[Cite as *State v. Whitehouse*, 2010-Ohio-587.]

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

STATE OF OHIO	C. A. No. 09CA009581
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
SEAN E. WHITEHOUSE	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellant	CASE No. 08CR076198

DECISION AND JOURNAL ENTRY

Dated: February 22, 2010

DICKINSON, Judge.

INTRODUCTION

{¶1} Immediately after a domestic dispute with Sean Whitehouse, her live-in boyfriend, Brittany Kramer called 911 and reported that Mr. Whitehouse had assaulted her. When police arrived, they found the apartment in disarray and saw a bruise on Ms. Kramer's leg and red marks around her neck. Ms. Kramer wrote a statement for the police that included allegations that Mr. Whitehouse had choked her and shoved her. She later recanted her allegations. Following a bench trial, the trial court found Mr. Whitehouse guilty of one count of domestic violence, a third-degree felony. This Court affirms because the State's improper impeachment did not affect Mr. Whitehouse's substantial rights and because the conviction is supported by sufficient evidence and is not against the manifest weight of the evidence.

BACKGROUND

{¶2} At the bench trial in this case, Ms. Kramer testified that she is the mother of Mr. Whitehouse's daughter and that, in June 2008, she and their daughter were living with him. She further acknowledged that she called the police to report an argument between her and Mr. Whitehouse. The 911 recording was played without objection at trial. Ms. Kramer admitted that she made the call accusing Mr. Whitehouse of assaulting her just minutes after the argument had ended. On the recording, she is heard telling police that her baby's father "has assaulted [her]" and "pushed [her]."

{¶3} Ms. Kramer allowed the officer who came to the house to take pictures inside, showing furniture askew, as well as a broken ceiling fan blade. She also allowed the officer to take pictures of her, showing bruising on her leg and red marks on her neck. At trial, on direct examination by the prosecutor, she agreed that she had written a police witness statement that blamed Mr. Whitehouse for the damage visible in the pictures. She also testified that, in the statement, she had accused him of refusing to allow her to leave the house and of choking her and shoving her onto the bed. But she also testified on cross-examination by Mr. Whitehouse's lawyer that she had lied to the police officer because she had been angry with Mr. Whitehouse. She testified that she and Mr. Whitehouse had argued because she thought he was cheating on her and, when he left the house, she called the police "to try to get him in trouble."

{¶4} When the police officer later took the stand, the trial court sustained Mr. Whitehouse's objections to all attempts to elicit testimony about what Ms. Kramer told him at the time of the incident. The trial court also sustained Mr. Whitehouse's objection to the admission of Ms. Kramer's written statement into evidence. The officer was permitted to testify

regarding what he saw and what he took photographs of on the night of the incident. The photographs were all admitted without objection.

{¶5} Despite Ms. Kramer's recantation of her allegations, the trial court found Mr. Whitehouse guilty of violating Section 2919.25(A) of the Ohio Revised Code. Due to two prior domestic violence convictions, Mr. Whitehouse's conviction in this case is a felony of the third degree. The trial court sentenced him to one year in prison and three years of mandatory post-release control.

SURPRISE

{¶6} Mr. Whitehouse's first assignment of error is that the trial court incorrectly allowed the State to impeach its own witness in violation of Rule 607 of the Ohio Rules of Evidence. He has not presented specific questions and answers that he believes demonstrate the State's attempts to impeach Ms. Kramer, but has argued only that the State failed to prove it was surprised by her trial testimony. In response, the State has argued that it did not impeach Ms. Kramer, but merely "question[ed] its witness in a manner [that sought] specific information regarding the actions or statements . . . of the witness [that] precipitated criminal charges." Mr. Whitehouse did not respond to that argument. App. R. 16(C).

