[Cite as *State v. Benner*, 2024-Ohio-4979.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

CYNTHIA BENNER

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. John W. Wise, J.
Hon. Andrew J. King, J.

Case No. 23 COA 019

O P I N I O N

CHARACTER OF PROCEEDING: Criminal Appeal from the Municipal Court, Case No. 23 CRB 00233

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: October 8, 2024

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellant Cynthia Jo Benner appeals her conviction on one count of Dereliction of Duty, entered in the Ashland Municipal Court on October 6, 2023, following a jury trial.

{¶2} Appellee is the State of Ohio.

Accelerated Calendar

{¶3} Preliminarily, we note this case is before this Court on the accelerated calendar which is governed by App.R. 11.1. Subsection (E), determination and judgment on appeal, provides in pertinent part: “The appeal will be determined as provided by App.R. 11.1. It shall be sufficient compliance with App.R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form.”

{¶4} One of the important purposes of the accelerated calendar is to enable an appellate court to render a brief and conclusory decision more quickly than in a case on the regular calendar where the briefs, facts, and legal issues are more complicated. *Crawford v. Eastland Shopping Mall Assn.*, 11 Ohio App.3d 158 (10th Dist. 1983).

{¶5} This appeal shall be considered in accordance with the aforementioned rules.

STATEMENT OF THE FACTS AND CASE

{¶6} For purposes of this appeal, the relevant procedural history is as follows:

{¶7} On or about November 3, 2021, Appellant Cynthia Jo Benner, a former Sergeant with the Ashland County Sheriff’s Office, was a supervisor on second shift. At 16:06:08, a call came to the Dispatch center of Ashland County Sheriff's Office requesting

an officer to respond to a deer carcass situation wherein a receipt was necessary in order for the deceased deer to be released to an Amish individual associated with the caller.

{¶8} Sgt. Benner responded to the call. After Sgt. Benner left to respond to the deer carcass call, Dispatch received a call for an officer to respond to an address that was known to law enforcement in reference to an incident involving a granddaughter upset because the Wi-Fi had been turned off by her grandfather. The request for assistance indicated that the granddaughter pushed her grandfather down and he possibly suffered a broken wrist. An ambulance was also dispatched.

{¶9} Deputy Shawn Taylor was dispatched as primary at 16:16:39 to the domestic violence call. Deputy Taylor had previous contacts with the grandfather and granddaughter and was familiar with the situation. After dispatching Deputy Taylor, dispatch then contacted Ohio State Patrol as backup to Deputy Taylor. Dispatch noted same over the radio at 16:20:23.

{¶10} On or about March 2, 2023, Sgt. Cynthia Benner was served with a Complaint charging her with four counts of Dereliction of Duty. Appellant was charged with four counts of Dereliction of Duty, in violation of R.C. §2921.44(A)(2), for a series of events spanning from November, 2021 through November, 2022, in which she failed to respond to various important calls while on duty.

{¶11} On October 4, 2023, the matter proceeded to jury trial.

{¶12} At trial, the jury heard the following testimony:

{¶13} Chief Deputy Dave Blake, one of Appellant's supervisors, testified as to some background on how deputies are dispatched and the varying levels of priority among calls. Chief Deputy Blake emphasized that a domestic violence call would be an

"all hands-on deck" call and that a deputy has no discretion as to whether or not to respond to such a call. (T. at 115-116). He explained that domestic violence calls are a priority three level call which would mean a supervisory deputy, such as Appellant, would be expected to respond to such a call and to do so "immediately." (T. at 118-119). Chief Blake went into great detail about the serious and "unpredictable" nature of domestic violence calls and that minutes, or even seconds, can make a difference when responding to such calls. (T. at 121). He further explained that domestic violence calls automatically require a two-deputy response with a third deputy in the area. (T. at 119).

{¶14} The November 3, 2021, domestic violence call relating to Count One went out to all deputies on the road. (T. at 178-179). Deputy Benner never responded in any fashion to the domestic violence call. (T. at 179).

{¶15} Deputy Shawn Taylor testified that he responded to the call and found a granddaughter who had pushed her grandfather down. (T. at 164). The grandfather possibly had a fractured wrist and was taken to the hospital. (T. at 164-165). Deputy Taylor took a report and forwarded it to the Ashland County Prosecutor for review of charges on the granddaughter. (T. at 165). On cross-examination he confirmed that his presence at the scene halted the commission of any crime, that he “apprehended the offender by noting who it was, and forwarded the report to the prosecutor for determination. (T. at 165).

{¶16} Another Deputy, Garrett Dudte, testified that a deer carcass call takes a "couple minutes" and in order of priority, such calls are one of the lowest you can take. (T. at 238).

{¶17} At the close of the State's case, counsel for Appellant made an oral motion for dismissal of all counts pursuant to Crim.R. 29. The trial court dismissed Counts Two and Three, finding that the State failed to present sufficient evidence for these counts to be presented to the jury for deliberation. (T. at 400-419). The trial court denied the Crim.R. 29 motion as to Counts One and Four and same were presented to the jury for deliberation.

{¶18} The jury returned a guilty verdict as to Count One and a Not Guilty verdict as to Count Four.

{¶19} Appellant now appeals, assigning the following error for review:

ASSIGNMENTS OF ERROR

{¶20} "I. THE TRIAL COURT ERRED IN DENYING MS. BENNER'S MOTION FOR A JUDGMENT OF ACQUITTAL UNDER CRIM. R. 29 REGARDING COUNT ONE, BECAUSE THE STATE FAILED TO OFFER SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR DERELICTION OF DUTY.

{¶21} II. THE JURY'S CONVICTION ON COUNT ONE, DERELICTION OF DUTY, WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I., II.

