

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 14AP-701
Plaintiff-Appellee,	:	(C.P.C. No. 14CR-448)
v.	:	
	:	(REGULAR CALENDAR)
[S.M., Jr.],	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 19, 2015

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for
appellee.

Siewert & Gjostein Co., LPA, and *Thomas A. Gjostein*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Defendant-appellant, S.M., Jr., appeals from a judgment of the Franklin County Court of Common Pleas convicting him of domestic violence. For the following reasons, we affirm.

I. Facts and Procedural History

{¶ 2} In January 2014, appellant was indicted on one count of domestic violence, in violation of R.C. 2919.25, a third-degree felony, and one count of felonious assault, in violation of R.C. 2903.11, a second-degree felony. The charges arose from an incident between appellant and his daughter, K.M. Appellant waived his right to a trial by jury, and the case proceeded to a bench trial in April 2014. K.M. and her mother, C.M., testified at trial and provided different versions of the altercation.

A. Testimony of K.M.

{¶ 3} K.M. testified as follows. K.M. is the daughter of appellant. At the time of testifying, she was 26 years old. From approximately 2005 until 2008, K.M. served in the United States Army as a private and military police officer, also known as an "MP." During her time in the army, K.M. received combat training.

{¶ 4} In December 2013, K.M. resided at an apartment located at 1611 Bay Club Circle, Columbus, Ohio, with C.M., appellant, and one of her two children. On December 26, 2013, K.M. awoke early to walk her dog. When she returned with the dog and entered the living room of the apartment, appellant was "grumbling" and speaking "underneath his breath." (Tr. Vol. I, 41.) Appellant was talking disparagingly about K.M., her daughter, and her boyfriend, specifically stating that K.M. needed to "get the F out of his house." (Tr. Vol I, 41-42.) K.M. responded by saying she was "not going to deal with [his] crap anymore," and she "wasn't scared of him anymore." (Tr. Vol. I, 42-43.) At some point during the confrontation, C.M. entered the living room.

{¶ 5} Appellant responded to K.M.'s statements by asking her whether she was "ready to fucking die." K.M. repeated, "I'm not scared of you." (Tr. Vol. I, 44.) Then appellant "attacked" K.M. (Tr. Vol. I, 99.) Appellant reached for his cane and swung it at K.M., who had been lying on the couch. Appellant "choked up on it like as if it were a baseball bat and swung it at [K.M.'s] head." (Tr. Vol. I, 44.) K.M. blocked the cane with her left hand, causing her wrist to swell. Appellant then obtained a baseball bat and swung it at K.M.'s head "like he was ready to go play at a ballpark." (Tr. Vol. I, 44.) K.M. used the cane in defense, which helped reduce the impact of the bat. The bat "wrapped around the cane," and either the cane or the bat hit K.M. in the back of her head. (Tr. Vol. I, 44.)

{¶ 6} When K.M. arose from the couch, appellant "put [her] in a choke hold," saying he was going to break her neck. (Tr. Vol. I, 45.) Appellant was "ripping [her] hair" and "clawing [her] face." (Tr. Vol. I, 46.) K.M. was "clawing at his face" in defense. (Tr. Vol. I, 46.) C.M. intervened and grabbed appellant's hair "and tried to help pull him off of [K.M.]." (Tr. Vol. I, 46.) Appellant ran toward the door, and K.M. pushed him outside.

{¶ 7} K.M. locked the door and called the police. K.M.'s 911 call was played at trial. During the 911 call, K.M. stated she was assaulted by appellant with a baseball bat

and a cane. Before police arrived, K.M. and C.M. took pictures with K.M.'s cell phone of K.M.'s face, injured hand, and a tuft of her forcibly removed hair.¹ There was no knot on K.M.'s head, but she had a "throbbing headache." (Tr. Vol. I, 48.) Columbus Police Officer Vincent Marchese arrived at the apartment and inspected the baseball bat and cane. He saw the cane had two strands of K.M.'s hair on it from the fight.

