

[Cite as *State v. Fagan*, 2009-Ohio-3760.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 08-CA-52
Plaintiff-Appellee	:	
	:	Trial Court Case No. 07-CRB-06564
v.	:	
	:	(Criminal Appeal from Springfield
MINDY JO FAGAN	:	Municipal Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 31st day of July, 2009.

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FAIN, J.

{¶ 1} Defendant-appellant Mindy Fagan appeals from her conviction for Domestic Violence.¹ Mindy contends that the trial court erred in finding that psychological injury cannot be the basis of the “battered woman” defense. Mindy further

¹For purposes of convenience, the parties will be referred to as “Mindy” and “Shawn,” the latter being the name commonly used to refer to the victim, William Shawn Fagan.

contends that the trial court deprived her of due process and the right to a fair trial. Finally, Mindy contends that the trial court erred in preventing her expert witness from testifying.

{¶ 2} We conclude that the trial court did not err in rejecting evidence about the “battered woman syndrome,” because Mindy failed to present evidence that she was in fear of bodily harm when she hit her husband, Shawn, and scratched his face. Self-defense is therefore inapplicable, and testimony about the “battered woman syndrome” is only relevant to a defense of self-defense. The trial court also did not deprive Mindy of the right to a fair trial. The cumulative errors alleged – restrictions on cross-examination of the victim and failure to admit expert testimony, for example – were correct rulings, based on the evidence. Accordingly, the judgment of the trial court is Affirmed.

II

{¶ 3} In December 2007, the State filed a criminal complaint in Clark County Municipal Court, alleging that Mindy Fagan had committed Domestic Violence when she scratched her husband, William Shawn Fagan, and struck him with a purse. After a bench trial, the court found Mindy guilty of the offense, as charged. During the trial, Mindy attempted to offer expert testimony on the “battered woman syndrome,” but the court refused to allow the testimony.

{¶ 4} The events in the case before us took place in late November 2007. At the time, Shawn and Mindy Fagan had been married since 1994, and had two daughters, ages 9 and 4. In the late evening, Shawn had gone to Kroger to purchase

pull-ups for their older daughter. When Shawn returned home, Mindy told him that he had purchased the wrong size of pull-ups, and an altercation ensued. Shawn neither hit Mindy nor attempted to hit her. Mindy scratched Shawn's face, and hit his face hard enough that he hit the side of his head against the head of his younger daughter, whom he was holding at the time. Mindy also hit Shawn near the right eye with her purse. She then left with the children, and Shawn drove back to Kroger to buy the correct size of pull-ups.

{¶ 5} A police officer was sitting in a cruiser in the Kroger parking lot, and Shawn approached the officer for help. At the time, Shawn was visibly upset. The officer also noticed that Shawn had wounds down the side of his face. The officer told Shawn that because of the wounds that he exhibited, and the requirements of the law, the officer would have to file Domestic Violence charges. Shawn told the officer that he did not want his wife to be arrested.

{¶ 6} Later that evening, Mindy appeared at the police station and spoke with a different police officer. Mindy indicated that she had gotten into an argument with her husband, that she had some fear, and that she had hit him because she was afraid. The officer testified that Mindy said that Shawn had never hit her, and that there had been no history of violence between them. However, Shawn was yelling loudly and it scared her. Mindy told the officer that Shawn was standing in the doorway yelling, and she described it as "towering." She said this was a common practice for Shawn. Mindy told the officer that Shawn was controlling, manipulative, and intimidating. Mindy was arrested that night, and was charged with Domestic Violence.

{¶ 7} Mindy testified that Shawn had been controlling and emotionally abusive

during their marriage. She admitted hitting him. Mindy also testified that she did not fear for her safety when she hit Shawn. She stated that she did not think Shawn was going to hit her. She said she was fearful of Shawn's "control," and that she had no way out of that control.

{¶ 8} Mindy attempted to present expert testimony at trial from a social worker who had assisted battered women. After hearing evidence about the qualifications of the social worker, the trial court concluded that the social worker was not qualified as an expert under R.C. 2901.06. The court, therefore, refused to allow the social worker to testify about the "battered woman syndrome." The court did allow Mindy to submit a post-trial memorandum on admissibility, and to proffer the expert's testimony.

{¶ 9} The trial court ultimately ruled that even if the social worker had been qualified as an expert, her testimony would have been irrelevant, because Mindy did not testify that she believed her husband would strike her or that she was in fear of imminent harm. Accordingly, the court found Mindy guilty of Domestic Violence, in violation of R.C. 2919.25(A), and sentenced her to a fine of \$100, plus court costs.

{¶ 10} Mindy appeals from her conviction and sentence.

II

{¶ 11} Mindy's First Assignment of Error is as follows:

{¶ 12} "THE TRIAL COURT ERRED IN FINDING THAT PSYCHOLOGICAL INJURY CANNOT BE THE BASIS OF THE 'BATTERED WOMAN' DEFENSE."

{¶ 13} Under this assignment of error, Mindy contends that the trial court erred in finding that psychological injury cannot form the basis of the "battered woman" defense.

