

[Cite as *State v. Walker*, 2016-Ohio-398.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103058

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

REYNALDO WALKER

DEFENDANT-APPELLANT

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

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-591279-A

BEFORE: E.A. Gallagher, P.J., Kilbane, J., and McCormack, J.

RELEASED AND JOURNALIZED: February 4, 2016

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EILEEN A. GALLAGHER, P.J.:

{¶1} Defendant-appellant Reynaldo Walker appeals his conviction from the Cuyahoga County Court of Common Pleas. Walker argues that his conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. He also argues that the trial court erred in admitting into evidence a letter he wrote to the victim in the case and in imposing consecutive sentences. For the following reasons, we affirm in part and reverse in part.

Facts and Procedural Background

{¶2} On November 21, 2014, Walker was charged with domestic violence and abduction. He plead not guilty to the charges and the case proceeded to a jury trial where the following facts were elicited.

{¶3} In 2013, Walker invited Dominique Virzi to move into his home. Virzi was homeless at the time and the two began a dating relationship a couple of days after living together. At some point, Virzi moved out of Walker's home because Walker began serving a term of imprisonment and, at that time, Virzi lived with her sister for six months. When she moved out of Walker's home, she took a DVD player, a radio and a television belonging to Walker.

{¶4} On June 27, 2014, Virzi moved back into Walker's home and they continued their relationship. On August 5, 2014, Walker became angry when he learned that his belongings were at the home of Virzi's sister and he struck her across the left side of her face with an open hand, making contact with her cheek and ear. Virzi also testified that Walker choked her during this incident. Virzi wanted to leave but was afraid that Walker would kill her due to previous

threats he had made. Virzi testified that she could not call the police on that date because Walker would not leave her alone and that he followed her when she tried to leave the home. Virzi did use her cell phone to take two pictures of her face in the bathroom of the home. The pictures depict significant and distinct red marks on the left side of her face consistent with her testimony.

{¶5} Virzi further testified that, on August 9, 2014, Walker choked her until she passed out due to an argument over the dishes and infidelity. Virzi stated that she was afraid to leave the home and, when she did, Walker followed her so that she could not attempt to contact the police.

{¶6} On August 11, 2014, Virzi contacted the police from a bathroom in St. Augustine's church. Police found no physical signs of abuse when they interviewed Virzi but she testified that she suffered a ruptured eardrum from the slap on August 5. Virzi testified that she was treated at MetroHealth Hospital in September for the ruptured eardrum because, over time, it became more painful.

{¶7} After Virzi reported the incidents to the police, Walker was arrested on an outstanding warrant from an unrelated case. While in custody, Walker wrote Virzi a letter urging her not to press charges, cooperate with the prosecutor or appear in court. Walker's letter also asked for forgiveness and stated that "I vow on my life I will never put my hands on you no matter what you have done since I've been here this time."

{¶8} The jury found Walker guilty of domestic violence and not guilty of abduction. The trial court imposed a prison term of 18 months and ordered the sentence to be served consecutively to a prison term Walker was serving in a separate case that is not now before this court.

Law and Analysis

Sufficiency of the Evidence

{¶9} In Walker’s first assignment of error, he argues that the evidence was insufficient as a matter of law to support a finding beyond a reasonable doubt that he was guilty of domestic violence. Williams argues that the state failed to establish that Virzi qualified as a family or household member for the purposes of the domestic violence statute and that he knowingly caused her physical harm.

{¶10} This court has said that, in evaluating a sufficiency of the evidence argument, courts are to assess not whether the state’s evidence is to be believed but whether, if believed, the evidence against a defendant would support a conviction. *State v. Givan*, 8th Dist. Cuyahoga No. 94609, 2011-Ohio-100, ¶ 13, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). The relevant inquiry then 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. *Id.*

{¶11} Walker was convicted of domestic violence in violation of R.C. 2919.25(A) that provides that no person shall knowingly cause or attempt to cause physical harm to a family or household member. A family or household member includes a “person living as a spouse” which is defined as:

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).

