[Cite as *State v. Kingery*, 2010-Ohio-1813.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-08-014
	:	O P I N I O N
- vs -		4/26/2010
	:	
BRADLEY R. KINGERY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 09 CR 100077

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RINGLAND, J.

{¶1} Defendant-appellant, Bradley R. Kingery, appeals his conviction from the Fayette County Court of Common Pleas for domestic violence, a felony of the third degree, in violation of R.C. 2919.25(A). We affirm appellant's conviction.

{¶2} Appellant and his girlfriend, Melissa Tackett, were living together at 918½ Maple Street in Washington Court House on March 17, 2009. On the evening of March 17, 2009, Ms. Tackett was watching a movie at the nearby residence of her friend, Patsy Adams. During that time, appellant was at the home of Adam Queen. At approximately

11:00 p.m., Ms. Tackett and Ms. Adams planned to pick up appellant from Mr. Queen's residence. As they were getting into a van, appellant walked up to the vehicle and told Ms. Tackett he was going home.

{¶3} As soon as Ms. Tackett and appellant arrived back at their apartment, they began arguing about a situation regarding Mr. Queen. The argument quickly escalated and became physical. According to the testimony at trial, appellant grabbed Ms. Tackett's throat, pushed her around, knocked her into a two by four, taped her mouth shut, held her nose and mouth shut numerous times, and stuck his fingers in her mouth, attempting to rip out her tongue. In addition, Ms. Tackett tried to escape the apartment four times, and got through the door twice. Appellant caught her, however, and "busted" her head back on the steps the first time and "cracked [her] head off the pavement" the second time. According to Ms. Tackett's testimony, appellant, while holding a knife in his hand, threatened that they were both going to die if she didn't "make love" with him. Ms. Tackett testified that she willingly had sex with him because she did what she thought she had to do. Around daylight, Ms. Tackett ran to Ms. Adams's house. According to Ms. Adams, Ms. Tackett had blood on her face and was hysterical when she arrived at Ms. Adams' residence. Ms. Adams then called the police department.

{¶4} Officers from the Washington Court House Police Department responded to Ms. Adams' call. The police took a report from Ms. Tackett, observed her injuries, and advised her that she needed to go to the hospital. Ms. Tackett testified that they went to her apartment and then to the police station, where she gave a statement. A police officer then brought her to Fayette Memorial Hospital.

{¶5} Ms. Tackett was treated by Dr. David Romano in the emergency room. Her documented injuries included contusions around her mouth, swelling in her lip, some bruising in her mouth, a contusion on the left side of her neck, and tenderness in

her right rib area. Tackett was released from the hospital the same day.

{¶6} On April 27, 2009, appellant was indicted by a Fayette County Grand Jury for one count of domestic violence, in violation of R.C. 2919.25(A), and one count of abduction in violation of R.C. 2905.02(A)(2). Because of appellant's two prior convictions for domestic violence, the grand jury determined the offense was a felony of the third degree.

{¶7} Prior to trial, appellant moved to dismiss or amend the indictment, arguing that one of his prior convictions was unconstitutional, as it did not include a valid waiver of counsel. The trial court denied appellant's motion, and the matter proceeded to a jury trial on July 9, 2009. The jury found appellant guilty of domestic violence and not guilty of abduction. On August 10, 2009, the trial court sentenced appellant to a three-year term of imprisonment. Appellant timely appeals his conviction, asserting two assignments of error.

{¶8} Assignment of Error No. 1:

{¶9} "THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN APPELLANT'S CONVICTION FOR DOMESTIC VIOLENCE."

{¶10} Appellant argues the trial court erred in convicting him of third-degree felony domestic violence because the state failed to present sufficient evidence showing he had been previously convicted of domestic violence.

{¶11} When reviewing the sufficiency of evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Wilson,* Warren App. No. CA2006-01-007, 2007-Ohio-2298. Therefore, "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. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶12} Appellant was charged with domestic violence under R.C. 2919.25(A), which provides, "No person shall knowingly cause or attempt to cause physical harm to a family or household member." Generally, a violation of R.C. 2919.25(A) is a misdemeanor of the first degree. R.C. 2919.25(D)(2). If, however, the offender has been previously convicted of domestic violence two or more times, then a violation of R.C. 2919.25(A) is a felony of the third degree. R.C. 2919.25(D)(4).

{¶13} When the existence of a prior conviction does not simply enhance the penalty but transforms the crime itself by increasing its degree, the prior conviction is an essential element of the crime and must be proven by the state beyond a reasonable doubt. *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, ¶8.

{¶14} Pursuant to R.C. 2945.75(B)(1), "[w]henever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such conviction."

{¶15} In this case, it is undisputed that appellant, while represented by counsel, pled guilty to one count of domestic violence on March 1, 2000, in the Washington Court House Municipal Court. Appellant, however, asserts that his December 1997 domestic violence conviction from the same court is constitutionally infirm because it lacks a valid waiver of his right to counsel. Specifically, appellant contends there was a document in the case file that "purports to be a waiver of counsel" with appellant's signature, but the form does not contain a case caption, the party names, or "conclusive evidence that this waiver was executed in the same case." Appellant also argues the state failed to produce sufficient evidence to identify the defendant named in both municipal court entries as appellant.

