

[Cite as *State v. Brown*, 2016-Ohio-1546.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103427

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM A. BROWN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-591840-A

BEFORE: E.T. Gallagher, J., McCormack, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: April 14, 2016

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, William A. Brown (“Brown”), appeals his domestic violence conviction and the imposition of court costs. He raises the following two assignments of error:

1. Trial counsel was ineffective in neglecting to request the sentencing court to waive defendant’s costs.
2. The verdict was not supported by sufficient evidence and it was against the manifest weight of the evidence.

{¶2} We find no merit to the appeal and affirm.

I. Facts and Procedural History

{¶3} Brown was charged with one count of domestic violence in violation of R.C. 2919.25(A). The domestic violence charge was a fourth-degree felony because of a furthermore clause alleging that Brown had previously been convicted of domestic violence.

{¶4} The victim, R.S., testified at a bench trial that she was living in an apartment on St. Clair Ave. in Cleveland, Ohio with her two-year old son at the time of the incident giving rise to this case. Brown, who was R.S.’s boyfriend, was also living in the apartment.

{¶5} R.S. testified that as she was vacuuming the floor on the morning of December 6, 2014, Brown became frustrated because he could not find his marijuana. R.S. continued vacuuming even though Brown had asked her to stop. Brown became

infuriated and pushed R.S. onto a bed in the living room. R.S. pushed back, and the two pushed and shoved each other into the kitchen where Brown struck R.S. on the back of the head. R.S. explained that she “blackened out seeing stars.” (Tr. 33.) As she regained consciousness, she asked herself, “[W]hat just happened?” (Tr. 33.)

{¶6} R.S. ran outside the apartment and called the police. In an audio recording of the 911 call, which was played in open court, R.S. is heard telling the dispatcher that Brown hit her several times and that she “almost blackened out.” She asks the dispatcher to send the police quickly because she is afraid Brown may strike her again.

{¶7} Charles Blubaugh (“Blubaugh”), a neighbor with an adjoining backyard, heard the disturbance and looked out his back door. R.S.’s back door was wide open, and Blubaugh could see the commotion inside R.S.’s apartment. Blubaugh testified that he did not know these neighbors, but called the police because he was concerned someone was going to get hurt. Blubaugh testified that he observed Brown hit R.S. on the head with a “club or hammer.” (Tr. 18.) In a recording of Blubaugh’s 911 call, Blubaugh is heard telling the dispatcher that Brown hit R.S. with a club.

{¶8} Officer Dante Aponte (“Officer Aponte”), of the Cleveland Police Department, responded to R.S.’s apartment. He testified that upon entering the apartment, he observed that R.S. was “shaken up.” (Tr. 59.) She was crying and “the house was pretty much in shambles, torn up, things everywhere. Her young son crying as well.” (Tr. 59.) Officer Aponte authenticated photographs of the back of R.S.’s head that depicted a tender area where some hair had fallen out.

{¶9} Based on this evidence, the trial court found Brown guilty of domestic violence. The court sentenced him to community control sanctions and ordered him to pay costs and supervision fees. Brown now appeals his conviction and the imposition of court costs.

II. Law and Analysis

A. Court Costs

{¶10} In his first assignment of error, Brown argues his Sixth Amendment right to counsel was violated because his trial counsel failed to move for a waiver of court costs.

{¶11} A claim of ineffective assistance of trial counsel requires both a showing that trial counsel's representation fell below an objective standard of reasonableness, and that the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A reviewing court "must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. The prejudice prong requires a finding that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, with a reasonable probability being "a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *see also State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989).

{¶12} R.C. 2947.23(A)(1) governs the imposition of court costs and provides in relevant part: "In all criminal cases * * * the judge * * * shall include in the sentence the costs of prosecution * * * and render a judgment against the defendant for such costs."

Thus, a sentencing court must include in the sentence the costs of prosecution and render a judgment against the defendant for costs, even if the defendant is indigent. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8.

{¶13} However, in its discretion, a trial court may waive court costs if the defendant is indigent. *State v. Walker*, 8th Dist. Cuyahoga No. 101213, 2014-Ohio-4841, ¶ 9. The discretion to waive court costs includes the discretion not to waive them. *Id.*

{¶14} Until recently, a defendant was required to seek a waiver of court costs at the sentencing hearing in order to preserve the issue for appeal. Otherwise the issue was barred by res judicata. *See State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 23. However, pursuant to R.C. 2947.23(C), as amended by Am.Sub.H.B. 247, effective March 22, 2013, a trial court now retains jurisdiction to waive, suspend, or modify payment of the costs “at the time of sentencing or at any time thereafter.” *See State v. Hunter*, 8th Dist. Cuyahoga No. 102245, 2015-Ohio-4180, ¶ 1.

{¶15} Brown cannot establish he was prejudiced by counsel’s failure to seek a waiver of court costs. A defendant is no longer required to seek a waiver of court costs at the sentencing hearing in order to preserve the issue for appeal. *Hunter* at ¶ 12. Strategic timing may now play a role in trial counsel’s decision not to seek a waiver at the time of sentencing. Trial counsel may decide as a matter of strategy not to seek a waiver or modification of court costs until some later time “when the trial court had time to either reflect upon its sanctions or the vividness of the impact of [Brown’s] conduct had faded.”

State v. Farnese, 4th Dist. Washington No. 15CA11, 2015-Ohio-3533, ¶ 16. *See also State v. Williams*, 3d Dist. Auglaize No. 2-13-31, 2014-Ohio-4425, ¶ 17 (even if counsel should have objected to court costs, the error was not prejudicial). Therefore, the first assignment of error is overruled.

B. Sufficiency and Manifest Weight of the Evidence

{¶16} In the second assignment of error, Brown argues his domestic violence conviction is not supported by sufficient evidence and is against the manifest weight of the evidence.

{¶17} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 12. 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*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶18} In contrast to sufficiency, “weight of the evidence involves the inclination of the greater amount of credible evidence.” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). While “sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, * * * weight of the evidence addresses the evidence’s effect of inducing belief.” *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *Thompkins* at 386-387.

{¶19} The reviewing court must consider all the evidence in the record, the reasonable inferences, and the credibility of the witnesses to determine 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.” *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶20} Although the terms “sufficiency” and “weight” of the evidence are “quantitatively and qualitatively different,” we address these issues together because they are closely related, while applying the distinct standards of review to Brown’s arguments. *Thompkins* at 386.

{¶21} Brown was charged with domestic violence, in violation of R.C. 2919.25(A), which states that “[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member.” R.C. 2901.01(A)(3) defines “physical harm to persons” as “any injury, illness, or other physiological impairment, regardless of its gravity or duration.”

{¶22} R.C. 2919.25(F)(1)(a)(i) defines “family or household member” as, among other things, “a person living as a spouse.” A “person living as a spouse” includes “a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question.” R.C. 2919.25(F)(2).

{¶23} Brown contends there was insufficient evidence to support his domestic violence conviction because R.S. sent him an apology on Facebook in which she stated that she “f---d up.” Brown also argues, without any evidence in support, that he never hit R.S., he merely “pushed past her after she punched him.” (Appellant’s brief at 14.)

{¶24} Brown contends his conviction was against the manifest weight of the evidence because R.S. was convicted of misdemeanor theft in 2008 and therefore has no credibility. Brown also argues the fact that R.S. refused an ambulance is proof that no domestic violence occurred.

{¶25} However, R.S. testified that Brown shoved her several times and hit her in the head with such force that she almost lost consciousness or, perhaps, lost consciousness for a moment. When she came to her senses she wondered what had happened. R.S. explained that she declined Officer Aponte’s offer to call an ambulance because her two-year old son was too “rambunctious” to make a trip to the hospital feasible, and her injuries were not so grave that her need for medical attention outweighed the difficulties presented by the child.

{¶26} Additionally, Blubaugh observed the incident and called police for help because he was afraid someone was going to get hurt. He testified that he did not know R.S. or Brown, and therefore, had no reason to fabricate his observations. Blubaugh testified that he saw Brown hit R.S. in the head with something that resembled a club.

{¶27} Moreover, the audio recording of R.S.’s 911 call is a compelling piece of evidence. It is obvious from her voice that she was distraught and afraid of Brown.

While she was still under the stress of the event, she told the dispatcher that he hit her several times, and that she almost blacked out after he struck her head. Blubaugh's testimony corroborated both the statements R.S. made during the 911 call and her trial testimony. Officer Aponte further corroborated her testimony when he described her demeanor as "shaken up," and testified that there was a tender area on the back of R.S.'s head where she had been hit.

{¶28} The trial court heard the audio recordings of both R.S.'s and Blubaugh's 911 calls. The court also had the opportunity to view the witnesses while assessing their credibility. Based on the evidence in the record, we cannot say that the trial court lost its way or created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

{¶29} Therefore, the second assignment of error is overruled.

{¶30} Judgment affirmed.

It is ordered that appellee recover from appellant 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 common pleas 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.

EILEEN T. GALLAGHER, JUDGE

TIM McCORMACK, P.J., and
MARY J. BOYLE, J., CONCUR