

**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-0042
DEANA L. CROSS-NECAS,	:	5/27/11
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. 2009 CRB 244 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} The instant appeal emanates from a final judgment of the Portage County Municipal Court, Ravenna Division. Appellant, Deana L. Cross-Necas, seeks reversal of her criminal convictions for disorderly conduct, a fourth-degree misdemeanor under R.C. 2917.11(A)(1), and resisting arrest, a second-degree misdemeanor under R.C. 2921.33(A). Appellant contests both the sufficiency and manifest weight of the evidence.

{¶2} The charges against appellant stemmed from a series of events that occurred on February 8, 2009. At that time, appellant was living with her four minor children in a mobile home park on State Route 59 in Portage County, Ohio. Appellant was not the owner of the mobile home in which she resided; rather, she had essentially been given permission to live there by John Chiarle after her prior home was destroyed by fire a few months earlier. Even though the status of Chiarle's ownership of the mobile home was somewhat in dispute, he was exercising exclusive control over the use of the home during the relevant time period.

{¶3} Prior to February 2009, appellant and Chiarle had been "dating" for nearly five years. While Chiarle did not reside at the mobile home with appellant, he did spend a significant amount of time there each week. Moreover, he was ostensibly responsible for some of the monthly bills associated with the home.

{¶4} On the date in question, Chiarle and appellant made plans to attend a concert at a local high school. When appellant did not meet Chiarle at a designated site that afternoon, he drove to the mobile home to pick her up. Upon initially entering the home, he believed that appellant was seriously ill; as a result, he telephoned the local emergency medical squad for assistance. However, once the paramedics had arrived, appellant was able to act coherently and adequately answer all questions put to her. In light of this, the paramedics left the scene without taking her to a hospital, and Chiarle eventually decided to still take her to the concert.

{¶5} Upon returning to the mobile home that night after the concert, appellant and Chiarle became embroiled in a serious verbal disagreement which ultimately led to a physical altercation. At one point during this altercation, the couple's momentum took

them into appellant's bedroom, where they fell upon her bed. At that juncture, she hit Chiarle's head a number of times and then bit one of his elbows. When the altercation ended, both individuals immediately exited the mobile home.

{¶6} While appellant went on foot to an adjacent mobile home where her adult daughter lived, Chiarle drove his car to the Portage County Sheriff's Department. After a deputy took Chiarle's statement about the incident and photographs of the injuries to his head and elbow, Chiarle returned to the mobile home with four deputies. Upon entering the trailer, the deputies found appellant asleep on the living room floor. Once awakened, one deputy tried to speak to appellant about the altercation with Chiarle. However, she immediately became agitated and stood up on a piece of furniture. After looking forward around the room for a few moments, she lurched from the piece of furniture in the direction of the four deputies.

{¶7} At that point, a new struggle ensued between appellant and at least two of the deputies. Since appellant was resisting the efforts of the deputies to subdue her so strongly, it became necessary for one deputy to "tase" her at least once. At the close of the struggle, the deputies were able to handcuff appellant and take her into custody.

{¶8} In light of the foregoing incidents, appellant was charged with two misdemeanor offenses. Appellant was released on her own recognizance, entered a "not guilty" plea to the two charges, and her trial was scheduled for June 2009. However, due to a number of delays caused primarily by the appointment of new counsel for appellant, her bench trial did not occur until December 4, 2009.

{¶9} In testifying on behalf of the state, Chiarle stated that the altercation after the concert pertained to appellant's use of a cell phone. Specifically, he testified that he

was trying to take the phone from appellant because the phone belonged to him; and he believed appellant was using the phone to contact other men for the purpose of obtaining drugs. Chiarle further testified that the struggle for the cell phone continued for over five minutes, and that appellant hit him on the head many times throughout the altercation. In relation to the end of their fight, Chiarle asserted that after he took the phone away from appellant in the bedroom, she tried to put her hands on the phone and yank it away. This caused both of them to fall on the bed, where he landed partly on her. It was then that she bit his elbow.

{¶10} Regarding the separate charge of resisting arrest, the state called Deputy Christopher Sattler of the sheriff's department. At the outset of his testimony, Deputy Sattler stated that when he tried to speak to appellant about the altercation with Chiarle, she appeared to become irritated because her name was being mispronounced. As to when appellant came down off the piece of furniture, the deputy stated that she lunged directly at the four deputies who were standing in front of her. According to the deputy, immediately following the lunge, he informed her that she was being arrested for domestic violence. She continued to struggle with the deputies until she was "tased" by one deputy.

{¶11} In response, appellant testified on her own behalf. Regarding the fight, she stated that the altercation began when Chiarle tried to take advantage of her sexually by picking her up on his shoulder, throwing her onto the bed, and trying to remove her clothes. It was her position that she was acting to protect herself when she hit and bit Chiarle. Concerning the second incident, appellant asserted that when she first woke up, she was confused because she believed that the deputies had come to

tell her that one of her daughters was in trouble, and that she stood on the piece of furniture because she thought she heard a third person, Eric Adkins, making a false statement about her altercation with Chiarle. Appellant testified that, in trying to step off the furniture piece, she lost her balance and accidentally stumbled toward the deputies, and that during her struggle with the deputies, she was never told that they were trying to arrest her.

{¶12} At the close of the evidence, the trial court stated that the testimony of both Chiarle and appellant had lacked credibility to some extent. Nevertheless, the trial court found that the evidence did show that Chiarle had sustained injuries as a result of appellant's acts. Thus, as to the charge stemming from appellant's altercation with Chiarle, the court found her guilty of disorderly conduct. As to the incident involving the deputies, the trial court found her guilty on the charge of resisting arrest.

{¶13} Upon conducting a distinct sentencing hearing in April 2010, the trial court concluded that the two offenses in the underlying case should be merged with a charge in a separate criminal proceeding for purposes of sentencing. Therefore, the trial court imposed a jail term of 90 days and a fine of \$500 for all three convictions. However, the court then suspended 75 days of the term and \$400 of the fine, contingent upon appellant's compliance with three general conditions. Finally, the trial court's final judgment indicated that the execution of the foregoing sentence would be stayed while appellant pursued the instant appeal.

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

{¶15} “[1.] Appellant's convictions of disorderly conduct and resisting arrest were contrary to the manifest weight of the evidence.

{¶16} “[2.] The trial court erred in failing to grant appellant’s Criminal Rule 29 motion to dismiss the disorderly conduct and resisting arrest charges at the conclusion of the state’s case and at the conclusion of the evidence.”

{¶17} Under her first assignment, appellant submits that her conviction on both offenses should not be permitted to stand because it was not supported by the manifest weight of the presented evidence. In essence, appellant maintains that the testimony of the state’s two witnesses should have been rejected in its entirety because it contained certain inconsistencies which rendered it unbelievable.

{¶18} As was noted above, regarding the physical altercation between appellant and Chiarle, the trial court found her guilty of disorderly conduct, in violation of R.C. 2917.11(A). This statute provides: “No person shall recklessly cause inconvenience, annoyance, or alarm to another by doing any of the following: (1) Engaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior.” At trial, Chiarle was the sole state witness who gave testimony concerning the altercation which took place immediately after the concert.

{¶19} In challenging Chiarle’s credibility, appellant contends that aspects of his testimony were too illogical to be deemed trustworthy. For example, she notes that, in describing her condition when he first saw her on the date in question, he testified that she appeared to be incoherent and was “frothing” at the mouth. Appellant further notes that, according to Chiarle, the seriousness of her condition did not stop them from still going to the concert once the paramedics had left the scene.

{¶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. Moreover, we have held that when the trial court is acting as the trier of fact, it has the ability to choose whether to believe all, part, or none of a person's testimony. *Howard*, 2010-Ohio-2817, at ¶33.

{¶21} In applying this precedent to the testimony in the instant matter, this court would emphasize that none of the perceived inconsistencies cited by appellant pertain to the events which happened during the actual physical altercation between her and Chiarle. Instead, the cited inconsistencies only related to peripheral issues which were not relevant to the elements of disorderly conduct. Under such circumstances, the trial court could, within its sound discretion, reject those aspects of Chiarle's testimony which were somewhat illogical, including his discussion of the extent of appellant's "sickness," but still accept his version of the altercation itself.

{¶22} In relation to the actual physical confrontation, appellant does not attempt to point out any significant inconsistencies in Chiarle's pertinent testimony. Rather, she only restates her own assertions that Chiarle had been the aggressor in the altercation, and she was merely defending herself against his unwanted sexual advances. Yet, as part of his testimony, Chiarle expressly denied that he had thrown appellant on her bed for the purpose of initiating sexual contact. According to him, to the extent that he may have touched her during the altercation, it was only to take his phone from her hands so that she could not contact other individuals in an attempt to obtain illegal drugs. Under his version, appellant was the only person who was acting in a violent manner by both

hitting and biting him.

{¶23} During the bench trial, the state introduced photographs taken by Deputy Sattler which showed the injuries sustained by Chiarle to his head and elbow. Hence, even though appellant alleged that she had also suffered certain injuries, only the harm to Chiarle was substantiated. It was within the trial court's province to decide the credibility issue. Furthermore, Chiarle's testimony, if believed, could convince a trier of fact beyond a reasonable doubt that appellant had engaged in fighting which caused inconvenience, annoyance, or alarm to Chiarle.

{¶24} As to her conviction for resisting arrest, appellant again primarily restates her own testimony pertaining to the events which occurred after the four deputies had entered the mobile home, and ignores the deputy's testimony. Under appellant's version, she merely stumbled off the piece of furniture in the living room, and was never told during the entire situation that she was being taken into custody or that she should stop moving while the deputies tried to subdue her. Concerning the testimony of Deputy Sattler, appellant only asserts that he "admitted" that he did not make any statement regarding her possible arrest *before* she came down off the piece of furniture.

{¶25} Our review of Sattler's testimony readily shows that, under his version of the various events, appellant did not exhibit any belligerent behavior prior to standing on the piece of furniture and then "lunging" off. Moreover, the deputy testified that she "lunged" from the piece of furniture in the direction of the deputies; therefore, unlike appellant's own description of her fall, Sattler described her leap into the air as a purposeful, belligerent act. Finally, the deputy expressly stated that, once appellant had completed her lunge, he informed her that she was now under arrest in light of her

physical altercation with Chiarle.

{¶26} According to Deputy Sattler, appellant began to resist after he made the statement about her arrest. Because the conduct constituting resisting arrest occurred after the lunge, it is of no consequence that appellant was not informed of her arrest before she lunged.

{¶27} Considered as a whole, Deputy Sattler's trial testimony did not contain any inherent inconsistencies implicating his credibility. To this extent, it was the trial court's prerogative to accept Deputy Sattler's version of the events over appellant's version. In addition, since there was no dispute that appellant continued to recklessly fight all four deputies after Deputy Sattler informed her that she was under arrest, the evidence before the trial court supported the finding that the elements of the offense of "resisting arrest" had been met. See R.C. 2921.33(A), which states that a person has committed that particular crime if she recklessly, or by force, resists or interferes with the lawful arrest of herself or another person.

{¶28} 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 guilt 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.

{¶29} Pursuant to the foregoing analysis, 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 both offenses. Hence, because appellant’s conviction was not against the manifest weight of the evidence, her first assignment of error lacks merit.

{¶30} Under her second assignment, appellant challenges the sufficiency of the evidence upon which her convictions for both offenses were based. First, she contends that the guilty verdict for disorderly conduct must be reversed because the state did not prove that she had engaged in violent or turbulent behavior. Second, she submits that the charge of resisting arrest should have been dismissed because the evidence did not show that she was informed of the intent to arrest prior to being “tased” by a deputy.

{¶31} Our review of the trial transcript indicates that, at the close of the state’s evidence, appellant moved for a judgment of acquittal as to both charges under Crim.R. 29. In interpreting that rule, 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.

{¶32} 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.

{¶33} In claiming that her actions against Chiarle should not be viewed as violent behavior, appellant reiterates that she was merely defending herself against his sexual advances. However, as was fully discussed under the first assignment, Chiarle testified that he only touched appellant’s hands for the purpose of taking his cell phone from her so that she could not make any additional “drug” calls. Furthermore, he testified that he never threw her on the bed to initiate sexual contact. In light of these assertions, it is evident that the state presented some evidence from which it could be inferred that appellant was guilty of disorderly conduct under R.C. 2917.11(A).

{¶34} As to appellant’s second argument under this assignment, this court would again emphasize that Deputy Sattler specifically testified that, immediately following her lunge from the piece of furniture, he advised appellant that she was now being placed under arrest, and that she thereafter continued to resist the deputies’ efforts to subdue her. Thus, there was sufficient evidence to support a resisting arrest conviction.

{¶35} Given that the record before this court confirms that the state was able to offer sufficient evidence concerning each element of both offenses, appellant’s second

assignment is likewise without merit.

{¶36} Consistent with our disposition of both assignments of error, the judgment of the trial court is affirmed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.