

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 11AP-512
	:	(C.P.C. No. 10CR-2564)
Robert L. Smith, Jr.,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

---

D E C I S I O N

Rendered on December 27, 2011

---

*Ron O'Brien*, Prosecuting Attorney, and *Susan M. Suriano*, for appellee.

*W. Joseph Edwards*, for appellant.

---

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Defendant-appellant, Robert L. Smith, Jr. ("appellant"), appeals from jury verdicts convicting him on charges of aggravated burglary, violating a protection order, and resisting arrest. For the reasons that follow, we affirm.

{¶2} Appellant was involved in a relationship with the victim, Shasta Pickens ("Pickens"). For a time, they lived together in Pickens' house at 879 Camden Avenue ("the house"). However, in early 2010, there was an altercation, and Pickens kicked appellant out of the house. On April 12, 2010, Pickens applied for and was granted an ex parte protection order providing that, among other restrictions, appellant was required to

stay 500 feet away from Pickens, was not to enter her residence, and was not to initiate or have any contact with her. It appears that this order was not served on appellant until April 17, but Pickens stated that she showed appellant a copy of the order on April 16 and explained that he was not permitted to have contact with her.

{¶3} During the morning of April 17, 2010, Pickens was preparing food in her kitchen when she heard a loud noise in her basement. She opened the door to the basement stairs and saw appellant coming up the stairs toward her. Appellant grabbed Pickens by the neck and put her in a chokehold. Pickens struggled against him, but he pushed her into a wall and punched her. At some point during this altercation, appellant also bit Pickens on the back. The altercation ended when Pickens' son and his friend arrived at the house. Pickens was able to sneak away and call 911. Pickens called 911 twice; on the first call, she did not say anything and hung up, and on the second call, she just asked them to come to 879 Camden Avenue.

{¶4} Columbus Police Officers Benjamin Rohaley ("Officer Rohaley") and Jayson Bear ("Officer Bear") responded within a few minutes of the calls. When the officers knocked on the door, appellant went to the basement and tried to flee through the same window he had used to enter the house. Officer Rohaley secured the outside of the house while Officer Bear pursued appellant into the basement. Appellant struggled with Officer Bear, and Officer Rohaley went to the basement to assist in subduing him. Ultimately, two additional police officers arrived. Appellant continued to struggle, and one of the officers used a taser to subdue appellant and place him in custody.

{¶5} Appellant was indicted on charges of aggravated burglary, violating a protection order, domestic violence, and resisting arrest. The case was tried to a jury. At

the close of the state's case, the trial court granted the state's motion to amend the resisting arrest count from a felony to a misdemeanor offense. Appellant moved for acquittal on all counts under Crim.R. 29. The trial court granted appellant's motion for acquittal as to the domestic violence charge and denied it as to all other counts. The jury found appellant guilty of aggravated burglary, violating a protection order, and resisting arrest. The trial court sentenced appellant to five years of imprisonment on the aggravated burglary conviction and two years of imprisonment on the violating a protection order conviction, with the sentences to be served consecutively for a total of seven years of imprisonment. The trial court also sentenced appellant to 30 days of imprisonment on the resisting arrest conviction, to be served concurrently with his sentences on the other two convictions.

{¶6} Appellant appeals his convictions,<sup>1</sup> setting forth the following three assignments of error for this court's review:

I. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE APPELLANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION[.]

II. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR ACQUITTAL PURSUANT TO CRIMINAL RULE 29[.]

III. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE APPELLANT WHEN THE CONVICTION AND [sic] WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE[.]

---

<sup>1</sup> Although the assignments of error do not differentiate between the three convictions, appellant's arguments focus exclusively on the aggravated burglary and violating protection order convictions. Thus, we conclude that appellant does not challenge his conviction on the resisting arrest charge and do not address it herein.

{¶7} Appellant's first assignment of error asserts that the evidence was insufficient to sustain guilty verdicts on the charges of aggravated burglary and violating a protective order. His second assignment of error contends that the trial court erred in denying his motion under Crim.R. 29 for acquittal on those charges. "Because a Crim.R. 29 motion questions the sufficiency of the evidence, '[w]e apply the same standard of review to Crim.R. 29 motions as we use in reviewing the sufficiency of the evidence.'" *State v. Walburg*, 10th Dist. No. 10AP-1087, 2011-Ohio-4762, ¶11, quoting *State v. Hernandez*, 10th Dist. No. 09AP-125, 2009-Ohio-5128, ¶6. Accordingly, we will consider appellant's first and second assignments of error together.

