

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. 2014CA00150
SHUXIN HAN	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Alliance Municipal Court, Case No. 2014CR00228

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: May 18, 2015

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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*Gwin, P.J.*

{¶1} Appellant, Shuxin Han ["Han"] appeals his conviction and sentence on one count of Criminal Damaging or Endangering, in violation of R.C. 2909.06(A)(1) after a jury trial in Alliance Municipal Court.

*Facts and Procedural History*

{¶2} Han is married to Amanda Han and the parties have two young children. At the time of the incidents giving rise to the charges, the parties were living separate and apart. The parties had previously resided in Mayfield Heights, Ohio with Amanda Han moving to the City of Alliance in October 2013.

{¶3} On November 18, 2014, Han arrived at Amanda Han's residence sometime after 9:00 p.m. The parties' children had gone to bed prior to his arrival. Han entered Amanda Han's residence and a brief conversation/argument between the parties ensued, after which Han went to the second floor of the residence and removed his son "Eddy" from the child's bed. Han return to the downstairs of the residence.

{¶4} Amanda Han testified that she attempted to call the police to diffuse the situation and Han "yanked the phone out of my hand and threw it on the, ground so hard it broke." (T. at 53).

{¶5} Amanda's sister, Amy Joy, was present during November 18, 2013 incident. Ms. Joy testified that Amanda had the phone in her hand and that Han grabbed it and threw it on the floor.

{¶6} Han testified that he grabbed the phone out of his wife's hand and threw it on the floor.

{¶7} On or about February 6, 2014, four criminal charges were filed against Han. These charges included Domestic Violence, R.C. 2919.25(A), Endangering Children, R.C. 2919.22(B)(1), Criminal Damaging or Endangering, R.C. 2909.06(A)(1) and Criminal Trespass, R.C. 2911.21(A)(1).<sup>1</sup>

{¶8} The Criminal Damaging charge concerned the cell phone, which Han admittedly threw on the floor during an argument and which was damaged as a result.

{¶9} According to Amanda Han, she had purchased the cell phone at Wal-Mart prior to separating from Han. Han testified that Amanda did not work at all during the marriage. Han further testified he had purchased the cell phone in question and paid the phone bill every month, even after Amanda moved out of the marital residence.

{¶10} The matter proceeded to a jury trial and Han was found "not guilty" as to all counts with the exception of the Criminal Damaging count. (T. at. 105). As to that count, Han was sentenced to 90 days in jail, given credit for time served the amount of eight days, and a balance of the 90-day jail term was suspended, with the exception of seven days. Id. Han was also fined in the sum of \$500.00 and ordered to pay court costs. Id

#### *Assignments of Error*

{¶11} Han raises three assignments of error,

{¶12} "I. THE APPELLANT'S CONVICTION FOR CRIMINAL DAMAGING WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

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<sup>1</sup>Because the jury acquitted Han of all other charges, the Court will focus on the events of the evening of November 18, 2013, and specifically only the facts relevant to the conviction of criminal damaging.

{¶13} “II. THE APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

{¶14} “III. THE APPELLANT'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

I & III

{¶15} Han's first and third assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶16} In his first assignment of error, Han challenges the sufficiency of the evidence; in his third assignment of error, Han contends his conviction is against the manifest weight of the evidence produced by the state at trial.

{¶17} Our review of the constitutional sufficiency of evidence to support a criminal conviction is governed by *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which requires a court of appeals to determine whether “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.*; see also *McDaniel v. Brown*, 558 U.S. 120, 130 S.Ct. 665, 673, 175 L.Ed.2d 582(2010) (reaffirming this standard); *State v. Fry*, 125 Ohio St.3d 163, 926 N.E.2d 1239, 2010–Ohio–1017, ¶146; *State v. Clay*, 187 Ohio App.3d 633, 933 N.E.2d 296, 2010–Ohio–2720, ¶68.

{¶18} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997), *superseded by constitutional amendment on other grounds as stated by State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668, 1997-Ohio–355. Weight of the evidence concerns “the

inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue, which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.” (Emphasis sic.) *Id.* at 387, 678 N.E.2d 541, *quoting* Black's Law Dictionary (6th Ed. 1990) at 1594.

{¶19} When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a “thirteenth juror” and disagrees with the fact finder’s resolution of the conflicting testimony. *Id.* at 387, 678 N.E.2d 541, *quoting* *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). However, an appellate court may not merely substitute its view for that of the jury, but must find that “the jury 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, supra*, 78 Ohio St.3d at 387, *quoting* *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720–721 (1st Dist. 1983). Accordingly, reversal on manifest weight grounds is reserved for “the exceptional case in which the evidence weighs heavily against the conviction.” *Id.*

“[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts.

\* \* \*

“If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.”

*Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, *quoting* 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

{¶20} To find Han guilty of criminal damaging or endangering the jury would have to find beyond a reasonable doubt that he caused, or created a substantial risk of physical harm to any property of another without the other person’s consent: (1) Knowingly, by any means;(2) Recklessly, by means of fire, explosion, flood, poison gas, poison, radioactive material, caustic or corrosive material, or other inherently dangerous agency or substance. R.C. 2909.06.

{¶21} The gravamen of Han’s argument is, either the victim purchased the cell phone with marital funds or Han purchased the cell phone with marital funds. This occurred during the marriage and, therefore, the cell phone was marital property. Thus, Han argues he cannot be convicted of destruction of property to which he had an equal possessory interest.

