[Cite as *State v. Lopp*, 2010-Ohio-1432.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93247

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY L. LOPP

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-520698

BEFORE: Cooney, J., McMonagle, P.J., and Sweeney, J.

RELEASED: April 1, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

John H. Lawson
Brownhoist Building
4403 St. Clair Avenue
Cleveland, Ohio 44103

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Daniel A. Cleary
Assistant County Prosecutor
8th Floor, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Anthony Lopp ("Lopp"), appeals his felony domestic violence conviction. Finding no merit to the appeal, we affirm.

{¶ 2} In February 2009, Lopp was charged with domestic violence, which carried a furthermore specification stating that he had been previously convicted of domestic violence in 2001. The matter proceeded to a jury trial, at which he was found guilty.[1] The court sentenced him to 16 months in prison. The following evidence was adduced at trial.

{¶ 3} In February 2008, the victim, Brandy Ferrarini ("Ferrarini"), met Lopp through an online social network. The two began dating, and in July 2008, Ferrarini learned that she was pregnant. She testified that Lopp was the baby's father and that she was not sexually active with anyone else while they were dating. When Ferrarini informed Lopp that she was pregnant, he said, "either have an abortion or I was on my own with the kid" because he did not want to pay her child support.

{¶ 4} The next time Ferrarini saw Lopp was on December 16, 2008, when she observed him standing in front of her porch steps. She turned to get into her car, but Lopp's friend, "Slick," was behind her. Lopp grabbed Ferrarini by her hair and threw her down on the porch steps. Lopp again told her "to have an abortion and if [she] wasn't going to have one, he was going to

[1]Lopp stipulated to the prior conviction before the commencement of trial.

give [her] one." She was 34 weeks pregnant at the time of the incident. She reported the incident to the police.

{¶ 5} Lopp presented no witnesses at trial.

{¶ 6} Lopp now appeals, raising five assignments of error for review, which shall be discussed together where appropriate.

Sufficiency of the Evidence

{¶ 7} In the first assignment of error, Lopp argues that there was insufficient evidence to sustain his domestic violence conviction. In the second assignment of error, he argues that the State failed to prove beyond a reasonable doubt that Ferrarini was a "family or household member" as defined in R.C. 2919.25(F). In *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶113, the Ohio Supreme Court explained the standard of review for a challenge to the sufficiency of the evidence:

> "Raising the question of whether the evidence is legally sufficient to support the jury verdict as a matter of law invokes a due process concern. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. In reviewing such a challenge, '[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, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560."

{¶ 8} Lopp was convicted of domestic violence under R.C. 2919.25(A), which provides that: "[n]o person shall knowingly cause or attempt to cause

physical harm to a family or household member." A "family or household member" is defined as "[t]he natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent." R.C. 2919.25(F)(1)(b).

{¶ 9} Lopp maintains that there is insufficient evidence to prove that he was a "family or household member" as required by R.C. 2919.25(A). He argues for the first time on appeal that R.C. 2919.25(F) does not include an unborn person in the definition of "child." He claims that because Ferrarini did not give birth until after the incident, he did not have a child with Ferrarini and therefore was not a family member. As a result, he claims that he could not be found guilty of domestic violence.

{¶ 10} However, a review of Lopp's Crim.R. 29 motion reveals that his only argument at trial was that there was a lack of evidence to prove that he was the father of Ferrarini's baby. When defense counsel made his Crim.R. 29 motion, he argued that the State had "not shown or proved even by a scintilla that the baby is my client's. There's been no DNA testing. No physical testing of any kind."

{¶ 11} This court has held that "if an accused does set forth specific grounds in a motion for judgment of acquittal, all grounds not specified are waived." *State v. Cayson* (May 14, 1998), Cuyahoga App. No. 72712, citing

U.S. v. Dandy (C.A.6, 1993), 998 F.2d 1344, 1356-57 (finding that "[a]lthough specificity of grounds is not required in a [Crim.R. 29] motion, where a [Crim.R. 29] motion is made on specific grounds, all grounds not specified are waived [.]" (Internal citation omitted.)).

