

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

State of Ohio

Court of Appeals Nos. L-09-1235
L-09-1236

Appellee

Trial Court No. CR-09-1535
CR-09-1823

v.

Kevin Kiss

DECISION AND JUDGMENT

Appellant

Decided: December 16, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Edward J. Fischer, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} This is an appeal from a judgment of the Court of Common Pleas of Lucas County, in which a jury determined appellant, Kevin Kiss, was guilty of aggravated burglary and domestic violence.

{¶ 2} Following an incident on February 12, 2009, appellant was indicted for aggravated burglary, a felony of the first degree, in violation of R.C. 2911.11(A)(1) and domestic violence, a felony of the fourth degree, in violation of R.C. 2919.25(A) and (D)(3). Appellant filed a notice of alibi, and on June 22, 2009, a jury trial commenced on both counts.

{¶ 3} Testimony elicited at appellant's trial indicates that on February 12, 2009, Kelly Kiss, appellant's ex-wife, was asleep in her home with her six-year-old son in a nearby room when she was awoken by an intruder tapping on her leg. The intruder dragged Kelly from her bed and then stomped on and punched her face. Kelly immediately ran to a neighbor's residence who contacted the police. Upon their arrival, Kelly identified appellant as the perpetrator.

{¶ 4} Laura Scribner, Kelly's neighbor, testified that Kelly appeared at her back door on the evening of February 12, 2009, in her pajamas crying and "screaming to call 911 because [appellant] was trying to kill her." Scribner called 911 and thereafter three officers arrived at her home to assist Kelly. Scribner then accompanied an officer to Kelly's apartment to make sure Kelly's son was safe, and to retrieve Kelly's purse.

{¶ 5} Officer Matthew C. Miller, a patrolman with the Sylvania Township Police Department, testified that he responded to Scribner's apartment on February 12, 2009, within five minutes of being dispatched. Upon arriving at approximately 10:45 p.m., he viewed Kelly's injuries and observed that she was fearful, confused, and disoriented. Officer Miller indicated that there were no signs of forced entry into Kelly's residence,

and that he did not witness appellant at the scene. Officer Miller also testified to a domestic violence statement filed with the prosecutor's office by Kelly in which she identified appellant as the assailant.

{¶ 6} Kelly testified to a history of domestic violence during and after her six year marriage to appellant. During the course of her testimony, Kelly identified appellant as her attacker from the February 12, 2009 incident. She described the attacker as wearing black clothing, and stated that the only light in her bedroom came from a hallway light. She also stated that the attacker did not speak. As to why there were no signs of forced entry into her apartment, Kelly testified that she was unsure if she locked her front door that evening and that her debit card and a couple of credit cards were missing after the attack. Furthermore, Kelly's testimony was that at some point prior to the attack, she noticed that her cell phone was missing.

{¶ 7} Donald Dudley then testified on behalf of appellant. Dudley and appellant went to high school together and were "on and off friends." Dudley testified that on the evening of the attack, he and appellant watched the Boston Celtics' basketball game, which began at 7:00 p.m. and then appellant stayed overnight at Dudley's home. Dudley testified that while watching the Celtics' game, he consumed eight to ten beers then went to bed after the game between 11:00 and 11:30 p.m. Dudley testified that he was 80 percent sure that appellant did not leave his home during the evening after he went to bed. When Dudley awoke to leave for work at 5:30 a.m., appellant was still at his home.

{¶ 8} On cross-examination, Dudley was impeached by the prosecution when it presented evidence confirming that the Celtics' game was not televised until 9:30 p.m. on February 12, 2009. Therefore, Dudley's prior testimony that the game began at 7 p.m. could not have been accurate. On re-direct examination, Dudley stated that it was possible that the pair had watched two basketball games that evening. On re-cross examination however, Dudley admitted that in his prior statements to the prosecution and an investigator for the state, he never mentioned that he had watched a second basketball game that evening.

