[Cite as *State v. Ward*, 2010-Ohio-4614.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-293 (C.P.C. No. 10CR-02-694)
Jerry Ward,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 28, 2010

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Blaise G. Baker, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} On August 21, 2009, officers from the Columbus Division of Police responded to a domestic violence call involving Jerry Ward and Reba Taylor (a/k/a Rebecca Adams or Rebecca Ward). Taylor is Ward's purported wife, and the mother of two of his children. Officers arrested Ward, and charged him with domestic violence; at the time, he already had five prior domestic violence convictions. Before trial, Ward stipulated to two of the prior convictions, which meant that the present charge was

enhanced from a first-degree misdemeanor crime to a third-degree felony.[1] The case was tried to a jury, which heard testimony from the victim's sister, the arresting officer(s), and a married couple who lived next door, one of whom told the 9-1-1 operator that she saw Ward beating his wife, and the other testified to witnessing Ward appearing to choke the victim until her "eyes rolled back in her head." The jury found Ward guilty on the sole charge in the indictment, and the trial court sentenced him to a five-year prison term, the maximum prison sentence for a third-degree felony conviction.

{¶2} On April 23, 2010, appellate counsel for Ward filed a motion for leave to file a delayed appeal, pursuant to App.R. 5(A), because of a supposed clerical error that prevented receipt of the trial court's final judgment. For good cause shown, we granted the motion, and we now consider two assignments of error, which appellant Ward has presented for review. The first assignment of error reads:

> [I.] The trial court erred in that Appellant's conviction was against the manifest weight of the evidence and was not supported by the sufficiency of the evidence in violation of the due process clause of the Fourteenth Amendment to the [U.S. Constitution,] and Article 1, Sections 1, 10, and 16 of the Ohio Constitution.

{¶3} In criminal cases, the weight and sufficiency of the evidence supporting the trial court's verdict are two separate inquiries. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. *Sufficiency of the evidence* is a term of art that refers to the legal standard that is applied to determine whether a case may go to the jury, or whether the State introduced evidence supporting each element of the crime charged. Id. (citing Black's Law Dictionary (6th ed.1990) 1433). Whether the evidence is legally sufficient to

[1] *See* R.C. 2919.25(D)(4).

sustain a verdict is a question of law. *State v. Cassell*, 10th Dist. No. 08AP-1093, 2010-Ohio-1881, ¶37 (citing *Thompkins*).

{¶4} To determine whether the evidence is sufficient to sustain the jury's verdict, an appellate court examines the evidence in a light most favorable to the prosecution, and then determines whether any rational trier of fact could have found that the prosecution proved the essential elements of the crime(s) beyond a reasonable doubt. *Cassell* (citing *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; and *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78). In evaluating the sufficiency of the evidence, we do not determine whether the evidence is believable, but rather, if believed, whether the evidence supports the conviction. See *Cassell* (citing *Jenks*); *Thompkins* at 390 (Cook, J., concurring); *Yarbrough* at ¶79 (noting that appellate courts do not evaluate witness credibility when reviewing the sufficiency of the evidence). Finally, a court of appeals will not disturb a jury's verdict unless it determines that reasonable minds could not arrive at the conclusion reached by the jury. *State v. Treesh,* 90 Ohio St.3d 460, 484; *Jenks* at 273.

{¶5} By contrast, when determining whether a verdict is against the manifest weight of the evidence, the court of appeals sits as a "thirteenth juror," reviewing the entire record, weighing all the evidence and reasonable inferences drawn therefrom, and considering the credibility of the witnesses to resolve any conflicts therein. *Thompkins* at 387 (quoting *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211; *State v. Martin* (1983), 20 Ohio App.3d 172, 175). When resolving apparent conflicts or inconsistencies in the evidence, the reviewing court may not disturb the jury's verdict unless the record shows that the jury "clearly lost its way," creating "such a manifest miscarriage of justice

that the conviction must be reversed and a new trial ordered." *Thompkins* at 378 (quoting *Martin*). Reversal on manifest weight grounds is reserved for only the most exceptional case where the evidence weighs heavily against the conviction. Additionally, the Ohio Constitution provides that the court of appeals may not reverse a jury's verdict on the manifest weight of the evidence unless all three appellate judges concur in the decision to reverse. See Section 3(B)(3), Article IV, Ohio Constitution ("No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause."); see also *Thompkins* at paragraph four of the syllabus.

{¶6} Turning to the evidence in this case, we will first examine the sufficiency of the evidence supporting appellant's conviction of domestic violence. To do so, we must compare the facts found by the jury with the elements of the crime charged in the indictment.

