

[Cite as *State v. Gibson*, 2010-Ohio-1121.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
GREENE COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 09-CA-05
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-673
v.	:	
	:	(Criminal Appeal from
VAUGHN M. GIBSON, JR.	:	Common Pleas Court)
	:	
Defendant-Appellant	:	

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OPINION

Rendered on the 19<sup>th</sup> day of March, 2010.

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BROGAN, J.

{¶ 1} Vaughn M. Gibson appeals from his conviction and sentence on one count of felonious assault, a second-degree felony.

{¶ 2} Gibson advances three assignments of error on appeal. First, he contends his conviction is against the manifest weight of the evidence. Second, he

claims the trial court erred in admitting into evidence a recording of a jailhouse telephone call. Third, he asserts that the trial court erred in not giving a limiting instruction regarding his prior domestic-violence convictions.

{¶ 3} The record reflects that Gibson was indicted on two counts of felonious assault, felony domestic violence, and abduction. The charges stemmed from allegations by Gibson's girlfriend, Brandy Dunn, that he punched her in the face, cut her with a knife, burned her arm, and held her at knife-point during a three-day period in September 2008.

{¶ 4} At trial, Dunn testified that Gibson punched her in the face and broke her nose during an argument over crack cocaine and drug money. The incident occurred at the home of an acquaintance, Richard Haines, where they were smoking crack cocaine. The only two people in the room at the time of the incident were Dunn and Gibson. Haines heard Dunn wailing and crying loudly, however, just before Gibson exited the room. Gibson advised Haines that Dunn was bleeding but otherwise okay. He also told Haines that Dunn punches herself in the face to get attention. Haines proceeded to drive Gibson to a trailer he shared with Dunn. Upon returning to his own house, Haines found Dunn still there, bleeding from the nose and mouth. Dunn later went back to the trailer. She testified at trial that other incidents of abuse occurred there over the next couple of days, leading her to leave the trailer and contact police. In particular, she claimed that Gibson cut her with a knife, forced her arm onto a hot stove burner, and held her at knife-point. For his part, Gibson testified that Dunn punched herself in the face at Haines' house. Gibson also denied the other alleged acts of abuse.

{¶ 5} A jury convicted Gibson on one count of felonious assault for punching Dunn in the face and breaking her nose. It acquitted him of abduction and failed to reach a verdict on the other counts. The trial court dismissed the deadlocked counts and sentenced Gibson to six years in prison. This appeal followed.

{¶ 6} In his first assignment of error, Gibson contends his felonious assault conviction is against the manifest weight of the evidence. The essence of Gibson's brief argument is that his testimony about what happened inside Haines' house is more credible than Dunn's version of events. He also stresses that Dunn is the only person who testified that he punched her.

{¶ 7} When a conviction is challenged on appeal as being against the weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. A judgment should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 8} With the foregoing standards in mind, we conclude that Gibson's conviction is not against the manifest weight of the evidence. He was convicted of felonious assault under R.C. 2903.11(A)(1) for knowingly causing serious physical harm to Dunn. We harbor no doubt that Dunn's broken nose, which still caused her problems at the time of trial, qualified as "serious physical harm." Gibson makes no

argument to the contrary. The only question is whether Gibson or Dunn caused that physical harm. Having reviewed the record, we believe the weight of the evidence supports the jury's determination that Gibson did.

{¶ 9} The only eyewitnesses to the incident were Gibson and Dunn. For her part, Dunn described the incident as follows: "I was knocked out standing up. I couldn't hear nothing, really couldn't see nothing, and the physical pain was—it was unbearable. I mean, I had been hit by him before, but nothing like this." Dunn proceeded to tell the jury that the blow left her "dazed" and resulted in a "pile of blood on the bathroom floor." Dunn's version of events is corroborated somewhat by Haines' testimony that she appeared fearful and wanted to stay at his house after he returned from driving Gibson home. We note too that the record contains no evidence, other than Gibson's own testimony, of Dunn having a history of punching herself.

