

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2014-T-0061
JEFFREY A. MILLER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Niles Municipal Court, Case No. CRB 1400119.

Judgment: Affirmed.

Terry A. Swauger, Niles City Prosecutor, 15 East State Street, Niles, OH 44446 (For Plaintiff-Appellee).

Louis M. DeFabio, 4822 Market Street, Suite 220, Youngstown, OH 44512 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Jeffrey A. Miller, appeals his conviction in the Niles Municipal Court, following a bench trial, of domestic violence against his wife, Stephanie Miller. At issue is whether the trial court abused its discretion in admitting photographs of Stephanie’s injuries in evidence and whether appellant’s conviction was supported by sufficient, credible evidence. For the reasons that follow, we affirm.

{¶2} Appellant was charged by complaint with domestic violence, a misdemeanor of the first degree, in violation of R.C. 2919.25(A). Appellant pled not guilty and the case was tried to the court.

{¶3} Stephanie Miller testified that she and her husband live on Salt Springs Road in Weathersfield Township with their three young children. She said that on February 14, 2014, at about 7:00 p.m., appellant came home drunk and upset about G.M., their five-year-old son, not being able to read. She said that G.M. was having difficulty at school learning how to read. Appellant was screaming at G.M. telling him to read a book. When G.M. said he could not read it, appellant became even more angry. Appellant physically took him upstairs and put him in his bed. Appellant yelled at G.M., “If you don’t want to learn how to read, you stay in bed and don’t come out for any reason.”

{¶4} Stephanie testified she was still downstairs when she heard G.M. crying, “Mommy.” She went upstairs and found G.M. in his bed. She calmed him down and then went in the bedroom she shares with appellant. He was sitting on the edge of the bed. She told him the way he was handling the situation was wrong. She said that G.M. gets frustrated and will not learn anything if appellant continues to yell at him. Appellant snapped at her, calling her a “loser” in front of their daughter, who was in the room with them. Appellant jumped up and tried to push Stephanie, but she blocked his push. As Stephanie turned around to leave the room, appellant grabbed his cell phone from their daughter’s hand and threw it at Stephanie. She immediately felt pain in her back. The phone hit her on the left side of her back and the back of her left arm.

{¶5} Stephanie testified she took the children with her and went to St. Elizabeth's Hospital in Austintown. She told hospital staff that she had severe back pain under her shoulder blade and some pain in her arm. A hospital employee called the Weathersfield Police Department and officers came to the hospital to take Stephanie's report. Although Stephanie felt pain to her back from where appellant hit her with his phone, bruises did not appear until the next day.

{¶6} Stephanie said that on the following morning, February 15, 2014, at about 8:30 a.m., she and her mother took photographs of the injuries she sustained in the incident. She identified four photographs. She said that her mother took Exhibits 1 and 2, which show bruises to the left side of her back and her left arm. The photographs show the injuries are right next to each other. Stephanie said both bruises resulted from appellant throwing the phone at her. She said that Exhibit 3, also taken by her mother, is a close up of the bruise on her left arm. She said she took Exhibit 4 herself with her cell phone. This photograph, which shows her entire back, was taken in a mirror so it is a photograph of her reflection and the image is reversed. Thus, it shows the bruises as being on the right side of her back and the back of her right arm.

{¶7} Stephanie testified appellant was about eight feet away from her when he threw his phone at her. At that time, appellant was in their bedroom and she was just outside the bedroom in the hallway. She said this was an intentional act, not an accidental contact with appellant's phone.

{¶8} Appellant called Officer George Antonell of the Weathersfield Township Police Department as a witness. He said that on February 14, 2014, he went to interview Stephanie Miller at St. Elizabeth's Hospital. Stephanie reported that she and

appellant were in an argument. She said that appellant pushed her and she knew that, based on his previous conduct, he was about to explode at her. She turned around and started walking away and at that time he threw his cell phone at her and hit her with it in the back. She said she had injuries to her back and also complained of pain to her rib in her back.

