

IN THE SUPREME COURT OF OHIO

On Appeal from the Fifth Appellate District Court
for Richland County, Ohio

COA No. 06 CA 52

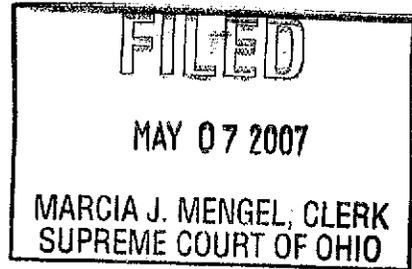
07-0833

STATE OF OHIO,
Plaintiff/Appellee,

Supreme Court No. _____

- VS -

KENYAN SELMON,
Defendant/Appellant.



MEMORANDUM IN SUPPORT OF JURISDICTION

Appearances:

FOR THE DEFENDANT/APPELLANT

FOR THE PLAINTIFF/APPELLEE

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STATEMENT AS TO WHY THIS CASE IS OF
GREAT PUBLIC INTEREST

[A]s a threshold matter, and for the purposes of jurisdiction, this case involves a felony, to wit: 2 counts of intimidation; 2 counts of retaliation; and, 1 count of perjury whereupon defendant/appellant was sentenced to an aggregate stated prison term of: (12) twelve years, including a maximum (5) five year term for aiding and abetting in the perjury charge and (6) six months on an assault plus (3) three years post release control with restitution.

In addition to the above, ... the case raises a substantial constitutional question founded upon a claim of ineffective assistance of appellate counsel, State v. Murnahan, 63 Ohio St. 2d 60, therein proffering a substantive constitutional challenge under State v. Foster, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E. 2d 470 and Blakely v. Washington (2004), 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403.

Ultimately, this case is of great public interest wherein it is brought upon well-settled maxims of statutory and constitutional law which prohibit the conviction of persons on evidence which was/is inherently insufficient to support the jury's verdict.

This case involves the public policy that all persons shall be accorded a fair trial in a fair tribunal and shall enjoy the right to equal protection and due process of law.

Finally, this case is of great public interests wherein it involves a substantive departure from the prescribed forms and modes of law commonly associated with 'simply justice.'

Accordingly, and for each of these reasons, and especially so because this case involves 'sentencing error claims' which this court has repeatedly held to constitute reversible error, the court should accept jurisdiction in and over this matter thereupon permitting the full and fair adjudication of appellant's well-founded statutory and constitutional claims therefore.

STATEMENT OF CASE AND FACTS

[T]his case originated in the Richland County Common Pleas Court as the criminal matter entitled: State v. Selmon, Case No. 06 CA 52, and alleged that on the evening of 'November 28, 2005,' appellant and his girlfriend, Ouida Birdow, were returning home from an evening out when they became involved in a verbal and then physical altercation.

Appellant was alleged to have struck Birdow in the face causing her to have two black-eyes and that appellant shoved her to the ground which allegedly resulted in her breaking a clavicle.

Birdow's 13 year old nephew, Travon Smith, allegedly witnessed the argument and ensuing physical altercation from his bedroom window and called 911. ('The Fire Dept. Rescue Squad and the Police were dispatched to the residence').

When the police, etc. arrived, they found Birdow in a bedroom crying and holding her shoulder ... she was however reluctant to tell the officer(s) anything about the incident.

Without a statement, and arguably based on the officer's experience ('which officer was never qualified as an expert') Officer Minard filled out and signed a domestic violence packet charging appellant with domestic violence and then placed appellant under arrest.

Birdow did not cooperate with anyone ['including the paramedics whom were attempting to treat her at the scene'], however, and after being transported to MedCentral Hospital, the prosecutrix then allegedly told one of the paramedics she was hit in the face with a fist and her shoulder was injured when she was thrown down to the ground. ['She later made a statement to Officer Minard on the matter'].

Later, *** and on 'December 4, 2005' while making a telephone call to the prosecutrix from the county jail facility, appellant is alleged to have instructed Birdow to tell the judge she had been in a fight with a woman named Jennifer with whom appellant was having an affair and to say that he ['appellant'] had nothing to do with her injuries ... four days later at appellant's preliminary hearing, Ms. Birdow she testified accordingly and denied that appellant had anything to do with her injuries.

Appellant was alleged to have also instructed the prosecutrix to lie to

the court or not show up at the trial and based upon those telephone calls, the appellee-state filed additional charges including 1 count of aiding and abetting perjury, 2 counts of intimidation and 2 counts of retaliation.

Appellant, prior to trial, filed a motion in limine and a motion for redaction of the audio tapes of appellant's phone calls to Birdow from the jail ... the court sustained appellant's motion in limine relating to the statements made by Birdow to Officer Minard and instructed the State to redact all references in the audio tapes of appellant's criminal history, however, ... the State failed to do so in relations to 2 comments by appellant in which he ['appellant'] refers to returning to the penitentiary and his prior convictions in direct conflict with the trial court's specific order to the contrary.

A timely objection was made to which the trial court found those comments ('which were clearly, 'highly prejudicial') to be minor ...

Those 'type' of intentional errors permeated the entire trial and appellant sought a mistrial on the matter to which again the trial court denied on the proposition that the State had made a good faith effort to redact the tapes.

