

IN THE SUPREME COURT OF OHIO

11-0629

STATE OF OHIO, :
Plaintiff/Appellee :
vs. :
JAMES LEWIS, pro se :
Defendant/Appellant :

Case No.: _____

MOTION FOR DELAYED APPEAL

Pro Se Appellant, James Lewis, does submit this Motion for Delayed Appeal, (with the Notice of Appeal, Affidavit and Motion for Indigency), in this his Appeal from his Direct appeal of the affirming of his criminal jury trial conviction case.

The Appellant is Pro Se, and unable to secure counsel. He is appealing the ruling that was due on or before March 17, 2011, (45 days). He had mailed that entire packet with the Memorandum In Support of Jurisdiction and copies of his Court of Appeals Ruling, and that packet was received, (10 regular postage envelopes), on March 15, 2011, Timely. However, that packet was NOT FILED and was returned by the Clerk, Deputy, Kimberly, (Rec'd 3-22-11), due to the fact that his Affidavit for Waiver of Filing Fees was NOT notarized, but signed and witnessed by fellow inmates. This was due to the fact, that with time expiring and no access to the law library, or notary, as stated therein, I could not acquire that Notary at that time. With the letter from the Deputy Clerk, I have now been able to have said documents Notarized and do immediately re-submit those documents, with this Motion and supporting affidavit, by mail on 3-29-11.

Respectfully Submitted,

James Lewis, Appellant
James Lewis, pro se

FILED
APR 18 2011
CLERK OF COURT
SUPREME COURT OF OHIO

AFFIDAVIT OF APPELLANT IN SUPPORT OF MOTION FOR DELAYED APPEAL

Affiant: James Lewis, Appellant pro se

Facts In Support of Motion for Delayed Appeal, Ohio Supreme Court

Appellant, James Lewis makes these statements under penalty of perjury swearing to their truth and accuracy to the best of his knowledge and belief:

- 1) That I am the Appellant and that the issues presented in my Notice of Appeal have merit and are of great public interests and of constitutional importance.
- 2) That I appealing my Court of Appeals Ruling entered on or about January 31, 2011, and that was due in this Court, (45 days), on March 17, 2011 as noted in Deputy Clerk Kimberly's Letter dated March 15th.
- 3) That I did prepare an appeal packet, which was mailed by me from N.C.I. while in segregation and received by the Clerk, on March 15, 2011 but NOT FILED.
- 4) That packet was returned to me with her letter, on or about March 22, 2011- due to the fact that the Affidavit in support of the Motion to Waive Filing Fees, because it was not notarized.
- 5) That Affidavit was not notarized because while I was in and am in segregation- one was not available in the limited time frame for filing- and is now, as refiled, with the Letter from the Deputy Clerk, via my working with the Institution's Inspector, Mr. Williams.
- 6) With that Affidavit and this one Notarized the deficiency is corrected, and I resubmit this Appeal, immediately

These statements I swear to be true, and are made by me in Noble County, Ohio on the _____ day of March, 2011.

Signed: James Lewis, James Lewis #635-508

NOTARY:

Sworn to and subscribed before me, in Noble County, Ohio on this the 29th day of March, 2011.

Jody Beardmore, Notary - Ohio

My Commission expires:

JODY BEARDMORE
Notary Public, State of Ohio
My Commission Expires, June 4, 2012

CERTIFICATE OF SERVICE

I certify that a copy of this motion for Delayed Appeal was sent by ordinary U.S. mail to counsel for appellee, David B Bender Fayette County Prosecutor at East Court Street Washington Court House, Ohio 43160 on 3rd of

March 2011

3/30/11

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2010-08-017
 :
 : OPINION
 - vs - : 1/31/2011
 :
 :
 JAMES M. LEWIS, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 01CRI00061

David B. Bender, Fayette County Prosecuting Attorney, Kristina M. Rooker, 1st Fl.,
Courthouse, 110 East Court Street, Washington Court House, Ohio 43160, for plaintiff-
appellee

Susan R. Wollscheid, P.O. Box 176, Washington Court House, Ohio 43160, for defendant-
appellant

BRESSLER, J.

