

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 09CA21
	:	
vs.	:	Released: June 3, 2010
	:	
CHRISTOPHER M. LUCAS,	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
Defendant-Appellant.	:	

APPEARANCES:

Teresa D. Schnittke, Lowell, Ohio, for Defendant-Appellant.

James E. Schneider, Washington County Prosecuting Attorney, and Alison L. Cauthorn, Washington County Assistant Prosecuting Attorney, Marietta, Ohio, for Plaintiff-Appellee.

McFarland, P.J.:

{¶1} Christopher M. Lucas, Defendant-Appellant, was convicted of domestic violence in the Washington County Court of Common Pleas.

Lucas claims there was error below in that 1) the jury's verdict was against the manifest weight of the evidence; and 2) the trial court abused its discretion during sentencing in finding that Lucas had caused serious physical harm to the victim and that Lucas' relationship with the victim facilitated the offense.

{¶2} Because there was substantial evidence for the jury to conclude that each element of domestic abuse had been established, we overrule Lucas' manifest weight argument. But we agree that the trial court erred in imposing sentence. The court abused its discretion by finding that Lucas' relationship with the victim was a factor that made the offense more serious than the norm, because the existence of the relationship itself was a necessary element of the offense. Accordingly, we overrule Lucas' first assignment of error, sustain his second assignment of error, and remand the matter for resentencing in accordance with this opinion.

I. Facts

{¶3} The appellant, Christopher Lucas, and his wife Lindsey, the victim in this case, were married in January 2008. The couple lived at Lindsey's father's apartment. On March 6th, less than two months after they were married, the couple was involved in a physical altercation. Lindsey stated that Lucas injured her while attempting to force her to have sex. Lindsey claimed that when she resisted Lucas grabbed her, causing her to fall. He then twice slammed her against a bed railing, injuring her lower back and elbow. After the incident, Lucas left the residence and did not return.

{¶4} Later that day, and once Lindsey's family became aware of the incident, the police were notified. The responding officer saw some bruising on Lindsey. After the officer recommended that she seek medical attention, Lindsey went to the hospital where she was examined and prescribed pain medication.

{¶5} The next day, March 7th, Lucas returned to the home. When he arrived, Lindsey was there along with her father, brother, and aunt. Lindsey's aunt accused Lucas of raping Lindsey. When Lindsey's father questioned Lucas about what he had done, Lucas allegedly became angry and approached Lindsey with raised fists. Lindsey's father then grabbed Lucas, threw him against a wall, and struck him numerous times. Lucas fled the scene, but was arrested later that evening.

{¶6} As a result of the incidents of March 6th and March 7th, Lucas was charged with domestic violence. After a jury trial, he was convicted of domestic violence in violation of R.C. 2919.25(A) and 2919.25(D)(1) and (4). The trial court subsequently sentenced him to two years in prison. After sentencing, Lucas timely filed the current appeal.

II. Assignments of Error

First Assignment of Error

APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Second Assignment of Error

THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE FOLLOWING FACTORS, MAKING THIS OFFENSE MORE SERIOUS THAN THE NORM, WERE PRESENT IN THIS CASE: (1) THE DEFENDANT CAUSED SERIOUS PHYSICAL HARM TO THE VICTIM, AND (2) THE DEFENDANT'S RELATIONSHIP WITH THE VICTIM FACILITATED THE OFFENSE.

III. First Assignment of Error

{¶7} In his first assignment of error, Lucas argues that the jury's verdict was against the manifest weight of the evidence. “The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. Sufficiency tests the adequacy of the evidence, while weight tests “the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other[.]” *State v. Sudderth*, 4th Dist. No. 07CA38, 2008-Ohio-5115, at ¶27, quoting *Thompkins* at 387.

{¶8} “Even when sufficient evidence supports a verdict, we may conclude that the verdict is against the manifest weight of the evidence, because the test under the manifest weight standard is much broader than that for sufficiency of the evidence.” *State v. Smith*, 4th Dist. No. 06CA7, 2007-Ohio-502 at ¶41. When determining whether a criminal conviction is against the manifest weight of the evidence, we “will not reverse a

conviction where there is substantial evidence upon which the [trier of fact] could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt.” *State v. Eskridge* (1988), 38 Ohio St.3d 56, 526 N.E.2d 304, paragraph two of the syllabus. See, also, *Smith* at ¶41. We “must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial granted.” *Smith* at ¶41, citing *State v. Garrow* (1995), 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814; *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. However, “[o]n the trial of a case, * * * the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.” *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, at paragraph one of the syllabus.

{¶9} Lucas' manifest weight argument seems to be based entirely on Lindsey's credibility, or lack thereof. But he lists only the following to support his argument: 1) at the preliminary hearing, Lindsey stated that she spoke to Lucas “for a second” during a phone conversation while he was in jail, when the conversation actually lasted for seventeen minutes; 2) when asked whether she called or sent text messages to Lucas on March 7th, she

stated that she did not recall when, in fact, the parties had exchanged numerous messages; and 3) there were no other witnesses to the March 6th incident, and her father was the only other witness who testified concerning the March 7th incident. We find that these challenges to Lindsey's credibility fall well short of establishing that Lucas' conviction was against the manifest weight of the evidence.

{¶10} Though we must necessarily consider both witness credibility and the weight of the evidence when doing a manifest weight analysis, those issues are primarily for the trier of fact. Unlike the jury, we are not in a position to observe body language, demeanor, voice inflection and other information conveyed by a witness during testimony. Here, the jury listened to Lindsey recount, in detail, the events of March 6th and March 7th that led to Lucas' arrest. The jury obviously found her believable and undoubtedly gave much weight to her testimony in rendering its verdict. But the prosecution also presented the jury with additional, corroborating evidence.

{¶11} Foremost was the evidence of Lindsey's physical injuries. Both Lindsey's father and the officer who responded to the initial incident testified that they observed bruising on her body. Lindsey's father further testified that, after the incident occurred, she had difficulty walking due to the pain she suffered. Evidence of her injuries was further corroborated by

the medical records from Lindsey's March 6th hospital visit. Her exam indicated that she had suffered contusions, and she was prescribed pain medication for her injuries. Lindsey testified that she continued taking pain medication for five or six days after the incident.

{¶12} Lucas also implies that Lindsey was not credible based on a phone conversation they had while Lucas was in jail. In that conversation, Lindsey told Lucas that she loved him and that she would do whatever she could to get him released. When questioned why she would say such things if Lucas had, in fact, assaulted her, she stated the following:

{¶13} “Because I was still very scared and very afraid. I didn't know when he was going to be out, and he had told me before, that if I ever called the police on him, that he would kill me.”

{¶14} Lindsey further testified that though she told Lucas on the phone that she would try to get him released, she never made an attempt to do so - she neither recanted her version of events nor asked the police to drop the charges. Her father also testified regarding Lindsey's fear of Lucas. “[S]he would not leave the apartment for a couple weeks, because she knew he was arrested, but she didn't know if he got out on bail, and until she found out, and that there was an order keeping him away from her, she wouldn't

leave the house. She even cut her hair and dyed it a little different color, so she looked different.”

{¶15} After a complete examination of the record below, we find that there was substantial evidence for the jury's decision. Lucas’ manifest weight argument is predicated solely on challenging Lindsey's credibility. He points to no other evidence that the jury considered or should have considered in making its allegedly erroneous decision. But based on the testimony presented at trial, the fact that the jury found Lindsey credible in no way indicates that it clearly lost its way and created the kind of manifest miscarriage of justice requiring reversal. Accordingly, Lucas’ first assignment of error is overruled.

IV. Second Assignment of Error

{¶16} In his second assignment of error, Lucas argues that the trial court abused its discretion during sentencing. He contends that the court made several findings to substantiate its sentence, but that those findings are not supported by the record. Specifically, the court found that Lucas had caused serious physical harm to the victim and that his relationship to her facilitated the offense. Before addressing the merits of the argument, we first state the appropriate standard of review.

