[Cite as *State v. Nixon*, 2012-Ohio-1292.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-11-116
	:	O P I N I O N
- vs -		3/26/2012
	:	
JOSHUA A. NIXON,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MASON MUNICIPAL COURT
Case No. 11 CRB 00357

Bethany S. Bennett, Mason City Prosecutor, Matthew P. Nolan, 5950 Mason Montgomery Road, Mason, Ohio 45040, for plaintiff-appellee

Joshua A. Engel, 212 North Broadway, Lebanon, Ohio 45036, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Joshua Nixon, appeals from his conviction in the Mason Municipal Court for one count of domestic violence. For the reasons outlined below, we affirm.

{¶2} On the early morning hours of May 7, 2011, Cheryl Gudlewski, appellant's former live-in girlfriend, called the police after she sustained injuries to her face and chest resulting from a physical altercation with appellant. Upon arriving at the scene, Officer

Robert Temple of the Mason Police Department made contact with Gudlewski. Gudlewski, who appeared shaken and scared, told Officer Temple that appellant became upset, slapped her in the face knocking her glasses off, and kicked her in the chest as she attempted to return his personal effects to him following their breakup. Gudlewski later provided Officer Temple with a written statement detailing the same. Shortly thereafter, Officer Temple took pictures of Gudlewski that depicted a red contusion on the bridge of her nose and dark circles under her eyes.

{¶3} Appellant was subsequently arrested and charged with one count of domestic violence in violation of Mason Codified Ordinance 537.14(a)(1), a first-degree misdemeanor. Following a jury trial, during which time Gudlewski recanted her previous statements by testifying appellant did not intentionally hit her and that any contact was merely an accident, appellant was found guilty and sentenced to serve 180 days in jail, 163 of which were suspended, two years of community control, and fined $500 and court costs.

{¶4} Appellant now appeals from his domestic violence conviction, raising three assignments of error for review. For ease of discussion, appellant's first and second assignments of error will be addressed together.

{¶5} Assignment of Error No. 1:

{¶6} THE TRIAL COURT COMMITTED CLEAR ERROR BY ADMITTING THE ORAL HEARSAY STATEMENTS OF THE ALLEGED VICTIM AS SUBSTANTIVE EVIDENCE OF GUILT.

{¶7} Assignment of Error No. 2:

{¶8} THE TRIAL COURT COMMITTED CLEAR ERROR BY ADMITTING THE WRITTEN STATEMENT OF THE ALLEGED VICTIM AS SUBSTANTIVE EVIDENCE OF GUILT.

{¶9} In his first and second assignments of error, appellant argues that the trial court

erred by admitting oral and written statements Gudlewski provided to Officer Temple. Appellant did not object to the admission of Gudlewski's oral or written statements at trial, and he has therefore waived all but plain error on appeal.

{¶10} Pursuant to Crim.R. 52(B), plain error exists where there is an obvious deviation from a legal rule that affected the defendant's substantial rights or influenced the outcome of the proceedings. *State v. Blanda*, 12th Dist. No. CA2010-03-050, 2011-Ohio-411, ¶ 20, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. As this court has stated previously, "[n]otice of plain error must be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." *State v. Clements*, 12th Dist. No. CA2009-11-277, 2010-Ohio-4801, ¶ 7, citing *State v. Long*, 53 Ohio St.2d 91, 95 (1978). An error does not rise to the level of plain error unless, but for the error, the outcome of the trial would have been different. *State v. Krull*, 154 Ohio App.3d 219, 2003-Ohio-4611, ¶ 38 (12th Dist.).

{¶11} Initially, appellant argues that it was plain error for the trial court to admit Gudlewski's oral and written statements provided to Officer Temple for they both constitute inadmissible hearsay evidence. We disagree.

{¶12} Hearsay, as defined by Evid.R. 801(C), is "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." Pursuant to Evid.R. 802, hearsay is not admissible unless the statement comes under some exception to the hearsay rule. *State v. Wagers*, 12th Dist. No. CA2009-06-018, 2010-Ohio-2311, ¶ 51; *State v. Hunneman*, 12th Dist. No. CA2006-01-006, 2006-Ohio-7023, ¶ 18. One such exception to the hearsay rule is the "excited utterance." *State v. Sims*, 12th Dist. No. CA2007-11-300, 2009-Ohio-550, ¶ 12.