{¶ 10} For his part, Gibson initially told police he did not touch Dunn at all that evening. On direct examination, he testified that he did not punch her. On cross examination, however, he admitted that he "pushed" her into a wall at Haines' house but denied punching her. Gibson further admitted on cross examination that he had a history of lying to police in connection with his prior domestic-violence offenses. He explained that he had lied on those prior occasions because he was afraid of going to jail. The jury reasonably could have inferred that Gibson was lying again for the same reason.

{¶ 11} Although a weight-of-the-evidence argument permits a reviewing court to consider the credibility of witnesses, that review must be tempered by the principle

that weight and credibility questions are primarily for the trier of fact. *State v. Goldwire*, Montgomery App. No. 19659, 2003-Ohio-6066, at ¶13, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. “Because the factfinder \* \* \* has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness.” *Id.* at ¶ 14, quoting *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288. Having reviewed the record before us, we believe the jury acted well within its discretion in crediting Dunn’s testimony and finding her allegations to be true. The evidence does not weigh heavily against Gibson’s conviction. Accordingly, his first assignment of error is overruled.

{¶ 12} In his second assignment of error, Gibson claims the trial court erred in admitting into evidence a recording of a jailhouse telephone call. The recording was of a call Gibson made to a woman named Michelle DeLaPena. At the outset of the call, a taped message warned him that his conversation was subject to recording and monitoring. During the call, Gibson repeatedly proclaimed that he had not kidnapped Dunn. DeLaPena agreed with him but insisted several times that she and Gibson both knew he had “smacked” Dunn. In response, Gibson once suggested that there was a difference between kidnapping and smacking. In response to another of DeLaPena’s assertions that he had smacked Dunn but had not kidnapped her,

Gibson stated: “I don’t feel like I deserve no twenty six years for something like this.” While DeLaPena repeatedly accused Gibson of “smacking” Dunn, he continued to deny that he had kidnapped her. Near the conclusion of the conversation, DeLaPena agreed to tell Gibson’s attorney that he did not kidnap Dunn.

{¶ 13} At trial, Gibson raised a hearsay objection to DeLaPena’s statements about him smacking Dunn. The State responded that DeLaPena’s remarks were not offered for the truth of the matter asserted. Rather, they were offered “only to demonstrate the effect on the listener, in this particular circumstance, the Defendant, Vaughn Gibson.” The trial court summarily overruled the hearsay objection. Gibson’s argument on appeal is that the trial court erred in overruling the hearsay objection to DeLaPena’s allegations.

{¶ 14} Having listened to the recording at issue, it is not clear to us that DeLaPena’s statements were admissible to demonstrate their effect on the hearer. “It is well established that extrajudicial statements made by an out-of-court declarant are properly admissible to explain the actions of the witness to whom the statement was directed.” *State v. Thomas* (1980), 61 Ohio St.2d 223, 232. In the present case, however, DeLaPena’s allegations do not help explain why Gibson subsequently did anything. Despite this conclusion, we believe DeLaPena’s remarks were admissible as adoptive admissions under Evid.R. 801(D)(2)(b).<sup>1</sup>

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<sup>1</sup>It is possible that the State’s effect-on-the-hearer argument below actually was a poorly worded adoptive-admission argument. The two arguments bear some similarity insofar as they both involve a defendant’s response to a third-party’s out-of-court statement. In any event, “a reviewing court is not authorized to reverse a correct judgment merely because it was reached for the wrong reason.” *State v. Lozier*, 101 Ohio St.3d 161, 166, 2004-Ohio-732. Therefore, regardless of whether the State intended to raise the adoptive-admission issue below, we must affirm the trial court’s

{¶ 15} The foregoing rule provides that an out-of-court statement is not hearsay if it is offered against a party at trial and is “a statement of which the party has manifested an adoption or belief in its truth[.]” A defendant may demonstrate his adoption of a non-party’s out-of-court statement through his demeanor, conduct, words, or even silence. *State v. Clark* (Sept. 8, 1993), Hamilton App. No. C-920603. “In order for an adoptive admission to be applicable, the declarant must have made the statement in the presence of the party against whom the statement is offered at trial. In addition, the party must have heard and understood the statement, must have been free to disavow it, and must have either expressly acknowledged the truth of the statement or remained silent when a reasonable person would have denied its truthfulness.” *State v. Comstock* (Aug. 29, 1997), Ashtabula App. No. 96-A-0058.

{¶ 16} Staff notes following Evid.R. 801(D)(2)(b) similarly explain the rule as follows: “An adoptive admission, or an admission by acquiescence, consists of a statement by a non-party which may be deemed to be that of a party by virtue of the failure of the party to deny the statement. There are obvious risks in attributing a statement of a third person to be that of a party and, in applying the rule, courts have been careful to consider the circumstances under which the utterance is made to insure that the party understood the utterance, that he was free to make a response, and that a reasonable person would have denied the statement. Absent these determinations, a statement of a third person cannot be an admission by acquiescence of a party opponent.”

{¶ 17} In the present case, DeLaPena’s remarks reasonably may be attributed

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ruling if Evid.R. 801(D)(2)(b) applies.

to Gibson through his acquiescence because the prerequisites for an adoptive admission are satisfied. As set forth above, several times DeLaPena accused Gibson of smacking Dunn while expressing her belief that he had not engaged in kidnapping. Gibson plainly heard these statements and understood them. We also find no impediment to his ability to respond. On appeal, Gibson contends DeLaPena dominated the conversation and prevented him from making any response. The record reflects, however, that he did respond at least twice. On one occasion, after DeLaPena accused him of smacking Dunn but not kidnapping her, Gibson responded: "See there's a difference." This response implicitly conceded the truth of DeLaPena's assertion by seeking to distinguish smacking from kidnapping while not denying that he had hit Dunn. On a second occasion, DeLaPena again asserted that he had smacked Dunn but had not kidnapped her. She then added: "I know you did what you did. \* \* \* I'm sure you ain't too happy about what you did." Gibson responded: "I don't feel like I deserve no twenty six years for something like this." Notably, rather than disputing DeLaPena's claim that he had smacked Dunn, Gibson complained only that his conduct did not warrant twenty six years in prison.

{¶ 18} Throughout the conversation, Gibson countered DeLaPena's allegations of smacking Dunn with protestations that he had not kidnapped her. By denying kidnapping while largely avoiding the smacking allegations, Gibson tacitly acquiesced in those allegations. Under the circumstances, we believe a reasonable person in Gibson's position would have denied the smacking allegations if they were untrue. Because Gibson did not, DeLaPena's allegations and his responses were admissible as admissions under Evid.R. 801. See, also, Hilles, *Tacit Criminal*

*Admissions*, 112 U. Pa. L. Rev. 210, 212 (1963) (“Evidence of a tacit admission consists not only of the defendant's response or lack thereof, but also of the out-of-court assertion by another person inculcating the defendant. \* \* \* [T]he reaction of the accused is the only substantive evidence, and the inculpatory statement is admitted only to explain the significance of the defendant's response.”).

{¶ 19} In reaching the foregoing conclusion, we have not ignored the fact that Gibson was in jail when his conversation occurred. The record establishes that Gibson knew his conversation with DeLaPena might be monitored. We recognize the possibility that an incarcerated individual might choose to remain silent in the face of incriminating accusations not because he agrees with them but because he does not wish to waive his Fifth Amendment right to remain silent by speaking while the government is listening. Where the record suggests that an incarcerated defendant's exercise of his right to remain silent is a motivating factor in his failure to refute incriminating allegations made by a private party, an adoptive admission may not be found. See, e.g. *Franklin v. Duncan* (N.D. Cal. 1995), 884 F.Supp. 1435, 1445-1448, affirmed, (9<sup>th</sup> Cir. 1995), 70 F.3d 75.

{¶ 20} In the present case, however, Gibson did not indicate that he wished to remain silent in the face of DeLaPena's allegations because he knew the government was listening. Significantly, Gibson himself initiated the phone call, knowing that it might be monitored, and proceeded to deny kidnapping Dunn. If the fact that his call might be monitored did not inhibit him from denying kidnapping, it is reasonable to assume that potential monitoring likewise did not inhibit him from denying DeLaPena's allegation that he smacked Dunn. In any event, when

DeLaPena accused him of smacking Dunn, Gibson *did not* remain silent in reliance on the Fifth Amendment. To the contrary, he twice responded. Once he suggested that there was a difference between kidnapping and smacking. Another time he complained that his actions did not warrant twenty six years in prison. As set forth above, a trier of fact could find that these responses implicitly conceded the truth of DeLaPena's allegations.

