

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : CASE NO. 2011-0629
Plaintiff-Appellee : On Appeal from the Fayette County
 : Court of Appeals, 12th Appellate District
vs. :
JAMES M. LEWIS : Court of Appeals
 : Case No. CA 2010-08-017
Defendant-Appellant :

**MEMORANDUM IN OPPOSITION TO JURISDICTION
OF APPELLANT, JAMES M. LEWIS**

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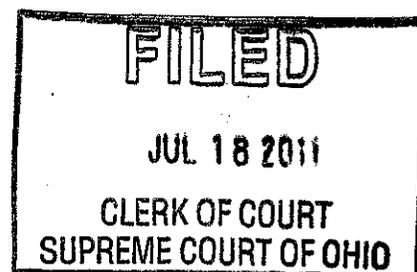


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EXPLANATION AS TO WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION.

This case is not of public or great general interest and does not involve a substantial constitutional question as the issues brought forward by Appellant have been settled by this Court in prior decisions. Additionally, none of the Propositions of Law set forth by Appellant contain any issues which are in conflict among the lower courts in the State.

Appellant's First Proposition of Law concerns whether the trial court erred in excluding evidence of the prior conviction of the victim for the purpose of impeaching the witness. Because more than ten years had elapsed since Carla Lewis' conviction for Falsification and because Evidence Rule 609(B) states that evidence of a conviction is not admissible if more than ten years has elapsed the trial court was not in error by excluding testimony concerning such conviction. The law in the State of Ohio is well settled on such issue and all of the lower courts are in agreement as to the appropriate standard to apply in reviewing such issues. Additionally, the issue of whether a prior conviction occurring more than ten years prior to a witnesses' testimony can be used as impeachment does not present an issue of public or great general interest and does not involve a substantial constitutional question.

Appellant's Second Proposition of Law concerns whether the trial court erred in excluding the testimony of Brittany Cox regarding statements made by Carla Lewis. The trial court did not err in not permitting Brittany Cox to testify concerning statements made by Carla Lewis because such testimony would have amounted to inadmissible hearsay. The law in the State of Ohio is well settled on such issue and all of the lower courts are in agreement as to the appropriate standard to apply in reviewing such issues. Additionally, this issue does not present an issue of public or great general interest and does not involve a substantial constitutional

question.

Appellant's Third Proposition of Law concerns whether the trial court erred in excluding transcripts from the pre-trial hearing held in April 2010. The trial court rightfully permitted counsel for the Defendant to question Ms. Lewis regarding prior inconsistent statements that took place as part of a preliminary hearing held in this matter. However, Appellant provides no support for his contention that the entire transcript of the preliminary hearing should have been admitted into evidence at his trial and there is no such support. The law in the State of Ohio is well settled on such issue and all of the lower courts are in agreement as to the appropriate standard to apply in reviewing such issues. Additionally, this issue does not present an issue of public or great general interest and does not involve a substantial constitutional question.

Appellant's Fourth Proposition of Law concerns whether the trial court erred in overruling his motion to dismiss or for acquittal. Because the State presented sufficient evidence at the Defendant's trial to support the guilty verdict returned by the jury, the trial court was not in error by overruling the Defendant's Criminal Rule 29 motion for acquittal. The law in the State of Ohio is well settled on such issue and all of the lower courts are in agreement as to the appropriate standard to apply in reviewing cases involving a question of whether the trial court erred in denying a defendant Criminal Rule 29 motion for acquittal. Additionally, the issue of whether a trial court was in error in denying a Criminal Rule 29 motion does not present an issue of public or great general interest and does not involve a substantial constitutional question.

For the aforementioned reasons, this Court does not have jurisdiction over this matter.

STATEMENT OF THE CASE AND FACTS

A. Procedural Posture

On May 7, 2010 the Defendant was indicted by a Fayette County Grand Jury for one

count of Domestic Violence in violation of R.C. 2919.25(A) , a felony of the third degree. The matter proceeded to jury trial on July 21, 2010 and the Defendant was found guilty of Domestic Violence. The jury also found that the Defendant had two prior convictions for Domestic Violence. On July 26, 2010 the Defendant was sentenced to two years in prison and informed that upon his release from prison he would be placed on a mandatory term of post release control for a period of three years.

