

[Cite as *State v. Vanderhorst*, 2010-Ohio-1856.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93040

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RONALD VANDERHORST

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-514568 and CR-515668

BEFORE: Dyke, J., Blackmon, P.J., and Celebrezze, J.

RELEASED: April 29, 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).

ANN DYKE, J.:

{¶ 1} Defendant Ronald Vanderhorst appeals from his convictions for assault and domestic violence. For the reasons set forth below, we affirm.

{¶ 2} Defendant was charged in Case No. CR-514568 with burglary in violation of R.C. 2911.12(A)(1), and domestic violence in violation of R.C. 2919.25(A), with a furthermore clause alleging that he had previously been convicted of domestic violence in March 2008. These charges arose in connection with the alleged attack on A.M. at her home on or about July 27, 2008. Defendant was charged in Case No. CR-515668 with rape in violation of R.C. 2907.02(A)(2), with a sexually violent predator specification; attempted rape in violation of R.C. 2923.02, with a sexually violent predator specification; felonious assault in violation of R.C. 2903.11(A)(1); and kidnapping in violation of R.C. 2905.01(A)(4) with a sexual motivation specification. These charges arose in connection with the alleged attack on A.M. at her home on or about December 5, 2007.

{¶ 3} Defendant pled not guilty in both matters and the trial court consolidated them for trial before a jury on January 15, 2009. A.M. did not testify. The state's witnesses established that A.M. went to the emergency room at Marymount Hospital on December 5, 2007, and was directed to Kristin Bernstein, a Sexual Assault Nurse Examiner. At this time, A.M. reported that her boyfriend, defendant, had assaulted her, vaginally raped her, and forced her to perform oral sex upon him. She stated that her pain level was 8 out of 10 and stated that defendant had punched her in the jaw, dislodging her earring. He

also reportedly slapped her and held her down.

{¶ 4} Bernstein noted that A.M. had swelling of her left cheek and jaw, and her right knee had a scratch and dried blood. Bernstein conducted a sexual assault exam and collected clothing, bodily fluid samples, and various swabs.

{¶ 5} Bernstein acknowledged on cross-examination that A.M. reported taking various medications. A.M. appeared lucid, however.

{¶ 6} Bureau of Criminal Identification forensic scientist Russell Edelheit testified that sperm cells were recovered from the vaginal samples of the rape kit obtained in this matter. DNA was recovered from the vaginal samples and compared to known samples from defendant and A.M. According to Edelheit, one DNA profile was consistent with A.M. and the other was consistent with defendant. Defendant could not be excluded as a source of the sperm, and the expected frequency of the occurrence of the identified DNA profile is one in five sextillion 543 quintillion unrelated individuals.

{¶ 7} Garfield Heights Det. John Cermak testified that defendant was previously convicted of domestic violence upon A.M. in Garfield Municipal Court in March 2008. At that time, defendant was reported to be residing with A.M. In connection with that case, and as a condition of community control sanctions, defendant was prohibited from having contact with A.M., and that no contact order remained in effect on July 27, 2008.

{¶ 8} Garfield Heights Police Officer Jarzembak testified that he responded to a complaint regarding a forced entry and assault at A.M.'s

apartment at 2:00 p.m. on July 27, 2008. According to Officer Jarzembak, defendant had been residing in the apartment. Defendant approached him as he arrived at the apartment and the officer had him sit in the zone car while Jarzembak's partner, Patrolman Monnolly, spoke with A.M. The door to A.M.'s apartment appeared to be damaged and A.M. was upset.

{¶ 9} Officer Jarzembak subsequently spoke with A.M. and retrieved a voice mail message from A.M.'s cell phone in which the caller threatened to whip A.M.'s ass and called her a bitch. The officer also testified that defendant explained to the police that he was there to pick up some of his belongings. He denied striking A.M., but stated that she had assaulted him. Defendant was subsequently arrested. At the time of booking, defendant stated that he resided on Alton Road in Cleveland. Officer Jarzembak was also permitted to testify pursuant to Evid.R. 901(B)(5) that, based upon his conversations with defendant, defendant had left the threatening voice mail message on A.M.'s cell phone.

{¶ 10} Officer Monnolly testified that the officers arrived at the apartment within a few minutes of A.M. placing a call for emergency assistance. Defendant was inside A.M.'s apartment when he arrived. A.M. was pacing, yelling, and appeared agitated. According to Officer Monnolly, A.M. stated that defendant came to the apartment to get his property, she asked him to leave, and he forced his way in. The two began to argue and he then "open-hand pushed her in the face."

