[Cite as *State v. Schweitzer*, 2015-Ohio-925.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
AUGLAIZE COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 2-14-10**

v.

CHRISTTON J. SCHWEITZER, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Auglaize County Municipal Court
Trial Court No. 14CRB168

Judgment Affirmed

Date of Decision: March 16, 2015

APPEARANCES:

Rob C. Wiesenmayer, II **for Appellant**

Alexander N. Fowler **for Appellee**

SHAW, J.

{¶1} Defendant-appellant Christton J. Schweitzer ("Schweitzer") appeals the July 14, 2014 judgment of the Auglaize County Municipal Court sentencing Schweitzer to 30 days in jail, with all thirty days suspended, after Schweitzer was found guilty in a bench trial of Domestic Violence in violation of R.C. 2919.25(C), a fourth degree misdemeanor.

{¶2} The facts relevant to this appeal are as follows. On March 10, 2014, a complaint was filed in the Auglaize County Municipal Court alleging that on March 8, 2014, Schweitzer "by threat of force, knowingly cause[d] a family or household member to believe that the offender will cause imminent physical harm to the family or household member" in violation of R.C. 2919.25(C), a fourth degree misdemeanor. (Doc. 8). The family or household member alleged to be the victim was Schweitzer's wife, Sue L. Schweitzer ("Sue").

{¶3} On March 10, 2014, Schweitzer pled not guilty to the charge.

{¶4} On June 13, 2014, the case proceeded to a bench trial. At trial the State called Sue along with two officers who responded to the Schweitzer residence as a result of the March 8, 2014 incident, Deputy Jacob Foxhoven and Deputy Michael Peterson. When the State's case concluded, Schweitzer presented his case-in-chief, taking the stand in his own defense. At the conclusion of Schweitzer's case, the court took the matter under advisement.

{¶5} On July 7, 2014, the trial court filed an entry finding Schweitzer guilty of Domestic Violence in violation of R.C. 2919.25(C). In its entry, the trial court summarized the testimony presented at trial and found that Schweitzer "knowingly caused [Sue] to believe she was in fear of imminent physical harm * * * on the 8th day of March, 2014[.]" (Doc. 35).

{¶6} On July 14, 2014, a sentencing hearing was held.[1] Schweitzer was sentenced to serve 30 days in jail with all thirty days suspended. A judgment entry reflecting this sentence was filed that same day, July 14, 2014. It is from this judgment that Schweitzer appeals, asserting the following assignments of error for our review.

ASSIGNMENT OF ERROR 1

THE TRIAL COURT ERRED IN FINDING APPELLANT GUILTY AS THERE WAS NOT A SUFFICIENT AMOUNT OF EVIDENCE FOR THE TRIAL COURT TO FIND THAT THE STATE HAD ESTABLISHED ALL THE ELEMENTS OF R.C. § 2919.25(C) BEYOND A REASONABLE DOUBT.

ASSIGNMENT OF ERROR 2

THE TRIAL COURT'S DECISION FINDING APPELLANT GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶7} Due to the nature of the discussion, the assignments of error will be addressed together.

[1] No transcript of this proceeding was produced for appeal.

First and Second Assignments of Error

{¶8} In Schweitzer's first assignment of error, he argues that there was legally insufficient evidence to convict him. Specifically, Schweitzer argues that the State did not present sufficient evidence that Sue believed Schweitzer would cause her imminent physical harm at the time of the offense. In Schweitzer's second assignment of error, he contends that even if there was sufficient evidence presented to sustain a conviction, the trial court's determination that any threat of physical harm was "imminent" was against the weight of the evidence.

{¶9} 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.* When an appellate court reviews a record upon a sufficiency challenge, " 'the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v. Leonard*, 104 Ohio St.3d 54, 2004–Ohio–6235, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶10} The Ohio Supreme Court has "carefully distinguished the terms 'sufficiency' and 'weight' in criminal cases, declaring that 'manifest weight' and 'legal sufficiency' are 'both quantitatively and qualitatively different.' " *Eastley v.*

Volkman, 132 Ohio St.3d 328, 2012–Ohio–2179, ¶ 10, quoting *State v. Thompkins*, 78 Ohio St.3d 380 (1997), paragraph two of the syllabus.

{¶11} Unlike our review of the sufficiency of the evidence, an appellate court's function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *Thompkins*, *supra*, at 387. In reviewing whether the trial court's judgment was against the weight of the evidence, the appellate court sits as a "thirteenth juror" and examines the conflicting testimony. *Thompkins* at 387. In doing so, this Court must review the entire record, weigh the evidence and all of the reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts in the evidence, the factfinder " '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. Andrews*, 3d Dist. No. 1–05–70, 2006–Ohio–3764, ¶ 30, quoting *Thompkins* at 387.

{¶12} In this case, Schweitzer was convicted of Domestic Violence in violation of R.C. 2919.25(C), which reads, "No person, by threat of force, shall knowingly cause a family or household member to believe that the offender will cause imminent physical harm to the family or household member."