B. Testimony of C.M.

{¶ 8} The defense called C.M., appellant's wife, to testify. C.M. presented a different version of the events than K.M. She testified as follows. At approximately 9:00 a.m., on December 26, 2013, C.M. told K.M.'s children to wake up their mother to prepare breakfast. The children proceeded to wake up K.M., who "woke up in a rage." (Tr. Vol. I, 114.) Because K.M. did not want to get up, she "was hollering, screaming at the kids." (Tr. Vol. I, 114.) Appellant went into the living room, where K.M. had been sleeping, and told her to "tone it down" because the neighbors might call the police. (Tr. Vol. I, 115.) K.M. "didn't want to calm down, and she started hollering at [appellant], telling him to shut the F up, and called him a faggot." (Tr. Vol. I, 115.) Appellant said he was going to leave, and K.M. said her boyfriend and his friends were waiting outside the apartment to "beat the crap out of [appellant]." (Tr. Vol. I, 116.)

{¶ 9} Appellant retrieved his cane and shook it at K.M. Appellant did not hit K.M. with the cane. K.M. reached for the cane, and there was a short struggle for it. Once K.M. gained control of the cane, she hit appellant with it. "It started getting really intense," and K.M. "grabbed [appellant] by the face," causing appellant's face to bleed. (Tr. Vol. I, 116.) Appellant began to exit the apartment, and K.M. "took her foot, put it in the middle of his back and shoved him out the door." (Tr. Vol. I, 116.) C.M. did not see appellant pick up a baseball bat or swing it at K.M. "Nobody picked up the bat." (Tr. Vol. I, 118.) K.M. did not sustain any injuries due to her fight with appellant. Officer Marchese asked C.M. whether she was present for the fight between K.M. and appellant, and she told him she was present. C.M. did not take any pictures of K.M. after the fight, and she did not see K.M. take any pictures of herself. The cane remained at the apartment after appellant left.

¹ Photographs of the tuft of hair and K.M.'s face were admitted into evidence.

C. Testimony of Columbus Police Officer Vincent Marchese

{¶ 10} Officer Vincent Marchese testified as follows regarding his response to the scene and his investigation. At approximately 11:00 a.m., on December 26, 2013, Officer Marchese was dispatched to the apartment at 1611 Bay Club Circle, to respond to a report of a domestic dispute. When Officer Marchese arrived at that location, he talked with K.M. to gather information. Officer Marchese noticed that K.M.'s "hair was messed up" and her "shirt looked * * * like [it had] been stretched." (Tr. Vol. I, 26.) K.M. held her hand out to Officer Marchese, indicating she had been hit with a cane, but Officer Marchese did not see any visible injury.

{¶ 11} When asked: "What was [K.M.'s] state of mind at that point?" Officer Marchese responded: "She was upset, crying, agitated." (Tr. Vol. I, 26.) When K.M. informed Officer Marchese what had occurred, C.M. was "standing there." (Tr. Vol. I, 26.) Officer Marchese did not take a statement from C.M. However, Officer Marchese asked C.M. "if that's what had occurred. And she said yes." (Tr. Vol. I, 26.) Officer Marchese did not take any pictures of K.M. or the apartment. Appellant was not at the scene when Officer Marchese arrived. K.M. pointed to an aluminum bat that was used as a weapon in her altercation with appellant. But Officer Marchese did not see any sign of injury on K.M.'s head that would have indicated she had been hit with a bat. The bat was propped up next to the door to the apartment. Officer Marchese did not examine the bat, but from where he was standing, he did not see any blood on the bat. Officer Marchese did not see a cane at the apartment.

{¶ 12} Emergency medical personnel were on standby in the apartment complex, but they were not dispatched to the apartment because K.M. indicated it was unnecessary. Officer Marchese prepared a report based on the information he gathered during his investigation at the apartment, and provided the report to the "domestic violence squad." (Tr. Vol. I, 32.)