{¶7} Rule 607 of the Ohio Rules of Evidence provides that a party may impeach his own witness via a prior inconsistent statement "only upon a showing of surprise and affirmative damage." Evid. R. 607(A). "Surprise exists if the witness gives testimony that is materially inconsistent with his or her prior written or oral statements and if the party did not have reason to believe that the witness would provide inconsistent testimony." *State v. Banaag*, 9th Dist. No. 98CA0033, 2000 WL 108856 at *3 (Jan. 26, 2000). "Affirmative damage is established if the witness testifies to facts that contradict, deny, or harm the party's trial position." *Id.* "The

limitation on the use of prior inconsistent statements 'was intended to prevent the circumvention of the hearsay rule.'" *State v. Tyler*, 50 Ohio St. 3d 24, 34 (1990) (quoting Giannelli, Ohio Rules of Evidence Handbook 53 (2d ed. 1986)).

{¶8} Mr. Whitehouse has correctly argued that the State was not able to show it was surprised by Ms. Kramer's recantation of the allegations she made against her boyfriend on the night of the incident. Ms. Kramer testified that she told the prosecutor who previously had been assigned to the case that she had fabricated the allegations. She had also testified before the Grand Jury that the allegations contained in her written statement of June 2008 were false. The police officer who responded to the incident testified that he had known before trial that the witness had recanted because an earlier court appearance had been canceled for that reason. Without a showing of surprise, the State could not meet the requirements of Rule 607(A) to allow it to use the prior written statement to impeach its own witness.

IMPEACHMENT

{¶9} The question for this Court is whether the State impeached Ms. Kramer. Before offering a prior inconsistent statement, a party must lay a foundation for impeachment by eliciting testimony directly contradictory to the prior statement. See *State v. McMillan*, 69 Ohio App. 3d 36, 46 (1990) (discussing the threshold inconsistency requirement for admitting a prior inconsistent statement for the purpose of impeachment). Mr. Whitehouse has argued that the trial court should not have allowed the State to impeach its own witness, but he has not, as part of that argument, pointed to any specific questions and answers in the record. See App. R. 12(A)(2); App. R. 16(A)(7). In the statement of facts section of his brief, he has quoted one passage of her testimony. He has pointed out that, instead of asking Ms. Kramer what happened on the night of the incident, the prosecutor asked her what she told the police happened that

night. After confirming with Ms. Kramer that a police officer had come to her home in response to the 911 call, the prosecutor then asked her, "what did you tell him occurred that day?" The trial court overruled Mr. Whitehouse's objection and allowed Ms. Kramer to testify: "That I believe we got into an argument, that he had knocked over some furniture in my house, and I was mad because I thought he was cheating on me. I was just upset." Mr. Whitehouse correctly stated that the prosecutor was "attempting to elicit from Ms. Kramer not what happened, but what she told [the police officer] happened." A generous reading of Mr. Whitehouse's brief would allow for the possibility that he has claimed the State impeached Ms. Kramer by asking the questions in this form, that is, asking what she told police as opposed to asking what happened that night.

{¶10} In this case, the State called Ms. Kramer as its first witness. After a few background questions, without asking Ms. Kramer what happened the night of the incident, the prosecutor asked her if she contacted the police. He then played the recording of the 911 call, without objection, and Ms. Kramer identified it as an accurate recording of the call she made to the police in June 2008. On the recording, Ms. Kramer can be heard accusing Mr. Whitehouse of assaulting her.

{¶11} At the time the State began asking the questions Mr. Whitehouse has highlighted, Ms. Kramer had not yet testified about the incident and neither had any other witness. The only evidence that had been offered at that point in the trial was the 911 recording and some background information from Ms. Kramer. On the 911 recording, Ms. Kramer says that she was assaulted and pushed by Mr. Whitehouse. Thus, the evidence the State sought to elicit from Ms. Kramer via questions about what she told police that night was supportive of, rather than contradictory to, her testimony.

{¶12} In his brief, Mr. Whitehouse has suggested that the State "[p]resumably" asked Ms. Kramer the questions it did in the form that it did because it "knew that Ms. Kramer had recanted her allegations, and was going to testify that she had fabricated the charges against Mr. Whitehouse." The key, however, is that, at the time of the questions that Mr. Whitehouse seems to have taken issue with, Ms. Kramer had not yet testified that the fight with her boyfriend had not involved assault. Regardless of what the prosecutor believed Ms. Kramer intended to say on that subject, he did not ask her and she did not say anything inconsistent prior to the exchange quoted by Mr. Whitehouse in his brief.

