

[Cite as *State v. Bosley*, 2010-Ohio-1570.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-090330
	:	TRIAL NO. B-0801274
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
JOSEPH BOSLEY,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Common Pleas Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: April 9, 2010

Joseph T. Deters, Prosecuting Attorney, and *Rachel Lipman Curran*, Assistant
Prosecuting Attorney, for Plaintiff-Appellee,

Laurie M. Harmon, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

WILLIAM L. MALLORY, Judge.

{¶1} In 2009, a jury found defendant-appellant Joseph Bosley guilty of felonious assault with a deadly weapon¹ and domestic violence² for slashing his live-in girlfriend with a knife. In this appeal, Bosley contends that his convictions were against the weight and sufficiency of the evidence and that the trial court erred in (1) permitting expert testimony based on material that had not been admitted into evidence; (2) failing to make a finding that he was not guilty by reason of insanity; (3) imposing a maximum sentence for felonious assault; and (4) imposing multiple punishments for allied offenses of similar import. We reject Bosley’s assignments of error and affirm the trial court’s judgment.

I. Bosley Stabs His Girlfriend

{¶2} In 2008, Bosley and his live-in girlfriend, Janice Merritt, had lived together as husband and wife for about 16 years. At the time, he had been taking medication for bipolar disorder, and he was appropriately taking his prescription around the time of the offenses.

{¶3} On one morning, after playing cards with friends, Bosley and Merritt showered and went to bed. Bosley left the bedroom and returned several minutes later with a wash glove, which he threw onto the bed with the middle finger sticking up. Bosley asked Merritt, “What’s this?” She replied, “Just a glove.”

{¶4} Bosley then became outraged and began to cut Merritt on her face, neck, chest, and hands while saying, “Everybody has been waiting on this. [I am] fighting the devil.” Merritt testified that she did not actually see a knife—but it was apparent that she

¹ R.C. 2903.11(A)(2).

² R.C. 2919.25(A).

had been stabbed with a sharp knife-like object. During the struggle, Bosley dropped whatever he had been stabbing her with, and he then pulled a knife from his chest pocket and continued to assault Merritt. Merritt's daughter called during the struggle, and when her mother answered the phone, she said, "Call 911, he is trying to kill me!" When Bosley grabbed Merritt, she dropped the phone, and he picked it up and said, "I'm going to kill her. Call 911." Merritt's daughter called 911, and a response unit was dispatched to their home.

{¶5} Merritt then splashed Bosley with a glass of cold water that had been sitting on a nightstand. She fled and Bosley followed, and when Bosley entered the hallway, Merritt hit him with a small brass object. Bosley then changed his demeanor, saying, "I'm not going to hurt you." Merritt ran out of the house, and Bosley again followed, saying, "You had better run."

{¶6} Merritt retreated to a neighbor's home, and when he learned that the police were on the way, Bosley returned to their home. At home, Bosley called 911 and told the operator to send police "for a domestic violence."

{¶7} The police arrived and found Merritt covered in blood and upset. She told the responding officers that Bosley had cut her or that he had tried to kill her. Officers later found Bosley at their home, and a search revealed that Bosley had a knife in his pants pocket. On being asked, "Is this what you used?", Bosley replied, "No. There's a knife in the kitchen." Officers then retrieved a box cutter on the kitchen floor that had a red blood-like substance on the blade.

{¶8} Merritt testified that she was shocked by Bosley's behavior, that she did not understand why it had happened, and that this was the first time Bosley had ever stabbed or attempted to stab her.

II. The Weight and Sufficiency of the Evidence

{¶9} Bosley first contends that the state failed to prove that he had acted knowingly in committing the felonious assault and domestic violence, and that his convictions, therefore, were against the weight and sufficiency of the evidence. We are not convinced.

{¶10} When reviewing the sufficiency of the evidence to support a criminal conviction, we must examine the evidence admitted at trial in the light most favorable to the state. We must then determine whether that evidence could have convinced any rational trier of fact that the essential elements of the crime had been proved beyond a reasonable doubt.³

{¶11} A review of the weight of the evidence puts the appellate court in the role of a “thirteenth juror.”⁴ We must review the entire record, weigh the evidence, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice.⁵ A new trial should be granted only in exceptional cases where the evidence weighs heavily against the conviction.⁶

{¶12} In determining a defendant’s culpable state of mind, the trier of fact must review the surrounding facts and circumstances.⁷ Both felonious assault⁸ and domestic violence⁹ require that the defendant knowingly commit the offense. “A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person

³ See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

⁴ See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

⁵ *Id.*, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211.

⁶ *Id.*

⁷ *State v. Johnson* (1978), 56 Ohio St.2d 35, 381 N.E.2d 637.

⁸ R.C. 2903.11(A)(2).

