[Cite as *State v. Clauson*, 2017-Ohio-9403.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 16 CO 0006
V.	)	
	)	OPINION
PAUL E. CLAUSON,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Columbiana County Municipal Court of Columbiana County, Ohio Case No. 2014 CRB 1330
JUDGMENT:	Motion sustained. Judgment affirmed.
APPEARANCES: For Plaintiff-Appellee	No brief filed
For Defendant-Appellant	Attorney Desirae Dipiero 7330 Market Street Youngstown, Ohio 44512

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: December 26, 2017

[Cite as *State v. Clauson*, 2017-Ohio-9403.]
DONOFRIO, J.

{¶1} Defendant-appellant, Paul Clauson, appeals from a Columbiana County Municipal Court judgment convicting him of domestic violence, following a bench trial.

{¶2} E.R. moved into appellant's home in December 2013. The two were married from 1998 to 1999, but have since been divorced. They rekindled their relationship in 2013, when E.R. moved in with appellant.

{¶3} Approximately a year later, on December 8, 2014, E.R. and appellant got into a heated argument. According to E.R., appellant became violent and threatened to kill her. She went upstairs and shut herself in a bedroom. E.R. stated that appellant kicked the door and continued to threaten her. E.R. messaged a friend on Facebook and told the friend she was fearful for her life. The friend called the police.

{¶4} The police arrived and knocked at the front door. When no one answered, the police pushed the door open. They found appellant upstairs in the hallway and E.R. still locked in the bedroom. E.R. was hysterical and crying. She told the police officers that appellant threatened to kill her and she was in fear for her life. The officers photographed the bedroom door, noting the damage where it appeared to have been kicked. Appellant was placed under arrest.

{¶5} Appellant was charged with one count of domestic violence, a fourth-degree misdemeanor in violation of R.C. 2919.25(C).

{¶6} The matter proceeded to a bench trial where the court heard testimony from E.R., one of the responding officers, and appellant. The court found appellant guilty. It sentenced him to 30 days in jail with 15 days suspended, ordered him to pay a $200 fine, and placed him on two years' probation.

{¶7} Appellant filed a timely notice of appeal on March 24, 2016.

{¶8} Appellant's appointed counsel has filed a no merit brief and request to withdraw pursuant to *State v. Toney*, 23 Ohio App.2d 203, 262 N.E.2d 419 (7th Dist. 1970).

{¶9} This court issued a judgment entry notifying the parties that appellant's counsel had filed a *Toney* brief and advising appellant he had 30 days to file a pro se

brief. Appellant did not file a pro se brief. Consequently, we are left only to conduct our own independent review pursuant to *Toney*.

{¶10} In *Toney*, this court set out the procedure to be used when appointed counsel finds that an indigent criminal defendant's appeal is frivolous. The procedure set out in *Toney*, at the syllabus, is as follows:

> 3. Where a court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, he should so advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.
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> 4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, pro se.
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> 5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the arguments pro se of the indigent, and then determine whether or not the appeal is wholly frivolous.
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> * * *
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> 7. Where the Court of Appeals determines that an indigent's appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed.

{¶11} Although counsel asserts there is no merit, she nonetheless raises two potential assignments of error regarding sufficiency of the evidence and manifest weight of the evidence. We will address those assignments of error.

{¶12} Sufficiency of the evidence is the legal standard applied to determine

whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the verdict. *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). In essence, sufficiency is a test of adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id*. In reviewing the record for sufficiency, 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. *Smith*, 80 Ohio St.3d at 113.

{¶13} Appellant was convicted of domestic violence in violation of R.C. 2919.25(C), which provides: "No person, by threat of force, shall knowingly cause a family or household member to believe that the offender will cause imminent physical harm to the family or household member." A "family or household member" includes a "spouse, a person living as a spouse, or a former spouse of the offender" "who is residing or has resided with the offender." R.C. 2919.25(F)(1)(a)(i).

{¶14} We must examine the state's evidence to determine whether it was sufficient to support the conviction.

{¶15} E.R. was the state's first witness. E.R. testified that she and appellant were married from 1998 to 1999. (Tr. 5). She stated that they reconnected in 2012, and in 2013 she moved in with him. (Tr. 6). E.R. testified that she lived with appellant for approximately one year. (Tr. 6-7). She stated that on the date in question, December 8, 2014, she was still living with appellant. (Tr. 7, 13).

