

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

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-P-0043
DEANA L. CROSS-NECAS,	:	5/27/11
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. 2009 CRB 368 R.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Timothy J. Piero*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Leonard J. Breiding, II, 4825 Almond Way, Ravenna, OH 44266 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal emanates from a final judgment of the Portage County Municipal Court, Ravenna Division. Appellant, Deana L. Cross-Necas, seeks reversal of her criminal conviction on one count of misdemeanor assault. Appellant contests the sufficiency and weight of the evidence upon which her conviction was based.

{¶2} The sole charge against appellant stemmed from an event that occurred on February 22, 2009. At that time, appellant was living with her four children in a

mobile home park on State Route 59 in Portage County, Ohio. Although appellant did not own the mobile home in which she lived, she had essentially received permission to reside there from her boyfriend of five years, John Chiarle. While Chiarle would spend a considerable amount of time at the mobile home each week, he and appellant were not living together.

{¶3} Eric Adkins was also a resident of the mobile home park. In addition, he occasionally worked with, or for, Chiarle. As a result, Adkins would often visit Chiarle at the mobile home where appellant resided.

{¶4} In the early evening of the date in question, Adkins went to “appellant’s” home for the purpose of speaking with Chiarle. During the course of that visit, Adkins was in the same room of the home with appellant and Chiarle. After some discussion between the three of them, appellant informed Adkins that she wanted him to leave the home. However, before Adkins could exit, he and appellant became involved in a minor physical altercation. Once the altercation had ended, Adkins left the residence and stood directly outside in the driveway.

{¶5} Upon considering the situation for a few moments, Adkins decided to contact the Portage County Sheriff’s Department on his cell phone. Two deputies responded to the call and spoke with Adkins and appellant. Both individuals told the deputies during separate discussions that the other person had been the aggressor in their altercation. As part of her meeting with Adkins, Deputy Marcia Zwick noticed that he had scratches on his neck. While with appellant, Deputy Zwick did not see any obvious injuries to her, but appellant did tell the deputy that Adkins had hurt her elbow when he pushed her into a wall.

{¶6} After the two deputies had conducted the interviews and taken the written statements of both persons, Adkins informed them that he intended to pursue a criminal charge against appellant. Consequently, the deputies placed appellant under arrest, and she was ultimately charged with assault, a first-degree misdemeanor under R.C. 2903.13. After appellant had entered a plea of “not guilty” and was released on bond, her trial on the sole charge was scheduled for June 2009. Due to a number of delays caused primarily by the appointment of new counsel for appellant, her bench trial did not go forward until December 4, 2009.

{¶7} As the state’s primary witness at trial, Adkins testified that when he arrived outside the mobile home, he could hear that appellant and Chiarle were having a heated argument. Adkins further testified that, even though Chiarle invited him into the home, their argument continued. According to Adkins, once he entered the front door of the mobile home, appellant spoke about various matters that were upsetting her, and then immediately stated to Adkins that she wanted him to leave. While making the latter statement, appellant reached around Chiarle, who was standing in front of Adkins, and swiped at Adkins with her hand. In doing so, appellant scratched Adkins’ neck with her fingernails.

{¶8} The only other witness presented by the state at trial was Deputy Zwick. In addition to providing a basic description of the investigation conducted at the scene, she gave testimony concerning the scratches she saw on Adkins’ neck, and the statement that appellant made regarding her elbow. Regarding Adkins’ oral statement, the deputy quoted him as stating that when he first arrived at the mobile home, Chiarle was not present, but he still went inside the residence and talked to appellant’s children.

Adkins' oral statement that Chiarle was not home when he first arrived clearly conflicted with his trial testimony.

{¶9} In response, appellant testified in her own behalf. According to her, she was not at home when Adkins first entered her residence. Appellant stated that when she initially saw Adkins that evening, he was smoking marijuana in the presence of her children. In light of this behavior, she demanded that Adkins leave the mobile home. Adkins refused, and then was told by Chiarle that he did not have to abide by appellant's demand. Under appellant's version, once Adkins heard Chiarle's statement, he walked up to her, grabbed her around the torso, and pushed her into a wall. Last, as part of her cross-examination, appellant indicated that, after Adkins left the home and walked into the driveway, she saw him purposely make marks on his neck using his own fingernails.

