[Cite as *State v. Chambers*, 2011-Ohio-1187.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-06-136
	:	O P I N I O N
- vs -		3/14/2011
	:	
DUSTIN SHANE CHAMBERS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2010-02-0204

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

Neal D. Schuett, 121 West High Street, Oxford, Ohio 45056, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Dustin Shane Chambers, appeals from his conviction in the Butler County Court of Common Pleas for one count of failing to properly confine a vicious dog. For the reasons outlined below, we affirm.

{¶2} On January 5, 2010 at 11:22 a.m., the Hamilton City Police Department received a call alleging that a "pregnant pitbull" [sic] was being kept behind a house located at 328 South B Street, Hamilton, Butler County, "without shelter or food." Once arriving at

the scene, and upon making contact with appellant who lived in the home's upstairs apartment, Deputy Kurt Merbs, a Butler County deputy dog warden, discovered a malnourished pregnant dog sitting on frozen clothing and tied to a broken toilet located in the backyard. Due to concerns over appellant's increasing hostility, and after appellant told Deputy Merbs to leave, Officer Terry Kiep, an officer with the Hamilton City Police Department, was dispatched to the scene to provide backup to Deputy Merbs as he issued appellant a citation for failing to properly confine the dog. Later that month, Officer Kevin Flannery, also with the Hamilton City Police Department, accompanied Deputy Merbs back to the scene so that he could safely serve appellant with a summons.

{¶3} On March 3, 2010, appellant was indicted by the Butler County Grand Jury for failing to properly confine the dog in violation of R.C. 955.22(D)(1), which, due to his prior conviction of the same offense, was a fourth-degree felony. Following a two-day jury trial, appellant was found guilty and sentenced to serve 18 months in prison.

{¶4} Appellant now appeals his conviction, raising four assignments of error for review. For ease of discussion, appellant's assignments of error will be addressed out of order.

{¶5} Assignment of Error No. 3:

{¶6} "THE MANIFEST WEIGHT OF THE EVIDENCE DID NOT SUPPORT A FINDING OF GUILT AGAINST DEFENDANT-APPELLANT FOR IMPROPER CONFINEMENT OF A VICIOUS DOG."

{¶7} In his third assignment of error, appellant argues that his conviction was against the manifest weight of the evidence. In support of his claim, appellant argues that the jury lost its way because "evidence exists proving third-parties are the owner, keeper, or harborer" of the dog. We disagree.

{¶8} 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 *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. A court considering whether a conviction is against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of the witnesses. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶39; *State v. Lester*, Butler App. No. CA2003-09-244, 2004-Ohio-2909, ¶33; *State v. James*, Brown App. No. CA2003-05-009, 2004-Ohio-1861, ¶9. The credibility of witnesses and weight given to the evidence 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. Upon review, the question is 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. *State v. Good*, Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25; *State v. Blanton*, Madison App. No. CA2005-04-016, 2006-Ohio-1785, ¶7.

{¶9} Pursuant to R.C. 955.22(D)(1), and as pertinent here, when a "vicious dog" is on the premises of its owner, keeper, or harboror, "no owner, keeper, or harborer * * * shall fail to * * * securely confine it at all times in a locked pen that has a top, locked fenced yard, or other locked enclosure that has a top." "An owner is the person to whom a dog belongs, while a keeper has physical control over the dog." *State v. Smith*, Huron App. Nos. H-08-006, H-08-008, 2009-Ohio-6681, ¶16. In determining whether a person is a "harborer," however, "the focus shifts from possession and control over the dog to possession and control of the premises where the dog lives." *State v. Turic*, Montgomery App. Nos. 21453, 21454, 2006-Ohio-6664, ¶16, quoting *Flint v. Holbrook* (1992), 80 Ohio App.3d 21, 25. A "harborer" is one who has possession and control of the premises where the dog lives and silently acquiesces to the dog's presence. *State v. Jones*, Lucas App. Nos. L-00-1231, L-00-

1232, L-00-1233, 2003-Ohio-219, ¶69; *Richeson v. Leist*, Warren App. No. CA2006-11-138, 2007-Ohio-3610, ¶12.

{¶10} In this case, Deputy Merbs testified that after arriving on the scene and informing appellant that he had received a "complaint about his dogs," appellant escorted him into the backyard where he observed a "larger female that was * * * tied up on a lead rope that was secured to the end of a broken toilet that was in the back." After asking appellant how long he had the dogs, Deputy Merbs testified that appellant told him that shortly after he moved into the upstairs apartment he found the "half dead and skinny" dog "in the shed," so he "took [it] from the shed and * * * gave [it] food and kept [it] alive." Deputy Merbs then testified that after he informed appellant that "there was a lot of violations" relating to the dog's confinement, appellant "took the chain off the dog's neck, kicked it in the rear, and said, 'Well, then get the f*** off my property.'" After informing appellant that turning the dog loose would result in another citation, Deputy Merbs testified that appellant "took the dog in the house and told [him] to get the f*** off his property and not return without the police." Thereafter, Officer Kiep, who was dispatched to the scene to ensure Deputy Merbs safety, testified that appellant referred to the dog as "my dog" and that appellant stated that he "want[ed] to keep [his] dogs." In addition, Earl Mills, appellant's neighbor, testified that although he was not sure, based on his previous conversations with appellant, he believed the dog belonged to appellant.

{¶11} In his defense, however, appellant testified that he "never saw that dog," and that it was not on his property. In addition, Shawn Nudds, appellant's landlord, Tamara Owens, appellant's neighbor, and Gary Mathis, a "friend of the family," Krysta Hoskins, appellant's wife, all testified that they never saw appellant caring for any dogs on the property. Furthermore, Officer Flannery, who accompanied Deputy Merbs so that he could safely serve appellant with a summons, testified that appellant was "adamant about saying

they're not [his] dogs."

{¶12} After a thorough review of the record, and while appellant did present some evidence that he was not the owner, keeper, or harborer of the dog, 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; *State v. Lloyd*, Warren App. Nos. CA2007-04-052, CA2007-04-053, 2008-Ohio-3383, ¶51; *State v. Woodruff*, Butler App. No. CA2008-11-824, 2009-Ohio-4133, ¶25. Therefore, because we find the state presented competent, credible evidence indicating appellant was the owner, keeper, or harborer of the dog, the jury did not clearly lose its way so as to create such a manifest miscarriage of justice requiring his conviction to be reversed. Accordingly, appellant's third assignment of error is overruled.

{¶13} Assignment of Error No. 2:

{¶14} "THERE WAS INSUFFICIENT EVIDENCE TO CONVICT DEFENDANT-APPELLANT OF IMPROPER CONFINEMENT OF A VICIOUS DOG."

{¶15} In his second assignment of error, appellant argues that the state provided insufficient evidence to prove "that the dog in question was a 'vicious dog.'" We disagree.

{¶16} Whether the evidence presented is legally sufficient to sustain a verdict is a question of law. *State v. Lazier*, Warren App. No. CA2009-02-015, 2009-Ohio-5928, ¶9; *Thompkins*, 78 Ohio St.3d at 386, 1997-Ohio-52. In reviewing the sufficiency of the evidence, "[t]he 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." *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶113, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Carroll*, Clermont App. Nos. CA2007-02-030, CA2007-03-041, 2007-Ohio-

7075, ¶117. Proof beyond a reasonable doubt is "proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs." R.C. 2901.05(D).

{¶17} A "vicious dog," as defined by R.C. 955.11(A)(4)(a), includes, among others, any dog that "[b]elongs to a breed that is commonly known as a pit bull dog." See R.C. 955.11(A)(4)(a)(iii). Although somewhat elusive, "[t]he phrase 'commonly known as a pit bull dog' refers to those animals which display the physical characteristics generally conforming to the various standards normally associated with pit bulls." *State v. Robinson* (1989), 44 Ohio App.3d 128, 133; *State v. Anderson* (1991), 57 Ohio St.3d 168, 171-172. Such characteristics include, but are not limited to, a boxy head, broad shoulders, and muscular jaws, as well as a propensity for aggression, tenacity, and unpredictability. See *State v. Smith*, Allen App. No. 1-07-67, 2008-Ohio-1900, ¶33; *Anderson* at 172-173; see, also, *Akron v. Hatcher* (Apr. 3, 1996), Summit App. No. 17442, 1996 WL 148629, *2. "The ownership, keeping, or harboring of such a breed of dog shall be prima-facie evidence of the ownership, keeping, or harboring of a vicious dog." R.C. 955.11(A)(4)(a)(iii).

{¶18} In this case, Deputy Merbs, who was familiar with pit bull dogs and who was trained in animal identification, testified that based on his experience, education, training, and observations, the dog in question was a "pit bull, pit bull mix." In addition, when shown a picture of the dog, Krysta Hoskins, appellant's wife and former pit bull owner, testified that the dog in question looked "like a female pit bull." Furthermore, Earl Mills, appellant's neighbor, testified that appellant told him to "watch [the dog] because [it] had an attitude problem." This evidence was sufficient to establish the state's prima facie evidence that the dog was of a breed commonly known as a pit bull, and therefore, presumed to be a "vicious dog" as defined by R.C. 955.11(A)(4)(a). See *Smith* at ¶33; see, also, *Robinson* at 133.

{¶19} Appellant, however, claims that "even if the state proved that the dog in

question was a pit bull, [he] offered sufficient evidence to rebut the state's prima facie showing that the dog in question was a 'vicious dog.'" However, while appellant did testify that he "wouldn't say it was a pit bull," appellant failed to provide any further evidence to rebut the state's prima facie showing that the dog was a "vicious dog" as defined by R.C. 955.11(A)(4)(a). See *State v. Browning*, Fairfield App. Nos. 2002CA42, 2002CA43, 2002CA44, 2002CA45, 2002-Ohio-6978, ¶29-32; see, also, *State v. Ferguson* (1991), 76 Ohio App.3d 747, 751. Accordingly, appellant's second assignment of error is overruled.

{¶20} Assignment of Error No. 1:

{¶21} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT ALLOWED THE PROSECUTOR TO ADMIT DEFENDANT-APPELLANT'S UNRELATED PRIOR CONVICTIONS."

{¶22} In his first assignment of error, appellant argues that the trial court erred by allowing Officer Flannery to testify on cross-examination regarding appellant's 2006 conviction for receiving stolen property, as well as appellant's 2003 convictions for importuning and attempted unlawful sexual conduct with a minor.

{¶23} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. An appellate court will not disturb evidentiary rulings absent an abuse of discretion that produced a material prejudice to the aggrieved party. *State v. Roberts*, 156 Ohio App.3d 352, 2004-Ohio-962, ¶14. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶181. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St .3d 619, 621, 1993-Ohio-122.

{¶24} Pursuant to Evid.R. 806(A), when a hearsay statement has been admitted into

evidence, "the credibility of the declarant may be attacked * * * by any evidence that would be admissible for those purposes if declarant had testified as a witness." In other words, Evid.R. 806(A) "allows the use of Evid.R. 609 prior convictions to impeach a hearsay declarant even if that declarant does not testify." *State v. Menton*, Mahoning App. No. 07 MA 70, 2009-Ohio-4640, ¶113-114; *State v. Block* (Apr. 11, 1991), Auglaize App. No. 2-90-4, 1991 WL 53735, *3; *State v. Hatcher*, 108 Ohio App.3d 628. This is true even when the defendant is the hearsay declarant. See *State v. Dickess*, 174 Ohio App.3d 658, 2008-Ohio-39, ¶38 ("[e]ven when the accused chooses not to take the stand, thereby ostensibly avoiding the potential for the prosecution to introduce impeachment evidence, such as prior convictions, those prior convictions may still be introduced into evidence through Evid.R. 806"); see, also, Giannelli and Snyder, Ohio Evidence (2001), Sections 609.7 and 806.5 (stating "an accused may be impeached even though he never testified"); Katz and Giannelli, Ohio Criminal Law (2007), Section 23:2.

{¶25} In this case, after the state rested, appellant initially called Officer Flannery to the stand, who testified, in pertinent part, as follows:

{¶26} "[APPELLANT'S TRIAL COUNSEL]: Do you recall an incident at 328 South B Street in January of 2010 involving [appellant]?

{¶27} "[OFFICER FLANNERY]: Yes, I do.

{¶28} "[APPELLANT'S TRIAL COUNSEL]: Okay. Who else was present at the time?

{¶29} "[OFFICER FLANNERY]: A female, I believe it was his girlfriend was at the house and the dog warden.

{¶30} "[APPELLANT'S TRIAL COUNSEL]: Deputy Merbs?

{¶31} "[OFFICER FLANNER]: Yes.

{¶32} "[APPELLANT'S TRIAL COUNSEL]: Can you please tell us why you were there?

{¶33} "[OFFICER FLANNER]: To assist the dog warden in serving a summons on [appellant], for his safety.

{¶34} "[APPELLANT'S TRIAL COUNSEL]: Did you happen to hear any conversation between Deputy Merbs and [appellant]?

{¶35} "[OFFICER FLANNERY]: I pretty much heard all of it, yeah.

{¶36} "* * *

{¶37} "[APPELLANT'S TRIAL COUNSEL]: Okay. Do you recall any questions regarding the ownership or possession of the dogs in question?

{¶38} "[OFFICER FLANNERY]: I remember—

{¶39} "[APPELLANT'S TRIAL COUNSEL]: Or dog in question?

{¶40} "[OFFICER FLANNERY]: I remember things about that, yes, but I don't remember the exact questions asked or the way they were answered other than [appellant] was adamant about saying *they're not my dogs*." (Emphasis added.)

{¶41} Although appellant claims otherwise, and while this testimony did not open the door to other aspects of appellant's character, Officer Flannery's testimony regarding appellant's out-of-court statement was clearly hearsay as defined by Evid.R. 801(C).[1] See *State v. Heinish* (1990), 50 Ohio St.3d 231, 237; *In re Coy*, 67 Ohio St.3d 215, 218, 1993-Ohio-202; see, also, *State v. Kraus*, Warren App. No. CA2006-10-114, 2007-Ohio-6027. By first eliciting this statement from Officer Flannery, thereby placing appellant's credibility directly at issue, we find appellant's prior convictions were admissible pursuant to Evid.R. 806(A), so long as such evidence was otherwise admissible as provided by Evid.R. 609.

{¶42} Pursuant to Evid.R. 609(A)(2), and as relevant here, "evidence that the accused

1. It should also be noted, Officer Flannery's testimony regarding appellant's statement to Deputy Merbs also does not amount to a non-hearsay statement offered "against" appellant's interest under Evid.R.801(D)(2)(a). See, generally, *In re Seymore* (Oct. 28, 1996), Butler App. No. CA95-11-204, at 10-11; see, also, *State v. Harris* (Dec.2, 1993), Franklin App. No. 93AP-206, 1993 WL 498019, *5.

has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year * * *." See *State v. Bryan,* 101 Ohio St.3d 272, 2004-Ohio-971, ¶132. Under Evid.R. 609(A)(3), however, "all convictions for crimes involving dishonesty or false statement, regardless of the possible punishment, are admissible for purposes of impeaching witnesses." *State v. Bradford*, Warren App. No. CA2010-04-032, 2010-Ohio-6429, ¶76; *State v. McCrackin*, Butler App. No. CA2001-04-096, 2002-Ohio-3166, ¶34, quoting Weissenberger's Ohio Evidence Treatise (2002) 258, Section 609.5.

{¶43} With these principles in mind, and after a thorough review of the record, we find no error in the trial court's decision allowing Officer Flannery to testify regarding appellant's 2006 conviction for receiving stolen property. *Bradford* at ¶76, quoting *State v. McCrackin*, Butler App. No. CA2001-04-096, 2002-Ohio-3166, ¶34. Receiving stolen property constitutes a crime of dishonesty, and therefore, evidence concerning this conviction was admissible pursuant to Evid.R. 603(A)(3). *State v. Ewing*, Franklin App. No. 06AP-243, 2006-Ohio-5523, ¶24; *State v. Brown* (1993), 85 Ohio App.3d 716, 726.

{¶44} The same cannot be said, however, for appellant's 2003 convictions for importuning and attempted unlawful sexual conduct with a minor, both fifth-degree felonies. As noted above, pursuant to Evid.R. 609(A)(2), evidence that the accused has been convicted of a crime, other than a crime of dishonesty or false statement, such as the case here, is admissible if the crime was punishable by "*imprisonment in excess of one year*." A fifth-degree felony is punishable by a maximum 12-month prison term. See R.C. 2929.14(A)(5). Therefore, because appellant's 2003 convictions, both fifth-degree felonies, were not punishable by death or imprisonment in excess of one year, such convictions were inadmissible pursuant to Evid.R. 609(A)(2). See *State v. Sledge*, Trumball App. No. 2001-T-0123, 2003-Ohio-4100, ¶24; see, also, *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, ¶26-27.

{¶45} That being said, after a thorough review of the record, we find any error in the trial court's decision allowing Officer Flannery to testify regarding appellant's 2003 convictions was harmless. *State v. Brown*, 65 Ohio St.3d 483, 485, 1992-Ohio-61. As the record clearly indicates, the testimony solicited from Officer Flannery regarding appellant's prior convictions for importuning and attempted unlawful sexual conduct with a minor consisted of a single question that did not elicit any further details of the crimes. Furthermore, immediately following Officer Flannery's testimony regarding appellant's prior convictions, the trial court provided the jury with a limiting instruction stating, in pertinent part, the following:

{¶46} "Ladies and gentlemen, the Court has permitted his prior criminal record to come into evidence. I want to explain to you why at this point it comes in, because I think it's very important. Testimony was elicited * * * on direct examination of this officer of a statement of the defendant. Okay. So the defendant's credibility becomes at issue, because essentially the testimony elicited was these were not my dogs.

{¶47} "Now, I'm permitting evidence of a prior criminal conviction to come in because it goes to the credibility or the believability of that statement. In other words, because of his prior criminal record, you would be likely to give that less weight because of his felony conviction, you are entitled to do so. It's to let you judge his credibility.

{¶48} "It's not being offered for the fact that he acted in conformity with that conviction, only that it goes to the credibility of the statement that he made to this officer, the fact that it was offered by the defense as for the truth of the matter, okay? So please understand that limited purpose."

{¶49} The jury is presumed to have followed this instruction. *State v. Cope*, Butler App. No. CA2009-11-285, 2010-Ohio-6430, ¶79, citing State v. *Raglin*, 83 Ohio St.3d 253, 264, 1998-Ohio-110.

{¶50} Moreover, as discussed in his second and third assignments of error, the state

provided overwhelming evidence of appellant's guilt. As this court has previously stated, harmless error is appropriate where there is "overwhelming evidence of guilt" or "some other indicia that the error did not contribute to the conviction." *State v. Sims*, Butler App. No. CA2007-11-300, 2009-Ohio-550, ¶34, quoting *State v. Ferguson* (1983), 5 Ohio St.3d 160, 166, fn. 5; see, e.g., *State v. Martin*, Warren App. Nos. CA2002-10-111, CA2002-10-115, CA2002-10-116, 2003-Ohio-6551 (admission of prior aggravated murder conviction for impeachment purposes at felonious assault trial was harmless). Therefore, because the trial court's decision allowing Officer Flannery to testify regarding appellant's convictions for importuning and attempted unlawful sexual conduct with a minor was harmless, appellant's first assignment of error is overruled.

{¶51} Assignment of Error No. 4:

{¶52} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT FAILED TO ALLOW DEFENSE COUNSEL TO QUESTION THE CHARACTER FOR TRUTHFULNESS OF A WITNESS."

{¶53} In his fourth assignment of error, appellant argues that the trial court erred by excluding opinion testimony of his witness, Tamara Owens, one of appellant's neighbors, regarding the reputation of truthfulness or untruthfulness of the state's witness, Earl Mills, another of appellant's neighbors.

{¶54} Pursuant to Evid.R. 608(A), and as pertinent here, "[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation," so long as the evidence refers "only to character for truthfulness or untruthfulness[.]" As previously noted, "[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *Sage*, 31 Ohio St.3d at 180. Therefore, the trial court's decision to admit or exclude evidence will not be reversed absent an abuse of discretion. *State v. Bell*, 176 Ohio App.3d 378, 2008-Ohio-2578, ¶40.

{¶55} In this case, the trial court prohibited Owens from testifying regarding Mills' reputation for truthfulness or untruthfulness within the community. According to appellant's proffer, which we find less than ideal, Owens would have testified that she was aware of Mills' reputation in the community and that it was one of untruthfulness. Owens' testimony concerning Mills' reputation, therefore, was clearly admissible pursuant to Evid.R. 608(A). See, e.g., *State v. Robertson*, Hamilton App. Nos. C-070151, C-070159, 2008-Ohio-2562, ¶28-30.

{¶56} However, while we may find the trial court's decision excluding Owens testimony was improper, after a thorough review of the record, we find such error to be harmless. See *State v. Reed*, 155 Ohio App.3d 435, 2003-Ohio-6536, ¶32, citing *State v. Bayless* (1976), 48 Ohio St.2d 73, paragraph seven of the syllabus. As noted in appellant's second and third assignments of error, the state provided overwhelming evidence of appellant's guilt and there is nothing in the record to indicate this error contributed to his conviction. Therefore, appellant's fourth assignment of error is overruled.

{¶57} Judgment affirmed.

POWELL, P.J., and BRESSLER, J., concur.

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