[Cite as *State v. Maple*, 2011-Ohio-1516.]

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

STATE OF OHIO Appellee v. ISH-SHAWLOM MAPLE Appellant	C.A. No. 25331 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 09 08 2613

DECISION AND JOURNAL ENTRY

Dated: March 30, 2011

MOORE, Judge.

{¶1} Appellant, Ish-Shawlom Maple, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On August 22, 2009, Maple and his girlfriend, Ashley Rucker, were involved in a domestic dispute. Rucker's family later contacted the police, who arrested Maple. On September 1, 2009, the Summit County Grand Jury indicted Maple on one count of domestic violence in violation of R.C. 2919.25(A), a felony of the fourth degree, one count of endangering children in violation of R.C. 2919.22(A), a misdemeanor of the first degree, one count of menacing in violation of R.C. 2903.22, a misdemeanor of the fourth degree, and one count of possession of marijuana in violation of R.C. 2925.11(A)(C)(3), a minor misdemeanor. On November 2, 2009, the Summit County Grand Jury issued a supplemental indictment in which it indicted Maple on one count of violating a protection order in violation of R.C. 2919.27, a

misdemeanor of the first degree, stemming from unauthorized contact with Rucker that took place on October 5, 2009. On November 23, 2009, the Summit County Grand Jury issued a second supplemental indictment in which it indicted Maple on one count of domestic violence in violation of R.C. 2919.25(A), a felony of the third degree.

{¶3} The prosecution dismissed the fourth-degree-felony count of domestic violence. From January 21 through January 22, 2010, the counts of endangering children, menacing, violation of a protection order, and domestic violence were tried to a jury. On January 25, 2010, the jury found Maple guilty of violating a protection order and domestic violence but not guilty of endangering children and menacing. He subsequently pleaded guilty to possession of marijuana. On March 5, 2010, the judge sentenced Maple to six months of incarceration on the charge of violating a protection order and two years of incarceration on the charge of domestic violence, both of which were to be served concurrently. The judge also sentenced him to pay a $100 fine for the offense of possession of marijuana.

{¶4} Maple timely filed a notice of appeal. He raises three assignments of error for our review. We have rearranged the assignments of error in order to facilitate our review.

II.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED [MAPLE'S] CRIMINAL RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL ON THE CHARGE OF DOMESTIC VIOLENCE[.]"

ASSIGNMENT OF ERROR III

"[MAPLE'S] CONVICTION FOR DOMESTIC VIOLENCE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE[.]"

{¶5} In his second and third assignments of error, Maple contends that his conviction for domestic violence is not supported by sufficient evidence and is against the manifest weight

of the evidence. Specifically, he contends that the State failed to prove that he was a "family or household member" for the purposes of R.C. 2919.25(A). We do not agree.

{¶6} Initially, we observe that Maple did not separately argue the manifest-weight issue as required by App.R. 12(A)(2). Accordingly, we limit our analysis to a discussion of sufficiency of the evidence.

{¶7} "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus. "In making this determination, all evidence must be construed in a light most favorable to the prosecution." *State v. Stafford*, 9th Dist. No. 24144, 2009-Ohio-701, at ¶7, citing *State v. Wolfe* (1988), 51 Ohio App.3d 215, 216. "Whether a conviction is supported by sufficient evidence is a question of law that [we] review[ ] de novo." *State v. Williams*, 9th Dist. No. 24731, 2009-Ohio-6955, at ¶18, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

{¶8} Maple was convicted of domestic violence in violation of R.C. 2919.25(A), which provides that "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." R.C. 2919.25(F)(1)(a)(i) defines "family or household member," in relevant part, as a "spouse, a person living as a spouse, or a former spouse of the offender[.]" "Person living as a spouse" is further 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).

{¶9} "The offense of domestic violence * * * arises out of the relationship of the parties rather than their exact living circumstances." *State v. Williams* (1997), 79 Ohio St.3d 459, at paragraph one of the syllabus. In *Williams*, the Supreme Court of Ohio determined that the essential elements of "cohabitation" with respect to R.C. 2919.25 are: "(1) sharing of familial or financial responsibilities and (2) consortium." Id. at paragraph two of the syllabus. The *Williams* Court further stated that

> "[p]ossible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets. Factors that might establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations. These factors are unique to each case and how much weight, if any, to give to each of these factors must be decided on a case-by-case basis by the trier of fact." Id. at 465.

