

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 13CA0078-M

Appellee

v.

MICHAEL BASFORD

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 13 CR 0196

Appellant

DECISION AND JOURNAL ENTRY

Dated: February 23, 2015

CARR, Presiding Judge.

{¶1} Appellant Michael Basford appeals his conviction in the Medina County Court of Common Pleas. This Court affirms in part, reverses in part, vacates in part, and remands.

I.

{¶2} Basford was indicted on one count of aggravated burglary in violation of R.C. 2911.11(A)(1), a felony of the first degree. He was found guilty by a jury. The trial court concluded that Basford was subject to a mandatory prison term pursuant to R.C. 2929.13(F) and sentenced him to four years in prison. Basford appealed and raises three assignments of error for review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED WHEN IT SENTENCED BASFORD TO A MANDATORY PRISON TERM UNDER DIVISION (F) OF SECTION 2929.13 OF THE OHIO REVISED CODE, FOR THE CONVICTION OF

AGGRAVATED BURGLARY, A VIOLATION OF REVISED CODE
SECTION 2911.11(A)(1), A FELONY OF THE FIRST DEGREE.

{¶3} Basford argues that the trial court erred by sentencing him to a mandatory prison term pursuant to R.C. 2929.13(F). The State concedes error and this Court agrees.

{¶4} Basford was found guilty of aggravated burglary after a trial before a jury. At sentencing, defense counsel argued for leniency and asserted that this was not an offense that carried a mandatory minimum sentence in prison. The trial court imposed a four-year prison term, but made no mention of any mandatory time. The trial court’s sentencing entry, however, states that as Basford was convicted of aggravated burglary in violation of R.C. 2911.11(A)(1), a felony of the first degree, he was “subject to a mandatory prison term under division (F) of section 2929.13 of the Ohio Revised Code.”

{¶5} Basford argues that R.C. 2929.13 is not applicable in this case, and the State concedes error. Because R.C. 2929.13(F) does not mandate a prison sentence for a violation of R.C. 2911.11(A)(1), the imposition of a mandatory sentence is contrary to law. *See State v. Randa*, 9th Dist. Medina No. 10CA0015-M, 2011-Ohio-1535, ¶ 6 (concluding that the imposition of a mandatory sentence for a violation of R.C. 2911.12(A)(1) (burglary) was not required pursuant to R.C. 2929.13(F), rendering the imposition of a mandatory sentence contrary to law).

{¶6} In *Randa*, this Court vacated the portion of the sentence described in the sentencing entry as “mandatory” and ordered that the remainder of the sentence would stand. *Id.* at ¶ 7. Pursuant to R.C. 2953.08(G), upon clearly and convincingly finding that a felony sentence is contrary to law, “[t]he appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing.” Accordingly, this Court modifies Basford’s sentence for

aggravated burglary by vacating the portion of the sentencing entry describing the sentence as “mandatory.” The remainder of his sentence shall stand.

{¶7} Basford’s first assignment of error is sustained to the extent that his sentence is vacated in part.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED IN FINDING APPELLANT GUILTY OF THE CHARGE[] BECAUSE THE FINDING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶8} Basford argues that his conviction was against the manifest weight of the evidence. This Court disagrees.

In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate 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 (9th Dist.1986).

Weight of the evidence concerns the tendency of a greater amount of credible evidence to support one side of the issue more than the other. *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). Further when reversing a conviction on the basis that it was against the manifest weight of the evidence, an appellate court sits as a “thirteenth juror,” and disagrees with the factfinder’s resolution of the conflicting testimony. *Id.*

State v. Tucker, 9th Dist. Medina No. 06CA0035-M, 2006-Ohio-6914, ¶ 5.

{¶9} This discretionary power should be exercised only in exceptional cases where the evidence presented weighs heavily in favor of the defendant and against conviction. *Thompkins*, 78 Ohio St.3d at 387.

{¶10} Basford was convicted of aggravated burglary in violation of R.C. 2911.11(A)(1) which states:

No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if * * * [t]he offender inflicts, or attempts or threatens to inflict physical harm on another[.]

{¶11} “Force” is satisfied by “any effort physically exerted.” *State v. Snyder*, 192 Ohio App.3d 55, 2011-Ohio-175, ¶ 18-19 (9th Dist.). A criminal trespass occurs when one “without privilege to do so * * * [k]nowingly enter[s] or remain[s] on the land or premises of another[.]” R.C. 2911.21(A)(1). This Court recognizes that a privilege may be revoked and that a privilege to enter or remain upon the premises terminates immediately upon the commencement of an act of violence against the person granting the privilege. *See State v. Watson*, 9th Dist. No. 14286, 1990 WL 80550, *2 (June 13, 1990). Pursuant to R.C. 2901.22(A): “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.” “Physical harm to persons” is defined as “any injury, illness, or other physiological impairment, regardless of its gravity or duration.” R.C. 2901.01(A)(3).

