[Cite as *State v. Travlus,* 2010-Ohio-4046.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23666
Plaintiff-Appellee	:	
	:	Trial Court Case No. 09-CR-2022
v.	:	
	:	
JOVAN D. TRAVLUS	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 27th day of August, 2010.

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BROGAN, J.

Jovan D. Travlus appeals from his conviction and sentence following a jury trial on two counts of abduction and one count of domestic violence.

Travlus advances three assignments of error on appeal. First, he contends the trial court erred in allowing the jury to have exhibits that had not been admitted into

evidence. Second, he claims the trial court erred in overruling his motion for judgment of acquittal. Third, he argues that his convictions are against the manifest weight of the evidence.

The present appeal stems from a June 22, 2009 incident involving Travlus and a woman named Tonjia McQuay. At trial, McQuay testified that she first met Travlus in September 2008. (Trial transcript at 146). They developed a relationship, and he moved into her apartment in May 2009, and that he stayed there almost every night. She testified he had a key to her apartment and received mail there. (Tr. 148-169.) On the day in question, Travlus left the apartment with McQuay's cell phone. When he returned, she tried to get her phone back. (Id. at 152, 183-184). McQuay testified that an argument ensued. Travlus chased her out the back door of the apartment and grabbed her by her hair as she ran around a neighbor's car. (Id. at 152-154). According to McQuay, Travlus continued to pull her hair as she tried to break free. She initially sought to escape his grasp and return to her apartment. She changed her mind, however, and moved toward her neighbor's apartment, which was closer. (Id. at 154, 158-159). McQuay testified that she reached the neighbor's apartment and got just inside the door with Travlus still pulling her hair. (Id. at 154-155). At that point, Travlus pulled McQuay's hair for another minute or so and then stopped. (Id. at 155). McQuay stated that Travlus scratched her neck during the incident and pulled a "little bit" of her hair out. (Id. at 155, 162).

The State's next witness was McQuay's neighbor, Ellisha Rainey. She testified that the first thing she saw was McQuay "rush[ing] through" her back door. (Id. at 201, 204). According to Rainey, Travlus was pulling McQuay's hair and trying to get

her back outside. (Id. at 201). Rainey and her sister responded by grabbing McQuay and pulling her inside like “tug of war.” (Id.) Rainey explained that Travlus “wasn’t really moving [McQuay] nowhere ‘cause she had a good grip on the side of the door.” (Id. at 206). Nevertheless, Rainey and her sister grabbed McQuay’s waist and arms and attempted to pull her farther inside the house. (Id. at 206-207). Travlus finally let go and remained outside until police arrived. (Id. at 209).

The third witness for the State was Arica Hobson, who was in McQuay’s apartment at the time of the incident. Hobson confirmed that Travlus took McQuay’s cell phone and left. According to Hobson, McQuay borrowed a cell phone to call Travlus and ask him to return it. (Id. at 227-228, 248). Hobson testified that an argument occurred when Travlus returned and that he chased McQuay out the back door. (Id. at 228). At that point, Hobson went to the back door to see what would happen. (Id. at 231). Hobson watched as Travlus pulled on McQuay’s hair and clothes. (Id. at 232). According to Hobson, Travlus was attempting to pull McQuay one direction while McQuay was attempting to go another direction. (Id. at 232-233). Hobson testified that Travlus was “[n]ot really” able to move McQuay, who was “trying to pull back to get away.” (Id. at 233). McQuay eventually broke free and ran into the neighbor’s house. (Id.). After the incident, Hobson saw a red scratch on McQuay’s neck. (Id. at 234).

The final witness at trial was deputy Kyle Baranyi, who was dispatched to the scene of the incident. Upon arriving, he spoke briefly with Hobson and then observed Travlus and McQuay arguing. (Id. at 260-261). Baranyi testified that McQuay accused Travlus of hitting her, scratching her, and pulling her hair. (Id. at 261-262).

He noticed McQuay's hair was "messed up," and she appeared to be "upset." (Id.). Baranyi saw a scratch on McQuay's neck. (Id. at 267). He arrested Travlus for domestic violence. (Id. at 268). Travlus admitted to Baranyi that he lived at McQuay's apartment and had been living there for a couple of months. (Id. at 270).

Following Baranyi's testimony, the parties stipulated to the jury that Travlus had two prior felony domestic-violence convictions. The State then rested subject to something the trial transcript records as "(indiscernible)." (Id. at 281). Travlus rested without presenting any evidence. The jury found him guilty of both abduction charges, which were third-degree felonies, and domestic violence, which also was a third-degree felony due to his prior convictions. The trial court imposed concurrent three-year prison sentences. This appeal followed.

