

[Cite as *State v. Fox*, 2010-Ohio-338.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

TERRY S. FOX

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 2009CA00085

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 09CR76

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

January 29, 2010

APPEARANCES:

For Plaintiff-Appellee

KENNETH OSWALT
20 South Second Street
4th Floor
Newark, OH 43055

For Defendant-Appellant

ROBERT C. BANNERMAN
P.O. Box 77466
Columbus, OH 43207-0098

Farmer, J.

{¶1} On February 20, 2009, the Licking County Grand Jury indicted appellant, Terry Fox, on one count of domestic violence in violation of R.C. 2919.25, a felony of the fourth degree. Said charge arose from an incident between appellant and his live-in girlfriend, Kay Spires.

{¶2} A jury trial commenced on June 3, 2009. The jury found appellant guilty as charged. The jury further found that appellant previously had been convicted of domestic violence. By judgment entry filed June 4, 2009, the trial court sentenced appellant to one year in prison.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

II

{¶5} "DID THE TRIAL COURT ERRED (SIC) IN ADMITTING HEARSAY TESTIMONY IN VIOLATION OF OHIO EVIDENCE RULE 802 AND IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

III

{¶6} "THE TRIAL COURT ABUSED ITS DISCRETION BY SENTENCING APPELLANT WITHOUT STATING THAT IT CONSIDERED THE PRINCIPLES AND

PURPOSES OF SENTENCING UNDER R.C. 2929.11 AND THE SERIOUSNESS AND RECIDIVISM FACTORS UNDER R.C. 2929.12 AT THE SENTENCING HEARING."

I

{¶7} Appellant claims his conviction was against the manifest weight of the evidence. We disagree.

{¶8} On review for manifest weight, a reviewing court is to examine 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 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. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶9} 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."

{¶10} It is appellant's position that there was no eyewitness testimony to prove that he caused physical harm to Ms. Spires. Appellant argues Ms. Spires could not remember how she was injured, and he denied ever injuring her. Therefore, appellant argues there is no credible evidence to prove that he caused any physical injuries to Ms. Spires.

{¶11} Appellant and Ms. Spires lived together for four to five years before the incident. They lived in an apartment unit and Ms. Spires's brother, Kevin Ferrell, and his

daughter, Tameka Robinson, lived in the adjoining apartment. At trial, Ms. Spires could not remember how she was injured and claimed she could have fallen. T. at 109. However, Mr. Ferrell and Ms. Robinson both testified that immediately after hearing a "thud" in the living room area of the Spires apartment, Ms. Spires appeared at their door visibly upset, crying, and yelling. T. at 81-82, 95-98. The investigating officer, Newark City Police Officer Timothy Fleming, testified Ms. Spires was crying, very upset, bleeding, and intoxicated. T. at 119-120. Ms. Spires told all three that appellant had punched her and had pushed her to the floor. T. at 82, 96, 120-121.

{¶12} The testimony of these three individuals on their observations and reporting, fall within the excited utterance rule:

{¶13} "[Evid.R. 803(2)] A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

{¶14} We find that although at trial Ms. Spires had no recollection of the cause of her injuries, there was sufficient evidence to substantiate a finding of guilty. Both her brother and niece heard a thud and yelling coming from the Spires apartment immediately before Ms. Spires appeared at their door crying, yelling, and bloody.

{¶15} Upon review, we find the jury did not lose its way, and find no manifest miscarriage of justice.

{¶16} Assignment of Error I is denied.

II

{¶17} Appellant claims the trial court erred in admitting hearsay evidence. We disagree.

{¶18} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶19} Appellant objects to Ms. Robinson's testimony that she filled out the victim's statement for her. However, the statement was not read for the record nor was it admitted as an exhibit. T. at 135. The trial court did not permit any testimony from Officer Fleming regarding the report. T. at 131.

{¶20} Appellant also objects to the testimony of Mr. Ferrell, Ms. Robinson, and Officer Fleming as to what Ms. Spires had told them contemporaneously with the incident. T. at 82-83, 96, 120-121. We note the state set a proper foundation for the testimony under the excited utterance rule cited supra.

{¶21} Both Mr. Ferrell and Ms. Robinson testified that Ms. Spires came to their door after hearing a "thud" and yelling next door. Ms. Spires was upset, crying, yelling, and bleeding. Immediately upon entering their apartment, Ms. Spires stated that appellant had hit her. Officer Fleming observed the same crying and stated that Ms. Spires was very upset when she told him that appellant had punched her.

