

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2008-G-2851
JAMES W. WARD,	:	
Defendant-Appellant.	:	

Criminal Appeal from Chardon Municipal Court, Case No. 2006 CRB 01386.

Judgment: Affirmed.

James M. Gillette, City of Chardon Police Prosecutor, National City Bank Building, 117 South Street, #208, Chardon, OH 44024 (For Plaintiff-Appellee).

Betsy L. Dvorak, 11165 Chillicothe Road, Chesterland, OH 44026 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Appellant, Mr. James W. Ward, was convicted of one count of domestic violence following a bench trial. The conviction arose from one of many domestic violence altercations between Mr. Ward and his wife, Mrs. Alison Ward, in their over ten-year tumultuous relationship.

{¶2} Mr. Ward contends the trial court erred in finding him guilty as the manifest weight of the evidence weighs heavily in his favor. Specifically, he denies that he beat and threatened Mrs. Ward and trashed their kitchen over an argument regarding the

children's clothing. He argues that her version of the events is inconsistent and simply not credible when one compares her police statement taken on the day of the incident, her testimony at the civil protection order ("CPO") hearing that followed shortly after the incident, and her testimony at trial.

{¶3} We disagree with Mr. Ward's contentions. A review of the evidence presented at trial reveals only inconsequential variants in testimony and failed impeachment attempts by trial counsel regarding a rather tortured and abusive relationship. Thus, we affirm.

{¶4} Substantive and Procedural History

{¶5} On December 17, 2006, the Chester Township Police Department received a domestic violence call from Mrs. Ward, the victim. Sergeant Deborah Davis, who responded to the call, arrived on the scene and found Mrs. Ward, standing in the kitchen, with her hair disheveled and crying, and holding a baby in her arms. Debris, food, shelving, and broken glass from a coffee pot was strewn about the kitchen floor.

{¶6} The trigger for the altercation was the new clothing Mrs. Ward purchased for their oldest daughter, Julia, who was then five. Apparently, Mr. Ward disagreed with Mrs. Ward that the clothes would shrink in the first wash so he decided to return them. The Wards began arguing about the ill-fitting clothes and Julia began "acting out." Mrs. Ward spanked her, and turned to feed the baby. Mr. Ward took Julia and her younger sister, who was then four, as well as the clothes, and put them in the car, intending to return the clothes at the store.

{¶7} Mr. Ward came back into the kitchen and approached the high chair where Mrs. Ward was feeding the baby. He grabbed her from behind and slammed her

into the wall, pulled her hair, and raised a cocked fist to her, threatening he would kill her if she ever hit the kids again. He tore apart the kitchen while she stayed underneath the high chair until he left.

{¶8} During trial, the defense tried to paint Mrs. Ward as the aggressor, however, Mrs. Ward readily admitted her previous convictions for domestic violence that arose from the ten-year period of their tumultuous relationship and explained Mr. Ward's manipulative behavior.

{¶9} Mrs. Ward testified that since the beginning of their relationship, Mr. Ward was abusive, and in fact, they separated in 2004 because of it. During that year, custody of the parties' children passed from Mr. Ward to Mrs. Ward after an investigation revealed there was no indication of abuse. Mrs. Ward also described three incidents during the month prior to this incident where she was assaulted for being \$15 over the household budget, cancelling a party, and opening a joint bank account statement. On all three occasions she did not call the police. When asked why she never reported the past abuse and was always the party charged in the altercations, she claimed that Mr. Ward was very clever and manipulative. When the police would arrive on the scene she would typically be very emotional, whereas Mr. Ward was very calm. Once charged, Mr. Ward would tell her to just plead guilty so she could come home.

{¶10} In the latest incident, however, she decided this would be the last time she would be abused and called the police. Because of the belittlement and violent behavior the children witnessed displayed by their father towards their mother, Mrs.

Ward's relationship with the children was being affected, and she began to have trouble disciplining them.

