

[Cite as *State v. Cole*, 2010-Ohio-1608.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

STATE OF OHIO

:

Plaintiff-Appellee

C.A. CASE NO. 2009 CA
20

v.

T.C. NO. 2008 CRB 5202
2008 CRB 5203

MICKEY COLE

:

Defendant-Appellant

(Criminal appeal
: from
Municipal Court)

:

.....

OPINION

Rendered on the 9th day of April, 2010.

.....

STACY M. WALL, Atty. Reg. No. 0070114, City of Piqua Prosecutor, 201 W. Water Street,
Piqua, Ohio 45356

Attorney for Plaintiff-Appellee

P.J. CONBOY II, Atty. Reg. No. 0070073, 5613 Brandt Pike, Huber Heights, Ohio 45424

Attorney for Defendant-Appellant

.....

FROELICH, J.

{¶ 1} Mickey Cole was convicted after a jury trial in the Miami County Municipal

Court of assault, in violation of R.C. 2903.13(A), and resisting arrest, in violation of R.C. 2921.33(B). The trial court sentenced him to 180 days in jail for each offense, to be served consecutively. Cole also pled guilty to drug possession, a minor misdemeanor; he was fined \$150, and his driver's license was suspended for six months.

{¶ 2} Cole appeals from his convictions for assault and resisting arrest.¹ In his sole assignment of error, he argues that his convictions were based on insufficient evidence and were against the manifest weight of the evidence. For the following reasons, the trial court's judgment will be affirmed.

I.

{¶ 3} “A sufficiency of the evidence argument disputes whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law.” *State v. Wilson*, Montgomery App. No. 22581, 2009-Ohio-525, ¶10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. When reviewing whether the State has presented sufficient evidence to support a conviction, the relevant inquiry is whether any rational finder of fact, after viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 430, 1997-Ohio-372, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d. 560. A guilty verdict will not be disturbed on appeal unless “reasonable minds could not reach the conclusion reached by the trier-of-fact.” *Id.*

¹In August 2009, Cole filed a motion in this Court to stay execution of his sentence pending appeal. We denied the motion on September 24, 2009. However, on February 22, 2010, we expedited this appeal under Loc.App.R. 2.8(B).

{¶ 4} In contrast, “a weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive.” *Wilson* at ¶12. When evaluating whether a conviction is contrary to the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, 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 conviction must be reversed and a new trial ordered.” *Thompkins*, 78 Ohio St.3d at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 5} Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder’s decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288. However, we may determine which of several competing inferences suggested by the evidence should be preferred. *Id.*

{¶ 6} The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence. *Wilson* at ¶14. A judgment of conviction should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *Martin*, 20 Ohio App.3d at 175.

II.

{¶ 7} First, Cole argues that his conviction for assault was not supported by the evidence, because both he and the victim testified that he did not assault her. The State’s evidence related to the assault charge established the following facts:

{¶ 8} On the evening of November 26, 2008, the night before Thanksgiving, Alisha

Persinger dropped off her boyfriend, Cole, in a parking lot beside a bar in Piqua, Ohio. The two had not gotten along throughout the day, and Persinger had been drinking. A couple of hours later, Cole called Persinger and told her that he was ready to leave the bar. Persinger returned to the bar to get him. Persinger was still angry at Cole, and she saw, to her displeasure, that Cole was talking to another woman outside the bar. When Cole got into Persinger's car, the two continued to argue. Cole asked Persinger for \$40, which Persinger did not have. Persinger did not have any injuries when Cole entered the car.

{¶ 9} Persinger drove to the home of her cousin, Christina Cox, who lived on Riverside Drive, approximately four blocks from the bar. Persinger exited the car, ran into Cox's home, and called the police. Persinger reported that her boyfriend had "beat her up," that her cousin's boyfriend was chasing him, and that he (Cole) was "about to get beat up."

