, she complained only of injury to her head, while at trial she testified to numerous bumps and bruises on her head, back, and knee, as well as a cut on her toe. She explained that she did not hurt at first, but later began to notice other injuries. The victim also testified that she had been wrestling the day before with someone else and had fallen over some chairs; but, she claimed that she had not been injured at the time. Appellant admitted that she lied to the medical personnel and told them that she had not been drinking. At the time of this incident the victim had been taking a prescription medicine, Zoloft, but did not recall any indication of a reaction from drinking at the same time. She also had been previously diagnosed with a borderline personality disorder.

{¶ 6} The investigating officer testified that when he arrived at the scene he found appellant outside. Appellant admitted to a verbal altercation with the victim and throwing beer at her. The officer observed that appellant had a red mark on the side of his face, but appellant did not state that he was injured. The officer also spoke to the victim who was upset and crying. She told the officer that appellant had poured beer on her several times and pushed her over a couch, which caused her to hit her head on the floor. He noted in his report that the victim asserted that her head and left side of her face

hurt, although he saw no evidence of injury. The officer believed the victim was intoxicated at the time but she appeared to be functioning well.

{¶ 7} A second responding officer testified that he had first been called to the scene because appellant was expressing thoughts of suicide. Appellant told the officer that he had been kicked out of a party because he was intoxicated and had been arguing with his girlfriend. The officer convinced appellant to go to the hospital. At that time, appellant had some red marks on his face, but did not appear to be injured. The officer left appellant at the hospital to respond to a second domestic violence call where he learned that appellant was the suspect. The officer returned to the hospital and spoke in depth to appellant about his argument with the victim and appellant indicated that the marks on his face were caused by her. He stated that she had struck him several times in the face and that he had pushed her to get her away from him and she had fallen over the couch because she was intoxicated.

{¶ 8} After the evidence was presented, the trial judge stated that he believed that appellant knowingly caused injury to the victim. He further stated that he believed some physical contact happened prior to the victim striking appellant and that, in response to the victim striking him, appellant pushed her over the couch because he was angry. The court noted that the victim was not a large person and would not have injured herself to the extent that she did by falling over a couch. Therefore, the judge concluded that appellant used excessive force.

{¶ 9} To establish self-defense, a defendant must show that "(1) [he] was not at fault in creating the situation giving rise to the affray, (2) [he] has [sic] a bona fide belief

that he was in imminent danger of death or great bodily harm and that his only means of escape was the use of force, and (3) that [he] must not have violated any duty to retreat or avoid the danger." *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph two of the syllabus, and *State v. Thomas* (1997) 77 Ohio St.3d 323, 326.

{¶ 10} Appellant asserts in his first assignment of error that the trial court found that appellant acted in self-defense, but that it erroneously found that he used excessive force. Appellant asserts that there is insufficient evidence to support the trial court's finding that he used excessive force. Appellant argues in his second assignment of error that the trial court could not have found that appellant knowingly caused physical harm when it had found that he acted in self-defense. We address both assignments of error simultaneously.

{¶ 11} We disagree with appellant's conclusion that the trial court found that he had acted in self-defense. While the judge stated that he believed that appellant struck the victim after she had slapped him, the judge did not conclude that appellant acted in self defense. There is sufficient evidence to establish that appellant's actions instigated the fight. The victim testified that appellant had torn her bracelet off earlier in the evening and then threw beer in her face and poured beer over her after she fell to her knees. The victim cannot recall striking appellant. However, the responding officers testified that appellant had red marks on his face and the judge apparently concluded from this evidence that the victim had struck appellant. However, the court also found that there must have been other physical contact prior to the victim striking appellant. The court found that appellant used excessive force because the court found it ludicrous

to believe that the victim tripped over the couch. All of the testimony led the judge to believe that appellant pushed the victim over the couch hard enough to tip it over and injure the victim in response to her defending herself against him. Therefore, we find that the trial court did not conclude that appellant acted in self-defense, and that the manifest weight of the evidence supports the conviction. Appellant's first and second assignments of error are not well-taken.

{¶ 12} Having found that the trial court did not commit error prejudicial to appellant and that substantial justice has been done, the judgment of the Fulton County Court, Western Division, is affirmed. Appellant is hereby ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____

JUDGE

Arlene Singer, J. _____

JUDGE

Thomas J. Osowik, P.J.
CONCUR. _____

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
