[Cite as *State v. Irvin*, 2015-Ohio-798.]

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

State of Ohio — Court of Appeals No. WD-14-019

Appellee — Trial Court No. 13 CR 414

v.

Douglas Irvin, Jr. — **DECISION AND JUDGMENT**

Appellant — Decided: March 6, 2015

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, David E. Romaker, Jr. and David T. Harold, Assistant Prosecuting Attorneys, for appellee.

Gary L. Smith, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Douglas Irvin, Jr., appeals a judgment of conviction and sentence entered by the Wood County Court of Common Pleas after he was found guilty of one count of perjury. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} Appellant sets forth three assignments of error:

I. The trial court erred by failing to grant defendant/appellant's motion for acquittal under Rule 29 of the Ohio Rules of Criminal Procedure.

II. The trial court erred by refusing to permit the appellant to identify and confront his accuser.

III. The trial court's sentence of appellant to a near maximum sentence of thirty months was contrary to law and further constituted an abuse of discretion in failing to properly consider and apply the sentencing guidelines set forth in Ohio Revised Code, Sections 2929.11 and 2929.12.

{¶ 3} The perjury charge against appellant arises out of testimony appellant provided in a motion hearing before a magistrate in the Wood County Common Pleas Court, Domestic Relations Division, in June of 2013.

{¶ 4} By way of background, appellant married Melissa Irvin in 2007. Melissa had two daughters, who then became appellant's stepdaughters. Appellant and Melissa had a daughter together before they divorced in 2011. On January 15, 2013, Melissa reported to law enforcement that appellant had touched her older daughter's bare breasts. An investigation ensued and appellant voluntarily took two polygraph tests, one in February 2013, which was not completed because appellant was sick, and the other in

April 2013, which appellant failed. The polygraph tests were administered by a state trooper and were videotaped.

{¶ 5} On May 29, 2013, Melissa filed an emergency motion to terminate appellant's visitation with their minor daughter. A hearing on this motion was held on June 12, 2013. Melissa testified under oath at the hearing that she filed the motion to protect their daughter because appellant was being investigated for molesting his former stepdaughter. Appellant was then sworn and stated, "This whole situation goes back to falsehood. I've been through the lie detector twice now, passed both times." The magistrate denied Melissa's motion.

{¶ 6} On August 8, 2013, appellant was indicted on one count of perjury, in violation of R.C. 2921.11(A) and (F), a felony of the third degree. Appellant pled not guilty to the charge.

{¶ 7} On January 23, 2014, a jury trial commenced, and appellant was convicted of one count of perjury. On March 10, 2014, appellant was sentenced to a total of 30 months in prison. This appeal ensued.

{¶ 8} R.C. 2921.11(A) states:

> (A) No person, in any official proceeding, shall knowingly make a false statement under oath or affirmation, or knowingly swear or affirm the truth of a false statement previously made, when either statement is material.

{¶ 9} In his first assignment of error, appellant argues the trial court erred by failing to grant his motion for acquittal. Regarding the materiality of the statement, appellant submits if a false statement cannot affect the course or outcome of the proceeding, it is immaterial as a matter of law. He asserts the state has offered no evidence suggesting the magistrate was unduly influenced "by an alleged polygraph result," thus all of the elements of perjury were not proven. Appellant also claims the ultimate issue is whether he was aware that he actually did fail the polygraph test and based on the surrounding circumstances, "it is certainly reasonable that the answer to that question is 'probably not.'" He maintains, after reviewing the testimony of the trooper who administered the polygraph test, the test results were a secondary goal and the primary goal was to create emotional anguish in appellant to get him to confess.

{¶ 10} We review a ruling on a Crim.R. 29 motion for acquittal under the same standard used to determine whether there was sufficient evidence to sustain a conviction. *State v. Merritt*, 6th Dist. Fulton No. F-12-009, 2013-Ohio-4834, ¶ 8. Under the sufficiency standard, it must be determined "'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.*, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. (Additional citations omitted.) Crim.R. 29 provides that upon a defendant's motion or the court's own motion, after the evidence of either party is closed, the court shall order

entry of judgment of acquittal if the evidence is insufficient to sustain a conviction of the charged offense.

{¶ 11} Here, it is not disputed that the statement at issue was uttered in an official proceeding, under oath. What is in dispute, according to appellant, is whether he knowingly made a false statement and whether the statement was material.