{¶ 12} We find the court's reasoning in *State v. Partee,* Summit App. No. 23643, 2007-Ohio-5114, persuasive. *Partee* involved the analogous situation in which appellant argued for the first time on appeal that the statute does not include an unborn person in the definition of child. Id. at ¶22. The alleged victim did not give birth until after the assault. Nevertheless, Partee forfeited the argument by failing to raise it in his Crim.R. 29 motion.

{¶ 13} Because Lopp set forth specific grounds in his Crim.R. 29 motion, but did not include the argument that an unborn child is not a child under R.C. 2919.25, we find that he has waived this argument on appeal.[2]

{¶ 14} Thus, the first and second assignments of error are overruled.

Manifest Weight of the Evidence

{¶ 15} In the third assignment of error, he argues that his domestic violence conviction was against the manifest weight of the evidence.

[2]Even if he had not waived this argument, clearly Lopp is the "putative other natural parent" based on Ferrarini's unrebutted testimony.

{¶ 16} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶25, the Ohio Supreme Court restated the standard of review for a criminal manifest weight challenge as follows:

> "The criminal manifest-weight-of-the-evidence standard was explained in [*Thompkins*, in which] the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive — the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. '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.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."

{¶ 17} Moreover, an appellate court may not merely substitute its view for that of the jury, but must find that "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* at 387. Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction."

Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720.

{¶ 18} Lopp argues that the jury clearly lost its way because there has to be a living child in order to find that Ferrarini was a "family or household member."[3]

{¶ 19} In the instant case, Ferrarini testified that while they were dating, she became pregnant with Lopp's baby. When Ferrarini informed Lopp that she was pregnant, he told her to have an abortion or she would be on her own. The next time Ferrarini saw Lopp was on December 16, 2008, when she observed him standing in front of her porch steps. Lopp grabbed Ferrarini by her hair and threw her down on the porch stairs. He told her to have an abortion, and if she was not going to have one, he was going to give her one.

{¶ 20} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "'there is *substantial* evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt.'" (Emphasis in original and

[3]He also argues that the trial court and attorneys lost their way, but with a challenge to the manifest weight of the evidence, we review the factfinder's resolution at trial. Because Lopp had a jury trial, our manifest-weight review is limited to the jury, not the trial court nor the attorneys.

citations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 81 N.E.2d 229, ¶81. Here, Lopp caused or attempted to cause Ferrarini harm when he threw her onto the porch steps. Furthermore, Ferrarini testified that Lopp was the father of her child. Thus, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice when it concluded that Lopp was guilty of domestic violence.

{¶ 21} Accordingly, the third assignment of error is overruled.

Jury Instructions

{¶ 22} In the fourth assignment of error, Lopp argues that the trial court erred when it defined "family or household member" to the jury because it failed to specify that the definition applied on December 16, 2008.

{¶ 23} However, we note that Lopp failed to object to this definition when the court read the charge to the jury. Thus, absent plain error, the failure to object to jury instructions is a waiver of the issue on appeal. See *State v. Underwood* (1983), 3 Ohio St.3d 12, 444 N.E.2d 1332, syllabus. Moreover, any error in the jury instructions is not plain error unless, but for the error, the outcome of the trial clearly would have differed. Id.

{¶ 24} In reviewing the record, we find no error in the court's instructions because the trial court supplied the jury with the date of the incident (December 16, 2008) and then defined the term "family or household member."

{¶ 25} Therefore, the fourth assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 26} In the fifth assignment of error, Lopp argues that he was denied effective assistance of counsel when defense counsel failed to object to witness testimony and photographs involving incidents that occurred after December 16, 2008.