⁹ R.C. 2919.25(A).

has knowledge of circumstances when he is aware that such circumstances probably exist.”¹⁰

{¶13} In support of his weight-and-sufficiency argument, Bosley contends that he did not know what he was doing, that he did not remember the incident, and that he came to his senses only when Merritt splashed him in the face with water. But the evidence showed that when Bosley attacked Merritt, he had two sharp objects or knives on his person; that he intended to kill her, as evidenced by his telephone statement advising Merritt’s daughter that she should call 911 because “[he was] going to kill [Merritt]”; that, as he acknowledged at trial, he knew killing Merritt would be wrong; and that he remembered swinging the knife at Merritt.

{¶14} At trial, Bosley disputed that he had told Merritt’s daughter to call 911, but the jury was free to believe Merritt’s daughter’s testimony rather than Bosley’s. His telephone conversation with Merritt’s daughter, where he told her to call 911 because he was going to kill Merritt, indicated that Bosley knew the wrongfulness of his acts and that he was aware of the consequences. We are convinced that the evidence proved that Bosley had knowingly assaulted Merritt.

{¶15} Bosley, under the rubric of the weight and sufficiency of the evidence, also contends that the state failed to prove that he had used a deadly weapon as prohibited by R.C. 2903.11(A)(2). We summarily overrule this assignment of error. Bosley admitted that the knife that he had used was in the kitchen, and officers recovered a box cutter with red blood-like stains on it in the kitchen. There was ample evidence proving that Bosley had used a deadly weapon to cut Merritt.

{¶16} Bosley’s weight-and-sufficiency arguments are overruled.

¹⁰ R.C. 2901.22.

III. Expert Testimony and Bosley's Insanity Defense

{¶17} Bosley also contends that Dr. Charles Lee's testimony that Bosley was not insane at the time he attacked Merritt was based on evidence that had not been admitted at trial—specifically the report of the forensic monitor and records from the Hamilton County Justice Center. Additionally, Bosley argues that Lee's opinions contradicted those reports and records.

{¶18} We note that Bosley did not object to Lee's testimony, so we review this assignment of error for plain error, and we will not reverse his convictions unless, but for any error, the outcome of the proceedings clearly would have been different.¹¹

{¶19} The crux of Bosley's argument is that Lee's opinions did not comport with the report and records that he now protests had not been admitted into evidence. Bosley has not made a showing of plain error—Dr. Lee interviewed Bosley and other witnesses and reviewed Bosley's history. We are convinced that the state properly laid the foundation for Lee to make an assessment on Bosley's not-guilty-by-reason-of-insanity plea notwithstanding the report and records, and, therefore, that Bosley has failed to make a showing of plain error.

{¶20} Bosley also argues that the trial court erred in failing to find him not guilty by reason of insanity. But Lee testified that Bosley's statement that Merritt's daughter should "call 911 [because he was] going to kill her" indicated that Bosley knew what he was doing and the wrongfulness of his actions. Lee also testified that Bosley had presented well at his interviews, and that he had been appropriately taking his medicine ten days before the stabbing. The record also reflects that Bosley had met with his forensic monitor, who had reported that he was doing well, taking

¹¹ See, e.g., *State v. Reid*, 1st Dist. No. C-050465, 2006-Ohio-6450, at ¶16, jurisdictional motion overruled, 113 Ohio St.3d 1468, 2007-Ohio-1722, 864 N.E.2d 654.

his medication, working, and supporting his family, and that he had not displayed any anger-management or temper problems. In fact, the forensic monitor concluded that Bosley was doing so well that he would soon have been relieved of his monitoring obligations.

{¶21} Lee also noted that both just before and after the attack Bosley had no mental-health problems, that he had not been hallucinating, and that the arresting officers had described him as calm and compliant. Our review of the record convinces us that Bosley failed to establish his not-guilty-by-reason-of-insanity defense, and this assignment of error is overruled.

IV. Was a Maximum Term of Imprisonment Proper?

{¶22} Bosley further contends that the trial court erroneously sentenced him to a maximum term of incarceration. His contention is without merit, and this assignment of error is summarily overruled—the sentences were not contrary to law, and the trial court did not abuse its discretion in sentencing Bosley.¹²

V. Felonious Assault and Domestic Violence—Allied Offenses?

{¶23} In his final assignment of error, Bosley argues that the trial court erred in convicting and sentencing him for both domestic violence and felonious assault. R.C. 2941.25 prohibits multiple punishments for the same criminal conduct when “the same conduct by defendant can be construed to constitute two or more allied offenses of similar import.”¹³ But R.C. 2941.25 permits multiple punishments “where the defendant’s conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar

¹² *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

¹³ R.C. 2941.25.

kind committed separately or with a separate animus as to each.”¹⁴ Bosley contends that, under Ohio law, domestic violence and felonious assault are allied offenses of similar import. We disagree and hold that the legislature has sought to protect a separate and distinct societal interest for each offense sufficient to impose multiple punishments.

