[Cite as *State v. Virden*, 2005-Ohio-6446.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 04 BE 39
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
ROGER R. VIRDEN, JR.	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the County Court, Eastern Division of Belmont County, Ohio Case No. 04 CRB 185

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Christopher Berhalter
Belmont County Prosecutor
Atty. Robert W. Quirk
Assistant Prosecuting Attorney
147½ West Main Street
St. Clairsville, Ohio 43950

For Defendant-Appellant:

Atty. David S. Trouten, Jr.
185 West Main Street
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JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: December 1, 2005

[Cite as *State v. Virden*, 2005-Ohio-6446.]
WAITE, J.

{¶1} Appellant, Robert R. Virden, Jr., timely appeals his domestic violence conviction. Appellant was charged with a violation of R.C. §2919.25(A) a first degree misdemeanor. He was convicted following a bench trial in the Belmont County Court, Eastern Division. For the following reasons, Appellant's conviction is affirmed.

{¶2} The charge arose out of an incident that occurred on an Easter Sunday involving Appellant's wife, Angela Lyn Virden and their children. Appellant and his wife were separated at the time, and the two were meeting in order to transfer the children for visitation purposes. Appellant intended to file his complaint for divorce the next day. Angela was evidently several hours late to drop off the children because her daughter was sick. Appellant and Angela eventually met on the side of the road. However, Angela refused to talk to Appellant, and she drove off after he had their children in his car.

{¶3} Thereafter, a chase ensued during which Appellant was following Angela's van in his vehicle and was yelling out of his car's passenger window. Angela's vehicle was eventually forced off of the road. Angela called 911 during the chase, and Appellant was subsequently arrested and charged with domestic violence.

{¶4} Appellant asserts two assignments of error on appeal. His first assignment of error alleges:

{¶5} "THE TRIAL COURT IMPROPERLY ALLOWED THE ADMITTANCE OF THE TAPE OF THE 911 CALL."

{¶6} Appellant asserts that his case should be dismissed or at least remanded for a new trial since the 911 tape was admitted at trial over his objection. Appellant relies on the state's alleged Crim.R. 16 violation in support of this error.

{¶7} Crim.R. 16(B)(c) requires the prosecuting attorney to disclose and make available for inspection to the defense any documents and tangible objects, "available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial * * *."

{¶8} If a party does not comply with the discovery rules, "* * * the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances." Crim.R. 16(E)(3).

{¶9} A trial court does not abuse its discretion in admitting undisclosed evidence unless the record shows that the failure to disclose was willful, that the defendant would have benefited from knowledge of the item prior to trial, or that the admission of the item unfairly prejudiced the defense. *State v. Parson* (1983), 6 Ohio St.3d 442, 453 N.E.2d 689, syllabus, *State v. Otte* (1996), 74 Ohio St.3d 555, 563, 660 N.E.2d 711, cert. denied, 519 U.S. 836, 117 S.Ct. 109, 136 L.Ed.2d 62, *State v. Wiles* (1991), 59 Ohio St.3d 71, 79, 571 N.E.2d 97.

{¶10} It is undisputed in the instant cause that Appellant's counsel was not provided a copy of the 911 tape prior to trial. In fact, he did not receive notice that the tape would be introduced until late in the afternoon the day before trial was scheduled

to begin. However, the state evidently did not receive the 911 tape until that same day. Once the tape was secured, the state promptly contacted Appellant's trial counsel to notify him. (Trial Tr., p. 21.) There is no indication that failure to earlier disclose was intentional.

{¶11} The 911 transcript is only two pages in length, and the substance of the tape for the most part mirrors Angela's testimony. Angela is heard on the tape telling the operator that her husband is chasing her. She gave a description of his car, and she provided the operator her location. (911 Tr.)

{¶12} The trial court overruled Appellant's objection and admitted the tape since Appellant's trial counsel was permitted to listen to the tape before the trial commenced. (Trial Tr., p. 21.)

{¶13} Appellant now claims that the trial court should have permitted Appellant to continue the trial when he first objected to the use of the 911 tape. However, Appellant's counsel never requested a continuance. (Trial Tr., pp. 20-21.)

{¶14} In addition, the second time the 911 tape was discussed on the record, the trial court offered to continue the trial: "The Court's going to admit the exhibits * * * at this time but also give the [Appellant] the option if he wants to proceed with his witnesses now or if he needs time to prepare to respond to the 9-1-1 tape, we can reschedule his testimony at a later date." (Trial Tr., p. 88.) Thereafter, Appellant chose to proceed with trial and testify on that date. (Trial Tr., p. 89.)

{¶15} Since Appellant chose to proceed with his testimony, he cannot now demonstrate that the delayed disclosure unfairly prejudiced his case. He was offered

additional time to prepare, but he declined. In addition, there is nothing before this Court demonstrating that the tape's admission unfairly prejudiced Appellant and he has not raised any claims of undue prejudice.

{¶16} Based on the foregoing, Appellant's first assignment of error lacks merit since the trial court did not abuse its discretion.

