

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DUSTIN M. BERRESFORD,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 CO 0033

Criminal Appeal from the
Columbiana County Municipal Court, of Columbiana County, Ohio
Case No. 17 CRB 494

BEFORE:

Cheryl L. Waite, Gene Donofrio, Kathleen Bartlett, Judges.

JUDGMENT:
Affirmed.

Atty. Robert Herron, Columbiana County Prosecutor and
Atty. Alec A. Beech, Assistant Prosecuting Attorney
105 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee

Atty. Wesley A. Johnston, P.O. Box 6041, Youngstown, Ohio 44501, for Defendant-Appellant.

Dated: January 31, 2019

WAITE, P.J.

{¶1} Appellant Dustin M. Berresford appeals a September 15, 2017 Columbiana County Municipal Court judgment entry in which he was found guilty of domestic violence. Appellant argues that his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence. Based on the following, Appellant's argument is without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On May 5, 2017, the victim was at her home when she heard a noise coming from her garage. She went to the garage where she discovered Appellant rummaging through her belongings. The two had recently ended their engagement after a one and one-half year relationship. They began arguing and the victim insisted that Appellant leave. The argument escalated, and Appellant struck the victim in the face near her right eye and fled on foot. Immediately thereafter, the victim got in her car to pick up her son, but watched as Appellant ran down the street and entered a vehicle matching the description of one owned by Appellant's aunt. After retrieving her son, the victim took a photograph of her injury with her phone's camera. When she returned to her garage, she noticed that there were items missing. She called Appellant's mother in an attempt to recover the items, which she believed included articles having sentimental value because they had belonged to her deceased son. Later that evening the victim contacted the sheriff's department to report the incident. Appellant was charged with domestic violence, a misdemeanor of the first degree in violation of R.C. 2915.25(A) and theft, in violation of R.C. 2913.02(A)(1), a misdemeanor of the first degree.

{¶3} On May 12, 2017, Appellant was arraigned and pleaded not guilty to both charges. On August 16, 2017 a bench trial commenced. Deputy Caleb Wycoff, who

had responded to the call, was unavailable for trial due to a scheduled vacation, and the matter was continued to August 23, 2017. On that date, Wycoff was in Kansas retrieving a prisoner. The matter was once again continued until September 15, 2017. The trial court found Appellant guilty of domestic violence, but not guilty of theft. The trial court sentenced Appellant to 180 days in jail with credit for 104 days served and a fine of \$100.00.

ASSIGNMENT OF ERROR

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE TRIAL COURT FINDING APPELLANT GUILTY OF DOMESTIC VIOLENCE AND THE APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶4} In Appellant's assignment of error he contests both the sufficiency of the evidence offered against him and the manifest weight of the evidence. Sufficiency of the evidence is a legal question dealing with adequacy. *State v. Pepin–McCaffrey*, 186 Ohio App.3d 548, 2010-Ohio-617, 929 N.E.2d 476, ¶ 49 (7th Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).

{¶5} "Sufficiency is a term of art meaning that legal standard which is applied to determine whether a case may go to the jury or whether evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Draper*, 7th Dist. No. 07 JE 45, 2009-Ohio-1023, ¶ 14, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955). "To discharge the state's burden when prosecuting a criminal offense, 'probative evidence must be offered' on 'every material element which is necessary to constitute the crime.' " *State v. Billman*, 7th Dist. Nos. 12 MO 3, 12 MO 5, 2013-Ohio-

5774, ¶ 8, citing *State v. Martin*, 164 Ohio St. 54, 57, 128 N.E.2d 7 (1955). In a sufficiency review, a reviewing court does not determine “whether the state’s evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.” *State v. Rucci*, 7th Dist. No. 13 MA 34, 2015-Ohio-1882, ¶ 14, citing *State v. Merritt*, 7th Dist. No. 09 JE 26, 2011-Ohio-1468, ¶ 34.

{¶16} Appellant contends the victim took from him some of his prescription medications. When he asked her about these medications while he was at her house she became agitated and argumentative. However, he claims he left the house without incident and there was no physical altercation. He also claims the victim punched herself in the eye, causing her own injuries.

{¶17} The state responds that it presented evidence on every element of the offense, including a photograph depicting the injury, testimony of the victim, and corroborating testimony by Deputy Wycoff. The state contends the matter involved an issue of witness credibility, and that the trial court found the victim’s testimony was more credible after being presented with all of the evidence.

{¶18} Pursuant to R.C. 2919.25(A), “[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member.” An attempt involves, “conduct that, if successful, would constitute or result in the offense.” R.C. 2923.02(A). Physical harm is defined as “any injury, illness, or other physiological impairment, regardless of its gravity or duration.” R.C. 2901.01(A)(3).

{¶19} To convict Appellant of domestic violence in violation of R.C. 2919.25(A), the trial court had to find that Appellant had knowingly caused or attempted to cause physical harm to a family or household member. It is undisputed that the parties were

engaged and resided in the same household until shortly before the incident. It is also undisputed that a no-contact order between the parties was in place at the time of the incident. Appellant's sole contention on appeal is that there was no physical contact between the parties and that he did not cause physical harm to the victim.

