[Cite as *State v. Sibole*, 2018-Ohio-3203.]

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

STATE OF OHIO	:	
Plaintiff-Appellee	:	Appellate Case No. 2017-CA-68
v.	:	Trial Court Case No. 17-CR-0220
MICHAEL TYLER SIBOLE	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 10th day of August, 2018.

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ANDREW P. PICKERING, Atty. Reg. No. 0068770, 50 E. Columbia Street, Suite 449, Springfield, Ohio 45502
Attorney for Plaintiff-Appellee

NICOLE RUTTER-HIRTH, Atty. Reg. No. 0081004, 2541 Shiloh Springs Road, Trotwood, Ohio 45426
Attorney for Defendant-Appellant

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HALL, J.

{¶ 1} Michael Sibole appeals his conviction for domestic violence. Finding no error, we affirm.

I. Background

{¶ 2} On the morning of April 4, 2017, John Scroggins, a HUD housing inspector, was driving between properties in Springfield, Ohio. While driving on East Street, a woman ran across the street in front of him pursued by a man. The woman screamed, " 'Help me.' " (Tr. 104). Scroggins slowed and watched as the man tackled the woman to the ground. The man then pulled her up by her hair and pulled her back to a house on the street by her hair. Scroggins immediately called 911 and reported what he had seen and heard.

{¶ 3} Officers Kevin Hoying and Candido Garcia of the Springfield Police Division responded to the scene. Officer Hoying arrived first and knocked on the door of the house that Scroggins saw the man and woman enter. Galen Boyd, Sibole's father, answered the door and spoke to Officer Hoying. Hoying also spoke with Sibole, who denied that anything had happened. Officer Hoying then attempted to speak with Sibole's girlfriend, Hannah Birt, but she had locked herself in a bathroom. Hoying knocked on the door and asked her to come out. She refused, and Hoying heard the shower go on. Five to ten minutes later, Birt came out of the bathroom. Officer Garcia had arrived by this time. Garcia testified that Birt was "visibly upset, shaken, looked like she had been crying." (Tr. 139). He noticed that "she had scratches and marks on her." (*Id.*). Hoying testified similarly, saying that "[s]he was very emotionally shaken and just very visibly upset, had been crying, and started crying again." (Tr. 150). He saw a bruise on her arm, and Birt

reluctantly admitted that Sibole had caused it. Officer Garcia photographed Birt, including the bruise. She was very reluctant to be photographed, and she wore a hood tight around her head so that only her face showed. Birt refused to file a statement of probable cause against Sibole. According to Officer Hoying, "[s]he definitely did not want him arrested." (Tr. 153). Sibole's father testified that Sibole and Birt were in a relationship at the time. Birt has a son named Michael Sibole, Jr. Sibole's father testified that Sibole had told him that the child was his (Sibole's).

{¶ 4} At some point, after Hoying had made it clear that he was going to arrest Sibole, the officers learned that Sibole had fled out of the back of the house. They gave chase and caught Sibole not far away.

{¶ 5} Sibole was indicted on one count of domestic violence in violation of R.C. 2919.25(A), with allegations of prior domestic-violence convictions. The case was tried to a jury. The jury found Sibole guilty and found that he had been previously convicted of domestic violence. The trial court sentenced Sibole to 18 months in prison.

{¶ 6} Sibole appealed.

II. Analysis

{¶ 7} Sibole presents two assignments of error for our review. The first challenges the admission of the testimony that Birt said Sibole caused the bruise on her arm. The second assignment of error challenges the sufficiency and manifest weight of the evidence.

A. Hearsay

{¶ 8} Sibole argues in the first assignment of error that the trial court erred by allowing the state to introduce the hearsay testimony of Officer Hoying about statements

made by Birt. Hoying testified that Birt said that Sibole caused the bruise on her arm. Sibole had objected to this testimony specifically on the ground that it was inadmissible hearsay: “I would object. Hearsay.” * * * “There’s no indication that this was an excited utterance.” (Tr. 152). The trial court ruled that the testimony fell under the hearsay exception for excited utterances.

{¶ 9} Sibole first argues here that he was denied the right to cross-examine the witness against him in violation of his right to confront his accuser guaranteed by the Sixth Amendment to the United States Constitution. The Confrontation Clause states that “[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him.” But Sibole did not raise any objections based on the Confrontation Clause at trial. It is on appeal that he for the first time challenges the admission of the testimony on this basis. The “failure to timely advise a trial court of possible error, by objection or otherwise, results in a waiver of the issue for purposes of appeal.” *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997). Both the Tenth and First districts have determined that when an objection is made on hearsay grounds, a Confrontation Clause objection is not preserved. *State v. Hairston*, 2016-Ohio-8495, 79 N.E.3d 1193, ¶ 34 (10th Dist.); *State v. Harris*, 1st Dist. Hamilton No. C-130442, 2014-Ohio-4237, ¶ 14. On this record we are unable to conclude that the specific objection made on hearsay grounds, referencing the lack of an excited utterance, preserved a constitutional Confrontation Clause question for appeal. Consequently, we determine whether the admission of the testimony violated Sibole’s Sixth Amendment right to confrontation using a plain-error analysis. *See* Crim.R. 52(B). To prevail, Sibole “must show that an error occurred, that the error was plain, and that but for the error, the

outcome of the trial clearly would have been otherwise." *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 69. Given our conclusion in paragraph 12, *infra*, that admission of the statement was not prejudicial, we see no plain error.