The Defendant subsequently filed an appeal with the Twelfth District Court of Appeals. In said appeal, the Defendant alleged that the trial court erred in excluding evidence of the prior conviction of Carla Lewis for the purpose of impeaching the witness; the trial court erred in excluding the testimony of Brittany Cox regarding statements by Carla Lewis, which were made in her presence; the trial court erred in excluding the transcripts from the pre-trial hearing held in April 2010; and the trial court erred in overruling defense motion to dismiss based on insufficient evidence for the jury to consider. In a decision filed January 31, 2011 the Twelfth District Court of Appeals overruled each assignment of error and affirmed the decision of the trial court.

The Defendant subsequently filed a motion for delayed appeal with this Court which was granted on June 8, 2011. On June 28, 2011 The Defendant filed a Memorandum in Support of Jurisdiction in this Court.

B. Statement of Facts

In April of 2010 Carla Lewis and her husband, the Defendant, were living at 110 ½ West Paint Street with her eleven year old son, Tyler Howard. T. at 13. On April 15, 2010 Carla Lewis and the Defendant got into an argument about the Defendant's brother taking her thirteen year old son without her permission. T. at 14-15. Ms. Lewis told the Defendant that if her son was not back at the residence within a half hour she was going to call the law on the Defendant's

brother. T. at 15. The argument escalated and the Defendant grabbed Ms. Lewis by the throat and threw her up against a wall. Id. Ms. Lewis was able to get away from the Defendant and was trying to find her cell phone when the Defendant threw her down on her bed and put his hands around her throat. T. at 16. Ms. Lewis was able to get away from the Defendant a second time and left the apartment with her son Tyler. T. at 17.

Ms. Lewis took her eleven year old son and went to the Washington Court House Police Department. Id. While at the police station both Ms. Lewis and her son, Tyler Howard, gave statements to officers and Ms. Lewis made a complaint of Domestic Violence against the Defendant. T. at 20-21.

Tyler Howard, who was eleven years old in April of 2010, testified at the Defendant's trial concerning what he observed at his residence on April 15, 2010. Tyler Howard had been in a downstairs apartment when he heard a "big thump". T. at 47. Tyler went up to his apartment to see what had caused the "big thump". As Tyler was walking up the stairs he saw the Defendant on a bed choking his mom, Carla Lewis. T. at 47-48. After observing this, Tyler went back downstairs. T. at 48. A short time later, Tyler's mom, Carla Lewis, came running down the stairs and Tyler and his mom walked to the police department. Id.

Sgt. Bruce Stolsenberg worked from three p.m. to eleven p.m. on April 15, 2010. T. at 57. Sgt. Stolsenberg was at the police department when Ms. Lewis came in to make a report of domestic violence. Id. When Ms. Lewis came in to the police department she had her eleven year old son, Tyler Howard, with her. T. at 57-58. Sgt. Stolsenberg took statements from both Ms. Lewis and Tyler Howard. T. at 58. Sgt. Stolsenberg also observed red marks on the neck of Ms. Lewis and took photographs of said marks. T. at 58-59. Sgt. Stolsenberg then went to the residence of the Defendant and Ms. Lewis in an attempt to locate the Defendant. Sgt.

Stolsenberg located the Defendant asleep on a couch and took him into custody for Domestic Violence. T. at 60.

At the Defendants trial the State and the Defendant stipulated to certified copies of the Defendants two prior convictions for Domestic Violence. T. at 64-65.

The Defendant called Brandy Cox as a witness at his trial. Ms. Cox had contact with the Defendant and Carla Lewis on April 15, 2010 at a residence of relatives of her boyfriend. T. at 66-67. Ms. Cox testified that the Defendant had been at that residence during the late morning or early afternoon hours of April 15, 2010. T. at 67. Ms. Cox also testified that Carla Lewis came to that residence at some point during the time she had been at said residence. T. at 67-68.

The Defendant also testified at his trial. According to the Defendant, he was at the Queen's residence on April 15, 2010 and Carla Lewis kept calling him wanting him to come home. T. at 73-74. The Defendant claimed that Ms. Lewis came over to the Queen residence at some point and told him if he was not home in fifteen minutes she would "get him for Domestic again". T. at 74-75. The Defendant testified that he went home shortly before nine p.m. that evening and that he and Ms. Lewis ended up having an argument concerning her thirteen year old son, Kyle, leaving with the Defendant's brother. T. at 76-77. According to the Defendant, Ms. Lewis had made threats to put him back in jail. T. at 77. The Defendant testified that he was watching a television show, dozed off, and the next thing he remembered was Sgt. Stolsenberg waking him up. T. at 77-78.

