

[Cite as *State v. States*, 2001-Ohio-3258.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 97-CA-221
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	<u>O P I N I O N</u>
)	
RUSSELL F. STATES)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Mahoning County Court No. 4, Mahoning County, Ohio
Case No. 96 CRB 1144

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Paul J. Gains
Prosecuting Attorney
Atty. Dawn Durkin
Asst. Prosecuting Attorney
120 Market Street
Youngstown, Ohio 44503

For Defendant-Appellant: Atty. Marilyn McMillin
100 Marwood Circle
Boardman, Ohio 44512

JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph E. O'Neill
Hon. Mary DeGenaro

Dated: May 10, 2001

WAITE, J.

{¶1} This timely appeal arises from a trial court judgment finding Appellant guilty of domestic violence in violation of R.C. §2919.25(C). For the following reasons, we affirm the judgment of the trial court.

{¶2} On September 25, 1996, Appellant, Russell F. States, put a gun to the head of his live-in girlfriend, Donna Rome. Appellant was charged with domestic violence in violation of R.C. §2919.25(C) in a complaint filed in Mahoning County Court No. 4 on September 26, 1996. Appellant waived his right to a speedy trial. A bench trial held on June 17, 1997, resulted in a guilty verdict. On October 7, 1997, the trial court sentenced Appellant to 30 days incarceration with all 30 days suspended and twelve months probation. The trial court also fined Appellant \$250.00 with \$50.00 suspended. The trial court permitted Appellant 60 days to pay the fine and court costs and ordered him to attend counseling.

{¶3} Appellant filed his notice of appeal on October 10, 1997. Pursuant to App.R. 9(C), Appellant filed an Agreed Statement of Evidence in Lieu of Transcript with the trial court on January 5, 1999. The Agreed Statement was signed by appropriate counsel for the state and approved by the trial court judge. Appellant's sole assignment of error alleges:

{¶4} "THE TRIAL COURT ERRED IN THAT THE CONVICTION

OF THE DEFENDANT/APPELLANT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶5} Appellant states that the trial of this matter consisted only of the testimony of Appellant and the victim. Appellant argues that his testimony was more credible, considering evidence that the victim actively sought to have him removed from her house. Appellant states that prior to the incident in question, Rome was advised by a prosecutor that the only way to have Appellant removed from her house was to file a domestic violence charge. In light of the evidence as contained in the agreed statement, Appellant concludes that Rome's testimony and the underlying charge of domestic violence was completely concocted. Based on the record before us, Appellant's assignment of error lacks merit.

{¶6} The issue as to whether a trial court judgment is against the manifest weight of the evidence was addressed extensively in *State v. Thompkins* (1997), 78 Ohio St.3d 380.

{¶7} "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.'"

{¶8} *State v. Thompkins*, 387, quoting Black's Law Dictionary (6 Ed.1990) 1594.

{¶9} When reviewing a trial court decision on the basis that the verdict was against the manifest weight of the evidence, a court of appeals acts as a "thirteenth juror," especially when it reviews the trial court's resolution of conflicts in testimony. *State v. Thompkins*, 387 citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42.

{¶10} "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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction."

{¶11} *State v. Thompkins*, 387 quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶12} "A reversal based on the weight of the evidence, moreover, can occur only after the State both has presented sufficient evidence to support conviction and has persuaded the jury to convict."

{¶13} *State v. Thompkins*, 387-388, quoting *Tibbs v. Florida* 41-43. (citations and footnotes omitted.) To reverse a jury verdict as against the manifest weight of the evidence, a unanimous concurrence of all three appellate judges is required. *State v. Thompkins*, 389.

{¶14} R.C. §2919.25(C) states that, "[n]o person, by threat of force, shall knowingly cause a family or household member to believe that the offender will cause imminent physical harm to

the family or household member." The agreed statement of the evidence states that, "[a]t the time of the alleged offense, Ms. Rome and [Appellant] were living together. Ms. Rome stated that on September 25, 1996, [Appellant] put a gun to her head and cocked the gun, and a shell fell out...She further testified that she felt in fear for her life." The agreed statement clearly contains enough evidence to support Appellant's conviction.

{¶15} As noted, Appellant challenges Rome's credibility in light of her testimony on cross examination. The agreed statement reflects that:

{¶16} "[Rome] testified that she wanted [Appellant] out of the house and that she had previously spoken to the Austintown Police Department, who referred her to the Prosecutor's Office. Ms. Rome testified that she was advised that she needed a domestic violence charge in order to get [Appellant] removed from the house."

{¶17} Appellant also asserts that his testimony was credible. The agreed statement reflects that, "[Appellant] denied ever having possession of a gun when Ms. Rome was present, and also denied ever making threats."

{¶18} Appellant asks this Court to conclude that his testimony was more believable than Rome's. It is axiomatic that judging the credibility of witnesses is primarily the responsibility of the trial court. *State v. DeHass*, (1967), 10 Ohio St.2d 230, 231. Where there exists conflicting testimony, either of which version may be true, we may not choose which

view we prefer. *State v. Gore* (Feb. 17, 1999), Mahoning App. No. 94 CA 97, unreported, *2. "Instead, we must accede to the [trier of fact] who 'is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.'" *Id.*, quoting *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶19} As the only issue presented by Appellant is the credibility of the witnesses and we may not assess credibility issues, we must hold that Appellant's assignment of error lacks merit. Accordingly, we affirm the judgment of the trial court.

O'Neill, J., concurs.

DeGenaro, J., concurs.