{¶ 10} Sibole also argues that the hearsay testimony did not fall under the hearsay exception for excited utterances, Evid.R. 803(2).

> An "excited utterance" is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Evid.R. 803(2). In order for an alleged excited utterance to be admissible, four prerequisites must be satisfied: (1) a startling event produced a nervous excitement in the declarant, (2) the statement was made while still under the stress of excitement caused by the event, (3) the statement relates to the startling event, and (4) the declarant personally observed the startling event. *State v. Brown*, 112 Ohio App.3d 583, 601, 679 N.E.2d 361 (12th Dist. 1996). "The excited utterance exception to the hearsay rule exists because excited utterances are the product of reactive rather than reflective thinking and, thus, are believed inherently reliable." *State v. Ducey*, 10th Dist. Franklin No. 03AP-944, 2004-Ohio-3833, ¶ 17.

State v. Hopkins, 2d Dist. Montgomery No. 27131, 2018-Ohio-1864, ¶ 36. We review a ruling on the admissibility of an alleged excited utterance for an abuse of discretion. *State v. Henley*, 2d Dist. Montgomery No. 20789, 2005–Ohio–6142, ¶ 22.

{¶ 11} On this record we are unable to conclude that the trial court abused its

discretion by admitting the statement as an excited utterance. The testimony from the two officers that the victim was "visibly upset, shaken" and "was very emotionally shaken and just visibly upset" at the time she made the questioned statement supports the trial court's ruling to admit the statement.

{¶ 12} Even if we were to determine that the victim's statement was inadmissible, we would not find reversible error. Under the criminal harmless-error rule, [a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Crim.R. 52(A). An error may be disregarded as harmless error if a defendant has not suffered any prejudice as a result. *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 25. Whether an error has affected the substantial rights of a defendant is determined using this tripartite analysis: "First, it must be determined whether the defendant was prejudiced by the error, i.e., whether the error had an impact on the verdict. Second, it must be determined whether the error was not harmless beyond a reasonable doubt. Lastly, once the prejudicial evidence is excised, the remaining evidence is weighed to determine whether it establishes the defendant's guilt beyond a reasonable doubt." *State v. Harris*, 142 Ohio St.3d 211, 2015-Ohio-166, 28 N.E.3d 1256, ¶ 37, citing *Morris* at ¶ 25, 27-29, and 33.

{¶ 13} Sibole was convicted of domestic violence under R.C. 2919.25(A), an element of which is "caus[ing] or attempt[ing] to cause physical harm." It is this element that the testimony about the bruise supports. But none of that testimony was needed to establish this element, because there was ample evidence that Sibole attempted to physically harm Birt. Scroggins's testimony that he saw Sibole tackle Birt and then pull her back to the house by her hair was sufficient to establish the physical-harm element.

Compare State v. Flores, 12th Dist. Warren No. CA2014-03-037, 2014-Ohio-5751, ¶ 13-14 (evidence sufficient where it showed that the defendant grabbed or shoved the victim, pulled her hair, and spit on her); *State v. Cross*, 9th Dist. Summit No. 25487, 2011-Ohio-3250, ¶ 22 (evidence that the defendant caused or attempted to cause harm sufficient where testimony of bystander established that the defendant dragged the victim into house by her hair); *State v. Keener*, 11th Dist. Lake No. 2005-L-182, 2006-Ohio-5650, ¶ 52 (evidence sufficient where the defendant caused physical harm by pulling the victim's hair and pushing her head to floor). We also note the testimony of Officer Hoying that Sibole attempted to flee. " 'It is well established that evidence of flight from the scene of a crime, resisting arrest, escape, and the like are permissible as evidence of consciousness of guilt and, thus, of guilt itself.' " *State v. Griffith*, 2015-Ohio-4112, 43 N.E.3d 821, ¶ 34 (2d Dist.), quoting *State v. Frock*, 2d Dist. Clark No. 2004 CA 76, 2006-Ohio-1254, ¶ 57. Indeed, we have said that "[a] juror may infer guilt from [the defendant]'s flight from the scene of the crime." *State v. Beal*, 2d Dist. Clark No. 2007-CA-86, 2008-Ohio-4007, ¶ 7.

{¶ 14} Given the evidence presented, even if it was error to admit the hearsay testimony, we do not think that Sibole was prejudiced by the admission. And we conclude that the admission was harmless beyond a reasonable doubt. The outcome of the trial would not have been different if the testimony that Sibole caused the bruise on the victim's arm had been excluded.

{¶ 15} The first assignment of error is overruled.

B. Evidence

{¶ 16} The second assignment of error argues that the evidence was insufficient

to support the conviction for domestic violence and adds, almost as an afterthought, that the conviction was also against the manifest weight of the evidence.

