[Cite as *State v. Swaby*, 2009-Ohio-3690.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. VINCENT SWABY Appellant	C.A. No. 24528 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR-2008-05-1661

DECISION AND JOURNAL ENTRY

Dated: July 29, 2009

WHITMORE, Judge.

{¶1} Defendant-Appellant, Vincent Swaby, appeals from his convictions in the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} In the early morning hours of May 11, 2008, Ariel Swaby became engaged in an altercation with her husband, Swaby. As a result of the altercation, Ariel left the Swaby's residence with her eighteen-month old son and drove to the Circle K gas station in Twinsburg. Ariel called 911 at approximately 4:20 a.m. from the gas station and reported that Swaby had attacked her. Summit County Sheriff's Deputy Rocky Croft responded to Ariel's call and took her statement. Deputy Croft noted that Ariel had cuts on her forearm and ankle and that her son had glass in his hair and on his clothes from the shattered back window of Ariel's car.

{¶3} On June 17, 2008, the grand jury indicted Swaby on the following counts: (1) kidnapping, in violation of R.C. 2905.01(A)(2)/(3); (2) kidnapping, in violation of R.C.

2905.01(B)(2); (3) felonious assault, in violation of R.C. 2903.11(A)(1)/(2); (4) domestic violence, in violation of R.C. 2919.25(A); (5) disrupting public services, in violation of R.C. 2909.04(A)(1); (6) endangering children, in violation of R.C. 2919.22(A); and (7) criminal damaging or endangering, in violation of R.C. 2909.06(A)(1). The matter proceeded to a jury trial on October 21, 2008. The jury found Swaby guilty on the lesser-included offense of unlawful restraint on both kidnapping counts, guilty on the lesser-included offense of assault on the felonious assault count, and guilty of domestic violence, criminal damaging or endangering, and endangering children. The trial court sentenced Swaby to a total of six months in prison.

{¶4} Swaby now appeals from his convictions and raises two assignments of error for our review.

II

Assignment of Error Number One

> "DEFENDANT WAS DENIED HIS RIGHT OF CONFRONTATION AND CROSS-EXAMINATION WHEN THE COURT ADMITTED A STATEMENT FROM A NON-TESTIFYING WITNESS OFFERED THROUGH A POLICE OFFICER."

{¶5} In his first assignment of error, Swaby argues that the trial court erred in admitting statements made by Ariel Swaby through the testimony of Deputy Croft. Specifically, Swaby argues that Ariel's statements were testimonial hearsay and their admission violated his Confrontation Clause rights. We disagree.

{¶6} The Sixth Amendment to the United States Constitution guarantees an accused the right to confront witnesses against him. *Crawford v. Washington* (2004), 541 U.S. 36, 54. Testimonial statements made by a witness may only be admitted when the declarant is unavailable and the defendant has previously been afforded the opportunity for cross-examination. Id. at 59. Statements are testimonial when the circumstances objectively indicate

that the primary purpose in obtaining them was to "establish or prove past events potentially relevant to later criminal prosecution." *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, paragraph one of the syllabus, quoting *Davis v. Washington* (2006), 547 U.S. 813. To prevail on appeal, an appellant must demonstrate both that the trial court erroneously admitted testimonial statements and that the admission prejudiced him at trial. *State v. McCarley*, 9th Dist. No. 23607, 2008-Ohio-552, at ¶24.

{¶7} At trial, Deputy Croft testified over objection about statements that Ariel made to him when he took her report at the Circle K. Deputy Croft testified that Ariel told him Swaby had assaulted her, come after her with a pair of scissors, and had kicked a door off its hinges when she attempted to get away from him. Swaby argues that the trial court erred by admitting Ariel's statements through Deputy Croft because the statements were testimonial hearsay. Even if the trial court erred by admitting the statements, any such error was harmless. See *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 684 (holding that constitutional challenges based on alleged violations of the Confrontation Clause are subject to harmless error analysis).

{¶8} Before Deputy Croft testified, the State played the tape of Ariel's 911 call for the jury. In the 911 call, Ariel said that Swaby had assaulted her and physically injured her. Ariel specified that she received a cut to her ankle and two cuts to her forearm as a result of Swaby's attack. Swaby did not object to the 911 call. Indeed, when the trial court specifically asked whether Swaby's counsel had any objection to the admission of the call, he indicated that he did not. At the close of the State's case, Swaby's counsel indicated, "[t]he 9-1-1 [call], I can't object to it. I don't dispute that, Judge, because it's been construed to not be testimonial[.]" The statements that Ariel made in her 911 call parallel the statements that were admitted through the testimony of Deputy Croft. As such, Swaby has not shown that the outcome of his trial would

have been different absent the admission of Ariel's statements through Deputy Croft. *McCarley* at ¶24; *Van Arsdall*, 475 U.S. at 684. Additionally, although the State did not call Ariel as a witness so as to subject her to Swaby's cross-examination, Swaby called Ariel as a witness in his case-in-chief, and the jury was able to hear Ariel's explanation for the statements that she made to Deputy Croft. Because Swaby has failed to demonstrate that he suffered prejudice as a result of the admission of Ariel's statements through the testimony of Deputy Croft, Swaby's first assignment of error is overruled.

