[Cite as *State v. Allen*, 2012-Ohio-3989.]

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

State of Ohio — Court of Appeals No. WD-11-012

Appellee — Trial Court No. 10 CR 057

v.

Jason Allen — **DECISION AND JUDGMENT**

Appellant — Decided: August 31, 2012

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
David E. Romaker Jr., Assistant Prosecuting Attorney, for appellee.

Richard A. Schmidt, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals his conviction for domestic violence entered on a guilty verdict following a jury trial in the Wood County Court of Common Pleas. Because we conclude that the court's response to a jury question during deliberations did not constitute plain error and the verdict was supported by the evidence, we affirm.

{¶ 2} On November 6, 2009, appellant, Jason Allen, his then girlfriend, Brandice Luzadder, and her two children visited the home of Luzadder's stepfather in Bradner, Ohio. On the way home, Luzadder drove. They stopped at a Wayne gas station. Appellant went inside to make a purchase. While inside appellant engaged in a conversation with a young woman with whom he was apparently acquainted. There is some dispute as to the length and to degree of intimacy of this conversation.

{¶ 3} When appellant returned to the car, Luzadder questioned appellant's exchange with the woman. Appellant and Luzadder agree that they argued as they continued toward their home. At one point, appellant grabbed the steering wheel and jerked it to the right. The car swerved, coming to rest partially on the berm. According to Luzadder's trial testimony, during this swerve, her head banged against the driver's side window.

{¶ 4} When the car came to a stop, Luzadder ordered appellant to get out and drove off without him. According to appellant, after Luzadder left he called a friend who picked him up and allowed him to spend the night.

{¶ 5} When Luzadder came home in the early morning hours she talked to her brother about what had happened and decided to call the Wood County Sheriff's Department. A short time later a deputy took Luzadder's statement. The deputy attempted to contact appellant over the weekend, but was unable to do so.

{¶ 6} On February 4, 2010, the Wood County Grand Jury indicted appellant for domestic violence with a prior conviction specification, a fourth degree felony. Appellant pled not guilty and that matter proceeded to a trial before a jury.

{¶ 7} At trial, the state called Luzadder who testified to the argument, the jerked steering wheel and striking her head on the window. Questioned about statements she made to the deputy the night of the incident that appellant had struck her in the face with an open hand during the argument, Luzadder denied memory of that part of the fight.

{¶ 8} Appellant testified in his own behalf. He admitted the argument and jerking the steering wheel, but offered a different version of his reason. According to appellant, Luzadder had become so concentrated on the argument between the two that she failed to see a Black Labrador run onto the road in front of the car. Appellant testified that he did not intend to harm Luzadder or place her children in jeopardy. He wanted to swerve to miss the dog.

{¶ 9} The jury found appellant guilty. The trial court accepted the verdict and, following a presentence investigation, sentenced him to three years community control and 250 hours of community service. From this judgment of conviction, appellant brings this appeal.

{¶ 10} Appellant sets forth the following two assignments of error:

> 1. The court's misleading and improper answer to the sequestered jury precluded Appellant's chance for a fair trial.
>
> 2. The decision of the jury was against the manifest weight of the evidence presented at trial pursuant to Ohio law and the U.S. Constitution.

I. Jury Question

{¶ 11} During deliberations, the jury sent the following question to the court, "If the jerk of the wheel caused an injury even though the injury was an unexpected

outcome, does that constitute 'knowingly' if the injury caused was a reasonably probable result?"

{¶ 12} In discussion with counsel, the court proposed to clarify the definition of "knowingly" by contrasting it with the mental state of "recklessness." The state objected, maintaining that no further instruction was necessary. Appellant's counsel favored the court's approach, but argued that the contrast should have been with an "intentional" mental state. In the end, over the state's objection, the court responded to the jury question by reiterating the definitions of "knowing" and "cause" used in the original charge and adding the following paragraph:

> Reckless conduct is not knowing conduct. A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

{¶ 13} Appellant notes that within an hour of the court's response to the jury's question, they returned a verdict. From this, appellant deduces that the jury found that it was reasonably foreseeable that appellant's action, pulling the wheel, might have resulted in an accident, causing foreseeable injury. If this were the standard, appellant insists, anyone who drives recklessly with a family member in the car could be convicted of domestic violence.

{¶ 14} Notwithstanding appellant's speculation into the mind of the jury, he did not object to the response to the jury's question. A failure to timely object to jury instructions waives all except plain error. *State v. Wickline*, 50 Ohio St.3d 114, 119, 552 N.E.2d 913 (1990). Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph two of the syllabus.

{¶ 15} All of the instructions on culpable mental states in the original charge to the jury and in response to the jury's question encompass the statutory language that defines "knowingly" and "recklessly" in R.C. 2901.22(B) and (C). The only addition in the purportedly offending response is the "recklessly" definition by which the court distinguishes what is not "knowingly." While the state's objection that the response introduces an element that had not been in the case before might have some merit, we fail to see how this contrasting example could produce a negative impact for appellant. Accordingly, it cannot be said that the response about which appellant complains clearly altered the outcome of the trial. Appellant's first assignment of error is not well-taken.

II. Manifest Weight

{¶ 16} In his second assignment of error, appellant asserts that the jury's verdict was against the manifest weight of the evidence.

{¶ 17} A verdict may be overturned on appeal if it is either against the manifest weight of the evidence or because there is an insufficiency of evidence. In the former, the appeals court acts as a "thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be

overturned and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541(1997). In the latter, the court must determine whether the evidence submitted is legally sufficient to support all of the elements of the offense charged. *Id.* at 386-387. The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime proven beyond a reasonable doubt. *Id.* at 390 (Cook, J., concurring); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. *See also State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978); *State v. Barnes*, 25 Ohio St.3d 203, 495 N.E.2d 922 (1986).

{¶ 18} R.C. 2919.25 provides, "No person shall knowingly cause or attempt to cause physical harm to a family or household member." It is uncontested that Brandice Luzadder at the time was a member of appellant's household. It is unrefuted that when the car swerved she struck her head on the driver's side window and, potentially, Luzadder and her children were at even greater risk. Appellant does not deny that he pulled the steering wheel, causing the car to swerve. Construing the evidence most strongly in favor of the prosecution, a reasonable jury could have dismissed appellant's assertion of a dog in the highway and found that he pulled the wheel in anger, with knowledge of the potential consequences. This is sufficient to satisfy the elements of the offense of domestic violence.

{¶ 19} As to whether the verdict is against the weight of the evidence, we have carefully reviewed the record of these proceedings and fail to find anything to suggest

that the jury lost its way or that the verdict represents a manifest miscarriage of justice. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 20} On consideration whereof, the judgment of the Wood County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

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, P.J. ______________________ JUDGE

Thomas J. Osowik, J. ______________________ JUDGE
CONCUR.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.