{¶ 10} At that time, Persinger "looked like a horrible mess." She had redness on her arm, which appeared to be a bite mark, an injury behind her left ear, redness around her entire neck area, abrasions on her nose and face, and a cut on her finger, which was bleeding.

{¶ 11} The police responded to Persinger's call. Piqua Police Officers Paula Craft and Jim Taylor noticed that Persinger was crying and very upset, and both observed that she had visible injuries. Clark took photographs of the injuries to Persinger's face, ear, arm, neck, and finger. Persinger had been drinking, but she answered questions and provided a written statement to the police, which stated:

{¶ 12} "[Cole] and I haven't spoken much all day. He said he wanted to go to the bar. So prior to that he grabbed my throat then I dropped him off at Francis Office Supply. Then he went to Lucky's Bar. A couple hours later I picked him up. We were arguing, we went driving around for a few minutes. He continued to choke me and bite me. Finally, I

acted like I was getting him the \$40 he wanted and went to my cousin's house and pulled up out front, and he choked me and bit me again and I can't remember anything else. I finally got both sets of keys and ran into the house crying. Jason [Perkins, Cox's boyfriend,] ran outside and tried to help. He saw it all outside his house I guess."

{¶ 13} Cole was located on the porch of a residence in the 600 block of Lindsey Street, which was approximately one block from Cox's home. He was arrested for assaulting Persinger.

{¶ 14} At her family's insistence, Persinger went to the hospital the following day. Persinger testified that the blood vessels in her eyes were "busted" and that she suffered from "severe strangulation."

{¶ 15} At trial, Persinger recanted her earlier statements and testified that Cole had not injured her on November 26, 2008. She testified that she had "backhanded" Cole when he got into her car at the bar and that Cole had grabbed her arms in order to stop her from hitting him. Persinger stated that she called the police from Cox's home, because Cox's boyfriend was chasing Cole with a knife and she thought he was going to hurt Cole. Persinger testified that she did not know how she got the injuries, "but I do know that my boyfriend would never intentionally cause any harm to me at all." Persinger stated that her original report to the police was based on what others had told her and that she had repeated the story to prosecutors to avoid being charged with filing a false police report. Persinger acknowledged that she did not have any injuries prior to picking up Cole from the bar and that she was injured when she arrived at Cox's home a few minutes later; Persinger stated that no one else had been in the vehicle.

{¶ 16} Cole testified on his own behalf. He stated that he and Persinger had started

arguing at around 10:00 a.m. on November 26, 2008, because Persinger believed that he was cheating on her. Cole spent the day at his sister-in-law's house in Piqua. When Persinger picked him up from there, the two continued to argue, and Cole had her return him to his sister-in-law's home. He went from there to a nearby bar. Persinger picked him up again and, after talking more, she dropped him at the parking lot next to the bar.

{¶ 17} According to Cole, Persinger picked him up at the bar a couple of hours later, and they drove to Cox's home. The two again argued, because Persinger believed that Cole had gone to the bar to see another woman. Cole testified that Persinger struck him, and he grabbed her arms to stop her from hitting him. Cole denied hitting, biting, or otherwise injuring Persinger. At Cox's house, Cole got out of the car because he "didn't want to be around her." Persinger then jumped out of the car and ran into Cox's house. Cole stated that two men – one of whom was holding a knife – and a woman came after him. Cole went onto a porch on Lindsey Street and told the resident to call the police. Cole was arrested at that house.

{¶ 18} Although Persinger and Cole both testified at trial that Cole had not injured Persinger, the State's evidence, if believed, was sufficient to prove beyond a reasonable doubt that Cole had assaulted Persinger in her vehicle. Persinger acknowledged that she was not injured prior to picking up Cole from the bar, that she had various injuries upon reaching Cox's house (which was only four blocks away), and that no one else had been in the vehicle. Persinger had reported to the police and, later, to the prosecutor that she had been assaulted by Cole, and her demeanor and physical appearance at Cox's residence supported her original statements. The jury could have reasonably believed that Persinger's original accusations had been truthful and that her recantation at trial was not credible. Likewise, the jury could

have reasonably chosen to disbelieve Cole's version of events, in which he claimed only to have grabbed Persinger's arms to prevent her from hitting him. Cole's conviction for assault was based on sufficient evidence and was not against the manifest weight of the evidence.