Appellant appealed his conviction and sentence to the Richland County Fifth Appellate Court to which that court affirmed each appellant's conviction and sentence.

This action does thus follow.

Law and Argument:

PROPOSITION OF LAW NO. 1:

[A] conviction is against the manifest weight of the evidence and violative of the Federal Constitution's Sixth and Fourteenth Amendments where the evidence presented was/is patently insufficient ('as a matter of law') to support such conviction and therefore incapable of sustaining the state's burden of proving every essential element of the offense beyond a reasonable doubt. see: State v. Thompkins, 78 Ohio St. 3d 380, 386, 678 N.E. 2d 541, 546;

and, State v. Jenks (1991), 61 Ohio St. 3d 259

[a]nd:

PROPOSITION OF LAW NO. 2:

[D]ue process and fundamental fairness rights as guaranteed by and through the Sixth and Fourteenth Amendments to the United States Constitution, are implicated when a trial court fails to grant a properly and timely made motion for acquittal where the evidence presented was/is insufficient to sustain a conviction and 'reasonable minds' could not reach a different conclusion as to whether each element of an offense has been proven beyond a reasonable doubt. see: State v. Wolfe (1988), 81 Ohio App. 3d 215, 216, 555 N.E. 2d 689, 691 [note].

[T]he following propositions of law ('enumerated as 1 and 2') are submitted verbatim from appellant's brief in the proceedings below and by reference, hereby incorporate each and every factual allegation and legal averment asserted therein.

The relevant issue in analyzing sufficiency of evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of crime beyond a reasonable doubt." see: State v. Jenks (1991), 61 Ohio St. 3d 259, 574 N.E. 2d 492 (at syllabus). The standard of review is whether the evidence "should convince the average mind" of the accused's guilt beyond a reasonable doubt. id., 61 Ohio St. 3d at. 273.

Manifest weight analysis requires an examination of the entire record, de novo, to determine whether the evidence attains the high degree of probative

[note]

Propositions 1 and 2 above are forwarded together because of the nature and the intertwined relationship thereof.

force and certainty required of a criminal conviction. see: State v. Eley (1978), 56 Ohio St. 2d 169, 383 N.E. 2d 132 (at syllabus); and, State v. Miley (1996), 114 Ohio App. 3d 738, 742, 684 N.E. 2d 102.

The same standard applies whether reviewing the weight or sufficiency of evidence, id. at: Miley, supra., and the verdict will not be disturbed unless a reviewing court finds that reasonable minds could not reach the conclusion reached by the trier of fact. see: Jenks, supra, at: 61 Ohio St. 3d at 273.

"In considering whether the evidence is sufficient to support a verdict, the inquiry is whether the evidence is legally sufficient to support the verdict as a matter of law, and ... a verdict not support by sufficient evidence violates due process. see: U.S.C.A. Const. Amend. 14.

In contrast, ... weight of the evidence concerns the inclination of the greater amount of evidence offered at trial to support one side of the issue rather than the other ... weight is not a question of mathematics, but depends on its effect on inducing belief.

The court must determine whether the jury, in resolving the conflicts in the evidence, clearly lost its way and created a manifest miscarriage of justice in convicting the accused of the offense charged." see: State v. Daviduk (Stark County, March 18, 2002), Case No. 2001 CA 213, 2002 WL 433434, citing: State v. Thompkins (1997), 78 Ohio St. 3d 380, 386-387.

"In essence, ... sufficiency is a test of adequacy." see: State v. Thompkins, supra.

Criminal Rule 29 provides that a court "shall" grant a judgment of acquittal when the evidence is insufficient to sustain a conviction, but only when "reasonable minds" could not reach different conclusions as to whether each element of an offense has been proved beyond a reasonable doubt, State v. Wolfe (1988), 51 Ohio App. 3d 215, 216, 555 N.E. 2d 689, 691, ... further, 'the evidence must be construed in a light most favorable to the State.' id.

In order to prove the charge of *retaliation under R.C. 2921.05(B), the State must prove the following elements: (1) that he purposely; (2) by unlawful threat of harm to any person; (3) retaliated against the victim of a

crime; (4) because the victim filed or prosecuted criminal charges. (emphasis added). see: State v. Lambert (Montgomery County, June 5, 1998), Case No. 16667, 1998 WL 288957, at: 2.

In the instant case, appellant was convicted of 'domestic violence' against a woman with whom he had been living with at the time; he later was with retaliation under R.C. 2921.05(B) arising from his conduct after the conviction.

The Lambert-court, finding the 'retaliation statute' vague in an aspect critical to deciding that appeal, delved into the legislative history of H.B. 88 which created it. The Court took notice that the intent of the 'retaliation statute' was "expanding current law concerning intimidation to include retaliation" and that "the distinguishing characteristic between intimidation and retaliation was said to be that intimidation occurs before a judicial decision, whereas retaliation occurs after a judicial decision has been rendered." id.

"The retaliation statute, therefore, was intended to correspond to the intimidation statute in its effect, save that it is applicable only after judgment has been rendered on the underlying offense." id.