{¶8} "Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict." *State v. Cassell*, 10th Dist. No. 08AP-1093, 2010-Ohio-1881, ¶36, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. In reviewing a challenge to the sufficiency of the evidence, an appellate court must 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* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, superseded by constitutional amendment on other grounds as recognized in *State v. Smith*, 80 Ohio St.3d 89, 102, 1997-Ohio-355.

{¶9} Appellant generally argues that the evidence was insufficient to sustain the convictions because Pickens was the only witness who testified that appellant broke into the house and that appellant had seen the protection order before April 17, 2010. However, "the testimony of one witness, if believed by the jury, is enough to support a conviction." *State v. Strong*, 10th Dist. No. 09AP-874, 2011-Ohio-1024, ¶42. Appellant

also challenges Pickens' credibility, based on her prior felony convictions, admitted drug use, and alleged variations between her statement to the prosecutor and her trial testimony. However, credibility challenges are more directly addressed to the weight rather than the sufficiency of the evidence. See *Columbus v. Miller*, 10th Dist. No. 09AP-770, 2010-Ohio-1384, ¶26, citing *Thompkins* at 387 ("Unlike a challenge to the sufficiency of the evidence, which attacks the adequacy of the evidence presented, a challenge to the manifest weight of the evidence attacks the credibility of the evidence presented.") Accordingly, we will address appellant's credibility arguments in our analysis of his challenge to the weight of the evidence.

{¶10} We begin by considering whether there was sufficient evidence to sustain the conviction for aggravated burglary. R.C. 2911.11(A) defines aggravated burglary and provides as follows:

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;
- (2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

{¶11} Appellant argues there was insufficient evidence that he trespassed on the residence or that he inflicted, attempted, or threatened to inflict physical harm.<sup>2</sup> For purposes of aggravated burglary, "trespass" is defined as a violation of the statute defining criminal trespassing. R.C. 2911.10. That statute, in relevant part, provides that "[n]o person, without privilege to do so, shall \* \* \* [k]nowingly enter or remain on the land or premises of another." R.C. 2911.21(A)(1). "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). "Physical harm" includes "any injury, illness, or other physiological impairment, regardless of its duration." R.C. 2901.01(A)(3).

{¶12} Pickens testified that she previously had a romantic relationship with appellant and that they lived together at the house. However, she stated that she kicked appellant out of the house in early 2010. Pickens stated that, after she kicked appellant out, he was not allowed back in the house. She confirmed that appellant was not living in or staying in the house in April 2010. Pickens testified that on the morning of April 17, she heard a "big bang" from the basement and that it was the sound of appellant entering the residence through a basement window. (Tr. 59.) She identified photos of the open basement window that appellant used to enter the house. Pickens and Officer Rohaley testified that, after the police arrived, appellant sought to flee through the basement window. The jury could reasonably infer that appellant attempted to flee through the same known point of access that he used to enter the residence. If believed, this testimony,

---

<sup>2</sup> Appellant also argues that there was insufficient evidence that he had a deadly weapon on or about his person or under his control to support a conviction under R.C. 2911.11(A)(2). However, in order to convict on a charge of aggravated burglary, a jury need find only that the state proved beyond a reasonable doubt either the element of physical harm per R.C. 2911.11(A)(1) or a deadly weapon per R.C. 2911.11(A)(2). It is

taken as a whole, would be sufficient to permit a jury to find that appellant knowingly entered the house without the privilege to be there, thus establishing the criminal trespass element of aggravated burglary.

{¶13} Pickens testified that, after she heard the bang, she opened the door and saw appellant coming up the basement stairs. Appellant grabbed Pickens by the neck and put her in a chokehold. Pickens testified that they struggled as she tried to get out of the chokehold and that appellant hit her with his fist. She stated that appellant also bit her during the struggle. Pickens testified that she suffered bruises on her arms and a bite mark on her back. Officer Rohaley testified that, when he arrived, Pickens told him a similar story, stating that appellant choked her nearly to the point of losing consciousness and that appellant pulled her hair and struck her against the wall. This evidence would be sufficient to establish that appellant inflicted physical harm on Pickens. See *State v. West*, 10th Dist. No. 06AP-114, 2006-Ohio-5095, ¶17 (victim's testimony that defendant hit her in the head, knocked her to the ground, kicked her, and repeatedly choked her, if believed, was sufficient evidence to find that defendant caused or attempted to cause physical harm).

