

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HOCKING COUNTY

STATE OF OHIO/CITY OF LOGAN,	:	
	:	
Plaintiff-Appellee,	:	Case No: 09CA9
	:	
v.	:	
	:	
CURTIS L. BAILEY,	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
	:	
Defendant-Appellant.	:	File-stamped date: 1-20-10

APPEARANCES:

Jason A. Sarver, Lancaster, Ohio, for Appellant.

Robert L. Lilley, City of Logan Law Director, Logan, Ohio, for Appellee.

Kline, J.:

{¶1} Curtis L. Bailey appeals his convictions for obstructing official business and criminal trespassing. On appeal, Bailey contends that we should vacate his conviction for criminal trespassing because the trial court erroneously admitted a prior statement that established that Bailey did not have permission to be at the property. We agree that the trial court erred, but we find the error harmless. Bailey next contends that the admission of this same statement violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. However, we find that the trial court did not consider the statement and so any error was harmless beyond a reasonable doubt. Finally, Bailey contends that we must vacate his convictions because they are not supported by sufficient evidence or by the manifest weight of the evidence. We disagree. Accordingly, we affirm the judgment of the trial court.

I.

{¶2} Bailey was released from prison and placed on parole. As a condition of his parole, Bailey was required to perform community service. Bailey failed to complete the required community service, and a warrant was issued for his arrest.

{¶3} A patrolman from the Logan Police Department received information that Bailey was at the 300 block of North Orchard Street. As the patrolman drove past 323 North Orchard Street, he saw a hooded figure that looked like Bailey run into the building. Despite repeated knocks by the patrolman, Bailey refused to exit the premises. The patrolman then called for help.

{¶4} Other patrolmen and probation officers arrived to help. The landlord provided the police with a key, but a chain lock still prevented their entrance. One of the probation officers then broke the door open. The officers searched the building for Bailey. They found him in the bathroom standing in the bathtub fully clothed with the shower curtain drawn. The police arrested Bailey.

{¶5} As the police prepared to transport Bailey to the police station, Bailey's girlfriend, Jennifer Davis, arrived. The house at 323 North Orchard Street was hers. Jennifer later completed a statement that indicated Bailey did not have her permission to be on the premises.

{¶6} At trial, the trial court admitted Jennifer's statement into evidence. The trial court found Bailey guilty of criminal trespass and obstructing official business.

{¶7} Bailey appeals his two convictions and asserts the following three assignments of error: I. "THE LOWER COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION, OVER THE OBJECTION BY DEFENDANT, BY

ADMITTING A WRITTEN STATEMENT OF [A] WITNESS INTO EVIDENCE WHEN IT WAS CLEARLY INADMISSIBLE HEARSAY.” II. “THE LOWER COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION, OVER THE OBJECTION BY DEFENDANT, BY ADMITTING A WRITTEN STATEMENT OF [A] WITNESS INTO EVIDENCE WHEN IT WAS CLEARLY A VIOLATION OF *CRAWFORD*.” III. “THE CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND BASED UPON INSUFFICIENT EVIDENCE.”

II.

{¶18} In his first assignment error, Bailey contends that the trial court’s admission of Jennifer’s prior written statement violated the rule against hearsay. The State argues that the admission of this statement was appropriate because it was a recorded recollection under Evid.R. 803(5). This rule allows the admission of memorandums or records “concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown by the testimony of the witness to have been made or adopted when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.” Evid.R. 803(5).

{¶19} “The admission or exclusion of relevant evidence rests within the sound discretion of the trial court[.]” *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, at ¶150, citing *State v. Robb*, 88 Ohio St.3d 59, 68, 2000-Ohio-275. An abuse of discretion connotes more than an error of judgment; it implies that the trial court’s attitude was

arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶10} On direct examination, Jennifer indicated that she could not recall whether she had given Bailey permission to be in her house or not. The prosecutor then provided her with her written statement. Among other things, Jennifer had written in the statement that “I locked my house before leaving the night before and Curtis Bailey did not have my permission to be at my house.” The prosecutor then asked Jennifer whether that statement refreshed her recollection. Initially, Jennifer indicated that it did not, but when pressed by the prosecutor on the specific issue of whether Bailey had permission to be in the house, Jennifer testified that Bailey did not have her permission.

{¶11} “Q Okay. And does that statement refresh your recollection of what happened that day?

{¶12} A I mean – no, not really. I was actually at my grandmother’s house and so I’m not really sure what happened.

{¶13} Q Listen to me now. Okay. You are under oath. Do you understand what that means?

{¶14} A Yes. I know I am.

{¶15} Q Now, we only have one issue that we have to get to here and the issue is whether or not Mr. Bailey had permission to be in your house on October 17th. Do you understand the question?

{¶16} A Yes, I understand it.

{¶17} Q Okay. Did he?

{¶18} A No, he didn’t.” Transcript at 22.

{¶19} On cross examination, defense counsel elicited testimony from Jennifer, which indicated that she, in fact, could not recall whether Bailey had her permission to be there or not. Finally, on redirect, the prosecution had Jennifer read the relevant portion of her prior statement. Defense counsel consistently objected to the admission of this evidence.

{¶20} In order for a statement to be admissible as a recorded recollection, the proponent of the evidence must lay the appropriate foundation. Among other things, the proponent must demonstrate the declarant's memory was fresh when the record was made, and that the record accurately reflected the declarant's memory. *State v. Bailey*, Cuyahoga App. No. 81498, 2003-Ohio-1834, at ¶32; *State v. Perry*, 147 Ohio App.3d 164, 2002-Ohio-1171, at ¶69; *State v. Henson*, Hamilton App. No. C-060320, 2007-Ohio-725, at ¶14.

{¶21} The prosecution did attempt to lay the requisite foundation. "Q When you made the statement the day afterwards, was your memory clear at that point? A No." Transcript at 24. This particular answer may strain credulity, but we cannot presume, and the trial court should not have presumed, the contrary proposition. Even if we suppose that the trial court could have concluded that Jennifer's memory was clear when the statement was drafted, nonetheless the law still requires the witness to testify "that such recollection was accurately recorded [in the witness's prior statement.]" *State v. Scott* (1972), 31 Ohio St.2d 1, 6. Unquestionably, Jennifer offered no such testimony in this case.

{¶22} Therefore, we find that the State failed to lay the requisite foundation for the admission of a past recollection recorded. Consequently, the trial court abused its

discretion in admitting this evidence. However, in order for this admission to rise to the level of reversible error, Bailey must demonstrate that its admission affected his substantial rights, or else the error amounts to harmless error. See *State v. Moon*, Adams App. No. 08CA875, 2009-Ohio-4830, at ¶44; Crim.R. 52(A).

{¶23} When the trial court admitted this statement, it admitted the actual paper statement as well as Jennifer's recitation of that statement. The trial court correctly noted in its judgment that the rule forbids the admission of the written statement unless the adverse party offers it. The trial court then stated, "the statement should not have been received into evidence. As such, the court has not and will not consider the statement." According to the trial court's reasoning, it needed only to disregard the writing of the statement. However, according to its judgment entry, the trial court disregarded the statement in its entirety and not just the writing. Therefore, we find that the trial court's initial admission of the recorded recollection is harmless error.

{¶24} Accordingly, we overrule Bailey's first assignment of error.

III.

{¶25} Bailey in his second assignment of error contends that Jennifer's testimony violated his constitutional rights under *Crawford v. Washington* (2004), 541 U.S. 36, 68 ("Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."). Bailey argues that Jennifer was not available for cross-examination within the meaning of *Crawford* because Jennifer stated that she could not remember whether she had given Bailey permission to be at her house.

{¶26} We may disregard even constitutional error in the admission of evidence where we find the error harmless beyond a reasonable doubt. See *State v. Love*, Ross App. No. 05CA2838, 2006-Ohio-1824, at ¶34, citing *Chapman v. California* (1967), 386 U.S. 18, 22. Here, because the trial court expressly stated it did not consider the erroneously admitted prior statement, we find any constitutional error related to that statement harmless beyond a reasonable doubt.

{¶27} This leaves the remainder of Jennifer's testimony, most particularly that portion where the prosecutor refreshed her recollection. Notwithstanding his arguments, Bailey's objection is not really that Jennifer was unavailable. Instead he is arguing that he was not afforded an opportunity to cross-examine the witness brought against him.

{¶28} However, we find Bailey's argument misconstrues the record. In the passage quoted above, Jennifer testified from her own memory that Bailey did not have her permission to be at her house. She was present and capable of being cross examined, and Bailey's Attorney elicited testimony from Jennifer that indicated she could not, actually, remember whether Bailey had her permission to be there or not. In other words, Bailey's attorney effectively cross-examined Jennifer. The trial court simply believed Jennifer's initial statement and chose not to believe her later protestations.

{¶29} Accordingly, for the above stated reasons, we overrule Bailey's second assignment of error.

IV.

{¶30} Finally, Bailey contends his convictions are not supported by sufficient evidence, and that they are against the manifest weight of the evidence. Bailey

combines both arguments in the same assignment of error, but these arguments are based on distinct standards of review. As such, we will consider each argument separately.

A. Sufficiency of the Evidence

{¶31} When reviewing a case to determine whether the record contains sufficient evidence to support a criminal conviction, our function “is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. 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.” *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 319.

{¶32} This test raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Rather, this test “gives full play to the responsibility of the trier of fact [to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *Jackson* at 319. Accordingly, the weight given to the evidence and the credibility of witnesses are issues for the trier of fact. *State v. Thomas* (1982), 70 Ohio St.2d 79, 79-80; *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶33} The trial court convicted Bailey of violating Logan City Code 136.06, which is analogous to R.C. 2921.31. “No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official’s official capacity, shall do any act that hampers or impedes a

public official in the performance of the public official's lawful duties." R.C. 2921.31(A). "A violation of this statute requires an affirmative act. A person cannot be guilty of obstructing official business by doing nothing or failing to act." *State v. Wellman*, 173 Ohio App.3d 494, 2007-Ohio-2953, at ¶10, citing *State v. King*, Marion App. No. 9-06-18, 2007-Ohio-335, at ¶58.

{¶34} Here, an officer saw Bailey enter the residence and knew Bailey was wanted on an outstanding warrant. The officers knocked on the front door and asked Bailey to exit the residence. After the officers obtained entry, they found Bailey standing in the bathtub fully clothed with the shower curtain drawn. After the police arrested him, Bailey said he "couldn't believe this was happening over stupid community service[.]"

{¶35} As we have previously noted, Ohio Courts have consistently held that fleeing from the police can constitute obstructing official business. *State v. Certain*, 180 Ohio App.3d 457, 2009-Ohio-148, at ¶15. In this case, we see little distinction. Bailey took affirmative actions to evade the police, here hiding rather than flight.

{¶36} Bailey argues that his actions did not in actuality impede or hamper the performance of law enforcement. Bailey's efforts were ultimately unsuccessful, but he may still be convicted of the offense, so long as his efforts did actually impede or hamper the performance of law enforcement. In this case, the finder of fact was permitted the reasonable inference that the police took longer to find Bailey because he was hiding in the bathroom. The record also supports the conclusion that Bailey was in the bathroom for the purpose of hiding from the police. Under these circumstances, Bailey's conviction for obstructing official business is supported by sufficient evidence.

{¶37} The trial court also convicted Bailey for criminal trespassing under Logan City Code 131.06(A)(1), which is analogous to R.C. 2911.21(A)(1). “No person, without privilege to do so, shall do any of the following: (1) Knowingly enter or remain on the land or premises of another[.]” R.C. 2911.21(A)(1). Bailey only argues that the trial court erred in finding that Bailey was without privilege to be on the premises. Here, Jennifer testified that Bailey did not have her permission to be present on the premises. Transcript at 22. Jennifer, in effect, later recanted this testimony by declaring she could not remember the day in question. The trial court apparently discounted this recantation because Jennifer also testified that she did not wish to testify against Bailey. Transcript at 19.

{¶38} Under a sufficiency of the evidence standard, the trial court was entitled to resolve this issue. “Thus, the trier of fact is free to believe all, part, or none of the testimony of any witness who appears before it.” *State v. Rhoads*, Highland App. No. 08CA25, 2009-Ohio-4180, at ¶23, citing *Rogers v. Hill* (1998), 124 Ohio App.3d 468, 470; *Stewart v. B.F. Goodrich Co.* (1993), 89 Ohio App.3d 35, 42. Therefore, after viewing the evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of the offenses of obstruction of official business and criminal trespassing proven beyond a reasonable doubt.

B. Manifest Weight of the Evidence

{¶39} Bailey next contends that his convictions are against the manifest weight of the evidence.

{¶40} When determining whether a criminal conviction is against the manifest weight of the evidence, we “will not reverse a conviction where there is substantial evidence upon which the [trier of fact] could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt.” *State v. Eskridge* (1988), 38 Ohio St.3d 56, paragraph two of the syllabus. See, also, *State v. Smith*, Pickaway App. No. 06CA7, 2007-Ohio-502, at ¶41. We “must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the 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 granted.” *Smith* at ¶41, citing *State v. Garrow* (1995), 103 Ohio App.3d 368, 370-71; *State v. Martin* (1983), 20 Ohio App.3d 172, 175. “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.” *Martin* at 175 (citations omitted).

{¶41} Bailey again argues his conviction for obstructing official business is against the manifest weight of the evidence because “failure to answer the knocking on the door by law enforcement does not constitute obstruction of official business.” Bailey’s Brief at 13. We agree with this proposition because proof of obstructing official business requires the State to prove the defendant committed an affirmative act. *Wellman* at ¶10. Nonetheless, we do not agree that the trial court so lost its way that this is an exceptional case in which we should exercise our power to grant a new trial.

{¶42} Here, the officers testified that Bailey was found hiding in the bathroom, standing in the bathtub, fully dressed, with the curtain drawn. The trier of fact was

entitled to draw the reasonable inference that Bailey's location prevented the police from apprehending him as quickly as they would have otherwise. And his comment upon his arrest, that he could not believe he was being arrested over community service, indicated that he understood the reasons the police were seeking him. And the statement further supported the inference that Bailey was in the bathroom for the purpose of hiding from the police. Under these circumstances, we do not agree that the trial court lost its way when it convicted Bailey of obstruction of official business.

{¶43} Bailey does not appear to advance any argument that his conviction for criminal trespass is not supported by the manifest weight of the evidence. And after Jennifer testified that she did not wish to testify against Bailey, the trial court reasonably discounted Jennifer's later protestations of forgetfulness. As such, we do not think the trial court so lost its way that his conviction is against the manifest weight of evidence.

{¶44} In conclusion, we find substantial evidence in the record upon which the [trier of fact] could reasonably conclude that all the elements of the offenses of obstruction of official business and criminal trespass have been proven beyond a reasonable doubt.

{¶45} Accordingly, we overrule Bailey's third assignment of error.

V.

{¶46} Having overruled all of Bailey's assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED. Appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking County Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, P.J.: Concurs in Judgment Only.
Harsha, J.: Concurs in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.