In his first assignment of error, Travlus contends the trial court erred in allowing the jury to have exhibits that had not been admitted into evidence. His argument concerns thirteen photographs that the prosecutor identified during trial and questioned witnesses about. Travlus asserts that the State never moved to admit the exhibits into evidence and that the trial court never admitted them. Therefore, he contends the trial court erred in sending the exhibits to the jury room.

For its part, the State contends the record reasonably supports an inference that it moved to admit the exhibits and that the trial court admitted them. The State cites the following comment by the prosecutor after presenting his evidence: "Your Honor, the State would rest subjective [sic] (indiscernible)." (Id. at 281). Defense counsel then rested, and the trial court instructed the jury: "You will have in your possession in the jury room the exhibits, and you'll have—I think the exhibits are the

photographs which were introduced during the course of the trial. Those are the only exhibits that you'll have with you. That's it. That's—those are the things that have been introduced, and those are the things that you are to consider as exhibits during the course of your deliberations. So you'll have those exhibits and the verdict forms." (Id. at 314). On appeal, the State contends we may infer from the transcript that the trial court admitted the exhibits outside the presence of the jury and off the record. Otherwise, the State argues, the trial court would not have submitted them to the jury for consideration.

Given the indiscernible portion of the prosecutor's statement, we cannot tell whether the State moved for admission of its exhibits. Moreover, the State concedes that the record contains no ruling by the trial court admitting the exhibits. All the record contains is the trial court's statement to the jury that the exhibits had been "introduced." This does not establish that the State sought admission or that the trial court admitted them. It establishes only that the trial court treated the exhibits as if they had been admitted, which is the very point of Travlus' assignment of error. Without actually admitting the exhibits into evidence, he claims the trial court erred in treating them as if they had been admitted and giving them to the jury.

While the record does not reflect that the trial court ever admitted the exhibits, we note too that Travlus never objected to the jury receiving them. Therefore, even if the trial court erred in allowing the jury to review the exhibits, we apply a plain-error standard of review. "Plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court's allegedly improper actions." *State v. Vannoy*, Champaign App. No. 09-CA-23,

2010-Ohio-2927, ¶14. Travlus has not established that the outcome of his trial would have been different if the jury had not reviewed the exhibits.

As set forth above, the exhibits at issue are thirteen photographs. The first picture is of McQuay's back door. (Trial transcript at 156). She testified that she ran out of it. The second picture is of the neighbor's car. (Id. at 157). McQuay testified she ran around it. The third picture shows the back of McQuay's apartment. (Id. at 158). McQuay used the picture to identify where she was running. The fourth picture is of McQuay's back yard. (Id. at 159). She used the picture to show where she went. The fifth picture shows the scratch on McQuay's neck. (Id. at 161). The sixth picture shows McQuay's hair on the back of her head. (Id. at 162). The seventh picture is of the front of McQuay's apartment. (Id.). She testified that Travlus entered the front of her apartment and chased her out the back. The eighth picture shows McQuay's couch. (Id. at 163). She testified that it depicted Travlus' "[c]lothes and stuff" on it. McQuay explained that she had placed the clothes on the couch because she had intended to kick Travlus out of her apartment on the day the fight occurred. (Id. at 164). The ninth picture shows more of Travlus' clothes that McQuay had moved downstairs because she wanted him out. (Id. at 165). The tenth picture is of an envelope addressed to Travlus at McQuay's apartment. (Id. at 166-167). McQuay identified the envelope as belonging to Travlus, apparently to help establish that he lived there.[1] (Id. at 167-168). The eleventh picture shows Travlus' suit, which was

[1]Travlus objected to the prosecutor's use of the photograph on the basis of hearsay and undue prejudice. The trial court overruled these objections, which have not been raised as issues on appeal. As set forth above, Travlus' only argument on appeal is that the jury should not have received any of the exhibits because they were not admitted into evidence.

among the clothes McQuay wanted out of her apartment. (Id. at 166). The twelfth and thirteenth pictures show additional pieces of mail addressed to Travlus at McQuay's apartment. (Id. at 168).

Upon review, we are unpersuaded that the outcome of Travlus' trial would have been different if the jury had not been given the photographs. Most of them are innocuous crime-scene type pictures. Two of them depict McQuay's physical condition (the scratch on her neck and her hair), which also was established through the testimony of more than one witness. Finally, with regard to the letters, they could not have had much impact on the jury's determination that Travlus resided with McQuay. Deputy Baranyi testified that Travlus *admitted* living at McQuay's apartment. (Id. at 270). Given the state of the evidence and the nature of the pictures, the trial court did not commit plain error by allowing the jury to have the pictures during deliberations. The first assignment of error is overruled.