{¶10} In its case-in-chief, the State presented the testimony of three witnesses relevant to the question of whether Maple and Ms. Rucker cohabited for the purposes of R.C. 2919.25: Ms. Rucker, her mother, Aliah Rucker, and Officer Jon Morgan. The testimony, viewed in the light most favorable to the State, included the following:

{¶11} Ms. Rucker's mother testified that she had visited Ms. Rucker at least every other day during the year prior to the incident. She stated that every time she visited her daughter, Maple was present at the house. She also observed that he kept at Ms. Rucker's house t-shirts, jogging pants, "stuff to change in," and two dogs.

{¶12} Ms. Rucker testified that from July 26, 2009, through August 22, 2009, Maple stayed at her home. She stated that during that time he ate, slept, showered and changed clothes at her home. He also kept shoes, underwear, and jogging pants there. Ms. Rucker also stated that she and Maple had sexual relations "all the time" and that, at the time of trial, she was five-months pregnant with his child. The couple also went out to eat, he took her out for her birthday,

they went to the movies and she attended his family gatherings. She also testified that although he did not have a job, Maple sometimes helped her out with money and they went out to buy things together when needed. She also testified that she gave him money, purchased things for him, and allowed him to use her car. She also testified that she sometimes spent nights at his apartment.

{¶13} Officer Jon Morgan of the Akron Police Department responded to the domestic violence call that resulted from this incident. He testified that in Maple's attempt to remove his belongings from Ms. Rucker's home, he had a trash bag full of clothes. He learned from Ms. Rucker that Maple "stays there all the time[.]" He further testified that "Mr. Maple told me he lived [at Ms. Rucker's house]. He told me he lived there and he lived at his mom's * * * he lived in both places."

{¶14} The State also played an excerpt, discussed more fully in our resolution of the first assignment of error, of a recorded phone conversation between Maple and his mother. The first statement was made by Maple's mother, to the effect that "You moved over there with her." Maple responded that "I've just been over there. I told you I was gonna be over there."

{¶15} Maple and Ms. Rucker frequently spent the night under the same roof, including, essentially, the month prior to the incident. Maple kept his two dogs at Ms. Rucker's house. They ate together, both at home and at restaurants, and they purchased things together. Ms. Rucker also allowed Maple the use of her vehicle. Maple also kept a significant amount of clothing at Ms. Rucker's house, enough to fill a trash bag. She attended his family gatherings. This evidence supports a finding that they shared familial and financial responsibilities.

{¶16} The evidence also establishes consortium. Ms. Rucker testified that the two had sexual relations "all the time." At the time of trial, she was five-months pregnant with Maple's child. She considered him her boyfriend.

{¶17} Taken together, the evidence was sufficient to allow a rational factfinder to find beyond a reasonable doubt that Ms. Rucker and Maple were family or household members for the purposes of R.C. 2919.25(A). *Bridgeman*, 55 Ohio St.2d at the syllabus.

{¶18} Accordingly, Maple's second and third assignments of error are overruled.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED IN PERMITTING EVIDENCE FROM WITNESSES IN DIRECT VIOLATION OF [MAPLE'S] RIGHT TO CONFRONTATION AND IN VIOLATION OF OHIO RULES OF EVIDENCE INVOLVING HEARSAY[.]"

{¶19} In his first assignment of error, Maple contends that the trial court erred in admitting evidence in violation of his right to confrontation and in violation of Ohio's rules of evidence pertaining to hearsay. We do not agree.

{¶20} The State played numerous excerpts of recorded phone calls that Maple made from the Summit County Jail. On appeal, Maple specifically contends that the trial court admitted two of the excerpts in violation of Evid.R. 802. The first statement was made by Maple's mother, to the effect that "You moved over there with her." Maple responded that "I've just been over there. I told you I was gonna be over there." The second statement took place in a conversation with Ms. Rucker. Ms. Rucker stated that "that's crazy how you go to jail and it's always somebody else's fault." Maple contends that the statements go to the "family or household member" element of domestic violence and tend to show that he was guilty of domestic violence.

Confrontation Clause

{¶21} With respect to Maple's contention that the trial court erred in admitting statements made by Maple's mother and Ms. Rucker in recorded conversations while he was in custody, he failed to preserve any objection based on the Confrontation Clause. Therefore, Maple forfeited this issue and we do not reach the merits of his contentions because he failed to argue plain error.

{¶22} Evid.R. 103(A)(1) provides as follows:

> "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and * * * [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record stating the specific ground of objection, if the specific ground was not apparent from the context[.]"

"The failure to raise a constitutional issue at the trial level [forfeits] the right to advance a constitutional argument at the appellate level." *State v. McGinnis*, 9th Dist. No. 05CA0061-M, 2006-Ohio-2281, at ¶29, citing, e.g., *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus. While a defendant who forfeits such an argument still may argue plain error on appeal, this court will not sua sponte undertake a plain-error analysis if a defendant fails to do so. See *State v. Hairston*, 9th Dist. No. 05CA008768, 2006-Ohio-4925, at ¶11.

{¶23} At trial, Maple's counsel objected to the introduction of the recordings on the basis of hearsay. Counsel did not, however, make any reference to the Confrontation Clause or any other constitutional basis to bar the admission of the recordings. Maple has not argued plain error on appeal. Accordingly, we must conclude that Maple's Confrontation-Clause-based contentions lack merit.

Hearsay

{¶24} Generally, this Court reviews a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Roberts*, 156 Ohio App.3d 352, 2004-Ohio-962, at ¶14. However, the Ohio Supreme Court has held that "[w]hen a court's judgment is based on an [arguably] erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate." *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, at ¶13. "Whether evidence is admissible because it falls within an exception to the hearsay rule is a question of law, thus, our review is *de novo*." (Italics sic.) *Monroe v. Steen*, 9th Dist. No. 24342, 2009-Ohio-5163, at ¶11, citing *State v. Denny*, 9th Dist. No. 08CA0051, 2009-Ohio-3925, at ¶4.

{¶25} 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.

> "Should hearsay statements be admitted improperly, however, such error does not necessarily require reversal of the outcome of the trial if it was harmless. See *Arizona v. Fulminante* (1991), 499 U.S. 279, 306-09 []. Crim.R. 52(A) describes a harmless error as one 'which does not affect substantial rights [and therefore] shall be disregarded.' In order to find harmless error in a criminal matter, a reviewing court must find that the error was harmless beyond a reasonable doubt. *Chapman v. California* (1967), 386 U.S. 18, 24 []. 'When determining whether the admission of evidence is harmless * * * this Court must find 'there is no reasonable probability that the evidence may have contributed to the defendant's conviction.'" (Citation omitted.) *State v. Jones*, 9th Dist. No. 24469, 2010-Ohio-879, at ¶46.

A. Mother's statement

{¶26} With respect to Maple's mother's side of the recorded conversation played for the jury, error, if any, in admitting the evidence was harmless. While the statement suggested that

Maple lived with Ms. Rucker in her house, the other evidence, recounted in our resolution of the second assignment of error, that Maple was living with Ms. Rucker was overwhelming. *State v. Tate*, 9th Dist. No. 21943, 2005-Ohio-2156, at ¶22, citing *State v. Williams* (1983), 6 Ohio St.3d 281, 290. This is particularly true of Maple's admission to Officer Morgan that he lived with Ms. Rucker; as well as Ms. Rucker's testimony that prior to the incident, Maple had stayed with her for nearly a month. Accordingly, the error, if any, in admitting Maple's mother's statement was harmless beyond a reasonable doubt. Id.; *Fulminante*, 499 U.S. at 306-09. With respect to Maple's mother's recorded statement, Maple's first assignment of error is overruled.

B. Ms. Rucker's statement

{¶27} With respect to Ms. Rucker's side of the recorded conversation played for the jury, error, if any, in admitting this evidence was also harmless. Maple's brief on appeal specifically contends that: "The statements deals with the fact that [Maple] was placed under arrest following the police investigation of possible domestic violence against [Ms. Rucker]. The statement specifically addresses the issue of [Maple's] responsibility for the event in which he went to jail." Less than addressing his culpability for this domestic violence charge, Maple's contention seems to suggest that a reference to previous arrests prejudiced him. The State introduced and trial counsel stipulated to the admission of two prior convictions for domestic violence. The jury could reasonably presume that each of his previous convictions for domestic violence was preceded by the arrests to which Ms. Rucker referred. Accordingly, any error in the admission of Ms. Rucker's recorded statement was harmless beyond a reasonable doubt, see *Tate*, at ¶22; see also *State v. Grant* (1993), 67 Ohio St.3d 465, 483. With respect to Ms. Rucker's recorded statement, Maple's first assignment of error is overruled.

III.

{¶28} Maple'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.

CARLA MOORE
FOR THE COURT

CARR, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

THOMAS D. BOWN, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.