[Cite as *State v. Williams*, 2011-Ohio-2702.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio	Court of Appeals Nos. L-10-1019 L-10-1020 L-10-1021
Appellee	
v.	Trial Court Nos. CR0200902571 CR0200902106 CR0200802216
Richard Williams	
Appellant	**DECISION AND JUDGMENT**
	Decided: June 3, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Claudia A. Ford, Assistant Prosecuting Attorney, for appellee.

Timothy W. Longacre, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Richard Williams, appeals the January 15, 2010 judgment of the Lucas County Court of Common Pleas which, following a jury trial convicting him of two counts of domestic violence and a court finding of a community

control violation, sentenced appellant to a total of six years of imprisonment. For the reasons set forth herein, we affirm.

{¶ 2} The relevant facts concerning this appeal are as follows. Appellant was indicted on six felony counts in four separate indictments: 1) December 31, 2008, charging one count of domestic violence, 2) June 2, 2009, charging two counts of domestic violence, 3) June 5, 2009, charging one count of intimidation of a witness, and 4) August 17, 2009, charging one count of aggravated burglary and one count of domestic violence. A community control violation was also alleged in a prior domestic violence conviction. These counts all involved the same victim, S.J., the mother of appellant's child. Appellant entered not guilty pleas to the counts.

{¶ 3} The state filed a notice of intent to use evidence of appellant's prior domestic violence convictions in order to prove an element of the felony domestic violence counts. On September 21, 2009, the state also filed a notice of intent to use evidence of other acts of domestic violence under Evid.R. 404(B). The state argued that prior acts of domestic violence are admissible at trial to show a defendant's intent. In opposition, appellant filed a motion in limine arguing that the intent in a domestic violence case is "self-evident" and that admission of such evidence would be unduly prejudicial.

{¶ 4} On November 25, 2009, the trial court, in a written decision, denied appellant's motion in limine. The court noted that in domestic violence cases, prior acts of domestic violence against the same victim may be admissible to prove the defendant's intent.

{¶ 5} The case proceeded to trial on December 7, 2009. The victim testified that she and appellant have a child together. As to the prior domestic violence incidents, the victim testified that appellant first became abusive toward her in 2007. The victim testified about an incident on September 29, 2007, where appellant twisted her arm; and in December 2007, where he threw her down a flight of stairs while she was pregnant. The victim also discussed some 2008 incidents.

{¶ 6} As to the charges in the indictment, the victim testified that on December 30, 2008, appellant had her car (that appellant had purchased for her.) In the late evening, she and two friends, Annette C. and Corie H., walked to the neighborhood carry-out, the Rainbow Market, to meet appellant and get her car. According to the victim, she and appellant were in between two houses when he grabbed her by the neck and hit her head against the side of the house. Appellant testified that she had a lump on her head.

{¶ 7} Annette C. and Corie H. also offered testimony as to this incident. Annette C. testified that she had a "falling out" with the victim and that they were no longer friends. Regarding the December 30, 2008 incident, Annette said that appellant and the victim were both grabbing at the car keys. The next day, Annette accompanied the victim to the courthouse to meet with Toledo Police Detective Jaggers. Annette stated that she went along with what the victim told police even though it was a lie. Eventually, Annette invoked her Fifth Amendment privilege.

{¶ 8} Corie H. testified that on December 30, 2008, appellant and the victim were "scuffling" over the keys and that the victim asked for help to get appellant off of her. Corie stated that she did not see appellant strike the victim.

{¶ 9} Toledo Police Officer David O'Brien responded to the victim's call. The victim indicated that appellant choked and punched her. Witness Annette C. corroborated her story. Toledo Police Detective Mary Jo Jaggers testified that on December 31, 2008, she met with the victim. Jaggers stated that she felt a "knot" on the victim's head.

{¶ 10} As to the March 1, 2009 incident, the victim testified that she was upstairs at her home watching television with the door closed when appellant, who somehow gained access without a key, kicked her bedroom door open, smashed her fan against the wall, and stated that the victim was going to appellant's home. The victim stated that he shoved her down the stairs; she ran out the front door. According to the victim, Annette C., who lived across the courtyard, saw the commotion and began pulling the victim into her home. Appellant tried to grab both ladies but they made it into Annette's home. They called the police.

{¶ 11} Annette C. testified that she and the victim planned the lies they were going to tell the police. Responding Toledo Police Officer John Noonan testified that he interviewed the victim and Annette. The victim indicated that she had a temporary protection order against appellant and that he attacked her. Noonan saw no signs of forced entry at the victim's home.

