

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals Nos. L-13-1024
L-13-1025

Appellee

Trial Court Nos. CR0201202214
CR0201202068

v.

Climmie Payne

DECISION AND JUDGMENT

Appellant

Decided: March 21, 2014

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

* * * * *

JENSEN, J.

{¶ 1} A jury convicted defendant-appellant, Climmie Payne, of domestic violence and intimidation of a victim or witness in a criminal case, violations of R.C. 2919.25(A) and (D)(4) and 2921.04(B). The trial court sentenced Payne to 36 months on each charge, to be served consecutively. Payne now appeals those convictions and the

resulting sentences, both journalized by the trial court on December 20, 2012. For the reasons that follow, we affirm the trial court judgments, in part, and reverse, in part.

I. Factual Background

{¶ 2} On June 8, 2012, Payne and his wife, Ishaun Fraiss, were at their apartment drinking. At some point, they began to argue and, according to Fraiss, Payne physically assaulted her. She claims that Payne jumped on her and began to “beat [her] senseless,” punching, kicking, and choking her. The door to their apartment had a deadlock which required a key to exit. Fraiss testified that Payne confiscated her keys, purse, and cell phone in an attempt to prevent her from leaving. She fled to the bathroom and then to a second floor bedroom from which she was prepared to jump to escape Payne. Payne eventually left, however, taking her purse and cell phone, but leaving her keys. Fraiss left the apartment, went to a nearby gas station, asked to use the phone, then dialed her cell phone. Payne answered it. He agreed to return Fraiss’ belongings and left them in his sister’s mailbox for her to retrieve. She picked up the items and drove herself to St. Vincent Mercy Medical Center’s emergency department.

{¶ 3} There is much about Fraiss’ visit to the emergency department that she does not recall. The record reveals that while there, Fraiss was evaluated and her injuries were photographed. She sustained bumps and bruises to her face, arms, stomach, and legs. While there, she was visibly intoxicated and she concedes that she was less than cooperative with hospital staff. Hospital security was called to monitor her. She fought attempts to place an IV and to otherwise treat her. She eventually expressed that she

wanted to leave, indicated that she was not fearful of leaving despite the fact that Payne was not in custody, and left without completing the required discharge documents. Payne was charged with domestic violence on July 2, 2012.

{¶ 4} Fraiss claims that after Payne was charged with domestic violence, he began threatening her via text messages, voicemails, and phone calls. Text messages produced at trial reveal that Payne asked what she was going to do about the charges and threatened damage to her car because Fraiss had not returned Payne's glasses to him. Voice mails recovered included more threatening statements indicating that he would break into Fraiss' house and that he would beat her and "carve [her] face up" to the point she would look like "lunch meat." Fraiss claims that Payne also sent her nude photographs that he had taken of her while she was sleeping, as well as photos of dead women. These threats resulted in intimidation charges being filed against Payne in a separate case on July 27, 2012.

{¶ 5} The two charges were tried to a jury on December 17 and 18, 2012. Fraiss testified, as did David Morford, a detective in the Computer Crimes Unit of the Toledo Police Department, and Ashley Nichols, the sergeant assigned to investigate Fraiss' claims. Morford discussed the procedure for extracting the messages from Fraiss' phone. Nichols described the investigation and presented certified judgment entries evidencing Payne's prior domestic violence convictions. The jury found Payne guilty on both charges and the court sentenced Payne to 36 months in prison for the domestic violence

conviction and 36 months for the intimidation conviction, to be served consecutively.

Payne now appeals and assigns the following errors for our review:

1. Appellant's conviction fell against the manifest weight of the evidence.
2. The Trial Court erred in sentencing appellant to consecutive sentences without making the required findings.

II. Legal Standards and Analysis

A. Appellant's First Assignment of Error

{¶ 6} In his first assignment of error, Payne claims that his conviction fell against the manifest weight of the evidence because (1) Frai could not remember much of her emergency room visit; and (2) the cell phone to which calls, messages, and photos were sent was not registered to Frai.