{¶13} An excited utterance, as defined by Evid.R. 803(2), is 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." A hearsay statement is admissible as an excited utterance if: "(1) there was an event startling enough to produce a nervous excitement in the declarant; (2) the statement was made while under the stress of excitement caused by the event; (3) the statement related to the startling event; and (4) the declarant must have had an opportunity to personally observe the startling event." *State v. Worth*, 10th Dist. No. 10AP-1125, 2012-Ohio-666, ¶ 22, citing *State v. Taylor*, 66 Ohio St.3d 295, 300-301 (1993). In analyzing whether a statement is an excited utterance, "[t]he controlling factor is whether the declaration was made under such circumstances as would reasonably show that it resulted from impulse rather than reason and reflection." *State v. Humphries*, 79 Ohio App.3d 589, 598 (12th Dist.1992); *State v. Lukas*, 188 Ohio App.3d 597, 2010-Ohio-2364, ¶ 21 (1st Dist.).

{¶14} After a thorough review of the record, we find no error, let alone plain error, in the trial court's decision admitting Gudlewski's oral statement made to Officer Temple. As noted above, Gudlewski was shaken and scared when she spoke with Officer Temple shortly after he arrived at the scene. *See State v. Waltzer*, 8th Dist. No. 94444, 2011-Ohio-594, ¶ 15 (finding statements made to police officer admissible as excited utterance where victim was visibly shaken and upset); *State v. Campbell*, 9th Dist. No. 24668, 2010-Ohio-2573, ¶ 30 (finding statements made to police officer admissible as excited utterance where victim was "very shaken up" and scared); *see also State v. Justice*, 92 Ohio App.3d 740, 746 (9th Dist.1994). Gudlewski's oral statement to Officer Temple was therefore properly admissible as an excited utterance.

{¶15} The same cannot be said for her written statement. Here, Officer Temple did not provide any testimony regarding Gudlewski's demeanor as she completed her written statement. *See Justice* at 748 (finding written statement provided to police officer did not constitute excited utterance where record was devoid of any evidence indicating declarant's demeanor as she completed her statement). Furthermore, after careful review of the record,

it is clear that Gudlewski was able to gather her thoughts and provided Officer Temple with a coherent written statement when asked. *Id*. This suggests that her written statement was the product of reflective thought instead of one made from impulse while under the stress of excitement. *See State v. Scarl*, 11th Dist. No. 2002-P-0091, 2003-Ohio-3493, ¶ 63. Gudlewski's written statement was therefore not admissible as an excited utterance.

{¶16} That said, although we find Gudlewski's statement was not admissible as an excited utterance, we nevertheless find the trial court's decision admitting her written statement was harmless as it was merely cumulative of her otherwise properly admitted oral statement. *See State v. Clay*, 181 Ohio App.3d 563, 2009-Ohio-1235, ¶ 20 (8th Dist.); *State v. Travis*, 165 Ohio App.3d 626, 2006-Ohio-787, ¶ 3 (2nd Dist.). Therefore, due to its cumulative nature, we find the trial court's decision to admit Gudlewski's written statement did not amount to plain error.

{¶17} Next, appellant argues that the trial court committed plain error by allowing the state to impeach Gudlewski with her prior oral and written statements. In support of this claim, appellant argues that the "state did not provide a sufficient foundation for the admission of the evidence for this purpose." We disagree.

{¶18} Pursuant to Evid.R. 607(A), which is designed to prevent circumvention of the hearsay rule, "the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage." *State v. Kraus*, 12th Dist. No. CA2006-10-114, 2007-Ohio-6027, ¶ 18. The state can establish "surprise" when its witness' testimony is materially inconsistent with a prior oral or written statement and the state did not have any reason to believe that its witness would recant the original statement when called to testify. *State v. Gayheart*, 12th Dist. No. CA97-01-001, 1997 WL 563270, *3 (Sept. 8, 1997); *State v. McCradic*, 5th Dist. No. 08-CA-058, 2009-Ohio-2592, ¶ 91, citing *State v. Holmes*, 30 Ohio St.3d 20, 23 (1987). In addition,

"affirmative damage" can be established only if the witness testifies to facts that contradict, deny, or harm the position of the party that called the witness. *State v. Crosky*, 10th Dist. No. 06AP-655, 2008-Ohio-145, ¶ 107, citing *Dayton v. Combs*, 94 Ohio App.3d 291, 299 (2nd Dist.1993).

{¶19} At the outset, we note that due to appellant's failure to object, the state did not have the opportunity to properly establish surprise and affirmative damage at trial. *See State v. Hartman*, 9th Dist. Nos. 10CA0026-M and 10CA0031-M, 2012-Ohio-745, ¶ 8. This court, therefore, is faced with a less than ideal record in which to review this matter in light of the requirements of Evid.R. 607(A). *See State v. Samples*, 5th Dist. App. No. 2008CA00027, 2009-Ohio-1043, ¶ 60.