{¶13} To convict Schweitzer of Domestic Violence, at trial, the State first called Sue to testify. Sue testified that she had been married to Schweitzer for

eleven or twelve years but they had been together for over twenty. (Tr. at 3). Sue testified that she lived with Schweitzer and that they had two children. (Tr. at 4).

{¶14} Sue testified that on March 8, 2014, she called the police because she and Schweitzer "had been arguing and [Schweitzer] was drinking and it just got out of control." (Tr. at 5). Sue testified that at the time of the incident Schweitzer drank a couple of times per week or more. (*Id*.)

{¶15} Sue testified that Schweitzer was "yelling and screaming and * * * arguing." (Tr. at 6). Sue testified that she did not recall how the argument started or what it was about. (*Id*.) She testified that he did not harm her physically but she testified that he did make threatening comments. Specifically, Sue testified "I'm pretty sure he told me he was gonna kick my ass and all that[.]" (*Id*.) Sue testified that when Schweitzer made that comment she was upset. (Tr. at 8).

{¶16} Sue testified that she called the police when Schweitzer "kept coming in the living room and just yelling and it was late and my kid was there and I just called them[.]" (Tr. at 7). Sue testified that Schweitzer was impaired at the time of the incident and that she called the police around 12:30 or 1:00 in the morning.[2] (Tr. at 5). Sue testified that she wanted the police to "make him stop, cause it seemed like the only thing that ever made him stop was when they came

[2] Sue testified that she also had been drinking.

out." (Tr. at 7). Sue testified that in the past if she did not contact the police "the arguing just keeps continuing." (*Id*.)

{¶17} Sue testified that the police showed up to her residence and that one officer talked to her and another went into the bedroom and talked to Schweitzer and ended up taking him to jail. (Tr. at 8).

{¶18} On cross-examination Sue testified that both she and Schweitzer had been drinkers, and that earlier in the day she had been intoxicated. (Tr. at 8-9). In addition, Sue testified that Schweitzer was disabled and had undergone multiple surgeries, and that he had trouble walking. (Tr. at 9). Sue also testified that the arguing happened often and that both she and Schweitzer sometimes said things that they did not mean. (Tr. at 10). The following exchange then took place between defense counsel and Sue.

> **Q: And when he – on that evening, when he was yelling at you, you didn't believe that he was gonna hurt you, did you?**
>
> **A: No I didn't, that's why I said I didn't want to press charges – I didn't want him to get in trouble, I just wanted it to stop, that was – I just wanted the arguing to stop.**

(Tr. at 10).

{¶19} On re-direct, the following exchange then occurred between the prosecutor and Sue.

> **Q: * * * [Y]ou stated uh—just seconds ago to defense counsel you were in no fear of any kind of harm from [Schweitzer]?**

A: No not really. It was just more verbal.

Q: What do you mean it was more verbal?

A: It was just – like I said yelling than just him threatening. I really wasn't thinking that he was gonna do it, but when he gets to drinking you never know what can happen sometimes.

(Tr. at 10-11).

{¶20} Sue then testified that although she had said that Schweitzer had difficulty walking he could actually walk and that Schweitzer was taller and bigger than her.[3] (Tr. at 11).

{¶21} The State next called Deputy Jacob Foxhoven of the Auglaize County Sheriff's office. Deputy Foxhoven testified that on March 8, 2014, the Sheriff's office received a call from Sue indicating her and her husband were arguing, that threats had been made and that Sue needed law enforcement to respond. (Tr. at 14). Deputy Foxhoven testified that two other officers responded to the scene with him, Deputy Peterson, and Sergeant Little. (*Id*.)

{¶22} Deputy Foxhoven testified that when the officers arrived, he saw Sue sitting on the living room couch and she told the officers that Schweitzer was in the bedroom. (Tr. at 16). Deputy Foxhoven testified that Sue "was very shaken, crying and upset. She was upset to the point where she had a hard time speaking, getting her words out." (Tr. at 16).

[3] Sue testified that she was 5'4" and weighed 113 pounds.

{¶23} Deputy Foxhoven testified that he spoke with Sue in the living room and that she told him that she wanted charges filed against Schweitzer. (Tr. at 17). Deputy Foxhoven testified that he was familiar with Sue and Schweitzer because he had been out to their apartment a few times prior to this incident for the same type of calls. (Tr. at 17). Deputy Foxhoven testified that, to his knowledge, no arrests had been made prior to this incident when the officers responded for similar types of calls. (Tr. at 18). The following exchange then took place between Deputy Foxhoven and the prosecutor.

> **Q: Okay. What did you do on the prior occasions?**
>
> **A: Basically told them they couldn't be arguing like this. If they are going to argue they need to do it civilly, uh—and if they need to be they need to separated [sic] in their house. (Inaudible) just because we went there doesn't mean there was an actual crime committed.**
>
> **Q: Okay, and on this one, what made this one different from the rest that there was an arrest made?**
>
> **A: Sue had said that he had threatened to kick her ass and kill her and that's why she had called our office.**

(Tr. at 18).