III.

{¶ 19} Next, Cole claims that his conviction for resisting arrest under R.C. 2921.33(B) was based on insufficient evidence and was against the manifest weight of the evidence. In order to establish resisting arrest under R.C. 2921.33(B), the State was required to prove that Cole recklessly or by force resisted or interfered with his lawful arrest or the lawful arrest of another person and, during the course of or as a result of the resistance or interference, caused physical harm to a law enforcement officer.

{¶ 20} Cole challenges his conviction for resisting arrest on two grounds: (1) the State did not prove beyond a reasonable doubt that Cole recklessly caused physical harm to an officer, and (2) Cole's arrest had already been effectuated before any struggles occurred between Cole and the officers.

{¶ 21} According to the State's evidence at trial, Cole was located on the porch of a home in the 600 block of Lindsey Street in Piqua. Officer Taylor asked Cole to come to him on the sidewalk, where Taylor advised Cole that he was accused of assaulting a female over on Riverside Drive. Cole denied the accusation. Taylor handcuffed Cole's hands behind his back and took him into custody. Taylor observed that Cole was intoxicated; Cole had a strong odor of an alcoholic beverage on his breath, his eyes were bloodshot, and his speech was slightly slurred. Taylor transported Cole to the police station without incident.

{¶ 22} Upon reaching the police station, Taylor took Cole to the processing room, where officers record an arrestee's information, take fingerprints, take photographs for mug

shots, and do whatever paperwork is necessary prior to incarceration. Taylor removed Cole's personal property from his person and placed it on the table. Cole became "agitated" in the processing room and raised his voice. Cole complained that someone had assaulted him prior to his arrest on Lindsey Street. Because of Cole's behavior and voice level, Officer Beasley, the officer in charge, directed Taylor to forego processing at the police department and to transport Cole directly to jail. Cole was in the processing room for approximately one and one-half minutes.

{¶ 23} Taylor took Cole by the right arm and began to escort him out of the south door of the processing room, which is right beside the garage bay where the officer's cruiser was parked. Cole started to pull back toward the processing room in order to retrieve his personal items, but Taylor pulled him toward the door. Officer Preston, who was standing outside the doorway to the processing room, immediately grabbed Cole by the left arm, and the two officers began to walk Cole toward the right rear side of Taylor's vehicle. Cole stopped walking and picked up his feet, causing the officers to carry him around to the right side of the car. Cole yelled and cursed at the officers.

{¶ 24} Cole was placed on the trunk hood of Taylor's vehicle, and Preston held him in that position. Cole continued to push back, tried to pull away, and pulled on Preston's uniform; he refused to obey instructions to stop. Taylor heard Preston tell Cole to "stop grabbing me." As Taylor opened the right rear door of the cruiser, he also heard Preston say, "Don't kick me." Preston indicated that Cole did not kick him, but he "could feel him [Cole] kick at least twice. [Preston] could feel his leg brushing past mine." As Preston told Cole to stop kicking, Officer Kimpel, who was standing behind Preston and was attempting to hold Cole's feet, was kicked in the right knee. Cole continued to struggle. Preston testified that

Cole “was told throughout the whole time either to stop kicking, stop pushing, stop resisting, you need to walk, he was told multiple different things throughout the whole time.”

{¶ 25} Taylor retrieved a taser from Officer Beasley and warned Cole to stop struggling and to get into the car or he would be tased. Cole did not stop. Taylor placed the taser against the right side of Cole’s abdomen and “initiated the cycle, which basically issues an electric charge.” As a result, Cole collapsed inside the back seat of the car. Cole grabbed the taser from Taylor as he fell into the vehicle. Preston took the taser back, handed it to Taylor, and Taylor returned it to Beasley.