In: State v. Goodson (Preble County, May 10, 1999), Case No. CA 98-07-08 and CA 98-08-013, appellant had been charged by a female friend with unauthorized use of her vehicle. There was evidence that Goodson subsequently harassed and threatened her to drop the charges, ... as a result, he was charged with abduction and retaliation. On appeal of his conviction, based on a manifest weight argument, the trial court reviewed the facts and found there was sufficient evidence to support a guilty verdict as to the retaliation under R.C. 2921.05(B). The court found that one of the salient facts supporting the conviction was "testimony that appellant threatened Barger and caused her physical injury because she would not drop the charge she had filed against him." id. (emphasis added)

The statutory requirement of the 'retaliation statute's subsection (B), unlike the intimidation statute, specifies that the "victim" of the offense must be more than a mere witness in a legal proceeding - the retaliation victim must be a person who has either filed or prosecuted charges.

Both Goodson and Lambert are clearly distinguishable from the case at bar whereas here, Ouida Birdow is the alleged victim of assault to which Officer Minard's testimony was clear that ['he'], had to initiate the charges himself due to Ouida's lack of desire to do so. ['He'] filled out the domestic violence packet and ['he'] sought charges for felonious assault after learning of Ouida's shoulder injury, and in fact, he had to threaten her just to get her to seek medical attention, which fact is corroborated by Ouida testimony itself.

Unlike the victim in Lambert, Ouida clearly did not want to charge appellant; she did not want him to go to jail, and she didn't want the trouble of dealing with the legal system -- she did not seek any type of protective order or report to any law enforcement officer that she had been threatened or intimidated by appellant.

Other than her testimony at the preliminary hearing, ... there is no evidence of Ouida's cooperation in initiating or furthering the prosecution of the assault charge and if the phone calls and trial testimony are to be believed ... her testimony there was not for the purpose of assisting the State in securing charges against appellant -- she loved him and wanted to help him beat the charges.

Therefore, the State failed to prove one of the elements of the offense of retaliation, and based on the testimony presented, the jury could not reasonably find its way to a verdict of guilt beyond a reasonable doubt as to *retaliation. The evidence was insufficient to support a finding that Ouida was the victim of *retaliation due to her participation in or initiation of the prosecution of appellant's assault case and therefore, the portion of appellant's sentence stemming from the 2 counts of retaliation should and must be vacated as a matter of law.

Further, *** the court had the opportunity to review this issue at the time of appellant's acquittal motion was made, ... the motion was made at the close of the State's case, before Ouida had even testified, and Officer Minard's testimony alone (even including the phone calls which were part of his testimony) was not sufficient to support a finding that Ouida was responsible for filing or prosecuting the assault charges -- therefore, it was an abuse of discretion for the trial court to deny the motion for acquittal as to the retaliation charge(s) and the conviction on each of the two count of retaliation should be reversed and the sentence vacated where such convictions and sentences are the very antithesis of due process and appellant was unquestionably deprived of a fundamentally fair trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

[R]elief is accordingly sought.

PROPOSITION OF LAW NO. 3:

[I]t is constitutional error of the first magnitude therein offending a criminal defendant's right to fundamental fairness and due process of law, when a trial court ('in abusing its discretion') denies a timely and properly made motion for mistrial. see: State v. Wilson (citation omitted); and, U.S.C.A. Const. Amends 6 and 14.

[P]rior to trial, appellant filed a motion in limine, which, and among other things, sought to limit the State from including portions of 'highly prejudicial' taped telephone conversation making any reference to appellant's prior record. The court granted the motion. see: Tr. pgs. 1-6. However, at trial, the prosecutor played for the jury an excerpt where (2) two comments in one of the phone calls clearly violated the court's ruling. see: [note: below].

At this point, defense counsel requested a bench conference to bring this to the court's attention. Tr. @ pg. 484. Although the prosecutor denied knowing the references were included, the court warned him: "You need to keep that out." id. Appellant's counsel refused the court's offer of a cutative instruction, not wanting to call any further attention to it. id. at: 484-485. Counsel asked for 'some assurance' - presumably that there would be no further instances of this type of commentary, but it is not completely expressed in the transcript, due to interruption by the prosecutor that he had his staff working on the tapes all week, and he had noted where the redactions were to be done. The court opined that these instances were "relatively minor," and that "its hard to edit all those things out." id. @ Tr. pgs. 484-485. Defense counsel thereupon entered his objection and the trial proceeded.

"Mr. Selmon: ... Damn, baby, you know I don't. Look at the shit (inaudible) every day, dawg, every mother-fucking thing I lost, and now I'm to the point now I'm at the bottom of the mother-fucking barrel now in the penitentiary again ..." id. at: Tr. pg. 483. "Mr. Selmon: ... I lied. Everybody lies sometimes. Now I'm about to cop out and go to the penitentiary, Ouida, and know goddam well I've got three, four mother-fucking numbers so you know I ain't got no — ." id. at: Tr. pg. 484. "Mr. Selmon: ... I'm telling you, dawg, if you had a warrant they would have picked you up in that courtroom. I'm telling you what I know. Like they did me. I know Mansfield (inaudible). I have enough warrants. I've been in jail enough, don't you think, huh? Hello?" id. at: Tr. pg. 519.

see: Tr. @ pg. 485. Later in the court session yet another phone call was played for the jury which contained even more explicit violations of the court's specific order prohibiting same. see: id. at: pg. 519.