D. Appellant is Found Guilty of Domestic Violence

{¶ 13} Following the presentation of evidence, the trial court announced its verdict on the two counts. Unconvinced that a bat was used in the fight between K.M. and appellant, the trial court found appellant not guilty of felonious assault. However, the trial court found appellant guilty of domestic violence, as charged in the indictment. The

trial court sentenced appellant to 12 months in prison on his domestic violence conviction. Appellant timely appealed.

II. Assignment of Error

{¶ 14} Appellant assigns the following error for our review:

Appellant's conviction was not supported by the sufficiency of the evidence in violation of the due process clause of the Fourteenth Amendment to the U.S. Constitution and Article I, Sections 1 & 16 of the Ohio Constitution and the conviction was also against the manifest weight of the evidence.

III. Discussion

{¶ 15} In his sole assignment of error, appellant argues his conviction for domestic violence was not supported by sufficient evidence and was against the manifest weight of the evidence. We disagree.

A. Sufficiency of the Evidence

{¶ 16} Whether there is legally sufficient evidence to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Sufficiency is a test of adequacy. *Id.* The relevant inquiry for an appellate court is whether the evidence presented, when viewed in a light most favorable to the state, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Mahone*, 10th Dist. No. 12AP-545, 2014-Ohio-1251, ¶ 38, citing *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶ 37.

{¶ 17} The trial court convicted appellant on a charge of domestic violence, in violation of R.C. 2919.25, a felony of the third degree. R.C. 2919.25(A) states that "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." For the purpose of R.C. 2919.25, a "person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). And "physical harm to persons" means "any injury, illness, or other physiological impairment, regardless of its gravity or duration." R.C. 2901.01(A)(3).

{¶ 18} Appellant argues there was insufficient evidence to support his conviction because of the following: inadmissible hearsay and state of mind testimony was presented at trial, the trial court erroneously admitted the photographs of K.M. without proper

foundation, and K.M.'s testimony regarding her fight with appellant was contradicted by the testimonies of Officer Marchese and C.M. and was otherwise unreliable. We will address each of these alleged reasons for the insufficiency of the evidence in turn.

{¶ 19} Appellant argues the trial court erroneously admitted without proper foundation the testimony of Officer Marchese regarding K.M.'s state of mind and hearsay testimony from Officer Marchese about C.M.'s response to his question regarding what had occurred. Appellant further argues the trial court erred in admitting photographs without requiring a proper foundation. These arguments are unavailing.

{¶ 20} Although appellant seeks to challenge the admission of certain evidence, he does not separately assign this as an alleged error. App.R. 16(A) provides that an "appellant shall include in its brief, under the headings and in the order indicated * * * [a] statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected," and a "statement of the issues presented for review, with references to the assignments of error to which each issue relates." App.R. 16(A)(3) and (4).

{¶ 21} Additionally, appellant's argument that certain evidence was improperly admitted into evidence is not a valid basis to challenge the sufficiency of evidence in support of a conviction. In determining the sufficiency of evidence, an appellate court considers all of the evidence before the factfinder, "whether or not it was properly admitted." *State v. Peeples*, 7th Dist. No. 07 MA 212, 2009-Ohio-1198, ¶ 17, citing *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 80. As explained by the court in *State v. Miller*, 7th Dist. No. 13 MA 12, 2014-Ohio-2936, ¶ 119, "The appellate court does not rule on all of the evidentiary issues, find various pieces of evidence inadmissible, and then review only the remaining evidence for sufficiency." The prejudicial admission of evidence requires a new trial, but a finding of insufficient evidence requires a reversal and dismissal. *Id.*; *Peeples* at ¶ 16.

{¶ 22} Moreover, because there was no objection to the challenged testimony at trial, appellant must demonstrate the admission of the testimony constituted plain error. See *State v. Darazim*, 10th Dist. No. 14AP-203, 2014-Ohio-5304, ¶ 33, citing *State v. Scott*, 10th Dist. No. 05AP-1144, 2006-Ohio-4981, ¶ 19, 21. An appellate court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent

a miscarriage of justice. *State v. Pilgrim*, 184 Ohio App.3d 675, 2009-Ohio-5357, ¶ 58 (10th Dist.), citing *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶ 139. For an error to be a "plain error" under Crim.R. 52(B), it must satisfy three prongs: (1) there must be an error, meaning a deviation from a legal rule, (2) the error must be "plain," meaning an "obvious" defect in the trial proceedings, and (3) the error must have affected "substantial rights," meaning the error must have affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002).