{¶24} In determining whether offenses are allied offenses of similar import under R.C. 2941.25, Ohio courts ordinarily resort to a two-part test.¹⁵ In the first step, the court compares the elements of both crimes to determine whether they correspond in such a manner that the commission of one crime will necessarily lead to the commission of the other.¹⁶ If the elements correspond in this manner, the crimes are offenses of similar import.¹⁷

{¶25} When offenses are of similar import, the next step requires a review of whether the offenses were committed separately or with a separate animus.¹⁸ If they were, the defendant can still be convicted and sentenced for both offenses.¹⁹

{¶26} Recently, in *State v. Brown*, the Ohio Supreme Court expanded the allied-offenses analysis and created a preemptive exception that supersedes application of the two-step analysis.²⁰ Under *Brown*, a defendant can be found guilty of multiple offenses that might otherwise be considered allied offenses, if in statutorily defining the offenses the legislature has manifested a clear intent to protect separate and distinct societal interests.²¹

¹⁴ *Id.*

¹⁵ *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.

¹⁶ *Id.*, paragraph one of the syllabus.

¹⁷ *Id.*

¹⁸ *Id.* at ¶14.

¹⁹ *Id.*

²⁰ 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶35-40.

²¹ *Id.*

{¶27} In *State v. Klein*, we reasoned that child endangerment protected a separate societal interest distinct from that of both felonious assault and involuntary manslaughter.²² We reached this conclusion because the child-endangerment statute was intended to bestow special protection upon children.²³

{¶28} In determining whether separate societal interests exist for felonious assault and domestic violence, we first look to the Ohio Supreme Court's recent decision in *Ohio v. Carswell* for guidance.²⁴ As *Carswell* noted, "[t]he General Assembly enacted the domestic violence statutes specifically to criminalize those activities commonly known as domestic violence. In contrast to stranger violence, domestic violence arises out of the relationship between the victim and the perpetrator."²⁵

{¶29} The Ohio Supreme Court's reasoning in *Carswell* supports our conclusion that there are separate societal interests underlying the felonious-assault and domestic-violence statutes. The Twelfth Appellate District has likewise made this distinction, holding that a defendant could be convicted and sentenced for felonious assault,²⁶ multiple counts of child endangerment,²⁷ and domestic violence²⁸ because "the legislature manifested an intention to serve different societal interests in enacting these three statutes."²⁹ *Craycraft* reasoned that "R.C. 2919.25, the domestic violence statute, generally protects family or household members from physical harm, * * * [whereas] R.C. 2903.11, the felonious assault statute, was more broadly wrought to protect any person or unborn child, but the harm sustained by the victim must be serious physical harm."³⁰

²² 1st Dist. No. C-080470, 2009-Ohio-2886, ¶29-33.

²³ *Id.*

²⁴ 114 Ohio St.3d 210, 2007-Ohio-3723, 871 N.E.2d 547.

²⁵ *Id.* at ¶30-31.

²⁶ R.C. 2903.11(A)(1).

²⁷ R.C. 2919.22(A) and R.C. 2919.22(B)(1).

²⁸ R.C. 2919.25(A).

²⁹ *State v. Craycraft*, 12th Dist. Nos. CA2009-02-013 and CA2009-02-014, 2010-Ohio-596, ¶108.

³⁰ *Id.*

{¶30} We recognize that the defendant in *Craycraft* was convicted and sentenced for felonious assault under R.C. 2903.11(a)(1), whereas Bosley was convicted under subsection (a)(2) of the same statute, which requires the additional element that the physical harm must have been caused by means of a deadly weapon. But in this case, that distinction is insignificant, given that subsections (a)(1) and (a)(2) generally involve the same type of criminal conduct. Thus in substance, both subsection (a)(1) and subsection (a)(2) protect parallel societal interests that are in contrast with the societal interests protected under the domestic-violence statute.

{¶31} Bosley attacked his live-in girlfriend with a sharp object—and his actions satisfied the elements of both felonious assault and domestic violence. We are convinced that the legislature intended to protect a distinct societal interest in enacting the domestic-violence statute—to protect those who are intimately associated with the assailant—whereas the felonious-assault statute was intended to prevent physical harm to all persons.³¹ We therefore hold that Bosley was properly convicted of both felonious assault³² and domestic violence.³³

{¶32} Having concluded that each of Bosley’s assignments of error is without merit, we affirm the trial court’s judgment.

Judgment affirmed.

CUNNINGHAM, P.J., and DINKELACKER J., concur.

Please Note:

The court has recorded its own entry this date.

³¹ *Klein*, supra, at ¶33.

³² R.C. 2903.11(A)(2).

³³ R.C. 2919.25(A).