Thereupon, defense counsel brought this to the court's attention, and based upon the the cumulative instances of prohibited commentary, a motion for mistrial was made. "I would request a mistrial because they are getting to hear about his prior record, and I made it quite clear that I don't anticipate calling Mr. Selmon." see: Tr. @ pg. 565. The court denied the motion on the grounds that the State had made a good faith effort to redact the phone call tapes, and further because appellant mentioned in the tapes that he knew the calls were recorded, "and these are things that he voluntarily put before the jury in the form of threats that he made against the victim." see: Tr. @ pg. 566.

"Mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible." see: State v. Shafer (Richland Co., 7/12/2004), Case No. 2003 CA 108, 2004 WL 1563644, at: ¶18 (citation omitted). The admission and exclusion of evidence and whether to grant a mistrial lie in the trial court's discretion, State v. Wilson (Stark Co., 12-22-2006), Case No. 2005 CA 114, 20053527843, at: ¶18 (citation omitted). In order to find an abuse of discretion, a reviewing court must determine that the trial court was unreasonable, arbitrary or unconscionable in its decision ... there must be more than an error of law or judgment." id. The standard for admission of "other acts evidence" is set out in Evidence Rule 403, which states that evidence otherwise relevant may be excluded if its probative value is outweighed by the risk of "unfair prejudice, of confusion of the issues, or of misleading the jury." id. at: Wilson, supra. at: ¶20.

A mistrial should have been granted in this case because the information regarding appellant's prior record could have been excised from the tapes with little burden to the State ... allowing the jury to hear this prohibited evidence was 'highly prejudicial' and as the record demonstrates, deprived appellant of his protected constitutional rights to due process of law; a fundamentally fair trial and to due process of law.

Permitting the jury to know that appellant had a prior record is an affront to the presumption of innocence to which every accused is entitled. see generally: Norris v. Risley, 878 F. 2d 1178 (9th Cir. 1989); and, Norris v. Risley, 918 F. 2d 828 (9th Cir. 1990).

The trial court obviously agreed to the 'prejudicial nature and effect' of this evidence and specifically ordered its prohibition in limine ... accordingly, it was inconsistent, arbitrary and unreasonable for the trial court to rule contrary after the damage had been done 'repeatedly' and the prejudice did therefore systemically attach.

Ultimately, *** and because the evidence in this case was not overwhelming, it must also be remembered that while the taint of improper evidence permeates the entire trial in this case, ... it is especially damaging to the defense ['as well the right to a fair trial'] of the defense of the retaliation charges which were not so clear-cut. The jury got to hear three different instances of improper evidence, all of which is likely to have misled the jury to believe that guilt was more likely because of appellant's prior history ... as such, the trial was fundamentally unfair and appellant is therefore entitled to relief as a matter of law.

[R]elief is accordingly sought.

PROPOSITION OF LAW NO. 4:

[T]he Sixth Amendment right to effective assistance of conflict-free representation is violated ('on appeal as of right') where appellate counsel fails to raise clear and obvious plain error claims in lieu of weaker and marginal ones where, as here, comprehensive errors related to the sentence imposed by the trial court are evident upon the face of the record requiring appellate review and consideration. see: State v. Murnahan, 63 Ohio St. 2d 60; Blakely v. Washington, ___ U.S. ___; and, State v. Foster, ___ Ohio St. 3d ___ (citations omitted).

[T]he Sixth Amendment's right to counsel guarantees to all criminal defendant in criminal trials the right to effective assistance of counsel, see : Strickland v. Washington, 466 U.S. 668; and, McMann v. Richardson, 397 U.S. 759, 771 (1970), ... and the failure of defense counsel to object to patently improper conduct of the prosecutor or to the introduction of unfairly prejudicial evidence may fall outside the range of competent lawyering and constitute a Strickland-violation. see: Seehan v. State of Iowa, 37 F. 3d 389,

391 (8th Cir. 1994); Gravley v. Mills, 87 F. 3d 779, 785 (6th Cir. 1996); and, Sager v. Maass, 907 F. Supp. 1412, 1420 (D. Or. 1995).

The failure to bring a claim of 'ineffective assistance of trial counsel' ['on appeal'] on grounds of the failure to raise an object on 'prosecutorial misconduct' grounds for the repeated usage of prohibited taped telephone calls substance constitutes a substantive breach of the Sixth Amendment right to counsel. see: Coleman v. Thompson, 501 U.S. 722, 753-54 (1991), see also: Cuyler v. Sullivan, 446 U.S. 335, 349 (1980) 'conflicted representation;' and, Wood v. Georgia, 450 U.S. 261, 276 (1981).

Likewise, *** and in the instant case, 'appellate counsel' failed to raise any claims in relations to the 'expertise of police officer *Minard,' whom had averred that "based on his experience" he concluded that 'domestic violence' had occurred and that accordingly, ['he'] prepared and filed the charges against the defendant. Here again, an arguably case for 'prosecutorial/police misconduct' was evident in the record and not raised on appeal. So too, the 'alleged' authentication of the tape recorded phone calls was equally objectionable and yet, no object was made or issue raised thereupon on appeal.