{¶12} The Ohio Supreme Court has held that evidence that the defendant and the victim were in a relationship and living together is sufficient to establish cohabitation under R.C.

2919.25(F)(2). *State v. McGlothan*, 138 Ohio St. 3d 146, 2014-Ohio-85, 4 N.E.3d 1021, ¶ 15.

The state clearly met its burden in this instance as Virzi testified that she and Walker had been dating for two years during which time they lived together in his home, with the exception of a six month period during which he was in jail. Virzi had a key to Walker's home and his letter to her affirmed that she lived there.

{¶13} Walker next argues that the state failed to present evidence that he “knowingly” committed domestic violence. Walker fails to present any cognizable sufficiency challenge under this argument and instead merely questions the veracity of Virzi's testimony. Thus, we find no merit to this argument under this assignment of error and consider it as part of Walker's manifest weight challenge below. Walker's first assignment of error is overruled.

Manifest Weight

{¶14} In Walker's second assignment of error, he argues that his domestic violence conviction was against the manifest weight of the evidence.

{¶15} A manifest weight challenge attacks the credibility of the evidence presented and questions whether the state met its burden of persuasion at trial. *State v. Whitsett*, 8th Dist. Cuyahoga No. 101182, 2014-Ohio-4933, ¶ 26, citing *State v. Thompkins*, 78 Ohio St.3d at 387, 1997-Ohio-52, 678 N.E.2d 541; *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13. Because it is a broader review, a reviewing court may determine that a judgment of a trial court is sustained by sufficient evidence but nevertheless conclude that the judgment is against the weight of the evidence.

{¶16} “When considering an appellant's claim that a conviction is against the manifest weight of the evidence, the court of appeals sits as a ‘thirteenth juror’ and may disagree ‘with the factfinder's resolution of conflicting testimony.’” *Thompkins* at 387, quoting *Tibbs v. Florida*,

457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). The reviewing court must examine the entire record, weigh the evidence and all reasonable inferences, consider the witnesses' credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact 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, citing *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983). In conducting such a review, this court remains mindful that the credibility of witnesses and the weight of the evidence are matters primarily for the trier of fact to assess. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraphs one and two of the syllabus. Reversal on manifest weight grounds is reserved for the "exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387, quoting *Martin, supra*.

{¶17} This is not the exceptional case where a reversal on manifest weight is appropriate.

The record provides little reason to question the veracity of Virzi's testimony. Although Virzi admitted that she has mental health problems, her testimony was strongly supported by photographic exhibits that reveal significant and distinct red markings on the left side of her face.

Furthermore, Virzi's account of why there was a delay in her contacting the police was consistent with her actions and credible. We cannot say that the jury's verdict was against the manifest weight of the evidence.

{¶18} Walker's second assignment of error is overruled.

Admissibility of the Letter

{¶19} In his third assignment of error, Walker argues that the trial court erred in admitting the letter Walker sent to Virzi while he was awaiting trial. Walker stipulated to the authenticity of the letter at trial so there is no dispute that the contents are his words and that he sent the letter to Virzi. Walker objected to the admission of the letter on the basis of relevancy.

{¶20} Evidentiary rulings lie within the broad discretion of the trial court and will form the basis for reversal on appeal only upon an abuse of discretion that amounts to prejudicial error. *State v. Graham*, 58 Ohio St.2d 350, 352, 390 N.E.2d 805 (1979). “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (9th Dist.1983).

{¶21} Walker argues that the trial court erred in admitting the letter because it lacked relevance, constituted hearsay and its probative value was outweighed by the danger of unfair prejudice.

{¶22} As a basic principle, all relevant evidence is admissible, unless the probative value of that evidence is substantially outweighed by its prejudicial effect. Evid.R. 403. “Relevant” evidence is defined as evidence having any tendency to make a fact of consequence to the determination of the action more or less probable than it would be without the evidence. *See* Evid.R. 401.

{¶23} Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Evid.R. 801(C). Pursuant to Evid.R. 802, hearsay is inadmissible unless it falls within an exception provided by the rules of evidence.

{¶24} Evid.R. 801(D)(2) provides as follows:

A statement is not hearsay if:

* * *

(2) Admission by party-opponent. The statement is offered against a party and is
(a) the party’s own statement, in either an individual or a representative capacity *

* *

{¶25} In this instance the letter qualifies as an admission by party-opponent and is relevant as it contains a request for forgiveness coupled with a vow that Walker will “never put my hands on you no matter what you have done since I’ve been here this time.” Read in conjunction with Walker’s request that Virzi not press charges, cooperate with the prosecutor or appear in court, reasonable minds could view the letter as evidence of an admission of guilt. Although the letter contains references to the fact that Walker is not at home and a plea of “don’t let me stay here,” we cannot say that the trial court abused its discretion in finding the evidence to be relevant and that its probative value was not substantially outweighed by any prejudicial effect. Walker’s third assignment of error is overruled.

Consecutive Sentences

{¶26} In his fourth assignment of error, Walker argues that the trial court erred in failing to make the required statutory findings prior to imposing consecutive sentences. We agree.

{¶27} When reviewing a felony sentence, we follow the standard of review set forth in R.C. 2953.08(G)(2), which provides in relevant part:

The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court’s standard for review is not whether the sentencing court abused its discretion. The appellate court may

take any action authorized by this division if it clearly and convincingly finds either of the following:

- (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
- (b) That the sentence is otherwise contrary to law.

Id.

{¶28} R.C. 2929.14(C)(4) requires a trial court to engage in a three-step analysis before it imposes consecutive sentences. First, the court must find that “consecutive service is necessary to protect the public from future crime or to punish the offender.” *Id.* Second, the trial court must find that “consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public.” *Id.* Third, the trial court must find that at least one of the following applies:

- (a) the offender committed one or more of the multiple offenses while awaiting trial or sentencing, while under a sanction, or while under postrelease control for a prior offense;
- (b) at least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the offenses was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender’s conduct; [or]
- (c) the offender’s history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

Id.

{¶29} The court must make the statutory findings as stated above at the sentencing hearing and incorporate those findings into its sentencing entry. *See State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. Although the trial court was not required to use “talismanic words,” it must be clear from the record that it actually made the findings required by statute. *Id.* at ¶ 37.

{¶30} In this instance, the trial court’s only reference to the above findings was that consecutive sentences were necessary in light of Walker’s long criminal record to protect the public and the victim. The record is devoid of any statement that could be construed as a finding that the consecutive sentences were not disproportionate to the seriousness of Walker’s conduct or the danger he posed to the public. The trial court’s sentencing entry is similarly deficient. In fact, the sentencing entry fails to incorporate any of the required findings in violation of *Bonnell*.

{¶31} Therefore, we find that the trial court erred in imposing consecutive sentences without making the required findings or incorporating the findings into Walker’s sentencing entry. *See, e.g., State v. Marneros*, 2015-Ohio-2156, 35 N.E.3d 925, (8th Dist.) (reversing consecutive sentences due to the trial court’s failure to make a proportionality finding).

{¶32} Walker’s fourth assignment of error is sustained.

{¶33} The judgment of the trial court is affirmed in part and reversed in part.

{¶34} We vacate Walker’s consecutive sentences and remand this matter to the trial court for resentencing. *See Bonnell* at ¶ 30, 37. On remand, the trial court shall consider whether consecutive sentences are appropriate under R.C. 2929.14(C)(4) and if so, shall make the

required statutory findings on the record at resentencing, and incorporate its findings into the subsequent sentencing entry.

It is ordered that appellant and appellee share the 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. The defendant's convictions 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.

EILEEN A. GALLAGHER, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
TIM McCORMACK, J., CONCUR