{¶9} Officer Antonell asked Stephanie to show him her injuries. She opened the back of her gown and pointed over her shoulder to her back. At one point in his testimony, he said she pointed to her mid-back as the area where she was injured, while at another point, he said “[s]he just pointed to her back,” not to her mid-back. The officer said he saw some red blotches in the area where she pointed, but he did not think the blotches would show up on a photograph so he did not take any pictures of them.

{¶10} Officer Antonell said he went to the Millers’ residence later that night. When he arrived, appellant was passed out. The officer woke him up and arrested him. Officer Antonell said that, although appellant had his cell phone with him, he did not confiscate it. Also, the officer said he did not go to the room where the assault allegedly occurred. Thus, he did not see if there was any evidence of an altercation in the bedroom.

{¶11} Following the presentation of the evidence, the court found appellant guilty of domestic violence and deferred sentencing. At the sentencing hearing, the court sentenced appellant to 180 days in jail, suspending the entire jail term, and placed him on community control for one year.

{¶12} Appellant appeals his conviction, asserting two assignments of error. For his first, he alleges:

{¶13} “The trial court erred in admitting State’s Exhibits 1 through 4, over Appellant’s objection, as the State failed to lay a proper foundation as required by Evid.R. 901.”

{¶14} The determination to admit or exclude evidence is within the sound discretion of the trial court and will not be reversed by an appellate court absent an abuse of discretion. *State v. Sledge*, 11th Dist. Trumbull No. 2001-T-0123, 2003-Ohio-4100, ¶20.

{¶15} Further, “the law presumes that in a bench trial the court considers only relevant, material, and competent evidence.” *State v. Glenn*, 8th Dist. Cuyahoga No. 94425, 2011-Ohio-3684, ¶19, quoting *State v. Bays*, 87 Ohio St.3d 15, 27 (1999). “Even if the trial court erroneously admitted testimony into evidence, we must presume that it did not consider it in reaching its verdict.” *Glenn, supra*.

{¶16} Appellant argues the trial court abused its discretion in admitting the four photographs of Stephanie’s injuries marked as Exhibits 1 through 4 into evidence because, he contends, they were not properly authenticated. Evid.R. 901(A) provides that the requirement of authenticity “is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Pursuant to section (B)(1) of that rule, an item may be authenticated by testimony of a witness with knowledge that “a matter is what it is claimed to be.”

{¶17} This court has held that photographs may be authenticated by the person who took them or by one who can testify that they represent a fair and accurate

depiction of the conditions at the time they were taken. In *State v. Peine*, 11th Dist. Lake No. 13-088, 1989 Ohio App. LEXIS 2883, *8 (Jul.29, 1989), this court stated:

{¶18} Evid.R. 901(B)(1) * * * states that “testimony that a matter is what it is claimed to be” is sufficient to authenticate the evidence. To properly authenticate photographs, the proponent need only adduce testimony by someone with knowledge of the purported subject of the photographs, who, by way of foundation, can testify that the photographs represent a fair and accurate depiction of the actual object or item which is the subject of the photographs at the time they were taken. [The officer who took the photographs] had firsthand knowledge of the subject matter and testified accordingly.”

(Emphasis omitted.)

{¶19} Here, Stephanie testified that her mother took the photographs marked as Exhibits 1 through 3 and that she took Exhibit 4. She said these photographs accurately depicted the way her back and arm looked on February 15, 2014, the morning after she was injured. Stephanie’s testimony clearly satisfied the threshold standard for authentication in Evid.R. 901. *State v. Brooks*, 101 Ohio App.3d 260, 264 (2d Dist.1995), citing 2 Weissenberger, *Ohio Evidence* (Rev.1988), 13-14, Section 901.16.

{¶20} Appellant challenges the admissibility of the photographs for various reasons. He argues: (1) the date and time they were taken were not printed on the photographs; (2) Stephanie indicated at the hospital she was hit in the mid-back, but the photographs show she was injured on the left side of her back and the back of her left

arm; (3) the photographs depict two injuries, but Stephanie said she was only hit once; and (4) Stephanie was in a car accident three days later.