It is well-settled that the failure to impeach a key prosecution witness (*Minard) or even to minimally challenge this witness's underlying 'alleged' expertise constitutes a breach of official duty and was so inconsistent with any reasonable trial strategy that it constitutes deficient performance. see: Berryman v. Morton, 100 F. 3d 1089, 1098 (3rd Cir. 1996); and, Driscoll v. Delo, 71 F. 3d 701, 710-11 (8th Cir. 1995).

In each case, appellate counsel patently failed to raise colorable plain errors evident on the face of the record to which appellant is entitled to relief as a matter of law, to include a statutory and constitutional 'speedy trial' violation claim. see: U.S.C.A. Const. Amend. 6; O.R.C. § 2945.73.

Moreover, *** appellate counsel failed to raise any claims in relations to the oppressive maximum and consecutive sentences imposed on appellant. In the recently decided case of: State v. Foster, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E. 2d 470, the Supreme Court of Ohio held that certain sections of Ohio's sentencing code violated the Sixth Amendment and United States Supreme Court's holding in: Blakely v. Washington (2004), 542 U.S. 296,

124 S. Ct. 2531, 159 L. Ed. 2d 403. Among the sections the court found unconstitutional were R.C. 2929.14(E) governing consecutive sentences. id. at: para. 3 of the syllabus. Thus, ... according to Foster, appellant was entitled to vacation of his sentence and a remand for resentencing and yet, appellate counsel failed to raise any such substantive claim nor did appellate counsel forward any averment of *ex post facto and/or prohibited retroactive laws in relations to the penalty phase errors in this case. see: State v. Beasley, 471 N.E. 2d 774, quoting from: Colegrove v. Burns (1964), 175 Ohio St. 437, 438.

Appellant's sentence was therefore predicated on an 'unconstitutional' sentencing scheme and it thus void ab initio.

Appellate counsel's failure to forward such claims as are set forth above in turn constitutes a violation of the Sixth Amendment right to counsel therefore.

[R]elief is accordingly sought.

PROPOSITION OF LAW NO. 5:

[O]ther errors exist in the record which constitute 'plain error affecting substantial rights,' requiring de novo 'plain error' analysis by this court pursuant to Ohio Criminal Rule 52(B). see: U.S.C.A. Const. Amend. 14.

[I]n raising this constitutional proposition, appellant does so from the position that 'other errors' appear in the record which constitute 'plain error affecting substantial rights' as contemplated in and under Ohio Criminal Rule 52(B), and that such 'plain error' ('under the rule') may be noticed by this court ['and adjudicated'] by their very nature.

It is clear from the record that appellant has brought a Murnahan-claim proffering a denial of the effective assistance of counsel in the underlying appeal and because of which any and all such 'plain errors' are hereby preserved.

Appellant strongly avers that he is proceeding 'pro se' and without the benefit of any portion of the trial court record, exhibits, and transcript of

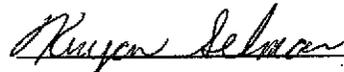
proceedings and accordingly ['for justifiable reasons'] cannot independently articulate any of those 'plain errors' referenced above to which a Criminal Rule 52(B) 'plain error' review and analysis is hereby respectfully requested. see: U.S.C.A. Const. Amend. 14.

CONCLUSION:

[W]herefore, *** and for each of those reasons stated above, appellant hereby respectfully asks this Honorable Court to 'accept jurisdiction' in and over the instant appeal and to grant relief as is otherwise required by law.

[R]elief is accordingly sought.

[E]xecuted this 30th day of April, 2007.



Kenyan Selmon, #503-747

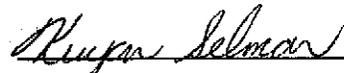
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44901

CERTIFICATE OF SERVICE:

This is to certify that the foregoing was duly served by United States Mail on the Office of the Richland County Prosecutor, at: 38 South Park Street, Mansfield, Ohio, 44902, on this 30th day of April, 2007.



Kenyan Selmon, #503-747

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COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

COURT OF APPEALS
RICHLAND COUNTY OHIO
FILED

2007 MAR 28 AM 10:26

LINDA H. FRARY
CLERK

STATE OF OHIO

Plaintiff-Appellee

-vs-

KENYAN SELMON

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. William B. Hoffman, J.

Hon. Sheila G. Farmer, J.

Case No. 06-CA-52

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Richland County Court of
Common Pleas, Criminal Case No's.
06-CR-248D & 05-CR-978D

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

KIRSTEN L. PSCHOLKA-GARTNER
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Hoffman, J.

{¶1} Defendant-appellant Kenyan Selmon appeals his conviction and sentence entered by the Richland County Court of Common Pleas, on one count of assault, in violation of R.C. 2903.13; two counts of intimidation of a witness, in violation of R.C. 2921.04 (B); two counts of retaliation, in violation of R.C. 2921.05(B); and one count of perjury, in violation of R.C. 2921.11(A), following a jury trial. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On the evening of November 28, 2005, appellant and his girlfriend, Ouida Birdow, were returning home from an evening out when they became involved in a verbal altercation. The verbal argument ultimately became physical with appellant striking Birdow in the face, causing two black eyes. Appellant also shoved Birdow to the ground, which result in her breaking her clavicle. Birdow's thirteen year old nephew, Travon Smith, witnessed the argument and ensuing physical altercation from his bedroom window and called 9-1-1. Birdow also called 9-1-1. The fire department rescue squad and the police were dispatched to Birdow's residence.