In his second assignment of error, Travlus claims the trial court erred in overruling his Crim.R. 29 motion for judgment of acquittal. He insists that the State presented legally insufficient evidence to support his domestic violence and abduction convictions. A review of the record reveals, however, that Travlus did not move for acquittal under Crim.R. 29. He neither made such a motion at the close of the State's case nor after resting himself. (Id. at 281-282). In any event, we have held that it is plain error for a defendant to be convicted based on legally insufficient evidence. *State v. Morris*, Clark App. No. 06-CA-65, 2007-Ohio-3591, ¶42; *State v. Osterfeld*, Montgomery App. No. 20677, 2005-Ohio-3180, ¶9. Accordingly, we will

consider Travlus' argument.

When a defendant challenges the sufficiency of the evidence, he is arguing that the State presented inadequate evidence on each element of the offense to sustain the verdict as a matter of law. *State v. Hawn* (2000), 138 Ohio App.3d 449, 471. "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." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

In the present case, Travlus was charged with domestic violence under R.C. 2919.25(A), which provides that "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." "Household member" means anyone who resides with the offender who has also cohabited with the offender within one year of the alleged assault. See R.C. 2919.25(E)(1)(a)(2). Travlus contends the State presented insufficient evidence to establish that he and McQuay were household members. We disagree. As set forth above, Deputy Baranyi testified that Travlus admitted living at McQuay's apartment. McQuay testified that Travlus moved in with her in May, 2009 and had a key to her apartment and received his mail at that location. She testified that he helped pay for food and groceries at times and they sometimes slept in the same bed. (Tr. 169, 170.) The fact that he

was not named on her lease is not dispositive. Moreover, McQuay explained at trial that she told the police he "stayed" with her but did not "live" there because he was not on the lease.

In *State v. Williams* (1997), 79 Ohio St.3d 459, the court held that the offense of domestic violence arises out of the relationship of the parties rather than their exact living circumstances. The court stated the essential elements of "cohabitation" are (1) sharing of familial or financial responsibilities and (2) consortium.

There was sufficient evidence in this record that the jury could believe that McQuay was a "household member" of Travlus within the contemplation of the statute. There was also sufficient evidence that Travlus attempted to cause physical harm to McQuay.

With regard to abduction, Travlus was charged under R.C. 2905.02(A)(1) and R.C. 2905.02(A)(2). These provisions provide: "No person, without privilege to do so, shall knowingly do any of the following: (1) By force or threat, remove another from the place where the other person is found; (2) By force or threat, restrain the liberty of another person under circumstances that create a risk of physical harm to the victim or place the other person in fear." Travlus contends the State presented insufficient evidence to establish that he removed McQuay from anywhere or that he restrained her liberty to the point of placing her in fear. Again, we disagree.

The State argued at trial that Travlus grabbed McQuay's hair in the parking lot and "removed" her by dragging her against her will from one spot to another. Although relatively little case law exists on the issue of removal under R.C.

2905.02(A)(1), the cases that do exist indicate that removal need not be for any specific distance or duration. See, e.g., *State v. Witcher*, Lucas App. No. L-06-1039, 2007-Ohio-3960, ¶22. Being dragged for one or two feet has been found sufficient. Id.; see, also, *State v. Mason* (April 11, 2002), Franklin App. No. 01AP-953. Here McQuay testified that Travlus grabbed her hair in the parking lot near her neighbor's car. (Trial transcript at 153-154, 157-158). The prosecutor then asked: "Where does he take you?" (Id. at 158). McQuay responded: "Around the car." (Id.). Moments later, the prosecutor raised the issue again, asking McQuay: "Where does he take you from there?" (Id. at 159). McQuay responded by indicating on a picture: "All the way around, right there." (Id.). This testimony, if believed, is legally sufficient to establish that Travlus removed McQuay from one place to another by force.

Finally, with regard to abduction under R.C. 2905.02(A)(2), the trial testimony is sufficient to establish that Travlus forcibly restrained McQuay's liberty under circumstances that placed her in fear. Rainey testified that McQuay rushed through her back door with Travlus pulling her hair and trying to get her back outside. (Id. at 201, 205-206). Rainey and her sister responded by grabbing McQuay and trying to pull her farther inside. (Id.). McQuay was screaming and trying to back herself into the apartment. (Id. at 206). Travlus was not able to move her because she had a good grip on the door frame. (Id. at 206). McQuay testified that she was afraid. (Id. at 154). After a minute or so, Travlus gave up and let go of her hair. (Id. at 207). But while Travlus had McQuay's hair and was pulling on her, he restrained her liberty (i.e., her freedom to go where she wanted) under circumstances that placed her in fear. Because the record contains legally sufficient evidence to support Travlus' three

convictions, we overrule his second assignment of error.

In his third assignment of error, Travlus argues that his convictions are against the manifest weight of the evidence. He claims the weight of the evidence does not support a finding that he shared a household with McQuay, that he removed her, or that he restrained her liberty.

When a conviction is challenged on appeal as being against the weight of the evidence, an appellate court essentially functions as a thirteenth juror. *State v. Hobbs*, Montgomery App. No. 22784, 2009-Ohio-3764, ¶24. It must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, 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 ordered.'" *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387 (citations omitted). A judgment should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

In the present case, the evidence does not weigh heavily against Travlus' domestic violence conviction. As noted above, he admitted to deputy Baranyi that he lived with McQuay. (Trial transcript at 270). This fact was confirmed by McQuay at trial. (Id. at 148). Hobson also testified that Travlus and McQuay lived together. (Id. at 222). Finally, Rainey, who was McQuay's next-door neighbor, testified that Travlus appeared to be living with McQuay. (Id. at 199-200). In light of this testimony, the jury did not clearly lose its way.

The evidence also does not weigh heavily against Travlus' abduction conviction based on restraining McQuay's liberty. As set forth above, Travlus struggled with McQuay in the doorway of Rainey's apartment. By grabbing her hair and pulling on her, he prevented her from going where she wanted to go, which was farther inside the apartment. Although he eventually released McQuay, she testified that the stalemate in the doorway lasted "a minute" and that she was afraid. (Id. at 154-155). Rainey confirmed that McQuay seemed scared. (Id. at 204-205). Thus, the evidence supports a finding that Travlus forcibly restrained her liberty under circumstances that placed her in fear.

The only remaining issue is whether Travlus' abduction conviction based on removal is against the weight of the evidence. In an opening statement, the prosecutor told the jury that Travlus violated R.C 2905.02(A)(1) because McQuay was "dragged, pulled, [and] yanked from one place to another" outside of her apartment. (Id. at 139-141).

Thereafter, in closing argument, the prosecutor stated:

"It's not a distance thing. If you find that he dragged her from one spot to a different spot, it might not be what you thought abduction was before you came in here, but that's abduction according to the Ohio Revised Code. It is removing some—moving somebody against their will and doing it by force. And in this case, the force was dragging her [by her] hair as she's fighting against him. * * *"

"* * *

"* * * [McQuay], when she came in and said, 'He's been living with me for two

months. He was mad. He chased me out that back door. He dragged me by my hair around the car in the parking lot and I'm struggling with him. I'm trying to get back to the house, but he's dragging me this way. So I end up going to my neighbor's house.' He changed her course." (Id. at 286-287).

As set forth above, the record does contain some evidence suggesting that Travlus dragged McQuay in the parking lot. After establishing that Travlus grabbed McQuay's hair, the prosecutor asked her where he took her. McQuay responded: "Around the car." (Id. at 158). When the prosecutor asked a second time where Travlus took her, McQuay responded while pointing to a picture: "All the way around, right here." (Id. at 159). On cross examination, defense counsel asked McQuay whether she got dragged onto the asphalt. She replied: "Around the car." She then added that she did not fall to the ground. (Id. at 187). On re-direct examination, the prosecutor asked McQuay how far Travlus had pulled her. McQuay responded: "It was around the car." (Id. at 190-191). McQuay then added that she could not break away and that Travlus was pulling her hair from the car to her neighbor's apartment. (Id. at 191).

On re-cross examination, however, McQuay testified somewhat differently. The following exchange occurred between defense counsel and McQuay:

"Q. Ms. McQuay, you were describing answering a question about being—that Jovan had his hand on your hair as you went around the car?

"A. Yes.

"Q. But you were in front of him the whole time.

"A. Yeah.

"Q. I'm sorry?

"A. He was pulling me by my hair.

"Q. He's behind you with his hand on your hair, and you're going around the car, is that right?

"A. Yes.

"Q. So you're pulling him?

"A. Well, he was pulling—I was trying to get away from him.

"Q. But he wasn't pulling you, was he?

"A. Yeah, by my hair.

"Q. He wasn't dragging you, was he? He was—you were still going forward. He didn't stop you from going around the car, did he?

