

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 24719

Appellee

v.

RICARDO LAMONT ALLISON

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 08 07 2539

DECISION AND JOURNAL ENTRY

Dated: March 31, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Ricardo Allison, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms in part and reverses in part.

I

{¶2} On July 13, 2008, Darlene Smith warned several individuals located in the hallway outside her apartment that she planned on calling the police if they did not stop fighting. One of the individuals, later identified as Allison, came over to Smith’s apartment and threatened to “blow [her] away” if she called the police. Smith called the police anyway to report that a fight had broken out in her apartment hallway. When police arrived, they saw Allison on the apartment building’s landing, but left shortly after they arrived because no one was fighting.

{¶3} On the night of July 15, 2008, Smith was at home in her apartment drinking beer with a friend. Allison smashed through Smith’s front door, accused her of calling the police on him, shoved her, and beat her repeatedly with an iron that he grabbed from the top of her dresser.

When Allison finished beating Smith, he took her phone with him. Smith had another phone in her bedroom and used it to call the police. The police interviewed Smith and searched their moniker database based on Smith's statement that someone she knew as "Trill" had attacked her. The police later arrested Allison after Smith viewed a photo array and identified him as her assailant.

{¶4} On August 11, 2008, a grand jury indicted Allison on the following counts: (1) aggravated burglary, a first-degree felony in violation of R.C. 2911.11(A)(1); (2) felonious assault, a second-degree felony in violation of R.C. 2903.11(A)(1)/(2); and (3) intimidation of a crime victim or witness, a third-degree felony in violation of R.C. 2921.04(B). Allison's aggravated burglary and felonious assault counts also contained repeat violent offender specifications, pursuant to R.C. 2941.14. The State later dismissed the specifications. The matter proceeded to a jury trial, and the jury found Allison guilty on all three counts. The trial court sentenced Allison to serve a total of eighteen years in prison.

{¶5} Allison now appeals from the trial court's judgment and raises three assignments of error for our review.

II

Assignment of Error Number One

"THE VERDICT FORM AND THE RESULTING ENTRY WERE INSUFFICIENT UNDER R.C. 2945.75 TO SUPPORT THE APPELLANT'S CONVICTION AND SENTENCE FOR COUNT THREE, INTIMIDATION OF CRIME VICTIM OR WITNESS, AS A FELONY OF THE THIRD DEGREE AS REFLECTED IN THE ENTRY."

{¶6} In his first assignment of error, Allison argues that his third-degree felony conviction and sentence for intimidation of a crime victim or witness must be modified as they run contrary to R.C. 2945.75(A)(2). Specifically, Allison argues that, because the jury's verdict

forms did not indicate either the degree of his offense or any aggravating elements, he could only be convicted of the least degree of the offense. We agree.

{¶7} R.C. 2945.75(A)(2) provides, in relevant part, that:

“When the presence of one or more additional elements makes an offense one of more serious degree *** [a] guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.”

In *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, at ¶14, the Ohio Supreme Court interpreted R.C. 2945.75(A)(2) pursuant to its plain language and held that a jury’s verdict form “must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense.” The Supreme Court subsequently held that *Pelfrey* applies to charging statutes that contain separate sub-parts with distinct offense levels, such as R.C. 2921.04. *State v. Sessler*, 119 Ohio St.3d 9, 2008-Ohio-3180, at ¶1.

{¶8} The State concedes that the verdict form for Allison’s intimidation of a crime victim or witness charge under R.C. 2921.04 did not contain either the degree of the offense or an aggravating element. A violation of R.C. 2921.04 is only a third-degree felony if the offender uses force or an unlawful threat of harm to intimidate or hinder a victim or witness. R.C. 2921.04(B) and (D). Otherwise, it is a misdemeanor of the first degree. R.C. 2921.04(A) and (D). Because the verdict form did not comport with *Pelfrey*, Allison’s third-degree felony conviction and sentence for the intimidation of a crime victim must be vacated. Upon remand, Allison only may be convicted of a first-degree misdemeanor and sentenced accordingly. Allison’s first assignment of error is sustained.

Assignment of Error Number Two

“THE EVIDENCE IN THIS CASE WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT CONVICTIONS FOR AGGRAVATED BURGLARY, FELONIOUS ASSAULT, AND INTIMIDATION OF A WITNESS AND AS A RESULT THE APPELLANT’S RIGHTS AS PROTECTED BY ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION AND FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE VIOLATED.”

{¶9} In his second assignment of error, Allison argues that his convictions for aggravated burglary, felonious assault, and the intimidation of a crime victim or witness are based on insufficient evidence. We disagree.

{¶10} 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, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

“In essence, sufficiency is a test of adequacy.” *Thompkins*, 78 Ohio St.3d at 386.

{¶11} R.C. 2911.11(A)(1) provides that “[n]o person, by force, stealth, or deception, shall trespass in an occupied structure *** when another person other than an accomplice of the offender is present, with purpose to commit in the structure *** any criminal offense, if *** [t]he offender inflicts *** physical harm on another[.]”

“A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.” R.C. 2901.22(A).

A person who commits the foregoing offense is guilty of aggravated burglary.

{¶12} R.C. 2903.11(A)(1)/(2) provide that “[n]o person shall knowingly *** [c]ause serious physical harm to another or *** [c]ause or attempt to cause physical harm to another *** by means of a deadly weapon or dangerous ordnance.” “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). A person who engages in the foregoing conduct is guilty of felonious assault.

{¶13} Smith testified that she made two phone calls to the Akron Police Department on July 13, 2003 because: (1) people were fighting in the hallway outside her apartment; and (2) after she warned the people that she intended to call the police if they did not leave, Allison came to her door and threatened to “blow [her] away” if she did so. Two days later, Smith and her friend were drinking beer in Smith’s apartment. Smith testified that Allison broke through her apartment door and told Smith’s friend that she could leave because “this didn’t have anything to do with her.” Allison pushed Smith, grabbed an iron from the top of her dresser, and struck her with the iron approximately five times while accusing her of reporting him to the police. After the attack, Allison took Smith’s phone and left. Smith was able to use the other phone in her bedroom to call the police. Smith sustained multiple injuries as a result of the attack, including facial lacerations that required staples and broken bones that required surgery.

{¶14} Smith admitted that when she called 911 after the attack she referred to Allison as a “stranger” even though she knew him and told the operator that “they” had attacked her. According to Smith, she only ever knew Allison by the nickname “Trill,” so she could not provide 911 with his proper name when the 911 operator asked her what happened. Smith

testified that although she told the 911 operator “they” attacked her, Allison was the only one who did so.

{¶15} Officer Richard O’Brien testified that he responded to Smith’s 911 call on July 15, 2003. Officer O’Brien testified that Smith told him someone had kicked in her door and had attacked her with an iron. According to Officer O’Brien, Smith was “hysterical” and in a large amount of pain when he spoke with her.

{¶16} Lieutenant James Phister testified that he interviewed Smith at the hospital. Smith told Lieutenant Phister that someone she knew only as “Trill” had attacked her. Lieutenant Phister searched the police department’s monikor database for the name “Trill” and found Allison’s picture. He then placed Allison’s picture in a photo array and presented the array to Smith. Smith immediately identified Allison as her attacker.

{¶17} Allison argues that his aggravated burglary and felonious assault convictions are based on insufficient evidence because Smith’s testimony was unreliable. Allison does not point to any portions of the record as an example of Smith’s unreliability, nor does he identify which elements of the foregoing crimes he believes the State failed to prove. Viewing the evidence in a light most favorable to the State, we cannot conclude that the State presented insufficient evidence. A rational trier of fact could have found that Allison committed aggravated burglary and felonious assault by forcibly breaking into Smith’s apartment for the purpose of beating her and by repeatedly beating her with an iron, thereby causing her serious physical harm. Allison’s argument that Smith was not credible sounds in manifest weight, not sufficiency. Accordingly, his argument lacks merit.