{¶14} Appellant also asserts that the evidence was insufficient to sustain his conviction for violating a protection order. The law provides that "[n]o person shall recklessly violate the terms of \* \* \* [a] protection order issued pursuant to section 2151.34, 2903.213, or 2903.214 of the Revised Code." R.C. 2919.27(A)(2). "A person acts recklessly when, with heedless indifference to the consequences, he perversely

---

not necessary to find both. Therefore, we address only the physical harm element and not the deadly weapon argument herein.

disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22(C). Appellant argues that there was insufficient evidence to establish that he knew there was a protection order in place and, thus, he could not have recklessly violated the order by disregarding a known risk that his conduct would violate the order.

{¶15} The record indicates that, on April 12, 2010, following an ex parte hearing, the Franklin County Court of Common Pleas issued a protection order under R.C. 2903.214 to Pickens. The order included a provision directing the clerk of courts to cause a copy of the order to be delivered to appellant. The return of service for the order indicates that it was served on appellant on April 17, 2010. However, Pickens testified that, on the day before the incident, April 16, she showed appellant a copy of the protection order and told him that he was not allowed to be around her. Pickens stated that appellant was angry about this development. Pickens' testimony was the only evidence introduced to establish that appellant was aware of the existence of the protection order.

{¶16} The Ninth District Court of Appeals considered a similar scenario in *State v. Bunch* (Jan. 17, 2001), 9th Dist. No. 20059. In that case, the defendant's former girlfriend, Deborah Majka ("Majka"), obtained a civil protection order pursuant to R.C. 3113.31. The defendant did not appear at the hearing on the order, and the court's attempt to serve the order by certified mail went unclaimed. The following year the defendant was charged with violating the order by going to Majka's apartment. At trial, Majka testified that a few months after the order was issued she had been at a Christmas event when the defendant arrived. Majka immediately began to leave, but the defendant

asked her to stay. Majka told the defendant she had a protection order against him and testified that he responded "I know." The defendant argued that he could not have recklessly violated the protection order by going to Majka's apartment because he was never served with a copy of the order and, therefore, could not be said to have disregarded a known risk that his conduct would violate the order. The appellate court rejected this argument, noting that service of a protection order was not an element of the crime of violating a protection order. The court found that Majka's testimony was sufficient evidence to establish that the defendant recklessly violated the order. See also *State v. Rutherford*, 2d Dist. No. 08CA11, 2009-Ohio-2071, citing *Bunch* ("R.C. 2919.27(A) does not make service of a civil protection order an element of the offense of violation of a civil protection order."); *State v. Bombardiere*, 3d Dist. No. 14-06-27, 2007-Ohio-1537, ¶16 ("[T]here was no direct evidence in the record that specifically stated that [defendant] was served, [but] he did readily admit in his testimony that he knew the terms of the civil protection order[.] \* \* \* We conclude that this evidence was sufficient to establish that he did have adequate notice of the terms of the civil protection order.") We agree with the reasoning of the *Bunch* decision and reach the same conclusion here.

{¶17} We do note, however, that the Fifth District Court of Appeals has held that the due process requirements of R.C. 2919.26 require a defendant be served with a temporary protection order before he can be found to have violated that order. *State v. Mohabir*, 5th Dist. No. 04CA17, 2005-Ohio-78, ¶34-35. See also *Bombardiere* at ¶22-26 (Rogers, P.J., dissenting) (arguing that conviction for violating a protection order should be reversed based on *Mohabir* because state failed to prove that order had been served on the defendant). R.C. 2919.26(G)(1) requires that a copy of an ex parte protection order

"be issued by the court to \* \* \* defendant \* \* \* [and] [t]he court shall direct that a copy of the order be delivered to defendant on the same day that the order is entered." Nevertheless, after reviewing the statute, we reach a different conclusion. Service of the protection order on the defendant is not an element of the crime of violating a protection order, as defined in R.C. 2919.27(A). The General Assembly could have required the prosecution to establish service of the order as an element of proving a violation of a protective order, or could have mirrored the language in R.C. 2919.26(G), but it did not. Therefore, we decline to expand the statute to require prior service of the order on a defendant before a violation can be established.

