[Cite as *State v. Payne*, 2019-Ohio-5429.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- GARY PAYNE Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J Hon. John W. Wise, J. Hon. Patricia A. Delaney, J. Case No. 19 CAA 03 0026 O P I N IO N
CHARACTER OF PROCEEDINGS:	Appeal from the Delaware County Court of Common Pleas, Case No. 18-CR-I-08-0448
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 23, 2019
APPEARANCES:	
For Plaintiff-Appellee MELISSA A. SCHIFFEL Delaware Prosecuting Attorney R. JOSEPH VARVEL KIMBERLY E. BURROUGHS Assistant Prosecuting Attorneys 145 North Union Street Delaware, Ohio 43015	For Defendant-Appellant WILLIAM T. CRAMER 470 Olde Worthington Road, Ste. #200 Westerville, Ohio 43082

Hoffman, P.J.

{¶1} Appellant Gary Payne appeals the judgment entered by the Delaware County Common Pleas Court convicting him of aggravated burglary (R.C. 2911.11(A)(1)) and two counts of violating a protection order (R.C. 2919.27(A)(1)), and sentencing him to an aggregate prison term of six years. Appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} K.F. is a fifty-one-year-old woman who is disabled following a 1992 traumatic brain injury, with diagnoses of schizoaffective disorder and bipolar disorder. She has been appointed a legal guardian, Attorney Nick McCoy, by the Delaware County Probate Court. McCoy described K.F. as having a very trusting nature, not comprehending the difference between a true friend and someone who wants something from her or who abuses her for money or food. Tr. 34. K.F. has known Appellant for about eight years, and was in love with him.

{¶3} In 2013, the Delaware County Common Pleas Court issued a civil protection order prohibiting Appellant from having contact with K.F. or her residence until November 11, 2018. Appellant was duly served with the order, and was convicted of violating the order in 2017. Almost immediately after his release from prison for his 2017 conviction for violating the protection order, Appellant returned to K.F.'s residence and began living with her. The guardian was unaware of Appellant's return.

{¶4} On August 11, 2018, K.F. awoke to find Appellant standing over her with a baseball bat. When she fell asleep earlier, she left the front door unlocked. Appellant was angry K.F. did not vacuum the floor to his satisfaction. He called her lazy. Appellant struck K.F. repeatedly with the baseball bat, leaving bruises on her lower back and forearms. He shoved K.F., causing her to fall and injure her knee.

{¶5} Appellant eventually left the apartment after beating K.F., and K.F. called her sister. She told her sister she had fallen asleep, woke to Appellant beating her with a baseball bat, and her whole body was bruised. K.F. also called her guardian, who called the Delaware Police Department to report Appellant had violated the civil protection order. Officer Dylan Griffith responded. When he arrived, Appellant was not at K.F.'s apartment. The officer observed injuries to K.F.'s left leg. He took a report but did not photograph her injuries and did not file charges.

{¶6} On August 13, 2018, K.F. was on the phone with her sister, Karolyn. Karolyn heard someone pounding on the door. When she asked K.F. if someone was there, K.F. responded, "Call." At a prior time, K.F. and Karolyn agreed if K.F. were to feel unsafe and unable to call for help herself, she should say the word "call" to Karolyn. This word was a signal for Karolyn to call the police. After hearing K.F. say "call" on August 13, Karolyn called the police. Before she hung up to call the police, Karolyn heard Appellant's voice say to K.F., "Who the F are you talking to?" Tr. 169. Karolyn had met Appellant numerous times, and felt comfortable identifying his voice.

{¶7} Officer Adam Graham of the Delaware Police Department responded to the call. When he arrived, Appellant was inside K.F.'s apartment. Officer Graham informed Appellant he was in violation of the civil protection order issued in 2013.

{¶8} Appellant claimed his attorney advised him the protection order had expired. Officer Graham informed Appellant the order was still in effect, and arrested Appellant.

{¶9} Officer Graham later learned Officer Griffin had responded to the same address two days earlier. On August 15, 2018, Officer Graham followed up on the August

11, 2018, complaint, photographing bruises to K.F.'s arms, legs, and back, as well as the scrape on her knee.