{¶10} After all evidence was presented, the trial court expressly found appellant guilty of assaulting Adkins. In addition, the court found appellant guilty of two other offenses charged under a different case number that were tried during the same proceeding. Those two separate crimes were based upon a distinct incident which had taken place approximately two weeks earlier.

{¶11} After holding a sentencing hearing in April 2010, the trial court merged the assault conviction with her two other convictions for purposes of sentencing. The trial court imposed a jail term of 90 days and a fine of \$500 for all three convictions. However, the trial court then suspended 75 days of the jail term and \$400 of the fine, contingent upon her compliance with three general conditions. Finally, the court's final judgment indicated that the execution of the foregoing sentence would be stayed while

appellant pursued the instant appeal.

{¶12} Before this court, appellant assigns the following as error:

{¶13} “[1.] Appellant’s conviction of assault was contrary to the manifest weight of the evidence.

{¶14} “[2.] The trial court erred in failing to grant appellant’s Criminal Rule 29 motion to dismiss the assault charge at the conclusion of the state’s case and at the conclusion of the evidence.”

{¶15} In claiming under her first assignment that the trial court’s verdict was not supported by the manifest weight of the evidence, appellant focuses upon the testimony of Adkins. Specifically, she contends that the trial court erred in not holding that his version of the altercation was completely lacking in credibility. As to this point, appellant first emphasizes that Adkins’ trial testimony conflicted with his prior statement to the two sheriff deputies in one important respect. Second, she asserts that his testimony should have been rejected because he did not provide a motive for her attack.

{¶16} Regarding the first basis of appellant’s argument, this court would again note that, as part of his direct testimony, Adkins stated that Chiarle was present at the mobile home when he initially arrived that evening. However, during Adkins’ cross-examination, appellant’s trial counsel was able to demonstrate that, in his written statement to the deputies, Adkins said that Chiarle was not at the mobile home upon his arrival. In maintaining that this contradiction harmed Adkins’ credibility, appellant submits that Adkins was not able to provide any logical explanation for the two different statements.

{¶17} Upon reviewing the complete transcript in this appeal, this court concludes

that appellant's characterization of the record is incorrect; i.e., in responding to counsel's questions on this point, Adkins did give a logical explanation for the contradiction in his statements. Specifically, Adkins testified that it was very "hectic" at the scene while the deputies were conducting the investigation, and that he could hardly remember writing the prior statement in question. Thus, it was Adkins' position that any misstatement on his part to the deputies was due to the confusion which ensued after the altercation.

{¶18} A review of the trial transcript further shows that when he was questioned about the contradiction upon re-direct, Adkins expressly affirmed that he had stated the truth during his direct testimony, and that Chiarle had actually been present at the home upon his arrival. In light of this and Adkins' explanation for his prior misstatement, the trial court could have readily concluded that his version of the physical altercation was credible. Moreover, we would note that the discrepancy did not relate to a material element of the charged crime; i.e., knowingly causing physical harm to another. See R.C. 2903.13(A).

{¶19} Similarly, the lack of any testimony concerning motive for the assault is of no consequence because motive is not a necessary element of assault. See *In re Reichenbach* (Oct. 23, 1987), 3d Dist. No. 5-86-30, 1987 Ohio App. LEXIS 9286, at *5. As to this point, it must be noted that R.C. 2901.22(B) expressly states that a person can act "knowingly" regardless of what her ultimate purpose is.

{¶20} In relation to questions of credibility, this court has consistently indicated that any determination of the trustworthiness of a person's testimony is the province of the trial court. See, e.g., *State v. Howard*, 11th Dist. No. 2009-L-158, 2010-Ohio-2817,

at ¶33. This elementary principle is predicated upon the fact that, since the trial court is able to directly observe the witness, it is in the best position to assess credibility. *State v. Chen*, 11th Dist. No. 2009-P-0057, 2010-Ohio-2289, at ¶41.

{¶21} Given the deference which must be shown to the trier of fact in assessing credibility, this court holds that appellant has failed to show that the trial court committed any reversible error in believing Adkins' testimony over her own. That is, the existence of the sole contradiction between his testimony and his prior statement was insufficient to warrant the complete rejection of his assertions, especially since the contradiction was on a matter that did not relate to an element of assault.

{¶22} Moreover, Adkins' trial testimony, if believed, constituted some competent evidence upon which a trier of fact could find beyond a reasonable doubt that the basic elements of the offense of assault had been satisfied. To obtain a conviction for assault under R.C. 2903.13(A), the state must demonstrate that the accused knowingly caused physical harm to another person. As part of his testimony, Adkins stated that appellant swung her arm around Chiarle's body and toward him, the fingernails on her hand caught him on the neck, and his neck sustained multiple scratches. Additionally, Deputy Zwick's testimony confirmed the presence of the scratches.