{¶ 12} The next alleged incident occurred on May 6, 2009, while the victim was living with a friend. On that date, appellant pulled up in the victim's car; the victim testified that she requested the car keys. According to the victim, appellant then began yelling at her and ordered her to get in the car. The victim saw police nearby and ran to them. Appellant left the area.

{¶ 13} According to the victim, appellant called her a few hours later requesting his apartment key that was on the ring with the car keys. The victim agreed to meet him at the Save-A-Lot parking lot. The victim stated that when she handed him the key, he twisted her arm and bit her thumb. Appellant then walked with the victim to his friend's house and got her a towel because her hand was bleeding.

{¶ 14} Once the victim was back at her temporary residence she called the police. Toledo Police Officer Julio Ramirez responded to the call. Officer Ramirez testified that the victim was very upset and that she had a "nasty" bite on her right hand. Officer Ramirez photographed the wound and the victim went to the hospital for treatment. The photographs and the medical records were admitted into evidence.

{¶ 15} Regarding the alleged May 8, 2009 incident, the victim testified that appellant arrived at the house where she was staying and began arguing with her. The victim stated that appellant tried to grab her and take her with him but that she kicked him and was able to get away. The victim then called the police. Toledo Police Officer Julio Ramirez responded to the call, completed some paperwork, and spoke with a detective.

{¶ 16} The final alleged incident testified to by the victim occurred on June 2, 2009, at Toledo Municipal Court. The victim testified that appellant made a gesture that she perceived indicated that he would kill her.

{¶ 17} The victim's friend, Heather H., who was with her in court that day, could not recall seeing appellant make a gun gesture to his head. Toledo Police Detective Michael Skotynsky testified that on the date of the alleged incident he was assigned as the court liaison at Toledo Municipal Court. The victim's advocate alerted him to the alleged incident in the hallway and he observed the victim shaking and being held by Heather. The victim told him that appellant made a gun gesture to his head.

{¶ 18} Following the state's case, the parties stipulated to two prior domestic violence convictions which occurred in 2002. Appellant was also granted his Crim.R. 29 motion as to the intimidation of a witness charge.

{¶ 19} Appellant then presented the testimony of Lisa S. who observed the victim on May 6, 2009, and heard her state that she cut her finger with a knife. Appellant also presented the testimony of Toledo Police Detective Robert Furr who stated that on January 20, 2009, appellant flagged down him and his partner to tell them that his girlfriend had just called in a domestic violence charge. The officers and appellant were located some distance from where the alleged incident took place. The officers then proceeded to the victim's home where she stated that the victim just left. Officer Furr then informed her that appellant could not have perpetrated the offense; she admitted that she was angry and wanted to get him into trouble.

{¶ 20} Following deliberations, the jury found appellant not guilty of the December 30, 2008 incident. As to the March 1, 2009 incident, the jury found appellant guilty of domestic violence and not guilty of aggravated burglary. The jury found appellant guilty of the May 6, 2009 incident and not guilty of the May 8, 2009 incident.

{¶ 21} On January 15, 2010, appellant was sentenced to a three-year sentence and a two-year sentence for the domestic violence convictions, to be served consecutively. Appellant was also sentenced to a one-year prison term for his community control violation, to be served consecutively for a total of six years. This appeal followed.

{¶ 22} Appellant raises four assignments of error for our review:

{¶ 23} "I. The trial court erred by allowing the prosecutor to repeatedly introduce testimony relative to evidence prohibited under Ohio Rule of Evidence 404(B).

{¶ 24} "II. The defendant-appellant was denied the effective assistance of counsel in that he was irreparably harmed by the admission of irrelevant testimony; hearsay testimony; highly prejudicial and impermissible 404(B) testimony.

{¶ 25} "III. The defendant-appellant's convictions are supported by insufficient evidence and are therefore a denial of due process.

{¶ 26} "IV. The defendant-appellant's convictions are against the manifest weight of the evidence."

{¶ 27} In appellant's first assignment of error, he argues that the trial court erred by allowing evidence prohibited under Evid.R. 404(B). Specifically, appellant argues

that the victim's testimony which recalled alleged abuse in 2007 and 2008, predating the counts in the indictment, was prejudicial.

{¶ 28} We first note that appellant did not object to the admission of the testimony. The failure to object to such alleged errors waives all but plain error. *State v. Watson*, 3d Dist. No. 14-09-01, 2009-Ohio-6713, ¶ 41, citing *State v. Johnson* (1999), 134 Ohio App.3d 586, 590. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus; *State v. Witcher*, 6th Dist. No. L-06-1039, 2007-Ohio-3960, ¶ 32.

{¶ 29} Further, the evidence at issue was the subject of appellant's motion in limine. A trial court's ruling on a motion in limine is a ruling to exclude or admit evidence; thus, our standard of review on appeal is whether the trial court committed an abuse of discretion that amounted to prejudicial error. *State v. Graham* (1979), 58 Ohio St.2d 350. An abuse of discretion is demonstrated where the trial court's attitude in reaching its decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 30} Evidence of other acts which are wholly independent of the crime charged is generally inadmissible. *State v. Thompson* (1981), 66 Ohio St.2d 496, 497. In that vein, Evid.R. 404(B) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Accordingly, evidence of other crimes committed by the accused either before or after the crime charged is inadmissible to show a propensity to commit crimes, but may be relevant and admissible to show motive or intent, the absence of mistake or accident, or a scheme, plan or system in committing the act in question. *State v. Broom* (1988), 40 Ohio St.3d 277, paragraph one of the syllabus. Evidence of an accused's other acts is thus admissible only when it "tends to show" one of the material elements in the charged offense and only when it is relevant to the proof of the accused's guilt for such offense. *State v. Curry* (1975), 43 Ohio St.2d 66, 68-69. See R.C. 2945.59.

{¶ 31} As to the admission of other acts of domestic violence, the Ninth Appellate District has held that prior acts against the same victim are admissible in a domestic violence prosecution to prove the defendant's intent. *State v. Blonski* (1997), 125 Ohio App.3d 103, 113. In order to be admissible, the current act and the other acts "must have occurred reasonably near to each other and a similar scheme, plan, or system must have been utilized to commit the offense at issue and the other offenses." Id., citing *State. v. Elliott* (1993), 91 Ohio App.3d 763, 771.

{¶ 32} In the present case, at trial the state elicited testimony from the victim about the following incidents. First, the victim testified that the first abusive incident occurred in 2007 when appellant did not like her clothing choice; he grabbed her arm and made her change. Next, the victim stated that in September 2007, appellant held a gun to

her head and twisted her arm. The victim stated in December 2007, appellant threw her down a flight of stairs when she was five months pregnant.

{¶ 33} The victim testified that after their child was born she and appellant argued and appellant grabbed her. The victim stated that when their child was a few weeks old, appellant threw the victim down the stairs while she was holding the baby. The recounting of these events consisted of roughly three pages of trial transcript.

{¶ 34} The trial court preliminarily allowed admission of the above testimony based upon its conclusion that it helped to establish the appellant's intent. We cannot say that the trial court abused its discretion in so finding; we further cannot find plain error in its admission. The incidents occurred within two years of the events at issue and involved the same parties. Further, contrary to appellant's contention, there is no evidence that appellant was prejudiced by the admission of the testimony. The jury found appellant not guilty as to three of the five counts before it - two of which were domestic violence charges. Thus, the events did not "poison" the jury to decide his guilt prior to hearing the testimony.

{¶ 35} Based on the foregoing, we find that the court did not err in allowing testimony regarding the prior incidents. Appellant's first assignment of error is not well-taken.

{¶ 36} In appellant's second assignment or error he asserts that he was denied the effective assistance of trial counsel. Appellant argues that counsel was ineffective by failing to object to the "other acts" testimony. In addition, appellant claims that counsel

failed to object to several references to appellant's criminal record. Appellant further argues that counsel failed to object to the use of prejudicial booking photographs of appellant. Finally, appellant claims that counsel failed to object to several instances of hearsay testimony.

{¶ 37} To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington* (1984), 466 U.S. 668, 687. Proof of prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. Further, debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips* (1995), 74 Ohio St.3d 72, 85.

{¶ 38} As to appellant's claim that counsel was ineffective in failing to object to the "other acts" evidence under Evid.R. 404(B), we have already addressed the admissibility of such testimony; thus, appellant's counsel was not ineffective in failing to object to its admission. The references to appellant's criminal record included the fact that there was a temporary protection order in place. In addition, multiple police witnesses referenced appellant's prior convictions as dictating the course of the

investigation. The state or the court quickly halted the offending testimony. Trial counsel's failure to object could reasonably be seen as a tactical attempt to minimize the impact of the prior convictions. Further, the jury learned of the stipulated convictions prior to commencing their deliberations.

{¶ 39} Appellant also contends that trial counsel was ineffective in failing to object to the admission of two booking photographs. Their admission occurred during the testimony of Toledo Municipal Court liaison Detective Michael Skotynsky. Skotynsky was testifying as to the events that allegedly occurred on June 2, 2009, at the courthouse. When showed the photographs, Skotynsky referred to them as booking photographs. (The photographs do not have any identifying information but do look like typical "mug" shots.) Immediately thereafter, a bench conference took place. The following discussion was had:

{¶ 40} "MS. FORD (assistant prosecutor): I don't know how to resolve that. He just indicated that it was a booking photo after I just –

{¶ 41} "THE COURT: Well, I think maybe – is there an objection to that?

{¶ 42} "MS. ROLLER (defense counsel): Your Honor, I would object only because we have had conversation about their nature and removing certain information from them in the past.

{¶ 43} "THE COURT: Well, I don't know if this booking photo based on one of the – as to one of these offenses but there can't be testimony that he has a prior record except there is going to be – it's highly objectionable.

{¶ 44} "MS. FORD: It's a booking photo from the June 2nd, Judge, that was redacted with all information so it just appeared to be a photograph.

{¶ 45} "THE COURT: Inasmuch as this photo is from the June 2nd incident, which is a subject of the current proceeding that will be noted, but then let's stay away from prior records."

{¶ 46} The state then proceeded to elicit testimony that the photographs did not show a lump on appellant's head. (Defense argued that appellant had been pointing at a lump on his head opposed to making a gun gesture.) Upon review, we find that the subject of the photographs had been previously discussed, that counsel did object to Skotynsky's testimony, and that the court, after hearing argument, allowed them for the state's purpose of discrediting appellant's defense.

{¶ 47} Finally, appellant argues that counsel failed to object to several instances of hearsay testimony. Appellant cites to only once instance where Officer Noonan testified that the victim told him that appellant was "after her" and that he was "attacking her." The state then admonished him to not relay what someone said to him. Arguably, defense counsel should have objected to this testimony. However, we cannot say that the result of the trial would have been different absent the testimony. As stated below, the jury had sufficient, credible evidence before it to reach its conclusion.

{¶ 48} Based on the foregoing, we find that appellant was not deprived the effective assistance of trial counsel. In fact, counsel aggressively cross-examined witnesses and was able to secure an acquittal as to one count and not guilty jury findings

as to three of the remaining five counts. Appellant's second assignment of error is not well-taken.

{¶ 49} Appellant's third and fourth assignments of error will be jointly addressed. Appellant argues that his two domestic violence convictions were not supported by sufficient evidence and were against the weight of the evidence. Appellant contends that the only evidence against him came from the victim; the state's attempts to corroborate her testimony failed. Appellant further contends that the victim had a reason to fabricate her testimony – that she was jealous of appellant's relationship with her former friend Annette. Appellant further claims that on multiple occasions the victim's testimony was contradicted by police.

{¶ 50} Sufficiency of the evidence and manifest weight of the evidence are quantitatively and qualitatively different legal concepts. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency of the evidence is purely a question of law. Id. Under this standard of adequacy, a court must consider whether the evidence was sufficient to support the conviction as a matter of law. Id. The proper analysis 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. Williams* (1996), 74 Ohio St.3d 569, 576, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 51} In contrast, a manifest weight challenge questions whether the state has met its burden of persuasion. *Thompkins* at 387. In making this determination, the court of

appeals sits as a "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 [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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 52} Appellant was found guilty of two counts of domestic violence, R.C. 2919.25(A) and (D)(4). The statute provides:

{¶ 53} "(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.

{¶ 54} "* * *

{¶ 55} "(4) If the offender previously has pleaded guilty to or been convicted of two or more offenses of domestic violence or two or more violations or offenses of the type described in division (D)(3) of this section involving a person who was a family or household member at the time of the violations or offenses, a violation of division (A) or (B) of this section is a felony of the third degree, * * *."

{¶ 56} After a careful review of the evidence presented at trial, we find that the verdict was supported by sufficient evidence and was not against the manifest weight of the evidence. As to the March 1, 2009 incident, the victim testified that appellant

grabbed her and threw her down the stairs; she then ran to her neighbor's house. Appellant then tried to grab both women, they broke free and called the police. Officer Noonan interviewed the victim and neighbor and former friend Annette. On May 6, 2009, there was testimony that appellant grabbed the victim and bit her hand. The responding officer testified that the victim was very upset. Photographs of the bite and hospital records were admitted into evidence. Further, the parties stipulated to the prior domestic violence convictions.

{¶ 57} Appellant attempts to discredit the victim's testimony by arguing that she was charged with falsifying a police report and that her testimony was uncorroborated. The jury simply assessed the credibility of the victim in the state's favor. There is nothing in the record to suggest that the jury lost its way or created a manifest miscarriage of justice. Appellant's third and fourth assignments of error are not well-taken.

{¶ 58} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE