[Cite as *State v. Blackford*, 2014-Ohio-4808.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff - Appellee	:	Hon. John W. Wise, J.
	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	
CHRISTOPHER BLACKFORD	:	Case No. 2014CA00050
	:	
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2013-CR-1833
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	October 27, 2014

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO Prosecuting Attorney	JACOB T. WILL 116 Cleveland Ave N.W., Suite 808 Canton, OH 44702
By: KATHLEEN O. TATARSKY Assistant Prosecuting Attorney Appellate Section 110 Central Plaza South, Suite 510 Canton, OH 44702-1413	

Baldwin, J.

{¶1} Defendant-appellant Christopher Blackford appeals his conviction and sentence on one count of aggravated burglary. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On December 23, 2013, the Stark County Grand Jury indicted appellant on one count of aggravated burglary in violation of R.C. 2911.11(A)(1), a felony of the first degree, and one count of domestic violence in violation of R.C. 2919.25(A), a felony of the third degree. At his arraignment on December 27, 2013, appellant entered a plea of not guilty to the charges.

{¶3} A jury trial commenced on February 5, 2014. The following testimony was adduced at trial.

{¶4} On November 19, 2013, Canton Police Officer David Grant responded to an apartment at 802 12th St. N.W. shortly after 1:00 a.m. The apartment was on the bottom level of a multi-unit apartment building. When he arrived on the scene, Officer Grant observed that a window directly next to the apartment's steel door was broken. The window was approximately three feet up. The Officer and other officers on the scene heard commotion inside the apartment and went inside. Officer Grant testified that the apartment "was in disarray' and that appellant was sitting on the bed. Transcript, Volume I at 127. Appellant was bleeding from his face and was "[e]xtremely loud", cursing and belligerent. Transcript, Volume I at 128-129.

{¶5} Officer Grant testified that appellant was handcuffed and put into the back of a police cruiser for safety purposes. After other officers on the scene left, Officer Grant and Officer Moore spoke with Fredrica Gomez who told them that appellant was

her live-in boyfriend and that he had come over because he was jealous that she was spending time with another male in the apartment. She indicated that appellant had struck her in the head and had attacked the homeowner. When Officer Grant asked Gomez how appellant sustained the cut on his face, she told him that appellant had broken the window out and had come through the window, cutting his forehead. Gomez signed a witness statement. According to the Officer, the majority of glass was inside the apartment and there was blood around the area of the floor containing the glass.

{¶6} Melvin Andrews testified that he had lived in the apartment for nine or ten years and that the apartment was an efficiency. When asked how he knew appellant, he stated that appellant was his cousin and he further testified that Fredrica Gomez was a friend of his. Andrews testified that the two came over every now and then.

{¶7} Andrews testified that on November 19, 2013, Gomez and one of her male friends were over when appellant began banging on the door. Andrews testified that he told appellant that he had company and that he should come back later. Andrews called 911 because appellant was "banging kind of hard, getting upset, yelling, talking about he was supposed to come in there." Transcript, Volume I at 149. Andrews also testified that he heard the window breaking and appellant was coming through. According to Andrews, appellant first went towards Gomez and hit her while cussing. He testified that appellant hit her all over. Andrews tried to break them up, but appellant then ran towards the other unnamed male in the apartment. After Andrews grabbed appellant, appellant bit him on his side. At the time, appellant was bleeding. When asked how appellant was injured, Andrews testified that he thought that appellant was injured while

coming through the window. Andrews also testified that he did not give appellant permission to enter his apartment and did not let him in through the front door.

{¶8} On cross-examination, Andrews testified that he wanted appellant to leave because he did not want appellant in the house fighting with Fredrica Gomez. He testified that he saw appellant come through the window from the inside and that he did not let appellant into the apartment. He further testified that after appellant was in the apartment, everyone, including the unidentified male, was fighting. During redirect, Andrews testified that everything in his apartment was destroyed during the struggle, including his new TV, and that there was glass all over the floor.