{¶21} In order to be admissible, the state was only required to present evidence sufficient to lay a foundation and to connect the photographs with the relevant facts of the case. *Brooks, supra*. “This low threshold standard does not require *conclusive* proof of authenticity, but only sufficient foundational evidence for the trier of fact to conclude that the document is what its proponent claims it to be.” (Emphasis sic.) *State v. Easter*, 75 Ohio App.3d 22, 25 (4th Dist.1991); Giannelli, Ohio Evidence Manual (1990) 6, Section 901.01.

{¶22} Appellant’s challenges to the photographs go to the weight, rather than the admissibility, of the photographs. *Brooks, supra*. Credibility is not the issue when determining the admissibility of the evidence. *Id.* Rather, the issue is the sufficiency of the evidence presented in support of its admissibility. *Id.* “Despite admission of the photographs, it remained the province of the trier of fact * * * [in reaching its verdict] to reject the authenticity of the photographs and disbelieve the testimony of the foundational witness, if they so chose.” *Brooks, supra*, citing 2 Weissenberger, Ohio Evidence (Rev.1988) 6, Section 901.3.

{¶23} Here, a proper foundation was laid by Stephanie’s testimony that she and her mother took the photographs and that they accurately depicted the condition of her back and arm on the morning after she was injured. After the photographs were admitted in evidence, it was then for the court to decide, based on all of the evidence presented, whether the photographs accurately reflected Stephanie’s back and arm. The credibility issues raised by appellant regarding the photographs, such as the fact

that the time and date are not printed on them, do not detract from the “sufficiency” of Stephanie’s testimony in relation to the *admissibility* of the photographs. *Brooks, supra*.

{¶24} Thus, the trial court did not abuse its discretion in admitting Exhibits 1 through 4 into evidence.

{¶25} Appellant’s first assignment of error is overruled.

{¶26} For his second assigned error, appellant contends:

{¶27} “The trial court’s verdict of Guilty as to the Domestic Violence charge was not supported by sufficient evidence and was against the manifest weight of the evidence.”

{¶28} An appellate court reviewing the sufficiency of the evidence examines the evidence admitted at trial and determines whether, after viewing the evidence in a light most favorable to the state, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 273 (1991). “On review for sufficiency, courts are to assess not whether the state’s evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.” *State v. Thompkins*, 78 Ohio St.3d 380, 390 (1997) (Cook, J., concurring). Whether the evidence is legally sufficient to sustain a verdict is a question of law, which we review de novo. *Id.* at 386.

{¶29} In contrast, a court reviewing the manifest weight of the evidence observes the entire record, weighs the evidence and all reasonable inferences, and considers the credibility of the witnesses. *Thompkins, supra*, at 387. The court determines whether, in resolving conflicts in the evidence and deciding witness credibility, the trier of fact clearly lost its way and created such a manifest miscarriage of

justice that the judgment must be reversed and a new trial ordered. *Id.* The discretionary power to grant a new trial should only be exercised in the exceptional case in which the evidence weighs heavily against the conviction. *Id.* Witness credibility rests solely with the finder of fact, and an appellate court is not permitted to substitute its judgment for that of the jury. *State v. Awan*, 22 Ohio St.3d 120, 123 (1986). “The jury is entitled to believe all, part, or none of the testimony of any witness.” *State v. Archibald*, 11th Dist. Lake Nos. 2006-L-047 and 2006-L-207, 2007-Ohio-4966, ¶61. The role of the reviewing court is to engage in a limited weighing of the evidence in determining whether the state properly carried its burden of persuasion. *Thompkins, supra*, at 390. If the evidence is susceptible to more than one interpretation, an appellate court must interpret it in a manner consistent with the verdict. *State v. Banks*, 11th Dist. Ashtabula No. 2003-A-0118, 2005-Ohio-5286, ¶33.

{¶30} R.C. 2919.25(A), which defines domestic violence, provides: “No person shall knowingly cause * * * physical harm to a family or household member.” R.C. 2901.22(B) provides: “A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result * * *.” Moreover, “[p]hysical harm to persons” is defined as “any injury * * * regardless of its gravity or duration.” R.C. 2901.01(A)(3). Further, the phrase “family or household member” includes a spouse. R.C. 2919.25(F)(1)(a)(i).

