

[Cite as *Cleveland v. Brown*, 2015-Ohio-2952.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102066

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

GREGORY BROWN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART,
REVERSED IN PART, AND REMANDED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2014 CRB 005125

BEFORE: Keough, P.J., E.A. Gallagher, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: July 23, 2015

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KATHLEEN ANN KEOUGH, P.J.:

{¶1} Defendant-appellant Gregory Brown appeals from his conviction and sentence for domestic violence. We affirm in part, reverse in part, and remand.

I. Background

{¶2} Brown was charged with one count of domestic violence, in violation of R.C. 2929.25, and three counts of endangering children, in violation of Cleveland Codified Ordinance 609.04, both first-degree misdemeanors. Brown pleaded not guilty, and the matter proceeded to a bench trial.

{¶3} The victim, Pamela McKenzie, testified that she and Brown had been married for approximately six months at the time of the incident. She said their relationship had “a lot of ups and downs,” and Brown “had a lot of anger issues.”

{¶4} McKenzie testified that on February 28, 2014, she and Brown got into a verbal argument. According to McKenzie, the argument escalated, and Brown punched holes in several walls, punched the thermostat and broke it, and kicked a hole in the kitchen wall. He then grabbed her around her neck, held her up against a wall, and then threw her into the hallway outside the kitchen, where she hit the wall and landed on the floor. When McKenzie’s children ran to her, Brown left the house.

{¶5} McKenzie called the police. Before they arrived, Brown returned to the home with his mother, Donna Parker, and his stepfather. McKenzie said that Parker cussed at her, and Brown told her that his mother was there to fight her. The police arrived, and McKenzie told them that she and Brown had been in a fight, and she wanted

him to collect his things and leave. The police remained on the scene until Brown collected his things, and Brown, Parker, and Brown's stepfather left.

{¶6} McKenzie said that she did not file a report when the police were at her house on February 28 because Brown's family was there, and she was afraid of what they would do if she said anything because "they like to retaliate." However, on March 4, 2014, she called the police, who came to her house, took a report, and took photographs of the damage allegedly caused by Brown during the altercation.

{¶7} McKenzie identified the city's exhibits Nos. 1 and 2 as photographs of bruises on her arm and ankle caused when Brown threw her during the altercation, and exhibit Nos. 3, 4, and 5 as pictures of damage to the walls caused by Brown during the altercation. She admitted that the other exhibits were pictures of damage to the home caused by Brown on other occasions.

{¶8} Parker testified in Brown's defense. She said that Brown called her on February 28, 2014, and asked her to come pick him up because he and McKenzie had been in a fight and she wanted him out of the house. Parker denied cussing at McKenzie, and said that McKenzie "kept yelling and screaming" at her. She testified that before the police arrived, Brown asked McKenzie for his two guns, which she had previously hidden, and McKenzie retrieved them and gave them to him. Parker said she did not observe any bruises on McKenzie or damage to the walls.

{¶9} The trial court found Brown guilty of domestic violence, and not guilty of endangering children. At the subsequent sentencing hearing, the court heard from the

prosecutor and defense counsel; the judge then collected \$20 from Brown for McKenzie and continued sentencing. At the next sentencing hearing, the court collected \$100 from Brown for McKenzie, and then sentenced him to 180 days in jail, 174 days suspended and credit for 6 days served, a \$1,000 fine, \$800 suspended, and one year active probation. The court further ordered that restitution was to be determined by the probation department.

{¶10} Brown appealed from this judgment. This court remanded the matter to the trial court, noting that the judgment was not final because it failed to set forth the domestic violence conviction and did not establish the amount of restitution with specificity. The trial court issued a nunc pro tunc entry finding Brown guilty of domestic violence, and sentencing him as noted above. In addition, the court ordered Brown to pay \$1,400 in restitution.

II. Analysis

{¶11} In his first assignment of error, Brown contends that the trial court erred in ordering restitution without determining the amount of restitution to be paid. We agree.

{¶12} R.C. 2929.28 provides for financial sanctions for misdemeanor offenses. It states, in pertinent part:

(A)(1) * * * If the court requires restitution, the court shall order that the restitution be made to the victim in open court or to the adult probation department that serves the jurisdiction or the clerk of the court on behalf of the victim.

If the court imposes restitution, the court shall determine the amount of restitution to be paid by the offender. If the court imposes restitution, the court may base the amount of restitution it orders on an amount

recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense.

{¶13} In accordance with R.C. 2929.28(A)(1), the trial court was required to determine the amount of restitution to be paid by Brown. Although a trial court is permitted to rely on a presentence report prepared by the probation department, it is not permitted to delegate this responsibility for determining the amount of restitution to the probation department after imposition of sentence. *State v. Myles*, 2d Dist. Montgomery No. 25297, 2013-Ohio-2227, ¶ 44, citing *State v. Purnell*, 171 Ohio App.3d 446, 2006-Ohio-6160, 871 N.E.2d 613, ¶ 9 (1st Dist.); *State v. Wilson*, 1st Dist. Hamilton No. C-061000, 2007-Ohio-6339, ¶ 17; *State v. Sheehan*, 12th Dist. Butler No. CA2006-10-285, 2008-Ohio-2737, ¶ 19; and *State v. Moore*, 7th Dist. Carroll No. 00AP0741, 2002-Ohio-5047, ¶ 14. “Restitution must be decided at sentencing.” *Purnell* (Painter, J., concurring). Accordingly, the trial court in this case erred in deferring a determination of the amount of restitution to the probation department after it sentenced Brown.