{¶12} At trial, the State presented the testimony of three witnesses: Bradley Clements, the alleged victim; Amanda Trimble, Mr. Clements’ girlfriend at the time of the incident; and Officer Ashlee McBride of the Lodi Police Department.

{¶13} Mr. Clements testified as follows. He and Ms. Trimble had been friends with Basford and his girlfriend Chelsea Williams for a couple years and had borrowed money from their friends on numerous occasions. On March 24, 2013, Basford and Ms. Williams were visiting Mr. Clements at his home. While Basford was outside, Mr. Clements asked Ms. Williams if he could borrow over \$200, and she agreed. Neither told Basford about the loan.

The next day, Mr. Clements was home alone when he heard loud banging and pounding on his front door. Not knowing who was there, but believing that there might be an emergency, he opened the door. Basford “barged” in, yelling and screaming that he wanted his money back. Although Mr. Clements told Basford that he had spent the money on rent and told him to leave, Basford continued yelling.

{¶14} Basford became belligerent and violent, pushing and shoving Mr. Clements into a corner and onto a couch. Mr. Clements struggled and dug his nails into his assailant’s neck as Basford tried to choke him while on top of him. The two ultimately “crashed” into a table, overturning and breaking it, and knocking laptop computers to the floor. As Mr. Clements began to scream, Basford left, warning that he would return later and that he wanted his money at that time. Shortly thereafter, Ms. Trimble called him. After his girlfriend told him that Basford had shown up where she was working, Mr. Clements called the police to report the incident. He admitted that he only gave the officer a rough estimate regarding where Basford was living, because Basford was staying at a friend’s home at the time. Mr. Clements also admitted that he never sought medical treatment after the attack because he was not severely injured, and that he did not tell the officer that Basford had damaged his front door during the incident because he was not aware of it until later.

{¶15} Amanda Trimble testified that she was dating and living with Mr. Clements on the date of the incident, but that, at the time of trial, they were no longer a couple. She further testified as follows. She was working at Subway on March 25, 2013, when Basford “barged” in, interrupting her as she waited on customers. Basford was upset and “rambling.” He told her that she needed to call Mr. Clements, her boyfriend, immediately because he could be hurt. Basford told Ms. Trimble that Mr. Clements had borrowed money from him and he needed it back that

day. Basford reported that he had pinned Mr. Clements down on the couch, was punching him, and that he could have killed him. Basford then ordered Ms. Trimble to look at his neck, informing her that Mr. Clements had tried to choke him. Ms. Trimble did not see any marks on Basford's neck.

{¶16} After Basford left Subway, Ms. Trimble called her boyfriend. When the line went dead, she called a neighbor to check on him. Ms. Trimble then called the police. She reported that she and Mr. Clements had borrowed money from Basford in the past without incident. She admitted that Mr. Clements did not tell her that Basford had forced his way into the apartment, but reiterated that Basford said he could have killed Mr. Clements, although she did not include that in her written statement to the police. She explained that she did not want to get anyone in trouble. Finally, Ms. Trimble could not remember whether the officer asked her where Basford was living. She testified, however, that she could not have identified a specific address, and that she only knew generally where Basford was staying with a friend in Medina as he was between residences at the time.

{¶17} Officer Ashlee McBride testified that she responded to Mr. Clements' apartment regarding an assault. Mr. Clements reported that he heard banging on his door, opened it, and that Basford barged in. He further reported to her that he and Basford exchanged words over a debt and that he told Basford he did not have the money and that he should leave. Mr. Clements told the officer that Basford became physically aggressive, tossing him around the apartment and placing Mr. Clements in a bear-hold or choke-hold. The officer noticed a faint red mark on Mr. Clements' neck. Officer McBride further noted and photographed the condition of the apartment. A coffee table had been upended and two of its legs were broken. Two laptop computers, along with other items from the table, were strewn about the floor. Officer McBride

described the living room as having been “destroyed.” She conceded, however, that it was impossible to determine from the damage who started the fight. As Mr. Clements did not mention that his front door had been damaged upon Basford’s entrance into the home, the officer neither noted nor photographed the door.

{¶18} Officer McBride next went to Subway to speak with Ms. Trimble, because Mr. Clements reported that Basford went there after leaving his apartment. Ms. Trimble reported that Basford was very irritated and belligerent when he approached her at work, telling her that he could have “kicked [Mr. Clements’] ass,” that he wanted his money back, and that he would return later for it.

{¶19} As neither Mr. Clements nor Ms. Trimble could spell Basford’s last name, they both identified him in a photo line up. In addition, neither of them could provide a precise address for Basford because he was in the process of moving and was staying with a friend in an apartment in Birch Hill in Medina. Officer McBride could not recall whether she asked if either Mr. Clements or Ms. Trimble had a phone number for Basford.

{¶20} After the State rested, Basford presented the testimony of two witnesses in his defense.

{¶21} Thomas Peterson testified that he has known Basford for five or six years, that he met Mr. Clements a year and a half ago while Clements was working with Basford, and that the three of them used to socialize. He knew that Basford and Mr. Clements had visited one another’s homes, even after Basford moved to Birch Hill in Medina.

{¶22} Mr. Peterson testified that on March 25, 2013, he was in communication with Mr. Clements who led him to believe that he was annoyed with Basford due to his “short-man syndrome.” Mr. Peterson could not identify how tall Basford is, but guessed three heights in the

range of 5 feet 7 inches to 5 feet 10 inches. Later that day, Mr. Peterson was on the phone with Basford while Basford was at Mr. Clements' apartment. Mr. Peterson knew Basford's girlfriend Chelsea Porter was with him. He heard yelling in the background, followed by Ms. Porter's statement that she had to get her baby out of there. Twenty to thirty minutes later, Basford, Ms. Porter, and their child arrived at Mr. Peterson's home, a trip that would have taken them twenty to twenty-five minutes to make. Mr. Peterson saw scratch marks on Basford's neck.

{¶23} While at Mr. Peterson's home, Basford told him that he had stopped at Subway on the way to tell Ms. Trimble that Mr. Clements had attacked him. Mr. Peterson believed that it was more likely that Mr. Clements, who owed money he could not repay, would have been more upset than Basford, who needed the money his girlfriend had loaned without his knowledge and which he could not be repaid. Mr. Peterson described Basford as someone who cares about his friends, loaning them, including himself, money when they have needed it.

{¶24} Mr. Peterson testified that Basford and his girlfriend considered calling the police to report Mr. Clements' attack, but Mr. Peterson asked them not to do that. Instead, Mr. Peterson called Mr. Clements to see if he and Ms. Porter could return to get the money. When Mr. Clements agreed, Mr. Peterson told Basford that he did not need to involve the police. The next day, Mr. Peterson accompanied Ms. Porter back to Mr. Clements' apartment to retrieve both a stuffed animal that belonged to Mr. Peterson and the money Ms. Porter had loaned to Mr. Clements.

{¶25} Mr. Peterson identified his phone number on records presented by Basford. Despite the fact that the records showed 3 one-minute phone calls from Mr. Peterson to Basford at 7:01, 7:10, and 7:27 p.m. on March 25, Mr. Peterson asserted that he heard the entire incident at Mr. Clements' apartment.

{¶26} Basford's now-fiancée Chelsea Porter testified that Basford and Mr. Clements were close enough friends that Basford and she had loaned money to him and Ms. Trimble on multiple occasions. While she did not discuss the events of March 24, 2013, when she allegedly loaned Mr. Clements money, Ms. Porter testified that she picked up Basford from work on March 25, and went to Mr. Clements' apartment as all three had agreed to retrieve the money. Ms. Porter testified that she knocked on the door, while Basford got their daughter out of the car. Mr. Clements then invited them inside, and the three adults talked. When Basford asked Mr. Clements if he had the money Ms. Porter had loaned him, however, Mr. Clements became hostile, yelling and cussing at Basford. Basford remained seated because he was then suffering from hernia-like symptoms and hemorrhoids. Medical records confirmed Basford's medical conditions.

{¶27} When Mr. Clements became more aggressive and jumped up from his seat, Ms. Porter grabbed her child and ran out the door. As she was leaving, she heard Mr. Clements tell Basford, "I'm going to stab you to death." Mr. Clements then knocked down a coffee table covered with items. Ms. Porter put her child in her car, and Basford got into the passenger seat after running out of the apartment. Basford had marks on his body after leaving the apartment. Ms. Porter also testified that at some point Basford told Mr. Clements that he was going to call the police, but Mr. Clements begged him not to do that because then he would be unable to repay the loan. Basford and Ms. Porter agreed not to call the police, but told Mr. Clements to have the money the next day.

{¶28} As Ms. Porter was driving away, Basford told her to stop at Subway because he was angry and wanted to tell Mr. Clements' girlfriend what happened. Ms. Porter did not accompany Basford into the Subway. Afterwards, they went to Mr. Peterson's home, where the

three of them discussed the incident and decided not to call the police, despite Mr. Clements' alleged threat to kill Basford.

{¶29} The next day, Ms. Porter and Mr. Peterson returned to Mr. Clements' apartment, where he repaid \$180 of the \$230 Ms. Porter claimed to have loaned him. She did not notice any injuries on Mr. Clements' body, and Mr. Clements assured her that he "got over" the incident and had no hard feelings towards Basford.

{¶30} In June, Ms. Porter learned that a warrant had issued for Basford's arrest, but she thought it arose out of his failure to pay child support. When Basford learned of the warrant, he ran from the police and Ms. Porter did not know where he was staying during the two days before he was finally arrested.

{¶31} This Court will not overturn the trial court's verdict on a manifest weight of the evidence challenge only because the trier of fact chose to believe certain witness' testimony over the testimony of others. *State v. Crowe*, 9th Dist. Medina No. 04CA0098-M, 2005-Ohio-4082, ¶ 22.

{¶32} A thorough review of the record indicates that this is not the exceptional case where the evidence weighs heavily in favor of Basford. The weight of the evidence supports the conclusion that Basford forced his way into Mr. Clements' apartment with purpose to assault him and retrieve the money his girlfriend had loaned the victim without Basford's knowledge or consent. There was evidence that Ms. Porter gave the victim over \$200 while her live-in boyfriend Basford was out of the room. Basford needed that money the next day. The trier of fact could reasonably infer that Basford was angry that his girlfriend had loaned money he needed, and that he became even angrier when the victim could not repay it the very next day. There was evidence that Basford pounded on Mr. Clements' door and pushed his way in, already

enraged about the situation. Mr. Clements' apartment was in disarray, appearing to have been "destroyed" during Basford's stay. Officer McBride confirmed the damage in the victim's apartment, as well as injuries to the victim's neck. The evidence further supports the conclusion that Basford inflicted physical harm on Mr. Clements, throwing him around the room and choking him. Accordingly, Basford's conviction for aggravated burglary was not against the manifest weight of the evidence. Basford's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ENGAGE IN IMPERMISSIBLE CONDUCT DURING THE TRIAL AND THEREFORE VIOLATING APPELLANT'S SUBSTANTIAL RIGHTS.

{¶33} Basford argues that the State engaged in prosecutorial misconduct during trial. This Court disagrees.

{¶34} Basford asserts that the assistant prosecutor engaged in multiple acts of misconduct including implying that a defense witness was lying, imputing guilt upon Basford by noting that he ran from the police, and commenting on Basford's remaining silent and not telling the police his side of the story. Basford failed, however, to object to these questions, comments, or arguments by the State. Accordingly, he "has forfeited all but plain error review on appeal." *State v. Bowerman*, 9th Dist. Medina No. 13CA0059-M, 2014-Ohio-4264, ¶ 16, citing *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, ¶ 242. Moreover, on appeal, Basford has failed to argue plain error in regard to any of this conduct by the State. Although a party who forfeits an argument by failing to object below may still raise plain error on appeal, this Court will neither create such a plain error argument, nor undertake a plain error analysis on the appellant's behalf. *Bowerman* at ¶ 16, citing *Hendy v. Wright*, 9th Dist. Summit No. 26422, 2013-Ohio-5786, ¶ 14; *see also State v. Cross*, 9th Dist. Summit No. 25487, 2011-Ohio-3250, ¶ 41, and

State v. Hairston, 9th Dist. Lorain No. 05CA008768, 2006-Ohio-4925, ¶ 11. Accordingly, Basford's third assignment of error is overruled.

III.

{¶35} Basford's first assignment of error is sustained in part. His second and third assignments of error are overruled. The judgment of the Medina County Court of Common Pleas is affirmed in part, reversed in part, and the sentence is vacated solely as to the imposition of a mandatory prison term. The cause is remanded for further proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
vacated 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 Medina, 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(C). 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.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR.

APPEARANCES:

CONRAD G. OLSON, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and MATTHEW A. KERN, Assistant Prosecuting Attorney, for Appellee.