{¶23} Physical harm includes any injury regardless of its gravity or duration. See R.C. 2901.01(A)(3). Thus, scratches are sufficient to constitute physical harm. *State v. White*, 2d Dist. No. 23816, 2010-Ohio-4537, at ¶26. Furthermore, in regard to the "knowingly" element for assault, R.C. 2901.22(B) provides that a person can be deemed to have acted in that manner when, inter alia, she was "aware that [her] conduct will probably cause a certain result ***." Given the nature in which appellant

manipulated her arm around Chiarle in Adkins' direction, the trier of fact could readily infer that she was fully aware that she would cause some type of harm to him if her hand made contact with his body.

{¶24} In disposing of questions of “manifest weight” in the context of a criminal appeal, an appellate court must decide whether, in resolving evidentiary conflicts, the trier of fact clearly “lost its way” to such an extent that a manifest miscarriage of justice took place. *State v. Legg*, 11th Dist. No. 2009-T-0111, 2010-Ohio-5399, at ¶47, quoting *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at *13-14. In making such a decision, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of the trial witnesses. *Id.* Under this standard, a finding of guilty can be reversed as against the manifest weight “only in the exceptional case in which the evidence weighs heavily against the conviction.” *State v. Lewis*, 11th Dist. No. 2009-L-138, 2010-Ohio-4288, at ¶86, quoting *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶25} Pursuant to the foregoing, this court concludes that appellant has failed to establish that the instant matter constitutes an “exceptional” case. That is, the record in this appeal does not demonstrate that the trial court lost its way in considering the evidence and finding appellant guilty of assault. Thus, because her conviction was not against the manifest weight of the evidence, appellant’s first assignment lacks merit.

{¶26} At the conclusion of the state’s evidence, appellant’s trial counsel moved to dismiss under Crim.R. 29, asserting that the state had not presented legally sufficient evidence to establish the crime of assault. Under her second assignment, appellant has renewed her “sufficiency” argument. She submits that the state’s evidence did not show

that she knowingly caused harm to Adkins.

{¶27} In applying Crim.R. 29, the Supreme Court of Ohio has held that a motion to acquit should not be granted if “the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.” *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus. Given the nature of the *Bridgeman* standard, it follows that appellant’s Crim.R. 29 motion was a proper means for contesting the sufficiency of the state’s evidence. *State v. Patrick*, 11th Dist. Nos. 2003-T-0166 & 2003-T-0167, 2004-Ohio-6688, at ¶18.

{¶28} Unlike a “manifest weight” issue, a question of sufficiency raises a purely legal point which does not involve a weighing of all evidence. *Lewis*, 2010-Ohio-4288, at ¶57, quoting *Schlee*, 1994 Ohio App. LEXIS 5862, at *13-14. Instead, the focus of a “sufficiency” analysis is solely upon the state’s evidence; i.e., the appellate court must decide if “the state offered evidence on each statutory element of the offense, so that a rational trier of fact may infer that the offense was committed beyond a reasonable doubt.” *Lewis*, 2010-Ohio-4288, at ¶59, quoting *State v. March* (July 16, 1999), 11th Dist. No. 98-L-065, 1999 Ohio App. LEXIS 3333, at *8.

{¶29} In light of our analysis under appellant’s first assignment, this court holds that the foregoing standard for legal sufficiency was also satisfied in the instant case. In describing the manner in which appellant swung her arm, Adkins testified that her arm went around Chiarle and toward her. Thus, this was not a situation in which appellant was randomly swinging her arm and accidentally hit the victim; i.e., the state’s evidence supported the inference that she acted knowingly. See R.C. 2901.22(B). Furthermore, the testimony of Adkins and Deputy Zwick established that he sustained a physical

injury as a direct result of appellant's act. R.C. 2901.03(A)(1); *White*, 2010-Ohio-4537.

{¶30} Since the trial transcript before this court confirms that the state was able to submit sufficient evidence as to each element of the offense of assault, appellant's second assignment of error also lacks merit.

{¶31} Based upon the foregoing, the judgment of the trial court is affirmed.

DIANE V. GRENDALL, J.,

MARY JANE TRAPP, J.,

concur.