{¶24} On cross-examination Deputy Foxhoven testified that Sue had been drinking and that she was visibly intoxicated. (Tr. at 20). He further testified that by the time the officers were ready to leave Sue didn't want any charges pressed. Deputy Foxhoven testified, "I went to my car to obtain the form for her to sign [to

press charges]. I read the form to her, explained what she would have to do. She became upset again, uh—said that he shouldn't be doing things like this but she didn't want to see him get in anymore trouble." (Tr. at 20). Deputy Foxhoven testified that in the previous times he had been involved with Sue and Schweitzer there had never been any physical violence. (*Id*.)

{¶25} The State next called Deputy Michael Peterson of the Auglaize County Sheriff's office. Deputy Peterson testified that he responded to Schweitzer's residence after Sue called along with Deputy Foxhoven and Sergeant Little. (Tr. at 23). Deputy Peterson testified that he talked with Schweitzer while the other two officers spoke with Sue. (*Id*.)

{¶26} Deputy Peterson testified that Schweitzer was in his bedroom of the residence when Deputy Peterson approached him. Deputy Peterson testified that he could tell Schweitzer had been drinking but other than that Schweitzer was "cordial." (Tr .at 24). Deputy Peterson testified, "I asked him what was going on, why we were there, that type of thing and he just said it was nothing, it was a small argument and that was pretty much the end of it." (Tr. at 24).

{¶27} Deputy Peterson testified that he had also responded to the Schweitzer residence previously for similar domestic responses and arguments and that he had not previously made arrests. (Tr. at 25). Deputy Peterson testified that the other officers, Deputy Foxhoven and Sergeant Little, made the decision to

arrest Schweitzer after speaking with Sue. (Tr. at 25). Deputy Peterson did testify that he observed Sue when he entered the residence, and stated that she was "distraught, she was crying, [and] she was upset." (Tr. at 24). However, Deputy Peterson testified that he did not really talk with Sue at the residence. (Tr. at 26).

{¶28} On cross-examination Deputy Peterson testified that Sue had been upset when he had been called to the residence previously. (Tr. at 26).

{¶29} At the conclusion of Deputy Peterson's testimony, the State rested its case. Schweitzer then made a Crim.R. 29 motion for acquittal and the court took the argument under advisement.

{¶30} Schweitzer then proceeded to his case-in-chief and took the stand in his own defense. Schweitzer testified that officers had been to his residence previously for arguments that he had with Sue. (Tr. at 30). Schweitzer testified that he had never harmed Sue and that he did not own a gun or a weapon of any kind. (*Id*.) Schweitzer testified that on the date of the incident he was fighting with Sue "over basic stuff, you know, not getting along, marital stuff. I thought she had been cheating on me and stuff[.]" (Tr. at 31).

{¶31} Schweitzer testified that "[n]othing really [happened]. It was just pretty much yelling and arguing." (Tr. at 31). Schweitzer testified that there was no physical violence, just yelling, screaming and arguing. Schweitzer testified that he did not threaten Sue, and that he did not threaten to kill her. (Tr. at 31).

Schweitzer testified that he knew Sue called the police, and that he did not think it was strange because she had done it "quite a few times because of arguing and yelling." (Tr. at 31).

{¶32} Schweitzer testified that his physical health was "not the greatest" due to an industrial accident. (Tr. at 32). Schweitzer testified that he could not "use [his] right leg for much anymore." (*Id.*) Schweitzer testified that he could only lift "like ten pounds * * * can't stand or sit for long periods of time[.]" (Tr. at 32). Schweitzer testified that he could not run either. (*Id.*)

{¶33} On cross-examination, Schweitzer testified that on the night of the incident he told officers that he wanted charges pressed against Sue for prior incidents where Sue had been "a little out of control and crazy from her drinking[.]" (Tr. at 33). Schweitzer also testified that he previously had a drinking problem, but at the time of trial he had given it up. (Tr. at 35).

{¶34} At the conclusion of Schweitzer's testimony, the court heard brief closing arguments and then took the matter under consideration. The court later issued a written ruling, which reads, in pertinent part,

> **The facts in this case are that on March 8, 2014 Sue L. Schweitzer contacted law enforcement to come to the home she shared with her husband Christton Schweitzer * * *[.] Three officers responded to the call: Deputy Jacob Foxhoven, Deputy Michael Peterson and Sergeant Brian Little.**
>
> **The testimony at trial indicates the parties were in separate rooms in the dwelling upon the officers' arrival. Deputy**

Foxhoven and Sergeant Little approached and spoke with Sue Schweitzer. Deputy Peterson went to the Defendant.

Deputy Foxhoven described Sue Schweitzer as shaking, crying and upset. He testified she had a hard time speaking. He testified Ms. Schweitzer reported to him Mr. Schweitzer told her he was going to kick her ass.

Deputy Foxhoven testified he had been to the Schweitzer residence on prior occasions and told the parties to settle down.

The testimony of all the parties indicated both parties had been drinking. Deputy Foxhoven believed the Defendant to be intoxicated.

During her testimony Sue Schweitzer basically downplayed the incident. She reported she and Mr. Schweitzer argue all of the time. She testified she did not want to press charges. She declared herself to be in no fear of physical harm at the time of the incident.

Ms. Schweitzer also testified when Mr. Schweitzer got to drinking "you never know what can happen sometimes."

The statute requires the trier of fact to find beyond a reasonable doubt that the Defendant knowingly caused the victim to believe there was an imminent threat of physical harm to the victim.

Favoring a finding of guilty are the fact that Ms. Schweitzer felt compelled to call in the police, Deputy Foxhoven's testimony of Ms. Schweitzer's demeanor when he and his fellow officers arrived at the dwelling, Ms. Schweitzer's declaration that the Defendant threatened to "kick her ass" and her declared uncertainty as to what might happen when the Defendant was drinking.

Favoring a finding of not guilty was Ms. Schweitzer's testimony she was not in fear of harm by the Defendant, she called the police because she wanted the incident over and the

> **Defendant's testimony they had both been drinking, they were both arguing and he did not threaten her.**
>
> **The Court takes note there was no challenge to Deputy Foxhoven's description of Ms. Schweitzer's demeanor at the time they arrived at the residence. While Ms. Schweitzer clearly downplayed the incident during her testimony, she did not recant the threat she asserted Mr. Schweitzer made to her.**
>
> **The Court finds highly more credible the statements made and the description of Ms. Schweitzer as described by Deputy Foxhoven than Ms. Schweitzer's testimony in Court [sic] made more than two months after the incident.**
>
> **The Court finds that the Defendant knowingly caused Ms. Schweitzer to believe she was in fear of imminent physical harm by him on the 8th day of March, 2014 and therefore finds him GUILTY of violating Ohio Revised Code §2919.25(c).**

(Doc. 35).

{¶35} On appeal, Schweitzer first argues that there was insufficient evidence to convict him. He claims that the State failed to prove that Sue believed that Schweitzer would cause her "imminent" physical harm. " 'Imminent' has been defined by Ohio courts as near at hand or impending." *State v. Fisher*, 197 Ohio App.3d 591, 594, 2011-Ohio-5965, ¶ 17 (2d Dist.) citing *Cincinnati v. Baarlaer*, 115 Ohio App.3d 521, 526–527 (1st Dist.1996). It has also been defined as requiring the belief of the victim that harm would occur immediately or, in the alternative, that the defendant will cause immediate physical harm. *Id*. citing *State v. Taylor*, 79 Ohio Misc.2d 82, 85 (1996).

{¶36} At trial, both Sue and Deputy Foxhoven testified that on the night of the incident Schweitzer threatened to "kick [Sue's] ass." This threat prompted Sue to call the police, made her upset and caused her to, at least initially, seek charges against Schweitzer.

{¶37} Schweitzer contends that given the nature of his disabilities, it was highly unlikely that Sue believed Schweitzer would cause her imminent physical harm. However, Sue did testify that Schweitzer could walk and that he was a lot bigger than her. Sue also testified that although Schweitzer had not been physically violent with her in the past, she did not know what would happen when he had been drinking. On the basis of these facts and circumstances, we cannot find that there was insufficient evidence presented to convict Schweitzer. Therefore Schweitzer's first assignment of error is overruled.

{¶38} Schweitzer next argues that his conviction was against the weight of the evidence, emphasizing that Sue testified at trial that she was not in fear of Schweitzer and that Schweitzer's disabilities made it unlikely that Sue could believe Schweitzer would cause her imminent physical harm.

{¶39} To support his argument, Schweitzer relies heavily on *State v. Fisher*, 197 Ohio App.3d 591, 594, 2011-Ohio-5965, ¶ 17 (2d Dist.). In *Fisher*, testimony from the victim indicated that she did not know if the defendant was going to hurt her, but she believed it was "absolutely" possible. The Second

District Court of Appeals found that this testimony did "not meet the criterion of a belief that [the defendant] would cause [the victim] imminent harm. At most, her testimony may have established that she was in fear that [the defendant] might hurt her[.]"[4] *Id*. at ¶ 27.

{¶40} The Fifth District Court of Appeals considered a similar "conditional threat" in *State v. Shahan*, 5th Dist. Tuscarawas No. AP060041, 2006-Ohio-402. In that case the Fifth District held that "generally, a conditional threat, standing alone, is insufficient to satisfy the element of imminent physical harm. * * * However, a conditional threat along with other circumstances, including the victim's state of mind, may sufficiently establish such element." *Shahan* at ¶ 19 (citations omitted).

{¶41} In this case, Sue testified that Schweitzer threatened to "kick her ass" and she told this to the police officers when they arrived. Months later at trial Sue claimed that she did not actually believe she was in danger of imminent physical harm. The trial court specifically stressed multiple times in its judgment entry that Sue "downplayed" the event at trial. The trial court also found Sue's statements less credible than the officers, who testified to Sue's state of mind being visually extremely upset to the point she was having a hard time talking. Sue also expressed her desire for the first time to press charges against Schweitzer, which

[4] *Fisher* was a 2-1 decision with a dissent on the issue of whether sufficient evidence was presented.

she had not done previously, indicating that this incident was different for her than previous incidents.

{¶42} Furthermore, the trial court heard the testimony of Schweitzer, and was free to accept or reject Schweitzer's statement that he did not make threats to Sue. Moreover, we would note that unlike in *Fisher* where the victim stated that it was absolutely possible that the defendant would cause her harm, there was testimony in this case that Schweitzer made a direct threat to harm Sue and that Schweitzer was much bigger than Sue.

{¶43} Thus there was circumstantial evidence from which the trial court could have found that Sue believed Schweitzer would cause her imminent physical harm. At the very least, we cannot find that the trial court clearly lost its way and created a manifest miscarriage of justice in convicting Schweitzer. Accordingly, Schweitzer's second assignment of error is overruled.

{¶44} For the foregoing reasons Schweitzer's assignments of error are overruled and the judgment of the Auglaize County Municipal Court is affirmed.

Judgment Affirmed

PRESTON, J., concurs.

/jlr

WILLAMOWSKI, J. dissents.

{¶45} I respectfully dissent from the majority's finding that the conviction for domestic violence under R.C. 2919.25(C) was supported by sufficient evidence, as presented at trial. Although I might find Schweitzer guilty of criminal conduct, had the State charged him with, for example, disorderly conduct,[5] I cannot agree that the essential elements of the crime of domestic

[5] The statute prohibiting disorderly conduct, R.C. 2917.11, states:

> (A) 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;
>
> (2) Making unreasonable noise or an offensively coarse utterance, gesture, or display or communicating unwarranted and grossly abusive language to any person;
>
> (3) Insulting, taunting, or challenging another, under circumstances in which that conduct is likely to provoke a violent response;
>
> (4) Hindering or preventing the movement of persons on a public street, road, highway, or right-of-way, or to, from, within, or upon public or private property, so as to interfere with the rights of others, and by any act that serves no lawful and reasonable purpose of the offender;
>
> (5) Creating a condition that is physically offensive to persons or that presents a risk of physical harm to persons or property, by any act that serves no lawful and reasonable purpose of the offender.
>
> (B) No person, while voluntarily intoxicated, shall do either of the following:
>
> (1) In a public place or in the presence of two or more persons, engage in conduct likely to be offensive or to cause inconvenience, annoyance, or alarm to persons of ordinary sensibilities, which conduct the offender, if the offender were not intoxicated, should know is likely to have that effect on others;
>
> (2) Engage in conduct or create a condition that presents a risk of physical harm to the offender or another, or to the property of another.
>
> R.C. 2917.11

violence were satisfied in this case.

{¶46} In order to prove that Schweitzer was guilty of domestic violence under, R.C. 2919.25(C), the State had to establish that (1) Schweitzer made threats of force; and (2) those threats caused Sue to believe that Schweitzer would cause imminent physical harm to her. The trial court found the threats of force element satisfied based on the alleged threats that Schweitzer "was going to kick [Sue's] ass." (R. at 35, J. Entry at 1.) I have no disagreement with this finding by the trial court. Nonetheless, these threats would still need to be linked to a belief by Sue that Schweitzer would carry out the threat and it would cause imminent physical harm to her. Notably, when testifying for the State, Sue indicated that she was "in no fear of any kind of harm"; Schweitzer never harmed her before; and she only called the police because she wanted the arguing to stop, not because she was afraid. (Tr. at 10.) The standard of review for sufficiency of the evidence is "whether the evidence submitted at trial, *if believed*, could reasonably support a finding of guilt beyond a reasonable doubt." (Emphasis added.) *In re Willcox*, 3d Dist. Hancock No. 5-11-08, 2011-Ohio-3896, ¶ 10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Under this standard, the trial court is not to weigh the testimony. *Id.* at ¶ 10. Therefore, the trial court was required to assume Sue's declarations as true. When looking at Sue's declarations as true, and at the other evidence presented by the State, there is no sufficient proof to

establish Sue's belief that Schweitzer would cause imminent physical harm to her as a result of his threat that he was going to "kick her ass."

{¶47} Cases reviewing the belief of imminent physical harm element under R.C. 2919.25(C) focus on the victim's state of mind. *See State v. Tackett*, 4th Dist. Jackson No. 04CA12, 2005-Ohio-1437, ¶ 15 ("To determine whether a threat of harm is 'imminent' as contemplated by R.C. 2919.25(C), the victim's state of mind is relevant."), citing *State v. Drake*, 135 Ohio App.3d 507, 510, 734 N.E.2d 865 (12th Dist.1999), and *City of Jackson v. Adams*, 4th Dist. Jackson No. 01CA2, 2001-Ohio-2617, 2001 WL 1468859, *4; *see also City of Hamilton v. Cameron*, 121 Ohio App.3d 445, 449, 700 N.E.2d 336 (12th Dist.1997) (" '[i]t must be shown by the prosecution that the victim believed the offender would cause her imminent physical harm at the time the incident took place.' "), quoting *State v. Sayres*, 1st Dist. Washington No. 95CA30, 1997 WL 142361, *1 (Mar. 26, 1997). Therefore, "the victim's testimony that she believed she would suffer imminent physical harm constitutes evidence of imminence." *Tackett*, at ¶ 15. In the instant case, the testimony of the victim was that she did not believe that Schweitzer would cause imminent physical harm to her. Therefore, Sue's testimony did not establish the required belief of imminent physical harm.

{¶48} While I am cognizant "that victims may change their testimony to protect a spouse, there must be some evidence either that a victim stated, or that

from other evidence it could be inferred, that the victim thought that the accused would cause imminent physical harm." *Cameron* at 449. For example, evidence of prior physical violence "can be used to establish the basis of the victim's belief that the offender is about to cause imminent physical harm, an element of this crime." *State v. Collie*, 108 Ohio App.3d 580, 584, 671 N.E.2d 338 (1st Dist.1996).

{¶49} Here, the trial court found that Sue "basically downplayed the incident." (R. at 35, J. Entry.) The trial court then looked at other evidence to infer that she must have believed that Schweitzer would cause imminent physical harm to her. It appears that the trial court interpreted Sue's 911 phone call, her demeanor upon the police officers' arrival, and her "declared uncertainty as to what might happen when the Defendant was drinking," as a fear of being harmed by Schweitzer. (R. at 35, J. Entry at 2.) No other evidence of fear was presented. I disagree that these three factors were sufficient for an inference about Sue's state of mind, as being contrary to her testimony.

{¶50} With respect to the 911 phone call, although the Fourth District Court of Appeals recognized that "the fact that the victim went to the police" may support the victim's belief that the offender is about to cause imminent physical harm, this fact would need to be coupled with other evidence of fear. *See Tackett*, 4th Dist. Jackson No. 04CA12, 2005-Ohio-1437, at ¶ 15-16 (finding evidence

sufficient to establish this element where the victim went to the police *and* testified "that she believed she would suffer imminent physical harm"); *Strong v. Bauman*, 2d Dist. Montgomery Nos. 17256, 17414, 1999 WL 317432, *4 (May 21, 1999) (recognizing a "close call" in a case where the victim "immediately called the police, instituted criminal charges, and subsequently sought a Civil Protection Order," but she "failed to testify directly that she feared or believed that [the defendant] would cause her imminent harm"); *see also Adams*, 4th Dist. No. 01CA2, 2001-Ohio-2617, 2001 WL 1468859, at *4 ("The victim stated that she believed that she would suffer imminent physical harm and that because of her fear, she went to the police station. Her testimony, if believed, sufficiently demonstrates her belief that physical harm was imminent."). Here, the 911 call *alone* cannot be interpreted as evidence of the requisite belief, where Sue testified that she only called the police because she wanted the arguing to stop, not because she was afraid. The evidence was that Sue regularly called the police to stop the parties' arguing. Furthermore, in spite of the initial 911 phone call, Sue refused to press charges.

{¶51} The trial court's reliance on Sue appearing "shaking, crying and upset," and having a hard time speaking is also misplaced, where *none of the deputies testified that Sue appeared frightened*. Conversely, Deputy Foxhoven attested that "not one time did [she] tell [the deputies] that she was frightened of

[Schweitzer]." (Tr. at 20.) Deputy Peterson attested that she had been crying and upset on prior occasions when he was called to her residence, when no threats were alleged or arrests made. (Tr. at 26.) Nothing in the police officers' testimony gave the trial court basis for an inference that this conduct was linked to the threats of having her "ass" kicked or a belief of imminent physical harm. Thus, there is no link between Sue's appearance of "shaking, crying and upset" and a belief of imminent harm.

{¶52} With respect to the trial court's reliance on Sue's "declared uncertainty as to what might happen when the Defendant was drinking," such uncertainty could, at the most, support a finding of a conditional fear of possible future harm, not a fear of immediate harm. Mere possibility is not imminent probability. *See State v. Elliott*, 104 Ohio App.3d 812, 819, 821, 663 N.E.2d 412 (10th Dist.1995) (distinguishing between evidence that shows mere possibility as opposed to probability when analyzing "a person's perception of the likelihood of the result"); *State ex rel. Skiles v. Indus. Com'n of Ohio, Bur. of Workers' Comp.*, 10th Dist. Franklin No. 85AP-108, 1986 WL 4656, *2 (Apr. 17, 1986) (recognizing the difference between the two terms when considering a medical expert's report). Thus, Ohio courts do not find a violation of R.C. 2919.25(C) upon conditional threats standing alone. *See, e.g.*, *Adams*, 4th Dist. No. 01CA2, 2001-Ohio-2617, 2001 WL 1468859, at *3; *Drake*, 135 Ohio App.3d at 510, 734

N.E.2d 865 (12th Dist.1999); *State v. Asher*, 112 Ohio App.3d 646, 655, 679 N.E.2d 1147 (1st Dist.1996) (holding that "a conditional threat of possible future harm" is insufficient to sustain a charge of domestic violence); *Collie*, 108 Ohio App.3d at 585, 671 N.E.2d 338 (1st Dist.1996) (holding that conditional threats alone were insufficient to support R.C. 2919.29(C)). Even when a victim testified that she had a subjective fear, the Fifth District Court of Appeals did not find a conviction under R.C. 2919.25(C) supported by sufficient evidence where "[i]t would not have been possible" for the defendant to harm the victim. *In re Jenkins*, 5th Dist. Stark No. 2003CA00330, 2004-Ohio-2657, ¶ 23.

{¶53} Sue's "declared uncertainty" could also be compared to the victim's testimony in *State v. Fisher*, 197 Ohio App.3d 591, 2011-Ohio-5965, 968 N.E.2d 510 (2d Dist.). There, the evidence was insufficient to "meet the criterion of a belief that Mr. Fisher would cause her imminent harm," because the victim, "by her own admission," did not know whether the defendant was going to hurt her. *Id.* at ¶ 26-27. The testimony in *Fisher* was as follows:

> "Q. Okay. Did you think that he was going to try to—try to hurt you?
>
> "A. I don't know.
>
> "Q. Did you think that was possible?
>
> "A. Absolutely.

Id. at ¶ 19-22. Analyzing this testimony, the court of appeals reasoned,

> At most, her testimony may have established that she was in fear that Mr. Fisher might hurt her, but R.C. 2919.25(C), "strictly construed against the state and liberally construed in favor of the accused," as required by R.C. 2901.04(A), requires the victim "to believe that the offender will cause imminent physical harm." By her own admission, Ms. Fisher did not know that he would try to hurt her.

Id. at ¶ 27. Thus, the court in *Fisher* found the fear of imminent harm element lacking, even though the victim had told a police officer "that she was in 'fear for her safety.' " *Id.* at ¶ 7. Although, as the majority of this court correctly points out, one judge dissented from the holding in *Fisher*, even the dissent agreed that "the victim's 'belief that it was "absolutely" possible does not cross the threshold of being a belief that Mr. Fisher would cause her imminent harm.' " *Id.* at ¶ 38, 40 (Kline, J., dissenting). While agreeing with the reasoning quoted above, the dissenting judge would have found that other evidence presented in that case, "barricading the door, calling the police, testimony about thrown objects," could support the finding of guilty. *Id.* at ¶ 41.

{¶54} Unlike the victim in *Fisher*, Sue did not barricade the door or separate herself from Schweitzer in any way. Her stated reason for calling the police was wanting the arguments to stop, rather than " 'fear for her safety,' " as in *Fisher* at ¶ 7. Additionally, no testimony of any sort of physical violence, akin to throwing objects, was presented. Accordingly, even more so than in *Fisher*, Sue's declared uncertainty as to what might happen when Schweitzer was drinking, is

insufficient to support a finding that she believed that Schweitzer would cause imminent physical harm to her on March 8, 2014.

{¶55} Our prior decisions in cases dealing with violations of R.C. 2919.25(C), do not support the trial court's conclusion that evidence was sufficient here. We have previously noted that "the essential inquiry is whether 'the proof fully evidences a reasonable belief by the victim that the accused will cause imminent physical harm.' " *State v. Pash*, 3d Mercer No. 10-09-13, 2010-Ohio-1267, ¶ 15, quoting *State v. Taylor*, 79 Ohio Misc.2d 82, 85, 671 N.E.2d 343 (1996), and citing *Collie*, 108 Ohio App.3d at 583, 671 N.E.2d 338. Thus, in *Pash*, we found evidence sufficient to support a finding that the victim "had a reasonable belief that Pash was going to cause her imminent physical harm," where the victim's testimony was that the defendant "repeatedly stated 'I will kill you' if she made any attempt to force him to leave her home"; "that she felt intimidated by Pash's statements and feared for her life"; and "that Pash's threat prompted her to change the locks on her house and file a complaint." *Id.* at ¶ 17-18. Likewise, in a case in which the victim "repeatedly testified at trial that defendant came to her residence, forced his way in, and threatened to kill her if she didn't give him their daughters," and "that she believed the defendant would cause imminent physical harm to her," we found evidence sufficient to sustain a conviction under R.C. 2919.25(C). *State v. Burd*, 3d Dist. Mercer No. 10-94-4,

1994 WL 265894 (June 16, 1994). In a civil protection order action concerning domestic violence, we found evidence sufficient to sustain a finding of fear of imminent physical harm by the preponderance of evidence under R.C. 3113.31, to which a similar analysis of the threat of imminent physical harm applies. *Smith v. Burroughs*, 3d Dist. Wyandot No. 16-09-23, 2010-Ohio-4806, ¶ 16-21. There, the defendant's threats to kill the victim rendered the victim speechless, caused her to call her ex-husband while pretending to talk to her children with a request to notify the police about her situation, and caused her to barricade herself in the bedroom and call the police after the defendant had left. *Id.* The instant case has none of the additional facts that were present in *Pash*, *Burd*, or *Smith*, which would support the element at issue; therefore, it is distinguishable and does not lend itself to a finding that "the proof fully evidences a reasonable belief by the victim that the accused will cause imminent physical harm." *Pash* at ¶ 15.

{¶56} For all the forgoing reasons, I would sustain the first assignment of error.

