

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
PORTAGE COUNTY, OHIO**

IN RE:	:	<b>OPINION</b>
T.M.W.	:	
	:	<b>CASE NO. 2010-P-0085</b>

Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. 2010 JCC 00587.

Judgment: Affirmed.

*James W. Armstrong*, Leippy & Armstrong, 101 Riverfront Centre, 2101 Front Street, Cuyahoga Falls, OH 44221 (For Appellant Jaimie R. Wiley).

*Victor V. Vigluicci*, Portage County Prosecutor, and *Allison B. Manayan*, Assistant Prosecuting Attorney, 241 South Chestnut Street, Ravenna, OH 44266 (For Appellee, Portage County Department of Job and Family Services).

*Lee Ann Schaffer*, 2910 Woodbridge Lane, Stow, OH 44224-5145 (Guardian ad litem).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Jaimie R. Wiley, appeals from the judgment of the Portage County Court of Common Pleas, Juvenile Division, adopting the magistrate's decision adjudicating her eleven-year-old son, T.M.W., an abused child. For the reasons discussed below, we affirm the trial court's judgment.

{¶2} On July 9, 2010, Deputy Beth Hurd of the Portage County Sheriff's Department responded to a report of domestic violence at appellant's residence. Upon arrival, the deputy found T.M.W. on a neighbor's porch. The boy was breathing heavily,

crying, and holding an ice pack to his head. The deputy discovered T.M.W. had a “goose egg” on his head and asked the boy what had happened. He stated his mother had rammed an elbow into his head, slapped him in the face, and punched him in the stomach. He also stated, prior to the deputy’s arrival, he had spit up blood. The deputy found appellant and asked her “why she was beating [T.M.W.] in the head?” According to Deputy Hurd, appellant simply indicated she was trying to restrain the boy.

{¶3} Ryan Leifheit, a fireman and paramedic for the Ravenna Township Fire Department, also responded to the scene. According to Leifheit, T.M.W. was very scared and wincing in pain when he arrived. T.M.W. told Leifheit his injuries occurred when his mother sat on top of him and struck him in the face and dug her elbow into his eye socket. According to Leifheit, T.M.W.’s face was red and swollen, but the left eye was more red than the right. At the time of the interview, T.M.W. complained that his left arm was hurting and tingling; his face was really hurting; and his head was throbbing. T.M.W. was subsequently taken to the hospital and appellant was arrested for felonious assault.

{¶4} On July 12, 2010, Portage County Department of Job and Family Services (“PCDJFS”) filed a complaint alleging T.M.W. was an abused, neglected, and/or dependent child. A shelter care hearing was held and, on July 15, 2010, an order was issued granting interim custody of T.M.W. to PCDJFS. An adjudicatory hearing was held before the magistrate and, on August 26, 2010, the court dismissed the allegations of neglect and dependency, but found T.M.W. to be an abused child. Neither party requested the magistrate to issue findings of fact and conclusions of law; on October 25, 2010, however, the trial judge recommitted the matter to the magistrate to render

findings and conclusions. The magistrate complied and in his decision issued the following determinations:

{¶5} “First, there was substantial evidence that the child had physical injuries that were not the result of any accidental means, i.e., blows to the face, head and torso, and that they were inflicted by his mother \*\*\*[.]”

{¶6} “Second, the child’s injuries were at variance with the history given by the mother in her brief self-serving comment to the police officer. There is simply no evidence whatsoever that the mother had attempted to ‘restrain’ the child for any reason, legitimate or otherwise. \*\*\*.”

{¶7} Appellant filed objections to the magistrate’s findings and conclusions. And, on October 29, 2010, after a hearing on the objections, the trial court adopted the magistrate’s decision. This appeal follows.

{¶8} For her first assignment of error, appellant alleges:

{¶9} “The trial court erred by finding the minor child to be an abused child without sufficient evidence.”