{¶ 23} Appellant cannot demonstrate plain error. Officer Marchese's testimony that K.M. was "upset, crying, agitated," was not improper speculation into K.M.'s state of mind. Rather, this testimony was based on the officer's perception of K.M.'s behavior and demeanor. Additionally, Officer Marchese's testimony regarding an out-of-court statement of C.M.'s was admissible as a prior inconsistent statement under Evid.R. 613(B), which addresses the admission of extrinsic evidence of a prior inconsistent statement of a witness. Officer Marchese twice testified that C.M. agreed with K.M.'s version of the events, first during the state's case-in-chief, and then in the state's rebuttal. C.M. testified that Officer Marchese asked her only whether she was present when the fight occurred. Thus, even though the state had not established the necessary foundation for the testimony during its case-in-chief, the testimony became admissible as impeachment evidence. And even if it was error for the court to admit the challenged testimony, appellant fails to show the error resulted in a miscarriage of justice.

{¶ 24} As to the admission of the photographs at trial, appellant's counsel did object to their admission into evidence. Appellant fails, however, to demonstrate error in their admission. Appellant argues the photographs should not have been admitted "without credible verification of the date and time when taken." (Appellant's Brief, 10.) Appellant suggests it was necessary for the photographs to have a date stamp, corresponding to the alleged date they were taken, for them to be admissible. But the rules of evidence do not require time-stamping on a photograph for it to be admissible. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). A photograph is admissible if it is shown to be an accurate representation of what it purports to represent. *State v. Hannah*,

54 Ohio St.2d 84, 88 (1978). Thus, it is unnecessary to show who took the photograph or when it was taken, provided that there is testimony that the photograph is a fair and accurate representation of what it represents. *State v. Farrah*, 10th Dist. No. 01AP-968 (Apr. 18, 2002). Here, K.M. testified that, while the quality of the photographs was poor, she took the photographs, and they were a fair and accurate representation of what they were purported to represent. Thus, it was not error for the trial court to admit the challenged photographs.

{¶ 25} We next address appellant's argument that certain testimony of Officer Marchese and C.M. demonstrates the insufficiency of the evidence. According to appellant, the evidence was insufficient because K.M.'s testimony alleging appellant hit her was discredited based on the testimony of Officer Marchese and C.M. In support, appellant cites Officer Marchese's testimony that he did not see any visible signs of injury to K.M.'s hand or head, that no blood was visible on the baseball bat, and that emergency medical personnel were not dispatched to the apartment because K.M. declined medical treatment. Appellant also cites Officer Marchese's testimony that he saw no cane at the apartment as part of his investigation, which was inconsistent with K.M.'s testimony that appellant used a cane to hit her. Additionally, appellant notes that much of C.M.'s testimony conflicted with K.M.'s version of the confrontation between her and appellant.

{¶ 26} Appellant's reference to this evidence does not demonstrate the conviction was based on insufficient evidence. K.M.'s testimony that appellant aggressively struck her with a cane, placed her in a choke hold, and forcibly removed some of her hair, constituted evidence that appellant knowingly caused or attempted to cause physical harm to her. R.C. 2919.25 does not require the physical harm to be visible. See R.C. 2901.01(A)(3) (defining "physical harm to persons"). Moreover, appellant's argument that K.M.'s testimony was discredited by the testimonies of Officer Marchese and C.M. does not account for the standard that is applied in reviewing a conviction for sufficiency of the evidence. "[I]n a sufficiency of the evidence review, an appellate court does not engage in a determination of witness credibility; rather, it essentially assumes the state's witnesses testified truthfully and determines if that testimony satisfies each element of the crime." *State v. Bankston*, 10th Dist. No. 08AP-668, 2009-Ohio-754, ¶ 4, citing *State v. Woodward*, 10th Dist. No. 03AP-398, 2004-Ohio-4418, ¶ 16. Therefore, even though

evidence at trial was conflicting, when the evidence is viewed in the light most favorable to the state, we find the state presented sufficient evidence to establish the elements of the crime of domestic violence.

