

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 12AP-646
 : (C.P.C. No. 11CR09-4939)
 Leonard W. Peterson, II, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on May 2, 2013

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

W. Joseph Edwards, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, P.J.

{¶ 1} Defendant-appellant, Leonard W. Peterson, II, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

I. Factual and Procedural Background

{¶ 2} A Franklin County Grand Jury indicted appellant with counts of aggravated burglary in violation of R.C. 2911.11 and felonious assault in violation of R.C. 2903.11. Both counts also contained a repeat violent offender specification in violation of R.C. 2941.149. The charges arose from a confrontation between appellant and a woman named Shelly Giles. Appellant entered a not guilty plea to the charges and proceeded to a

jury trial. At trial, the state and appellant presented different versions of the events that took place between appellant and Giles.

{¶ 3} On the evening of June 23, 2011, Angie Gochenouer went to Giles' apartment to have a few drinks. Appellant and Gochenouer were engaged to be married at the time. Gochenouer brought her daughter to the apartment, who ended up watching cartoons in a bedroom with Giles' neighbor, Josh Marshall. Later in the evening, appellant knocked on the door to Giles' apartment. Giles opened the door and appellant asked her where Gochenouer and her daughter were. Giles refused to let appellant inside. At this point, the versions of events presented by the two sides differ.

{¶ 4} The state presented testimony from Giles and Marshall that appellant then forced his way into Giles' apartment and, once inside, began to punch and kick her and smashed her face into a fish tank. Alternatively, appellant presented testimony from Gochenouer and from his mother (who was also there that night) that Gochenouer and her daughter ran out of the apartment when appellant came to the door. According to those witnesses, appellant never entered Giles' apartment and never hit Giles. The jury ultimately found appellant guilty of aggravated burglary but not guilty of felonious assault.¹ The trial court sentenced him accordingly.

II. The Appeal

{¶ 5} Appellant appeals and assigns the following errors:

I. The trial court erred when it entered judgment against the appellant when the evidence was insufficient to sustain a conviction.

II. The trial court erred in overruling appellant's motion for acquittal pursuant to Criminal Rule 29.

III. The trial court erred when it entered judgment against the appellant when the conviction and was not supported by the manifest weight of the evidence.

IV. The trial court erred by admitting testimony by Josh Marshall regarding the appellant's alleged assault of Angela Gouchenouer in violation of Ohio Rule of Evidence 404(B) thus depriving appellant of his due process rights under the state and federal constitutions.

¹ The trial court dismissed the repeat violent offender specification.

V. The trial court erred when it instructed the jury that to find appellant guilty of aggravated burglary, it only need to find that the appellant had the purpose to commit *a criminal offense* and not the specific criminal offense of felonious assault with which appellant was charged, thus depriving appellant of his due process rights under the state and federal constitutions.

VI. The sentence imposed by the trial court is inconsistent with the principles set forth under the Ohio Revised Code and thus is contrary to law.

A. The Sufficiency and Manifest Weight of the Evidence

{¶ 6} Appellant contends in his first, second, and third assignments of error that his convictions are not supported by sufficient evidence and are against the manifest-weight of the evidence. We disagree.

{¶ 7} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally adequate to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Whether the evidence is legally sufficient to support a verdict is a question of law. *Id.*

{¶ 8} In determining whether the evidence is legally sufficient to support a conviction, " '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶ 34, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. A verdict will not be disturbed unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484 (2001).

{¶ 9} In this inquiry, appellate courts do not assess whether the state's evidence is to be believed, but whether, if believed, the evidence admitted at trial supports the conviction. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79-80 (evaluation of witness credibility not proper on review for sufficiency of evidence); *State v. Bankston*, 10th Dist. No. 08AP-668, 2009-Ohio-754, ¶ 4 (noting that "in a sufficiency of the evidence review, an appellate court does not engage in a determination of witness

credibility; rather, it essentially assumes the state's witnesses testified truthfully and determines if that testimony satisfies each element of the crime.").

{¶ 10} The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *Thompkins* at 387. Although there may be sufficient evidence to support a judgment, a court may nevertheless conclude that a judgment is against the manifest weight of the evidence. *Id.*

{¶ 11} When presented with a challenge to the manifest weight of the evidence, an appellate court may not merely substitute its view for that of the trier of fact, but must 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 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. *Id.* at 387. An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983); *State v. Strider-Williams*, 10th Dist. No. 10AP-334, 2010-Ohio-6179, ¶ 12.

{¶ 12} In addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. *State v. Cattledge*, 10th Dist. No. 10AP-105, 2010-Ohio-4953, ¶ 6. However, in conducting our review, we are guided by the presumption that the jury, or the trial court in a bench trial, " 'is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *Id.*, quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). Accordingly, we afford great deference to the jury's determination of witness credibility. *State v. Redman*, 10th Dist. No. 10AP-654, 2011-Ohio-1894, ¶ 26, citing *State v. Jennings*, 10th Dist. No. 09AP-70, 2009-Ohio-6840, ¶ 55. *See also State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus (credibility determinations are primarily for the trier of fact).

{¶ 13} Although sufficiency and manifest weight are different legal concepts, manifest weight may subsume sufficiency in conducting the analysis; that is, a finding that a conviction is supported by the manifest weight of the evidence necessarily includes

a finding of sufficiency. *State v. McCrary*, 10th Dist. No. 10AP-881, 2011-Ohio-3161, ¶ 11, citing *State v. Braxton*, 10th Dist. No. 04AP-725, 2005-Ohio-2198, ¶ 15. "[T]hus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Id.* In that regard, we first examine whether appellant's conviction is supported by the manifest weight of the evidence. *State v. Gravely*, 188 Ohio App.3d 825, 2010-Ohio-3379, ¶ 46 (10th Dist.).

{¶ 14} In order to find appellant guilty of aggravated burglary, the state had to prove beyond a reasonable doubt that appellant, by force, stealth, or deception, trespassed in an occupied structure when another person was present, with the purpose to commit a criminal offense in the structure, and that he inflicted, or attempted to inflict physical harm on another. R.C. 2911.11(A)(1). Appellant claims that the state failed to prove that (1) he trespassed into Giles' apartment, (2) he went into the apartment with a purpose to commit a criminal offense, and (3) he inflicted or attempted to inflict physical harm to Giles.

1. Did Appellant Enter into Giles' Residence?

{¶ 15} Appellant claims that the state failed to prove that he entered Giles' apartment. We disagree. Although Gochenouer and appellant's mother testified that he did not enter the apartment, Giles and Marshall both testified that appellant entered the apartment. A defendant is not entitled to a reversal on manifest-weight grounds merely because inconsistent evidence is presented at trial. *Gravely* at ¶ 45. Appellant argues that those witnesses were not credible because Giles was drunk at the time and Marshall is biased because of his close relationship with Giles. The jury obviously disagreed with appellant's assessment of the witnesses' credibility. Mere disagreement over the credibility of witnesses is not a sufficient reason to reverse a judgment on manifest-weight grounds. *State v. G.G.*, 10th Dist. No. 12AP-188, 2012-Ohio-5902, ¶ 7. Although this court, in conducting a manifest weight of the evidence review, can engage in some limited credibility weighing, we defer to the jury for these determinations, as they are in a much better position to judge the credibility of the witnesses given their ability to view the witnesses' live testimony. Appellant's arguments regarding the credibility of the state's witnesses do not render their testimony not credible as a matter of law. *See State v. Timmons*, 10th Dist. No. 04AP-840, 2005-Ohio-3991, ¶ 12. In light of the conflicting

testimony presented to the jury, we cannot say that the jury lost its way when it concluded that appellant entered the apartment.

2. Did Appellant Inflict or Attempt to Inflict Physical Harm on Giles?

{¶ 16} Appellant also contends that he did not harm Giles and that the credible evidence proved that she harmed herself by tripping and falling into the fish tank. We disagree. Again, inconsistent evidence does not support a manifest-weight argument. *Gravelly*. Neither is a conviction against the manifest weight of the evidence because the trier of fact believed the state's version of events over appellant's version. *Id.* Although Gochenouer and appellant's mother testified that appellant did not harm Giles, and appellant's mother also testified that Giles fell on her own into the fish tank, Giles and Marshall testified that appellant kicked and punched Giles and smashed her face on her fish tank. In light of this conflicting testimony, we cannot say that the jury lost its way when it rejected appellant's version of events and believed the testimony of the state's witnesses that appellant inflicted physical harm on Giles.

3. Did Appellant have a Purpose to Commit a Criminal Offense?

{¶ 17} Finally, appellant contends that he did not go to Giles' apartment with the purpose to commit a criminal offense but only went to the apartment to find Gochenouer and her daughter. The reason why appellant went to the apartment is not of consequence, because a defendant may form the purpose to commit a criminal offense at any point during the course of a trespass. *State v. Tyson*, 10th Dist. No. 10AP-830, 2011-Ohio-4981, ¶ 31; *State v. Fontes*, 87 Ohio St.3d 527 (2000), syllabus. While appellant may not have gone to Giles' apartment to assault her, he obviously formed that intent once inside the apartment, as the jury concluded that he assaulted her. Accordingly, we cannot say that the jury lost its way when it concluded that appellant had the purpose to commit a criminal offense.

4. Conclusion

{¶ 18} Appellant's conviction for aggravated burglary is not against the manifest weight of the evidence. This disposition resolves appellant's claim that his conviction is also not supported by sufficient evidence. *Gravelly*. Accordingly, we overrule appellant's first, second, and third assignments of error.

B. Evidentiary Issues

{¶ 19} Appellant argues in his fourth assignment of error that the trial court abused its discretion by allowing Marshall to testify that appellant dragged Gochenouer through the parking lot by her hair and hit her after leaving Giles' apartment. Appellant claims that the admission of this testimony violated the prohibition against the admission of other-acts testimony in Evid.R. 404(B). We disagree.

{¶ 20} 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.

Similarly, R.C. 2945.59 allows for the admissibility of any act taken by the accused that would tend to show "motive or intent, the absence of mistake or accident * * * or the defendant's scheme, plan, or system."

{¶ 21} The admission of other acts-evidence under Evid.R. 404(B) "lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice." *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶ 66; *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, ¶ 23. Although an abuse of discretion is typically defined as an unreasonable, arbitrary, or unconscionable decision, *State v. Beavers*, 10th Dist. No. 11AP-1064, 2012-Ohio-3654, ¶ 8, we note that no court has the authority, within its discretion, to commit an error of law. *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶ 70.

{¶ 22} The state argues that the testimony describing appellant's conduct was properly admitted because it formed part of the immediate background of appellant's actions and was inextricably related to the crime. We agree. Other-acts testimony is relevant and, hence, admissible, under the scheme, plan, or system exception of R.C. 2945.59 and Evid.R. 404(B) "where those acts form part of the immediate background of the crime charged, and hence are "inextricably related" to the act alleged in the indictment; that is, where the challenged evidence plays an integral part in explaining the sequence of events and is necessary to give a complete picture of the alleged crime.' "

State v. Wilkins, 135 Ohio App.3d 26, 32 (9th Dist.1999), quoting *State v. Thompson*, 66 Ohio St.2d 496, 498 (1981). See also *State v. Jackson*, 10th Dist. No. 02AP-867, 2003-Ohio-6183, ¶ 31.

{¶ 23} Here, appellant's behavior towards his fiancé, committed just moments after he assaulted Giles, gives a complete picture of the events that night and is inextricably related to the charged offense. See *State v. Perkins*, 2d Dist. No. 2009 CA 41, 2010-Ohio-5161, ¶ 58-59 (trial court did not abuse its discretion by admitting testimony that defendant swung an object at another person which occurred shortly after charged crime, because jury is entitled to have a complete picture of the charged offense). Moreover, the trial court instructed the jury when the testimony was admitted and again before deliberations began that Marshall's testimony regarding appellant's conduct could not be used to prove appellant's character, to show that he acted in conformity with that, or to prove his guilt in the matter. (Tr. 109, 190.) These limiting instructions, which the jury is presumed to follow, reduce the chance that appellant would have been materially prejudiced by the admission of Marshall's testimony, even if improper. See *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, ¶ 24 (limiting instruction lessens prejudicial effect of other-acts evidence); *State v. Bey*, 85 Ohio St.3d 487, 491 (1999) (same).

{¶ 24} For these reasons, the trial court did not abuse its discretion by admitting Marshall's testimony. Accordingly, we overrule appellant's fourth assignment of error.

C. Aggravated Burglary Jury Instruction

{¶ 25} In his fifth assignment of error, appellant argues that the trial court erred by instructing the jury that it could find him guilty of aggravated burglary if he had the specific purpose to commit any criminal offense and not the specific criminal offense he was charged with, felonious assault. He argues that this instruction denied him his right, pursuant to Crim.R. 31(A), to have a jury unanimously find him guilty of an offense, because it is impossible to determine whether each juror found him guilty of the same underlying criminal offense. We disagree.

{¶ 26} In 2008, the Supreme Court of Ohio rejected appellant's argument in *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787. Three justices concluded that a defendant charged with burglary is not deprived of a unanimous verdict simply because

the jury was not required to agree unanimously as to the nature of the crime the defendant intended to commit at the time he entered unlawfully into the victim's building. *Id.* at ¶ 68. The court concluded that it was not plain error for the trial court to instruct the jury that it could find the defendant guilty of aggravated burglary if it found that he intended to commit any criminal offense. Appellant argues that *Gardner* is not binding precedent because only three justices concurred in the opinion.² The Supreme Court, however, has considered the same issue after *Gardner* and provided more clarity.

{¶ 27} In *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, the court again rejected the argument that unanimity was required as to the nature of the underlying offense the defendant intended to commit in the premises for an aggravated burglary conviction. This time, a unanimous court rejected the argument, quoting its opinion in *Gardner* that a defendant " 'is not deprived of a unanimous verdict simply because the jury was not required to agree unanimously as to the nature of the crime the defendant intended to commit at the time he entered unlawfully into the victim's building. " 'In situations where "the alternatives of the mens rea [intent] component give rise to the same criminal culpability, it does not appear critical that the jury may have reached different conclusions regarding the nature of the defendant's intent if such differences do not reflect disagreement on the facts pertaining to the defendant's conduct." ' " *Id.* at ¶ 123, quoting *Gardner* at ¶ 68. *See also State v. Eicholtz*, 2d Dist. No. 2012-CA-7, 2013-Ohio-302, ¶ 22-23 (relying on *Gardner* and *Fry* to reject same argument).

{¶ 28} Although both *Gardner* and *Fry* reviewed only for plain error,³ the larger import of those holdings are clear: in a prosecution for aggravated burglary, a trial court has discretion whether to instruct a jury on the specific underlying offense intended to be committed while inside the structure. Indeed, although the *Gardner* court opined that the preferable approach would be to instruct the jury on the underlying offense the defendant was alleged to have intended to commit inside the premises, the court concluded that such approach is not required in every case. *Gardner* at ¶ 73-74. This comports with our general review of decisions regarding the refusal to provide jury

² A fourth justice concurred in judgment only.

³ Here, appellant did request the trial court to instruct the jury on a specific underlying offense and, therefore, has not waived all but plain error in this regard.

instructions. *State v. McDowell*, 10th Dist. No. 10AP-509, 2011-Ohio-6815, ¶ 26 ("When we review a court's refusal to give a requested instruction, we must determine whether the trial court's decision constituted an abuse of discretion under the facts and circumstances of the case."). Here, the trial court chose not to provide the requested instruction. In light of the facts and circumstances of this case, especially considering that the state only alleged that appellant committed an assault against Giles inside the apartment and the absence of any apparent jury confusion on this issue, we cannot say that such decision was an abuse of discretion. Accordingly, we overrule appellant's fifth assignment of error.

D. Sentencing

{¶ 29} Lastly, appellant argues in his sixth assignment of error that his eight-year prison sentence is contrary to law because it is disproportionate and inconsistent with the principles and purposes of sentencing found in R.C. 2929.11. We disagree.

{¶ 30} We first reject appellant's request for this court to perform a de novo review of the trial court's sentence to determine if it complies with Ohio's sentencing guidelines. That is not our level of review. Instead, we must determine whether clear and convincing evidence establishes that a felony sentence is contrary to law. A sentence is contrary to law when the trial court failed to apply the appropriate statutory guidelines. *State v. Worth*, 10th Dist. No. 10AP-1125, 2012-Ohio-666, ¶ 83; *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶ 19.

{¶ 31} Having established the proper review to apply, we conclude that the eight-year sentence imposed on appellant is not contrary to law. The trial court noted in its sentencing entry that it considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors in R.C. 2929.12. Such language in a judgment entry belies a claim that the trial court failed to consider statutory guidelines. *State v. Vaughn*, 10th Dist. No. 09AP-73, 2009-Ohio-4970, ¶ 21; *State v. Saur*, 10th Dist. No. 10AP-1195, 2011-Ohio-6662, ¶ 40. Additionally, the trial court noted at sentencing its consideration of a number of factors in arriving at its sentence. The trial court noted that appellant's offense was not the worst form of the offense, even though it was quite forceful. The trial court also noted that appellant inflicted or attempted to inflict physical harm to Giles. The trial court also noted appellant's prior criminal record. Further, R.C. 2929.14(A)(1) authorizes an eight-year prison sentence for appellant's conviction.

Therefore, appellant's sentence is not clearly and convincingly contrary to law. *Vaughn* at ¶ 22; *State v. Hernton*, 11th Dist. No. 2008-L-104, 2009-Ohio-1487, ¶ 19 (sentence not contrary to law where trial court considered all statutory guidelines and sentence was within statutory range); *State v. Gray*, 7th Dist. No. 07 MA 156, 2008-Ohio-6591, ¶ 20-22 (same).

{¶ 32} Appellant has not demonstrated that his eight-year sentence is contrary to law. Accordingly, we overrule appellant's sixth assignment of error.

III. Conclusion

{¶ 33} Having overruled all of appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and DORRIAN, JJ., concur.