ARGUMENT

Proposition of Law No. 1:

THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF THE PRIOR CONVICTION OF THE VICTIM FOR THE PURPOSE OF IMPEACHING THE WITNESS.

The trial court was not in error for excluding evidence of Carla Lewis' 1999 conviction for Falsification as more than ten years had elapsed since said conviction. Under Evidence Rule 609(A) evidence that any witness has been convicted of a crime involving dishonesty or a false statement is admissible. See Evid. R. 609. However, the admissibility of such conviction is subject to the time limits set forth in Evidence Rule 609(B). Evidence Rule 609(B) states that evidence of a conviction is not admissible if a period of more than ten years has elapsed. See Evid. R. 609. As the Twelfth District Court of Appeals discussed in *State v. Ghee*, "the admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Ghee*, 2009 Ohio App. LEXIS 2252 citing *State v. Roten*, 149 Ohio App. 3d 182 (2002). "An appellate court will not disturb a trial court's ruling as to the exclusion of evidence absent an abuse of discretion". *Id.* An abuse of discretion occurs when a trial court "acts in an unreasonable, arbitrary, or unconscionable manner". *Id.*

Appellant has argued that Carla Lewis' 1999 conviction for Falsification should have been admitted as its probative value substantially outweighs the prejudicial effect of its admission and it effects a substantial right. This argument is based on the Defendant's claim that Ms. Lewis made threats to him that she would make a false report and that her prior conviction for Falsification would support his defense. However, Ms. Lewis testified that her comments regarding making a report to the police concerned the fact that the Defendant's brother had taken her son without her permission. Additionally, part of the domestic violence that Ms. Lewis reported to the police was witnessed by her eleven year old son. Thus, there is no support to Appellant's claim that the probative value of Ms. Lewis' 1999 conviction outweighed the prejudicial effect of its admission.

Furthermore, Appellant has not established that the trial court committed an abuse of

discretion in excluding Ms. Lewis' 1999 conviction for Falsification. There has been no showing that the trial court's decision in excluding said conviction was unreasonable, arbitrary, or unconscionable. Therefore, the decision of the trial court to exclude Carla Lewis' 1999 conviction for Falsification should be upheld.

Proposition of Law No. 2:

THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF BRITTANY COX REGARDING STATEMENTS BY THE VICTIM, WHICH WERE MADE IN HER PRESENCE.

The trial court did not err in not allowing Brittany Cox to testify regarding statements made by Carla Lewis as such testimony would have been inadmissible hearsay. Pursuant to Evidence Rule 801 statements made outside of court that are offered in evidence to prove the truth of the matter asserted are not admissible unless an exception to hearsay applies. See Evid. R. 801. As the Twelfth District Court of Appeals discussed in *State v. Ghee*, "the admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Ghee*, 2009 Ohio app. LEXIS 2252 citing *State v. Roten*, 149 Ohio App. 3d 182 (2002). "An appellate court will not disturb a trial court's ruling as to the exclusion of evidence absent an abuse of discretion". *Id.* An abuse of discretion occurs when a trial court "acts in an unreasonable, arbitrary, or unconscionable manner". *Id.*

During her testimony, Carla Lewis was questioned regarding whether she had made statements to the Defendant threatening to "call the law on him" if her son was not returned to the residence within thirty minutes. T. at 24. When asked, Ms. Lewis acknowledged telling the Defendant that she was going to "call the law on him" if her son was not returned to the residence. *Id.* When further questioned about these "threats" Ms. Lewis indicated that she was going to call the law on the Defendant's brother. T. at 28. When Brittany Cox was called as a

witness by the Defendant counsel for the Defendant asked her questions regarding statements Ms. Lewis allegedly made at the Queen residence. The State objected to the hearsay and the trial court sustained said objection.

Appellant now argues that Ms. Cox should have been able to answer this line of questions under the hearsay exception for then existing mental, emotional, or physical condition. The hearsay exception for then existing mental, emotional, or physical condition applies to hearsay statements of the declarant's then existing state of mind, emotion, sensation, or physical condition. See Evid. R. 803. A statement allegedly made by Carla Lewis at the Queens residence concerning having charges filed if the Defendant did not come home is not a statement of Ms. Lewis' then existing mental, emotional, or physical condition and thus inadmissible hearsay. Furthermore, Ms. Lewis was not specifically questioned regarding whether she made such alleged statement in the presence of Brittany Cox or whether she made it at all.

Appellant has not established that the trial court committed an abuse of discretion in not permitting Ms. Cox to testify to hearsay statements allegedly made by Ms. Lewis. There has been no showing that the trial court's decision in excluding such testimony was unreasonable, arbitrary, or unconscionable. Therefore, the decision of the trial court to not permit Brandy Cox to testify about hearsay statements of Carla Lewis should be upheld.

Proposition of Law No. 3:

THE TRIAL COURT ERRED IN EXCLUDING THE TRANSCRIPTS FROM THE PRE-TRIAL HEARING HELD IN APRIL 2010.

The trial court was not in error by not admitting the transcript of Carla Lewis' testimony at a preliminary hearing as evidence at the Defendant's trial. Pursuant to Evidence Rule 613 a witness can be impeached through the use of a prior inconsistent statement. As the Twelfth District Court of Appeals discussed in *State v. Ghee*, "the admission or exclusion of relevant

evidence rests within the sound discretion of the trial court. *State v. Ghee*, 2009 Ohio app. LEXIS 2252 citing *State v. Roten*, 149 Ohio App. 3d 182 (2002). “An appellate court will not disturb a trial court’s ruling as to the exclusion of evidence absent an abuse of discretion”. *Id.* An abuse of discretion occurs when a trial court “acts in an unreasonable, arbitrary, or unconscionable manner”. *Id.*

In this case, counsel for the Defendant was permitted to question Carla Lewis regarding testimony that she gave at the Defendant’s preliminary hearing that counsel believed to be inconsistent with the testimony Ms. Lewis was giving at the Defendant’s trial. A transcript of Ms. Lewis’ testimony from the preliminary hearing was marked as an exhibit and the Defendant moved to admit it as evidence. The trial court did not permit the admission of said transcript.

Appellants reliance on Appellate Rule 9 to support his argument that the trial court should have admitted the transcript from the preliminary hearing is misguided. Appellate Rule 9(B) refers to the transcript of the proceedings not a transcript of testimony given at a prior hearing in another court. Appellate Rule 9 does not govern the admission of evidence at trial but rather refers to documentation that needs to accompany an appeal.

Appellant’s reliance on *State v. Brenson* is also misguided. The decision in *Brenson* concerned the admission of a transcript of the defendant’s testimony that was given at grand jury. Such a scenario does not apply to the issue at hand. It is also important to note that we are not talking about the jury reviewing the trial testimony of a witness during its deliberations but rather the transcript of testimony given at a previous hearing being admitted as evidence. The cases cited to in Appellants brief address juries reviewing testimony given at trial and transcripts of such. Again, such a scenario does not apply to the issue at hand.

Appellant has provided no support for his argument that the transcript of Carla Lewis’

testimony at his preliminary hearing should have been admitted as evidence in his trial. Thus, Appellant has not established that the trial court committed an abuse of discretion in not admitting the transcript of Carla Lewis' prior testimony. There has been no showing that the trial court's decision in excluding such evidence was unreasonable, arbitrary, or unconscionable. Therefore, the decision of the trial court to not admit the transcript should be upheld.

Proposition of Law No. 4:

THE TRIAL COURT ERRED BY FAILING TO GRANT THE MOTION TO DIMISS OR (ALTERNATIVELY) FOR ACQUITTAL WHEN THE EVIDENCE SUBMITTED COURT NOT PROVE BEYOND A REASONABLE DOUBT ALL THE ELEMENTS OF THE OFFENSE CHARGED.

Because the State presented sufficient evidence at the Defendant's trial to support the guilty verdicts that were returned by the jury, the trial court was not in error by overruling the Defendant's Criminal Rule 29 motion for acquittal. Pursuant to Criminal Rule 29, "the court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses." See Crim. R. 29. The Twelfth District Court of Appeals held in *State v. Krull* that when reviewing a trial court's denial of a motion for acquittal under Criminal Rule 29 a reviewing court is to apply "the same test as it would in reviewing a challenge based upon the sufficiency of the evidence to support a conviction." See *State v. Krull*, 154 Ohio App. 3d 219 (2003) citing *State v. Thompson*, 127 Ohio App. 3d 511 (1998). The relevant inquiry in a sufficiency of the evidence review 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 could have been proven beyond a reasonable doubt." See *Id* citing *State v. Jenks*, 61 Ohio St. 3d 259 (1991). It is the duty of an appellate court reviewing a case to determine

whether sufficient evidence was presented at trial to support a criminal conviction “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.” See *Jenks*.