{¶16} On that day, E.R. testified she returned home from work and began talking to appellant about ending their relationship. (Tr. 7). She stated that appellant became violent and threatened her. (Tr. 7). E.R. stated that she went upstairs and appellant followed her. (Tr. 7). She testified that she shut the bedroom door and appellant kicked the door. (Tr. 7). E.R. stated that appellant told her he was going to kill her if she left. (Tr. 8). She stated she believed him and was fearful of him. (Tr. 8).

{¶17} E.R. identified two photographs that the police took of the bedroom door. (Tr. 8; State Exs. 1 and 2). The photographs show at least two holes in the door. (State Exs. 1 and 2). E.R. testified that there had been no damage to the door previously. (Tr. 8).

{¶18} E.R. testified that while she was in the bedroom, she messaged a friend on Facebook. (Tr. 9). She told the friend she was fearful for her life and she was afraid appellant was going to kill her. (Tr. 9). She stated she did not call the police because appellant would hear her so she contacted her friend using the computer instead. (Tr. 13). E.R. testified that she stayed in the bedroom for three hours. (Tr. 9). Eventually, she stated, the police arrived. (Tr. 9).

{¶19} Patrolman Cannon was the state's second and final witness. Patrolman Cannon stated that on the day in question he had been working for the Columbiana County Sheriff's Department. (Tr. 18-19). He and his sergeant responded to a call from a third party of a domestic situation at appellant's house. (Tr. 19, 23-24). Upon arriving at appellant's house, the officers pounded on the door but no one answered. (Tr. 20). Patrolman Cannon stated that the door swung open and they announced themselves as the sheriff's office, but still no one came to the door. (Tr. 20). He testified that they entered into the house and saw appellant standing on the stairs outside of a closed door. (Tr. 20-21). Inside the room with the closed door was E.R.. (Tr. 21). The patrolman testified that his sergeant asked E.R. to unlock the bedroom door so he could speak with her. (Tr. 21). He noticed that the door was "partially destroyed like somebody had been kicking it, punching it." (Tr. 21). The patrolman believed it to be "fresh damage." (Tr. 21).

{¶20} Patrolman Cannon testified that E.R. was hysterical and crying. (Tr. 21). She told them that she feared for her life and that appellant had threatened to kill her. (Tr. 22). The patrolman then arrested appellant for domestic violence. (Tr. 22).

{¶21} This evidence is sufficient to support a domestic violence conviction. The state presented evidence that appellant, by threat of force, caused E.R. to

believe that he would cause her imminent physical harm by threatening her life. Moreover, E.R. was appellant's former spouse and had been living with him for the past year. Thus, the state presented sufficient evidence going to each element of domestic violence.

{¶22} Next, we must examine whether appellant's conviction was against the manifest weight of the evidence.

{¶23} In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine 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. *Thompkins*, 78 Ohio St.3d at 387. "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.'" *Id.* (Emphasis sic.) In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence produced at trial. *Id*. at 390.

{¶24} *Thompkins* addressed a manifest weight argument in the context of a jury trial. But the standard of review is equally applicable when reviewing a manifest weight challenge from a bench trial. *State v. Layne,* 7th Dist. No. 97 CA 172, 2000 WL 246589, at *5 (Mar. 1, 2000). A reviewing court will not reverse a judgment as being against the manifest weight of the evidence in a bench trial where the trial court could reasonably conclude from substantial evidence that the state has proved the offense beyond a reasonable doubt. *State v. Hill,* 7th Dist. No. 09-MA-202, 2011-Ohio-6217, ¶ 49, citing *State v. Eskridge,* 38 Ohio St.3d 56, 59, 526 N.E.2d 304 (1988).

{¶25} Yet granting a new trial is only appropriate in extraordinary cases where the evidence weighs heavily against the conviction. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). This is because determinations of witness credibility, conflicting testimony, and evidence weight are primarily for the trier of the

facts who sits in the best position to judge the weight of the evidence and the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *State v. Rouse*, 7th Dist. No. 04-BE-53, 2005-Ohio-6328, ¶ 49, citing *State v. Hill*, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. Thus, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. No. 99-CA-149, 2002-Ohio-1152.

{¶26} In addition to the evidence set out above, we must also consider appellant's testimony, which he offered in his defense.