{¶17} Appellant's second assignment of error alleges:

{¶18} "THE TRIAL COURT FOUND THE DEFENDANT GUILTY AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶19} It is well established that, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578, syllabus. "[A]n appellate court may not simply substitute its judgment for that of the trial court so long as there is some competent, credible evidence to support the lower court findings." *State ex. rel. Celebrezze v. Environmental Enterprises, Inc.* (1990), 53 Ohio St.3d 147, 154, 559 N.E.2d 1335. Further, even if the evidence is reasonably susceptible to more than one interpretation, an appellate court must construe it consistently with the lower court's judgment. *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19, 526 N.E.2d 1350.

{¶20} Appellant claims that his conviction was against the manifest weight of the evidence. He argues that his intention on the day of the incident was to get Angela to stop and talk with him and that he did not intend to act in a threatening manner. He

claims that had he intended to harm her, he could have easily done so. He directs this Court's attention to the fact that his vehicle never came into contact with Angela's vehicle.

{¶21} Notwithstanding Appellant's assertions at trial, he was convicted of R.C. §2919.25(A), which prohibits any person from, "knowingly cause or attempt to cause physical harm to a family or household member."

{¶22} This Court has held that a defendant's motive and intent during an incident giving rise to a charge of domestic violence are irrelevant to a determination as to whether the defendant acted with knowledge. *State v. Kartman*, 7th Dist. No. 01 BA 65, 2002-Ohio-5189, at ¶8, citing *State v. Young* (1988), 37 Ohio St.3d 249, 253, 525 N.E.2d 1363 and *State v. Wenger* (1979), 58 Ohio St.3d 336, 339, 390 N.E.2d 801. Instead, "[a] defendant need not act with deliberate intent to act knowingly; if the result is probable, then the defendant acts with knowledge." *Kartman,* supra, at ¶8, citing *Wenger*, supra at 339, 390 N.E.2d 801.

{¶23} In a comparable case, the Ninth District Court of Appeals held that a domestic violence conviction was not against the manifest weight of evidence where the record revealed that the defendant followed the victim multiple times until she was forced to stop in a stranger's driveway. An officer responded and found the victim hysterical and fearful for her life. *State v. Pruiett*, 9th Dist. No. 21796, 2003-Ohio-3256.

{¶24} The record before us contains evidence to support the trial court's decision. There was testimony, that, because Angela was running late that day, she

and Appellant were to meet on an exit ramp in order to exchange the couple's two young children. Appellant had repeatedly called her cellular phone prior to their meeting. She stated that she was afraid Appellant was going to "beat her up." (Trial Tr., pp. 9-11.)

{¶25} Angela refused to roll down her window when the two finally met. She sat in her van when their two young children were removed. Appellant was yelling at her through her window. He would not go back to his car, so she simply drove away from the scene. Thereafter, she saw Appellant's car speeding toward her in her rearview mirror. His car was so close that she could not see the hood of his car. (Trial Tr., pp. 13-16.)

{¶26} Angela testified that she was very afraid, especially when Appellant pulled his car along side of her van and was yelling at her through his driver's side window. She had to cross the white line to prevent him from hitting her van. She called 911 for assistance. Appellant then pulled approximately one foot in front of her van and forced her to slow down. She saw Appellant's car almost drive into a barrier two times. (Trial Tr., pp. 17-19.)

{¶27} Angela's telephone bill was introduced as evidence at trial. It reflected that Appellant made 36 calls to her that day. She testified that the calls frightened her, as well, and that Appellant told her that he knew her final destination and that he was going to "beat her up." (Trial Tr., pp. 10, 24, 26, 28, 39.)

{¶28} Sergeant Thomas G. DuVaul from the Belmont County Sheriff's Department also testified. He stated that when he met Angela in a parking lot, she

was crying, shaking, and very distraught. She told him that both her van and Appellant's car nearly struck the median. During their discussion, she received two cellular telephone calls. The male caller's voice was loud and he sounded highly excited. (Trial Tr., pp. 53, 56-57.)

{¶29} Angela's son from a prior relationship, 17-year-old Brock, also testified. Brock and his girlfriend were with Angela on the day of the incident. He testified that Appellant pulled along side of their van and was yelling at them through his passenger side window. Brock said that he and his mother were both afraid and that Appellant was using profanity throughout the incident. (Trial Tr., pp. 75-76, 84, 86.)

{¶30} Appellant was the only witness to testify for the defense. His description of the incident was similar to Angela's and Brock's testimony. However, Appellant denied ever battering Angela or threatening her. He insisted that he merely wanted to talk with her because their daughter was sick. Appellant admitted he was driving over the speed limit to catch Angela, and he admitted being highly excited and upset. He denied he intended anyone physical harm, and he does not believe that he jeopardized anyone's safety. (Trial Tr., pp. 99-109.)

{¶31} Notwithstanding Appellant's testimony, the state's evidence establishes that Appellant attempted to cause physical harm to Angela. His reckless operation of his motor vehicle combined with his threatening phone calls support the trial court's judgment. Appellant's domestic violence conviction is supported by competent credible evidence. Accordingly, Appellant's second assignment of error lacks merit and is overruled.

{¶32} Based on the foregoing, Appellant's domestic violence conviction is hereby affirmed.

Vukovich, J., concurs.

DeGenaro, J., concurs.