{¶ 26} Cole was physically compliant after he was tased. Per the officers’ request, Cole stuck his legs out of the car door so that they could put leg restraints on him. He was then seated in the back seat. Cole was handcuffed throughout the incident.

{¶ 27} Kimpel testified that his knee was red and little sore as a result of Cole’s kick. Taylor also observed that Kimpel had “redness to his right knee” as a result of the kick. Kimpel did not have trouble walking, seek medical attention, or miss work due to being kicked. Taylor did not report that Kimpel had been kicked in his police report; however, Kimpel stated that he included that he had been kicked in his police report and reported that he had been kicked to another officer and to the officer in charge, Officer Beasley.

{¶ 28} The State played a videotape of the incident for the jury to view, and the officers described what had occurred as the tape was played.

{¶ 29} Cole testified that he did not resist the officers when he was taken from the processing room to Taylor’s police cruiser. He said that he was confused and “a little upset” in the processing room, because he did not understand why he was going to jail when someone else had just pulled a knife on him. Cole told the officers that he preferred to go straight to

the jail.

{¶ 30} Cole testified that he wanted his “stuff” and, when he turned, Taylor jerked him (Cole), looped his arm, grabbed him by the shoulder, bent him over, and pushed him toward the door. Preston immediately grabbed him and did the same thing. Cole twisted his ankle when Preston grabbed him. Cole testified: “I did not refuse to walk. I was held up by my arms. My ankle was sprung. Naturally, your body limps; it gives out on that. I told them hold on a second, and they would not give me a second.” Cole denied kicking his legs and refusing to get into the back of the cruiser. He stated:

{¶ 31} “I get slammed on the car, I don’t know, I’m so confused, I got one guy’s got my arm twisted this way, somebody’s hollering this, screaming that, another guy’s pushing me this way. It’s like one would jerk or push my body to go one direction, and then the other one’s trying to tell me not to do that, to quit resisting, then they’d do it the other direction. I got one cop, while one cop had his arms up in me, I got one grabs my head down, sticks his thumbs in me, slams my head down, and the whole time (inaudible) I’m telling them to stop, they’re not telling me to quit resisting, I’m saying to them, why are you doing this, quit, what, what is wrong with you? I’m one hundred twenty pounds, one man, I’m already in cuffs, this is unnecessary.”

{¶ 32} Cole testified that he was tased twice. He claimed that he did not purposely or recklessly kick at any officer.

{¶ 33} It is unclear whether “recklessly” in R.C. 2921.33(B) modifies “cause physical harm to a law enforcement officer” in addition to the phrase “resist or interfere with a lawful arrest.” Regardless, assuming that the State was also required to prove that Cole recklessly caused physical harm to a law enforcement officer, we find sufficient evidence to prove that

Cole recklessly caused physical harm to Officer Kimpel.

{¶ 34} Taylor and Preston both testified that Cole refused to walk to Taylor's cruiser from the processing room and struggled with the officers. Cole was kicking while he was positioned on the trunk of the cruiser and failed to comply with repeated instructions to stop. Although Kimpel did not require medical attention upon being kicked, he testified that his right knee was red and sore as a result of being kicked. Taylor observed the redness. This evidence, if believed, was sufficient to establish that Cole recklessly caused physical harm to Kimpel, and the jury did not "lose its way" when it credited the officers' testimony.

{¶ 35} Cole further argues that he could not be convicted of resisting arrest because he was already under arrest and handcuffed when he struggled with the officers. Citing *State v. Darrah* (1980), 64 Ohio St.2d 22, 26, he states that an arrest is completed when the police officers had (1) an intent to arrest, (2) under real or pretended authority, (3) accompanied by an actual or constructive seizure or detention, and (4) which was so understood by Cole. *Id.*, quoting *State v. Barker* (1978), 53 Ohio St.2d 135, 139. He asserts that, as a matter of law, he could not have been convicted of resisting an arrest that was completed on Lindsey Street.