{¶7} Under Ohio law, the elements of domestic violence are to: (1) knowingly; (2) cause or attempt to cause physical harm; (3) to a family or household member. R.C. 2919.25(A). For purposes of the statute, the legislature has defined "family or household member" very broadly, to include anyone residing with the accused, past or present, a spouse, ex-spouse, or *apparent*[2] spouse, or one who is the other natural parent of the accused's child(ren). See R.C. 2919.25(F).

{¶8} In this case, two witnesses, next-door neighbors Willard and Misty Ruble, testified that appellant knowingly caused or attempted to cause physical harm to the

[2] Any individual who has held him or herself out to others as a married couple, or carried on in a manner such that a reasonable person would believe that the couple is married. *See* R.C. 2919.25(F).

victim. (Tr. 98, 115.) Although Mrs. Ruble testified that she could not remember calling 9-1-1 on August 21, 2009, the State introduced a recording of the 9-1-1 call as evidence. Therein, a woman identifying herself as Mrs. Ruble stated that her neighbor was beating up his wife. (Tr. 101.) Despite the forgetfulness of Mrs. Ruble, and the apparent inconsistencies between her initial statement to the police and her trial testimony, the recording of her 9-1-1 call was telling. Mr. Ruble also testified that he witnessed appellant punch the victim and that he witnessed appellant placing the victim in a chokehold. (Tr. 115, 126.)

{¶9} Appellant argues that the purported eyewitness testimony of Mr. and Mrs. Ruble cannot be reconciled with the testimony of Officer Matthew Gasaway, who stated that he saw no visible injuries on the victim. (Tr. 74.) However, Officer Gasaway also testified that appellant admitted to him that he and the victim had been fighting or wrestling. (Tr. 58.) Moreover, R.C. 2919.25 does not require the State to prove that the victim sustained any actual injury, "since a defendant can be convicted of domestic violence for merely *attempting* to cause physical harm." *State v. Nielsen* (1990), 66 Ohio App.3d 609, 612; *State v. Blonski* (1997), 125 Ohio App.3d 103, 114 ("A defendant may be found guilty of domestic violence even if the victim sustains only minor injuries, or sustains no injury at all.").

{¶10} Next, appellant argues that the State failed to present any direct evidence that the victim was a family or household member. We disagree. The testimony of both Mr. and Mrs. Ruble was direct evidence that Ward and Taylor were married, or appeared to be married. (Tr. 29–33, 115–16, 133.) Ann Taylor, the victim's sister, testified that she believed that appellant and the victim were legally married at one time, that they had two

children together, that they had lived together periodically, and had even been co-lessees of a south campus-area apartment. (Tr. 33–34.) Further, she testified that the victim sometimes used appellant's last name. (Tr. 34.) To satisfy the elements of R.C. 2919.15(A), the State is not required to introduce a marriage license, or produce the testimony of the minister or justice of the peace who performed the couple's alleged ceremony. See, e.g., *State v. Williams*, 79 Ohio St.3d 459, 1997-Ohio-79, paragraph one of the syllabus ("The offense of domestic violence, as expressed in R.C. 2919.25(E)(1)(a) and related statutes, arises out of the relationship of the parties rather than their exact living circumstances.") (citing *State v. Miller* (1995), 105 Ohio App.3d 679, 686 (holding that the evidence supported a finding that the victim was "a family or household member," even though both testified that their relationship was purely sexual, and that at no time did they share any living expenses). In fact, the legislature intended just the opposite, by including extremely broad definitions of the terms family or household member within the statute.

{¶11} Accordingly, it appears from the evidence before us that there was sufficient evidence supporting appellant's conviction, and the verdict was not against the manifest weight of the evidence. The first assignment of error is overruled. The second assignment of error reads:

> [II.] The trial court erred when it improperly exposed the jury to inadmissible hearsay in violation of the Ohio Rules of Evidence.

{¶12} Appellate courts review a trial court's decision to permit or exclude evidence using an abuse of discretion standard. See, e.g., *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus; see also *State v. Swann*, 119 Ohio St.3d 552, 2008-

Ohio-4837, ¶33 (citing *State v. Sumlin*, 69 Ohio St.3d 105, 108, 1994-Ohio-508), on remand, *State v. Swann*, 10th Dist. No. 06AP-870, 2008-Ohio-6957 ("[W]e hold that the trial court abused its discretion in concluding that the evidence proffered * * * was insufficient to confirm the trustworthiness of the third-party's confession."). This is because the trial court is in a much better position than we are to evaluate the authenticity of evidence, and assess the credibility and veracity of witnesses. See, e.g., *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶129; *State v. Chandler*, 10th Dist. No. 09AP-394, 2009-Ohio-5858, ¶22 (noting that the trial court is in a better position to weigh the credibility of witnesses). The trial court is, thus, vested with broad discretion in evidentiary matters, and the court of appeals will not disturb the trial court's ruling absent an abuse of discretion. See, e.g., *Sage*; *State v. Hairston*, 10th Dist. No. 08AP-735, 2009-Ohio-2346, ¶27. An abuse of discretion is more than an error of law or in judgment; rather, it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. See, e.g., *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107.