{¶22} We find these statements clearly qualify as an exception to the hearsay rule.

{¶23} Lastly, appellant claims testimony by Mr. Ferrell that Ms. Spires was afraid of appellant and he would be upset with her and they fought a lot were unfairly

prejudicial and constituted hearsay. T. at 75, 78-79. Although the statements were hearsay, they were not unfairly prejudicial sub judice.

{¶24} We note harmless error is described as "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Crim.R. 52(A). Overcoming harmless error requires a showing of undue prejudice or a violation of a substantial right."

{¶25} Evidence regarding appellant's propensity for violence was already in the record via his prior domestic violence conviction (State's Exhibit D).

{¶26} Assignment of Error II is denied.

III

{¶27} Appellant claims the trial court erred in sentencing him. Specifically, appellant claims the trial court did not consider the principles and purposes of sentencing under R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12. We disagree.

{¶28} If a sentence is not contrary to law, and "assuming the trial court has complied with the applicable rules and statutes, the exercise of its discretion in selecting a sentence within the permissible statutory range is subject to review for abuse of discretion pursuant to *Foster* [*State v.*, 109 Ohio St.3d 1, 2006-Ohio-856]." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶17. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217.

{¶29} R.C. 2929.11 governs overriding purposes of felony sentencing. Subsection (A) and (B) state the following:

{¶30} "(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

{¶31} "(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders."

{¶32} In exercising its discretion in sentencing, a trial court shall consider the factors relating to the seriousness of the conduct and the likelihood of recidivism, as well as "any other factors that are relevant to achieving those purposes and principles of sentencing." R.C. 2929.12(A). Seriousness factors are set forth in R.C. 2929.12(B) and (C). More serious factors include the following in pertinent part:

{¶33} "(1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

{¶34} "(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense." R.C. 2929.12(B).

{¶35} Less serious factors include the following:

{¶36} "(1) The victim induced or facilitated the offense.

{¶37} "(2) In committing the offense, the offender acted under strong provocation.

{¶38} "(3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

{¶39} "(4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense." R.C. 2929.12(C).

{¶40} With respect to recidivism, factors that indicate a likelihood to reoffend include whether the offender was already under the control of the court, whether there are previous adjudicated delinquencies or criminal convictions, whether the offender has not responded favorably to previous sanctions or attempts at rehabilitation, whether the offender refuses to acknowledge a drug or alcohol abuse problem or refuses treatment, and whether the offender shows no genuine remorse. R.C. 2929.12(D).

{¶41} "A trial court is under no duty to discuss each sentencing factor individually and state whether each factor is applicable to the case. *State v. Hughes*, Wood App. No. WD-05-024, 2005-Ohio-6405, ¶10." *State v. Fuller*, Madison App. No. CA2006-11-047, 2008-Ohio-20, ¶15.

{¶42} Appellant was convicted of domestic violence in the fourth degree. A fourth degree felony is punishable by "six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months." R.C. 2929.14(A)(4).

The trial court imposed a one year sentence, clearly within the statutory guidelines. The victim was injured to the point of bleeding. In addition, appellant had been convicted on a previous domestic violence charge in 2008, and had numerous convictions dating back to 1994, including two counts of domestic battering in 1997. T. at 185-186.

{¶43} In its June 4, 2009 judgment entry on sentencing, the trial court stated it "considered the record, oral statements, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors under Ohio Revised Code Section 2929.12."

{¶44} The trial court also stated, "after consideration of the factors under Ohio Revised Code Section 2929.12, the Court also finds that prison is consistent with the purposes of Ohio Revised Code Section 2929.11, and the defendant is not amenable to an available community control sanction."

{¶45} Appellant argues while the trial court included this language in its sentencing entry, it did not affirmatively state on the record that it had complied with the statutory requirements. In *State v. Kinder*, Delaware App. No. 03CAA12075, 2004-Ohio-4340, ¶25, this court held the following:

{¶46} "We find nothing in the record which demonstrates the trial court did not consider the criteria set forth in R.C. 2929.12 or consider the sentencing principles set forth in R.C. 2921.11. In the absence of an affirmative showing the trial court failed to do so, we presume the trial court accurately followed the law."

{¶47} Upon review, we find the sentence was not contrary to law, and the trial court did not abuse its discretion in sentencing appellant to one year in prison.

{¶48} Assignment of Error III is denied.

{¶49} The judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Wise, J. concur.

s/Sheila G. Farmer

s/W. Scott Gwin

s/ John W. Wise

JUDGES

SGF/sg 0120

