[Cite as *State v. Morgan*, 2010-Ohio-4858.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	W. Scott Gwin, J.
Plaintiff-Appellee	:	William B. Hoffman, J.
	:	
-vs-	:	Case No. 2009 CA 00130
	:	
	:	
MATTHEW LEE MORGAN	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Criminal Appeal from Stark County Court of Common Pleas Case No. 2007 CR 2150
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 4, 2010

APPEARANCES:

For Plaintiff-Appellee

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Edwards, P.J.

{¶1} Defendant-appellant, Matthew Lee Morgan, appeals his conviction and sentence from the Stark County Court of Common Pleas on one count of violating a protection order and one count of burglary. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On January 22, 2008, the Grand Jury indicted appellant on one count of violating a protection order in violation of R.C. 2919.27(A)(1), a felony of the third degree, one count of burglary in violation of R.C. 2911.12(A)(4), a felony of the fourth degree, and one count on endangering children in violation of R.C. 2929.22(A), a misdemeanor of the first degree. At his arraignment on February 15, 2008, appellant entered a plea of not guilty to the charges.

{¶3} As memorialized in an order filed on March 27, 2008, the indictment was amended to allege, in Count One, a violation of a protection order in violation of R.C. 2919.27(A)(3) rather than (A)(1).

{¶4} Subsequently, a jury trial commenced on March 28, 2008. The following testimony was adduced at trial.

{¶5} Vanessa Morgan [hereinafter "Morgan"], who at the time of trial was married to appellant, resided with her mother and daughter, Kayla. Appellant and Morgan were married in New Jersey in 2002 and Kayla was born in 2004. During their relationship, the two moved back and forth between New Jersey and Ohio.

{¶6} Morgan testified that, on approximately December 5, 2006, when they were both living in New Jersey, she and appellant separated. Morgan testified that she obtained a restraining order against appellant in New Jersey and that appellant was

aware of the same because he had been served with a copy of the order. Morgan further testified that the order barred appellant from having any relationship with their daughter until he received a mental health evaluation and also barred appellant from harassing, stalking or threatening her.

{¶7} After the restraining order was issued, Morgan moved back to Ohio in January of 2007 and, in August of 2007, moved in with her mother. She testified that from January of 2007 until the incident at issue in this case, she spoke with appellant about their daughter, Kayla, and that the two made arrangements for appellant to see Kayla. Appellant sometimes had Kayla for periods of time.

{¶8} Morgan testified that appellant had a cell phone under her family plan and that she had no problem with him having the phone as long as he paid for the same. Morgan testified that appellant would call her a lot about their relationship and would text her “a bunch of times” if she did not answer or return his calls. Trial Transcript at 90. According to Morgan, appellant begged her to get back with him and she told him that she was not interested in doing so. She further testified that she was told that appellant could see Kayla in the State of Ohio.

{¶9} On December 5, 2007, appellant, who was watching Kayla, called Morgan at work and told her that his electricity had been shut off. Morgan tried to get appellant to bring Kayla home that night or to make plans to go get Kayla, but appellant stated that Kayla would spend the night. After she got off of work, Morgan called appellant who told her that he did have heat, but not electric. Once again, Morgan tried to get appellant to bring Kayla home. The following is an excerpt from Morgan’s testimony at trial:

{¶10} "…I know that I can't go there and physically remove her [Kayla] from his house so I was trying to get him to bring her there, and he, he kept bothering me, calling me. We had been fighting like once I had gotten home, and he wasn't going to bring her, about him wanting to get back together with me, which I kept telling him no, and then finally I'm like yeah, sure, I'll get back together with you. Cause at this point I had been on the phone with him for an hour, he was - - you know, fighting and arguing with him, and if I hung up the phone, he would call back over and over again or text message me which costs me money." Trial Transcript at 91-92.

{¶11} After telling appellant that she would get back together with him, Morgan hung up the phone. She testified that appellant called her back a few minutes later and offered to bring Kayla home. Once appellant arrived with Kayla, appellant carried Kayla into the house. Morgan testified that she let appellant inside her mother's house even though neither she nor her mother wanted appellant in the house because Kayla was sleeping and she did not want her to wake up. After appellant exited the house, Morgan went outside to talk to him and told him that she wanted a divorce. According to Morgan, appellant, at that point, "said, Well, then you better not let me see Kayla ever again, and I said, That's fine with me, and he ended up leaving." Trial Transcript at 93.

{¶12} Approximately ten minutes later, appellant called Morgan who owed her $500.00 at the time for the cell phone bill. After appellant threatened to run up the cell phone bill, Morgan turned appellant's cell phone off. Appellant then returned to Morgan's mother's house and began ringing the doorbell over and over again. Morgan testified that she then went outside to talk to appellant because she did not want him to wake up their daughter. After Morgan refused appellant's repeated demands to turn his

cell phone back on, appellant demanded that Morgan bring Kayla outside. Morgan refused.

{¶13} Morgan testified that at the time, the main door to her mother's house was closed while the glass door in front of the same was open. According to Morgan, appellant's foot had been in the glass door. When Morgan attempted to open the main door to the house and go inside, appellant put his foot between the door jamb and the inner door and tried to push his way into the house while Morgan tried to close the door. Appellant was able to push the door into Morgan who fell into a couch behind the door. He then ran to Kayla's room and grabbed her out of her bed and ran out of the back door of the house. Morgan testified that appellant then threw Kayla into the front seat of a parked running car that was being driven by someone else. As the car took off, Morgan was able to get the license plate number which she provided to the police. The police brought Kayla home at 1:30 a.m.

