

**IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
HENRY COUNTY**

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 7-14-15

v.

GREGORY D. VELA,

OPINION

DEFENDANT-APPELLANT.

**Appeal from Henry County Common Pleas Court
Trial Court No. 14 CR 0028**

Judgment Affirmed

Date of Decision: April 6, 2015

APPEARANCES:

Clayton J. Crates for Appellant

John H. Hanna for Appellee

SHAW, J.

{¶1} Defendant-appellant, Gregory D. Vela (“Vela”), appeals the September 11, 2014 judgment of the Henry County Court of Common Pleas journalizing his conviction by a jury for one count of Intimidation of a Victim in a Criminal Case and sentencing him to twenty-four months in prison.

{¶2} On April 10, 2014, the Henry County Grand Jury returned a one count indictment against Vela charging him with Intimidation of a Victim in a Criminal Case in violation of R.C. 2921.04(B)(1), a felony of the third degree. The charge stemmed from an incident occurring on January 30, 2014, while Vela was seated in the gallery of a courtroom at the Napoleon Municipal Court during his wife’s initial appearance as a defendant in a criminal damaging case. The victim in that case was Melanie Cover (“Melanie”). Vela was seated in the row behind Melanie, her mother, and the Victim Advocate. As Vela exited the courtroom after the proceeding ended, he hit Melanie in the back of the head with his elbow. Vela subsequently pleaded not guilty to the charge.

{¶3} On July 30, 2014, the trial court conducted a jury trial. The trial court instructed the jury on assault as a lesser included offense. The jury returned a verdict finding Vela guilty of Intimidation of a Victim in a Criminal Case.

{¶4} On September 11, 2014, the trial court sentenced Vela to twenty-four months in prison. Vela filed this appeal, asserting the following assignments of error.

ASSIGNMENT OF ERROR NO. I

THE STATE OF OHIO COMMITTED PREJUDICIAL MISCONDUCT IN ITS CLOSING ARGUMENT THEREBY PROHIBITING THE DEFENDANT FROM RECEIVING A FAIR TRIAL.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT COMMITTED ERROR TO THE PREJUDICE OF THE APPELLANT BY OVERRULING HIS MOTIONS FOR ACQUITTAL PURSUANT TO OHIO CRIMINAL RULE 29.

ASSIGNMENT OF ERROR NO. III

DEFENDANT'S CONVICTION OF THE CHARGE OF INTIMIDATION OF A VICTIM IN A CRIMINAL CASE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶5} For ease of discussion, we elect to address the assignments of error out of order.

Second and Third Assignments of Error

{¶6} In his second and third assignments of error, Vela claims the trial court erred when it overruled his Crim. R. 29 motions for acquittal based on the sufficiency of the evidence against him. Vela also asserts that the jury's verdict is against the manifest weight of the evidence.

{¶7} Whether there is legally sufficient evidence to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Sufficiency is a test of adequacy. *Id.* When an appellate court reviews a record upon a sufficiency challenge, “ ‘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. Leonard*, 104 Ohio St.3d 54, 2004–Ohio–6235, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶8} Unlike our review of the sufficiency of the evidence, an appellate court’s function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). In doing so, this Court must review the entire record, weigh the evidence and all of the reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts in the evidence, the factfinder “clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *Thompkins*, 78 Ohio St.3d at 387.

{¶9} Vela was charged with Intimidation of a Victim in a Criminal Case in violation of R.C. 2921.04(B), which states in relevant part:

No person, knowingly and by force or by unlawful threat of harm to any person or property or by unlawful threat to commit

any offense or calumny against any person, shall attempt to influence, intimidate, or hinder any of the following persons:

(1) The victim of a crime or delinquent act in the filing or prosecution of criminal charges or a delinquent child action or proceeding;

{¶10} The following testimony was presented at trial. Melanie, the victim, testified that Vela is her ex-husband's uncle. Melanie explained that an incident occurred between her and Vela's wife, Lynn, on January 28, 2014, which resulted in Lynn causing \$171.55 in damage to Melanie's car. Lynn was subsequently charged with criminal damaging. On January 30, 2014, Lynn was in court for her initial appearance in the criminal damaging case and Melanie was seated in the courtroom gallery observing the proceedings. Melanie was seated near the door to the lobby in between her mother and the Victim Advocate. Vela was also seated in the gallery in the row behind Melanie.¹

{¶11} Melanie recalled speaking with the Victim Advocate when she saw Vela out of the corner of her eye stand up and walk toward her. She explained that she was then hit in the back of the head with enough force to cause her head to jerk forward. She testified that Vela was directly behind her when this happened. Melanie testified that she was shocked, frightened, and scared. Lisa Rhoads, Melanie's mother, provided similar testimony recalling Melanie's head suddenly move forward as Vela passed behind her.