{¶1} Defendant-appellant, James M. Lewis, appeals his conviction and sentence in
the Fayette County Court of Common Pleas for domestic violence. For the reasons that
follow, we affirm the decision of the trial court.

{¶2} On April 15, 2010, appellant's wife (the victim) filed a police report, alleging
appellant choked her, "slammed" her against the wall, and subsequently threw her onto the

bed. The victim explained that prior to the physical incident, she and appellant argued because appellant's brother took the victim's 13-year-old son out of their home without the victim's permission. Following a police investigation, appellant was charged with domestic violence in violation of R.C. 2919.25(A), a third-degree felony, due to appellant's two prior domestic violence convictions. Following a jury trial, appellant was convicted and sentenced to serve two years in prison.

{¶13} Appellant now appeals from his conviction, raising four assignments of error. For ease of analysis, we will address appellant's assignments of error out of order.

{¶14} Assignment of Error No. 4:

{¶15} "THE TRIAL COURT ERRED BY FAILING TO GRANT THE MOTION TO DISMISS OR (ALTERNATIVELY) FOR ACQUITTAL WHEN THE EVIDENCE SUBMITTED COULD NOT PROVE BEYOND A REASONABLE DOUBT ALL THE ELEMENTS OF THE OFFENSE CHARGE." [sic]

{¶16} In his fourth assignment of error, appellant argues his conviction is not supported by sufficient evidence, thus the trial court erroneously denied his Crim.R. 29 motion for acquittal at the close of all evidence. Specifically, appellant argues the evidence was insufficient where the state presented the conflicting testimony of two witnesses: the victim and her 11-year-old son, whose accounts of the events on April 15, 2010 varied "significantly" from each other.

{¶17} When reviewing the trial court's denial of a motion for acquittal under Crim.R. 29, an appellate court applies the same test it would in reviewing a sufficiency of the evidence argument. *State v. Alkire*, Madison App. No. CA2008-09-023, 2009-Ohio-2813, ¶51. When reviewing the sufficiency of the evidence underlying a criminal conviction, "[t]he 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." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. A reviewing court must not substitute its evaluation of the witnesses' credibility for that of the jury. *State v. Benge*, 75 Ohio St.3d 136, 143, 1996-Ohio-227; *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶8} In the case at bar, appellant was convicted of domestic violence in violation of R.C. 2919.25(A), which states, "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member."

{¶9} The state called three witnesses during trial. The state's first witness was the victim, who testified she and appellant argued after appellant's brother took the victim's 13-year-old son out of their home without her permission. When the victim discovered her son's disappearance, she told appellant she would "call the law" on his brother unless he returned her son within 30 minutes. The victim testified appellant became upset, at which time he grabbed the victim's throat and "slammed" her against the wall. Further, the victim testified once she escaped appellant's grasp, she attempted to walk to the kitchen to find her mobile phone, but appellant pushed her onto the bed before she could do so.

{¶10} The state's second witness was the victim's youngest son, who testified "I saw my dad on the bed * * * choking my mom," after he walked upstairs to discover the cause of a "big thump" he heard from downstairs.

{¶11} Finally, the state presented testimony from Sergeant Bruce Stolsenberg of the Washington Court House Police Department. Stolsenberg testified he met the victim and her youngest son in the police department lobby on April 15, 2010. Stolsenberg testified the victim continually rubbed her neck during her interview and explained appellant created the red marks on her neck when he choked her. At that time, the state presented four photographs taken by Stolsenberg on April 15, 2010, showing redness on the victim's neck.

{¶12} While appellant testified to a conflicting version of the events, the jury was free

to accept or reject any and all of the evidence offered by the parties. See, e.g., *State v. Antill* (1964), 176 Ohio St. 61, 67; *State v. Smith*, Fayette App. No. CA2007-10-035, 2008-Ohio-5931, ¶16. Further, "[t]he existence of conflicting evidence does not render the evidence insufficient as a matter of law." *State v. Gray*, Franklin App. No. 06AP-15, 2007-Ohio-1504, ¶18, citing *State v. Murphy*, 91 Ohio St.3d 516, 543, 2001-Ohio-112.