{¶ 11} Defendant moved for acquittal of the charges. The trial court

determined, with regard to the felonious assault charge, that there was no serious physical harm and it reduced this charge to assault. The court also determined that it would instruct the jury on the fourth degree felony offense of burglary in violation of R.C. 2911.12(A)(4) in addition to the second degree offense set forth in the indictment. In all other respects, the trial court denied the motion for acquittal and defendant elected to present evidence.

{¶ 12} Lorna Leary testified that she drove defendant to A.M.'s home to retrieve his belongings after A.M. was evicted from her apartment. While waiting in the parking lot for defendant, Leary observed A.M. follow defendant out of the apartment. Defendant did not have any of his belongings. A.M. appeared to be angry and called the police.

{¶ 13} Brenda Bickerstaff, a private investigator, testified that she interviewed A.M. on December 11, 2008. At this time, A.M. stated that she did not want to pursue prosecution and that defendant was innocent.

{¶ 14} Defendant was subsequently convicted in Case No. CR-514568 of the domestic violence charge, and convicted in Case No. CR-515668 of the lesser charge of assault. He was acquitted of all other charges. The trial court subsequently sentenced defendant to a total of 18 months of imprisonment plus three years of postrelease control. He now appeals and assigns three errors for our review.

{¶ 15} In his first assignment of error, defendant asserts that there is insufficient evidence to support his convictions.

{¶ 16} “Sufficiency is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.” *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 17} “An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of defendant’s guilt beyond a reasonable doubt. 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.” *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph two of the syllabus following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 18} The elements of the offense of assault is defined in R.C. 2903.13(A) in pertinent part as follows:

{¶ 19} “[n]o person shall knowingly cause or attempt to cause physical harm to another or to another’s unborn.”

{¶ 20} The offense of domestic violence, as it pertains to this matter, is defined in R.C. 2919.25(A) as follows:

{¶ 21} “No person shall knowingly cause or attempt to cause physical harm to a family or household member.”

{¶ 22} The state also alleged that defendant had previously pleaded guilty

to or had been convicted of the crime of domestic violence, thus rendering the offense a fourth degree felony. R.C. 2919.25(D)(3).

{¶ 23} In connection, we must note that the trial court properly admitted A.M.'s statements to the emergency room nurse and to the police who responded to her apartment on July 27, 2008.

{¶ 24} The Sixth Amendment to the United States Constitution guarantees that a person accused of committing a crime has the right to confront and cross-examine witnesses testifying against him. In *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, the United States Supreme Court held that the admissibility of out-of-court statements cannot be determined solely by application of the Rules of Evidence. *Id.* Instead, the Court held that the Confrontation Clause bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.” *Id.* The Court did not precisely define the term “testimonial,” but it listed the following examples: (1) *ex parte* in-court testimony or its functional equivalent, such as affidavits and prior testimony that the defendant was unable to cross-examine, or pretrial statements that declarants would reasonably expect to be used in a prosecution; (2) extra-judicial statements contained in formal testimonial materials such as depositions, prior testimony or confessions; and (3) statements made under circumstances that would lead an objective witness to believe the statement would be available for use at a later trial. *Id.*

{¶ 25} “[W]here non-testimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law * * * as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.” *Id.*

{¶ 26} In *Davis v. Washington* (2006), 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224, the Court further considered the meaning of the term “testimonial” and held that:

{¶ 27} “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution.”

{¶ 28} With regard to the statements made to the emergency room nurse on December 5, 2007, we note that the Supreme Court of Ohio has recently held that “[s]tatements made to medical personnel for purposes of diagnosis or treatment are not inadmissible under *Crawford*, because they are not even remotely related to the evils which the Confrontation Clause was designed to avoid.” *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, _63. Accord, *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834; *State v. Swanigan*, Richland App. No. 08A19, 2009 -Ohio- 978; *State v. Brown*, Portage App. No. 2007-P-0014, 2008 -Ohio- 832. Such statements are

admissible pursuant to Evid.R. 803(4), which states:

{¶ 29} “Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.”

{¶ 30} With regard to the statements made by A.M. to the police who responded to the July 27, 2008 call, the record demonstrates that these statements were made minutes after A.M. placed a call for emergency assistance and were made for the purpose of enabling police to respond to the call of a forced entry and assault. A.M.’s statements at this time were made for the purpose of enabling police to meet an “ongoing emergency,” so they were not testimonial. *Davis v. Washington*, supra; *State v. Williams*, Lucas App. No. L-08-1371, 2009- Ohio-6967. The statements also “relat[ed] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition,” so they were admissible pursuant to Evid.R. 803(2).

