

[Cite as *State v. Napier*, 2010-Ohio-563.]

IN THE COURT OF APPEALS OF DARKE COUNTY, OHIO

STATE OF OHIO	:	
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Plaintiff-Appellee	:	C.A. CASE NO. 09CA0002
vs.	:	T.C. CASE NO. 08CRB11209
STACY A. NAPIER	:	(Criminal Appeal from Municipal Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 19th day of February, 2010.

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GRADY, J.:

{¶ 1} Defendant, Stacy A. Napier, appeals from her conviction
for disorderly conduct in violation of R.C. 2911.17(B)(1).

{¶ 2} On November 7, 2008, Ansonia police officers Zimmer,
Barga, and McCans were dispatched to Defendant's residence in
Ansonia. As they approached the residence, the officers heard

Defendant screaming in a loud and high-pitched voice. Defendant's husband told the officers that he called 911 because Defendant had tried to kill herself. Defendant denied that, saying that she just had been trying to get a cat out of a tree.

{¶ 3} Defendant was inside her house when the officers arrived, but stepped outside onto a porch or patio to deal with them. Defendant denounced the officers as "crooked" and demanded that they get off her property. At Defendant's trial, Officer Zimmer stated that Defendant's tone was "harsh" and that she was "cussing."

(T. 9). Officer Barga testified that Defendant was "very irate" and uncooperative. (T. 20). Both officers testified that they asked Defendant several times to settle down and be quiet.

{¶ 4} Defendant began to go back inside her house. Concerned about her condition and the reported suicide attempt, Officer Barga told Defendant she should not go inside. Defendant nevertheless went in, followed by Officer Barga, who testified: "I opened the door, (and) went in after her. She turned around and said, 'you fat bitch, get out of my house' and pushed me through the screen door." (T. 22). Officer Zimmer also testified that Defendant pushed officer Barga back outside the door.

{¶ 5} Defendant was arrested for disorderly conduct and placed in the officers' police cruiser. Officer Zimmer testified that he noticed an odor of alcohol from Defendant when they were in

the cruiser. Officer Barga testified that Defendant then "had a strong odor of alcohol beverage coming from about her." (T. 23). Officer Barga testified that she first noticed the odor from Defendant when they were talking on the porch or patio.

{¶ 6} Officer Barga was asked what other "indicators" of alcohol impairment she noticed. Officer Barga did not recall any, except that Defendant was "[j]ust very belligerent and out of control." (T. 24). She added that when Defendant was placed in the cruiser Defendant "was banging her head on the glass, and I don't know if she was elbowing the door or what she was doing."

(*Id.*) Defendant was twice asked to stop, and then did. Officer Barga testified that, in her opinion, Defendant was intoxicated.

{¶ 7} Defendant was found guilty by the court, which imposed a fine of \$150 and a thirty day jail sentence. The sentence was ordered suspended. Defendant filed a notice of appeal.

{¶ 8} Before proceeding to the error Defendant assigns, we caution the State to in the future comply with App.R. 19, which governs the form of briefs. Division (A) of that rule requires that, except for quoted matters, briefs shall be double-spaced between each line of text. The State's brief is instead single-spaced throughout.

FIRST ASSIGNMENT OF ERROR

{¶ 9} "THE CONVICTION SHOULD BE REVERSED BECAUSE THE EVIDENCE

SUPPORTING THE INTOXICATION ELEMENT OF THE OFFENSE WAS INSUFFICIENT."

{¶ 10} A person is not guilty of a criminal offense unless the person's liability is based on conduct that includes either a voluntary act or an omission to perform an act or duty that the person is capable of performing, and the person has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section of the Revised Code defining the offense. R.C. 2901.22(A). The standard applicable to that determination is the reasonable doubt standard. R.C. 2901.05(A).

{¶ 11} When deciding whether evidence that was offered at trial was sufficient as a matter of law to support a guilty verdict, a reviewing court must determine "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 beyond a reasonable doubt." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 12} Defendant was convicted of engaging in disorderly conduct in violation of R.C. 2911.17(B)(1). That section states:

{¶ 13} "No person, while voluntarily intoxicated, shall . . . in a public place or in the presence of two or more persons, engage in conduct likely to be offensive or to cause inconvenience, annoyance, or alarm to persons of ordinary sensibilities, which

conduct the offender, if the offender were not intoxicated, should know is likely to have that effect on others.”

{¶ 14} Defendant argues that the evidence was insufficient to prove that she was intoxicated. The disorderly conduct statute focuses not on the drunken state of the accused but rather on the accused’s conduct while drunk. *State v. Graves*, 173 Ohio App.3d 526, 2007-Ohio-4904. Furthermore, whether an individual is intoxicated within the meaning of the disorderly conduct statute is determined from the perspective of an ordinary observer. R.C. 2917.11(D); *McCurdy v. Montgomery County* (C.A. 6, 2001), 240 F.3d 512. Addressing the issue in the context of the Liquor Control Act, which prohibits sales of liquor to intoxicated persons, the Franklin County Court of Appeals wrote:

{¶ 15} “For many years it has been a controverted question as to when a person is intoxicated. Different courts have determined different standards. We think it a fair statement to say that the person claimed to be intoxicated must be so far under the influence that his conduct and demeanor are not up to standard. We also think it would be fair to say that such conduct or demeanor should be reasonably discernible to a person of ordinary experience; at least, as applicable to this case.” *State ex rel. Gutter v. Hawley* (1942), 44 N.E.2d 815, 819; 36 Ohio Law Abs. 594.

{¶ 16} Defendant, citing *State v. Spillers* (Mar. 24, 2000),

Darke App. No. 1504, argues that evidence of the odor of alcohol the officers said they detected was insufficient to demonstrate intoxication. The issue in *Spillers* was whether the defendant was impaired for purposes of R.C. 4519.11, which presents the question in a different context. We held that absent additional evidence of impaired driving, an odor of alcohol on the driver was insufficient probable cause to support an arrest for an R.C. 4511.19 violation. That further proof of intoxication is not absent from the case before us. Defendant engaged in conduct which reasonable minds could find was a product of her intoxication.

{¶ 17} Defendant also relies on *Cleveland v. Swiecicki*, 149 Ohio App.3d 77, 2002-Ohio-4027. In that case, the defendant heckled a player at a baseball game. The defendant was also seen to have carried several beers to his seat during the game, and to be holding a beer in his hand when he heckled the player. The appellate court held that evidence the Defendant carried or held beers, absent supporting breath-alcohol or blood alcohol evidence, was insufficient to prove intoxication. However, the court put more significance on the fact that the heckling involved was insufficient to cause inconvenience, annoyance, or alarm to person of ordinary sensibilities, which is the conduct in which the offender must have engaged while drunk in order to be convicted of disorderly conduct.

{¶ 18} Such evidence is not lacking in the present case. Reasonable minds could find that Defendant's screaming, her harsh and irate manner, and her denunciation of the officers as "crooked," caused annoyance, inconvenience, and/or alarm to the officers who where dispatched to Defendant's home on official business. Coupled with evidence of the odor of alcohol about her to which the officers testified, reasonable minds could find that Defendant was intoxicated.

{¶ 19} Even were we to find that such evidence was insufficient to prove intoxication circumstantially, we would find that the matter was proved by direct evidence. Officer Barga was asked whether "there is any doubt in your mind as to whether or not the Defendant was or was not intoxicated?" She replied: "In my opinion, she was intoxicated." (T. 25). There was no objection to that testimony.

{¶ 20} Evid.R. 701 states:

{¶ 21} "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

{¶ 22} A lay opinion is rationally based on the witness's

perception if it is derived from firsthand knowledge of the subject and involves an opinion or inference that a normal person would form on the basis of the observed facts. Weisenberger's Ohio Evidence Treatise (2009 Ed.) §701.3. The opinion is "helpful" if it aids the trier of fact in determining a matter in issue. *Id.*, §701.4,

{¶ 23} Officer Barga's opinion satisfies the requirements that Evid.R. 701 imposes. Therefore, her opinion was admissible to prove intoxication. Then, the only issue remaining is the weight to be given that evidence. *State v. Hopfer* (1996), 112 Ohio App.3d 521, 556. Construing that evidence in a light most favorable to the prosecution, *Jackson v. Virginia*, we find that the evidence was sufficient to prove the element of intoxication in R.C. 2907.11(B)(1), beyond a reasonable doubt.

{¶ 24} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 25} "THE EVIDENCE SHOULD ALSO BE DEEMED INSUFFICIENT BECAUSE THE STATE FAILED TO PROVE THAT THE 'CONDUCT' HERE OCCURRED IN A PUBLIC PLACE OR IN FRONT OF TWO OR MORE PERSONS."

{¶ 26} Defendant argues that her conduct did not occur in a "public place" for purposes of R.C. 2917.11(B)(1), and the State does not dispute the point.

{¶ 27} Alternatively, R.C. 2917.11(B)(1) prohibits the conduct

defined therein when it occurs "in the presence of two or more persons." Defendant concedes that three police officers were present, but argues that they should not count as persons for purposes of the disorderly conduct statute because "[t]he very essence of an officer's job is to deal with unsavory acts and, sometimes, unsavory people." (Brief, p. 7).

{¶ 28} The gist of Defendant's argument is that police officers, unlike other persons, are not likely to be offended or inconvenienced, annoyed, or alarmed by conduct that might otherwise be disorderly. That contention imposes a subjective standard that R.C. 2917.11(B) (1) rejects, by providing that whether such reactions are likely to result from a defendant's conduct is determined according to the reactions that "persons of ordinary sensibilities" would have to that conduct. The standard does not make an exception for the thicker skins police officers are expected to develop. Police officers therefore "count" as persons for purposes of R.C. 2917.11(B) (1).

{¶ 29} The second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 30} "THE EVIDENCE TO SUPPORT THE CONVICTION AS A FOURTH DEGREE MISDEMEANOR WAS INSUFFICIENT BECAUSE APPELLANT DID NOT 'PERSIST IN DISORDERLY CONDUCT AFTER REASONABLE WARNING OR REQUEST TO DESIST.'" "

{¶ 31} A violation of the disorderly conduct statute is a minor misdemeanor. R.C. 2917.11(E) (2). The offense is instead a fourth degree misdemeanor if "[t]he offender persists in disorderly conduct after reasonable warning or request to desist." R.C. 2917.11(E) (3). Defendant was convicted of disorderly conduct as a fourth degree misdemeanor.

{¶ 32} Officer Zimmer testified that all three officers told Defendant to be quiet. (T. 13). Officer Barga, when asked whether she asked Defendant "to settle down or be quiet" replied, "Many times." (T. 21). Officer Barga explained that was "[p]ossibly three or four times at least." (*Id.*)

{¶ 33} Reasonable minds could infer from the foregoing evidence that, following requests to desist, Defendant continued to "engage in conduct likely to be offensive or to cause inconvenience, annoyance, or alarm to persons of ordinary sensibilities." R.C. 2917.11(B) (1). The evidence was therefore sufficient to elevate Defendant's conviction from a minor misdemeanor to a fourth degree misdemeanor per R.C. 2917.11(E) (3).

{¶ 34} Defendant further argues that the nature or quality of her conduct did not rise to the level of an R.C. 2917.11(B) (1) violation. That argument and the contentions it involves concern the weight of the evidence and are outside the sufficiency of evidence error Defendant assigns, and will therefore be

disregarded.

{¶ 35} The third assignment of error is overruled. The judgment of the trial court will be affirmed.

DONOVAN, P.J. And FAIN, J., concur.

Copies mailed to:

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Hon. Julie L. Monnin