{¶16} "Where questions arise concerning a prior conviction, a reviewing court must presume all underlying proceedings were conducted in accordance with the rules of law ***." *Brooke* at ¶11 (citation omitted). "If [a] defendant claims a constitutional defect in any prior conviction, [he] has the burden of proving the defect by a preponderance of the evidence." R.C. 2945.75(B)(3). See also, *State v. Tanner*, Summit App. No. 24614, 2009-Ohio-3867, ¶7. For appellant to prove that his prior conviction was uncounseled, he had to establish that he did not validly waive his right to counsel in the 1997 domestic violence case. Id.

{¶17} We find that appellant has failed to establish by a preponderance of the evidence that his 1997 conviction was constitutionally infirm. The record demonstrates that in the 1997 domestic violence case, there was a form signed by appellant entitled "WAIVER OF COUNSEL." The entry provides the following:

{¶18} "I, the undersigned defendant, having been fully advised of my right to counsel, including the right to have counsel appointed for me under certain conditions do voluntarily waive my right to counsel and submit this case to the court without record."

{¶19} In addition to appellant's signature, Kathy Robinson, a clerk of the Washington Court House Municipal Court, signed her name as a witness. The waiver was also stamped and filed on December 31, 1997. In a hearing regarding this issue held immediately before trial, Ms. Robinson testified that in 1997, the clerks wrote all of the court notes by hand and they did not have time to fill in the rest of the information, including a case caption and case number. She testified that she witnessed the procedures followed by the court in appellant's case and in other similar cases. She stated that the judge had only one case in front of him at a time. The judge explained the rights to the defendant and asked him if he wished to waive counsel. When a

defendant chose to waive counsel, the judge instructed him to sign the waiver form, which was then witnessed and "file stamped" by Ms. Robinson. The judge then put the waiver in the corresponding file in front of him, and Ms. Robinson would file and process the judgment entry and other documents after the proceedings. She also stated that she would not have witnessed the waiver of counsel document had appellant not signed it. Ms. Robinson also testified that she found appellant's 1997 waiver of counsel in a file containing the judgment entry and other documents with the caption "City of Washington v. Bradley R. Kingery."

{¶20} We presume all underlying proceedings were conducted in accordance with the rules of law, and because appellant has failed to present evidence that would question the validity of his waiver, we find the trial court did not err in denying appellant's motion to dismiss or amend the indictment, as appellant failed to establish that his prior conviction was constitutionally infirm.

{¶21} In addition, the state presented sufficient evidence to identify appellant as the Bradley R. Kingery named in the 1997 and 2000 municipal court domestic violence cases. The judgment entries in both cases contained the name Bradley R. Kingery, his birth date, and social security number. Sgt. Stolensburg, a shift supervisor who assisted officers in gathering evidence in this case, testified at trial that he was familiar with appellant and provided his date of birth and social security number, which were the same as those contained in both prior convictions. See *State v. Bolish*, Butler App. No. CA2005-10-441, 2006-Ohio-5375, ¶36; *State v. Robinson*, Union App. No. 14-02-01, 2002-Ohio-2714, ¶23. Furthermore, appellant himself testified that he had two prior domestic violence convictions in the municipal court, and they were the convictions that had been presented at his trial.

{¶22} When this evidence is examined a light most favorable to the state, it is

apparent that the state presented sufficient evidence to identify the "Bradley R. Kingery" named in the certified copies of the judgment entries from the prior cases as being the same "offender as the case at bar," i.e., appellant. See R.C. 2945.75(B)(1). Accordingly, appellant's first assignment of error is overruled.

{¶23} Assignment of Error No. 2:

{¶24} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN OVERRULING HIS OBJECTION TO THE ADMISSION OF HEARSAY STATEMENTS INTO EVIDENCE."

{¶25} Appellant argues the trial court erred in allowing the testimony of Dr. Romano concerning the injuries reported by Ms. Tackett and the contents of Ms. Tackett's medical records, because the physician assistant who conducted most of the examination did not testify at trial. Appellant further contends the trial court erred in admitting Ms. Tackett's medical records from her March 18, 2009 visit to Fayette Memorial Hospital. Appellant asserts these records contained hearsay not subject to any exceptions.

{¶26} The admissibility of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. Absent an abuse of discretion, an appellate court will not disturb a trial court's ruling as to the admissibility of evidence. *State v. Martin* (1985), 19 Ohio St.3d 122, 129.

{¶27} At trial, Dr. Romano testified that he briefly examined Ms. Tackett during an initial examination, and his physician assistant conducted a thorough clinical examination on her. The physician assistant then reviewed the pertinent findings and discussed with Dr. Romano any treatment that was needed. Dr. Romano then conducted an exit interview of Ms. Tackett, reviewing with her his diagnosis and prescribed treatment and making sure she had no questions or concerns. When

questioned by the state at trial, Dr. Romano relayed the pertinent findings noted by the physician assistant, including the noted injuries and treatment prescribed.

