[Cite as *Cleveland v. Johnson*, 2019-Ohio-3286.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

CITY OF CLEVELAND, :

Plaintiff-Appellee, :

No. 107930

v. :

JOHN JOHNSON, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: August 15, 2019

Criminal Appeal from the Cleveland Municipal Court
Case No. 2018-CRB-010412

Appearances:

Barbara Langhenry, City of Cleveland Director of Law, Karrie D. Howard, Chief Prosecutor, and Marco A. Tanudra, Assistant City Prosecutor, *for appellee*.

Patrick S. Lavelle, *for appellant*.

KATHLEEN ANN KEOUGH, J.:

{¶ 1} Defendant-appellant, John Johnson, appeals from the trial court's judgment finding him guilty of domestic violence. Finding no merit to the appeal, we affirm.

I. Background

{¶ 2} Johnson was charged in a two-count complaint. Count 1 charged domestic violence in violation of R.C. 2919.25, a first-degree misdemeanor. Count 2 charged unlawful restraint in violation of Cleveland Codified Ordinances 621.08, a third-degree misdemeanor. Johnson pleaded not guilty and the case proceeded to a bench trial.

{¶ 3} Cleveland Police Officer Ashley Graham testified that on June 26, 2018, she received a priority call regarding domestic violence at 4661 East 173rd Street. The dispatcher reported that a female had been assaulted and was having a seizure. Graham said that the police respond with urgency to priority calls to determine whether there is an immediate threat, where the suspect is, and whether medical attention is needed for the victim.

{¶ 4} Graham testified that the police responded to a park near the East 173rd address because dispatch advised that the female victim had left the home and was at the park. Graham said that when they arrived at the park, the victim, who was "clearly upset" and "distraught," exited an SUV and told them she had called the police because she had been assaulted by Johnson. Graham testified that the police interviewed the victim to assess the situation. They learned that the victim and Johnson had a child together. Graham said the victim told them that Johnson was still at her house, "tearing [it] up," and she wanted him gone "before he destroyed her house." Graham testified that the victim was also concerned that Johnson would still be at the home when her other children returned home. Officer Graham

testified that in light of what the victim told her, she called a supervisor, who responded to the house.

{¶ 5} Officer Graham testified that after interviewing the victim, she and her partner went to the house on East 173rd Street, where they found Johnson in the living room of the home. Johnson told them that he had called the police because he wanted their assistance with removing the living room furniture from the house; he said he had receipts to prove he had purchased the furniture. Graham testified that Johnson made no mention of any assault until after he was detained in the police car, when he said that he and the victim had gotten into a struggle after the victim attacked him, and he had scratches on his chest and back.

{¶ 6} Officer Graham testified that the police arrested Johnson after speaking with him and the victim and observing their injuries. Graham identified state's exhibit Nos. 3 and 4 as pictures the police took of the victim's injuries on June 26, 2018. The photographs revealed scratch marks and bruising on the victim's neck. Graham testified that Johnson admitted that the victim had scratched him, and that she (Graham) observed scratches on Johnson's chest and back that were consistent with the victim's statement that she had scratched Johnson as she was trying to fight him off while he was holding her down.

{¶ 7} Officer Graham testified that she has been a Cleveland police officer for five years, and that she handles four to five priority domestic violence calls each week. She said that she receives specialty training every year regarding handling domestic violence cases, and that in light of her training and experience, she

concluded that the woman she spoke with in the park was a victim of domestic violence.

{¶ 8} Officer Graham testified that she was wearing a body camera on June 26, 2018, and that state's exhibit No. 1, the video from her body camera, accurately reflected her interactions with the victim and Johnson that day. The prosecutor then made an oral motion to admit the video. The trial court admitted the video over defense counsel's objection, finding that the victim's statements were made to assist the police with an ongoing emergency and thus were not barred by the Confrontation Clause. The prosecutor then played the video in court.

{¶ 9} On cross-examination, Officer Graham testified that the victim followed the police in her SUV when they went to the house after they interviewed her at the park. Graham said the victim remained in her SUV while the police spoke with Johnson in the house, and that when the police removed Johnson from the house and put him in the backseat of the zone car, she yelled out that Johnson had her keys and cell phone.

{¶ 10} Cleveland Police Officer Tonya Torres testified that when she encountered Johnson at the home on East 173rd Street on June 26, 2018, he was sweating and "looked like he had been in an altercation." Torres said that Johnson told the police that the mother of his child had attacked him, so the police put him in their zone car for his protection. Upon further investigation, they determined that Johnson was the primary aggressor. Torres testified that the police decided to arrest Johnson because his injuries were consistent with the victim's statement to the

police that she tried to defend herself as Johnson was on top of her, holding her down.