Knowingly

{¶ 12} R.C. 2901.22(B) provides:

> A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

{¶ 13} In order for a false statement to be knowingly false, "'it must appear that the accused knew his statement to be false or was consciously ignorant of its truth.'" *State v. Bayless*, 14 Ohio App.2d 11, 14, 235 N.E.2d 737 (4th Dist.1968), quoting 70 Corpus Juris Secundum, Perjury, Section 17b(1) at 473 (1942). A defendant's purpose or intent "must be gathered from the surrounding facts and circumstances." (Citations omitted.) *State v. Lott*, 51 Ohio St.3d 160, 168, 555 N.E.2d 293 (1990).

{¶ 14} Here, appellant contends from his point of view, "the State's failure to coerce a false confession for GSI [gross sexual imposition] during an interrogatory polygraph test truly means that he passed" the polygraph tests both times. Appellant

claims due to the perceived deception of the officers, he did not believe he had failed the test.

{¶ 15} The video recording of the first polygraph test reveals that appellant was clearly informed by the state trooper conducting the test that the test could not be completed due to appellant's coughing. The trooper and appellant then scheduled another date for appellant to re-take the test. Appellant appeared on April 9, 2013, to re-take the polygraph test and after that test was completed, the trooper advised appellant, "Ok, now, you failed the polygraph." In response, appellant said, "I failed the polygraph." The trooper said, "You failed it." Appellant replied, "Ok." The trooper then said, "You outright failed it."

{¶ 16} The circumstances surrounding appellant's testimony at the motion hearing shows appellant was given an oath, was asked to state his name and address, and was then told by the magistrate, "[g]o ahead." Appellant testified, "[t]his whole situation goes back to falsehood. I've been through the lie detector twice now, passed both times." The record shows appellant spontaneously offered this statement; it was not made in response to any questioning. Moreover, the record reveals appellant's testimony on this point was categorical, as he did not vacillate or equivocate in his testimony.

{¶ 17} When viewing the foregoing evidence in a light most favorable to the state, we find a rational trier of fact could have found, beyond a reasonable doubt, that appellant knowingly made a false statement under oath.

Material

{¶ 18} R.C. 2921.11(B) states:

> A falsification is material, regardless of its admissibility in evidence, if it can affect the course or outcome of the proceeding. It is no defense to a charge under this section that the offender mistakenly believed a falsification to be immaterial.

{¶ 19} Appellant argues the statement at issue was made at a post-divorce hearing, the primary purpose of which was to appoint a guardian ad litem. He asserts if the statement cannot affect the outcome of the post-divorce proceeding, it is immaterial as a matter of law. Appellant also contends, under Ohio law, the results of polygraph examinations are not admissible unless both parties stipulate to the admissibility of the results, and there is no written stipulation between him and the state for the admission of the results in this matter.

{¶ 20} Appellant is correct that the results of polygraph examinations are admissible in evidence in court if the parties so stipulate. *See State v. Souel*, 53 Ohio St.2d 123, 372 N.E.2d 1318 (1978), syllabus. Here, however, the result of the polygraph exam was not admitted in evidence; neither party introduced that appellant failed the polygraph. Rather, appellant made a statement under oath in front of a magistrate that he took and passed two polygraph exams. This statement, as part of appellant's story that the molestation investigation was based on a falsehood, had the potential to bolster his credibility and influence the magistrate in her decision of whether appellant's visitation

with his daughter should continue or be terminated. When viewing this evidence in a light most favorable to the state, we find a rational trier of fact could have found, beyond a reasonable doubt, that appellant's false statement that he took and passed two polygraph exams was material to the magistrate in determining whether or not to grant the emergency motion to terminate appellant's visitation with his daughter.

{¶ 21} Because we find, after viewing the evidence in a light most favorable to the state, that a rational trier of fact could have found the essential elements of perjury proven beyond a reasonable doubt, we conclude that sufficient evidence supports appellant's conviction. Appellant's first assignment of error is therefore not well-taken.

{¶ 22} In the next assignment of error, appellant argues the trial court erred by refusing to permit appellant to identify and confront his accuser as guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section 10 of the Ohio Constitution. Appellant contends, at his perjury trial, he wanted to ask his former wife, Melissa, whether she was his accusing witness, but he was prevented from establishing this fact. Appellant asserts the perjury case was a ruse and a "substitution for * * * [a R.C. 2907.05](A)(4) GSI allegation in which the accusing witness was the same Melissa."