{¶18} Pickens testified that she showed appellant a copy of the order and explained that he could not be around her. This testimony, if believed, would permit a reasonable jury to conclude that appellant knew about the order when he broke into Pickens' house on April 17, 2010. A jury could further conclude that appellant knew that there was a risk that his conduct would violate the order and that he acted recklessly by disregarding such risk. Therefore, the evidence was sufficient to permit the jury to conclude that appellant was guilty of violating the protection order.

{¶19} For all these reasons, we conclude that appellant's convictions for aggravated burglary and violating a protection order were supported by sufficient evidence. Accordingly, appellant's first and second assignments of error are without merit and are overruled.

{¶20} In his third assignment of error, appellant argues that his convictions for aggravated burglary and violating a protection order are against the manifest weight of the evidence.

{¶21} "While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief." *Cassell* at ¶38, citing *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, citing *Thompkins* at 386. "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Thompkins* at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 2220. "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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." *Thompkins*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. This discretionary authority " 'should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*

{¶22} Appellant argues that his convictions were against the manifest weight of the evidence because Pickens provided the only testimony to establish her injuries and appellant's knowledge of the protection order. At trial, Pickens admitted that she had previously been convicted of multiple felony charges, including receiving stolen property and forgery. Pickens also admitted that she had twice violated her probation and that she had been sent to prison after the second probation violation. Further, Pickens admitted that she had used drugs, including marijuana and cocaine, with appellant. Appellant argues that Pickens' prior convictions of crimes involving deception and history of drug

use make her an unreliable witness and that her testimony was not credible.

{¶23} "[A]lthough an appellate court must act as a 'thirteenth juror' when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility." *State v. Spires*, 10th Dist. No. 10AP-861, 2011-Ohio-3312, ¶18. In this case, the jury was made aware of Pickens' prior convictions, probation violations, and drug use through her direct testimony and through cross-examination. Thus, the jury could properly weigh this information in determining whether Pickens' testimony was credible. After reviewing the evidence presented at trial, we find no reason to overturn the jury's determination as to her credibility.

{¶24} With respect to the aggravated burglary charge, Pickens testified that appellant broke into the house through a basement window. Both Pickens and Officer Rohaley testified that appellant attempted to flee through the same basement window. As noted above, the attempt to flee through an open basement window is circumstantial evidence that the same window had been appellant's point of entry into the house. Further, this suggests that appellant knew he was not allowed to be there because he did not attempt to enter the house through the door. Pickens also testified to the bruises on her arms and the bite mark on her back. On cross-examination, she conceded that there were no photographs of her injuries and no way to verify them other than her testimony. Pickens also conceded that she did not tell the prosecutor that appellant struck her with his fist during an interview several months before trial. However, during her testimony, Pickens also reviewed the statement she made to the police on the day of the incident. That statement did not indicate that appellant punched her, but it was otherwise

consistent with her trial testimony. Despite a lack of physical evidence to corroborate Pickens' injuries and some inconsistency in her statements as to whether appellant struck her with his fist, we cannot conclude that the jury clearly lost its way in finding that appellant was guilty of aggravated burglary.

{¶25} Pickens' testimony constituted the only evidence to establish that appellant violated the protection order. She testified that she showed appellant a copy of the order on the day before the incident and told him he was not allowed to be around her. Additionally, she testified that, as appellant was coming up the basement stairs after breaking in the basement, he said "yeah, bitch, you thought it was over." (Tr. 60.) The jury could reasonably infer that this statement indicated that appellant was aware of the protection order—i.e., appellant believed that Pickens "thought it was over" because she had obtained a protection order, which was intended to keep appellant away from her. Again, we cannot conclude that the jury clearly lost its way in believing Pickens' testimony and finding appellant guilty of violating the protection order.

{¶26} For all these reasons, we conclude that appellant's convictions for aggravated burglary and violating a protection order were not against the manifest weight of the evidence. Accordingly, appellant's third assignment of error is without merit and is overruled.

{¶27} For the foregoing reasons, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

*Judgment affirmed.*

KLATT and TYACK, JJ., concur.

---