{¶3} When the police and paramedics arrived, they found Birdow in a bedroom, crying and holding her shoulder. Officer David Minard attempted to speak to Birdow, however, she was reluctant to tell him about the incident. Based upon his experience, Officer Minard filled out and signed a domestic violence packet, charging appellant with domestic violence. The officer then placed appellant under arrest.

{¶4} Birdow did not cooperate with the paramedics who attempted to treat her. Due to the severity of Birdow's injuries, the paramedics transported her to MedCentral

Hospital. Birdow subsequently told one of the paramedics she was hit in the face with a fist and her shoulder was injured when she was thrown to the ground. At the hospital, Birdow underwent x-rays of her shoulder and head. While waiting for the results of the x-ray, she asked to speak with Officer Minard. Birdow made a statement to the officer, implicating appellant as the person who caused her injuries. She also reported to the emergency room doctor her chief complaint was that she had been beaten. Birdow waited several hours in the emergency room, but left the hospital before learning the results of the x-rays. A member of the hospital staff contacted Birdow and informed her she had a broken collar bone. Birdow returned to the emergency room where her arm was placed in a splint and she received pain medication. After Officer Minard learned Birdow had a broken collar bone, he filed a charge of felonious assault against appellant.

{15} Appellant called Birdow from jail on December 4, 2005. During the phone conversation, he instructed Birdow to tell the judge she had been in a fight with a woman named Jennifer with whom appellant was having an affair. Appellant specifically told her to say he had nothing to do with her injuries. Four days later, on December 8, 2005, Birdow testified under oath at appellant's preliminary hearing. Birdow testified as appellant had instructed her, stating she became involved in a fight with another woman, during which she slipped and hurt her shoulder. Birdow explained her injuries occurred because she was drunk. Birdow admitted she and appellant had an argument that night. Officer Minard also testified at the preliminary hearing regarding the statement Birdow gave him at the hospital.

{116} Following the preliminary hearing, appellant called Birdow from the jail, enraged she had given a statement to the police while at the hospital. He was also angry about her testimony they had argued the night she was injured. Appellant called Birdow a rat, and told her she "burned him" by making the statement to the police. Appellant placed over 170 calls to Birdow. During these phone conversations, appellant acknowledged beating Birdow, telling her her mouth was responsible for her receiving the black eyes.

{117} Appellant pressured Birdow to drop the charges against him, lie to the court, or not show up for the trial. Appellant tried to make Birdow feel guilty for causing him to be in jail and facing a potential of ten years in prison. When those attempts were unsuccessful, appellant threatened Birdow, raging he would make her pay for everything she did.

{118} Based upon those telephone calls, the State filed additional charges against appellant. The Richland County Grand Jury indicted appellant on one count of aiding and abiding perjury, two counts of intimidation and two counts of retaliation. The cases were consolidated and scheduled for trial on April 13, 2006. Prior to trial, appellant filed a motion in limine and motion for redaction of audio tapes of appellant's phone calls to Birdow from the jail. Via Judgment Entry filed April 13, 2006, the trial court sustained appellant's motion in limine relating to statements made by Birdow to Officer Minard. The trial court also instructed the State to redact all references in the audio tapes of appellant's criminal history.

{119} During the trial, the State played portions of the phone calls. One excerpt contained two comments by appellant in which he refers to returning to the penitentiary

and to his prior convictions. Appellant objected, and the trial court found the references were minor and the State was making ongoing efforts to redact the tapes. Appellant refused the trial court's offer of a curative instruction.

{¶10} In another phone call played for the jury, appellant mentions Mansfield Correctional Institution as well as the fact he had been in jail "enough". Defense counsel brought this unredacted reference to the trial court's attention and requested a mistrial. The trial court denied the motion, finding the State had made a good faith effort to redact the tapes. The trial court also stated appellant knew the phone calls were recorded; therefore, he voluntarily put these remarks before the jury.

{¶11} After hearing all the evidence and deliberations, the jury found appellant not guilty of felonious assault, but guilty of the lesser included charge of assault; and guilty of the remaining charges. The trial court sentenced appellant to an aggregate prison term of twelve years.

{¶12} It is from these convictions and sentence appellant appeals, raising the following assignments of error:

{¶13} "I. APPELLANT'S CONVICTION ON THE CHARGES OF RETALIATION IS CONTRARY TO THE MANIFEST WEIGHT AND SUFFICIENCY OF EVIDENCE PRESENTED AT TRIAL, DUE TO THE STATE'S FAILURE TO PROVE EACH AND EVERY ELEMENT OF THE CHARGE BY PROOF BEYOND A REASONABLE DOUBT, THUS DENYING APPELLANT OF A FAIR TRIAL AND DUE PROCESS OF LAW.

{¶14} "II. THE TRIAL COURT DEPRIVED APPELLANT [SIC] OF A FAIR TRIAL AND DUE PROCESS OF LAW IN ITS DENIAL OF APPELLANT'S [SIC] RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL.