{¶ 7} A challenge to the manifest weight of the evidence questions whether the state has met its burden of persuasion. The appellate court sits as a "thirteenth juror" and may review the entire record, weigh the evidence and make all reasonable inferences, and consider witness credibility. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). The appellate court determines whether the trier of fact "lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and new trial ordered." *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172,175, 485 N.E.2d 717 (1st Dist.1983). Manifest weight errors are found only in exceptional cases where the evidence weighs heavily against conviction. *Id.*

{¶ 8} With respect to his domestic violence conviction, Payne essentially argues that Frai's version of events should not be believed because of significant lapses in her memory. For instance, Frai did not recall that hospital staff had placed security personnel by her bed to prevent her from leaving, she left the hospital without signing discharge papers, and she told hospital staff that she was not afraid to go home, despite knowing that Payne was not in custody.

{¶ 9} With respect to his conviction for intimidation of a victim or witness, Payne contends that the threatening messages retrieved by police were sent to a phone registered to someone other than Frai. He complains that the police never confirmed that the phone belonged to Frai.

{¶ 10} At trial, the jury was presented with photographs of Frai's injuries and the medical records from her emergency room visit. Frai was cross-examined about her behavior during the examination and admitted that there were certain things she did not recall. Frai was also questioned about the fact that the account for the cell phone to which the messages had been sent was registered in someone else's name. She explained that the account was in a friend's name—not hers—because the cell phone provider refused to issue service to her because of her poor payment history. Nonetheless, she testified that it was her phone and it was the phone that she used.

{¶ 11} Payne's arguments present credibility issues. Although under a manifest-weight standard we consider the credibility of witnesses, we must nonetheless extend special deference to the jury's credibility determinations given that it is the jury who has

the benefit of seeing the witnesses testify, observing their facial expressions and body language, hearing their voice inflections, and discerning qualities such as hesitancy, equivocation, and candor. *State v. Fell*, 6th Dist. Lucas No. L-10-1162, 2012-Ohio-616, ¶ 14.

{¶ 12} In this case, the jury observed Fraiss' testimony and found it credible. We cannot conclude that the jury lost its way. We, therefore, find Payne's first assignment of error not well-taken.

B. Appellant's Second Assignment of Error

{¶ 13} In his second assignment of error, Payne claims that in its judgment entries, the trial court failed to make the required findings of fact before sentencing Payne to consecutive sentences. He concedes that at the sentencing hearing, the court "clearly stated its reasons for sentencing Appellant to consecutive sentences on the record," but he argues that the trial court's failure to place these findings in its judgment entries requires remand.

{¶ 14} Payne is correct that a trial court speaks through its judgment entries. *State v. Kunz*, 6th Dist. Wood WD-10-047, 2011-Ohio-3115, ¶ 16. Payne is also correct that under R.C. 2929.14(C)(4), the trial court must make statutorily-mandated findings before imposing consecutive sentences.

{¶ 15} At the sentencing hearing, the trial court clearly set forth its reasons for imposing consecutive sentences. The court explained:

The reason for the consecutive sentence is that the Court finds that it is necessary to protect the public from future crimes and to punish--and/or to punish the Defendant, and I do not find this to be disproportionate to the seriousness of your conduct or the danger that you present to the community.

Your past history and criminal record suggest that you are a man with a history of violence, a history of using weapons, and a history of acting upon your violent impulses. I also find your criminal history requires consecutive sentences, and that the harm caused was so great or unusual that no single prison term for any of these two offenses as committed and in the course of conduct would reflect the seriousness of your conduct, that being once the domestic violence offense had occurred and was getting ready to go to the Grand Jury, or to the courtroom, that the intimidation took place thereafter, while the domestic violence investigation was pending, and that the conduct is consecutive in nature to the intimidation to the crime victim for domestic violence, and therefor [sic] the sentences are appropriately ordered consecutive.

{¶ 16} While we find that the court fully explained the reasons for ordering consecutive sentences and made the findings required under R.C. 2929.14(C)(4), we must nonetheless remand this matter to the trial court so that it can amend its judgment entry to reflect its findings. We, therefore, find Payne's second assignment of error well-taken.

III. Conclusion

{¶ 17} We find Payne's first assignment of error not well-taken. The trier of fact made credibility determinations that were not against the manifest weight of the evidence. We find his second assignment of error well-taken and we remand this matter to the trial court for the limited purpose of amending the judgment entry to reflect that it made the findings required under R.C. 2929.14(C)(4). The December 20, 2012 judgments of the Lucas County Court of Common Pleas are affirmed, in part, and reversed and remanded, in part. The costs of this appeal are assessed to appellant and appellee equally under App.R. 24.

Judgments affirmed, in part,
and reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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