

ORIGINAL

IN THE SUPREME COURT OF OHIO
2012

STATE OF OHIO,

Case No. 12-0239

Plaintiff-Appellee,

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

-vs-

ROBERT L. SMITH, JR.,

Court of Appeals
Case No. 11AP-512

Defendant-Appellant.

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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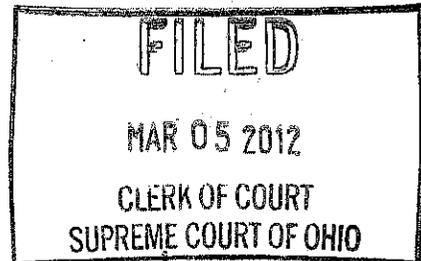


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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

The instant case does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court.

Defendant argues that the case is in conflict with decisions from the First and Fifth Districts but never asked to certify a conflict. Moreover, the First and Fifth District cases can be distinguished on the facts. Finally, R.C. 2919.27 clearly defines the elements of the violating a protection order and demonstrates that proof of service of the protection order need not be proven. It is respectfully submitted that jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

Appellee State of Ohio adopts the recitation of the case and facts as stated by the Tenth District Court in its Decision. *State v. Smith*, 10th Dist. No. 11AP-512, 2001-Ohio-6730 ¶¶ 1-5.

ARGUMENT

RESPONSE TO PROPOSITION OF LAW:

SUFFICIENT EVIDENCE EXISTS TO SUPPORT THE CONVICTIONS.

There was sufficient evidence to support defendant's convictions for aggravated burglary and violating a protection order. The issue of sufficiency of the evidence presents a purely legal question for the Court regarding the adequacy of the evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2718, 61 L.Ed. 560 (1979). When there is conflicting evidence, "it [is] the function of the jury to weigh the evidence and assess the credibility of the witnesses in arriving at its verdict." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). "It is not the function of an appellate court to substitute its judgment for that of the factfinder." *Id.* "[I]t is the minds of the jurors rather than a reviewing court which must be convinced." *State v. Thomas*, 70 Ohio St.2d 79, 80, 434 N.E.2d 1356 (1982).

This Court has provided the following test for judging the sufficiency of the evidence:

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.

Jenks at paragraph two of the syllabus.

A court reviewing the sufficiency of the evidence must consider the totality of all of the evidence, construing all of the evidence in the light most favorable to the prosecution. *Jackson*,

at 319; *Jenks*, at 272 (jury weighs “all of the evidence”). “[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.” *Bourjaily v. United States*, 483 U.S. 171, 179-80, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). “[A] piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence.” *Id.* at 180. “[T]he mere existence of conflicting evidence cannot make the evidence insufficient as a matter of law.” *State v. Murphy*, 91 Ohio St.3d 516, 543, 747 N.E.2d 765 (2001).

Ms. Pickens testified that she had dated defendant and ended the relationship. Her experience with him was “rocky” and she felt the need to get a protection order against him. The court granted that order and Ms. Pickens showed defendant the protection order when he was at her house on April 16, 2011. Defendant knew that he was not allowed to be around Ms. Pickens. Yet, the next day, defendant entered her home through the basement window, while she was upstairs cooking in the kitchen. He came up the stairs and said, “yeah, bitch, you thought it was over.” Ms. Pickens testified that defendant put her in a chokehold, they tussled around, and defendant threw her into the wall several times, hitting her with a closed fist. Ms. Pickens said she was left with bruises on her arms and a bite mark on her back.

Officer Rohaley testified that when he responded to the call at 879 Camden Avenue, he saw defendant attempting to escape officers through the basement window, and while attempting to arrest defendant, defendant became violent. Officer Rohaley said that when Officer Bear was wrestling defendant on the ground, the officers were not able to gain control of defendant’s arms and hands to handcuff him until a taser was deployed on defendant. Officer Rohaley testified that when the officers were able to grab ahold of defendant, a black pocket knife was found laying where defendant’s left hand had been.

No testimony other than that of Ms. Pickens's was necessary to prove the charges. The trial court instructed the jury, "[t]he testimony of one witness, is sufficient to prove a fact." Viewing this evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of aggravated burglary were proven. Thus, the trial court properly found defendant guilty of aggravated burglary. *See* R.C. 2911.11.

Defendant argues that there was insufficient evidence presented as to his reckless violation of a protection order, because he allegedly did not know about the protection order and therefore could not have disregarded a "known" risk. The State, however, presented evidence that defendant did have notice of the protection order, and therefore defendant acted recklessly. No evidence to the contrary was presented.

