[Cite as *State v. Martin*, 2011-Ohio-1213.]

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

STATE OF OHIO Appellee v. THOMAS W. MARTIN, JR. Appellant	C.A. No. 25438 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 08 09 3204

DECISION AND JOURNAL ENTRY

Dated: March 16, 2011

WHITMORE, Presiding Judge.

{¶1} Defendant-Appellant, Thomas Martin, Jr., appeals from his conviction in the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} The Summit County Sheriff's Department responded to Martin's residence on the afternoon of September 22, 2008 after receiving a domestic violence dispatch. When they arrived at the residence, the police observed Martin as well as Heather Teeter, the victim in this case and the mother of Martin's child. Teeter was visibly upset and had several injuries, including red marks and a cut to the inside of her cheek. She told the police that Martin had attacked her and, although reluctant because she thought the incident was "minor" in nature, completed a written statement.

{¶3} On October 8, 2008, a grand jury indicted Martin on one count of domestic violence, in violation of R.C. 2919.25(A). Martin waived his right to a jury, and the matter

proceeded to a bench trial on November 18, 2008. The trial court found Martin guilty and issued a sentencing entry on November 25, 2008. Martin appealed, and this Court vacated his sentence and remanded the matter due to an invalid post-release control notification. *State v. Martin*, 9th Dist. No. 24534, 2009-Ohio-4338.

{¶4} The trial court issued another sentencing entry on November 17, 2009, followed by two nunc pro tunc entries. Martin again sought to appeal, but this Court dismissed his appeal because the trial court's November 17, 2009 sentencing entry did not comply with Crim.R. 32(C). *State v. Martin* (Apr. 12, 2010), 9th Dist. No. 25208. On May 7, 2010, the trial court issued a sentencing entry and sentenced Martin to two years in prison.

{¶5} Martin now appeals from his conviction and raises two assignments of error for our review. For ease of analysis, we rearrange the assignments of error.

II

Assignment of Error Number Two

> "THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A FINDING OF GUILTY."

{¶6} In his second assignment of error, Martin argues that his conviction is based on insufficient evidence. We disagree.

{¶7} 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.

{¶8} "No person shall knowingly cause or attempt to cause physical harm to a family or household member." R.C. 2919.25(A). The phrase "family or household member" includes the "natural parent of any child of whom the offender is the other natural parent[.]" R.C. 2919.25(F)(1)(b). "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). Domestic violence is a third-degree felony if an offender was previously convicted of two or more domestic violence offenses. R.C. 2919.25(D)(4).

{¶9} Martin stipulated to several prior domestic violence convictions at trial and does not take issue with the fact that Teeter is the mother of his child. See id. (enhancing domestic violence to a third-degree felony if an offender has two or more prior domestic violence convictions); R.C. 2919.25(F)(1)(b) (defining family or household member for purposes of domestic violence statute as the natural parent of an offender's child). Martin argues that his conviction is based on insufficient evidence because Teeter testified that she had no recollection of the alleged domestic violence incident and refused to say that Martin had attacked her.

{¶10} Officer Bron Thomas testified that he responded to Martin and Teeter's residence after the Summit County Sheriff's Department received a dispatch for a possible domestic violence situation. Both Martin and Teeter were home when Officer Thomas arrived. Officer Thomas testified that Teeter was upset, shaking, and crying. He observed that her shirt was torn, she had red marks on her arms and neck, and she had a cut on the inside of her mouth. Teeter told Officer Thomas that Martin had hit her in the head with a candy bar before grabbing her,

throwing her down, and striking her in the face. Martin admitted to Officer Thomas that a candy bar had been thrown and there had been an argument, but claimed that Teeter had attacked him and had sustained injuries as a result of him "fighting her off[.]" Two other witnesses, Officer Jeffrey Bennett and Fire Medic Virgil Schlabach, also testified that they observed Teeter's injuries shortly after the incident occurred and that Teeter identified Martin as her attacker.

{¶11} Viewing the evidence in a light most favorable to the State, the record contains sufficient evidence that Martin knowingly caused Teeter, a household or family member, physical harm after twice being convicted of domestic violence. See *State v. Anderson*, 9th Dist. No. 25377, 2011-Ohio-563, at ¶8 (affirming domestic violence victim based on officer's testimony and victim's statements to that officer). The fact that Teeter refused to identify Martin as her attacker at trial is inapposite, as other witnesses presented testimony through which the trier of fact could have found the essential elements of domestic violence proven beyond a reasonable doubt. See *Jenks*, 61 Ohio St.3d at paragraph two of the syllabus. Martin's second assignment of error is overruled.