Assignment of Error Number Two

> "THE TRIAL COURT ERRED IN DENYING DEFENDANT'S CRIM. R. 29(A) MOTION FOR ACQUITTAL BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT HIS CONVICTION AND THE CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶9} In his second assignment of error, Swaby argues that his convictions are based on insufficient evidence and are against the manifest weight of the evidence. We disagree.

{¶10} A review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct determinations. *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, at *1. "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." Id., citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 274. Furthermore:

> "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." Id. at paragraph two of the syllabus; see, also, *Thompkins*, 78 Ohio St.3d at 386.

In *State v. Roberts*, this Court explained:

> "[S]ufficiency is required to take a case to the jury[.] *** Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." (Emphasis omitted.) *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96CA006462, at *2.

Accordingly, we address Swaby's challenge to the weight of the evidence first, as it is dispositive of his claim of sufficiency.

{¶11} In determining whether a conviction is against the manifest weight of the evidence an appellate court:

> "[M]ust review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses 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." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Id. Therefore, this Court's "discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶12} R.C. 2905.03(A) provides that "[n]o person, without privilege to do so, shall knowingly restrain another of the other person's liberty." Such an act constitutes unlawful restraint. R.C. 2905.03(A). "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." R.C. 2901.22(B).

{¶13} R.C. 2903.13(A) provides that "[n]o person shall knowingly cause or attempt to cause physical harm to another[.]" Such an act constitutes assault. R.C. 2903.13(A). Similarly, R.C. 2919.25(A) provides that "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." Such an act constitutes domestic violence. R.C. 2919.25(A).

{¶14} R.C. 2919.22(A) provides, in relevant part, that "[n]o person, who is the parent *** of a child under eighteen years of age *** shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support." Such an act constitutes child endangerment. R.C. 2919.22(A).

{¶15} R.C. 2909.06(A)(1) provides that "[n]o person shall cause, or create a substantial risk of physical harm to any property of another without the other person's consent *** [k]nowingly, by any means[.]" Such an act constitutes criminal damaging or endangering. R.C. 2909.06(A)(1).

{¶16} Swaby does not separately address his various convictions or point to any law in support of his manifest weight argument. Rather, Swaby collectively challenges all of his convictions on the basis that "there was simply no admissible evidence whatsoever to convict [him] of the charges." We disagree.

{¶17} In her 911 call, Ariel stated that Swaby attacked her and that she suffered two cuts to her forearm and one cut to her ankle as a result of the attack. Deputy Croft testified that when he arrived at the Circle K gas station Ariel appeared "emotionally upset," looked as if she had

been crying, and had cuts on her arm and leg. He further testified that Ariel's son was in the back seat of her car and had broken glass from the car's back window in his hair and on his clothing. Officer Jeremy Hilton described the disarray that he observed when he took Ariel back to Swaby's residence. Officer Hilton testified that items were scattered about the residence, including the garage and bathroom. He further testified that there was damage to the garage and mailbox and glass strewn about the grass near the road.

{¶18} Ariel testified for the defense. According to Ariel, she consumed sixteen ounces of straight Vodka shortly before going home on the morning of the incident and engaged in a verbal disagreement with Swaby, whom she suspected of cheating on her. Ariel testified that she cut her own forearm, called 911, and completed a police report framing Swaby for assault because she was extremely intoxicated and angry with him. Shortly after Ariel's 911 call, several individuals had contact with her: Deputy Croft, Officer Roy Cunningham, and Kelly Whapham, a paramedic/firefighter for the City of Macedonia. None of the foregoing individuals indicated that Ariel, who stood 5'4" and weighed about 130 pounds at the time, appeared intoxicated. Despite Ariel's assertion that she drank sixteen ounces of Vodka, both Officer Cunningham and Whapham specifically testified that Ariel did not appear impaired or intoxicated.

{¶19} Based on the evidence in the record, we cannot conclude that the jury lost its way in convicting Swaby of unlawful restraint, assault, domestic violence, child endangerment, and criminal damaging and endangering. Accordingly, Swaby's convictions are not against the manifest weight of the evidence.

{¶20} Having disposed of Swaby's challenge to the weight of the evidence, we similarly dispose of his sufficiency challenge. See *Roberts*, supra, at *2. Ariel's 911 call and Deputy

Croft's observations regarding Ariel's and her son's appearances constituted sufficient evidence to take this matter to the jury. Swaby's second assignment of error lacks merit.

III

{¶21} Swaby's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

JAYE M. SCHLACHET, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.