{¶ 21} On the record before us, we find no violation of Gibson's Fifth Amendment right to remain silent arising from the trial court's admission of his jailhouse telephone conversation with DeLaPena. Additionally, the trial court did not abuse its discretion in overruling Gibson's hearsay objection to DeLaPena's remarks about his smacking Dunn. The remarks, and Gibson's responses to them, were admissible as admissions under Evid.R. 801(D)(2). Accordingly, the second assignment of error is overruled.

{¶ 22} In his third assignment of error, Gibson asserts that the trial court erred in not giving a limiting instruction regarding his prior domestic-violence convictions. This argument concerns the State's introduction of evidence that he had domestic violence convictions in 1997, 1998, and 2004. Gibson contends the trial court should have instructed the jury that these convictions were admissible only to enhance the degree of the current domestic violence charge and not as evidence that he committed any crimes against Dunn. Gibson claims there was an obvious danger that the jury would convict him because he had a propensity to commit violent acts.

{¶ 23} Upon review, we find Gibson's argument to be without merit. Gibson did not request a limiting instruction when the evidence of his prior convictions was

introduced. Therefore, he concedes that a plain-error analysis applies. Plain error exists only if an error is obvious and but for the error the outcome of the trial clearly would have been different. *State v. Molen*, Montgomery App. No. 21941, 2008-Ohio-6237, ¶9. We see no plain error here.

{¶ 24} Although there was no limiting instruction when the State introduced its evidence, the trial court's jury instructions at the close of trial included the following: "Evidence was received that this Defendant was convicted of prior crimes. That evidence was received only for a limited purpose. It was not received, and you may not consider it, to prove the character of the Defendant in order to show that he acted in conformity with that character. If you find that the Defendant was convicted of prior crimes you may consider that evidence only for the purpose of testing the Defendant's credibility or believability and the weight to be given to the Defendant's testimony. It cannot be considered for any other purpose." (Trial transcript at 532-533).

{¶ 25} The record reflects that two of Gibson's three prior domestic-violence convictions were felonies. (Id. at 433). On cross examination of Gibson, the State elicited testimony about the domestic-violence convictions as well as testimony that he had prior felony convictions for burglary, complicity to commit burglary, and disrupting service. (Id. at 438). Evidence of these felony convictions was admissible for the reason stated by the trial court, namely to challenge Gibson's credibility. See Evid.R. 609.

{¶ 26} Evidence of all three domestic-violence convictions was admissible for an additional reason. The convictions were an essential element of the current

domestic-violence charge against Gibson because they elevated the degree of that offense. See R.C. 2919.25(D)(4); *State v. Kinney*, Ross App. No. 07CA2996, 2008-Ohio-4612, ¶15. In discussing the elements of domestic violence, the trial court properly instructed the jury as follows: “If your verdict is guilty with regard to the offense of Domestic Violence you will separately determine whether the Defendant was previously convicted of Domestic Violence in Fairborn Municipal Court, Case No. 97CRB140, and Greene County Common Pleas Court, in Case No. 98-CR-425 and 04-CR-606.” (Trial transcript at 538).

{¶ 27} The only significant flaw in the foregoing jury instructions was the trial court’s failure to make clear that Gibson’s one misdemeanor domestic-violence conviction, unlike the felonies, was not admissible for purposes of challenging his credibility. In light of the other five felony convictions, two of which were felony domestic-violence convictions, we cannot say the outcome of the proceeding clearly would have been different if the trial court had been more precise. This is particularly true given the trial court’s specific admonition that *none* of the prior convictions could be used “to prove the character of the Defendant in order to show that he acted in conformity with that character.” Gibson’s third assignment of error is overruled.

{¶ 28} Based on the reasoning set forth above, we affirm the judgment of the Greene County Common Pleas Court.

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DONOVAN, P.J., and FROELICH, J., concur.

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