Assignment of Error Number One

> "THE COURT IMPROPERLY ALLOWED THE STATE PER EVID. RULE 803 (5), TO USE HEARSAY STATEMENT FROM VICTIM, HEREIN HER PRIOR RECORDED STATEMENT TO POLICE, AND USED IT TO ALLEGEDLY REFRESH HER MEMORY, WHEN HER TESTIMONY AT TRIAL WAS THAT SHE COULD NOT RECALL WHETHER HER PRIOR STATEMENT WAS ACCURATE OR NOT."

{¶12} In his first assignment of error, Martin argues that the trial court erred by allowing the State to introduce Teeter's prior, recorded statement pursuant to Evid.R. 803(5). Specifically, he argues that the statement was inadmissible because Teeter never testified that she had an independent recollection of the statement and its accuracy.

{¶13} Evid.R. 803(5) permits the introduction of a recorded memorandum or record.

> "In order to admit a statement as substantive evidence under Evid.R. 803(5), a party must establish through the testimony of the witness that[:] (1) the witness does not have a present recollection of the events in question; (2) the recorded recollection was made at a time when the events were fresh in the witness'[] memory; (3) the recorded recollection was made or adopted by the witness; and (4) the recorded recollection correctly reflects the prior knowledge of the witness." *State v. Moorer*, 9th Dist. No. 24319, 2009-Ohio-1494, at ¶15, quoting *State v. Rutkowski* (May 31, 1995), 9th Dist. No. 94CA005831, at *4.

Even if a trial court errs by admitting a recorded recollection pursuant to Evid.R. 803(5), however, the error is not a reversible one unless the appellant demonstrates that he was prejudiced as a result of its admission. *Moorer* at ¶16-17.

{¶14} The State sought to introduce the written police statement that Teeter completed in this case after she arrived at trial and indicated both that she was "plead[ing] the Fifth" and that she could not remember what happened on September 22, 2008. Teeter acknowledged that the handwriting and signature on the written statement were hers, but she refused to attest to its accuracy and said that she could not recall writing it. The State then proceeded to question Teeter directly from her written statement, repeatedly asking her whether the written statement contained specific items (e.g. "isn't it [] in your statement that *** you locked yourself in the bathroom?"). Teeter responded to each question with an answer similar to "[t]hat's what the statement says." Martin argues that because Teeter refused to vouch for the statement's accuracy, the court erred by allowing the State to introduce the statement and rely upon it as a recorded recollection.

{¶15} Initially, we note that the State has responded to Martin's argument by indicating that no error occurred here because: (1) it used the written statement to attempt to refresh Teeter's memory in accordance with Evid.R. 612; and (2) "[n]o hearsay was admitted because Teeter did not confirm that the statement was accurate and the statement was not admitted into evidence." While "[a] party may refresh the recollection of a witness under Evid.R. 612 by

showing him or her a prior statement[,] *** a party may not read the statement aloud, have the witness read it aloud, or otherwise place it before the jury." (Internal citations omitted.) *State v. Ballew* (1996), 76 Ohio St.3d 244, 254. Accord *Dayton v. Combs* (1993), 94 Ohio App.3d 291, 297-98 (concluding that trial court erred by allowing the State to read statements verbatim to witnesses from their witness statements in an attempt to refresh their recollections). Contrary to the State's argument, we are not convinced that the State's "attempt to refresh Teeter's memory" did not run afoul of Evid.R. 612 and amount to the introduction of hearsay.

{¶16} Even assuming that the trial court erred by allowing the State to question Teeter based on her prior, recorded statement, Martin has not demonstrated prejudice as a result of the statement's introduction. As outlined above in Martin's second assignment of error, the record contains sufficient evidence to support Martin's conviction outside of Teeter's written police statement. Martin himself admitted to Officer Thomas that Teeter had sustained her injuries as a result of an altercation between the two of them, but claimed that she was the attacker. Further, Officer Thomas testified that Teeter identified Martin as her attacker at the scene of the incident and described how he had ripped her shirt, grabbed her, and hit her. Martin has not challenged the trial court's admission of any of those statements on appeal. See App.R. 16(A)(7). As such, he has not established prejudice as a result of the introduction of Teeter's prior, written statement. See *Moorer* at ¶16-17. Martin's first assignment of error is overruled.

III

{¶17} Martin'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

DICKINSON, J.
MOORE, J.
CONCUR

APPEARANCES:

WESLEY A. JOHNSTON, Attorney at Law, for Appellant.

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