Mindy contends that the Supreme Court of Ohio has discussed psychological injury, but has not specifically stated that psychological injury alone is enough, because the cases before the court have so far only involved defendants who were physically battered. Mindy argues that we need to decide this issue, so that evidence about the “battered woman syndrome” can be presented in cases like hers, where only psychological battering has been alleged.

{¶ 14} Mindy was charged with violating R.C. 2919.25(A), which states that “No person shall knowingly cause or attempt to cause physical harm to a family or household member.” Mindy does not dispute that she physically caused harm to Shawn. She attempts to rely on self-defense and the “battered woman syndrome,” as that syndrome is relevant to the assertion of self-defense.

{¶ 15} The Supreme Court of Ohio first recognized the scientific validity of the “battered woman syndrome” in *State v. Koss* (1990), 49 Ohio St.3d 213. Shortly thereafter, the General Assembly enacted R.C. 2901.06, which recognizes the syndrome as a matter of commonly accepted scientific knowledge. R.C. 2901.06(A)(1). R.C. 2901.06(B) further provides that:

{¶ 16} “If a person is charged with an offense involving the use of force against another and the person, as a defense to the offense charged, raises the affirmative defense of self-defense, the person may introduce expert testimony of the ‘battered woman syndrome’ and expert testimony that the person suffered from that syndrome as evidence to establish the requisite belief of an imminent danger of death or great bodily harm that is necessary, as an element of the affirmative defense, to justify the person's use of the force in question. The introduction of any expert testimony under this division

shall be in accordance with the Ohio Rules of Evidence.”

{¶ 17} On its face, R.C. 2901.06 does not appear to cover situations involving the use of less than deadly force. But even if we assume, for purposes of argument, that the statute applies to situations involving non-deadly force, evidence on the “battered woman syndrome” is irrelevant to the case before us, because Mindy failed to establish the elements of self-defense.

{¶ 18} The Supreme Court of Ohio stressed in *Koss* that “admission of expert testimony regarding the battered woman syndrome does not establish a new defense or justification. Rather, it is to assist the trier of fact in determining whether the defendant acted out of an honest belief that she was in imminent danger of death or great bodily harm and that the use of such force was her only means of escape.” *Koss*, 49 Ohio St.3d at 217.

{¶ 19} “Under Ohio law, self-defense is an affirmative defense.” *State v. Williford* (1990) 49 Ohio St.3d 247, 249. “A real or perceived threat of death or great bodily harm is required in order for the use of deadly force to be justified as self-defense; however, such a grave threat is not necessary in cases where less than deadly force is used to repel a feared attack. One may use such force as the circumstances require to protect oneself against such danger as one has good reason to apprehend.” *City of Akron v. Dokes* (1986), 31 Ohio App.3d 24, syllabus.

{¶ 20} “[S]elf-defense * * * must be proven by a preponderance of the evidence. * * * To establish self-defense for the use of less than deadly force in defense of one’s person, the defendant must prove: (1) he was not at fault in creating the situation which gave rise to the event in which the use of non-deadly force occurred; (2) he had honest

and reasonable grounds to believe that such conduct was necessary to defend himself against the imminent use of unlawful force; and (3) the force used was not likely to cause death or great bodily harm.” *State v. Tanner*, Medina App. No. 3258-M, 2002-Ohio-2662, at ¶21. Accord *State v. Cozart*, Cuyahoga App. No. 91226, 2009-Ohio-489, at ¶21, and *State v. Dawson*, Licking App. No. 2008-CA-122, 2009-Ohio-2331, at ¶28 (citations omitted).

{¶ 21} Mindy failed to establish during trial that she was in fear of the imminent use of unlawful force. During Mindy’s direct examination, the following exchanges occurred:

{¶ 22} “Q When you told him that he brought, brought the wrong items, what did he say?

{¶ 23} “A I believe he ignored it. I don’t believe he said anything.

{¶ 24} “Q What happened next?

{¶ 25} “A I don’t recall exactly what order things happened, I know I did hit and scratch him. I know that he did pick up our daughter. * * *

{¶ 26} “ * * * *

{¶ 27} “Q All right. And so when this incident occurred, did you feel in any fear for your safety at that point in time? Did you think he was gonna hit you?

{¶ 28} “A No, but it was the control was what I was fearful of. He has controlled me since I was 15. I’ve had no way out of that control.” Trial Transcript, pp. 69-71.

{¶ 29} During Mindy’s cross-examination, the following further exchange occurred:

{¶ 30} “Q The late evening hours of the 30th of November, the beginning of the first day of December, you told Mr. Potter and the court that you really didn’t fear that he was going to hit you, correct?

{¶ 31} “A Yes.

{¶ 32} “Q And that you scratched him on the face, both sides of his face? Do you remember that?

{¶ 33} “A I, yes.

{¶ 34} “Q You were basically in a raking motion?

{¶ 35} “A Right.

{¶ 36} “ * * * *

{¶ 37} “Q Do you remember hitting Shawn in the face with your purse?

{¶ 38} “A Yes.

{¶ 39} “Q In the eye area?

{¶ 40} “A Yes.” Trial Transcript. pp. 75-76.

{¶ 41} Mindy also told the police the night of the incident that there was no history of violence in their relationship, and that Shawn had never hit her. Accordingly, the trial court correctly concluded that Mindy failed to establish that she was in fear of bodily harm when she scratched her husband’s face. Because Mindy failed to establish this element of self-defense, there was no need to consider testimony regarding the “battered woman syndrome” and whether, based on that syndrome, Mindy had an honest belief that she was in danger of imminent bodily harm. Based on her own testimony, Mindy was not in danger of the imminent use of unlawful force.

{¶ 42} Mindy’s First Assignment of Error is overruled.

III

{¶ 43} Mindy's Second Assignment of Error is as follows:

{¶ 44} "THE TRIAL COURT DEPRIVED DEFENDANT OF DUE PROCESS OF LAW."

{¶ 45} Under this assignment of error, Mindy contends that she was deprived of a fair trial because of cumulative trial errors. These errors include the restriction of Shawn's cross-examination, denial of the ability to present testimony from her expert witness, restriction of Mindy's direct examination, and the trial court's refusal to allow Shawn to be recalled for purposes of cross-examination.

{¶ 46} "Separately harmless errors may violate a defendant's right to a fair trial when the errors are considered together. * * * In order to find cumulative error, we first must find that multiple errors were committed at trial." *State v. Harris*, Montgomery App. No. 19796, 2004-Ohio-3570, at ¶ 40, citing *State v. Madrigal*, 87 Ohio St.3d 378, 397-98.

{¶ 47} Our review of the trial transcript does not indicate that multiple errors were committed at trial. During Shawn's cross-examination, the trial court rejected defense counsel's attempt to cross-examine Shawn at length about which party had controlled the parties' finances during their marriage. This occurred after Shawn answered several questions about finances and who controlled their money. At that point, the trial court indicated that the defense should leave the issue of the "battered woman syndrome" for its case-in-chief, because self-defense is an affirmative defense.

{¶ 48} The trial court subsequently rejected testimony on the "battered woman

syndrome,” because the defense expert was not qualified. Ultimately, after considering Mindy’s post-trial memorandum, the trial court held that the defense was irrelevant, due to Mindy’s failure to present evidence that she feared bodily harm. We agree with the trial court’s conclusion on this point. Consequently, the trial court did not err in restricting Shawn’s cross-examination or in failing to allow testimony on the “battered woman syndrome.”

{¶ 49} Mindy alleges a second category of “cumulative” errors in situations where the trial court sustained objections to defense counsel’s leading or irrelevant questions. We have examined all the references mentioned in Mindy’s brief, and find that the trial court properly sustained the objections, because the questions were either leading or irrelevant to the matters at issue. For example, defense counsel asked Mindy if she felt “ready to move on” after receiving counseling. Trial Transcript, p. 71. The trial court properly sustained an objection to this testimony as irrelevant.

{¶ 50} The final “cumulative” error alleged is that the trial court improperly refused to allow Mindy to recall Shawn for purposes of cross-examination. At the end of her case, Mindy asked to recall Shawn, to establish his complete control of all the financial accounts. Defense counsel conceded that Mindy had already testified that Shawn had complete control over the funds, and that Shawn would not likely change the answers he had already given about financial matters. Counsel maintained, however, that he wanted to point out specifics to undermine Shawn’s credibility. The trial court refused to allow Shawn to be recalled, after ascertaining that counsel had no other reason for recalling him as a witness.

{¶ 51} The trial court did not err in refusing to allow Shawn to be recalled as a

witness, because the issue of financial control is irrelevant. Mindy admitted hitting Shawn, and further admitted that she did not fear for her safety. Mindy also failed to present evidence that would establish her affirmative claim that she acted in self-defense. Assuming for the sake of argument that Shawn controlled the parties' money, that fact has no bearing on whether Mindy feared bodily harm and believed her conduct was necessary to prevent Shawn from committing the use of unlawful force.

{¶ 52} “Where no individual, prejudicial error has been shown, there can be no cumulative error.” *State v. Jones*, Montgomery App. No. 20349, 2005-Ohio-1208, at ¶66. Accordingly, Mindy’s Second Assignment of Error is overruled.

IV

{¶ 53} Mindy’s Third Assignment of Error is as follows:

{¶ 54} “THE TRIAL COURT ERRED IN PREVENTING THE EXPERT WITNESS FROM TESTIFYING.”

{¶ 55} Under this assignment of error, Mindy contends that the trial court should have allowed her expert witness to testify that psychological abuse by one spouse can cause the other spouse to be “battered.” We previously concluded that evidence regarding the “battered woman syndrome” is irrelevant, because Mindy failed to establish that she was in fear of bodily harm at the time she scratched Shawn’s face and hit him in the head with her purse. Without a defense of self-defense, testimony on the “battered woman syndrome” is immaterial.

{¶ 56} Mindy’s Third Assignment of Error is overruled.

{¶ 57} Mindy’s assignments of error having been overruled, the judgment of the

trial court is affirmed.

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DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

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