

[Cite as *State v. Clark*, 2010-Ohio-1746.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92854

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MAURICE CLARK

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-513743

BEFORE: Rocco, P.J., McMonagle, J., and Boyle, J.

RELEASED: April 22, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant Maurice Clark appeals from his conviction after a jury found him guilty of third-degree felony domestic violence.

{¶ 2} Clark presents three assignments of error. He claims his conviction is against the manifest weight of the evidence, the trial court erred in failing to provide a curative instruction to the jury at one point in the proceedings, and his trial counsel rendered ineffective assistance.

{¶ 3} Upon a review of the record, this court cannot find merit to any of his claims. Consequently, his conviction is affirmed.

{¶ 4} Clark's conviction resulted from an incident that took place in the family home during the early morning hours of July 5, 2008. His family at that time consisted of himself and his wife Latasha, their son Kayson, Latasha's older son Clifton Smith, and Latasha's nephew.

{¶ 5} Clark and Latasha had spent the Fourth of July at a friend's cookout. In the meantime, the three children went to a beach party.

{¶ 6} According to Latasha's testimony, Clifton had been instructed to walk home with the other two boys when the children's party concluded. Instead, he decided that they would all go to his biological father's house, "which was closer to the beach" than the family home. Clifton called his mother to inform her of his decision.

{¶ 7} The cookout concluded at approximately 2:00 a.m. Clark drove with Latasha to Clifton's father's house to pick up the boys.

{¶ 8} Clark acknowledged at trial that he was displeased with Clifton's failure to

follow the instructions he had been given. Thus, when the boys came to the car, Clark chastised Clifton.

{¶ 9} Clark continued to talk to Clifton as he drove the family home; Clark admitted at trial that his conversation became “loud * * * because [he] felt that [Clifton] wasn’t hearing” him, and because Clifton “had an attitude.” Clark felt “disrespect[ed]” by his stepson. Latasha attempted to mediate, but Clark believed she was “shield[ing] him.”

{¶ 10} By the time the family arrived home, Clark had turned his attention to his wife. Clark admitted the two of them were “yelling” at each other. Latasha told the boys to go upstairs to bed, so they would not be exposed to the argument.

{¶ 11} According to Latasha, as she began to follow the boys, Clark demanded the money she had planned to use for the rent payment. She told him she “didn’t have it,” but “he grabbed for [her] chest, because [she] had the money in [her] bra.” Latasha pushed Clark away, and, suddenly, they “were wrestling” with each other. Clark still sought the money from her bra; “[t]hen he grab[bed her] by the neck.”

{¶ 12} Latasha stated that Clark placed first one hand and “squeezed and put his other hand around [her] neck,” making it difficult for her to breathe. Latasha managed to scream, however, and became aware that the three boys had emerged from their rooms. Clifton came to her aid by pulling Clark away from her.

{¶ 13} When the adults had been separated, Latasha instructed the boys to go outdoors; they obeyed. Clifton ran down the street, looking for police officers.

{¶ 14} Cleveland police officers Dorothy Todd and her partner James Bryant

already were in the neighborhood in their patrol car in response to “a report of a domestic [dispute] in progress.” The officers proceeded to the Clark home after the “hysterical” boys ran up to them.

{¶ 15} Todd and Bryant arrived to hear “screaming coming from the house.” They went indoors and into the living room, where they observed Clark standing over Latasha, who was seated in a chair; Clark was “shaking her a little bit” and “pushing her down” by her wrists. The officers each took one of Clark’s arms and restrained him.

{¶ 16} Clark subsequently was indicted on one count of domestic violence, in violation of R.C. 2919.25(A); the indictment additionally contained two furthermore clauses, charging Clark with having committed the same offense twice previously. Clark stipulated to these convictions at trial.

{¶ 17} After the state presented the testimony of Latasha, Clifton, Todd, and Bryant, Clark testified on his own behalf. The jury ultimately found Clark guilty of the offense.

{¶ 18} Clark now challenges his conviction with three assignments of error.

“I. The conviction of Domestic Violence [in violation of] R.C. 2919.25(A) is against the manifest weight of the evidence.

“II. The failure of the trial court to provide an immediate curative instruction to questioning which elicited information that the appellant had previously been convicted of domestic violence against the same victim deprived appellant of a fair trial.

“III. The appellant was denied the effective assistance of counsel.”

{¶ 19} Clark asserts in his first assignment of error that the manifest weight of the evidence does not support the jury's verdict. As support for his assertion, he cites *State v. Mattison* (1985), 23 Ohio App.3d 10, 490 N.E.2d 926. *Mattison* suggested several factors to consider in reviewing the weight of the evidence to support a verdict.

{¶ 20} More recently, the Ohio Supreme Court has held that, with regard to an appellate court's function in reviewing the weight of the evidence, it must be determined from the entire record whether in resolving conflicts in the evidence, the jury "clearly lost its way" and created "a manifest miscarriage of justice"; cases in which this occurs are "exceptional." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. Thus, this court must remain mindful that the weight of the evidence and the credibility of the witnesses are matters primarily reserved for the jury. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

{¶ 21} Clark was convicted of domestic violence in violation of R.C. 2919.25. Subsection (A) of the statute prohibits a person from knowingly causing or attempting to cause physical harm to a family member. Clark concedes the evidence demonstrated he and Latasha are husband and wife.