{¶ 36} The First District addressed this argument in *State v. Bay* (1998), 132 Ohio App.3d 772. In *Bay*, the defendant was handcuffed and taken into custody outside of a bar in Cincinnati. Officers transported him to the Hamilton County Justice Center for intake processing, which included the filing of a complaint and arrest slip, fingerprinting, booking, and the completion of the charge process. Bay arrived outside of the intake area approximately 15 to 30 minutes after he first encountered the police. Bay refused to leave the cruiser. He ultimately walked ten feet toward the building before going limp and falling to the ground. Officers struggled with Bay and carried him inside for processing and medical

treatment. Bay was charged with and convicted of disorderly conduct for his actions outside the bar and resisting arrest for his actions outside the intake area.

{¶ 37} Relying on *Darrah*, Bay challenged his conviction for resisting arrest, claiming that the trial court erred in denying his Crim.R. 29 motion because his arrest was completed outside the bar. The First District rejected Bay's argument, reasoning:

{¶ 38} "Bay's reliance upon the well-established and often-cited four-factor test, however, is misplaced. He misconstrues the purpose behind the *State v. Darrah* test. In concluding that a trucker was not under arrest when he was stopped and ticketed for violating a traffic-control device, the Ohio Supreme Court, in *Darrah*, identified when a police officer's seizure of a person is tantamount to a formal arrest. *Id.*, 64 Ohio St.2d at 25, 18 O.O.3d at 194-195, 412 N.E.2d at 1330.

{¶ 39} "While the *State v. Darrah* test does not, by itself, resolve the question of whether a formal arrest ends once the four factors are demonstrated, in the very next sentence, the Supreme Court noted, 'Furthermore, an arrest, in the technical, as well as the common sense, signifies the apprehension of an individual or the restraint of a person's freedom in contemplation of the formal charging with a crime.' *Id.*, 64 Ohio St.2d at 26, 18 O.O.3d at 195, 412 N.E.2d at 1331. A formal arrest, therefore, is 'not necessarily an instantaneous event,' *State v. Bolden* (1990), 104 Ore.App. 356, 359, 801 P.2d 863, 864, but rather is a process beginning with the seizure of a person, which can encompass acts necessary to effect the formal charging of a crime. Therefore, before a defendant is formally charged, temporal and spatial limits are factual issues from which the trier of fact determines whether the arrest is complete." *Bay*, 132 Ohio App.3d at 775.

{¶ 40} The First District thus found that the State had presented evidence from which

reasonable minds could find that “the officers were still engaged in completing the formal charging process, thus precluding an entry of judgment of acquittal.” *Id.* See, also, *Cleveland v. Ellsworth*, Cuyahoga App. No. 83040, 2004-Ohio-4092, ¶42 (affirming defendant’s conviction for resisting arrest where the defendant was uncooperative during the booking process, force had to be used to remove the defendant’s shoes, the defendant attempted to grab his money when the officer was counting it for inventory purposes, and eventually the defendant had to be wrestled to the ground).

{¶ 41} We find this rationale to be persuasive and applicable to the facts in this case. Here, Cole was transported to the Piqua police station without incident, but became belligerent when Taylor attempted to process him. When Taylor was advised by Beasley to forego processing and take him to the jail, Cole lifted his feet, refused to walk, and actively pushed, pulled, grabbed, and kicked at the officers who were attempting to escort him to Taylor’s police cruiser. Cole’s resistive conduct took place shortly after he arrived at the police station. Given the totality of the circumstances and especially because the resistance occurred while the officers were in the course of their booking procedures, we conclude that Cole’s acts of resistance occurred, for purposes of the resisting arrest statute, during the course of his arrest. Accordingly, the State’s evidence was sufficient to support Cole’s conviction for resisting arrest, and his conviction was not against the manifest weight of the evidence.

IV.

{¶ 42} The judgment of the trial court will be affirmed.

.....

FAIN, J. and GRADY, J., concur.

Copies mailed to:

Stacy M. Wall