[Cite as *State v. Anderson*, 2011-Ohio-563.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. LEO A. ANDERSON Appellant	C.A. No. 25377 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 09 10 3040

DECISION AND JOURNAL ENTRY

Dated: February 9, 2011

WHITMORE, Judge.

{¶1} Defendant-Appellant, Leo Anderson, appeals from his conviction in the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} At approximately 8:30 p.m. on September 25, 2009, the Akron Police Department received a 911 call from the victim in this case, Monica Anderson. Officer Drew Reed responded to the Anderson's apartment. Officer Reed observed Monica's shirt was torn and that she was upset. Monica informed Officer Reed that her husband, Anderson, had pushed her, scratched her, and spit on her. Officer Reed observed fingernail scratches on Monica. Anderson left the scene before the officers arrived.

{¶3} On October 15, 2009, a grand jury indicted Anderson on one count of domestic violence, pursuant to R.C. 2919.25(A). The matter proceeded to a jury trial on March 2, 2010. The jury found Anderson guilty and further found that he had two prior convictions for domestic

violence. Specifically, Anderson had been convicted of committing domestic violence against Monica on one occasion and against their daughter on another occasion. The trial court sentenced Anderson to two years in prison.

{¶4} Anderson now appeals from the trial court's judgment and raises three assignments of error for our review.

II

Assignment of Error Number One

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED DEFENDANT-APPELLANT ANDERSON'S MOTION FOR JUDGMENT OF ACQUITAL (sic) UNDER CRIM. 29 (sic)."

{¶5} In his first assignment of error, Anderson argues that his conviction is based on insufficient evidence. We disagree.

{¶6} In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 274. Furthermore:

> "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; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

"In essence, sufficiency is a test of adequacy." *Thompkins*, 78 Ohio St.3d at 386.

{¶7} "No person shall knowingly cause or attempt to cause physical harm to a family or household member." R.C. 2919.25(A). The phrase "family or household member" includes a spouse. R.C. 2919.25(F)(1)(a)(i). "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." R.C. 2901.22(B). Domestic violence is a third-degree felony if an offender was previously convicted of two or more domestic violence offenses. R.C. 2919.25(D)(4).

{¶8} Anderson argues that his conviction is based on insufficient evidence because of credibility issues with the State's witnesses. Specifically, he argues that the police were biased against him, the victim had a potential bias against him, and the State's expert was not a credible witness. Issues of credibility sound in weight, not sufficiency. *State v. Jones*, 9th Dist. No. 24776, 2010-Ohio-351, at ¶11. Here, Officer Reed testified that he observed injuries on Monica Anderson, Anderson's wife, after she called 911. Monica identified Anderson as her attacker and told Officer Reed that Anderson had pushed her, ripped her shirt, and spat on her. Further, the State presented testimony and journal entries from Anderson's two prior domestic violence convictions. Viewing the evidence in a light most favorable to the State, the record contains sufficient evidence that Anderson knowingly caused his wife, a family member, physical harm after having twice been convicted of domestic violence offenses. See R.C. 2919.25(A); R.C. 2919.25(D)(4). Anderson's first assignment of error lacks merit.

Assignment of Error Number Two

> "DEFENDANT-APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF EVIDENCE." (Sic.)

{¶9} In his second assignment of error, Anderson argues that his conviction is against the manifest weight of the evidence. We disagree.

{¶10} In determining whether a conviction is against the manifest weight of the evidence an appellate court:

> "[M]ust 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.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Id. Therefore, this Court's "discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶11} Anderson's entire manifest weight argument consists of this Court's standard of review in manifest weight challenges and the two following sentences:

> "In the case sub judice, upon considering the entire record and weighing the evidence and all reasonable inferences arising there from, it becomes clear that the jury lost its way in resolving the conflicts in the evidence and created a manifest miscarriage of justice by returning a guilty verdict for domestic violence. Thus the jury clearly lost its way in this case, and in doing so, created such a manifest miscarriage of justice that their conviction must be reversed and a new trial ordered."

Anderson does not cite to any evidence in support of his argument. He does not explain what "conflicts in the evidence" he believes exist or cite to any portions of the record. His argument merely rephrases the standard of review that applies in manifest weight challenges. As the appellant, Anderson bears the burden of presenting this Court with an argument, supported by citations to the record and applicable legal authority. App.R. 16(A)(7). This Court has repeatedly held that "[i]f an argument exists that can support [an] assignment of error, it is not this [C]ourt's duty to root it out." *Cardone v. Cardone* (May 6, 1998), 9th Dist. No. 18349, at *8. Because Anderson has failed to present this Court with a proper analysis in support of his

manifest weight challenge, this Court will not engage in an analysis on his behalf. Anderson's second assignment of error is overruled.

Assignment of Error Number Three

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED THE TESTIMONY OF DIANA ZEDAK AS AN EXPERT WITNESS TO EXPLAIN THE DOMESTIC VIOLENCE DYNAMICS AND THE CYCLE OF VIOLENCE AND COUNTERINTUITIVE BEHAVIOR."