{¶ 22} He contends, however, that the testimony failed to prove he caused or attempted to cause Latasha physical harm, because she failed to indicate she sustained any injury, and because Clifton's account of the incident was "extremely inconsistent" with his mother's. The record contradicts Clark's contention.

{¶ 23} Each of the family members who testified, including Clark himself, stated

that, as they arrived at their home, Clark and Latasha argued loudly. Furthermore, each indicated the argument continued inside the home.

{¶ 24} Latasha stated that Clark began grabbing for the money she had placed into her bra, then choking her. She indicated she found it difficult to breathe. Latasha stated that Clark's choke hold on her was interrupted only when one of the boys interceded.

{¶ 25} Clifton corroborated her testimony in these respects; he saw Clark "choking her" and grabbing at her in an attempt to obtain the money. Clifton tried to deflect Clark before Latasha told him to run outside. Thus, their testimony was consistent to the extent that Clark at least attempted to cause Latasha physical harm.

{¶ 26} The additional details Clifton provided about his actions indicated he may have embellished his role in the incident. In light of Clifton's age, such details did not necessarily detract from the essential facts.

{¶ 27} Even Clark admitted he "grabbed" Latasha. Clark denied that he choked Latasha; however, Clark only "believed" the boys could not have witnessed that episode, and "thought" he took her only by the wrist.

{¶ 28} Under the circumstances presented, the jury acted within its prerogative to give more credit to Latasha's version of the incident than to Clark's. Thus, this court cannot conclude his conviction is against the manifest weight of the evidence. *State v. Williams*, Cuyahoga App. No. 84040, 2004-Ohio-6418; *State v. Barker*, Lorain App. No. 04CA008439, 2004-Ohio-4329.

{¶ 29} Clark's first assignment of error, accordingly, is overruled.

{¶ 30} In his second assignment of error, Clark argues that the trial court erred at one point in the proceedings by neglecting to provide a “curative” instruction to the jury. Clark further argues in his third assignment of error that his trial counsel provided ineffective assistance when she failed to request the curative instruction he asserts should have been provided. The context for these two assignments of error follows.

{¶ 31} During Latasha’s direct examination, the prosecutor asked her to describe her “emotional state” during the incident. Latasha responded that she “was scared.” The prosecutor then asked, “Is this the first time Maurice had laid his hands on you?” Defense counsel objected to this question, and the trial court sustained the objection.

{¶ 32} The prosecutor then asked Latasha if Clark had ever been convicted of domestic violence “before.” Although defense counsel once again objected, the objection was overruled, and Latasha responded affirmatively. When the prosecutor asked her if she knew who the victim was in the other cases, Latasha answered, “I was.”

{¶ 33} Defense counsel objected to this exchange, and the trial court sustained the objection. Nevertheless, Clark now asserts the trial court also should have provided a “curative instruction” to the jury concerning the proper consideration of evidence that Clark previously had committed the same offense against Latasha. He additionally claims his trial counsel provided ineffective assistance for failing to request such an instruction.

{¶ 34} In considering these two assignments of error, this court notes that Clark fails to present the text of the instruction he claims the trial court should have provided to cure the “error.” This court also is cognizant of the requirements a defendant must meet to be

successful on a claim of ineffective assistance of counsel. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373; *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128.

{¶ 35} The record reflects that, in giving preliminary instructions to the jury, the trial court stated that if “a question is asked of a witness and an objection to the question is sustained, you will then not hear the answer. * * * You are to completely disregard any such question and answer and disregard either for any purpose.” The jury is presumed to have followed this instruction. *Pang v. Minch* (1990), 53 Ohio St.3d 186, 559 N.E.2d 1313.

{¶ 36} Furthermore, R.C. 2919.25(D)(4) elevates the offense of domestic violence to a felony of the third degree for an offender who more than once previously has pleaded guilty to or been convicted of the same offense. Thus, because they increase the degree of the offense, any prior convictions for domestic violence constitute essential elements of the crime charged. *State v. Arnold* (Jan. 24, 2002), Cuyahoga App. No. 79280.

{¶ 37} Although the state need not provide the name of the previous victim, by the same token, the state is not required to accept the defendant’s stipulation in order to prove these elements. *Id.*; *State v. Williams*, *supra*. Defense counsel in this case nevertheless sought to protect her client by interposing appropriate objections; she cannot be faulted for failing to request an instruction that would have served little purpose but to draw additional attention to the matter.

{¶ 38} Clark, therefore, cannot demonstrate either that the trial court failed to ensure the fairness of his trial, or that defense counsel failed to conform to an objective standard of

reasonable representation. *State v. Stone*, Cuyahoga App. Nos. 91679 and 91680, 2009-Ohio-2262; *State v. Williams*, supra.

{¶ 39} For the foregoing reasons, Clark's second and third assignments of error also are overruled.

{¶ 40} Clark's conviction is affirmed.

It is ordered that appellee recover from 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.

KENNETH A. ROCCO, PRESIDING JUDGE

CHRISTINE T. McMONAGLE, J., and
MARY J. BOYLE, J., CONCUR