{¶ 31} Applying the foregoing, we find sufficient evidence to support defendant’s convictions for assault and domestic violence. The record clearly indicates that A.M. reported to the emergency room nurse that after defendant requested sex, she turned her head away. Defendant turned her head back, then punched her in the left cheek and jaw, slapped her arm, held her down, and pulled her hair. After viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found that defendant knowingly

caused or attempted to cause physical harm to A.M. There is sufficient evidence to support the conviction for this offense. The record further indicates that defendant had been living with A.M., that he forcibly attempted to enter the apartment, and that he “open-hand pushed her in the face.” The record also indicates that defendant had previously been convicted of domestic violence. Viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found that defendant knowingly caused or attempted to cause physical harm to a family or household member. There is sufficient evidence to support this offense. Moreover, the fact that defendant was moving his possessions from the apartment at the time of the incident does not negate the “household member” element of the statute. See *State v. Kent* (Aug. 26, 1999), Mahoning App. No. 97 CA 129.

{¶ 32} The first assignment of error is without merit.

{¶ 33} For his second assignment of error, defendant argues that the convictions are against the manifest weight of the evidence.

{¶ 34} In *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541, the Ohio Supreme Court set forth the standard for evaluating challenges to the manifest weight of the evidence as follows:

{¶ 35} “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.’ Black’s Law Dictionary (6 Ed.1990), at 1594.

{¶ 36} “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.*, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 72 L.Ed.2d 652.

{¶ 37} 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. See *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 38} 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. *Id.*

{¶ 39} In this matter we cannot conclude that the jury clearly lost its way and created a manifest miscarriage of justice in convicting defendant of the offenses of assault and domestic violence. The state’s evidence was consistent and certain, and presented by professionals who responded to A.M.’s complaints

in dealing with defendant. It reliably established the elements of the offenses. The evidence offered by the defense, on the other hand, was fragmentary, vague, and self-serving.

{¶ 40} The second assignment of error is overruled.

{¶ 41} For his third assignment of error, defendant asserts that the trial court erred in joining the offenses charged in Case No. CR-514568 and Case No. CR-515668 for a single trial.

{¶ 42} A defendant claiming error in the denial of severance must affirmatively show that the trial court abused its discretion in refusing separate trials and that his rights were prejudiced. *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, 822 N.E.2d 1239, citing *State v. Torres* (1981), 66 Ohio St.2d 340, 343, 421 N.E.2d 1288.

{¶ 43} In general, the law favors joining multiple offenses in a single trial if the offenses charged are of the same or similar character, *State v. Lott* (1990), 51 Ohio St.3d 160, 163, 555 N.E.2d 293, and Crim.R. 13 provides that two or more indictments may be tried together “if the offenses * * * could have been joined in a single indictment.” Similarly, pursuant to Crim.R. 8(A), two or more offenses may be charged in the same indictment if the offenses charged are “of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.”

{¶ 44} We agree with the determination that the offenses herein were part

of a single course of conduct as the alleged victim was the same in both matters and both offenses had similar features. The trial court therefore acted within its discretion in consolidating the matters for a single trial.

{¶ 45} With regard to the issue of prejudice to defendant, we note that when a defendant claims that he was prejudiced by the joinder of multiple offenses, a court must determine (1) whether, under Evid.R. 404(B), the evidence of the other crimes would be admissible even if the counts or indictments were severed; or, if not, (2) whether the evidence of each crime is simple and distinct. *State v. Lott*, supra; *State v. Franklin* (1991), 62 Ohio St.3d 118, 580 N.E.2d 1. An accused is not prejudiced by joinder when simple and direct evidence exists as to each separate crime, regardless of the admissibility of evidence of other crimes under Evid.R. 404(B). *Id.*

{¶ 46} In this matter, the evidence as to each separate matter was simple and direct, and the jury was clearly able to segregate the proof needed to establish each offense in light of the fact that they acquitted defendant of four of the alleged offenses. Accordingly, we are unable to conclude that defendant suffered prejudice in connection with the joinder of the offenses for trial.

{¶ 47} The third assignment of error is without merit.

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.

ANN DYKE, JUDGE

PATRICIA ANN BLACKMON, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR