

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 25159

Appellee

v.

DANIEL LEE BITTING

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 09 05 1655

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 4, 2010

CARR, Judge.

{¶1} Appellant, Daniel Bitting, appeals his conviction out of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On June 4, 2009, Bitting was indicted on one count of domestic violence in violation of R.C. 2919.25(A)(D)(5), a felony of the fifth degree; and one count of possession of marijuana in violation of R.C. 2925.11(A)(C)(3), a minor misdemeanor. The alleged victim of domestic violence was Bitting's live-in pregnant girlfriend Denise Edwards. Bitting pleaded not guilty to the charges.

{¶3} The matter proceeded to trial before the jury. At the conclusion of the evidence, and after the jury had retired for deliberations, Bitting informed the trial court that he wished to withdraw his prior plea of not guilty to the possession charge and enter a plea of guilty to that

charge. The trial court accepted his guilty plea. The court fined him \$100.00 and suspended his driver's license for a period of six months.

{¶4} The jury returned a verdict of guilty on the charge of domestic violence. Bitting filed a motion for acquittal and for a new trial. The trial court denied the motion. The trial court sentenced Bitting to six months in jail. Bitting filed a timely appeal, raising two assignments of error for review.

II.

ASSIGNMENT OF ERROR I

“THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A FINDING OF GUILT TO THE CHARGE OF DOMESTIC VIOLENCE.”

ASSIGNMENT OF ERROR II

“THE VERDICT OF GUILTY TO THE CHARGE OF DOMESTIC VIOLENCE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶5} Bitting argues that his conviction for domestic violence was not supported by sufficient evidence and was against the manifest weight of the evidence. This Court disagrees.

{¶6} A review of the sufficiency of the State's evidence and the manifest weight of the evidence adduced at trial are separate and legally distinct determinations. *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600. “While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion.” *Id.*, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook J., concurring). When reviewing the sufficiency of the evidence, this Court must review the evidence in a light most favorable to the prosecution to determine whether the evidence before the trial court was sufficient to sustain a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259, 279.

“An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. 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.” *Id.* at paragraph two of the syllabus.

{¶7} A determination of whether a conviction is against the manifest weight of the evidence, however, does not permit this Court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

“an appellate court 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. Otten* (1986), 33 Ohio App.3d 339, 340.

“Weight of the evidence concerns the tendency of a greater amount of credible evidence to support one side of the issue more than the other. *Thompkins*, 78 Ohio St.3d at 387. Further when reversing a conviction on the basis that it was against the manifest weight of the evidence, an appellate court sits as a ‘thirteenth juror,’ and disagrees with the factfinder’s resolution of the conflicting testimony. *Id.*” *State v. Tucker*, 9th Dist. No. 06CA0035-M, 2006-Ohio-6914, at ¶5.

This discretionary power should be exercised only in exceptional cases where the evidence presented weighs heavily in favor of the defendant and against conviction. *Thompkins*, 78 Ohio St.3d at 387.

{¶8} Bitting was charged with domestic violence in violation of R.C. 2919.25(A)/(D)(5) which states, in relevant part:

“No person shall knowingly cause or attempt to cause physical harm to a family or household member. *** [I]f the offender knew that the victim of the violation was pregnant at the time of the violation, a violation of division (A) *** is a felony of the fifth degree, and the court shall impose a mandatory prison term on the offender ***.”

{¶9} R.C. 2901.22(B) states:

“A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.”

{¶10} “Physical harm to persons” is defined as “any injury, illness, or other physiological impairment, regardless of its gravity or duration.” R.C. 2901.01(A)(3).

{¶11} R.C. 2919.25(F)(1) defines “family or household member” as

“(a) Any of the following who is residing or has resided with the offender:

“(i) A spouse, a person living as a spouse, or a former spouse of the offender;

“(ii) A parent, a foster parent, or a child of the offender, or another person related by consanguinity or affinity to the offender;

“(iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the offender, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the offender.

“(b) The natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent.”

A “person living as a spouse” includes “a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question.” R.C. 2919.25(F)(2).

Sufficiency of the evidence

{¶12} Bitting concedes that Ms. Edwards was a family or household member and that she was pregnant at the time of the alleged incident. He argues solely that there was insufficient evidence to establish that he knowingly caused or attempted to cause physical harm to Ms. Edwards.

{¶13} At trial, Meredith Duncan testified that she went to the AMHA building on Cedar Street in Akron at 6:30 a.m. on May 19, 2009, to apply for housing. She testified that she offered to let another woman sit in her car to wait because it was chilly. Ms. Duncan testified that a man, whom she identified as Bitting, approached her car and argued with the other woman. She testified that Bitting was agitated but that he also sat in her car briefly while waiting for AMHA to open.

{¶14} Ms. Duncan testified that Bitting, the other woman, and she left her car when a line began to form at the AMHA building. She testified that Bitting kept trying to grab the woman's cell phone, grabbing the woman's arm and sweater, and mumbling in her ear. She testified that the woman kept telling Bitting to stop touching her and to leave her alone. Ms. Duncan testified that she asked the woman whether she was okay and the woman responded, "No." She testified that Bitting became more aggressive, finally "scoop[ing] her up by the arm" and taking the woman to another area. She testified that she called 911 because the woman had told her that she was not okay and did not seem to want to go off with Bitting.

{¶15} Ms. Duncan authenticated a recording of her call to 911. She reported that a woman's boyfriend "was beating the crap out of her in the parking lot and she was screaming[.]" She testified that Bitting had the victim "bent over a car backwards holding her by her throat and she was screaming." Ms. Duncan testified that these incidents occurred at approximately 7:30 a.m., that it was light, and that she had an unobstructed view of Bitting as he had the victim bent over a car. She conceded that she lost sight of the couple at some point and that she assumed that Bitting continued to beat the victim. Ms. Duncan clarified, however, that she personally observed Bitting "beating the crap" out of the victim as she reported that to the 911 operator.

{¶16} Daniel Leslie testified that he was working with his apprentice at Bassak Brothers near Cedar Street during the early morning of May 19, 2009, when they heard someone screaming loudly outside. He described it as “bloodcurdling screaming. Like there was somebody getting killed kind of screaming.” He testified that he and his apprentice left the shop and saw a man and a woman fighting in a parking lot. He testified that the lighting was good and that he had an unobstructed view of the couple. Mr. Leslie testified that the man was pulling on the woman’s shirt and “hitting her in the head and arms, wherever he could swing.” He described the blows to the victim as forceful enough to cause visible damage. Mr. Leslie testified that he and his apprentice yelled at the man, who then walked away from the woman. He testified that the police arrived and stopped the couple.

{¶17} Kyle Illingworth testified that he was working as an apprentice at Bassak Brothers on May 19, 2009, when he heard a very loud scream around 7:15 a.m. He described the scream as “[v]ery loud, like I thought somebody was being attacked or something.” He testified that he went outside with Dan Leslie and saw a man hitting a woman “pretty hard” in the face. He testified that the woman was trying to get away and that she was shaking. Mr. Illingworth testified that he and Mr. Leslie yelled to try to make the man stop hitting the woman, and he did. He testified that the man and woman walked away and began struggling again. He testified that the police arrived and put the couple in police cruisers.

{¶18} Officer Tanisha Stewart of the Akron Police Department (“APD”) testified that she has received specialized training regarding domestic violence, specifically, what to expect at the scene; how to defuse the situation, separate the parties, and get to the truth of the matter; and where to refer the parties for assistance. The officer testified that she responds to domestic

violence calls on a daily basis. She testified that it is common for perpetrators to assert that “nothing happened,” or that the parties were “just talking.”

{¶19} Officer Stewart testified that she was dispatched to assist another unit regarding a fight on Cedar Street around 7:10 a.m. on May 19, 2009. She testified that she arrived at the AMHA building to find numerous people in a state of high emotion, yelling comments such as “That way” and “He’s hitting her.” The officer testified that she went where the people directed her and she saw a woman leaning back over some bushes as a man hovered over her. She identified Bitting as the man she saw.

{¶20} Officer Stewart testified that she separated Bitting from the victim and escorted the crying and “shaken” victim to her police cruiser. She testified that the victim immediately began talking, claiming, “Nothing happened. It’s taken care of. It’s okay.” She testified that the victim admitted that she and Bitting had been arguing over keys and a cell phone. She testified that the victim had scratches on her face and neck. The officer testified that the victim claimed to have caused the scratches herself, although the victim did not know where the scratches were until able to look in a mirror. She testified that the victim appeared to be disturbed when she saw her injuries. She testified that, based on her experience, it is very common for victims to take responsibility for their own injuries. The officer authenticated photographs taken at the scene which show bloody scratches on the victim’s face and neck, as well as the victim’s demeanor.

{¶21} Officer Stewart testified that she did not speak with Bitting or other witnesses, although she overheard another officer interviewing two male witnesses. She testified that the decision to arrest Bitting was made based on several factors, including statements by Ms. Duncan, Mr. Leslie, and Mr. Illingworth who all reported that they saw Bitting hitting the victim;

the victim's physical injuries; and the fact that the victim did not know where the injuries she claimed to have made herself were on her body.

{¶22} Reviewing the evidence in a light most favorable to the State, this Court concludes that any rational trier of fact could have found the essential elements of the charge of domestic violence were proved beyond a reasonable doubt. See *Jenks* at paragraph two of the syllabus. The State presented the eye witness testimony of three people who saw Bitting hit his pregnant, live-in girlfriend with sufficient force that one would expect to see injuries. The State presented evidence that Bitting had the victim bent over a car with his hands around her throat. Photographs of the victim taken immediately after the altercation show bloody scratches on her face and neck. Accordingly, there was sufficient evidence to establish that Bitting knowingly caused physical harm to the victim. Bitting's first assignment of error is overruled.

Manifest weight of the evidence

{¶23} The victim Denise Edwards testified for the defense. She testified that she and Bitting were living together on the date of the incident and that he knew she was pregnant. She testified that she and Bitting went to AMHA early in the morning on May 19, 2009, to apply for housing together. She testified that a woman allowed her to wait in her car to stay warm until a line began to form at AMHA. Ms. Edwards verified that she and Bitting got into an argument in line over keys to their then-current home and her cell phone. She denied that Bitting touched her other than to gently touch her arm in an attempt to calm her. Ms. Edwards testified that she has had a bad temper her whole life and that family members have counseled her to seek anger management treatment. She admitted that she was screaming loudly after she and Bitting left the housing line, but she asserted that she routinely screams "to let my anger out." She testified that she also displays anger by scratching herself. She asserted that she did so on May 19, 2009, and

that her fresh scratches that morning were self-inflicted. Ms. Edwards testified that the three eye witnesses who testified that they saw Bitting hitting her were all lying or mistaken.

{¶24} Bitting testified in his own defense. He testified that he is the only person who took care of Ms. Edwards because her mother was very sick and her father was verbally abusive and neglectful. He testified that Ms. Edwards is an “emotional roller coaster,” “just a little off,” and that “she really doesn’t know too much.”

{¶25} Bitting admitted that he and Ms. Edwards got into an argument outside the AMHA building on the morning of May 19, 2009, because she would not let him use her cell phone. He testified that he tapped her on the shoulder and asked her to step out of line with him to discuss the matter because he did not want other people to hear their discussion, asserting, “I don’t want anybody in my business.” He admitted that Ms. Edwards was trying to get away from him.

{¶26} Bitting testified that he and Ms. Edwards walked around a corner and she began “moving around just all crazy” and that she started screaming “to get attention.” He testified that he tried to calm her down by a car, but he denied bending her over a car. He also denied hitting her. Bitting testified that he has too much respect for his daughter, the child’s mother, and himself to ever hit a woman. In fact, he testified that before he would hit his girlfriend, he would just “go and find another female.”

{¶27} Bitting testified that the witnesses who testified that he hit Ms. Edwards simply had assumed the worst because she was screaming. He testified that Ms. Duncan was mistaken about what she thought she saw. He addressed Officer Stewart’s testimony that she saw him hovering over the victim by explaining that Ms. Edwards was wearing sandals, that one had come off, and he was helping her put it back on. Bitting described himself as weighing 150

pounds at the time of the incident, while Ms. Edwards weighed 210 pounds. He denied dragging her away from the housing line by testifying that “I am not able to pull no 200-pound plus woman.” Bitting testified that his “trial has been exaggerated to just make me seem barbaric.”

{¶28} This Court will not overturn the trial court’s verdict on a manifest weight of the evidence challenge only because the trier of fact chose to believe certain witness’ testimony over the testimony of others. *State v. Crowe*, 9th Dist. No. 04CA0098-M, 2005-Ohio-4082, at ¶22.

{¶29} A review of the record indicates that this is not the exceptional case, where the evidence weighs heavily in favor of Bitting. A thorough review of the record compels this Court to find no indication that the trial court lost its way and committed a manifest miscarriage of justice in convicting Bitting of domestic violence. Bitting does not dispute that he and Ms. Edwards were living together at the time of the incident and that she was pregnant. He further does not dispute that he and Ms. Edwards had an argument while waiting to apply for public housing. While Bitting denied abusing Ms. Edwards, he repeatedly referred to her throughout his testimony in a disparaging manner.

{¶30} The weight of the evidence supports the conclusion that Bitting aggressively compelled Ms. Edwards to leave the AMHA housing line. Three eye witnesses testified that they saw Bitting hit Ms. Edwards around her face and neck. Ms. Duncan testified that she saw Bitting choking Ms. Edwards as he had her bent backwards over a car. Messrs. Leslie and Illingworth both testified that Bitting was hitting the victim with sufficient force to expect that she would suffer injuries. In addition, Officer Stewart testified that she witnessed Bitting hovering over the victim who was leaning back over some bushes. Ms. Edwards had fresh scratches on her face and neck immediately after the incident. The weight of the evidence supports the conclusion that Bitting knowingly caused or attempted to cause physical harm to his

pregnant, live-in girlfriend. Accordingly, his conviction for domestic violence is not against the manifest weight of the evidence. Bitting's second assignment of error is overruled.

III.

{¶31} Bitting's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

GERALD R. LEIPPLY, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.