

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90476

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DELONTA SMITH

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-494964

BEFORE: Sweeney, A.J., Cooney, J., and Rocco, J.

RELEASED: November 20, 2008

JOURNALIZED:

[Cite as *State v. Smith*, 2008-Ohio-5985.]
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this Court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

[Cite as *State v. Smith*, 2008-Ohio-5985.]

JAMES J. SWEENEY, A.J.:

{¶ 1} Defendant-appellant, Delonta Smith (“defendant”), appeals his convictions for felonious assault and domestic violence following a jury trial. Defendant also challenges being sentenced for a felony, rather than a misdemeanor, domestic violence conviction. For the reasons that follow, we affirm.

{¶ 2} Defendant was indicted on two counts of felonious assault and one count of domestic violence. The domestic violence count contained a furthermore clause specifying that defendant had been previously convicted of domestic violence. The defense stipulated to the furthermore clause and defendant’s prior conviction for domestic violence. The defense then objected to submission of the conviction as a State’s exhibit to the jury stating that, “[s]ince we have stipulated to that prior conviction of domestic violence, that’s no longer an element that they [the jury] have to judge and determine whether there is proof beyond a reasonable doubt of that element, that furthermore clause. We’re conceding it by stipulation. *** [T]here is no real relevance [of submitting the prior conviction to the jury as an Exhibit] because the jury doesn’t have to determine that issue, the furthermore clause, that’s conceded by stipulation.” (Tr. 144-145.) The court excluded State’s Exhibit B, defendant’s prior conviction for domestic violence, from the evidence “based on the stipulations agreed upon by the parties, the State and the defendant.”

{¶ 3} The defense also stipulated to the victim’s medical records but requested redaction of the following note: “Patient was hit in head with metal can by boyfriend.” The trial court admitted the medical records without redaction.

{¶ 4} At trial, the State presented the testimony of the victim. The victim testified that on the day of the incident, she and the defendant were living together with their child. She and defendant were in their residence alone with their infant son. They began to argue and, as the victim was leaning over the baby's crib, defendant hit her in the head with a can of roach spray. This caused the victim's head to bleed. Although the victim had not contacted the police herself, the police arrived at the residence. According to the investigating detective, several neighbors had called the police.

{¶ 5} The victim did not open the door initially but eventually spoke to police. She signed a complaint for domestic violence and defendant was arrested. The victim then went to the hospital where she received stitches.

{¶ 6} The victim further authenticated several letters that defendant wrote to her, wherein he urged her not to appear for his trial.

{¶ 7} The defense called the investigating detective on cross-examination. She indicated that she spoke to the victim over the phone but was not able to obtain a written statement from her. The detective reviewed the 911 tapes and the parties' criminal records. The 911 tapes were not provided to the defense nor introduced as exhibits at trial. The detective presented her evidence to the city prosecutor who instituted the charges against the defendant.

{¶ 8} The trial court denied defendant's motion made pursuant to Crim.R. 29. The trial court charged the jury and, based on the defense objection and stipulation, the trial court did not submit the issue of defendant's prior domestic violence charge to the jury.

{¶ 9} The jury found defendant guilty of one count of felonious assault and domestic violence. The court sentenced defendant to serve a concurrent two-year prison sentence, comprised of one year for the domestic violence conviction and two years for the felonious assault conviction. Defendant did not object to being sentenced for a felony domestic violence conviction.

{¶ 10} Defendant now appeals, raising seven assignments of error for our review, which will be addressed together where appropriate for discussion.

{¶ 11} "I. The accused's conviction for felonious assault was not supported by sufficient evidence as required by due process in violation of U.S. Constitution Amendment XIV and Crim.R. 29.

{¶ 12} "II. The accused's conviction for domestic violence was not supported by sufficient evidence as required by due process in violation of U.S. Constitution Amendment XIV and Crim.R. 29."

{¶ 13} "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.” *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 14} In count one, defendant was charged with felonious assault in violation of R.C. 2903.11(A)(1), which provides:

{¶ 15} “(A) No person shall knowingly do either of the following:

{¶ 16} “(1) Cause serious physical harm to another or to another's unborn.”

{¶ 17} Defendant was also charged with domestic violence in violation of R.C. 2929.25 with a prior conviction specification.