{¶13} In the case at bar, the jury chose to believe the victim. Construing the evidence in a light most favorable to the state, we hold a rational fact-finder could have found the essential elements of the domestic violence charge proven beyond a reasonable doubt. Therefore, we decline to substitute our judgment for that of the jury in this matter.

{¶14} Based upon the foregoing, we find the trial court did not err in denying appellant's Crim.R. 29 motion, as sufficient evidence was presented at trial to support his conviction.

{¶15} Accordingly, appellant's fourth assignment of error is overruled.

{¶16} Assignment of Error No. 1:

{¶17} "THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF THE PRIOR CONVICTION OF [THE VICTIM] FOR THE PURPOSE OF IMPEACHING THE WITNESS."

{¶18} In his first assignment of error, appellant argues the trial court erred in excluding evidence of the victim's prior falsification conviction from 1999. At trial, appellant attempted to admit the conviction for impeachment purposes. Appellant argues this conviction was highly probative because it "demonstrated [the victim's] lack of veracity when dealing with law enforcement and the judicial system in particular."

{¶19} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Ghee*, Madison App. No. CA2008-08-017, 2009-Ohio-2630, ¶32; *State v. Brown*, 100 Ohio St.3d 51, 58, 2003-Ohio-5059, ¶27. An appellate court will not disturb a trial court's ruling as to the exclusion of evidence absent an abuse of

discretion. *Ghee* at ¶32. A trial court abuses its discretion when it acts in an unreasonable, arbitrary, or unconscionable manner. *Id.*

{¶20} Evid.R. 609 provides for impeachment by evidence of the conviction of a crime, and pursuant to Evid.R. 609(A)(3), evidence that any witness has been convicted of a crime "is admissible if the crime involved dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance."

{¶21} However, Evid.R. 609(B) imposes time limits on the use of that information, and states:

{¶22} "Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement, or the termination of community control sanctions, post-release control, or probation, shock probation, parole, or shock parole imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."

{¶23} After review of the record, we find no abuse by the trial court in excluding the evidence relating to the victim's prior falsification conviction. See *State v. Adams* (1980), 62 Ohio St.2d 151, 157. First, while not disputed by the parties, there is no evidence in the record to verify the date of the victim's prior falsification conviction. Without an adequate record, we cannot determine whether this conviction is within the appropriate time frame set forth by Evid.R. 609(B). Cf. *State v. Greene*, Ashtabula App. No. 2002-A-0104, 2004-Ohio-6701, ¶22. Accordingly, we "must presume the regularity of the trial court proceedings and the presence of sufficient evidence to support the trial court's decision." *Id.*, citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶24} Secondly, appellant's counsel was permitted to cross-examine the victim

regarding her more recent convictions, including her 2002, 2003, and 2007 convictions for theft and a 2008 conviction for complicity to theft. Under these circumstances, there was little additional probative value to be derived from the admission of the victim's dated falsification conviction.

{¶25} In light of these considerations, we find the trial court did not abuse its discretion in excluding evidence of the victim's prior falsification conviction. See, e.g., *State v. Breckenridge*, Franklin App. No. 05AP-868, 2006-Ohio-5038, ¶10.

{¶26} Accordingly, appellant's first assignment of error is overruled.

{¶27} Assignment of Error No. 2:

{¶28} "THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF BRITTANY COX REGARDING STATEMENTS BY [THE VICTIM], WHICH WERE MADE IN HER PRESENCE."

{¶29} In his second assignment of error, appellant argues the trial court abused its discretion in excluding extrinsic evidence of a prior inconsistent statement made by the victim. Specifically, appellant argues Brittany Cox witnessed the victim threaten to file false charges of domestic violence against appellant on April 15, 2010, which would contradict the victim's testimony that she never threatened to call the police on appellant.