{¶13} Generally speaking, "hearsay" is an out-of-court statement that is offered to prove the truth of the matter asserted. See, e.g., Evid.R. 801(C); Black's Law Dictionary (8th ed.2004) 427. In reality, hearsay occurs when a witness gives testimony relating to a statement made by someone else—which must have been made out-of-court, and which is therefore dependent upon the credibility of someone other than the witness—where the statement is being offered to prove the statement's own substance. See, e.g., *State v. Smith*, 87 Ohio St.3d 424, 434, 2000-Ohio-450 ("[T]hese statements were not hearsay, because they were not offered to prove the truth of the matter asserted (*i.e.*-that Lally would feel bad, that he knew where Lally's parents lived, that it would be a shame, *etc*.").

A statement is not hearsay if it is offered to prove something other than the truth of its contents—e.g., that the declarant made the statement. *State v. Keith*, 79 Ohio St.3d 514, 536, 1997-Ohio-367 (quoting *State v. Williams* (1988), 38 Ohio St.3d 346, 348); accord *State v. Santiago*, 10th Dist. No. 02AP-1094, 2003-Ohio-2877, ¶22–24. Under Evid.R. 802, hearsay is generally inadmissible, unless one of the exceptions in Evid.R. 803 or 804 applies to the proffered statement. The underlying rationale of the so-called hearsay rule is trustworthiness. *Peppers v. Dept. of Rehab. and Corr.* (1988), 50 Ohio App.3d 87, 88.

{¶14} In this case, counsel alleges that the trial court improperly allowed hearsay testimony by Ann Taylor, the victim's sister, regarding her current living situation—that the victim was, at that time, living in a "battered shelter, hidden for safety."

> [THE PROSECUTOR]: Do you know where Ms. Taylor is right now --
>
> A. Yes.
>
> Q. -- Reba Taylor? Generally where is she?
>
> A. In a battered shelter, hidden for safety.

(Tr. 31.)

{¶15} While the witness's statement may have been irrelevant, it was not hearsay. The alleged fact that the victim was located in any particular place is not a statement offered for the truth of the statement; rather, it is an independent, verifiable statistic based upon personal observation. Furthermore, the prosecutor did not pose a question that was reasonably calculated to elicit a hearsay statement—he simply asked about the victim's whereabouts. If trial counsel was concerned about the witness's answer to the question, the proper thing to do would have been to object and make a motion to strike the

statement; however, counsel said nothing. As a result, counsel did not preserve this issue for appeal, and has waived its review for all but plain error. Crim.R. 52; see *State v. Long* (1978), 53 Ohio St.2d 91, 96; *State v. Adams* (1995), 106 Ohio App.3d 139, 144 ("Objections concerning the admissibility of evidence are waived and may not be raised on appeal if not made at the time of trial unless plain error has occurred.").

{¶16} Plain error is that which is so serious that it affects the outcome of the trial. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long* at 97. By contrast, the United States Supreme Court has held that where evidence was improperly admitted in derogation of a criminal defendant's constitutional rights, that error is harmless beyond a reasonable doubt if the remaining evidence alone comprises overwhelming proof of the defendant's guilt. *Harrington v. California* (1969), 395 U.S. 250, 254, 89 S.Ct. 1726.

{¶17} Given the testimony of the various witnesses who saw appellant punching the victim, and placing her in a chokehold, the evidence of his guilt was overwhelming. Thus, even if the trial court did err in allowing testimony regarding the victim's presence in a battered women's shelter, such error would have been harmless, and certainly would not rise to the level of plain error. Counsel for appellant also argues that testimony from two police officers was inadmissible hearsay. Officer Chad Caudill testified that witnesses to the interaction between Ward and his wife/girlfriend stated that a male and female were outside fighting. Defense counsel, at trial, did not object, making this the testimony subject to a plain error review on appeal. Given the other testimony presented at trial, the

testimony that witnesses stated that Ward was outside fighting with his wife/girlfriend could not have affected the outcome of the trial. Therefore, no plain error occurred.

{¶18} Officer Gasaway testified that Reba Taylor gave him a detailed statement about how the assault occurred. At the time of Ms. Taylor's statements, she was visibly fearful and upset. The statements were excited utterances and therefore admissible under Evid.R. 803(2), which reads:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (2) **Excited utterance**. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

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

{¶20} Having overruled both assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and FRENCH, JJ., concur.

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