{¶ 27} In a claim of ineffective assistance of counsel, the burden is on the defendant to establish that counsel's performance fell below an objective standard of reasonable representation and prejudiced the defense. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.3d 373, paragraph two of the syllabus; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 28} Hence, to determine whether counsel was ineffective, Lopp must show that: (1) "counsel's performance was deficient," in that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) counsel's "deficient performance prejudiced the defense" in that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*.

{¶ 29} In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164. In evaluating whether a petitioner has been denied the effective assistance of counsel, the Ohio Supreme Court held that the test is "whether the accused, under all the

circumstances, * * * had a fair trial and substantial justice was done." *State v. Hester* (1976), 45 Ohio St.2d 71, 341 N.E.2d 304, paragraph four of the syllabus. When making that evaluation, a court must determine "whether there has been a substantial violation of any of defense counsel's essential duties to his client" and "whether the defense was prejudiced by counsel's ineffectiveness." *State v. Lytle* (1976), 48 Ohio St.2d 391, 358 N.E.2d 623; *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905. To show that a defendant has been prejudiced, the defendant must prove "that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *Bradley,* paragraph three of the syllabus; *Strickland*.

{¶ 30} In the instant case, Ferrarini testified that after the incident on December 16, she observed Lopp driving up and down her street on two occasions. Also, after Lopp's arraignment, Slick and another male broke into her home and beat her up. They asked, "where is [Lopp's] brat?" Ferrarini testified that the last incident with Lopp occurred as she walked to her front door with her daughter, who was strapped in a car seat. When she put down the car seat to open her front door, an unknown male came up and grabbed the car seat, causing it to flip over. Ferrarini used her stun gun on the attacker, grabbed the car seat, and ran inside. She observed Lopp sitting in a car parked on the street.

{¶ 31} Nicole Powers ("Powers") and Heidi Beal ("Beal") also testified for the State. Powers testified that she was with Ferrarini on one of the occasions when Lopp drove by Ferrarini's house. She observed Ferrarini look outside and become frightened. Beal testified that she is Ferrarini's neighbor and had observed two men sitting in a vehicle, pointing at Ferrarini's home. As she approached the vehicle, the two men drove away. She also testified that she observed bruises on Ferrarini following one of the incidents.

{¶ 32} Lopp argues that defense counsel was ineffective for failing to object to this testimony because it was not relevant and it misled the jury. The State claims this evidence shows Lopp believed the child was his. A review of the record, however, demonstrates that defense counsel objected to the testimony regarding these incidents prior to trial, arguing that this was a domestic violence case, not a violation of a temporary restraining order. Then, when defense counsel cross-examined Ferrarini, he used the testimony about the post-December 16 events in an attempt to attack her credibility. It is well established that trial tactics are within the sound discretion of trial counsel and, even if the most effective tactics are not employed, will not constitute ineffective assistance of counsel. *Leonard* at ¶146 (stating that "debatable trial tactics do not establish ineffective assistance of counsel"). As

such, this was a strategic decision made at trial that was within the sound discretion of defense counsel.

{¶ 33} Lopp further argues that defense counsel was ineffective for failing to object to the photos that were introduced. In particular, he claims that defense counsel should have objected to the photos of Ferrarini's injuries from the incident with Slick and an unknown male in February 2009. However, a review of the record reveals that defense counsel requested a sidebar when the photos were first shown to Ferrarini, at which the State claims that defense counsel objected to the admission of these photos. Then, defense counsel objected to their admission at the end of trial.

{¶ 34} Lopp also claims that defense counsel was ineffective for failing to object to the admission of his bond revocation hearing transcript. However, at the end of trial, defense counsel argued that the transcript should not be admitted. Therefore, we find Lopp's arguments lack merit, and his ineffective assistance of counsel claim must fail.

{¶ 35} Accordingly, the fifth assignment of error is overruled.

{¶ 36} Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____

COLLEEN CONWAY COONEY, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
JAMES J. SWEENEY, J., CONCUR