{¶11} As for the incident on December 17, 2006, Mrs. Ward had no bruises, black eyes, or broken bones, and she claimed she was not injured in "that way, just attacked." She did have a bump on her head, and the next day, felt "like she was in a car accident." She refused treatment even though she was pregnant at the time. During a CPO hearing, she also testified that she did not have medical insurance. At both hearings she testified that she refused treatment because she had the children, no one to watch them, and no means of transportation.

{¶12} Mrs. Ward also refused treatment in the past. She refused treatment for what she believes was a broken sternum when she was pregnant with their second child. Mr. Ward attacked her and, while she did not receive treatment for what she believes was a broken sternum, she did need to have her left breast implant removed after she had the baby because it shifted when Mr. Ward drove his knee into her chest.

{¶13} Mrs. Ward has a history of criminal convictions for child endangerment, domestic violence, and resisting arrest. She has been through alcoholics anonymous for several OVIs and was ordered to undergo anger management classes. She disagrees that she has either an alcoholic problem or anger management problem. She opined that her OVI convictions resulted from the poor choices she made when she was working in the "entertainment industry" over five years ago.

{¶14} In sum, Mrs. Ward testified she has been the victim in their past altercations, not Mr. Ward, but that she always took the blame. She testified that she is a strong person, which is why she took the abuse for so long. Now that the children

were older and it was affecting them and her, she realized she must end this abusive situation.

{¶15} It was also revealed at trial that Mr. Ward called Sergeant Davis repeatedly for the next ten months after the incident asking her to testify in his favor. He told Sergeant Davis that he paid for a transcript from the CPO hearing and wanted her to review it and testify that Mrs. Ward was lying. Sergeant Davis appropriately declined as she was not present for the CPO hearing that was held in February of 2007 (after the ex parte emergency temporary CPO that was granted several days after the initial incident in December of 2006). During those calls, Mr. Ward would also inform Sergeant Davis he felt wrongly arrested, the department was not handling the situation correctly, and Mrs. Ward was really the person at fault. When asked if she ever thought Mrs. Ward was lying, Sergeant Davis stated, “No.” She also felt harassed by Mr. Ward's repeated calls.

{¶16} For some reason there was no record made of the remainder of the hearing, thus an App.R. 9(C) statement supplementing Mr. Ward's testimony and the testimony of Sergeant Davis upon reexamination was submitted by the parties. The approved statement revealed that Mr. Ward was recently convicted of forgery and tampering with records for the sale of a motor vehicle. He claims he was wrongly charged.

{¶17} As to his version of events, Mr. Ward testified on the day of the incident he took the children into the garage to return the pants, went back into the house where he told Mrs. Ward to pack her “stuff,” and was driving down Mayfield Road when the police pulled him over, indicating he was under arrest. He then testified he did not walk into

the kitchen for a second time, he did not touch Mrs. Ward or even go near her, and he told the officer what happened and would have given a statement had he been asked.

{¶18} On rebuttal, Sergeant Davis testified she did ask Mr. Ward to give a written statement, but that he refused.

{¶19} The court found Mr. Ward guilty of one count of domestic violence, in violation of R.C. 2919.25(A), a misdemeanor of the first degree. He was sentenced to a jail term of 180 days, suspended; ordered to pay a fine of \$1,000, with \$750 suspended; and placed on probation for one year.

{¶20} Mr. Ward now appeals, raising the following assignment of error:

{¶21} “The trial court erred to the prejudice of Defendant-Appellant when it convicted Defendant-Appellant of domestic violence.”

{¶22} Manifest Weight of the Evidence

{¶23} Specifically, Mr. Ward raises a manifest weight of the evidence argument, contending that the evidence is insufficient to uphold his conviction because Mrs. Ward’s testimony has been inconsistent since the time of incident, and thus her testimony is not credible.

{¶24} Manifest “weight of the evidence involves the ‘inclination of the *greater amount of credible evidence*.’” *State v. Taylor*, 11th Dist. No. 2008-A-0007, 2008-Ohio-4670, ¶10, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387 (emphasis sic) (citation omitted). “Weight of the evidence addresses the evidence’s effect of inducing belief.” *Id.*, quoting *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶25 (citation omitted). “In other words, a reviewing court asks whose evidence is more persuasive -- the state’s or the defendant’s?” *Id.*

{¶25} “Generally, the weight to be given to the evidence and the credibility of the witnesses is primarily for the trier of fact to determine.” *Id.* at ¶11, citing *State v. Thomas* (1982), 70 Ohio St.2d 79, syllabus. “When reviewing a manifest [weight of the evidence] challenge, however, the appellate court sits as the ‘thirteenth juror.’” *Id.*, citing *Thompkins* at 387 (citation omitted). “The reviewing court must consider all the evidence in the record, the reasonable inferences, and the credibility of the witnesses, to determine 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 and a new trial ordered. 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.’” *Id.*, quoting *Thompkins*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶26} Mr. Ward was convicted of domestic violence, a first degree misdemeanor in violation of R.C. 2919.25(A), which states: “[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member.”

{¶27} Mr. Ward contends that no visible injuries were observed by Sergeant Davis, and Mrs. Ward’s testimony was inconsistent since the time of the incident, throughout trial, and at the CPO hearing. Thus, he contends the evidence presented by the state was less than credible, indicating that the trier of fact clearly lost its way and that a new trial must be ordered. The issue in this case turns on credibility of the witnesses, as Mr. Ward does not challenge the sufficiency of the evidence and does not argue, as the state notes in its brief, that the evidence is insufficient to sustain his conviction. We find Mr. Ward’s contentions to be without merit.

{¶28} First, it is not necessary that visible markings must be observed. Pursuant to R.C. 2901.01(A)(3), physical harm “means any injury, illness, or other physiological impairment, *regardless of its gravity or duration.*” (Emphasis added.)

{¶29} As we stated in *State v. Boldin*, 11th Dist. No. 2007-G-2808, 2008-Ohio-6408, “[d]omestic violence merely requires a showing of ‘physical’ harm as defined in R.C. 2901.01(A)(3), which does not require evidence of visible injuries.” *Id.* at ¶40. “See, also, *State v. Hawn*, 11th Dist. No. 2002-P-0042, 2003-Ohio-5868 (the state presented sufficient evidence of the element of physical injury where the victim attested that defendant punched her in the eye, and the victim’s condition was later corroborated by an investigating officer); *State v. Barnes*, 8th Dist. No. 87153, 2006-Ohio-5239 (even though a victim had no visible injuries after the incident, there was sufficient evidence to support a finding that the victim was physically injured under R.C. 2901.01(A)(3)); *State v. Summers*, 11th Dist. No. 2002-A-0074, 2003-Ohio-5866 (testimony from defendant’s girlfriend that defendant grabbed her around her neck causing a bruise to appear the next day was sufficient to prove the physical harm element to sustain defendant’s domestic violence conviction; it was irrelevant that she failed to seek medical treatment, nobody saw her injury, and no photographs were taken of her bruise); *State v. Blonski* (1997), 125 Ohio App.3d 103 (a defendant may be found guilty of domestic violence if the victim sustains minor injuries or even no injuries at all).” *Id.* at ¶42. See, also, *State v. Taliaferro*, 11th Dist. No. 2008-P-0060, 2009-Ohio-1317 (the testimony of the victim and the officer was sufficient to prove physical harm, even where the officer testified that he observed no physical markings).

{¶30} The record reveals that Mrs. Ward testified that Mr. Ward slammed her into the wall, further slammed her head into the wall, pulled her hair, and crushed her. He then had his “fist cocked,” and threatened that if she ever “hit the kids again, he would kill her.” Mrs. Ward also testified she had a bump on her head and that her injuries were not severe. Sergeant Davis testified when she arrived on the scene, she found Mrs. Ward disheveled and crying in the kitchen, and that Mrs. Ward refused her recommendation of treatment even though she was pregnant at the time. When asked if she believed Mrs. Ward was lying about the incident, Sergeant Davis replied “no.”

{¶31} At trial, Mr. Ward simply denied the altercation even happened, aside from the verbal argument that resulted in him leaving the house with the children to return the clothing. He testified they had an argument over the clothing so he decided to take the clothing back when the two older children ran into the garage, screaming “Mommy hit us.” He then told Mrs. Ward to pack her “stuff,” and believes Mrs. Ward destroyed the kitchen after he left.

{¶32} Second, as to Mr. Ward’s contention that Mrs. Ward’s testimony has been inconsistent since the time of the incident, we disagree. Our review of the police statement, the police report, the trial transcript, as well as the transcript from the CPO hearing reveals no material inconsistencies. Rather, Mrs. Ward’s descriptions have remained the same throughout. The words may have been parsed upon cross-examination, and there were either failed impeached attempts or attempts to impeach where it was clear trial counsel did not have the impeaching evidence “in his pocket,” but any variants were explained and the trial court was in the best position to evaluate credibility. Whether or not she was wrongly labeled the abuser in the past is not for us

to determine, but an assessment of the facts and circumstances of this case leave us with no doubt that the trial court did not lose its way or create such a manifest miscarriage of justice that Mr. Ward's conviction must be reversed and a new trial ordered.

{¶33} Mrs. Ward candidly admitted to her past behavior and convictions, and admitted that she was upset and spanked her child because that is how she chooses to discipline her children. She asserted that she has not exaggerated or embellished her story as time has passed. Rather, she was adamant that she called the police in this instance because it was the last time she was going to be a victim and a pawn. Sergeant Davis testified that she believed Mrs. Ward was abused that day. Mr. Ward claims he was not asked for a written statement by Sergeant Davis, but that testimony was contradicted and rebutted by the officer.

{¶34} Thus, although Mr. Ward denies the whole event and attributes the disarray in the kitchen to Mrs. Ward having a “temper-tantrum,” the trier of fact was free to find that Mrs. Ward and Sergeant Davis were the more credible witnesses, and that Mrs. Ward was indeed attacked, especially when viewed in light of his prior convictions for a crime of dishonesty and his apparent obsessive attempts to sway the officer’s testimony prior to trial.

{¶35} “It is well-settled that when assessing the credibility of witnesses, ‘[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact.’” *State v. Homan*, 11th Dist. No. 2006-P-0116, 2007-Ohio-6162, ¶24, quoting *State v. McKinney*, 11th Dist. No. 2006-L-169, 2007-Ohio-3389, ¶49, citing

State v. Grayson, 11th Dist. No. 2006-L-153, 2007-Ohio-1772, ¶31, citing *State v. Awan* (1986), 22 Ohio St.3d 120, 123. “Indeed, the factfinder is free to believe all, part, or none of the testimony of each witness appearing before it.” *Id.*, quoting *McKinney* at ¶49, citing *Warren v. Simpson* (Mar. 17, 2000), 11th Dist. No. 98-T-0183, 2000 Ohio App. LEXIS 1073, 8.

{¶36} Furthermore, “[i]f the evidence is susceptible to more than one interpretation, a reviewing court must interpret it in a manner consistent with the verdict.” *Id.* “Moreover, in a criminal bench trial, a reviewing court will not reverse a conviction ‘where there is substantial evidence upon which the court could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt.’” *Id.*, quoting *Grayson* at ¶31, citing *State v. Arnold* (Sept. 7, 1999), 12th Dist. No. CA99-02-026, 1999 Ohio App. LEXIS 4159, 10.

{¶37} We find Mr. Ward’s assignment of error to be without merit.

{¶38} The judgment of the Chardon Municipal Court is affirmed.

DIANE V. GRENDALL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.