[Cite as *State v. Stout*, 2010-Ohio-4799.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-04-039
	:	O P I N I O N
- vs -		10/4/2010
	:	
JAMES STOUT,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09CR26005

Rachel A. Hutzel, Warren County Prosecuting Attorney, Travis Vieux and Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Donald E. Oda II, 130 East Mulberry, Lebanon, Ohio 45036, for defendant-appellant

YOUNG, P.J.

{¶1} Defendant-appellant, James Stout, appeals his conviction in the Warren County Court of Common Pleas for harassment by an inmate. For the reasons set forth below, we affirm appellant's conviction.

{¶2} On July 27, 2009, appellant was indicted on two counts of harassment by an inmate in violation of R.C. 2921.38(A) and (C), felonies of the third and fifth

degrees. The state alleged that on April 19, 2009, appellant, while incarcerated at the Lebanon Correctional Institution, threw a cup filled with his urine in the face of corrections officer Richard Stiehl.

{¶3} Following a jury trial on April 15, 2010, appellant was found guilty of the fifth-degree felony count of harassment in violation of R.C. 2921.38(A), and was sentenced to one year in prison.[1] The additional term was to be served consecutively to the eight-year sentence he was then serving for prior convictions of felonious assault and abduction.

{¶4} Appellant appeals his conviction, raising four assignments of error for our review. For ease of discussion, we will first address appellant's third assignment of error.

{¶5} Assignment of Error No. 3:

{¶6} "THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR FELONIOUS ASSAULT AND THE JURY VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE[.]"

{¶7} In his third assignment of error, appellant contends that his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence.[2] In the context of his sufficiency argument, appellant claims that there was no evidence presented to support the state's contention that the substance thrown on Officer Stiehl was urine. He further asserts that the scientific evidence introduced by the state was "inconclusive at best," and that the eyewitness testimony was "vague

1. A nolle prosequi was entered as to the third-degree felony harassment count.

2. Although as written, appellant's third assignment of error challenges the sufficiency and weight of the evidence supporting his "felonious assault" conviction, we construe this as a typographical error and presume that appellant intended to assign as error that his conviction for harassment by an inmate is not supported by sufficient evidence and is against the manifest weight of the evidence.

and conflicting."

{¶8} Whether the evidence presented at trial is legally sufficient to sustain a verdict is a question of law. *Barberton v. Jenney*, 126 Ohio St.3d 5, 2010-Ohio-2420, ¶14. In reviewing a sufficiency challenge, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52; *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. 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." *Jenney* at id., quoting *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶113.

{¶9} In order to preserve the right to appeal the sufficiency of the evidence upon which a conviction is based, a defendant must timely raise a Crim.R. 29 motion for acquittal with the trial court. *State v. McCuller*, Butler App. No. CA2005-07-192, 2007-Ohio-348, ¶35. If a Crim.R. 29 motion is not made, a defendant waives his right to argue on appeal that the conviction is based on insufficient evidence. Id. In this case, the record indicates that appellant moved for a Crim.R. 29(A) acquittal at the close of the state's case-in-chief. However, he did not renew his motion at the close of all the evidence. "It is well-established that a failure to renew a Crim.R. 29(A) motion for acquittal at the close of all the evidence constitutes a waiver of any error relative thereto." *State v. Lloyd*, Warren App. Nos. CA2007-04-052, CA2007-04-053, 2008-Ohio-3383, ¶38. In failing to renew his motion, appellant waived any sufficiency claim he may have had on appeal.

{¶10} However, even if appellant had preserved this issue for appeal, a

determination that his conviction is supported by the manifest weight of the evidence would also be dispositive of the issue of sufficiency. See *State v. Miller*, Warren App. No. CA2009-10-138, 2010-Ohio-3821, ¶10. Unlike a sufficiency challenge, a manifest weight challenge 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. *State v. Ghee,* Madison App. No. CA2008-08-017, 2009-Ohio-2630, ¶9, citing *Thompkins*, 78 Ohio St.3d at 387. In conducting its review, an appellate court examines 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. *State v. Good,* Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25; *Thompkins* at id. However, while appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide. *State v. Gesell,* Butler App. No. CA2005-08-367, 2006-Ohio-3621, ¶34; *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶11} Appellant was convicted of harassment by an inmate in violation of R.C. 2921.38(A), which provides: "No person who is confined in a detention facility, with intent to harass, annoy, threaten, or alarm another person, shall cause or attempt to cause the other person to come into contact with blood, semen, urine, feces, or another bodily substance by throwing the bodily substance at the other person, by expelling the bodily substance upon the other person, or in any other manner."

{¶12} R.C. 2921.38(A) requires that the inmate possess the requisite "intent"

to harass, annoy, threaten or alarm. In the context of culpable mental states, "intent" and "purpose" are synonymous. *State v. Miller*, Cuyahoga App. No. 93731, 2010-Ohio-4347, ¶4, citing *White v. Maxwell* (1962), 174 Ohio St. 186, 188. "A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." R.C. 2901.22(A).

{¶13} At trial, Officer Stiehl testified that on April 19, 2009, he was assigned to the isolation unit of the prison, where appellant was housed. Stiehl explained that in isolation, inmates are confined to their cells for approximately 23 hours each day and are only permitted to leave for a one-hour recreation period. Officer Stiehl testified that after he escorted appellant out of his cell for his recreation period, he returned to inspect the cell for contraband. During his search, Stiehl observed that appellant was in possession of approximately 20 books. According to Stiehl, inmates in isolation were permitted to keep one religious book and two paperback books. Stiehl removed all but three books from appellant's cell.

{¶14} Upon returning to his cell, appellant called Stiehl over to his door. Officer Steihl testified that appellant was speaking in a "very low volume," and he could not understand him. Steihl stated that through the small window in the cell door, he observed appellant motioning for him to come toward the door. Stiehl walked to the door and placed his head next to the approximate two-inch wide area between the cell door and the wall in order to better hear appellant. Officer Steihl testified that as he leaned in: "Immediately, without any warning, fluids were splashed onto my head, face, and upper torso." According to Stiehl, he believed the "fluid"

was urine because it "smelled, tasted, and felt like warm bodily fluids and it was yellow." Stiehl removed his uniform shirt and white undershirt, and observed a "yellow-tinted wet stain" on the collar of his undershirt.

{¶15} The state also introduced the testimony of Sarah Glass, a forensic scientist with the Ohio Bureau of Criminal Identification and Investigation. Glass testified that she performed an amylase test on a stain on Officer Stiehl's uniform shirt. She explained that amylase is an enzyme found in saliva, and is also present in other bodily fluids, including urine, in "small amounts." Glass stated that the amylase test performed on Stiehl's shirt yielded a positive result, indicating the presence of the enzyme. She testified that based upon her training and experience, the presence of amylase indicated that there "could be saliva there." She also stated that there could be other bodily substances present.

{¶16} Appellant testified at trial and admitted to throwing fluid on Stiehl, but claimed that it was water from the toilet in his cell. He stated that upon returning to his cell he observed that it had been "shake[n] down," and believed that Officer Stiehl had removed his books. Appellant summoned Officer Stiehl to his cell door, and asked him to return his books. Appellant testified that as he was speaking to Stiehl, he reached over to his toilet, dipped a plastic cup into the water, and threw the water on Stiehl. According to appellant, he did not urinate or spit in the cup prior to throwing the water.

{¶17} The nature of the substance thrown on Officer Stiehl was disputed at length at trial. Glass admitted on cross-examination that although the test she performed detected the amylase enzyme, it did not necessarily indicate that a bodily substance was present. Glass explained that the enzyme is produced by both

humans and animals, and is also found in food products. Glass further testified that she was not told to perform any specific tests on Stiehl's uniform shirt, and chose the amylase test because it was the most expedient and cost-effective test to perform in checking for the presence of saliva. She also testified that she was not instructed to conduct a creatinine test on the shirt, which is specifically used to test for the presence of urine.

{¶18} Upon review of the record, we do not find appellant's conviction against the manifest weight of the evidence. Although there was contradictory evidence presented to the jury with regard to the nature of the substance thrown on Stiehl, it is well-established that "[w]hen conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony." *State v. Bromagen,* Clermont App. No. CA2005-09-087, 2006-Ohio-4429, ¶38, quoting *State v. White*, Butler App. No. CA2003-09-240, 2004-Ohio-3914, ¶28; *State v. Woodruff,* Butler App. No. CA2008-11-824, 2009-Ohio-4133, ¶25. The jury was within its province to credit the testimony of the state's witnesses and discredit appellant's testimony. *State v. Howard,* Ross App. No. 07CA2948, 2007-Ohio-6331, ¶16. "The jury 'is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of proffered testimony.'" Id., quoting *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Although appellant maintained that he threw water on Officer Stiehl, we find it reasonable that the jury believed the state's claim that the fluid was urine, particularly in light of Stiehl's testimony regarding the smell and taste of the fluid, and the presence of a yellow-tinted stain on his undershirt. The jury also heard Glass' testimony that the amylase enzyme can be found in urine in

"small amounts." In addition, Glass' testimony that the test indicated, at a minimum, that saliva was present on Stiehl's uniform shirt was sufficient to establish the existence of a "bodily substance" under R.C. 2921.38(A).

{¶19} Upon review of the record, we conclude that there was ample evidence presented to the jury, which, if believed, would support appellant's conviction for harassment. Accordingly, it cannot be said that the jury lost its way and created a manifest miscarriage of justice. Appellant's third assignment of error is overruled.

{¶20} Assignment of Error No. 1:

{¶21} "THE TRIAL COURT ERRED IN ASKING QUESTIONS OF THE STATE'S WITNESS WHICH WERE NOT PHRASED IN AN IMPARTIAL, UNBIASED MANNER[.]"

{¶22} In his first assignment of error, appellant argues that the trial court improperly questioned Glass regarding the testing procedures used on Officer Stiehl's uniform. Appellant claims that the court's questions were not phrased in an impartial, unbiased manner as required by Evid.R. 614(B).

{¶23} "Evid.R. 614(B) permits a trial judge to interrogate a witness as long as the questions are relevant and do not suggest a bias for one side or the other." *State v. Blankenship* (1995), 102 Ohio App.3d 534, 548. Absent a showing of bias, prejudice, or prodding of the witness to elicit partisan testimony, it is presumed that the trial court interrogated the witness in an impartial manner in an attempt to ascertain a material fact or develop the truth. *State v. Baston*, 85 Ohio St.3d 418, 426, 1999-Ohio-280. In addition, "[a] trial court's interrogation of a witness is not deemed partial for purposes of Evid.R. 614(B) merely because the evidence elicited during the questioning is potentially damaging to the defendant." *State v. Vanloan*,

Butler App. No. CA2008-10-259, 2009-Ohio-4461, ¶7, quoting *Blankenship* at 548.

{¶24} However, the Ohio Supreme Court has cautioned that in a jury trial, the "court's participation by questioning or comment must be scrupulously limited, lest the court, consciously or unconsciously, indicate to the jury its opinion of the evidence or on the credibility of a witness." *State ex rel. Wise v. Chand* (1970), 21 Ohio St.2d 113, paragraph three of the syllabus. Where the jury might infer the court's opinion of a witness through the persistence, tenor, range or intensity of its questions, the court's interrogation is prejudicially erroneous. Id. at paragraph four of the syllabus.

{¶25} A trial court's questioning of a witness pursuant to Evid.R. 614(B) is subject to review on appeal under an abuse of discretion standard. *Vanloan* at ¶8. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *State v. Atkinson,* Warren App. No. CA2009-10-129, 2010-Ohio-2825, ¶7. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. Id.

{¶26} The exchange of which appellant complains concerns the trial court's questioning of Glass regarding the amylase test. The questioning occurred at the end of appellant's recross-examination of Glass:

{¶27} "THE COURT: I do have a question or two. They send you this evidence. You're asked to run a test to determine if there are bodily fluids on the shirt. Is that what you are doing?

{¶28} "[GLASS]: Yes.

{¶29} "THE COURT: Okay. You have a choice as to whether you can test

for saliva, urine, or blood?

{¶30} "[GLASS]: Or feces or semen.

{¶31} "THE COURT: Okay. You have a choice - - you can test for any of those specifically, correct?

{¶32} "[GLASS]: Correct.

{¶33} "THE COURT: Do you know what substance you were supposed to test for when you got this case?

{¶34} "[GLASS]: No, I did not.

{¶35} "THE COURT: You were just testing to see whether or not there was a bodily fluid?

{¶36} "[GLASS]: Yes.

{¶37} "THE COURT: And you ran the first and the easiest test being the amylase test?

{¶38} "[GLASS]: Correct.

{¶39} "THE COURT: Once you found - - you got a positive result from that, you stopped running tests - -

{¶40} "[GLASS]: Correct.

{¶41} "THE COURT: - - because you saw there was a bodily fluid?

{¶42} "[GLASS]: Yes.

{¶43} "THE COURT: Okay. Are you able to - -

{¶44} "[DEFENSE COUNSEL]: Your Honor, could we approach?

{¶45} "THE COURT: One moment. Are you able to tell any concentrations by specific numbers?

{¶46} "[GLASS]: We do have a standard that we apply to paper that is a very

deliberate concentration type amylase and if the positive on what we test, the stain that we test, the positive is greater than that standard that is positive, anything less we don't call positive."

{¶47} At a sidebar conference, appellant noted his objection to the court's questions. Although the objection occurred after the court's questioning of Glass, the record indicates that the court properly treated appellant's objection as timely. Evid.R. 614(C) provides that "[o]bjections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present."

{¶48} Appellant argues that the court's questions served to improperly bolster Glass' testimony regarding the existence of a bodily substance. He claims that the questioning was in error because it came at a point in the trial in which he was attempting to establish that the amylase test did not conclusively prove that the stain on Stiehl's uniform shirt was in fact a bodily substance. As discussed in our resolution of appellant's third assignment of error, Glass testified on cross-examination that she "[could not] say" that the stain on the shirt was a bodily substance, only that the stain tested positive for the amylase enzyme.

{¶49} Although the trial court's questions came close to crossing the line from "helpful clarification to unwarranted interference," upon review, we conclude that the questions did not go beyond the parameters of Evid.R. 614(B). See *Baston*, 85 Ohio St.3d at 426. The tenor and nature of the court's questions did not indicate that it was expressing an opinion as to the evidence or Glass' credibility. Rather, they consisted of attempts to clarify her testimony. Id. In addition, the fact that the questions were directly relevant to a material issue and Glass' responses did not

favor the defense did not render the questions per se impermissible under Evid.R. 614(B). *Vanloan*, 2009-Ohio-4461 at ¶7. We also note that appellant questioned Glass further following the court's inquiry. Glass once again admitted that although the amylase test indicated whether the enzyme was present, it did not necessarily show the existence of a bodily substance.

{¶50} The trial court also instructed the jury to disregard anything which may have indicated the court's view on the evidence presented at trial: "If during the course of the trial I did or said anything that you consider an indication of the Court's view on the facts, you are specifically instructed to disregard it. I must be and I sincerely desire to be impartial in presiding over this and every other trial." We must presume that the jury followed the trial court's instruction in this regard. *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶103; *State v. Manns*, 169 Ohio App.3d 687, 2006-Ohio-5802, ¶93.

{¶51} Because appellant has been unable to demonstrate that the trial court's questions to Glass were made in a biased or partial manner, or that they had a prejudicial effect on the outcome of the trial, we find no abuse of discretion on the part of the trial court. Appellant's first assignment of error is therefore overruled.

{¶52} Assignment of Error No. 2:

{¶53} "THE TRIAL COURT ERRED IN FAILING TO GIVE RECESS INSTRUCTIONS TO THE JURY."

{¶54} Appellant's second assignment of error challenges the trial court's failure to admonish the jury when they were permitted to separate during the trial. Appellant argues generally that the trial court's failure to admonish the jury constituted prejudicial error requiring his conviction to be reversed.

{¶55} R.C. 2945.34 provides that "[i]f the jurors are permitted to separate during a trial, they *shall* be admonished by the court not to converse with, nor permit themselves to be addressed by any person, nor to listen to any conversation on the subject of the trial, nor form or express any opinion thereon, until the case is finally submitted to them." (Emphasis added.)

{¶56} The record indicates that the jury stood in recess several times during the course of the one-day trial, but did not receive the required admonition from the trial court pursuant to R.C. 2945.34. However, the record also indicates that although he had opportunities to do so, appellant did not object to the court's failure to instruct the jury. In failing to object, appellant has forfeited all but plain error on appeal. Crim.R. 52(B). Plain error exists where there is an obvious deviation from a legal rule which affected the defendant's substantial rights, or influenced the outcome of the proceeding. *State v. Craycraft,* Clermont App. Nos. CA2009-02-013, CA2009-02-014, 2010-Ohio-596, ¶23. Notice of plain error is taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. Id., citing *State v. Landrum* (1990), 53 Ohio St.3d 107, 111. An appellate court will not reverse a trial court's decision on plain error grounds unless the outcome of trial would have been different absent the alleged error. See *State v. Rohrbaugh,* Slip Opinion No.2010-Ohio-3286, ¶6, citing *State v. Barnes,* 94 Ohio St.3d 21, 27, 2002-Ohio-68.

{¶57} Although the trial court erred in failing to admonish the jury, this error, standing alone, does not rise to the level of plain error. R.C. 2945.34 does not require an automatic reversal if a trial court fails to admonish the jury prior to periods of separation, and other courts have not interpreted the statute to impose such a

requirement. See *State v. Rose* (Aug. 20, 1999), Montgomery App. No. 17431, 1999 WL 957715 at 2; *State v. Harper* (Aug. 12, 1994), Montgomery App. No. 13912, 1994 WL 450120 at 1. Indeed, the Ohio Supreme Court has held that "[t]he failure by a court to perform its statutory duty of admonishing the jury concerning their conduct while separated during the trial does not constitute reversible error, where it is not shown that the jury were in fact guilty of misconduct or indiscretions and where it further appears that counsel for [defendant] in error observed the omission and did not call the attention of the court thereto." *Warner v. State* (1922), 104 Ohio St. 38, syllabus (construing General Code section 13443-17, predecessor of R.C. 2945.34); See, also, *State v. Williams* (1974), 39 Ohio St.2d 20, paragraph two of the syllabus.

{¶58} In this case, appellant fails to argue, and there is no evidence before this court to suggest, that the jurors engaged in any misconduct or indiscretions in violation of the statute. While we do not condone the trial court's failure to admonish the jury as required, absent evidence of juror impropriety and resulting prejudice, it cannot be said that the outcome of appellant's trial would have been otherwise had the court complied with R.C. 2945.34. *Harper* at id. Appellant's second assignment of error is therefore overruled.

{¶59} Assignment of Error No. 4:

{¶60} "THE MULTIPLE ERRORS OF THE TRIAL COURT SET FORTH HEREIN, EVEN IF NOT HARMFUL INDIVIDUALLY, HAD THE CUMULATIVE EFFECT OF DENYING APPELLANT A FAIR TRIAL[.]"

{¶61} In his final assignment of error, appellant argues that he was denied a fair trial due to the cumulative errors committed by the trial court.

{¶62} Under the cumulative error doctrine, "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Garner,* 74 Ohio St.3d 49, 64, 1995-Ohio-168, citing *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus.

{¶63} Since we have not found multiple instances of harmless error in this case, the cumulative error doctrine is inapplicable and appellant's fourth assignment of error is overruled.

{¶64} Judgment affirmed.

POWELL, and BRESSLER, JJ., concur.