{¶10} The victim testified this incident commenced when she heard a disturbance in her garage and found Appellant rummaging through belongings that she had stored. The parties had a contentious relationship, and at trial both noted that there was a no-contact order in place at the time of the incident. She stated that she and Appellant began arguing and the matter escalated, ending when Appellant struck her in the face near her right eye. He fled the garage carrying two white garbage bags full of items from the garage. The victim saw him run up the street, where he was picked up by a vehicle identical to one owned by his aunt. A few minutes after being struck, the victim had to pick up her son from the bus a short distance from her home. The photograph of her injury she took shortly thereafter was admitted into evidence at trial. (9/15/17 Tr., p. 62.)

{¶11} The state also presented the testimony of Deputy Wycoff. Wycoff was familiar with Appellant from a previous domestic call. (9/15/17 Tr., p. 62.) The victim reported the incident the evening it happened and called the station again the next morning. Wycoff proceeded to the victim's home to make a report. Although Wycoff was not present when the incident occurred, he testified that he observed the victim's injury the next day, which he described as "swelling [and] an abrasion." (9/15/17 Tr., pp. 61-62.) Wycoff was shown the photograph of the victim's injury and testified that it accurately reflected the injury he observed on the victim's face. (9/15/17 Tr., p. 62.)

{¶12} Appellant elected to testify on his own behalf. The trial court advised Appellant that both counsel had informed the court Appellant had another matter pending in common pleas court over similar charges with the same victim. (9/15/17 Tr., p. 100.) Appellant stated that he understood the implications and was waiving his Fifth Amendment right against self-incrimination. (9/15/17 Tr., pp. 101-102.) Appellant testified that he had seen the victim the day before this incident when she brought some of his personal items to him at his grandmother's, where he was currently residing. He said that she invited him to her home to retrieve more of his belongings, and that he agreed to go. He testified that she picked him up and the two spent the night together. (9/15/17 Tr., p. 104.) The following morning Appellant was looking for his Adderall medication, which was missing. The victim told him she found the medication. Appellant testified that 10 pills were missing, and when he confronted the victim about it she became "irrational." (9/15/17 Tr., p. 104.) Appellant decided to call his aunt to pick him up, and he left without incident. Appellant admitted on cross-examination that a previous domestic incident occurred in 2016, where he pleaded guilty to disorderly conduct. (9/15/17 Tr., pp. 106-107.) Appellant testified that he thought the victim had tried to get him arrested for that incident so she could rob him of his possessions. (9/15/17 Tr., p. 110.) He contended that the victim had a history of self-harm, in the past had threatened to punch herself and blame him, and that she had inflicted her current injury on herself. (9/15/17 Tr., p. 111.)

{¶13} In the instant matter, each party presented their own version of that day's events. The state's evidence consists of testimony from the victim and Deputy Wycoff, and a photograph taken by the victim of her injury. In a review of the sufficiency of the

evidence, we must weigh the evidence in a light most favorable to the prosecution. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). Thus, we must accept as true the state's evidence presented in support of its version of the incident. This record contains evidence that, if true, shows that Appellant struck the victim in the face during an altercation. This evidence is sufficient to convince a reasonable trier of fact that Appellant knowingly caused the victim physical harm.

{¶14} Appellant also contends his conviction is against the manifest weight of the evidence. He contends the victim has a history of self-harm and inflicted the injury on herself. He infers that because she contacted his mother before calling the police, her injuries were not severe. Finally, he reiterates there were no other direct witnesses to the incident to corroborate the victim's account of what transpired.

{¶15} As discussed, while a review of the sufficiency of the evidence focuses on the state's burden of production, a review of the manifest weight of the evidence relates to the state's burden of persuasion. *Merritt*, at ¶ 34. A reviewing court "weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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." *Thompkins, supra*, at 387, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 484 N.E.2d 717 (1st Dist.1983).

{¶16} A reversal should be granted only "in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Andric*, 7th Dist. No. 06 CO 28, 2007-Ohio-6701, ¶ 19, citing *Martin* at 175. When reviewing a bench trial, a court should not reverse a judgment as against the manifest weight of the evidence where the

record shows the judge could have reasonably concluded from substantial evidence presented that the state proved the offense beyond a reasonable doubt. *Andric* at ¶ 19, citing *State v. Eskridge*, 38 Ohio St.3d 56, 59, 526 N.E.2d 304 (1988).

{¶17} As noted, the state presented the testimony of the victim and of Deputy Wycoff, and presented a photograph of the injury. The victim testified she discovered Appellant in her garage and an argument ensued. She testified that Appellant punched her in the right eye and then fled on foot. Deputy Wycoff testified that he witnessed the victim's injury during his interview of her the following morning and that the photograph of the victim's injury, admitted into evidence, accurately represented the injury he observed. Appellant testified that, while the couple argued, he left her home without having any physical contact with the victim and that any injury she sustained was self-inflicted. This matter becomes solely one of credibility: which witness was more believable. The trial court believed the victim. We do not second-guess a trial court's decision as to credibility of a witness.

{¶18} The state presented competent, credible evidence that Appellant caused physical harm to the victim supporting the trial court's judgment. Appellant was simply not believed by the trial court. This record reflects that Appellant's conviction is not against the manifest weight of the evidence. Appellant's assignment of error is without merit and is overruled. The judgment of the trial court is affirmed.

Donofrio, J., concurs.

Bartlett, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Columbiana County Municipal Court of Columbiana County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.