{¶ 9} Finally, appellant testified on his own behalf, revealing a history of violence between himself and the victim. Appellant testified to an incident that occurred in late July or early August 2006, during his marriage to Kelly. Apparently, Kelly pushed appellant while he was showering and then "when [appellant] got out of the shower, [he] went after her and slammed her head on the floor." Further, appellant testified that in September 2006, he and Kelly got into an argument and when the police eventually arrived, they arrested him and charged him with domestic violence. Appellant was eventually convicted of domestic violence and evidence of this conviction was admitted at trial. Thereafter, Kelly and appellant divorced, and Kelly moved to the residence where she was eventually attacked. Testimony reflects that in July 2008, after dropping off his son at Kelly's apartment, he found out that "[Kelly] was dating somebody else, and she had been lying to [appellant] about it." Feeling used, appellant decided to take Kelly's cell phone because he paid for Kelly to use it. When Kelly tried to grab the cell

phone out of appellant's pocket, he tried "to grab it back out of her hand at which time she started screaming for help." Nearby neighbors, including Scribner, called 911.

Resultantly, appellant was charged with violating a protection order, but was ultimately convicted of an amended charge of disorderly conduct. From that point, appellant was not permitted in Kelly's apartment and was required to meet Kelly at a Wal-Mart parking lot to exchange their son for visits. Appellant's testimony revealed that after the phone incident, he was depressed and wrote letters to Kelly often. That fall, appellant attempted to commit suicide.

{¶ 10} Appellant then testified to yet another incident that occurred in January 2009, approximately one month before Kelly's assault. Apparently, their son left a blanket at appellant's house, so appellant showed up at Kelly's residence to return the blanket. Upon arrival, appellant inquired if he could enter the residence, to which Kelly responded that he could not. Appellant then stood in Kelly's doorway and talked for 45 minutes. Appellant testified that he observed Scribner return home, and then the police arrived "not five minutes after that * * *." Appellant was again arrested and charged with violating a protection order.

{¶ 11} In regards to the evening of the February 12, 2009 assault, appellant testified that he arrived at Dudley's home between 6:45 and 7:00 p.m., drank six or seven beers, watched one or two basketball games and then left at 5:00 or 5:30 a.m. The prosecution then impeached appellant on his prior inconsistent statement in his notice of alibi, in which appellant stated that he left Dudley's home at 6:30 a.m.

{¶ 12} The jury found appellant guilty of the aggravated burglary and domestic violence charges. Thereafter, appellant was sentenced to a three-year prison term on the aggravated burglary charge and a 12-month prison term on the domestic violence charge. The trial court ordered appellant to pay the costs of the prosecution and credited him for having served 155 days in custody.

{¶ 13} Appellant now asserts the following assignment of error:

{¶ 14} "The evidence was insufficient to support Appellant's conviction and the conviction was against the manifest weight of the evidence."

{¶ 15} Because appellant raises two distinct arguments in his single assignment of error, we will address each argument separately.

{¶ 16} Appellant asserts that the evidence was insufficient to support the convictions for the aggravated burglary and the domestic violence charges.

"[S]ufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, quoting Black's Law Dictionary (6 Ed.1990) 1433. On review, "[t]he 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." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus (superseded by statute and constitutional amendment on other grounds).

{¶ 17} The elements for the crime of aggravated burglary, as set forth in R.C. 2911.11, include:

{¶ 18} "(A) No person, by force, stealth, or deception, shall trespass in an occupied structure * * * when another person other than an accomplice of the offender is present, with the 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:

{¶ 19} "(1) The offender inflicts, or attempts or threatens to inflict physical harm on another[.]"