"A. Yeah, because he had me by my hair.

"Q. *But you kept moving around the car, didn't you?*

"A. Yeah, trying to get away from him.

"Q. So he wasn't pulling you back by your hair.

"A. He was pulling me by my hair. I mean I can't remember. I know he was pulling me though.

"Q. But did—were you going backwards?

"* * *

"Q. Ms. McQuay.

"A. Uh-huh.

"Q. *When you left your apartment, you started around your neighbor's car,*

right?

"A. *Yes.*

"Q. *Jovan grabbed the back of your hair.*

"A. *Yes.*

"Q. *And you kept going, didn't you?*

"A. *Uh-huh.*

"*Q. Yes?*

"A. *Yes.*

"Q. *And he pulled on you.*

"A. *Uh-huh.*

"Q. *And you kept going?*

"A. *Yeah, trying to get away from him*.

"Q. *And he pulls again*.

"A. *He just kept pulling*.

"Q. *And you kept going*.

"A. *Yep*."

(Id. at 193-195) (Emphasis added).

Hobson, the only third-party who saw what took place outside, testified on direct examination that Travlus was "pulling at [McQuay's] hair, on her clothes, dragging her, calling her all kind of names, and she was trying to escape around to the next-door neighbor's house." (Id. at 229). The prosecutor then inquired again about what Hobson saw. Hobson testified that Travlus was trying to move McQuay one direction while McQuay was trying to go another direction. (Id. at 232-233).

When the prosecutor asked whether Travlus was "able to physically move McQuay," Hobson replied: "Not really, 'cause she's trying to pull back to get away from him." (Id. at 233). Then, on cross examination, Hobson again asserted that Travlus was "pulling [McQuay] and dragging her by her hair and her [shirt] strap." (Id. at 252). At the same time, however, Hobson testified that McQuay was "backing up" and trying to get away from Travlus. (Id.).

Having reviewed the foregoing testimony, we find that Travlus' abduction conviction based on removing McQuay is against the weight of the evidence. Ordinarily, the fact that a jury hears two different versions of events does not render a conviction against the weight of the evidence. *State v. Barnes*, Franklin App. No. 04AP-1133, 2005-Ohio-3279, ¶17. Here, however, the same witness said seemingly contradictory things. In response to questioning from the prosecutor,[2] McQuay first asserted that Travlus had dragged her around a car. On cross examination, defense counsel asked McQuay whether she fell to the asphalt. She responded: "Around the car." She then clarified that she did not go to the ground. On re-direct examination, McQuay claimed that Travlus had "pulled" her. The weight of the evidence persuades us, however, that Travlus *pulled on* her, not that he actually had moved her.

The re-cross examination quoted above is the most detailed testimony about the hair pulling in the parking lot. It reflects that Travlus failed to stop McQuay's progress or physically move her anywhere. McQuay conceded to defense counsel that she "kept going" around the car with Travlus in tow. Similarly, Hobson initially

[2]The prosecutor at least twice asked McQuay, "Where does he take you?" (Trial transcript at 158-159). These questions assumed that Travlus took her somewhere without first establishing that fact.

testified that she saw Travlus outside "pulling at [McQuay's] hair, on her clothes, dragging her * * *." Shortly thereafter, however, Hobson told the jury that Travlus was "[n]ot really" able to move McQuay.

Although Travlus undoubtedly grabbed McQuay's hair and pulled it, the weight of the evidence does not support a finding that he removed her from one place to another. The State's theory at trial was that Travlus had committed abduction by forcibly dragging McQuay around a car in the parking lot. Based primarily on her own testimony, however, and acting in our capacity as the thirteenth juror, we are firmly convinced the State failed to prove that Travlus succeeded in dragging McQuay anywhere. Accordingly, his abduction conviction under R.C. 2905.02(A)(1) is against the manifest weight of the evidence. The third assignment of error is sustained, in part.

The trial court's judgment is affirmed in part and reversed in part. The judgment is affirmed with regard to Travlus' conviction and sentence for domestic violence in violation of R.C. 2919.25(A) and abduction in violation of R.C. 2905.02(A)(2). The judgment is reversed with regard to Travlus' conviction and sentence for abduction in violation of R.C. 2905.02(A)(1). Finally, because we have reversed the abduction conviction based on the weight of the evidence, we will remand the cause to the trial court for the State to proceed with a retrial on that charge if it wishes. See *State v. Macias*, Darke App. No. 1562, 2003-Ohio-1565, ¶56.

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FAIN and FROELICH, JJ., concur.

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