{¶27} Appellant testified that E.R. moved in with him in December 2013. (Tr. 31). He stated that on the day in question, he and E.R. were already broken up and she had moved in with a friend. (Tr. 32). Nonetheless, appellant stated that on that day he loaned E.R. $100 and she left his house around 2:30 p.m. (Tr. 32). He stated that she returned between 4:30 and 5:00 p.m. (Tr. 33). Appellant stated that he was not happy with E.R. when she returned home because there was no food in the house. (Tr. 33). After they argued, appellant stated that E.R. took a box of wine up to the bedroom. (Tr. 34). Appellant stated that E.R. stayed in the bedroom and that he spoke to her through the closed door. (Tr. 35). He told her to get out of his house. (Tr. 35). Appellant testified that he never threatened E.R.. (Tr. 36). He stated that she was crying and belligerent. (Tr. 36). Appellant stated that he and E.R. continued to argue for some time. (Tr. 37). He also stated that she filled his cup up from the box of wine. (Tr. 37).

{¶28} Appellant stated that when the police arrived, he was in the living room watching television. (Tr. 38). When he heard the knock at the door, appellant stated he went upstairs so that he could see who was outside. (Tr. 39). At that point, appellant stated that the police "busted" down his door. (Tr. 39).

{¶29} On cross-examination, appellant admitted to kicking the door twice. (Tr. 42). He also claimed that the bedroom door did not lock. (Tr. 45-46). Again, he

testified that he did not threaten to harm or kill E.R.. (Tr. 47).

{¶30} Appellant's conviction is not against the manifest weight of the evidence. This case came down to credibility. E.R. testified that appellant threatened her life and she was fearful he would kill her. Appellant testified that while he and E.R. argued, he never threatened her. The trial court, as the trier of fact, was in the best position to judge the witnesses' credibility. *DeHass*, 10 Ohio St.2d at paragraph one of the syllabus. The court was able to view the witnesses' gestures, voice inflections, and demeanor while they testified. We will not second-guess the trial court's credibility determination. Moreover, Patrolman Cannon's testimony corroborated E.R.'s testimony. The patrolman testified that E.R. was crying and hysterical when he arrived and that E.R. told him that appellant had threatened her life. Thus, the manifest weight of the evidence supports appellant's conviction.

{¶31} In addition to sufficiency and manifest weight, we must also examine appellant's sentence.

{¶32} An appellate court reviews a misdemeanor sentence for abuse of discretion. *State v. Tribble*, 7th Dist. No. 16 MA 0009, 2017-Ohio-4425, ¶ 24; R.C. 2929.22. Abuse of discretion connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶33} In rendering a misdemeanor sentence, the trial court must consider the factors set out in R.C. 2929.22(B)(1). The factors include the nature and circumstances of the offense; the offender's criminal record; whether there is a substantial risk the offender is a danger to others; whether the victim's youth, age, disability, or other factor made the victim particularly vulnerable to the offense or made the impact of the offense more serious; likelihood of recidivism; any emotional, mental, or physical injuries traceable to military service that contributed to the offense; and the offender's military service record. R.C. 2929.22(B)(1)(a)-(g). The trial court's failure to consider these factors amounts to an abuse of discretion. *State v. Fares*, 7th Dist. No. 15 MA 0210, 2016-Ohio-8555, ¶ 35.

{¶34} While the better practice is for the trial court to state on the record that it considered the statutory factors, R.C. 2929.22(B) does not require the court to do so. *Id*. at ¶ 37, citing *State v. Lundberg*, 2d Dist. No. 2278, 2009-Ohio-1641, ¶ 21. Thus, when the trial court's sentence is within the statutory limit, an appellate court is to presume that the trial court followed the standards in R.C. 2929.22 absent a showing to the contrary. *Id*., citing *State v. Bodnar*, 7th Dist. No. 12-MA-77, 2013-Ohio-1115, ¶ 20.

{¶35} In this case, the trial court did not state on the record that it considered the R.C. 2929.22(B) factors. But its sentence was within the statutory limit. Therefore, we can presume the trial court followed the applicable standards.

{¶36} Appellant was convicted of a fourth-degree misdemeanor. The maximum jail sentence for a fourth-degree misdemeanor is 30 days. R.C. 2929.24(A)(4). The trial court sentenced appellant to 30 days, with 15 days suspended. The trial court also ordered appellant to pay a $200 fine. For a fourth-degree misdemeanor, an offender cannot be fined more than $250. R.C. 2929.28(A)(2)(a)(iv). Thus, both appellant's jail sentence and fine are within the statutory limits. Nothing in the record indicates that the trial court erred in sentencing appellant.

{¶37} Upon review of the case file and appellate filings, we conclude there are no appealable issues.

{¶38} For the reasons stated above, the trial court's judgment is hereby affirmed. Counsel's motion to withdraw is granted.

Waite, J., concurs.

DeGenaro, J., concurs.