{¶30} Appellant first argues such evidence was admissible under Evid.R. 613(B) as a prior inconsistent statement. Evid.R. 613 governs the procedures for impeachment of a witness by self-contradiction. "When extrinsic evidence of a prior inconsistent statement *** is offered into evidence pursuant to Evid.R. 613(B), a foundation must be established through direct or cross-examination in which: (1) the witness is presented with the former statement; (2) the witness is asked whether he [or she] made the statement; (3) the witness is given an opportunity to admit, deny or explain the statement; and (4) the opposing party is given an opportunity to interrogate the witness on the inconsistent statement." *State v. Mack*, 73 Ohio

St.3d 502, 514-515, 1995-Ohio-273.

{¶31} After examining the record, we find appellant's counsel failed to establish a proper foundation for the admission of Cox's testimony under Evid.R. 613(B). Specifically, we find the victim was never asked if she threatened appellant with false domestic violence charges in the presence of Brittany Cox on April 15, 2010. While the victim was asked whether she "threatened to retaliate" against appellant, no mention was made of Brittany Cox or false domestic violence charges during cross-examination. Because a proper foundation was not laid for the admission of the extrinsic evidence, we reject appellant's argument and find the trial court did not abuse its discretion in excluding Cox's testimony on these grounds.

{¶32} Appellant also argues Cox's testimony regarding the victim's statement was admissible pursuant to Evid.R. 803(3).

{¶33} Evid.R. 803(3) permits the admission of out-of-court statements involving the declarant's then existing state of mind. Specifically, Evid.R. 803(3) exempts the following from the prohibition on hearsay:

{¶34} "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

{¶35} The Ohio Supreme Court has held "[u]nder Evid.R. 803(3), statements of current intent to take future actions are admissible for the inference that the intended act was performed." *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, ¶199. In the case at bar, Cox's testimony regarding the victim's threat to file false domestic violence charges against appellant constitutes admissible hearsay pursuant to Evid.R. 803(3) inasmuch as it reflects the victim's then existing state of mind. Cf. *State v. Davis* (1991), 62 Ohio St.3d 326, 343. In

other words, Cox's testimony was probative of the victim's intent to retaliate against appellant with specific charges of domestic violence on April 15, 2010.

{¶36} Nevertheless, any error by the trial court in excluding Cox's testimony was harmless. Appellant's counsel had ample opportunity during cross-examination to challenge the victim's testimony that she did not threaten to "call the law" on appellant. Moreover, as previously discussed, sufficient evidence existed to support appellant's domestic violence conviction beyond a reasonable doubt. Upon reviewing the entire record and examining all the other evidence produced at trial, we find that if the hearsay testimony, i.e., that the victim threatened appellant with false domestic violence charges, had been introduced, the jury would have made the same decision.

{¶37} Accordingly, appellant's second assignment of error is overruled.

{¶38} Assignment of Error No. 3:

{¶39} "THE TRIAL COURT ERRED IN EXCLUDING THE TRANSCRIPTS FROM THE PRE TRIAL HEARING HELD IN APRIL 2010."

{¶40} In his third assignment of error, appellant argues the trial court erred in refusing to admit into evidence transcripts of the preliminary hearing held April 27, 2010. Appellant attempted to admit the transcripts to impeach the victim as to inconsistencies in her testimony during the preliminary hearing and at trial.

{¶41} However, the inconsistencies appellant asserts were disclosed in the preliminary hearing transcripts were also fully discussed during cross-examination. Specifically, the victim was cross-examined regarding her testimony during the preliminary hearing that after appellant put his hands around her neck, she entered the kitchen for a drink of water, whereas during trial, the victim testified "I never once went into my kitchen."

{¶42} We find that as a result of counsel's inquiry on cross-examination, any discrepancies in the victim's statements were readily apparent to the jury, even without the

preliminary hearing transcripts. See Evid.R. 103(A). Further, we find whether the victim entered the kitchen during the altercation and any other inconsistencies discussed during cross-examination were immaterial to appellant's culpability on the charged offense. Accordingly, we find no abuse in the trial court's ruling.