{¶13} This Court's independent review of the State's entire direct examination of Ms. Kramer revealed one instance of impeachment by the State. On page 24 of the transcript, near the end of its direct examination, the State asked Ms. Kramer:

> Q. And did the defendant have any interaction with you in the bedroom?
>
> A. No.
>
> Q. According to your statement that you made on that day, did he have any interaction with you in the bedroom?
>
> A. According to this statement, yes.
>
> Q. And what interaction was that?
>
> A. He choked me.
>
> Q. Did he throw you on the bed as well?
>
> A. Yes, according to the statement.

{¶14} Although Mr. Whitehouse failed to point it out, this is an example of the State impeaching its own witness in contradiction to Rule 607 of the Ohio Rules of Evidence. The

State asked a question and received a negative response. The State then used Ms. Kramer's written statement to force her to admit that she had said something contradictory to police on the night of the incident. As this Court has already discussed, the trial court should not have allowed the State to impeach its own witness because it could not show that it was surprised by her testimony that there was no interaction between her and Mr. Whitehouse in the bedroom during the argument. Evid. R. 607(A).

{¶15} The one instance of impeachment, however, is harmless error. See Crim. R. 52(A) ("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."). Ms. Kramer admitted she made the 911 call accusing Mr. Whitehouse of having assaulted and pushed her. She also admitted that she and Mr. Whitehouse had an argument that night that moved from the living room into the bedroom. She said that furniture had been moved around during the argument and she identified photographs, taken by police, showing her living room in disarray. Ms. Kramer testified that other photographs, which were admitted into evidence without objection, showed red marks on her neck and bruises on her legs and were taken by police on the night of the incident. Officer Sustarsic testified without objection that he took the pictures of her head and neck because "[t]hat's where the visible injuries or marks appeared." The officer also testified, without objection, that Ms. Kramer signed a motion for a protective order that night. Finally, Ms. Kramer testified during direct examination that she wrote a statement to police accusing Mr. Whitehouse of "choking" her. Although Mr. Whitehouse objected to the question and answer on that point, the objection was overruled. Whatever the basis of that objection, Mr. Whitehouse has not argued about it on appeal. In any event, it was not improper impeachment because it was not contradictory to any

previous testimony. Given the other evidence against Mr. Whitehouse, the improper exchange regarding what happened in the bedroom did not affect his substantial rights. Crim. R. 52(A).

{¶16} Mr. Whitehouse has not argued that the trial court erred by admitting the prior statements to police because those statements were inadmissible hearsay. App. R. 16(A)(7). If Mr. Whitehouse had made such an argument, it is not clear whether the prior statements to police may have been admissible under a hearsay exception. See Evid. R. 803; see also Evid. R. 607(A). In any event, Mr. Whitehouse's first assignment of error is that the trial court incorrectly allowed the State to impeach its own witness in violation of Rule 607 of the Ohio Rules of Evidence. This assignment of error is overruled because the impeachment, to the extent that it occurred, was harmless error.

DOMESTIC VIOLENCE

{¶17} Mr. Whitehouse's second and third assignments of error are that there was insufficient evidence to support his conviction and that his conviction is against the manifest weight of the evidence. Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶33. This Court must determine whether, viewing the evidence in a light most favorable to the prosecution, it could have convinced the average finder of fact of Mr. Whitehouse's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991). When a defendant argues that his conviction is against the manifest weight of the evidence, however, this Court "must 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*, 33 Ohio App. 3d 339, 340 (1986). "Inasmuch as a court cannot weigh the evidence unless there is evidence to weigh," this Court will consider the sufficiency argument first. *Whitaker v. M.T. Automotive Inc.*, 9th Dist. No. 21836, 2007-Ohio-7057, at ¶13.

{¶18} The trial court found Mr. Whitehouse guilty of violating Section 2919.25(A) of the Ohio Revised Code. Under that section, "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." R.C. 2919.25(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." R.C. 2901.22(B). "A person has knowledge of circumstances when he is aware that such circumstances probably exist." *Id.* "'Physical harm to persons' means any injury, illness, or other physiological impairment, regardless of its gravity or duration." R.C. 2901.01(A)(3).

{¶19} Mr. Whitehouse has argued that his conviction is not supported by sufficient evidence because "[t]he only evidence introduced at trial to establish that [he] caused or attempted to cause physical harm to Ms. Kramer was unsworn, out-of-court statements [she] made to the police which she subsequently recanted . . . ." Mr. Whitehouse has argued that the out-of-court statements were offered for impeachment purposes and cannot be considered as substantive evidence of guilt. This Court has determined, however, that the State did not offer the bulk of the evidence regarding Ms. Kramer's written statement to impeach her testimony, but as substantive evidence. Furthermore, in addition to Ms. Kramer's testimony that she reported to police that Mr. Whitehouse had choked her and pushed her, there was additional evidence of Mr. Whitehouse's guilt. The exhibits admitted by the trial court include various photographs of Ms. Kramer's apartment showing furniture askew that she testified was due to them both "push[ing]

over some furniture" during the argument. The trial court also admitted, without objection, the photographs of bruising on her leg and red marks around her neck. The recording of the 911 call that was made immediately after the argument reveals that Ms. Kramer reported that Mr. Whitehouse had assaulted her and that he shook her up a bit, but that she was not injured and did not need an ambulance. Viewing the evidence in a light most favorable to the prosecution, it could have convinced an average finder of fact that Mr. Whitehouse knowingly caused or attempted to cause physical harm to Ms. Kramer. Mr. Whitehouse's conviction is supported by sufficient evidence. The second assignment of error is overruled.

{¶20} Mr. Whitehouse's third assignment of error is that his conviction is against the manifest weight of the evidence because the trial court relied on Ms. Kramer's testimony regarding her statements to police as opposed to her in-court recantation of the allegations. Again, he has argued that, because the out-of-court statements were admissible only for impeachment purposes, the trial court incorrectly relied on them as evidence of guilt. This Court has determined that the State did not impeach Ms. Kramer with its general approach to questioning her.

{¶21} Eight months after the incident, Ms. Kramer testified that, after a domestic dispute with Mr. Whitehouse, she called the police and fabricated allegations about an assault in an attempt to get him in trouble. She said that the marks on her body came from playing with her daughter and gave an innocent explanation for the broken ceiling fan blade and the mess in the house.

{¶22} The 911 recording allowed the trier of fact to hear Ms. Kramer accuse Mr. Whitehouse of assaulting her just minutes after the argument had ended. On the recording, Ms. Kramer reported that Mr. Whitehouse "ha[d] assaulted [her]" and "pushed [her]." The trial court

also heard testimony from Ms. Kramer regarding the specific allegations she made on the night of the incident, including that he had choked her. When police arrived, she had red marks around her neck and her apartment was in disarray.

{¶23} As the fact finder, the trial court was entitled to reject any evidence it found incredible. Ms. Kramer's testimony was that she had lied to the police, but was telling the truth at trial. The trial court was not required to believe her trial testimony over the 911 recording and the other evidence of guilt. After a review of the entire record, this Court cannot conclude that the evidence weighs so heavily in favor of Mr. Whitehouse that the trial court "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*, 33 Ohio App. 3d 339, 340 (1986). The third assignment of error is overruled.

CONCLUSION

{¶24} Mr. Whitehouse's assignments of error are overruled because the improper impeachment, to the extent that it occurred, did not affect Mr. Whitehouse's substantial rights and because the conviction is supported by sufficient evidence and is not against the manifest weight of the evidence. The judgment of the Lorain County Common Pleas Court 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 Lorain, 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.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
MOORE, P. J.
CONCUR

APPEARANCES:

PAUL A. GRIFFIN, attorney at law, for appellant.

DENNIS P. WILL, prosecuting attorney, and LAURA ANN E. SWANSINGER, assistant prosecuting attorney, for appellee.