{¶ 20} We note that appellant does not dispute that Kelly was a victim of an aggravated burglary on February 12, 2009. Nevertheless, our own review of the record reveals that there was sufficient evidence set forth to support a finding of guilt as to the charge of aggravated burglary. Evidence offered at trial included testimony that an intruder trespassed into Kelly's residence by stealth as there were no signs of forced entry. Kelly testified that she was asleep in her bed when she was awoken by the attacker. Further, the residence was occupied at the time by Kelly and her son. Testimonial evidence and a domestic violence complaint form evince that the intruder committed the offenses of theft when stealing Kelly's debit and credit cards. Finally, testimony from multiple witnesses and photographic evidence support a finding that the intruder inflicted physical harm on Kelly. Finally, Kelly identified appellant as the

attacker. Thus, we find that the evidence was sufficient to support a finding of guilt in regards to the aggravated burglary charge.

{¶ 21} In regards to sufficiency of the evidence to sustain a conviction for the domestic violence offense, former R.C. 2919.25 provides in relevant part:

{¶ 22} "(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.

{¶ 23} "* * *

{¶ 24} "(3) Except as otherwise provided in division (D)(4) of this section, if the offender previously has pleaded guilty to or been convicted of domestic violence * * * a violation of division (A) or (B) of this section is a felony of the fourth degree * * *.

{¶ 25} "* * *

{¶ 26} "(F) As used in this section * * *:

{¶ 27} "(1) 'Family or household member' means any of the following:

{¶ 28} "(a) Any of the following who is residing or has resided with the offender:

{¶ 29} "(i) A spouse, a person living as a spouse, or a former spouse of the offender;

{¶ 30} "(ii) A parent, a foster parent, or a child of the offender, or another person related by consanguinity or affinity to the offender;

{¶ 31} "* * *

{¶ 32} "(b) The natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent."

{¶ 33} Evidence of Kelly's injuries was presented in the form of sworn testimony, medical records, and photographs. Furthermore, Kelly identified appellant as the assailant, and evidence was submitted in the form of a certified court record from Toledo Municipal Court which confirmed appellant's prior domestic violence conviction. Testimony from both Kelly and appellant evidenced their prior marriage and that appellant is the other natural parent of their son born during their marriage. Thus, we find that the evidence was sufficient to support a finding of guilt in regards to the felony domestic violence charge.

{¶ 34} We must next consider whether appellant's convictions were against the manifest weight of the evidence. Appellant concedes that "there is no doubt that Kelly Kiss was attacked on the evening of February 12, 2009." The crux of appellant's argument is that "the State provided no independent evidence at trial, other than the victim's statement which placed the appellant at the crime scene." He concludes that "no tangible, physical evidence was presented at trial which placed Appellant at the crime scene."

{¶ 35} When reviewing a manifest weight of the evidence claim, the appropriate inquiry is whether "there is *substantial* evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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.'" (Emphasis sic.) *State v. Kelly*, 6th Dist. No. F-11-002, 2011-Ohio-5687, ¶ 19, quoting *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶ 81. (Citations omitted.) Further, "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The trier of fact may believe all, some, or none of what a witness says. *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶ 36} In the instant case, we cannot find that the trial court "clearly lost its way." The testimony of appellant's sole alibi witness was at times confusing and contradictory. Dudley admittedly consumed between eight to ten beers that evening, which calls into question his ability to accurately perceive the events that he described on that evening. Further, appellant's own testimony portrayed him as a man unable to cope with his ex-wife's desire to move on with her life.

{¶ 37} Finally, appellant argues that Kelly's testimony was the only evidence linking him to the scene that evening. He argues that it was dark, and that the only light in the bedroom was from a window and a hallway light. However, Kelly testified that appellant—a man to whom she was married for several years—attacked her on that evening. The jury found her testimony to be credible and believed that appellant was in fact Kelly's attacker.

{¶ 38} Thus, we find that appellant's convictions for aggravated burglary and domestic violence were not against the manifest weight of the evidence.

{¶ 39} Accordingly, we find the appellant's assignment of error not well-taken.

{¶ 40} The judgment of the Lucas County Court of Common Pleas is affirmed.

Appellant is 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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

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