¹ The courtroom gallery consisted of long wooden pews and had one exit located to the side of the pews.

{¶12} Tara Buehrer, the Victim Advocate, testified that she was talking to Melanie when she observed Vela's elbow come forward and hit Melanie in the back of the head. She recalled Melanie immediately grabbing her head and stating "Are you kidding me?" (Tr. at 128). The prosecution also introduced video surveillance footage of the courtroom during the incident. The footage clearly depicts Melanie's head suddenly jerk forward as Vela passes by her from behind. It is notable from the video footage that Melanie appears to be the only person Vela made contact with from behind despite the fact that she was seated in between two other individuals. Officer Justin Ruffer of the Napoleon Police Department testified that he contacted Vela over the phone after he took Melanie's statement regarding the incident. Vela denied striking Melanie with his elbow and explained that he may have accidentally bumped into someone.

{¶13} In his defense, Vela testified that he went to the municipal courtroom to support his wife, but he asserted that he did not intentionally hit Melanie with his elbow that day. Specifically, he denied hitting anyone in the head while in the courtroom and stated that if he did hit someone, it was an accident. He explained that the space between the pew seating was narrow and that he weighed 305 pounds at the time and was carrying winter coats and his wife's large purse making it difficult for him to maneuver through the rows.

{¶14} On appeal, Vela challenges the evidence supporting his conviction on two grounds: (1) Vela claims that the prosecutor presented insufficient evidence to establish that Melanie was influenced, intimidated, or hindered by any physical contact Vela made with her; and (2) Vela claims that his conviction is against the manifest weight of the evidence because he did not intentionally hit Melanie with his elbow.

{¶15} At the outset, we note that R.C. 2921.04(B) requires only an *attempt* to influence, intimidate, or hinder. “[T]he defendant need only *try* to create fear about *or* try to influence or hinder the filing or prosecution of criminal charges.” *State v. Thompson*, 7th Dist. Columbiana No. 13 CO 20, 2014-Ohio-1225, ¶ 16, citing R.C. 2921.04(B) (emphasis sic). There is no requirement that the victim feel intimidated. *Thompson* at ¶ 16, citing *State v. Williams*, 8th Dist. Cuyahoga No. 94261, 2011-Ohio-591, ¶ 14 (stating that “[n]othing in the statute requires the victim to even know that the defendant attempted to intimidate the witness”). Moreover, actual intimidation is not an element of this offense. *Thompson* at ¶ 16, citing *State v. Thomas*, 6th Dist. Lucas No. L-02-1375, 2004-Ohio-6458, ¶ 22 (explaining that “[i]t is sufficient that an attempt to intimidate a witness or victim in a criminal case was made by the accused”).

{¶16} Accordingly, the prosecution was only required to show that Vela attempted to influence, intimidate, or hinder Melanie by hitting her in the back of

his head with his elbow, not that he actually achieved that result. After viewing the evidence in a light most favorable to the prosecution, a rational fact-finder could conclude that Vela's conduct constituted an attempt by force to influence, intimidate, or hinder Melanie in regards to the prosecution of his wife's criminal damaging case. Therefore, we find no error in the trial court decisions to overrule Crim. R. 29 motions for acquittal on this basis.

{¶17} Vela also claims that the jury clearly lost its way in returning a guilty verdict against him because he did not intentionally hit Melanie in the back of the head with his elbow. Thus, Vela maintains that he could not have knowingly attempted to influence, intimidate, or hinder Melanie in order to support a verdict of guilty of this offense. A person's intent is regularly inferred from the surrounding circumstances. *State v. Johnson*, 93 Ohio St.3d 240, 245–246, 2001-Ohio-1336 (2001); *State v. Loughman*, 10th Dist. No. 10AP–636, 2011–Ohio–1893, ¶ 47 (stating that the jury is free to infer intent from the entire set of circumstances surrounding the commission of the offense).