{¶14} On cross-examination, Morgan testified that she was told by an unidentified governmental agency in Ohio that the restraining order from New Jersey was not valid in Ohio. She testified that she checked into the issue after appellant called her and told her that an attorney he had spoken with told him that the order was not valid in this state. Morgan also testified that she had taken the New Jersey restraining order to a lawyer in Ohio and was told that it was not valid in Ohio. According to Morgan, the police department told her that because the order was not valid in Ohio, both Morgan and appellant had full custody of Kayla "and we could take her any time we wanted except out of each other's houses." Trial Transcript at 103.

{¶15} On cross-examination, appellant testified that the restraining order out of New Jersey barred him from Morgan's residence, prohibited him from committing future acts of domestic violence, and prohibited him from having any form of contact or communication with Morgan. He also testified that the restraining order prohibited him from making, or causing anyone to make, harassing communications to Morgan, and prohibited him from stalking, following, or threatening to harm Morgan. Appellant testified that he was aware of all of this. Appellant further testified that he was told that the restraining order was not effective in Ohio.

{¶16} At the conclusion of the evidence and the end of deliberations, the jury, on March 28, 2008, found appellant guilty of violation of a protection order and burglary, but not guilty of endangering children. The jury found that appellant had violated the protection order while he was committing the felonious offense of burglary. Pursuant to a Judgment Entry filed on April 28, 2008, appellant was placed on three years of community control.[1]

{¶17} Appellant now raises the following assignment of error on appeal:

{¶18} "THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I

{¶19} Appellant, in his first assignment of error, argues that his convictions for violation of a protection order and burglary are against the manifest weight and sufficiency of the evidence. We disagree.

[1] A Nunc Pro Tunc Judgment Entry to correct a clerical error was filed on February 9, 2009. We note that such Entry incorrectly stated that appellant was convicted of violating R.C. 2919.27(A)(1) rather than (A)(3). The verdict form indicates that appellant was found guilty of violating R.C. 2919.27(A)(3).

{¶20} In *State v. Jenks* (1981), 61 Ohio St.3d 259, 574 N.E.2d 492, the Ohio Supreme Court set forth the standard of review when a claim of insufficiency of the evidence is made. The Ohio Supreme Court held: “An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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. Id. at paragraph two of the syllabus.

{¶21} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses 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 judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment.” *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, syllabus 1.

{¶22} Appellant was convicted of violation of a protection order in violation of R.C. 2919.27(A)(3) and burglary in violation of R.C. 2911.12(A)(4). R.C. 2919.27

states, in relevant part, as follows: “No person shall recklessly violate the terms of any of the following:…(3) A protection order issued by a court of another state.” R.C. 2901.22 defines reckless as follows: “(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature.”

{¶23} R.C. 2911.12(A)(4), the burglary statute, states as follows: “A) No person, by force, stealth, or deception, shall do any of the following: ... (4) Trespass in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present.” Force is defined as “any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.” R.C. 2901.01(A)(1). In turn, trespass is defined as knowingly entering the premises of another without privilege to do so. R.C. 2911.21(A)(1). See also *State v. O'Neal,* 87 Ohio St.3d 402, 408, 2000-Ohio-449, 721 N.E.2d 73.

{¶24} Appellant maintains that he could not have recklessly violated the New Jersey protection order because he lacked the mens rea to do so. Appellant notes that both he and Morgan were separately advised that the New Jersey protection order was not valid in Ohio and that appellant could see and visit with his daughter and not be in violation of the New Jersey order.

{¶25} However, appellant, on cross-examination, admitted that he knew the New Jersey order prohibited him from making any type of harassing communication to Morgan and from stalking, following or threatening to harm her. While he testified that both he and Morgan were advised by Ohio lawyers that the protection order was not effective in Ohio, the protection order, which appellant read at trial, stated that the same

could only be changed or dismissed by the New Jersey Family Court. As noted by appellee, appellant "does not contest the existence or validity of the New Jersey Protection order in this case."

{¶26} Testimony was adduced at trial that appellant repeatedly called and texted Morgan in an attempt to get her to get back together with him. At trial, there was testimony that, on December 5, 2007, after Morgan told him that she wanted a divorce, appellant left. He then proceeded to call Morgan and threatened to run up her cell phone bill. After Morgan turned her cell phone off, appellant returned to the house and rang the door bell repeatedly.

{¶27} With respect to the burglary charge, testimony was adduced that appellant was aware that he was not supposed to be in the house owned by Morgan's mother. Morgan testified that both she and her mother did not want appellant in the house, but that she left him in on the date in question so that appellant could put Kayla, who he was holding, to bed. Testimony also was adduced that, later the same day, appellant forced his way into the house without permission and grabbed Kayla.

{¶28} Based on the foregoing, we find that, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found appellant guilty of both offenses. We further find that the jury did not lose its way in convicting appellant of violation of a protection order and burglary.

{¶29} Appellant's sole assignment of error is, therefore, overruled.

{¶30} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Edwards, P.J.

Gwin, J. and

Hoffman, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/William B. Hoffman

JUDGES

JAE/d0624

[Cite as *State v. Morgan*, 2010-Ohio-4858.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MATTHEW LEE MORGAN	:	
Defendant-Appellant	:	CASE NO. 2009 CA 00130

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/W. Scott Gwin

s/William B. Hoffman

JUDGES