{¶ 11} After denying Johnson's Crim.R. 29 motion for acquittal, the trial court found him guilty of Count 1, domestic violence, and not guilty of Count 2, unlawful restraint. The court subsequently sentenced him to 180 days of incarceration, suspended, and five years of community control. This appeal followed.

II. Law and Analysis

A. Confrontation Clause Issues

{¶ 12} In his third assignment of error, Johnson contends that his constitutional right to confront the witnesses against him was violated because although the victim did not testify, the trial court improperly allowed the prosecutor, through Officer Graham's testimony, to introduce hearsay statements of the victim in which she identified him as her assailant.[1] Because our resolution of this assignment of error impacts Johnson's other assigned errors, we consider it first.

{¶ 13} The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct.

---

[1] Evid.R. 801(C) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 802 generally deems hearsay inadmissible unless the evidence falls under a specific exception to the hearsay prohibition. *State v. Montgomery*, 148 Ohio St.3d 347, 2016-Ohio-5487, 71 N.E.3d 180, ¶ 87.

1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that the admission of a testimonial out-of-court statement of a witness who does not appear at trial violates the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.

{¶ 14} The Confrontation Clause does not bar the admission of hearsay statements that are not testimonial. *Davis v. Washington*, 547 U.S. 813, 823, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534, ¶ 21. Where nontestimonial hearsay is at issue, the Confrontation Clause is not implicated and need not be considered. *Whorton v. Bockting*, 549 U.S. 406, 420, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007).

{¶ 15} Although it has not defined "testimonial," in *Crawford*, the U.S. Supreme Court stated generally that the core class of statements implicated by the Confrontation Clause includes statements "made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial." *Crawford* at 52. The Supreme Court found that at a minimum, testimonial evidence includes prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and statements made during police interrogations. *Crawford* at 68.

{¶ 16} The Supreme Court subsequently clarified that statements made during a police interrogation are nontestimonial if made under circumstances indicating the purpose of the interrogation is to assist the police with an ongoing emergency. *Davis* at 822. Statements to law enforcement are testimonial where

there is no ongoing emergency and the primary purpose of the interrogation is to establish past events for later prosecution. *Id.*

{¶ 17} Johnson concedes there is a "plausible argument" that the victim's statements to the police officers at the park were made during an ongoing emergency. He contends there was no longer an ongoing emergency when the police arrived at the house on East 173rd Street, however, because he and the victim were separated, he was under police control, the crime scene was secured, and there was no immediate danger to the victim or her children. Therefore, he contends, the trial court erred in allowing Officer Graham to testify about statements made by the victim at the house that identified him as her assailant. Johnson asserts that without this identification testimony from Officer Graham, there would have been no evidence that he was the assailant and the case would have had to have been dismissed.

{¶ 18} It is apparent that the victim's statements to the police at the park were made to assist the police with an ongoing emergency. *Davis* identified four characteristics of a statement that meets the emergency exception: (1) the witness describes contemporaneous events rather than events that occurred hours earlier, (2) an objective emergency exists, (3) the questions are necessary to resolve the emergency, and (4) the interview is of an informal nature. *State v. Clark*, 2016-Ohio-4561, 67 N.E.3d 182, ¶ 38, (8th Dist.), citing *Davis*, 547 U.S. at 826-830, 126 S.Ct. 2266, 165 L.Ed.2d 224.

{¶ 19} Here, the record demonstrates that the victim called the police shortly after the attack, and the police arrived at the park shortly after the 911 call and interviewed her to assess the situation. The victim told the police that she had been assaulted by Johnson, and that although the assault was over, Johnson was still at her house, "tearing [it] up." She also said that she was concerned about what would happen if her children came home while Johnson was still there. Thus, it is apparent that the victim's primary purpose in talking to the police was to receive assistance, and the primary purpose of the police in talking to her was to assist her — not to develop testimony about past events for a criminal proceeding.

{¶ 20} Because the victim's statements to the police at the park were made to assist the police with an ongoing emergency, they were not testimonial and thus are admissible if they fall within a hearsay exception to the evidence rules. The excited utterance exception to the hearsay rule allows the admission of a hearsay "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Evid.R. 803(2). The victim's statements to the police at the park, made while the victim was still under the stress of the excitement caused by the domestic assault, qualify as an excited utterance. Accordingly, the trial court properly admitted them into evidence.