{¶ 18} With regard to felonious assault, defendant believes the evidence is insufficient to establish serious physical harm.

{¶ 19} R.C. 2901.01 (A)(5) provides that “[S]erious physical harm to persons’ means any of the following:

{¶ 20} “(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶ 21} “(b) Any physical harm that carries a substantial risk of death;

{¶ 22} “(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶ 23} “(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶ 24} “(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.”

{¶ 25} This Court has held that “[w]here injuries to the victim are serious enough to cause him or her to seek medical treatment, the finder of fact may reasonably infer that the force exerted on the victim caused serious physical harm as defined by R.C. 2901.01(A)(5).” *State v. Lee*, Cuyahoga App. No. 82326, 2003-Ohio-5640, ¶24, citing *State v. Wilson* (Sept. 21, 2000), Cuyahoga App. No. 77115. In this case, the evidence reflects that the victim sought medical treatment for the injuries she sustained and, therefore, there was sufficient evidence to satisfy the element of serious physical harm.

{¶ 26} Defendant further maintains that there was insufficient evidence that he acted knowingly as required to submit either the domestic violence or the felonious assault counts to the jury.

{¶ 27} 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.” The victim testified that she was alone in the house with defendant and their infant, that she and the defendant were fighting, and that he hit her in the back of her head with a can, which caused her head to bleed. There is sufficient evidence to satisfy the mens rea element for purposes of Crim.R. 29.

{¶ 28} Assignments of Error I and II are overruled.

{¶ 29} “III. Defendant’s convictions for felonious assault and domestic violence were against the manifest weight of the evidence.”

{¶ 30} To warrant reversal from a verdict under a manifest weight of the evidence claim, this Court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 31} The defendant challenges his conviction as being against the manifest weight of the evidence based upon his belief that the victim’s testimony was not supported and questionable. The evidence established that, besides the presence of an infant, no one else witnessed the incident. The record establishes that the victim sustained injuries to her head, which she testified the defendant had inflicted. The medical records show that the victim received stitches. The investigating officer testified that various neighbors called 911, causing the police to respond to the residence.

{¶ 32} On cross-examination, the defense suggested that the victim sustained her injuries by falling on the steps, which she denied. The defense also questioned the victim about her level of intoxication at the time of the incident. The jury was also presented with letters reportedly authored by the defendant, which urged the victim not to appear for his trial.

{¶ 33} Considering the totality of the record evidence, the jury did not clearly lose its way in resolving any conflicts and the convictions cannot be considered a manifest miscarriage of justice.

{¶ 34} Assignment of Error III is overruled.

{¶ 35} “IV. The trial court erred by allowing hearsay testimony in the form of the medical records entered by the prosecution.”

{¶ 36} Defendant stipulated to the admission of the victim’s medical records with the exception of the following statement: “Patient was hit in head with metal can by boyfriend.”

{¶ 37} Defendant maintains this statement identified him and was inadmissible hearsay.

{¶ 38} “Absent some evidence that the identity of the perpetrator is necessary for medical purposes, statements identifying an assailant are not properly admitted pursuant to Evid.R. 803(4). *** [H]earsay statements in medical records could not come in under the business records exception in Evid.R. 803(6) unless they had an independent basis for their admission. See Staff Notes to Evid.R. 803(6).” *State v. Henderson* (Aug. 20, 1999), Trumbull App. Nos. 98-T-0039, 98-T-0040 and 98-T-0041; see, also, *State v. Morris* (Dec. 12, 1991), Cuyahoga App. No. 59453, citing *Mastran v. Urichich* (1988), 37 Ohio St.3d 44, 48 (“the identity of the person who struck [the victim] was not reasonably pertinent to diagnosis or treatment.”)

{¶ 39} In this case, the statement which defendant objected to did not actually identify defendant but simply indicated a “boyfriend” hit the patient. Even if the statement in the medical record could be construed as identifying the defendant as the perpetrator, the error in its admission was harmless pursuant to Crim.R. 52(A), because it was merely cumulative to the admissible testimony by the victim. See *State v. Harris* (June 7, 2001), Cuyahoga App. 78241, citing *State v. Fears* (1999), 86 Ohio St.3d 329 (witness's hearsay testimony was cumulative and constitutes harmless error, since the error did not contribute to the verdict.)

{¶ 40} Assignment of Error IV is overruled.