{¶18} Here, the jury reviewed the video footage clearly depicting Melanie's head suddenly jerk forward as Vela passed behind her. In addition, the Victim Advocate testified that she observed Vela extend his elbow and hit Melanie in the back of the head. Vela was in the courtroom to support his wife who was a defendant in a criminal case in which Melanie was the victim and thereby a likely

key witness for the prosecution. The jury could infer from these circumstances that Vela intended to hit Melanie in the back of the head in an attempt to influence, intimidate, or hinder her in regards to the prosecution of his wife's criminal damaging case.

{¶19} Vela directs our attention to evidence he presented at trial supporting his position that any physical contact he may have had with Melanie was accidental and not an attempt to influence, intimidate, or hinder her. With regard to the manifest weight of the evidence, we note that the jury as the trier of fact is in the best position to assess the credibility of witnesses. Here, the jury chose to believe the prosecution's witnesses. Accordingly, we cannot say that the trier of fact clearly lost its way in finding Vela guilty of Intimidation of a Victim in a Criminal Case. Vela's second and third assignments of error are overruled.

First Assignment of Error

{¶20} In his first assignment of error, Vela argues that he was denied a fair trial as a result of certain statements made by the prosecutor during closing argument, which he contends amounted to prosecutorial misconduct.

{¶21} The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights. *State v. Pickens*, 141 Ohio St.3d 462 , 2014-Ohio-5445, ¶ 110, citing *State v. Smith*, 14 Ohio St.3d 13, 14 (1984). The touchstone of the analysis "is the

fairness of the trial, not the culpability of the prosecutor.” *Pickens* at ¶ 110, quoting *Smith v. Phillips*, 455 U.S. 209, 219 (1982).

{¶22} The remarks at issue involved the prosecutor’s characterization of the testimony of the Victim Advocate, Tara Buehrer. The following is an excerpt from the trial transcript providing the context of the prosecutor’s statements that Vela alleges to be improper which appear in italics. In his closing argument, the prosecution reviewed the evidence presented at trial.

Prosecutor: * * * The elements of the offense are that the defendant did knowingly cause the victim, well did knowingly attempt to intimidate, which means scare, frighten, bully the victim who is a victim in a criminal case against his wife, by striking her in the head in the courtroom. *I don’t believe there is any question that he hit her in the head*, okay, you have her testimony that she felt somebody hit her in the head, you have the mom’s testimony that she saw her head go violently forward, you saw the video a number of times, it shows her head going forward as the defendant strikes her in the head. The defendant tells you that well, if I hit her it was an accident but I didn’t hit her, but you have Tara Buehrer who said, I was looking directly at her, I saw him and she showed you the motion which he did, which was essentially, for those who used to play football we used to call a forearm shiver, okay, right to her head. Tara told you that she saw it happen and I don’t think there’s any question in your mind that it actually happened. There is certainly no reason for Tara to make up the story, she is the Victim Advocate, she is not a party to this case, she has nothing to gain or lose by this case.

(Tr. at 163).

{¶23} Defense counsel then responded to the prosecutor’s statements regarding the Victim Advocate’s testimony in his closing argument.

Defense Counsel: * * * As far as Ms. Buehrer, as [the prosecutor] says does not have anything to gain, she's not a party to this, that's laughable, she's a Victims Advocate. Do you think she's going to come in here and say [Melanie] is a liar? Do you think she would have a job if she did that? Do you think she would have anything negative to say? Of course not. Of course she's going to say it looked like he threw his arm out, as [the prosecutor] called it, a forearm shiver. I didn't see that on the video. Of course she has everything to gain by saying that. Do you think her boss would be upset with her if she didn't describe it that way? And remember this, when I asked Ms. Buehrer, do you recall if my client was carrying anything in his hand, she doesn't remember, she doesn't recall that. She was right, a couple of feet away, she doesn't remember a big purse that was described as a diaper bag, she doesn't remember a jacket that was over that? Pretty important details to forget and not recall. Discuss that in your deliberations.

(Tr. at 169-70).

{¶24} The prosecutor in his rebuttal replied to defense counsel's description of the Victim Advocate's testimony.