{¶15} "III. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION FOR MISTRIAL, WHICH VIOLATED APPELLANT'S [SIC] RIGHT TO DUE PROCESS AND A FAIR TRIAL."

I, II

{¶16} Because appellant's first and second assignments of error require similar analysis, we shall address said assignments of error together. In his first assignment of error, appellant challenges the sufficiency and weight of the evidence with regard to his conviction on two counts of retaliation. In his second assignment of error, appellant contends the trial court violated his rights to due process and a fair trial by denying his Crim. R. 29 Motion for Judgment of Acquittal, also with respect to his convictions on the two counts of retaliation.

{¶17} In *State v. Jenks* (1981), 61 Ohio St.3d 259, the Ohio Supreme Court set forth the standard of review when a claim of insufficiency of the evidence is made. The Ohio Supreme Court held: "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 the crime proven beyond a reasonable doubt." *Id.* at paragraph two of the syllabus.

{¶18} 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 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 judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

{¶19} The standard to be used by a trial court in determining a Crim.R. 29 motion is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus. The *Bridgeman* Court found: "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." An appellate court reviews a denial of a Crim.R. 29 motion for acquittal using the same standard used to review a sufficiency of the evidence claim. See *State v. Carter* (1995), 72 Ohio St.3d 545, 553, 1995-Ohio-104. Thus, "[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."

{¶20} Appellant was convicted of two counts of retaliation, in violation of R.C. 2921.05, which reads, in pertinent part:

{¶21} "(B) No person, purposely and by force or by unlawful threat of harm to any person or property, shall retaliate against the victim of a crime because the victim filed or prosecuted criminal charges.

{¶22} "(C) Whoever violates this section is guilty of retaliation, a felony of the third degree." Accordingly, in order to find appellant guilty of retaliation, the State's evidence had to be such that, if believed, the jury could have found beyond reasonable doubt appellant: (1) purposely, (2) by unlawful threat of harm to Birdow, (3) retaliated against Birdow, (4) because Birdow filed or prosecuted criminal charges. See, *State v. Lambert* (June 5, 1998), Montgomery App. No. 16667, unreported.

{¶23} Appellant contends the State failed to prove Birdow "filed or prosecuted" the criminal charges against him. Appellant explains Officer Minard testified he initiated the charges against appellant due to Birdow's lack of willingness to do so. Officer Minard completed the domestic violence packet and pursued the charge of felonious assault after learning the extent of Birdow's injuries. Appellant adds Birdow was not in a position to "drop the charges," and she never sought a protective order or reported appellant's threats to law enforcement officials. Appellant concludes there is no evidence Birdow cooperated in initiating or furthering the prosecution, other than her testimony at the preliminary hearing. We do not believe Birdow's failure to drop the charges or failure to report appellant's threats necessarily equate to her failure to file or prosecute the criminal charges.

{¶24} We must construe the word "prosecute". Webster's New International Dictionary defines "prosecute" as follows: "To seek to obtain, enforce, or the like by legal process; as, to prosecute a right or a claim in a court of law." In the parlance of

lawyers, the word "prosecute" is commonly understood to mean "to engage in a proceeding before a court, or to carry on litigation". Additionally, the Oxford Dictionary (1909), p. 1489, defines "prosecute" as "to follow, pursue, attend, follow up, persevere or persist in". See, also, Standard Dictionary to the same effect.

{¶25} Black's Law Dictionary defines "prosecuting witness" as: "The private person upon whose complaint or information a criminal accusation is founded and whose testimony is mainly relied on to secure a conviction at the trial. In a more particular sense, the person who was chiefly injured, in person or property, by the act constituting the alleged crime (as in case of robbery, assault, criminal negligence, bastardy, and the like), and who instigates the prosecution and gives evidence."

{¶26} We find Birdow was the private person upon whose information the criminal action against appellant was founded. Birdow called 911; provided Officer Minard with an oral statement; and testified at the preliminary hearing. Birdow's statements to the paramedics as well as her statements to Officer Minard and the emergency room doctor were clearly relied upon to secure appellant's conviction. We find these actions are tantamount to her prosecuting the criminal charges against appellant. As in many assault and domestic violence cases, the victims are reluctant to pursue charges or testify, either out of fear or hope the aggressor will change his behavior. We believe reading R.C. 2921.05(B) in the narrow and restrictive manner appellant asks us to do would defeat the legislative intent.

{¶27} Accordingly, we find appellant's convictions on two counts of retaliation were not against the manifest weight or the sufficiency of the evidence. We further find

the trial court did not err in denying appellant's Crim. R. 29 motion for acquittal of the retaliation charges.

{¶28} Appellant's first and second assignments of error are overruled.

III

{¶29} In his final assignment of error, appellant maintains the trial court abused its discretion in denying its motion for a mistrial.

{¶30} The grant or denial of a mistrial rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 182. Moreover, mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118. "An appellate court will not disturb the exercise of that discretion absent a showing that the accused has suffered material prejudice." *Sage*, supra at 182.