Ms. Pickens testified that at her residence on April 16, 2010 she showed defendant a copy of the protection order she had received on April 12, 2010, and told him he was not allowed to be around her. She also testified that he became angry when she showed him the order.

The Second and Ninth Districts have found that R.C. 2917.27 does not require proof of service of the protection order. *State v. Rutherford*, 2nd Dist. No. 08CA11, 2009-Ohio-2071, ¶ 28 ("R.C. 2919.27(A) does not make service of a civil protection order an element of the offense of violation of a civil protection order. Rather, that statute requires the State to prove beyond a reasonable doubt that defendant acted in disregard of a known risk that a protection order likely existed against him."); *State v. Bunch*, 9th Dist. No. 20059, 2001 WL 39599, *2 (Jan. 17, 2001) ("[Ohio] Revised Code does not require that service of a CPO be accomplished upon the person against whom a CPO is issued before the person can be found to have violated the order.")

Here, in accordance with R.C. 2919.27(A)(2) and (B)(4), the judge instructed the jury that in order to find defendant guilty of violating a protection order, the jury would have to find

that defendant recklessly violated the terms of the protection order (which was admitted into evidence as State's Exhibit D). Further, the jury also had to find that defendant violated the protection order while committing aggravated burglary. *See* R.C. 2919.27.

In *State v. Davidson*, 4th Dist. Nos. 04CA2771, 04CA2773, 2004-Ohio-6828, ¶11, the wife of the defendant was granted a protection order against the defendant and she testified that she showed him and gave him a copy of the order. A deputy also testified that he gave Davidson a copy of the protection order. *Id.* at ¶12. Davidson testified that he did not know about the protection order and that the deputy never served him. *Id.* at ¶13. Even with this contradicting testimony, the Fourth District found that the testimony presented by the State was sufficient evidence to establish that Davidson knew about the protection order and therefore recklessly violated it. *Id.* at ¶14.

Ms. Pickens testified that she showed defendant the protection order and told him he was not allowed to be around her. As in *Davidson*, this testimony was enough to establish that defendant knew of the protection order. Therefore, defendant disregarded a "known risk" and recklessly violated the protection order when he came back to Ms. Pickens's home the next day and committed aggravated burglary.

In *State v. Bombardiere*, 3rd Dist. No. 14-06-27, 2007-Ohio-1537, the court considered a similar case. The court found that, despite the fact that no evidence was presented to show whether Bombardiere was served with a protection order, evidence was admitted to show that he was aware of the existence of the order. *Id.* at ¶ 16. Therefore, the evidence was sufficient to support the conviction for violating the protection order. Defendant's reliance on the dissent in this case is not persuasive.

Defendant asserts that the Tenth District's decision is in conflict with decisions from the First and Fifth Districts. In *State v. Franklin*, 1st Dist. No. C-000544, 2001 WL 698107, *1 (June 22, 2011), Franklin was found sitting on the couch with his domestic violence complainant, Christman. When police arrived, Christman denied that Franklin did anything wrong and no evidence was presented regarding a protection order or that Franklin was aware of any such order. *Id.* No hearing was ever held to issue the order, therefore, it was found to be invalid. *Id.* at *2. Here, there is no question that a protection order was granted by the court on April 12, 2010. The only question was whether defendant was aware of it and acted recklessly in violating it.

State v. Mohabir, 5th Dist. No. 04CA17, 2005-Ohio-78, is distinguishable as well. The Fifth District found that the temporary protection order at issue in that case was never issued in compliance with R.C. 2929.26. Here, Ms. Pickens testified that she had an order issued by the court and she showed the order to defendant. In *Mohabir*, there was no such testimony by a witness that the defendant was aware of the order. The issue revolved around whether the sheriff properly served it and whether defendant even knew of the order. *Id.* at ¶ 35.

Defendant did not ask the Tenth District Court to certify the claimed conflict. The State asserts the reason for this is that the cases are distinguishable and no conflict exists. A plain reading of R.C. 2919.27 demonstrates that the State need not prove the defendant was served with the protection order. The Tenth District Court's interpretation of the statute is proper. As the court noted:

Service of the protection order on the defendant is not an element of the crime of violating a protection order, as defined in R.C. 2919.27(A). The General Assembly could have required the prosecution to establish service of the order as an element of proving a violation of a protective order, or could have mirrored the language in R.C. 2919.26(G), but it did not. Therefore, we decline to expand the

statute to require prior service of the order on a defendant before a violation can be established.

Smith, 10th Dist. No. 11AP-512, 2001-Ohio-6730 at ¶ 17.

Therefore, defendant's proposition of law does not merit review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail this day, March 5, 2012, to STEPHEN P. HARDWICK, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215; Counsel for Defendant-Appellant.



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