{¶28} Pursuant to Evid.R. 802, hearsay is not admissible unless the statement comes under some exception to the hearsay rule. Evid.R. 803(4) allows, as an exception to the hearsay rule, the admission of statements made in order to further medical treatment or diagnosis. The rule provides that the following are not excluded by the hearsay rule: "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

{¶29} Statements that are admissible under Evid.R. 803(4) are understood to be reliable because the effectiveness of treatment frequently depends upon the accuracy of the information related to the physician, and such statements are "reasonably relied on by a physician in treatment or diagnosis." *State v. Dever* (1992), 64 Ohio St.3d 401, 411; *State v. Cockrell*, Franklin App. No. 04AP-487, 2005-Ohio-2432, ¶ 31.

{¶30} In this case, the statements given by Ms. Tackett to the medical staff during her examination and the findings noted by the physician assistant were statements made for purposes of Ms. Tackett's medical diagnosis and treatment by Dr. Romano. Evid.R. 803(4). Therefore, the trial court did not err in admitting the testimony of Dr. Romano.

{¶31} Appellant also argues the trial court erred in admitting the medical records of Ms. Tackett into evidence, because the records included photographs not necessary for diagnosis or treatment and documents containing hearsay that identified appellant and gave Ms. Tackett's description of the events of the previous evening. Appellant asserts these documents and the photographs taken by the hospital staff were

otherwise inadmissible and should not have been admitted as an exception to the hearsay rule.

{¶32} Generally, authenticated medical records are admissible at trial. *Hunt v. Mayfield* (1989), 65 Ohio App.3d 349, 352. Although potentially replete with hearsay problems, medical records are admissible under the exception to the hearsay rule for records of regularly conducted activity set forth in Evid.R. 803(6). *State v. Humphries* (1992), 79 Ohio App.3d 589.

{¶33} Although appellant asserts that the medical records were not properly authenticated, our review of the record reveals that the medical records were authenticated by Dr. Romano and Joan King, a registered nurse who assisted in the treatment of Ms. Tackett at Fayette Memorial Hospital. Dr. Romano testified that the medical records were made under his supervision and were done in the ordinary course of treatment for Ms. Tackett. Ms. King testified that she took the photographs of Ms. Tackett under the supervision of the physician assistant in the ordinary course of diagnosis and treatment of Ms. Tackett. See *Hunt* at 354; Evid.R. 803(6); R.C. 2317.40; R.C. 2317.41.

{¶34} Absent some evidence that the identity of the perpetrator is necessary for medical purposes, however, statements identifying an assailant are not properly admitted pursuant to Evid.R. 803(4) and Evid.R. 803(6), unless there was an independent basis for their admission. *State v. Smith*, Cuyahoga App. No. 90476, 2008-Ohio-5985, ¶38; *Mastran v. Urichich* (1988), 37 Ohio St.3d 44, 48 ("the identity of the person who struck [the victim] was not reasonably pertinent to diagnosis or treatment").

{¶35} In this case, the specific statements contained in the medical records that identified appellant as the perpetrator were admitted in error. The error in admission, however, was harmless pursuant to Crim.R. 52(A), as it was merely cumulative to the

admissible testimony by the victim, Ms. Tackett. *State v. Fears*, 86 Ohio St.3d 329, 1999-Ohio-111 (witness' testimony was cumulative and constituted harmless error because the error did not contribute to the verdict); *Smith* at ¶39. See, also, *State v. Blevins* (1999), 133 Ohio App.3d 196, 199.

{¶36} The other documents contained in the medical records about which appellant complains were admissible pursuant to Evid.R. 803(4) and Evid.R. 803(6). As previously discussed, Dr. Romano testified that the documents contained in Ms. Tackett's records were made for the purpose of diagnosing and treating her.

{¶37} In addition, appellant argues the photographs taken of Ms. Tackett were "not reasonably pertinent to, or even necessary, for either diagnosis or treatment of the injuries." The photographs taken by Ms. King, however, are not hearsay as they are physical evidence – not statements as defined by Evid.R. 801. Furthermore, the photographs were highly probative, and the trial court's admission of the photographs was not unfairly prejudicial to appellant. *State v. Morales* (1987), 32 Ohio St.3d 252, 258 (If the probative value of a photograph outweighs its prejudicial impact and the photograph is neither repetitive nor cumulative, the court should not disturb a trial court's decision to admit it). The photographs merely depict the same injuries described in the properly admitted medical records and those about which Ms. Tackett testified that she sustained. See *State v. Patterson* (Sept. 22, 1998), Franklin App. No. 97APA12-1682. Accordingly, appellant's second assignment of error is overruled.

{¶38} Judgment affirmed.

BRESSLER, P.J., and HENDRICKSON, J., concur.