{¶17} The Supreme Court of Ohio addressed the issue of post-*Foster* felony sentencing in *State v. Kalish*, 120 Ohio St.3d 23, 896 N.E.2d 124, 2008-Ohio-4912. Under *Kalish*, appellate courts are required to apply a two-step approach when reviewing felony sentences. “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.” *Kalish* at ¶4. “As to the first step, the *Kalish* court did not clearly specify what ‘pertinent laws’ we are to consider to ensure that the sentence ‘clearly and convincingly’ adheres to Ohio law. The only specific guideline is that the sentence must be within the statutory range * * *.” *State v. Ross*, 4th Dist. No. 08CA872, 2009-Ohio-877, at ¶10.

{¶18} In the case sub judice, the court imposed a two-year prison term, which is more than the minimum for the offense, but within the statutory range. Further, both at the sentencing hearing and in its journal entry, the trial court specifically stated that it had weighed the applicable seriousness and recidivism factors and considered the principles and purposes of felony sentencing pursuant to R.C. 2929.11 through 2929.19. And it also stated that the two-year sentence was calculated to achieve those

purposes. Accordingly, we find that the trial court complied with all applicable rules and statutes in imposing Appellant's sentence, and that the sentence was not clearly and convincingly contrary to law. As such, the first prong of the *Kalish* test is satisfied and we now turn to the second prong, whether or not the trial court abused its discretion in imposing the sentence.

{¶19} As previously stated, the trial court found the following factors were present which made the crime more serious than the norm: “(1) The defendant caused serious physical harm to the victim. (2) The defendant's relationship to the victim facilitated the offense. The victim is the defendant's wife.” Lucas argues that neither of these findings were supported by the record. Because we find it to be dispositive, we first address Lucas’ second argument, that his relationship to the victim facilitating the offense.

{¶20} “A trial court may not elevate the seriousness of an offense by pointing to a fact that is also an element of the offense itself.” *State v. Davis*, 4th Dist. No. 09CA28, 2010-Ohio-555 at ¶24. “Under R.C. 2919.25(A), a defendant is guilty of domestic violence if he knowingly causes or attempts to cause physical harm to ‘a family or household member.’ Under R.C. 2919.25(F)(1)(a)(i), a ‘family or household member’

includes a spouse of the offender who ‘is residing or has resided with the offender.’” Id.

{¶21} As was the case in *Davis*, here there is no evidence that Lucas had any relationship with Lindsey beyond that which was necessary for a domestic violence conviction – that is, she was his wife and they resided or had resided with each other. In other words, a household or familial relationship between the two was necessary before Lucas could be convicted of domestic violence against Lindsey. As such, the trial court could not properly cite that relationship as a factor indicating that the offense was a more serious domestic violence offense. Accordingly, we find the court abused its discretion in determining that Lucas’ relationship with Lindsey facilitated the domestic violence charge. As a result, we must remand the matter for resentencing.

{¶22} As we noted in *Davis*, our decision does not necessarily require a lighter sentence on remand. Post *Foster*, trial courts have full discretion to determine whether a sentence satisfies the overriding purposes of Ohio's sentencing statutes. Here, the trial court may determine that, taken together, the myriad pertinent sentencing factors still indicate that a two-year sentence is appropriate. Our decision simply mandates that the trial court

may not use Lucas' relationship to Lindsey as a factor in determining that the offense was a more serious domestic violence offense.

V. Conclusion

{¶23} After reviewing the entire record below and weighing the evidence and all reasonable inferences, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice requiring reversal. Accordingly, Lucas' manifest weight argument has no merit and we overrule his first assignment of error. However, because the trial court found that Lucas' relationship with the victim made his offense more serious, when that relationship was a necessary element of the offense itself, his second assignment of error is warranted. Accordingly, to the extent the trial court relied upon that finding in imposing Lucas' sentence, there was error. As such, we sustain Lucas' second assignment of error and remand the matter for resentencing.

**JUDGMENT AFFIRMED IN
PART, REVERSED IN PART,
AND THE CAUSE REMANDED.**

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED IN PART, REVERSED IN PART, AND THE CAUSE REMANDED and that the Appellant and the Appellee split the 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 Washington County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Harsha, J. and Kline, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.