{¶ 21} Johnson contends, however, that because there was no ongoing emergency during the police interaction with him at the house, any statements made by the victim at the house identifying him as her assailant were testimonial and

admitted in violation of the Confrontation Clause, requiring reversal of his conviction. Even assuming the statements were improperly admitted, however, we find harmless error in their admission.

{¶ 22} Confrontation Clause claims are subject to harmless-error analysis. *State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028, ¶ 178, citing *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 192. Constitutional error is harmless if it is determined to be harmless beyond a reasonable doubt. *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 78, citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). "Whether a Sixth Amendment error was harmless beyond a reasonable doubt is not simply an inquiry into the sufficiency of the remaining evidence. Instead, the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.*, citing *Chapman* at 23.

{¶ 23} Johnson's argument that there was no evidence identifying him as the perpetrator other than the victim's identification at the house fails to acknowledge that upon direct examination, Officer Graham testified that the victim told the police during the interview at the park that she had been assaulted by Johnson. (Tr. 11.) Johnson's argument also ignores his own admission that he had engaged in a fight with the victim, and Officer Torres's testimony that when she encountered Johnson at the house, "he looked like he had been in an altercation." (Tr. 59.) It also ignores Officer Graham and Officer Torres's testimony that they

observed scratches on Johnson's chest and back that were consistent with the victim's statement that she had scratched Johnson as he held her down and she tried to fight him off. The factfinder could easily have inferred from the officers' testimony, even without the victim's identification at the house of Johnson as her assailant, that Johnson was indeed the perpetrator of the domestic violence assault.

{¶ 24} Thus, Johnson's argument that the case would have been dismissed "if the trial court had properly excluded the victim's identification at the crime scene under the Confrontation Clause" has no merit. Even without Officer Graham's testimony and the body camera footage about the victim's identification at the house of Johnson as her assailant, there was significant and sufficient evidence that established Johnson's identity as the perpetrator of the assault. Accordingly, even if the evidence about the victim's identification of Johnson at the house was improperly admitted, there is no reasonable probability the evidence contributed to Johnson's conviction, and thus any error in its admission is harmless beyond a reasonable doubt. The third assignment of error is therefore overruled.

B. Sufficiency of the Evidence

{¶ 25} Johnson was convicted of domestic violence in violation of R.C. 2919.25(A), which provides that "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member."

{¶ 26} In his first assignment of error, Johnson contends that his conviction was against the manifest weight of the evidence. In his second assignment of error, he asserts there was insufficient evidence to support his conviction.

{¶ 27} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 12. An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is 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 proven beyond a reasonable doubt. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).

{¶ 28} In contrast to a sufficiency argument, a manifest weight challenge questions whether the state met its burden of persuasion. *Bowden* at *id*. A reviewing court "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 reversed and a new trial ordered." *Thompkins* at 388. A conviction should be reversed as against the manifest weight of the evidence only in the most "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶ 29} Johnson makes the same argument with respect to both the sufficiency and manifest weight of the evidence: he contends the city never established he was the perpetrator of the domestic violence because (1) the victim's

statement, made during a "cold stand" identification when he was escorted from the house to the police car, that Johnson had her keys and cell phone was not a sufficient identification; and (2) Officer Graham's hearsay testimony regarding the victim's identification of him at the house was improperly admitted. With respect to both assignments of error, Johnson asserts that but for the improperly admitted evidence regarding the identification, he would not have been convicted. Johnson's argument has no merit.

{¶ 30} First, Johnson's assertion that the victim was placed in a police car at the house and asked to identify him is not supported by the record. Officer Graham testified that the victim followed the police in her SUV from the park to the house and then waited in her vehicle outside the house while the police were inside, and that she yelled out that Johnson had her keys and cell phone when he was escorted out of the house. There is nothing in the record suggesting that the victim was ever placed in a police car and asked to identify Johnson as her assailant. With respect to Officer Graham's testimony regarding the victim's identification of Johnson at the house as her assailant, we have already concluded that even without this evidence, assuming it was wrongly admitted, there was more than sufficient evidence establishing Johnson's identity as the perpetrator.

{¶ 31} Johnson's conviction for domestic violence was supported by sufficient evidence and was not against the manifest weight of the evidence. The second and third assignments of error are therefore overruled.

{¶ 32} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cleveland Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, JUDGE

EILEEN T. GALLAGHER, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR