

[Cite as *Mt. Vernon v. Brown*, 2009-Ohio-6883.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CITY OF MOUNT VERNON

Plaintiff-Appellee

-vs-

ERIC BROWN

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Julie A. Edwards, J.

Case No. 2009CA00027

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Mt. Vernon Municipal
Court, Case No. 09-CRB-323

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

December 28, 2009

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

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Hoffman, J.

{¶1} Defendant-appellant Eric Brown appeals the May 20, 2009 Judgment Entry of the Mount Vernon Municipal Court finding him guilty of failing to confine a dog, in violation of Mount Vernon City Ordinance 505.01(C). Plaintiff-appellee is the City of Mount Vernon.

STATEMENT OF THE FACTS AND CASE

{¶2} In early November of 2007, Sanjiv Sharma came to Appellant's home on several occasions to complain of Appellant's dog defecating in his yard. Appellant then indicated to Sharma the dog was contained by an electric fence, showing him the dog's collar.

{¶3} Sharma later placed a letter in Appellant's mailbox reporting his yard was "messy" where Appellant's dog had been seen.

{¶4} On December 7, 2007, Sharma again went to Appellant's residence to complain, at which time Appellant told him it was not a good time and shut the door. The parties had no further contact for over a year.

{¶5} On December 31, 2008, Sharma contacted the Mount Vernon Police Department to complain of Appellant permitting his dog to run at large. Sharma provided Corporal Scott McKnight with photographs of the dog in his yard. Corporal McKnight contacted Appellant to investigate the complaints, at which time Appellant indicated to Corporal McKnight there were several dogs in the neighborhood similar to Appellant's, including one residing adjacent to Sharma's property. Appellant then showed Corporal McKnight the wireless restraint used to restrain his dog.

{¶6} Upon leaving Appellant's residence, Corporal McKnight observed a dog similar to the dog in the photograph near Sharma's backyard, but chose not to question the owner of the dog. It is undisputed a dog similar in appearance to Appellant's lives on the other side of Sharma's residence. Additionally, it is undisputed there are three to four dogs of the same breed residing in the parties' neighborhood.

{¶7} Teresa Brate, owner of Midnight Magic Kennels Boarding and Grooming, testified she picked up Appellant's dog on December 23, 2008 and boarded the dog until December 29, 2008, at which time she returned the dog. The boarding was corroborated by a business record.

{¶8} On February 28, 2009, Sharma again went to the police station to report Appellant's dog running at large.

{¶9} On April 16, 2009, the Mount Vernon Prosecutor filed charges against Appellant for failure to confine his dog, in violation of Mount Vernon Ordinance 505.01(C).

{¶10} Via Judgment Entry of May 20, 2009, the trial court found Appellant guilty of the charge.

{¶11} Appellant now appeals, assigning as error:

{¶12} "I. THE EVIDENCE BEFORE THE TRIAL COURT WAS INSUFFICIENT TO SUSTAIN A CONVICTION, EVEN WHEN VIEWED IN LIGHT MOST FAVORABLE TO THE PROSECUTION, BECAUSE THE PROSECUTION FAILED TO POSITIVELY IDENTIFY THE DOG AS APPELLANT'S, DID NOT PROVE THAT THE YARD IN THE EXHIBITS BELONGED TO COMPLAINANT AND FAILED TO ESTABLISH THAT APPELLANT'S DOG WAS NOT UNDER REASONABLE CONTROL.

{¶13} “II. APPELLANT’S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE TRIAL COURT JUDGE UNMISTAKABLY CREATED SUCH A MANIFEST MISCARRIAGE OF JUSTICE THAT THE CONVICTION MUST BE REVERSED.

{¶14} “III. THE TRIAL COURT JUDGE ABUSED HIS DISCRETION WHEN HE DID NOT ALLOW APPELLANT TO QUESTION COMPLAINANT ABOUT IDENTIFYING CHARACTERISTICS OF THE DOG AND WHEN HE DISREGARDED APPELLANT’S CROSS EXAMINATION OF THE POLICE OFFICER BECAUSE THE TESTIMONY WAS ‘BORING’ HIM.”

I, II.

{¶15} Appellant’s first and second assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶16} On review of a sufficiency of the evidence claim ‘[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. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.”

{¶17} “An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction 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. Again, 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.” *Id.*

{¶18} On review for manifest weight, a reviewing court is to examine 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 judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment.” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶19} Appellant was charged with failure to confine a dog, in violation of Mount Vernon City Ordinance 505.01(C) which reads:

{¶20} “No owner, keeper or harbinger of any dog shall fail at any time to keep it either physically confined or restrained upon the premises of the owner, keeper or harbinger by a leash, tether, adequate fence, supervision or secure enclosure to prevent escape, or under reasonable control of some person.”

{¶21} Initially, we note, because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, syllabus 1.

{¶22} Based upon the evidence set forth above, we find there is sufficient evidence supporting the trial court's finding Appellant violated the city ordinance. On February 28, 2009, Sharma testified he saw Appellant's dog in his yard, alone and not

under the control of any person or restraint. Sharma provided the court with three photographs of the dog. Sharma testified he watched the dog walk from his yard to Appellant's yard, up onto the patio. While we agree with Appellant the evidence was not sufficient to prove the allegation with regard to the time period the dog was shown to be boarded from December 23, 2008 to December 29, 2008, Appellant was convicted of a single count of failure to confine the dog. We find there was sufficient competent, credible evidence going to the essential elements of the charge involving the February 28, 2009 incident to support the trial court's verdict.

{¶23} The first and second assignments of error are overruled.

III.

{¶24} In the third assignment of error, Appellant maintains the trial court abused its discretion in not allowing Appellant to question Sharma relative to identifying characteristics of the dog he observed on his premises, and in disregarding Appellant's cross-examination of the police officer who investigated the claims. Specifically, Appellant attempted to question Sharma relative to identifying characteristics of the dog in order to test Sharma's credibility with regard to the complaint. Further, Appellant cites the trial court's limiting his questions of Corporal McKnight, indicating the court was bored and the questions were irrelevant. Appellant asserts the behavior of the trial court indicates the court did not properly consider the evidence.

{¶25} Ordinarily, a trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence. The admission of relevant evidence pursuant to Evid.R. 401 rests within the sound discretion of the trial court. E.g., *State v.*

Sage (1987), 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343, paragraph two of the syllabus. An appellate court that reviews the trial court's admission or exclusion of evidence must limit its review to whether the lower court abused its discretion. *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107, 543 N.E.2d 1233, 1237. As this court has noted many times, the term 'abuse of discretion' connotes more than an error of law; it implies that the court acted unreasonably, arbitrarily or unconscionably. E.g., *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 482, 450 N.E.2d 1140, 1142. A reviewing court should be slow to interfere unless the court has clearly abused its discretion and a party has been materially prejudiced thereby. *State v. Maurer* (1984), 15 Ohio St.3d 239, 264, 473 N.E.2d 768, 791.

{¶26} While we believe cross-examination of Sharma relative to the dog's identifying characteristics may have been improperly restricted, based upon the above and in view of the record before this Court, we find Appellant has not demonstrated prejudice as a result of the trial court's exclusion of that evidence. The comment the trial court was bored with Appellant's cross-examination of Corporal McKnight does not affirmatively demonstrate the trial court did not consider the same. We presume the trial court properly considered the evidence presented, and do not find the trial court abused its discretion.

{¶27} The third assignment of error is overruled.

{¶28} Appellant's conviction in the Mount Vernon Municipal Court is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Edwards, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