{¶57} Furthermore, I would sustain the second assignment of error, because I believe that the trial court created a manifest miscarriage of justice in its resolution of the conflicting testimony. Without an express finding that Sue's testimony was not credible, the trial court discredited her testimony at trial and found "highly more credible" the statements made by Sue to Deputy Foxhoven

two months prior to the trial, when she was "[v]isibly intoxicated." (R. at 35, J. Entry at 1; Tr. at 20.) Absent any effort of impeachment, I would not discredit Sue's testimony at trial completely. The Second District Court of Appeals held,

> The state may rely on evidence other than the victim's testimony to prove the offense. In particular, the state may offer evidence of the victim's conduct to prove her state of mind. But absent some sound reason to discount the victim's declaration, it should be given greater weight than contrary inferences derived from her conduct.

Fisher, 197 Ohio App.3d 591, 2011-Ohio-5965, 968 N.E.2d 510, at ¶ 32.

{¶58} Sue's conduct of calling the police, shaking, crying, and being upset upon the police officers' arrival could further evidence support for the finding of fear, had she testified that she believed in Schweitzer's threats. But it could not be construed as *contradicting* her testimony that she did not believe in the threats, where Schweitzer had never hurt her before; she testified that she only called the police to stop the argument "cause it seemed like the only thing that ever made him stop was when they came out" (Tr. at 7); she had called the police on multiple prior occasions for the same reason and no arrests were made; Schweitzer was partially disabled and Sue was not concerned about him hurting her; she remained in the residence with him after the threats were uttered; and she did not press charges against him. Moreover, in spite of shaking, crying, and being upset upon the police officers' arrival, at no point did Sue tell the police officers that these emotions were caused by Schweitzer's threats or that they were the result of being

in fear of imminent physical harm. As pointed out above, nothing in the police officers' testimony gave the trial court basis for an inference that Sue's shaking, crying, and being upset, was linked to the threats or belief of imminent physical harm. Similarly, Sue's declared uncertainty as to whether Schweitzer might possibly cause Sue harm in some indefinite future "when he gets to drinking," does not contradict Sue's testimony that she did not believe that Schweitzer was going to hurt her on the night in question. (Tr. at 10-11.) Therefore, I would hold that the trial court lost its way in resolving the conflicts in evidence and that the facts of this case contradict the finding of fear.

{¶59} The Twelfth District Court of Appeals held that evidence did not establish a violation of R.C. 2919.25(C), even though the victim signed a complaint indicating that the defendant was threatening to shoot her, two loaded shotguns were found in the couple's residence, and the victim sought a restraining order against the defendant. *Cameron*, 121 Ohio App.3d at 446-447, 700 N.E.2d 336. The court of appeals found that other facts contradicted the finding of fear. In particular, the victim testified "that she did not believe the threat" and that she had signed the complaint as a result of being tired and upset; she testified that she had signed the complaint for the restraining order because she "wanted time to think." *Id.* at 447-448. The court of appeals considered the fact that the victim did not herself call the police and remained in the house after the alleged threats, the

fact that the defendant never "made a motion toward a shotgun," and the fact that "[n]o evidence was presented of prior acts by appellant showing that he had harmed or had threatened to harm [the victim] before the incident." *Id.* at 448-449. The instant case is similar to *Cameron* because Sue testified that she did not believe the threat, and she remained in the apartment in spite of the threat. Schweitzer never made any move toward her and there were no indications that he intended to carry out the threat. Moreover, the testimony indicated that although they had fought frequently, the altercations were verbal, "there's never been any physical violence." (Tr. at 10, 20.) The evidence in the instant case favors reversal even more than in *Cameron*, because Sue never signed a complaint or sought a restraining order against Schweitzer, although she herself called the police to stop the argument.

{¶60} The Second District Court of Appeals held that the situation presented "a close call" on the issue of fear of imminent harm element, where the victim "immediately called the police, instituted criminal charges, and subsequently sought a Civil Protection Order," but she "failed to testify directly that she feared or believed that [the defendant] would cause her imminent harm." *Strong*, 2d Dist. Montgomery Nos. 17256, 17414, 1999 WL 317432, at *4. The court in *Strong* affirmed the trial court's finding of fear under the abuse of discretion standard. *Id.* I recognize that *Strong* was a civil case concerning

domestic violence under R.C. 3113.31; but the relevant analysis of the fear of imminent harm is applicable here. Although Sue immediately called the police, she did not institute criminal charges, did not seek a protection order, and did not testify that she feared or believed that Schweitzer would cause her imminent harm. Therefore, under the more stringent standard of proof in criminal cases, I do not believe the element of fear could be found here.

{¶61} While I recognize the "unique nature of domestic violence cases," and I express "concern for the victims thereof," *Collie*, 108 Ohio App.3d at 583, 671 N.E.2d 338, we cannot elevate every domestic argument to a criminal conviction for domestic violence, especially where, as here, the evidence presented at trial does not support the elements of the offense beyond a reasonable doubt.[6]

{¶62} For all the forgoing reasons, I would hold that the conviction for domestic violence under R.C. 2919.25(C) is against the manifest weight of the evidence.

[6] My opinion herein should not be read to imply that Schweitzer's conduct was not criminal. I am merely pointing out that the State did not put on sufficient evidence and did not prove the elements of the statute under which Schweitzer was charged.