{¶22} At trial, Amanda Han testified that she had purchased the cell phone in question with her own money. (T. at 71). She further testified that the cell phone broken during the argument was not the same phone that Han had purchased. (Id.). Amanda Han explained that the cell phone was a “pay as you go” phone. (T. at 55). When the phone runs out of minutes, you purchase additional minutes. (T. at 56). Accordingly,

there was no bill for the cell phone. (Id.). Amanda Han did not produce a receipt for the cell phone or the minutes.

{¶23} Han testified that he bought “eight or seven cell phones like that.” (T. at 140). Han did not produce either receipts or billing statements to verify that the cell phone that was broken was in his name or that he paid for the phone minutes or plan after the parties had separated.

{¶24} Viewing the evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that Han committed the crime of criminal damaging. We hold, therefore, that the state met its burden of production regarding each element of the crime of criminal damaging and, accordingly, there was sufficient evidence to submit the charge to the jury and to support Han’s conviction.

{¶25} Ultimately, “the reviewing court must determine whether the appellant or the appellee provided the more believable evidence, but must not completely substitute its judgment for that of the original trier of fact ‘unless it is patently apparent that the fact finder lost its way.’” *State v. Pallai*, 7th Dist. Mahoning No. 07 MA 198, 2008-Ohio-6635, ¶31, *quoting State v. Woullard*, 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E.2d 964 (2nd Dist. 2004), ¶ 81. In other words, “[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe.” *State v. Dyke*, 7th Dist. Mahoning No. 99 CA 149, 2002-Ohio-1152, at ¶ 13, *citing State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125(7th Dist. 1999).

{¶26} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212(1967), paragraph one of the syllabus; *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶118. *Accord, Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Marshall v. Lonberger*, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

{¶27} The jury as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly \* \* \* such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence". *State v. Craig*, 10th Dist. Franklin No. 99AP-739, 1999 WL 29752 (Mar 23, 2000) *citing State v. Nivens*, 10th Dist. Franklin No. 95APA09-1236, 1996 WL 284714 (May 28, 1996). Indeed, the jury need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶21, *citing State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964); *State v. Burke*, 10th Dist. Franklin No. 02AP-1238, 2003-Ohio-2889, *citing State v. Caldwell*, 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist. 1992). Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks*, *supra*.

{¶28} In *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E. 2d 118 (1954), the Supreme Court further cautioned,

The mere number of witnesses, who may support a claim of one or the other of the parties to an action, is not to be taken as a basis for



resolving disputed facts. The degree of proof required is determined by the impression which the testimony of the witnesses makes upon the trier of facts, and the character of the testimony itself. Credibility, intelligence, freedom from bias or prejudice, opportunity to be informed, the disposition to tell the truth or otherwise, and the probability or improbability of the statements made, are all tests of testimonial value. *Where the evidence is in conflict, the trier of facts may determine what should be accepted as the truth and what should be rejected as false. See Rice v. City of Cleveland*, 114 Ohio St. 299, 58 N.E.2d 768.

161 Ohio St. at 477-478. (Emphasis added).

A fundamental premise of our criminal trial system is that “the jury is the lie detector.” *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973) (emphasis added), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the “part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.” *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88, 11 S.Ct. 720, 724-725, 35 L.Ed. 371 (1891).

*United States v. Scheffer* (1997), 523 U.S. 303, 313, 118 S.Ct. 1261, 1266-1267(1997).

{¶29} We find that this is not an “exceptional case in which the evidence weighs heavily against the conviction.” *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541,

*quoting Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. The jury neither lost their way nor created a miscarriage of justice in convicting Han of the charge.

{¶30} Based upon the foregoing and the entire record in this matter, we find Han's conviction was not against the sufficiency or the manifest weight of the evidence. To the contrary, the jury appears to have fairly and impartially decided the matters before them. The jury as a trier of fact can reach different conclusions concerning the credibility of the testimony of the witnesses. This court will not disturb the jury's finding so long as competent evidence was present to support it. *State v. Walker*, 55 Ohio St.2d 208, 378 N.E.2d 1049 (1978). The jury heard the witnesses, evaluated the evidence, and was convinced of Hans guilt.

{¶31} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed, proves all the elements of criminal damaging or endangering as charged beyond a reasonable doubt.

{¶32} Han's first and third assignments of error are overruled.

## II.

{¶33} In his second assignment of error, Han maintains he received ineffective assistance of counsel because trial counsel failed to move for acquittal at any point in the proceedings pursuant to Crim. R. 29. Han contends this could be construed as a waiver of the argument on appeal that his conviction was based upon insufficient evidence.

{¶34} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's

essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180(1993); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373(1989).

{¶35} In order to warrant a finding that trial counsel was ineffective, the petitioner must meet both the deficient performance and prejudice prongs of *Strickland* and *Bradley*. *Knowles v. Mirzayance*, 556 U.S. 111, 129 S.Ct. 1411, 1419, 173 L.Ed.2d 251(2009).

{¶36} Because we have addressed Han's sufficiency of the evidence argument, he cannot establish prejudice from counsel's failure to move for acquittal pursuant to Crim. R. 29.

{¶37} Han's second assignment of error is overruled.

{¶38} For the foregoing reasons, the judgment of the Alliance Municipal Court, Stark County, Ohio is affirmed.

By Gwin, P.J.,

Wise, J., and

Baldwin, J., concur