{¶22} In her two assignments of error, Appellant argues her conviction is against the manifest weight and sufficiency of the evidence. We disagree.

{¶23} Appellant argues that the trial court erred when it denied her Crim.R. 29 motion for acquittal. Pursuant to Crim.R. 29(A), a court "shall order the entry of the judgment of acquittal of one or more offenses * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." Because a Crim.R. 29 motion questions the

sufficiency of the evidence, "[w]e apply the same standard of review to Crim.R. 29 motions as we use in reviewing the sufficiency of the evidence."

{¶24} "Whether the evidence is legally sufficient to sustain a verdict is a question of law." *Id.* at ¶ 38, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). "Sufficiency is a test of adequacy." *Id.* "We construe the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt." *Id.*, citing *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶25} Appellant also argues her conviction is against the manifest weight of the evidence. In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered." *State v. Thompkins, supra*. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶26} Appellant herein was convicted of one count of Dereliction of Duty, in violation of R.C. §2921.44(A)(2), which provides, in relevant part,

R.C. §2921.44 Dereliction of Duty

(A) No law enforcement officer shall negligently do any of the following:

(1) ***

(2) Fail to prevent or halt the commission of an offense or to apprehend an offender, when it is in the law enforcement officer's power to do so alone or with available assistance.

{¶27} "A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist." R.C. §2901.22(D).

{¶28} "Due Care is defined as "that amount of care which a reasonably prudent or an ordinarily cautious person is accustomed to use under the same or similar circumstances."

{¶29} "Substantial, as used within the negligence definition, is defined as follows: [T]o constitute negligence, a lapse or failure to use due care must be substantial ... [T]he lapse must be a material departure from the standard of due care ... [I]f the juror finds that the defendant failed to use due care, the jury must then determine if her failure was a substantial lapse from the standard of care."

{¶30} As set forth above, for dereliction of duty, Appellant must have "negligently fail[ed] to prevent or halt the commission of an offense or to apprehend an offender, when it [was] in [Appellant's] power to do so alone or with available assistance."

{¶31} Appellant herein argues that the trial court erred in finding that there was a summons issued for the granddaughter and therefore the determination that there was an "apprehension" was incorrect and not supported by sufficient evidence.

{¶32} While the term 'apprehend' is not defined in the Ohio Revised Code, this Court has found that a reasonable reader of the statute would understand the term to mean "capture or seize". *State v. Carpenter*, 2013-Ohio-3439, ¶ 22 (5th Dist.). In *State v. Beggs*, 2013-Ohio-3440, ¶ 21 (5th Dist.), "apprehend" was defined in the instructions to the jury as "to take hold of actually and bodily, and it may include seizing or arresting a person."

{¶33} In the case *sub judice*, Appellant failed to respond to the call from Dispatch, which went out over the radio as a domestic violence call, a call that she knew was a high-level, priority call. In failing to respond, she exhibited a substantial lapse from due care as it pertained to preventing or halting the commission of an offense or apprehending an offender when it [was] in [Appellant's] power to do so alone or with available assistance.

{¶34} Viewing the evidence in the light most favorable to the State, we conclude that the jury could have found that Appellant was guilty of dereliction of duty. Accordingly, we find Appellant's conviction is supported by sufficient evidence.

{¶35} Appellant further contends that the jury did not fully consider and properly weigh all the evidence. She contends that because Dispatch contacted the Ohio State Highway Patrol for backup and because Deputy Taylor handled the domestic violence call without incident, she was not guilty of dereliction of duty in failing to respond to the call.

{¶36} Upon review, we find that this is not an " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins*, 78 Ohio St.3d 380 at 386-387. Upon review of the entire record, weighing the evidence and all reasonable

inferences as a thirteenth juror, including considering the credibility of witnesses, we cannot reach the conclusion that the trier of fact lost its way and created a manifest miscarriage of justice. We do not find the jury erred when it found Appellant guilty of the crime charged. Taken as a whole, the testimony and record contain ample evidence of Appellant's responsibility for the crime. The state presented testimony and evidence from which the jury could have found all the essential elements of dereliction of duty beyond a reasonable doubt.

{¶37} The jury as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the credibility of the witnesses. Further, the trier of fact need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, 2003-Ohio-958, ¶ 21 (10th Dist.), *citing State v. Antill,* 176 Ohio St. 61, 67 (1964); *State v. Burke*, 2003-Ohio-2889 (10th Dist.).

{¶38} We therefore find the jury's verdict was not against the manifest weight of the evidence.

{¶39} Appellant's assignments of error are overruled.

{¶40} The judgment of the Ashland Municipal Court is affirmed.

By: Wise, J.
Gwin, P. J., concurs.
King, J., dissents.

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King, J. dissents,

{¶ 41} The difficulty presented in this case is illustrated by the fact that Benner was charged with four offenses: two offenses were dismissed on a Crim.R. 29 motion and of the remaining two offenses submitted to the jury, she was found guilty of only one. I can appreciate and understand the need to maintain discipline and order within a law enforcement command structure. And there may be a strong case here for discipline and possibly termination. But not every nonfeasance or violation of a standing order by a law enforcement officer is sufficient to give rise to a criminal offense under R.C. 2921.44.

{¶ 42} Here, our obligation is to strictly construe the statute against the state, and liberally construe the statute in favor of the accused. R.C. 2901.04. The crux of the state's argument is that Benner committed criminal nonfeasance by failing to follow an internal policy on prioritizing calls for assistance from the public. In that context of both the facts present in this case and our duty in how to construe the statute, I cannot agree that Benner's decision to continue dealing with the prior incident—rather than abandon it for another call to which she was dispatched—was sufficient to demonstrate a criminal dereliction of duty. I therefore dissent and would reverse the conviction.