{¶ 41} “V. The trial court erred by allowing inadmissible testimonial statements of the victim to be admitted through the admission of medical records in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 10 of the Ohio Constitution.”

{¶ 42} The Sixth Amendment to the United States Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him ***.”

{¶ 43} Here, defendant maintains that the trial court improperly admitted testimonial statements from the victim’s hospital records and thereby deprived him of the opportunity to confront witnesses against him.

{¶ 44} The medical records were certified in accordance with R.C. 2317.422. Accordingly, neither the preparer nor the custodian was required to testify. *State v. Spikes* (1981), 67 Ohio St.2d 405, 408.

{¶ 45} The defense stipulated to the admission of the medical records with the exception of the single statement addressed in Assignment of Error IV, where the victim/patient reported being hit by her “boyfriend.” Defendant contends this constitutes a testimonial out-of-court statement barred by the Confrontation Clause as set forth in *Crawford v. Washington* (2004), 541 U.S. 36.

{¶ 46} The Ohio Supreme Court has declined to include statements made to medical professionals within the meaning of “testimonial statements” as construed by *Crawford*. *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482. Furthermore, the victim/patient who made the disputed statement in the medical record testified at trial and was subject to cross-examination.

{¶ 47} Assignment of Error V is overruled.

{¶ 48} “VI. The prosecution violated Mr. Smith’s constitutional rights under Article I, Section 10 of the Ohio Constitution, the Fifth Amendment to the United States Constitution, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution when it engaged in improper argument designed to appeal to the passions of the finder of fact.”

{¶ 49} Defendant contends that the following statement made by the prosecutor during closing argument amounted to prosecutorial misconduct meriting a new trial:

{¶ 50} “This may have been a violent relationship, but this has happened in the past and it will happen again if something is not done.”

{¶ 51} While improper, this statement did not prejudicially affect the substantial rights of the defendant or alter the outcome of the trial. Defendant stipulated to his prior domestic violence conviction. The defendant never objected to the subject statement. And, the defense informed the jury during opening statements of the “troubled relations” between the defendant and the victim. Considering the record as a whole, it is clear that the outcome of the trial was not affected by the prosecutor’s isolated statement.

{¶ 52} Assignment of Error VI is overruled.

{¶ 53} “VII. The court erred when it sentenced Mr. Smith for a count of domestic violence as a felony of the fourth degree when the jury verdict was a finding of guilt as to a misdemeanor count of domestic violence.”

{¶ 54} Where a prior conviction is “needed for a penalty enhancement, the prior conviction must be proven to the jury if it is an essential element of the offense which increases the degree of the offense.” *State v. Arnold* (Jan. 24, 2002), Cuyahoga App. No. 79280, citing *State v. Allen* (1987), 29 Ohio St.3d 53 at 54 (other citations omitted.)

{¶ 55} Stipulating to a prior conviction is an acceptable and typical method of proving the prior conviction element of an offense. *Id.*, citing *State v. Ward* (1999), 130 Ohio App.3d

551, at 559 (“A certified copy of a judgment entry of a prior conviction is not the exclusive method to prove a prior conviction. An offender may, and often does, stipulate to the prior conviction ***.”)

{¶ 56} “In order to prove its case of felony domestic violence, the State must be able to prove to the jury that defendant was previously convicted of domestic violence. One way to allow the prosecution to meet its burden of proof and avoid undue prejudice to the defendant is to tell the jury that a defendant has stipulated to one element of the offense charged, that is, he/she admits to a prior conviction.” *Id.*

{¶ 57} In this case, the defendant stipulated to the prior conviction and urged the court to exclude any evidence of it from the jury, arguing that it was unnecessary for the jury to make the prior conviction finding. Based upon the defense objections and stipulation, the trial court did not submit evidence or instruct the jury as to the prior conviction element necessary for a felony domestic violence conviction. Although the trial court should have informed the jury of the stipulation and their duty to make the required finding, “defendant is not permitted to take advantage of an error which he himself invited or induced the trial court to make.” *Id.*, quoting *State v. Nieves* (1997), 121 Ohio App.3d 451 at 455-56.

{¶ 58} Assignment of Error VII is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, ADMINISTRATIVE JUDGE

COLLEEN CONWAY COONEY, J., and
KENNETH A. ROCCO, J., CONCUR