{¶10} Appellant was indicted by the Delaware County Grand Jury on one count of aggravated burglary and one count violation of a protection order for the events of August 11, 2018, and one count of violation of a protection order for the events of August 13, 20118. The case proceeded to bench trial in the Delaware County Common Pleas Court. Appellant was convicted of all charges. The court found the violation of a protection order conviction related to the events of August 11, 2018, merged into the aggravated burglary conviction, and sentenced Appellant to six years incarceration for aggravated burglary. The court sentenced Appellant to twelve months in prison for the conviction of violation of a protection order related to the events of August 13, 2018, to be served concurrently to the aggravated burglary conviction. The court also sentenced Appellant to serve 672 days of post-release control under case number 16-CR-I-12-0617, to be served consecutively to the sentence imposed in the instant case.

{¶11} It is from the March 13, 2019 judgment of conviction and sentence Appellant prosecutes this appeal, assigning as error:

I. APPELLANT'S RIGHT TO DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS WAS VIOLATED BY A CONVICTION FOR AGGRAVATED BURGLARY THAT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

II. APPELLANT'S CONVICTION FOR AGGRAVATED BURGLARY WAS AGAINST THE WEIGHT OF THE EVIDENCE.

III. APPELLANT'S RIGHT TO DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS WAS VIOLATED BY CONVICTIONS FOR VIOLATING A PROTECTION ORDER THAT WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE.

IV. APPELLANT'S CONVICTIONS FOR VIOLATING A PROTECTION ORDER WERE AGAINST THE WEIGHT OF THE EVIDENCE.

V. APPELLANT'S RIGHT TO DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS WAS VIOLATED BY THE CONVICTION ON COUNT TWO FOR VIOLATING A PROTECTION ORDER AS A THIRD-DEGREE FELONY BECAUSE THERE WAS INSUFFICIENT EVIDENCE THAT APPELLANT VIOLATED THE PROTECTION ORDER WHILE COMMITTING A FELONY OFFENSE.

VI. APPELLANT'S CONVICTION FOR VIOLATING A PROTECTION ORDER IN COUNT TWO AS A THIRD-DEGREE FELONY IS AGAINST THE WEIGHT OF THE EVIDENCE.

STANDARD OF REVIEW

{¶12} Each of Appellant's assignments of error challenges his convictions as against the manifest weight and sufficiency of the evidence.

{¶13} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses,

and determines whether in resolving conflicts in evidence the jury '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. Thompkins*, 78 Ohio St. 3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App. 3d 172, 175, 485 N.E.2d 717 (1983).

{¶14} An appellate court's function when reviewing the sufficiency of the evidence is to determine 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. *State v. Jenks*, 61 Ohio St. 3d 259, 574 N.E.2d 492, paragraph two of the syllabus (1991).

{¶15} It is pursuant to this standard of review we consider each of Appellant's assignments of error.

I., II.

{¶16} In his first and second assignments of error, Appellant argues his conviction of aggravated burglary is against the manifest weight and sufficiency of the evidence. He specifically argues there was no evidence he lacked privilege to be in K.F.'s apartment because she gave him permission to be there, and thus, the State failed to prove the element of trespass necessary to convict him of aggravated burglary.

{¶17} Appellant was convicted of aggravated burglary in violation of R.C. 2911.11(A)(1):

> (A) 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 any of the following apply:

(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

{¶18} Trespass is defined by R.C. 2911.21:

(A) No person, without privilege to do so, shall do any of the following:

(1) Knowingly enter or remain on the land or premises of another;

(2) Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows the offender is in violation of any such restriction or is reckless in that regard;

(3) Recklessly enter or remain on the land or premises of another, as to which notice against unauthorized access or presence is given by actual communication to the offender, or in a manner prescribed by law, or by posting in a manner reasonably calculated to come to the attention of potential intruders, or by fencing or other enclosure manifestly designed to restrict access;

(4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified by signage posted in a conspicuous place or

> otherwise being notified to do so by the owner or occupant, or the agent or servant of either.

{¶19} The parties stipulated on the date of the incident, Appellant was validly subject to a civil protection order issued under R.C. 3113.31(F)(3). The order prohibited Appellant from coming within 500 feet of K.F., and additionally prohibited him from initiating or having any contact with K.F. or her residence.

{¶20} Appellant argues K.F. was in sole custody of the apartment, and therefore her possessory interests were "the only thing that mattered for purposes of trespass," and she repeatedly testified she loved Appellant and wanted him there. He therefore argues he had privilege to be in the apartment, regardless of the protection order.

