[Cite as *State v. Smith*, 2011-Ohio-201.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
IVAN LAMAR SMITH	:	Case No. 2010CA00093
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2009CR0136
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	January 18, 2011

APPEARANCES:

For Plaintiff-Appellee

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Stark County Prosecutor

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Farmer, J.

{¶1} On March 1, 2010, the Stark County Grand Jury indicted appellant, Ivan Smith, on two counts of felonious assault in violation of R.C. 2903.11 and one count of intimidation of an attorney, victim or witness in a criminal case in violation of R.C. 2921.04. Said charges arose from incidents involving appellant's girlfriend, Jennifer Benjamin.

{¶2} A jury trial commenced on April 8, 2010 on the two counts of felonious assault as the intimidation count was dismissed. The jury found appellant not guilty of the felonious assault counts, but guilty of the lesser included offenses of assault. By judgment entry filed April 16, 2010, the trial court sentenced appellant to six months in jail on each count, to be served consecutively.

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

I

{¶4} "THE TRIAL COURT'S FINDING OF GUILT IS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

II

{¶5} "THE TRIAL COURT'S IMPOSITION OF MAXIMUM CONSECUTIVE SENTENCES WAS CONTRARY TO LAW."

I

{¶6} Appellant claims his convictions on two counts of assault were against the sufficiency and manifest weight of the evidence as the victim, Jennifer Benjamin, lacked credibility. We disagree.

{¶7} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. "The 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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307. 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. We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881. The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger,* 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶8} Appellant was convicted of two counts of assault in violation of R.C. 2903.11(A)(1) which states, "[n]o person shall knowingly***[c]ause serious physical harm to another or to another's unborn."

{¶9} Ms. Benjamin testified to two incidents of assault. On December 27, 2009, after getting high with appellant throughout the night, she and appellant went to a friend's house where appellant agreed to sell the friend's laptop computer to obtain money for drugs. T. at 108. Appellant left to sell the laptop but when he returned, he did not have the laptop or any money or drugs. Id. Also, Ms. Benjamin's purse came up missing. T. at 109. The two left the friend's house and as they walked down the street with appellant's brother, Ms. Benjamin kept asking appellant about the items. Id. Appellant, who was walking ahead of Ms. Benjamin, turned around, ran up to her, and punched her in the nose with his fist. T. at 111-112. Appellant and his brother took her to an apartment to clean the blood off of her. T. at 112. Appellant then ordered Ms. Benjamin to "get his brother the money" they owed him, but she "didn't want to." Id. Ms. Benjamin tried to get away but every time she ran, appellant chased her and punched her until she ended up unconscious on a street corner. T. at 113. Someone called an ambulance, but Ms. Benjamin left before the ambulance arrived because she wanted her purse from appellant because "everything, for my kids and my cell phone was in there." T. at 114. After ending up at a friend's house, Ms. Benjamin went to the police station where she was taken to the hospital and photographed. T. at 115-116; State's Exhibits 1-3. Appellant had a fractured nose. T. at 116.

{¶10} Thereafter, Ms. Benjamin continued to have contact with appellant. T. at 116-117. On January 6, 2010, appellant and Ms. Benjamin were getting high and evidentially hooked up with a passing motorist who was looking for crack. T. at 117-118. They jumped into the vehicle, obtained crack, and all got high together. T. at 118. Thereafter, the motorist wanted more, so they went to his house for more money. T. at

118-119. Appellant then told Ms. Benjamin to get out of the vehicle, but she refused. T. at 119. The motorist wanted Ms. Benjamin out of the vehicle so after they drove around, the motorist stopped the vehicle, pulled Ms. Benjamin out onto the ground, and appellant punched and kicked her in the face more than once. T. at 119-120. They left Ms. Benjamin on the street whereupon she got up and started walking when she was picked up by a police officer. T. at 121. Again, Ms. Benjamin was taken to the hospital and photographed. T. at 122-123; State's Exhibits 4-6.

{¶11} On both occasions, police officers testified that Ms. Benjamin was visibly shaken, crying, hysterical, bloody, and injured. T. at 144-145, 153. Both officers testified that Ms. Benjamin stated that appellant had assaulted her. T. at 144, 155.

{¶12} The jury had before it Ms. Benjamin's account of the incidents, the photographs of her injuries, and the testimony regarding her demeanor and spontaneous statements to police. Upon review, we find there was sufficient independent corroboration of Ms. Benjamin's testimony to support the guilty findings, and no manifest miscarriage of justice.

{¶13} Assignment of Error I is denied.

II

{¶14} Appellant claims the trial court erred in ordering him to serve maximum consecutive sentences. We disagree.

{¶15} In *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, ¶4, the Supreme Court of Ohio set forth the following two-step approach in reviewing a sentence:

{¶16} "In applying *Foster* [*State v.,* 109 Ohio St.3d 1, 2006-Ohio-856] to the existing statutes, appellate courts must apply a two-step approach. First, they must

examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard."

{¶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.

{¶18} By judgment entry filed April 16, 2010, the trial court sentenced appellant to six months on each count, to be served consecutively. Misdemeanors are punishable by "not more than one hundred eighty days." R.C. 2929.24(A)(1). Clearly the sentences on each count were within the permissible range. Furthermore, in its judgment entry, the trial court expressly stated that it considered the purposes and principles of sentencing under R.C. 2929.11, as well as the seriousness and recidivism factors under R.C. 2929.12. Accordingly, the sentences are not clearly and convincingly contrary to law.

{¶19} Pursuant to R.C. 2929.41(B)(1):

{¶20} "A jail term or sentence of imprisonment for a misdemeanor shall be served consecutively to any other prison term, jail term, or sentence of imprisonment when the trial court specifies that it is to be served consecutively or when it is imposed for a misdemeanor violation of section 2907.322, 2921.34, or 2923.131 of the Revised Code.

{¶21} "When consecutive sentences are imposed for misdemeanor under this division, the term to be served is the aggregate of the consecutive terms imposed, except that the aggregate term to be served shall not exceed eighteen months."

{¶22} The aggregate term in this case is twelve months, within the statutory range under R.C. 2929.41(B)(1). The assaults upon Ms. Benjamin were on two separate occasions and her injuries were independent of each other.

{¶23} Upon review, we find the aggregate sentence was neither contrary to law nor an abuse of discretion.

{¶24} Assignment of Error II is denied.

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

By Farmer, J.

Edwards, P.J. and

Wise, J. concur.

_s/ Sheila G. Farmer_____

_s/ Julie A. Edwards_____

_s/ John W. Wise_____

JUDGES

SGF/sg122

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
IVAN LAMAR SMITH	:	
Defendant-Appellant	:	CASE NO. 2010CA00093

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed. Costs to appellant.

_s/ Sheila G. Farmer_____

_s/ Julie A. Edwards_____

_s/ John W. Wise_____

JUDGES