{¶18} Allison’s captioned assignment of error also challenges the sufficiency of his conviction for intimidation of a crime victim or witness. The body of his brief, however, does

not contain any argument with regard to this conviction. An appellant bears the burden of providing this Court with an argument supported by legal authority and citations to the record. App.R. 16(A)(7). Because Allison has not fulfilled his burden with regard to his intimidation conviction, we decline to address it. Allison's second assignment of error is overruled.

Assignment of Error Number Three

“THE VERDICTS IN THIS CASE WERE AGAINST THE MANIFEST WEIGHT EVIDENCE (sic) AND AS A RESULT, APPELLANT’S RIGHTS AS PROTECTED BY ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION AND FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE VIOLATED.”

{¶19} In his third assignment of error, Allison argues that his convictions are against the manifest weight of the evidence. We disagree.

{¶20} 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.

{¶21} Allison argues that his convictions are against the manifest weight of the evidence because Smith was not a credible witness. First, he argues that Smith was not a credible witness because she smoked crack on the day she was attacked. Smith admitted at trial that she was battling a crack cocaine addiction. She testified that she was still using crack in July 2003, but had started treatment. On direct examination, she stated that she had not used crack on July 15, 2003 the day Allison attacked her. Allison points to Smith’s testimony on cross-examination to argue that Smith contradicted herself. On cross-examination, Smith testified as follows:

“[DEFENSE COUNSEL]: *** My question was *** you were still smoking crack at the time, right?

“[SMITH]: That day?

“[DEFENSE COUNSEL]: In July.

“[SMITH]: Yes, I smoked crack.”

It would appear that Smith only admitted that she smoked crack in July 2003, not on the specific date of the incident, and defense counsel did not ask Smith to clarify her response. Smith’s admission on cross-examination that she smoked crack in July 2003 was consistent with her admission on direct examination. Moreover, Lieutenant Phister, an officer with twenty-three years of experience, testified that he did not believe Smith was under the influence when he interviewed her at the hospital after her attack. The evidence does not support Allison’s assertion that Smith smoked crack on the day of the attack.

{¶22} Second, Allison argues that Smith was not a credible witness because she lied to the 911 operator when she said a “stranger” attacked her and “they” attacked her. Smith explained, however, that she did not provide the 911 operator with Allison’s name because she only knew him by his nickname, “Trill.” She further stated that she was not correct when she told the 911 operator that “they” attacked her. Officer O’Brien testified that Allison was

hysterical and in a great deal of pain when he arrived in response to her 911 call. Given the severity of her injuries, the jury could have reasonably determined that Smith's imprecise statements to the 911 operator were the result of trauma.

{¶23} After interviewing Smith at the hospital, Lieutenant Phister conducted an investigation in this matter. Lieutenant Phister checked the police department's phone records and verified the portion of Smith's statement in which she told him that she had called the police two days before the attack because several people, including Allison, were fighting in the hallway outside her apartment. Moreover, Officer Todd Myers testified that he was the officer to respond to Smith's 911 call on July 13, 2003. Officer Myers testified that Allison was one of the people he saw on the landing of Smith's apartment building. Accordingly, there was evidence that Allison was one of the individuals about whom Smith complained to the police two days before she was beaten.

{¶24} Upon our review of the record, we are unable to conclude that this is one of the exceptional cases in which the evidence weighs heavily against the conviction. *Martin*, 20 Ohio App.3d at 175. The jury chose to believe Smith's testimony that Allison threatened Smith based on her 911 call, forcibly broke into her apartment, and beat her with an iron. There is no indication that the jury created a manifest miscarriage of justice by doing so. *Otten*, 33 Ohio App.3d at 340. Allison's third assignment of error is overruled.

III

{¶25} Allison's first assignment of error is sustained and her third-degree felony conviction and sentence for the intimidation of a crime victim are vacated pursuant to that determination. Her remaining assignments of error are overruled. The judgment of the Summit

County Court of Common Pleas is affirmed in part, reversed in part, and remanded for further proceedings consistent with the foregoing opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

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 equally to both parties.

BETH WHITMORE
FOR THE COURT

MOORE, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

CHRISTOPHER R. SNYDER, Attorney at Law, for Appellant.

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