As applied to this case and specifically to this issue, there was sufficient evidence presented by the State at the Defendant’s trial to support the guilty verdict returned by the jury for the charge of Domestic Violence. The testimony at the Defendant’s trial, if believed, would clearly convince the average mind of the Defendant’s guilt beyond a reasonable doubt as to the Domestic Violence charge as well as the special finding concerning the Defendant’s prior convictions. Carla Lewis testified at the Defendant’s trial that she and the Defendant had been arguing about the fact that the Defendant’s brother had taken her son without her permission and things escalated. Ms. Lewis had told the Defendant if her son was not back in thirty minutes she was going to “call the law”. The argument continued and the Defendant grabbed Ms. Lewis by the throat and threw her up against a wall. Ms. Lewis was able to get away from the Defendant and was trying to find her cell phone when the Defendant threw her down on her bed and put his hands around her throat. Part of this incident was witnessed by Carla Lewis’ eleven year old son, Tyler Howard, who also testified at the Defendant’s trial.

Tyler Howard testified that he had been in a downstairs apartment when he heard a “big thump”. Tyler went up to his apartment to see what had caused the “big thump”. As Tyler was walking up the stairs he saw the Defendant on a bed choking his mom, Carla Lewis. Tyler testified that the Defendant was over his mom who was on a bed while the choking was going on. After observing this Tyler went back downstairs.

Ms. Lewis was questioned at the Defendant’s trial about her prior testimony at a preliminary hearing and some purported inconsistencies in said testimony. Other than

differences in the order of events the main inconsistency would seem to be whether or not Ms. Lewis made it into the kitchen during the argument and altercation with the Defendant. Ms. Lewis was questioned about specific answers she gave at the preliminary hearing and provided explanations for purported differences in her testimony. These purported inconsistencies do not discount the testimony of Carla Lewis especially when part of the assault leading to the Domestic Violence charge was witnessed by Ms. Lewis' son, Tyler Howard, who also testified at the Defendant's trial concerning what he observed. Tyler Howard's observations were consistent with Ms. Lewis' account of what happened.

Appellant argues that Ms. Lewis' testimony from the April preliminary hearing and the Defendant's trial were inconsistent, that her testimony at the Defendant's trial was inconsistent, and that her testimony was inconsistent with that of Tyler Howard. Whatever inconsistencies there may have been are matters for the jury to consider and would certainly not cause the testimony of two witnesses to be discounted completely.

When looking at the evidence produced by the State at the Defendant's trial it is apparent that there was sufficient evidence to support the guilty verdict returned by the jury as well as the finding that the Defendant had two prior convictions for Domestic Violence. Furthermore, when looking at all the testimony and evidence presented at the Defendant's trial in a light most favorable to the State, any rational trier of fact could have found the essential elements of Domestic Violence. Therefore, the Defendant's conviction should be upheld.

CONCLUSION

The trial court was not in error by excluding evidence of Carla Lewis' 1999 conviction for Falsification, hearsay testimony of Brittany Cox, or the transcript of Carla Lewis' testimony at the Defendant's preliminary hearing. The trial court also was not in error by overruling the

Defendant's Criminal Rule 29 motion because there was sufficient evidence presented by the State at the Defendant's trial to show that the Defendant committed the offense of Domestic Violence and that the Defendant had two prior convictions for Domestic Violence. Furthermore, the issues set forth by the Defendant do not rise to the level of public or great general interest and do not involve substantial constitutional questions. Therefore, this Court does not have jurisdiction in this matter.

Respectfully submitted,



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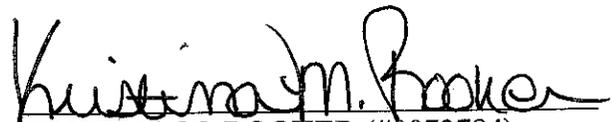
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum in Opposition was served upon James Lewis (#635-508), Appellant pro se, at the Ross Correction Institution, P.O. Box 7010, Chillicothe, Ohio 45601 by ordinary U.S. Mail service on this 14th day of July, 2011.



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