{¶ 23} "The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.'" (Citation omitted.) *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Section 10, Article I of the Ohio Constitution

"provides no greater right of confrontation than the Sixth Amendment[.]" *State v. Self*, 56 Ohio St.3d 73, 79, 564 N.E.2d 446 (1990). The Sixth Amendment right to confrontation is not implicated by the appellant's own statement. *State v. Hardison*, 9th Dist. Summit No. 23050, 2007-Ohio-366, ¶ 16. "If the statements are properly viewed as [defendant's] own, there is no Confrontation Clause issue because [defendant] cannot claim that he was denied the opportunity to confront himself." *State v. Rivera-Carrillo*, 12th Dist. Butler No. CA2001-03-054, 2002 WL 371950, *17 (Mar. 11, 2002).

{¶ 24} Here, at appellant's perjury trial, he was confronted with the statement he made under oath, in a proceeding before a magistrate, which was recorded and then transcribed by a court reporter. The state called the state trooper, who administered the polygraph exams to appellant, who testified that appellant completed only one exam—and he failed it. The state also called the court reporter as a witness to testify that she transcribed the recording of the June 12, 2013 proceeding, produced a transcript and filed the official copy of the transcript with the clerk. Appellant did not challenge the court reporter's veracity at trial, nor does he claim he did not make the statement. Since appellant's former wife was not considered a "witness against" him for purposes of his own perjured statement, appellant's inability to question her to ascertain if she brought the statement to the attention of the prosecutor is not a violation of his constitutional right to confront witnesses against him. Appellant's second assignment error is therefore not well-taken.

{¶ 25} In his third assignment of error, appellant argues his near maximum sentence of 30 months was contrary to law and the trial court abused its discretion in failing to properly consider and apply the sentencing guidelines set forth in R.C. 2929.11 and 2929.12. Appellant contends he was sentenced for the unindicted R.C. 2907.05(A)(4) GSI offense rather than perjury.

{¶ 26} We review felony sentences using the standard of review set forth in R.C. 2953.08. *State v. Tammerine*, 6th Dist. Lucas No. L-13-1081, 2014-Ohio-425, ¶ 11. R.C. 2953.08(G)(2) provides we may either increase, reduce, modify, or vacate a sentence and remand for resentencing where we clearly and convincingly find that either the record does not support the sentencing court's findings under R.C. 2929.13(B) or (D), 2929.14(B)(2)(e) or (C)(4), or 2929.20(I), or the sentence is otherwise contrary to law. *Id.* In determining whether a sentence is clearly and convincingly contrary to law, the approach in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, can provide guidance. *Id.* at ¶ 15.

> Significantly, *Kalish* determined that a sentence was not clearly and convincingly contrary to law in a scenario in which it found that the trial court had considered the R.C. 2929.11 purposes and principles of sentencing, had considered the R.C. 2929.12 seriousness and recidivism factors, had properly applied post release control, and had imposed a sentence within the statutory range. *Id.*

{¶ 27} Here, none of the statutory provisions specified under R.C. 2953.08(G)(2) is relevant. *See Tammerine* at ¶ 19-21. A review of the record reveals, and we find, appellant's sentence is not contrary to law. The 30-month sentence imposed upon appellant is within the permissible statutory sentencing range for a third degree felony. *See* R.C. 2929.14(A)(3)(b). In addition, the trial court properly considered the purposes and principles of sentencing, pursuant to R.C. 2929.11, and the seriousness and recidivism factors as well as appellant's history of criminal convictions, in accordance with R.C. 2929.12. At the sentencing hearing, the trial court found a combination of community control sanctions would demean the seriousness of appellant's conduct and a sentence of imprisonment was commensurate with the seriousness of his conduct. Since the trial court did not abuse its discretion and appellant's sentence is not contrary to law, appellant's third assignment of error is without merit.

{¶ 28} The judgment of the Wood County Court of Common Pleas is hereby affirmed, and appellant's bond issued April 23, 2014 is revoked. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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

Mark L. Pietrykowski, J. _____

JUDGE

Arlene Singer, J. _____

JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.

JUDGE