{¶ 17} Two different standards must be brought into play. "In reviewing a record for sufficiency, '[t]he 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. Wilks*, 2018-Ohio-1562, ___ N.E.3d ___, ¶ 156, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. And "[t]o evaluate a claim that a jury verdict is against the manifest weight of the evidence, we review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that we must reverse the conviction and order a new trial." *Id.* at ¶ 168, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 18} Sibole was found to have violated 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." He argues that the evidence does not adequately establish the "physical harm" and "family or household member" elements.

{¶ 19} Scroggins testified that Sibole tackled Birt, picked her up by her hair, and then dragged her by her hair. Sibole says that there is no evidence that Birt had injuries consistent with this testimony. The only injuries noted by the officers were a "faded" or "light" bruise and scratches. Sibole points out that while Birt said that he caused the

bruise, she did not say when that happened. Sibole says that the jury lost its way by finding him guilty because it gave too much weight to Scroggins's testimony.

{¶ 20} We reject Sibole's argument for a couple of reasons. First, the statutory definition of "physical harm to persons" is "any injury, illness, or other physiological impairment, *regardless of its gravity or duration*." (Emphasis added.) R.C. 2901.01(A)(3). Thus, visible marks are not necessary to find physical harm. *State v. Ward*, 11th Dist. Geauga No. 2008-G-2851, 2009-Ohio-3145, ¶ 28 (saying that "it is not necessary that visible markings must be observed"). We note too that while the officers were questioning her, Birt wore a hood tight around her head, which may have hidden some injuries. Second, the physical-harm element can be established with evidence that Sibole "attempt[ed] to cause physical harm." Even if the bruises seen by the officers were not caused as a part of the events on the day in question, there is ample evidence that Sibole at least attempted to physically harm Birt by tackling her and pulling her back into the house by her hair. *Compare Flores*, 12th Dist. Warren No. CA 2014-03-037, 2014-Ohio-5751, at ¶ 13-14 (evidence sufficient where it showed that the defendant grabbed or shoved the victim, pulled her hair, and spit on her); *Cross*, 9th Dist. Summit No. 25487, 2011-Ohio-3250, at ¶ 22 (evidence that the defendant caused or attempted to cause harm sufficient where testimony of a bystander established that the defendant dragged the victim into house by her hair); *Keener*, 11th Dist. Lake No. 2005-L-182, 2006-Ohio-5650, at ¶ 52 (evidence sufficient where the defendant caused physical harm by pulling the victim's hair and pushing her head to floor).

{¶ 21} As to the "family or household member" element, Sibole argues that the only evidence supporting that element came from his father, Galen Boyd, who testified that

Sibole and Birt have a child together. Sibole says that his paternity was not established by genetic testing or other verified means.

{¶ 22} One of the statutory definitions of "family or household member" is "[t]he natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent." R.C. 2919.25(F)(1)(b). Here, Sibole's father, Galen Boyd, testified that he lives in the house to which officers responded. He said that Birt was his son's girlfriend and that they had been together "[a]bout three years, two, three years." (Tr. 133). And Boyd said that Birt and Sibole have a child and further that he knows that Sibole is the child's father because Sibole told him so. There is no evidence that anyone other than Sibole and Birt are the child's natural parents.

{¶ 23} Boyd's testimony is sufficient to establish that Sibole and Birt are the natural parents of the child. A paternity test is not necessary. *See State v. Mills*, 2d Dist. Montgomery No. 21146, 2005-Ohio-2128, ¶ 15-16 (concluding that uncontested evidence that the defendant is the father of victim's child, if believed, "is clearly sufficient to establish" that the defendant is the father of the child). To the extent that Sibole's argument questions Boyd's credibility, we note that "witness credibility is not a proper matter on review of the sufficiency of the evidence," *Wilks*, 2018-Ohio-1562, ___ N.E.3d ___, ¶ 162. Credibility is relevant to the question of the evidence's weight. But "[t]he credibility of the witnesses and the weight to be given to their testimony is a matter for the trier of facts, the jury here, to resolve." *State v. White*, 2d Dist. Montgomery No. 20324, 2005-Ohio-212, ¶ 65, citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). "This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving

at its verdict." (Citation omitted.) *Id.* at ¶ 67. Here, nothing in the record calls into question the credibility of Boyd's testimony.

{¶ 24} "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." *Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph two of the syllabus. Here, witness testimony is sufficient to support Sibole's conviction. This evidence, if believed, would have convinced the average mind that he was guilty beyond a reasonable doubt. In addition, this is not the " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541, quoting *Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717. Given the lack of conflicting evidence and no reason to doubt the witnesses, we conclude that the jury neither lost its way nor created a miscarriage of justice in finding Sibole guilty.

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

III. Conclusion

{¶ 26} We have overruled both of the assignments of error presented. The trial court's judgment is therefore affirmed.

. . . .

FROELICH, J. and TUCKER, J., concur.

Copies mailed to:

Andrew P. Pickering
Nicole Rutter-Hirth
Hon. Richard J. O'Neill