{¶20} Regardless, even without a more complete record, it is clear that Gudlewski never provided the state with express notice that she would recant her prior oral and written statements at trial. As this court has stated previously, "[a]bsent an express intention by the witness to the contrary, the state has the right to presume that its witness will testify in accordance with a prior statement." *State v. Bowling*, 12th Dist. No. CA93-01-006, 1993 WL 541600, *2 (Dec. 30, 1993). Although the record indicates Gudlewski informed the state that her prior oral and written statements may not reflect her current recollection of the events, she never provided the state with *express notice* of her intent to recant her prior oral and written statements. Without this express notice, we find the trial court did not err, let alone commit plain error, by allowing the state to impeach Gudlewski's credibility by means of her prior inconsistent statements. *See, e.g., State v. Stevens*, 12th Dist. No. CA2009-01-031, 2009-Ohio-6045, ¶ 30 (finding trial court did not err by allowing state to impeach its own witness where there was no express notice by the witness that she would wholly deny her prior statement provided to police); *State v. Caudill*, 6th Dist. No. WD-07-009, 2007-Ohio-1557, ¶ 54 (finding no plain error in trial court's decision admitting victim's written statement

to police at trial where the record contained no evidence that the state was expressly forewarned of her intent to repudiate her prior statements). Appellant's second argument is therefore overruled.

{¶21} Finally, appellant argues that the trial court committed plain error by not instructing the jury that it could not consider Gudlewski's prior oral and written statements for "anything beyond impeachment value." We disagree.

{¶22} As it relates to Gudlewski's oral statement, we find no error, let alone plain error, resulting from the trial court's failure to provide the jury with a limiting instruction. As noted above, Gudlewski's oral statement was properly admitted as both substantive evidence of appellant's guilt and to impeach her credibility. On the other hand, with respect to Gudlewski's written statement, a statement previously found admissible for impeachment purposes only, the trial court should have provided the jury with a limiting instruction. However, because the written statement was cumulative, we find any error the trial court may have made in failing to issue a limiting instruction to the jury does not rise to the level of plain error. Appellant's third argument is therefore overruled.

{¶23} In light of the foregoing, having found no reversible error as to any of the three claims appellant raised regarding Gudlewski's oral and written statements, appellant's first and second assignments of error are overruled.

{¶24} Assignment of Error No. 3:

{¶25} THE VERDICT IN THIS CASE WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

{¶26} In his third assignment of error, appellant argues that the state provided insufficient evidence to support his conviction for domestic violence. We disagree.

{¶27} Whether the evidence presented is legally sufficient to sustain a verdict is a question of law. *State v. Lazier*, 12th Dist. No. CA2009-02-015, 2009-Ohio-5928, ¶ 9; *State*

v. Thompkins, 78 Ohio St.3d 380, 386, 1997-Ohio-52. In reviewing the sufficiency of the evidence, "[t]he 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. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶ 113, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. Proof beyond a reasonable doubt is "proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs." R.C. 2901.05(D).

{¶28} Appellant was charged with one count of domestic violence in violation of Mason Codified Ordinance 537.14(a)(1), a first-degree misdemeanor, which prohibits any person from "knowingly caus[ing] or attempt[ing] to cause physical harm to a family or household member."[1]

{¶29} In this case, construing only that evidence which was properly admitted for substantive purposes, we find the state provided sufficient evidence to support appellant's domestic violence conviction. As noted above, shortly after arriving at the scene, Gudlewski told Officer Temple that appellant became upset, slapped her in the face knocking her glasses off, and kicked her in the chest. The state also introduced pictures depicting a red contusion on the bridge of Gudlewski's nose and dark circles under her eyes. Although Gudlewski recanted her previous statements by testifying appellant did not intentionally hit her and that any contact was merely an accident, "the jury was free to accept or reject any and all of the evidence offered by the parties." See *State v. Lewis*, 12th Dist. No. CA2010-08-017, 2011-Ohio-415, ¶ 12.

{¶30} It is well-settled that "[t]he existence of conflicting evidence does not render the

1. Mason Codified Ordinance 537.14(a)(1) is identical to the domestic violence statute provided under R.C. 2919.25(A) of the Ohio Revised Code.

evidence insufficient as a matter of law." *State v. Gray*, 10th Dist. No. 06AP-15, 2007-Ohio-1504, ¶ 18, citing *State v. Murphy*, 91 Ohio St.3d 516, 543, 2001-Ohio-112. Therefore, construing the evidence in a light most favorable to the state, a rational fact-finder could have found the essential elements of domestic violence proven beyond a reasonable doubt. Accordingly, appellant's third assignment of error is overruled.

{¶31} Judgment affirmed.

POWELL, P.J., and PIPER, J., concur.