{¶14} Under R.C. 2929.28(A)(1), “if the court decides to impose restitution, the court shall hold an evidentiary hearing on restitution if the offender, victim, or survivor disputes the amount of restitution.” By delegating to the probation department the responsibility for determining the amount of restitution until after the imposition of sentence, the trial court deprived Brown of any opportunity to contest the amount of

restitution ordered. The trial court was required to determine the amount of restitution at sentencing, and if the amount was disputed, to hold a hearing on the issue.

{¶15} Brown also argues that the restitution order in this case should be vacated because no evidence was presented as to the monetary value of the alleged damage done to McKenzie's property. We agree that the record contains no evidence of the value of McKenzie's economic loss. Because the trial court improperly delegated its authority for determining the amount of restitution to the probation department, the trial court's judgment regarding restitution is reversed, and the matter is remanded to the trial court for a determination of the amount of restitution to be paid by Brown, recognizing that he paid \$120 in restitution before he was sentenced. The first assignment of error is therefore sustained.

{¶16} In his second assignment of error, Brown contends that his conviction for domestic violence was against the manifest weight of the evidence.

{¶17} A manifest weight challenge questions whether the state met its burden of persuasion. *State v. Hill*, 8th Dist. Cuyahoga No. 98366, 2013-Ohio-578, ¶ 32. A reviewing court "weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, 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*, 78 Ohio St.3d 380, 388, 678 N.E.2d 541 (1997). A conviction should be reversed as against the manifest weight of the evidence only in the most "exceptional case in which the evidence

weighs heavily against the conviction.” *Id.*

{¶18} Brown argues that his conviction is against the weight of the evidence because McKenzie’s testimony that he had assaulted her was “simply unbelievable.” He asserts that there must have been no bruises on McKenzie or damage to the walls when the police came to the home because they would have arrested him if they had seen evidence of physical injury or other damage. He further asserts that the police must not have believed an assault took place because “not only was [he] not arrested but the police were informed that he had firearms.”

{¶19} Brown also argues that McKenzie’s testimony about the assault was unbelievable because if she had actually been fearful of him, she “certainly” would have told the police so when they arrived at the house after the altercation, and the fact that she waited several days to make a police report demonstrates that she was not fearful of him. He argues further that McKenzie’s testimony was unbelievable because she testified that he choked her, which should have caused a bruise on her neck, but the photographs of her injuries showed bruises to her arm and ankle.

{¶20} Brown’s arguments are without merit. His arguments about what the police did or did not observe on February 28, 2014, why he was not arrested that day, and whether the police believed there had been an altercation are mere speculation. And there is no evidence in the record to support his assertion that the police were informed that he had firearms. As testified to by Brown’s mother, McKenzie retrieved the guns and gave them to Brown before the police arrived.

{¶21} Brown’s argument that McKenzie’s testimony was not credible because she said he grabbed her neck but only produced pictures of bruises to her arm and ankle is likewise without merit. McKenzie said that in addition to grabbing her neck, Brown threw her into the hallway, where she hit the wall and fell to the floor, bruising her arm and ankle. Thus, although Brown may not have bruised McKenzie’s neck when he grabbed her, there was evidence that she was injured during the altercation.

{¶22} Brown’s argument that McKenzie’s testimony was unbelievable because she did not report the altercation to the police for several days is likewise without merit. McKenzie explained that she did not initially report the altercation to the police because she was fearful of retaliation from Brown and his family.

{¶23} The trial judge observed the witnesses, heard the testimony, and evaluated the evidence. Although we consider the credibility of witnesses in a manifest weight challenge, we are mindful that the credibility of the witnesses and the weight to be given to their testimony are issues primarily for the trier of fact, who is in the best position to view the witnesses and observe their demeanor, gestures, and voice inflections — observations critical to determining a witness’s credibility. *State v. Dehass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus; *State v. Hill*, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); *State v. Antill*, 176 Ohio St. 61, 66, 197 N.E.2d 548 (1964). In this case, before rendering judgment, the trial judge noted that she found McKenzie to be “extremely credible.” We find nothing in the record demonstrating the trial court lost its way in believing McKenzie’s testimony and convicting Brown of

domestic violence. This is not the exceptional case where the evidence weighs heavily against the conviction and, accordingly, the second assignment of error is overruled.

{¶24} Affirmed in part, reversed in part, and remanded.

It is ordered that the parties share equally in the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
SEAN C. GALLAGHER, J., CONCUR