{¶10} At the adjudicatory proceeding, PCDJFS bore the burden of demonstrating, by clear and convincing evidence, that T.M.W. was either dependent, neglected, or abused. See, e.g., *In re Savchuk Children*, 180 Ohio App.3d 349, 2008-Ohio-6877, at ¶32. “‘Clear and convincing evidence is that measure or degree of proof which is more than a mere “preponderance of the evidence,” \*\*\* and which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.’” *Id.* at ¶33, quoting *Cross v. Ledford* (1954), 161 Ohio St 469, paragraph three of the syllabus.

{¶11} In this case, T.M.W. was adjudicated an “abused child” pursuant to R.C. 2151.031(C). That subsection defines an “abused child” as any child who:

{¶12} “Exhibits evidence of any physical or mental injury or death, inflicted other than by accidental means, or an injury or death which is at variance with the history given of it. Except as provided in division (D) of this section, a child exhibiting evidence of corporal punishment or other physical disciplinary measure by a parent, guardian, custodian, person having custody or control, or person in loco parentis of a child is not an abused child under this division if the measure is not prohibited under Section 2919.22 of the Revised Code.”

{¶13} R.C. 2919.22, the child endangering statute, provides, in relevant part:

{¶14} “No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age:

{¶15} “\*\*\*

{¶16} “(3) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child.”

{¶17} R.C. 2901.01(A)(5) defines “serious physical harm.” It provides, in relevant part:

{¶18} “\*\*\*

{¶19} “(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.”

{¶20} In adopting the magistrate's decision, the trial court determined that the evidence at the adjudicatory hearing demonstrated that T.M.W. had physical injuries that were not a result of an accident. The court further determined that T.M.W.'s injuries were at variance with the history given, at the scene, by appellant: viz., that the injuries occurred in the course of her attempting to restrain T.M.W. And there was nothing in the record to suggest the injuries occurred in the course of disciplinary corporal punishment. Finally, the trial court concluded that "\*\*\*\* the limited exceptions to Section 2151.031 of the Revised Code referencing conduct not prohibited by R.C. 2919.22 have no application to the facts of this case." A review of the transcript as well as other relevant aspects of the record support the trial court's conclusions.

{¶21} The record reflects that T.M.W. suffered physical injuries; namely, an observable lump on his head and a swollen, apparently battered face. According to testimony, T.M.W. was crying, breathing heavily, frightened, and wincing in pain when the first-responders arrived. Further, the boy indicated his condition was a result of a beating his mother administered, which included blows to the head with her hands and elbow as well as a punch to the stomach. Although appellant suggested T.M.W.'s injuries occurred while she was restraining him and therefore were "accidental," the boy's physical and emotional conditions belie such an explanation.

{¶22} Furthermore, the evidence demonstrates that appellant's actions in causing T.M.W.'s injuries would stand in violation of R.C. 2919.22. As the trial court correctly noted, nothing indicates appellant was administering corporal punishment or physical discipline in causing the injuries; and, even if she was, T.M.W.'s condition demonstrates that her methods created a substantial risk of serious physical harm to

the boy; indeed, the record indicates that appellant's actions not only created a substantial risk, but actually caused T.M.W. "substantial suffering" as well as "intractable pain." Furthermore, assuming appellant's actions could be construed as a form of physical restraint, such restraint, given T.M.W.'s condition, could be reasonably construed as cruel or excessive, while, at the same time, creating a substantial risk of serious physical harm.

{¶23} We therefore hold there was clear and convincing evidence to support the trial court's legal conclusions that (1) T.M.W. suffered physical injuries that were non-accidental; (2) the injuries were at variance with the history provided by appellant; (3) the injuries did not occur while appellant was employing corporal punishment; and, (4) even if the injuries occurred in the course of corporal punishment or restraint, the actions would still be prohibited under the child endangering statute.

{¶24} Appellant's first assignment of error is overruled.

{¶25} Appellant's second assignment of error asserts:

{¶26} "The trial court abused its discretion and the mother was denied due process when the trial court prohibited mother's counsel from asking a key witness relevant and proper questions."

{¶27} Appellant contends the trial court acted unreasonably when it limited counsel's ability to cross-examine Deputy Hurd relating to T.M.W.'s physical condition as well as the deputy's justification for arresting appellant for felonious assault.

{¶28} Pursuant to Evid.R. 611(B), "[c]ross-examination shall be permitted on all relevant matters and matters affecting credibility." "The limitation of such cross-examination lies within the sound discretion of the trial court, viewed in relation to the

particular facts of the case. Such exercise of discretion will not be disturbed in the absence of a clear showing of an abuse of discretion.” *State v. Acre* (1983), 6 Ohio St.3d 140, 145. An abuse of discretion is a term of art, connoting a judgment which fails to comport with reason or the record. See, e.g., *Gaul v. Gaul*, 11th Dist. No. 2009-A-0011, 2010-Ohio-2156, at ¶24.

{¶29} During cross-examination, defense counsel attempted to elicit testimony from Deputy Hurd regarding how she would define “serious physical harm.” PCDJFS objected to the question. In sustaining the objection, the trial court ruled:

{¶30} “[The deputy is] here to testify as to the facts and not medical conclusions. She’s described the child that she’s seen that has a goose egg growing on the side of his head from what appears to be an injury just recently inflicted. His explanation was that it was blows to the head by the mother. Now, if I want to make a finding that I think that is evidence of risk of serious physical harm, having been struck on the side of the head by elbow or other means, that’s up to me; not up to the witness. She testifies to the facts. I’ll deal with the conclusions.”

{¶31} Whether appellant’s actions caused a substantial risk of serious physical harm is a question of fact. Under the circumstances, Deputy Hurd could testify only to the facts she gleaned from her personal knowledge, i.e., “[k]nowledge gained through firsthand observation or experience \*\*\*.” *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, quoting Black’s Law Dictionary (7 Ed.Rev.1999). Questions of law are outside the realm of firsthand knowledge, and thus, Deputy Hurd could not offer legal conclusions. We therefore hold the trial court did not abuse its

discretion in limiting counsel's cross-examination to the officer's personal observations of T.M.W.'s specific physical condition.

{¶32} Later, defense counsel queried why the deputy arrested appellant for felonious assault when she had no medical evidence relating to T.M.W.'s injuries. PCDJFS again objected. In sustaining the objection, the trial court ruled:

{¶33} "The arrest is based on probable cause, and I dare say, if I take you out in the parking lot and beat you on the side of the head and leave a swelling, you might well think it's felonious assault. Now, the officer's testified as to what she did. As to what conclusions will be drawn from the evidence in the case, I'll take care of that. So, what charges are filed or are pending is really not all relevant to this court. This court will make its decision based upon the allegations in this complaint in the civil proceeding and the evidence here, so let's not dwell on the pending criminal charges."

{¶34} We agree with the trial court that the deputy's reasons for arresting appellant on a felonious assault charge are irrelevant to the underlying adjudicatory proceeding. T.M.W. was alleged to be and was ultimately adjudicated an abused child. The primary issues, therefore, were whether the boy suffered physical or mental injuries and whether the injuries were inconsistent with the explanation offered for the injuries. The deputy's justification for filing a collateral criminal charge is coincidental to the juvenile proceedings and has no material evidentiary value to either proving the allegation or defending against the same. In other words, such information has no "\*\*\*\* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."



Evid.R. 401. We therefore hold the trial court did not abuse its discretion in limiting the scope of defense counsel's cross-examination on the foregoing issues.

{¶35} Appellant's second assignment of error is without merit.

{¶36} For the reasons discussed above, appellant's assignments of error are overruled and the judgment of the Portage County Court of Common Pleas, Juvenile Division, is affirmed.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.