{¶43} Appellant's third assignment of error is overruled.

{¶44} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

The Supreme Court of Ohio

OFFICE OF THE CLERK

65 SOUTH FRONT STREET, COLUMBUS, OH 43215-3431

CHIEF JUSTICE
MAUREEN O'CONNOR

CLERK OF THE COURT
KRISTINA D. FROST

JUSTICES
PAUL E. PFEIFER
EVELYN LUNDBERG STRATTON
TERRENCE O'DONNELL
JUDITH ANN LANZINGER
ROBERT R. CUFF
YVETTE MCGEE BROWN

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April 4, 2011

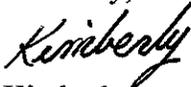
James Lewis 635-508
Noble Correctional Institution
15708 St., Rte. 78, West
Caldwell, Ohio 43724

Dear Mr. Lewis:

The enclosed notice of appeal, motion for delayed appeal, and affidavit of indigency were not filed because you did not comply with the Rules of Practice of the Supreme Court of Ohio. Specifically, you did not attach a certificate of service to the notice of appeal and motion for delayed appeal that is required by Rule 14.2 of the Rules of Practice of the Supreme Court of Ohio. You may resubmit your documents to the Clerk's Office if you attach a certificate of service to your notice of appeal and your motion for delayed appeal indicating that you sent a copy to the attorney representing the State of Ohio in this matter and the date and manner in which this occurred. Please refer to the Rules of Practice and Pro Se Guide I sent to you on March 15, 2011.

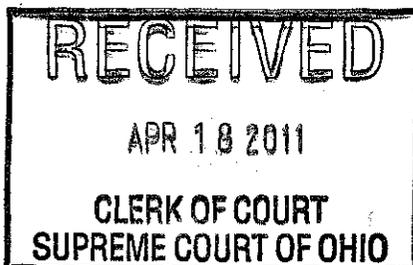
Please see Rule 2.2(B)(1) of the Rules of Practice of the Supreme Court of Ohio regarding information that should be included in your notice of appeal.

Sincerely,



Kimberly
Deputy Clerk

Enclosures



The Supreme Court of Ohio

OFFICE OF THE CLERK

65 SOUTH FRONT STREET, COLUMBUS, OH 43215-3431

CHIEF JUSTICE
MAUREEN O'CONNOR

CLERK OF THE COURT
KRISTINA D. FROST

JUSTICES
PAUL E. PFEIFER
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March 15, 2011

James Lewis 635-508
Noble Correctional Institution
15708 St., Rte. 78, West
Caldwell, Ohio 43724

Dear Mr. Lewis:

The enclosed notice of appeal, memorandum in support of jurisdiction, and affidavit of indigency were not filed because you did not comply with the Rules of Practice of the Supreme Court of Ohio. Specifically, you did not provide a notarized affidavit of indigency as required by Rule 15.3(A) of the Rules of Practice of the Supreme Court of Ohio. To timely appeal a January 31, 2010 court of appeals decision, your notice of appeal, memorandum in support of jurisdiction, and affidavit of indigency must be received in the Clerk's Office no later than March 17, 2011. If you correct your documents you may resubmit them for filing.

If you are appealing a felony conviction on the merits, it is possible to file a delayed appeal after the 45-day time period has passed by submitting a notice of appeal listing the date of the court of appeals judgment being appealed and that the case involves a felony, a motion for delayed appeal, and a notarized affidavit of indigency meeting the Court's requirements (or an entry appointing you counsel or the \$100 filing fee). A motion for delayed appeal must state the date of the entry of the judgment being appealed and give adequate reasons for the delay; a copy of the decision being appealed must be attached. An affidavit in support of the facts set forth in your motion is also required. See Rule 2.2(A)(4); Rule 2.2(B)(1); and Rule 15.3, for more information.

A copy of the Rules of Practice and our Pro Se Guide to Filing an Appeal in the Supreme Court are enclosed for further guidance.

Sincerely,



Kimberly
Deputy Clerk

Enclosures