{¶12} In his third assignment of error, Anderson argues that the trial court erred by admitting expert testimony on the cycle of violence and counterintuitive behavior on the part of a victim of domestic violence.

{¶13} The Ohio Supreme Court has recognized that the State may introduce testimony on the cycle of violence and battered-women's syndrome in its case-in-chief, provided that such testimony is relevant and helpful. *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, at ¶44. For such testimony to be relevant, the State must set forth an evidentiary foundation showing that the witness at hand is, in fact, a battered woman. Id. at ¶46-47.

> "[T]he party seeking to introduce battered woman syndrome evidence must lay an appropriate foundation substantiating that the conduct and behavior of the witness is consistent with the generally recognized symptoms of the battered woman syndrome, and that the witness has behaved in such a manner that the jury would be aided by expert testimony which provides a possible explanation for the behavior." Id. at ¶47, quoting *State v. Stringer* (1995), 271 Mont. 367, 378.

Although the Court rejected any "set of rigid foundational requirements," it did impose two specific limitations on the admission of cycle of violence and battered-women's syndrome testimony. *Haines* at ¶47. First, the evidence must be rehabilitative in nature. Id. at ¶44. Second, the couple at issue must have "go[ne] through the battering cycle at least twice." Id. at ¶49, quoting *State v. Koss* (1990), 49 Ohio St.3d 213, 216.

{¶14} Here, the trial court permitted the State to present expert testimony on cycles of violence and the effect of those cycles on abuse victims. The State's expert, Diana Zedak, did not offer any specific testimony about Monica, the victim in this case, or her particular situation. Rather, she explained cycles of violence in general and opined that it is common for victims of domestic violence to remain with their abusers and to decline to prosecute their abusers. The State presented Zedak's testimony in its case-in-chief pursuant to *Haines* over the defense's objection that *Haines* did not apply. The trial court determined that *Haines* permitted Zedak's testimony. Specifically, the court determined that the State met the foundational requirements for Zedak's testimony because the record contained evidence that: (1) Anderson had previously been convicted of domestic violence against Monica; (2) there was at least some evidence that he had been abusive towards her again, leading to the charges in this case; and (3) there was at least some evidence that Monica and Anderson were back to living under the same roof at the time of Anderson's arrest.

{¶15} Assuming without deciding that the trial court erred by admitting Zedak's testimony without *Haines'* foundational requirements having been met, we conclude that Anderson has failed to demonstrate prejudice as a result of its admission. "[T]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Haines* at ¶62, quoting *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, at ¶78. We conclude that there is not.

{¶16} In *Haines*, the Supreme Court concluded that the admission of certain expert testimony on battered women's syndrome prejudiced Haines with regard to three of the counts against him because there: (1) the expert actually diagnosed the victim as a battered woman, thereby implying that Haines was a batterer; and (2) the victim's credibility was key as to the

three counts at issue because the evidence on those charges was "almost entirely based on [the victim's] testimony." *Haines* at ¶58, ¶63. On Haines' remaining counts, however, the Supreme Court concluded that the admission of the expert's testimony was harmless beyond a reasonable doubt because the jury also saw photographs of the victim's injuries and heard testimony from her co-workers and police officers. Id. at ¶64. Therefore, the Court affirmed the convictions on those counts. Id. at ¶65.

{¶17} Here, the State's expert did not offer an opinion as to whether Monica was, in fact, a battered woman. Zedak readily admitted that she had "no idea" whether Monica was a battered woman. Arguably, therefore, the expert testimony elicited in this case was, by itself, less prejudicial than the testimony elicited in *Haines*. Compare *Haines* at ¶57-58 (noting that the expert's testimony "went to the very question that the jury was asked to answer – whether Haines committed domestic violence against [the victim] – and answered it"). Moreover, other evidence in the record went to the heart of Anderson's conviction. The State introduced the 911 call from Monica in which she told the operator that Anderson had "flipped out" and that he had torn her shirt and thrown her to the floor. It also introduced the testimony of several officers who observed Monica's torn shirt when they arrived on scene. In particular, Officer Reed testified that Monica was visibly upset, her shirt was torn, and there were fingernail scratches on her skin where her shirt had been torn open. Monica told Officer Reed that Anderson had attacked her, but Anderson left the scene before the officers arrived. The State also produced evidence of Anderson's two prior convictions for domestic violence in the form of journal entries from his other cases.

{¶18} Given the other evidence in the record and the fact that Zedak's opinion testimony was phrased in terms of generalities, we are not convinced that the admission of her testimony

prejudiced Anderson. Therefore, even if the trial court erred by admitting Zedak's testimony, its error was harmless beyond a reasonable doubt. Anderson's third assignment of error is overruled.

III

{¶19} Anderson'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.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
MOORE, J.
CONCUR

APPEARANCES:

EDWIN PIERCE, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.