{¶9} Canton Police Officer Joseph Barnhouse also testified. He testified that he and his partner responded to a call about an incident that took place at 802 12th Street N.W. in Canton at approximately 1:16 a.m. When they pulled up to the apartment building, the officers heard commotion and fighting going on inside. The apartment was torn up and blood was everywhere. Officer Barnhouse testified that appellant had blood on his face and was belligerent and screaming. Appellant was handcuffed and taken to the hospital. According to Officer Barnhouse, Gomez told them that appellant had busted out a window and entered the apartment through the same and then punched her. The Officer also testified that Gomez stated that appellant was her former boyfriend and that she had lived with him previously. He further testified that Andrews had a bite mark on the side of his rib cage.

{¶10} Appellant told the officers that he was stabbed by Gomez that night, but the only knife found was ruled out. Appellant also told them that while he was walking with a friend, his friend grabbed him and threw him through the window. Appellant later

changed his story and stated that the same male had broken the window and then took off and that after the window was broken, Andrews opened the door and let him in. When asked if he was able to determine what had cut appellant, Officer Barnhouse opined that appellant had received the cuts on his face from window glass.

{¶11} Photographs of the injuries sustained by appellant, Gomez and Andrews were shown to the jury.

{¶12} At the conclusion of the evidence and the end of deliberations, the jury, on February 6, 2014, found appellant not guilty of domestic violence but guilty of aggravated burglary. Pursuant to a Journal Entry filed on February 13, 2014, appellant was sentenced to six (6) years in prison.

{¶13} Appellant now raises the following assignments of error on appeal:

{¶14} THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE HEARSAY TESTIMONY UNDER OHIO RULE OF EVIDENCE 804(B)(6).

{¶15} THE DEFENDANT'S CONVICTIONS FOR AGGRAVATED BURGLARY WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

I

{¶16} Appellant, in his first assignment of error, argues that the trial court erred in allowing the State to introduce hearsay testimony under Evid.R. 804(B)(6). Appellant specifically contends that the trial court erred in allowing the Officers to testify as to the statements made by Fredrica Gomez to them and in introducing jail phone calls between appellant and Gomez.

{¶17} The Sixth Amendment of the U.S. Constitution provides a defendant the right to be confronted with the witnesses against him. *Crawford v. Washington*, 541 U.S.

36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Evid.R. 801 protects this right by prohibiting the use of hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Evid.R. 801(C).

{¶18} However, there are exceptions to the hearsay rule. “Under Evid.R. 804(B)(6), a statement offered against a party is not excluded by the hearsay rule if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying. Evid.R. 804(B)(6) was adopted in 2001 and is patterned on Fed.R.Evid. 804(B)(6), which was adopted in 1997. Staff Notes (2001), Evid.R. 804(B)(6). To be admissible under Evid.R. 804(B)(6), the offering party must show (1) that the party engaged in wrongdoing that resulted in the witness's unavailability, and (2) that one purpose was to cause the witness to be unavailable at trial.” (Internal quotations omitted.) *State v. Hand,* 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶ 84.

{¶19} A preponderance of evidence standard is applied in determining whether the foundational requirements for Evid.R. 804(B)(6) are met. *State v. Boyes,* 5th Dist Licking App. Nos. 2003CA0050 and 2003CA0051, 2004-Ohio-3528, ¶ 54–56.

{¶20} In the case sub judice, appellee, on January 31, 2014, filed a motion seeking to have Gomez taken into custody as a material witness. Appellee, in its motion, noted that Gomez had failed to appear before the grand jury and that attempts to serve her with subpoenas were unsuccessful. On the same date, the motion was granted and a capias was issued for her arrest.

{¶21} On January 31, 2014, appellee also filed a Notice of Intent to Introduce Evidence Pursuant to Evidence Rule 804(B)(6). Appellee sought to admit verbal and written statements made by Gomez to police and her telephone conversations with appellant. On February 2, 2014, a subpoena was returned showing that Gomez had not been served.

{¶22} Prior to the start of trial on February 5, 2014, the trial court held a hearing on appellee's motion. During the hearing, appellee played a telephone call between appellant and Gomez made on January 2, 2014 that had been recorded at the jail. During the call, appellant, who was emotional and at times yelling, told Gomez that his life was on the line and that he would beat it if no one went to court. Appellant told Gomez not to go to court and also told Gomez more than once to talk with Andrews and tell Andrews not to go to court.