{¶21} The trial court found the protection order had the legal effect of obviating any claim of lawful privilege Appellant may have to be inside K.F.'s residence. We agree.

{¶22} The civil protection order specifically stated, "Respondent may not violate this order even with the permission of the protected person." Tr. 234. An order of the court must be obeyed unless and until a court finds it is invalid or rescinds it. *City of Reynoldsburg v. Eichenberger*, 5th Dist. Licking No. CA-3492, 1990 WL 52467, *4, *citing In re White*, 60 Ohio App. 2d 62 (1978), *citing U.S. v. United Mine Workers of America*, 330 U.S. 258 (1947). Appellant stipulated the protection order was in effect on August 11, 2018. By the terms of the protection order, K.F. could not grant permission to Appellant to violate the order, and Appellant did not have privilege to be present in her residence.

{¶23} Appellant also argues the evidence was insufficient to demonstrate he had purpose to commit a criminal offense inside the residence, as the evidence he assaulted her with a baseball bat is not credible. K.F. testified Appellant struck her with a baseball bat repeatedly, and pushed her to the ground. The state of Ohio offered photographs of her bruises. Guardian McCoy testified when he went to K.F.'s residence on August 13, 2018, he observed a large bruise on her knee. While Appellant argues the evidence was insufficient to demonstrate felonious assault, pursuant to R. C. 2911.11, the intent to commit *any* criminal offense is sufficient. We find the court's determination Appellant had purpose to commit a criminal offense in K.F.'s residence is not against the manifest weight nor based upon insufficient evidence.

{¶24} We find the judgment finding Appellant guilty of aggravated burglary is not against the manifest weight or sufficiency of the evidence. The first and second assignments of error are overruled.

III., IV.

{¶25} In his third and fourth assignments of error, Appellant argues his convictions for violation of a protection order are against the manifest weight and sufficiency of the evidence because he was told by his attorney the order had expired, and therefore he did not "recklessly" violate the protection order.

{¶26} Appellant was convicted of two counts of violation of a protection order as prohibited by R.C. 2919.27(A)(1):

> (A) No person shall recklessly violate the terms of any of the following:

> (1) A protection order issued or consent agreement approved pursuant to section 2919.26 or 3113.31 of the Revised Code;

{¶27} "Recklessly" is defined by R.C. 2901.22(C):

> (C) A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist.

{¶28} Appellant argues Officer Graham testified Appellant told the officer his attorney told him the civil protection order had expired. However, the officer further testified he verified the existence of the order because it is not uncommon for someone to say, "No, that's not in place anymore." Tr. 181. Further, while K.F. testified Appellant told her the order was no longer in place, she also testified Appellant was not supposed to be there because of the protection order, and Appellant knew about the order. Tr. 110. We find the trial court could reasonably conclude from the evidence a valid protection order was in place, and Appellant acted recklessly with regard to its expiration date even if the court believed Appellant was told by his attorney the order had expired. Further, the trial court could have found Appellant's statements to police and to K.F. his attorney

told him the order expired to be self-serving and not credible. We find the judgment convicting Appellant of two counts of violation of a protection order are not against the manifest weight of the evidence nor based upon insufficient evidence.

{¶29} The third and fourth assignments of error are overruled.

V., VI.

{¶30} In his fifth and sixth assignments of error, Appellant argues the court erred in convicting him of violation of a protection order as a third degree felony in count two.

{¶31} R.C. 2919.27(B)(4) provides, "If the offender violates a protection order or consent agreement while committing a felony offense, violating a protection order is a felony of the third degree." Appellant restates his arguments in his first assignment of error concerning his conviction of aggravated burglary. He argues because his conviction of aggravated burglary is against the manifest weight and sufficiency of the evidence and any evidence of felonious assault is not credible, there is no evidence he violated the protection order while committing a felony offense.

{¶32} For the reasons stated in our discussion of Appellant's first and second assignments of error, the judgment convicting Appellant of aggravated burglary, making violation of protection order a third degree felony, is not against the manifest weight nor sufficiency of the evidence. Therefore, we find the evidence supports a finding Appellant violated the protection order on August 11, 2018, while committing a felony offense.

{¶33} The fifth and sixth assignments of error are overruled.

{¶34} The judgment of the Delaware County Common Pleas Court is affirmed.

By: Hoffman, P.J.
Wise, John, J. and
Delaney, J. concur