{¶31} Prior to trial, the trial court ordered the State to redact from the audio tapes any reference appellant makes to his prior record. However, when the State played the audiotapes for the jury, it became evident the State had not redacted all of these references.

{¶32} Call Seven included the following:

{¶33} "Mr. Selmon: Damn, baby, you know I don't. Look at the shit (inaudible) every day, dawg, every mother-fucking thing I lost, and now I'm to the point now I'm at the bottom of the mother-fucking barrel now in the penitentiary again. Can you pay attention to that?"

{¶34} * * *

{¶35} "Mr. Selmon: You can't possibly - - you can't possibly. Ouida, you mean to tell me you would rather for me to go do eight years than you do thirty days?"

{¶36} " * * *

{¶37} "Mr. Selmon: You really didn't understand what I was telling you when I said tell them I didn't did nothing, did you? * * * I said tell them I didn't do nothing. When I say nothing, I mean nothing. I lied. Everybody lies sometimes. Now I'm about to cop out and go to the penitentiary, Ouida, and know goddamn well I've got three, four mother-fucking numbers so you know I ain't got no - -"

{¶38} Tr. at 483-484.

{¶39} At this point, defense counsel asked to approach the bench. He questioned why the State had not redacted the references to appellant's prior convictions. The prosecutor informed the trial court he was not aware of those references. The trial court admonished the prosecutor and asked defense counsel if he wanted something said to the jury. Counsel for appellant declined the trial court's offer, explaining he did not want to bring more attention to the remarks. The trial court noted the difficulty in editing all the references as appellant "would rattle off in mid-sentence, trying to make Birdow feel guilty." The trial court added it would not strike all of the references because such were evidence of the pressure appellant put on Birdow.

{¶40} The playback of the phone calls continued without incident until Call Eleven, which included the following:

{¶41} "Mr. Selmon: I'm saying, Ouida, you didn't even have to show up to that courtroom, man. I'm telling you, dawg, if you had a warrant they would have picked you up on that in that courtroom. I'm telling you for what I know. Like they did me. I know

Mansfield (inaudible). I have enough warrants. I've been in jail enough, don't you think, huh? Hello?"

{¶42} Tr. at 519.

{¶43} Defense counsel did not ask to approach the bench regarding this reference. Several additional phone calls were played for the jury. Thereafter, defense counsel made a motion for a mistrial, arguing the State had failed to redact the portions of the tapes referencing appellant's prior criminal record, and as a result, the jury heard highly prejudicial evidence.

{¶44} Appellant submits the State had sufficient evidence without including the references at issue, and the prohibited portions of the phone calls were not crucial to the State's case. The trial court denied appellant's mistrial motion, finding the State had made a good faith effort to redact the phone call tapes. The trial court also noted, during these phone conversations, appellant knew the calls were being recorded. The trial court found appellant had voluntarily put the information before the jury.

{¶45} Upon review of the entire record in this matter, we find the trial court did not abuse its discretion in denying appellant's motion for a mistrial. As the trial court correctly determined, the State made a good faith effort to redact the audiotapes. Appellant's comments represent a small portion of the hundreds of minutes of phone conversations he had with Birdow. Furthermore, appellant put his prior record out in the open as he knew the phone calls were recorded. We further find the references to appellant's prior record explain his motivation for intimidating Birdow. The information contained in the audiotapes of the phone conversation formed a part of the res gestae of the offense. Appellant's prior prison record was a reason for his making the

threatening phone calls to Birdow. Even if the trial court's admission of those portions of the phone calls was erroneous, we find such was not prejudicial as the jury heard overwhelming evidence of appellant's guilt.

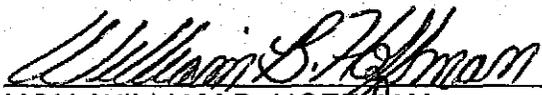
{¶46} Appellant's third assignment of error is overruled.

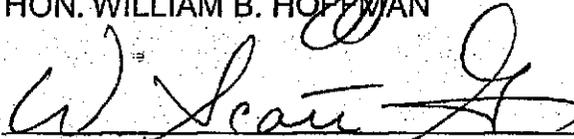
{¶47} The judgment of the Richland County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Farmer, J. concur


HON. WILLIAM B. HOFFMAN


HON. W. SCOTT GWIN


HON. SHEILA G. FARMER

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

COURT OF APPEALS
RICHLAND COUNTY OHIO
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STATE OF OHIO

Plaintiff-Appellee

-vs-

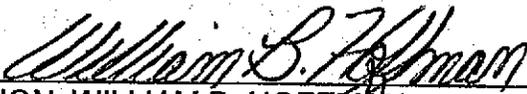
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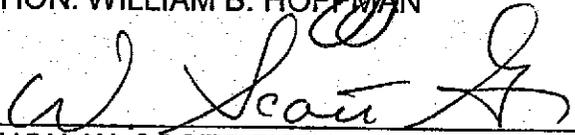
Defendant-Appellant

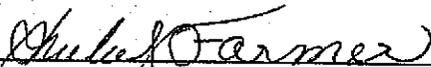
JUDGMENT ENTRY

Case No. 06-CA-52

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to appellant.


HON. WILLIAM B. HOFFMAN


HON. W. SCOTT GWIN


HON. SHEILA G. FARMER