

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

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2010-08-017 |
| - vs - | : | <u>OPINION</u> |
| | : | 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, ¶99. 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.