{¶31} Here, Stephanie testified that, while appellant was angry with her, he called her a “loser,” grabbed his cell phone from their daughter, and threw it at her. By throwing the phone at Stephanie, it can reasonably be inferred that appellant was aware his conduct would probably result in injury. Evidence was thus presented that he acted

knowingly. *State v. Dickson*, 7th Dist. Columbiana No. 12 CO 50, 2013-Ohio-5293, ¶20 (by throwing piece of wood at victim defendant was aware it would probably result in injury and he thus acted knowingly); *State v. Zarlenga*, 8th Dist. Cuyahoga No. 55414, 1989 Ohio App. LEXIS 1999, *8 (June 1, 1989) (when defendant threw projectile at an occupied car, there was a probability injury would result and he acted knowingly).

{¶32} Further, by throwing the phone at Stephanie and hitting her with it, appellant caused her to sustain physical harm. The bruises to Stephanie's back and the back of her arm are evidence of physical harm. Finally, because Stephanie is appellant's spouse and resides with him, she is a family or household member. The state thus presented evidence, which, if believed, was sufficient to prove that appellant was guilty of domestic violence.

{¶33} Appellant's reliance on *State v. Berry*, 12th Dist. Warren No. CA2006-11-133, 2007-Ohio-7082, is misplaced. In that case, which was tried to the bench, the trial court found that the defendant threw a drinking glass *to the floor* and that his wife, who was standing nearby, was injured by shards of flying glass. Based on this finding, the court found the defendant guilty of domestic violence. The Twelfth District reversed, holding there was no evidence the defendant acted knowingly. *Id.* at ¶14. In stark contrast to *Berry*, here, there is evidence appellant threw his cell phone *at* Stephanie.

{¶34} With respect to appellant's manifest-weight argument, he argues that Stephanie was not a credible witness because, while she claimed she was struck one time, the photographs she presented showed two injuries to two different parts of her body. However, the photographs show these two areas are right next to each other. In fact, the two bruises appear to be part of the same injury.

{¶35} Next, appellant argues that Officer Antonell said Stephanie indicated she was injured in the mid-back. This conflicts with Stephanie's testimony that she was injured in the left side of her back and the back of her left arm. However, Stephanie documented her injuries with photographs and, although Officer Antonell said he saw red blotches on her back, he did not photograph them. Also, the officer's testimony was equivocal regarding the area where Stephanie indicated she was injured. Although he testified that Stephanie pointed to her mid-back as the area where she was injured, he also testified that she "just pointed to her back," not her mid-back. The court was entitled to consider these issues in resolving any conflicts in the testimony and in determining that Stephanie was more credible than the officer regarding the location of her injury.

{¶36} Appellant also argues Stephanie was not credible because the photographs she identified did not include the date and time they were taken. However, Stephanie explained that these photographs were not taken to a photo shop or to a store like Walmart to be printed. Instead, her mother printed them on a computer and that is why the date and time were not printed on the photographs.

{¶37} Next, appellant suggests that Stephanie's injuries were the result of a car accident that occurred three days after the assault, i.e., on February 17, 2014. However, Stephanie said that the injuries depicted in the state's exhibits occurred when appellant threw his phone at her on February 14, 2014 and that she sustained no injuries in the traffic accident. Moreover, the police report regarding the traffic accident, which was admitted in evidence, shows *she sustained no injuries in the accident*. Thus,

there was no evidence in the record that Stephanie sustained any injuries in the traffic accident.

{¶38} Finally, appellant argues that Officer Antonell did not see anything in the Millers' residence corroborating Stephanie's testimony. However, the officer testified he did not go in the room in which appellant struck Stephanie. Thus, it is not surprising that the officer did not see any evidence of the assault.

{¶39} Based on our review of the entire record, appellant's conviction was supported by sufficient evidence. Moreover, we cannot say that in resolving conflicts in the evidence and deciding witness credibility, the trial court clearly lost its way and created such a manifest miscarriage of justice that appellant's conviction must be reversed and a new trial ordered.

{¶40} For the reasons stated in this opinion, appellant's assignments of error are overruled. It is the order and judgment of this court that the judgment of the Niles Municipal Court is affirmed.

DIANE V. GRENDALL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.