Prosecutor: Wow, I am quite stunned. We now start attacking credibility [sic] who is simply doing their job as a Victim Advocate, who is sitting there because there was a crime that has been reported and there is a victim of that crime. Whether it's \$171 or \$271 the fact, that has nothing to do with it. Melanie was the victim of a crime by the defendant's wife and the Victim Advocate is simply sitting there so she can advise her as to what is happening in the courtroom and to suggest somehow she would lose her job unless she lied and manufactured a tale is about as unbelievable as any argument I've ever heard put forth in this courtroom. There is absolutely no reason for Tara Buehrer to make up any story. If she wasn't there and didn't see it, she wouldn't say it. *And to attack her credibility as if somehow or other she's losing her job makes absolutely no sense and if that is the depths to which this case has fallen, it's pretty clear that [Defense Counsel] believes his client is guilty.*

Defense Counsel: I would object to that Your Honor.

Trial Court: Objection noted. Refrain from any personal attack on counsel.

(Tr. at 171-72).

{¶25} Vela argues that the first remark was improper because the prosecutor gave his personal opinion of the evidence presented. “Prosecutors are entitled to latitude as to what the evidence has shown and what inferences can be drawn from the evidence.” *State v. Jackson*, 107 Ohio St.3d 300, 2006-Ohio-1, ¶ 154. A prosecutor may state his or her opinion if it is based on the evidence presented at trial. *Id.* Initially, we note that there was no objection raised at the time the prosecutor made this comment. Notwithstanding this fact, the record demonstrates that the prosecutor’s statement was a characterization based on the evidence at trial and therefore was not improper. Moreover, Vela has failed to show that the comment prejudiced his substantial rights.

{¶26} Vela also argues that the prosecutor committed misconduct during closing arguments on rebuttal by vouching for the truthfulness of the testimony of the Victim Advocate and by expressing that Vela’s counsel believed him to be guilty. Both parties have latitude in responding to arguments of opposing counsel. *State v. Loza*, 71 Ohio St.3d 61, 78 (1994). With regard to Vela’s first argument we note that generally “[i]t is improper for an attorney to express his or her

personal belief or opinion as to the credibility of a witness or as to the guilt of the accused.” *State v. Williams*, 79 Ohio St.3d 1, 12 (1997). However, the evidence does not establish that the prosecutor vouched for the Victim Advocate. Rather, the prosecutor was simply rebutting and responding to defense counsel’s closing argument that attacked the truthfulness and motives of the Victim Advocate’s testimony. *See State v. Gapen*, 104 Ohio St. 3d 358, 2004-Ohio-6548, ¶ 95.

{¶27} Vela cites *State v. Keenan* in support of his position that the prosecutor committed misconduct by remarking upon the defense counsel’s belief in Vela’s guilt. *State v. Keenan*, 66 Ohio St.3d 402, 405–406 (1993). In *Keenan*, the Ohio Supreme Court reversed a defendant’s conviction for aggravated murder due to the prosecutor’s shockingly prejudicial comments during closing argument. It was abundantly clear in *Keenan*, however, that the prosecutor’s argument was carefully drafted to denigrate the defendant and his counsel and appeal to the emotions of the jury, rather than to aid the jury by presenting a summation of the evidence supporting the state’s case. The court in *Keenan* found that the prosecutor’s misconduct was “a textbook example of what a closing argument should not be.” *Id.* at 410, citing *State v. Liberatore*, 69 Ohio St.2d 583, 589 (1982).

{¶28} We agree that the prosecutor’s comment with regard to defense counsel’s personal belief in Vela’s guilt exceeded the boundaries of acceptable

prosecutorial conduct and was erroneous. Nonetheless, we do not find the comment as egregious or numerous as the statements at issue in *Keenan*. It is apparent from the record that the prosecutor was responding to the equally improper and erroneous attacks on the Victim Advocate's credibility by defense counsel in his closing statement rather than a persistent strategy to undermine the defense's position in front of the jury. Moreover, Vela has failed to demonstrate any prejudice from the prosecutor's remark to the extent of depriving Vela of a fair trial. As previously discussed, there was ample evidence presented at trial to support the jury finding Vela guilty which included the Victim Advocate's testimony and the video footage corroborating her testimony. Accordingly, we cannot find that the prosecutor's comments influenced the jury's verdict in such way that the outcome at trial would have been different had the remark never been made. The first assignment of error is overruled.

{¶29} Based on the foregoing, the judgment is affirmed.

Judgment Affirmed

ROGERS, P.J. and WILLAMOWSKI, J., concur.

/jlr