{¶23} We find that the trial court did not err in admitting the Gomez statements under Evid.R. 804(B)(6). As noted by appellee, "[t]he jail house tape recorded call demonstrates [appellant's] numerous antics to get Gomez not to appear for trial but also to persuade Andrews not to appear for trial." There thus was evidence of appellant's wrongdoing pursuant to Evid.R. 804(B)(6).

{¶24} Moreover, assuming, arguendo, that the trial court erred in admitting the Gomez statements, we find that the admission of the same was harmless. As is stated above, Andrews, who was appellant's cousin, testified that he heard the window breaking and observed appellant entering his apartment through the same. Glass was found on the ground inside the apartment. He also testified that appellant bit him in the stomach and that he observed appellant hit Gomez several times. Photos of the injuries

to Andrews and Gomez were admitted into evidence. Moreover, during recordings of telephone calls that appellant made to Gomez while in he was in jail, which were admitted as evidence, appellant told Gomez that he was angry because Andrews would not open the door after appellant knocked. During the recordings, Gomez told appellant that he should not have busted the window. Based on the foregoing, we find that there is no reasonable possibility that the statements of Gomez that appellant challenges in this assignment of error contributed to his conviction for aggravated burglary.

{¶25} Appellant's first assignment of error is, therefore, overruled.

II

{¶26} Appellant, in his second assignment of error, argues that his conviction for aggravated burglary is against the manifest weight and sufficiency of the evidence. We disagree.

{¶27} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins,* 78 Ohio St.3d 380, 1997–Ohio–52, 678 N.E.2d 541, paragraph two of the syllabus. The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held, "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 the 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."

{¶28} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "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 overturned and a new trial ordered." *State v. Thompkins,* supra, 78 Ohio St.3d at 387*,* quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist. 1983). Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶29} Appellant was convicted upon one count of aggravated burglary pursuant to R.C. 2911.11(A)(1), which states "No person, by force, stealth, or deception, shall trespass in an occupied structure * * * when another person other than an accomplice of the offender is present, with purpose to commit in the structure * * * any criminal offense, if any of the following apply: [t]he offender inflicts, or attempts or threatens to inflict physical harm on another."

{¶30} Appellant argues that appellee failed to prove beyond a reasonable doubt that appellant entered the apartment by force, stealth, or deception and that appellant inflicted physical harm on another. According to appellant, the jury lost its way in convicting him.

{¶31} At trial, Melvin Andrews testified that he heard appellant banging on the front door, but did not want to let him in because he was concerned that there would be fighting. He then "heard the window breaking and he [appellant] was coming through,…" Transcript, Volume I at 151. He testified that he saw appellant, who did not have his consent to enter the apartment, coming through the window from the inside. Moreover, during jail house telephone calls from appellant to Gomez that were recorded and were part of the evidence, appellant told Gomez that she should have let him in and that he busted the window because he was mad that Andrews would not open the door. Thus, there was evidence that appellant entered Andrews' apartment by force, stealth, or deception.

{¶32} As is stated above, appellant also argues that appellee failed to prove beyond a reasonable doubt that he caused physical harm to another person once he was in the residence. Appellant notes that Gomez, who was the alleged victim of the domestic violence charge, did not appear at trial and that because she did not testify, there was no way for the jury to determine who caused her injuries.

{¶33} However, Andrews testified that appellant immediately jumped on Gomez and hit her all over more than once. Andrews further testified that appellant bit him on the stomach. Photographs of the injuries to both were shown to the jury. Thus, there was evidence that appellant caused physical harm or intended to cause physical harm.

{¶34} Based on the foregoing, we find that, 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 of aggravated burglary proven beyond a reasonable doubt. We further find that the jury did not lose its way in convicting appellant.

{¶35} Appellant's second assignment of error is, therefore, overruled.

{¶36} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Baldwin, J.

Gwin, P.J. and

Wise, J. concur.