{¶ 27} Because we conclude there was sufficient evidence to sustain appellant's conviction for domestic violence, we must next determine whether the conviction was against the manifest weight of the evidence.

B. Manifest Weight of the Evidence

{¶ 28} When presented with a manifest weight argument, an appellate court engages in a limited weighing of the evidence to determine whether sufficient competent, credible evidence supports the jury's verdict. *State v. Salinas*, 10th Dist. No. 09AP-1201, 2010-Ohio-4738, ¶ 32, citing *Thompkins* at 387. "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a ' "thirteenth juror" ' and disagrees with the factfinder's resolution of the conflicting testimony." *Thompkins* at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). Determinations of credibility and weight of the testimony are primarily for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. Thus, the jury may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part, or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67 (1964).

{¶ 29} An appellate court considering a manifest weight challenge "may not merely substitute its view for that of the trier of fact, but must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Harris*, 10th Dist. No. 13AP-770, 2014-Ohio-2501, ¶ 22, citing *Thompkins* at 387. Appellate courts should reverse a conviction as being against the manifest weight of the evidence in only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶ 30} In view of this standard of review, when an appellant challenges the credibility of a witness on manifest weight grounds, the reviewing court must not interfere

with the findings of the trier of fact " 'which accepted the testimony of such witness unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶ 10, quoting *State v. Long*, 10th Dist. No. 96APA04-511 (Feb. 6, 1997). Thus, " 'where a factual issue depends solely upon a determination of which witnesses to believe, that is the credibility of witnesses, a reviewing court will not, except upon extremely extraordinary circumstances, reverse a factual finding * * * as being against the manifest weight of the evidence.' " *In re L.J.*, 10th Dist. No. 11AP-495, 2012-Ohio-1414, ¶ 21, quoting *In re Johnson*, 10th Dist. No. 04AP-1136, 2005-Ohio-4389, ¶ 26.

{¶ 31} According to appellant, the trial court clearly lost its way in returning the verdict of guilty on the domestic violence count because the evidence was minimal and reasonable doubt existed. Contrary to appellant's argument, the trial court did not clearly lose its way in finding appellant guilty of domestic violence. The trial court, as the trier of fact, had to resolve the evidentiary conflict between the testimonies of K.M. and C.M. Their testimonies directly conflicted on, inter alia, the issue of who was the aggressor in the fight between appellant and K.M. K.M. testified that she and appellant verbally argued and then appellant attacked her with a cane and a bat, placed her in a choke hold, and forcibly pulled out some of her hair. Conversely, C.M. testified that K.M. was the aggressor, striking appellant with the cane after he shook it at her. In assessing the testimonies of K.M. and C.M., the trial court was in the best position to take into account inconsistencies, "along with the witnesses' manner and demeanor and determine whether the witnesses' testimony is credible." *State v. J.E.C., Jr.*, 10th Dist. No. 12AP-584, 2013-Ohio-1909, ¶ 46. While the trial court was unconvinced by K.M.'s testimony regarding the use of a bat, it was reasonably persuaded by other aspects of her testimony. Based on the evidence in this case, appellant cannot demonstrate this is one of the "extremely extraordinary circumstances" calling for this court to disturb the trier of fact's resolution of which testimony and witness to believe.

{¶ 32} After thoroughly reviewing the record, we find sufficient evidence to support appellant's conviction for domestic violence, and the conviction was not against the manifest weight of the evidence. Accordingly, we overrule appellant's sole assignment of error.

IV. Conclusion

{¶ 33} Having overruled appellant's sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and SADLER, JJ., concur.
