

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

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| STATE OF OHIO | : | |
| | : | Appellate Case No. 22977 |
| Plaintiff-Appellee | : | |
| | : | Trial Court Case No. 08-CRB-327 |
| v. | : | |
| | : | |
| LORETTA WALTERS | : | (Criminal Appeal from Miamisburg Municipal Court) |
| Defendant-Appellant | : | |
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OPINION

Rendered on the 29th day of January, 2010.

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BROGAN, J.

{¶ 1} Loretta Walters appeals from her conviction and sentence following a bench trial on one count of domestic violence in violation of R.C. 2919.25(A).

{¶ 2} Walters advances two assignments of error on appeal. First, she contends her conviction is based on legally insufficient evidence and is against the

manifest weight of the evidence. Second, she contends the trial court abused its discretion in excluding evidence of the victim's character and reputation.

{¶ 3} The present appeal stems from a dispute at Walters' home on February 21, 2008. Her daughter, Stacy West, had spent the afternoon and evening visiting there. West testified at trial that she and Walters each had consumed approximately two mixed drinks during the visit. At some point, the women started arguing. West acknowledged cursing at Walters. According to West, Walters responded by slapping her on the left cheek. When Walters raised a hand to strike again, West grabbed her mother's wrist and pushed the hand down. West testified that Walters then "reached out and bit [her] nose[.]" West stated that the slap and the bite did not really hurt. She noted, however, that the bite left a "little red mark" that lasted about an hour. West's husband, Anthony, also observed the dispute. He testified and largely corroborated his wife's version of events. He added that he saw redness on his wife's left cheek where Walters struck her. He also stated that his wife was not intoxicated.

{¶ 4} For her part, Walters testified and acknowledged drinking with West before the argument. Although she did not specify how many drinks West had consumed, Walters accused her daughter of being "very drunk." Walters denied being drunk herself. She also testified that West initiated the physical contact by scratching her face and grabbing her wrists, which caused severe pain due to a recent surgery. Walters stated that she bit West's nose to free herself from West's grip. Walters did not remember whether she slapped West.

{¶ 5} Walters' son, Vernon, also testified as a defense witness. Although he was not present during the incident, he stated that he saw a scratch on his mother's

face and injuries to her wrists the following day. Defense counsel then attempted several times to elicit testimony from Vernon about West's personality when she drinks. Defense counsel also attempted to elicit testimony about West's "reputation" regarding her interaction with Walters. The trial court sustained objections to this questioning based on a lack of foundation.

{¶ 6} The final witness was Germantown police officer Nathan Wale, who testified in rebuttal. Wale explained that he was dispatched to Walters' residence after the dispute. Upon arriving, he spoke to West, her husband Anthony, and Walters. Based on his experience dealing with intoxicated drivers, Wale opined that West and her husband were not intoxicated, but that Walters was intoxicated. Wale added that he saw redness on West's nose and left cheek, where Walters had struck her. Wale also testified that he examined Walters' wrists and saw no injuries.

{¶ 7} Based on the foregoing evidence, the trial court found Walters guilty of domestic violence. It imposed a fine and a 180-day jail sentence with 170 days suspended. The trial court stayed execution of the sentence pending this appeal.

{¶ 8} In her first assignment of error, Walters challenges the legal sufficiency and manifest weight of the evidence to support her conviction. With regard to sufficiency, she asserts that the slap and bite did not constitute "physical harm" under the domestic-violence statute. In support, she relies on West's testimony that the slap and bite did not cause pain and resulted only in temporary redness. Walters further argues that where the completed slap and bite did not cause physical harm, they logically could not even constitute an attempt to cause physical harm. With regard to her manifest-weight argument, Walters insists that the evidence supports a

finding of self-defense. She contends the evidence establishes that she slapped or bit West to free herself from West's painful grip.

{¶ 9} When a defendant challenges the sufficiency of the evidence, she is arguing that the State presented inadequate evidence on each element of the offense to sustain the verdict as a matter of law. *State v. Hawn* (2000), 138 Ohio App.3d 449, 471. "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." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 10} Our analysis is different when reviewing a manifest-weight argument. When a conviction is challenged on appeal as being against the weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, 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. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. A judgment should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 11} With the foregoing standards in mind, we conclude that Walters' conviction is based on legally sufficient evidence and is not against the manifest weight of the evidence. The trial court found her guilty of violating R.C. 2919.25(A), which provides that "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." "Physical harm" includes any injury or impairment, regardless of its gravity or duration. R.C. 2901.01(A)(3). A slap or other physical contact that results in temporary redness is sufficient to establish "physical harm" under the domestic-violence statute. *State v. Kellum*, Butler App. No. CA2009-03-081, 2009-Ohio-6743, ¶15-16. Although West testified that the slap and bite did not really hurt her, some degree of "physical harm" is virtually inherent in being slapped and bitten, particularly where visible redness follows. Viewing the evidence in a light most favorable to the prosecution, we believe the trial court properly found proof of physical harm beyond a reasonable doubt.

{¶ 12} We are equally unpersuaded by Walters' self-defense argument. Walters denies slapping West and insists that her bite was in response to West grabbing her wrist. West and her husband both testified, however, that the physical contact began with Walters slapping West's cheek. According to West, she only grabbed her mother's wrist to avoid being hit again. When she did so, Walters leaned forward and bit her nose.

{¶ 13} Although a weight-of-the-evidence argument permits a reviewing court to consider the credibility of witnesses, that review must be tempered by the principle that weight and credibility questions are primarily for the trier of fact. *State v. Goldwire*, Montgomery App. No. 19659, 2003-Ohio-6066, at ¶13, citing *State v.*

DeHass (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. “Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness.” *Id.* at ¶14, quoting *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 14} In the present case, the trial court acted reasonably in crediting the testimony of West and her husband and in finding Walters guilty. As the first aggressor, Walters had no self-defense argument. *State v. Smith*, Greene App. No. 2006 CA 68, 2007-Ohio-2969, ¶31. Having reviewed the record, weighed the evidence and all reasonable inferences, and considered the credibility of the witnesses, we cannot say that the trial court clearly lost its way and created a manifest miscarriage of justice. The evidence does not weigh heavily against Walters' conviction. Her first assignment of error is overruled.

{¶ 15} Walters' second assignment of error concerns the trial court's refusal to allow her son, Vernon, to testify about West's personality when she drinks and about West's “reputation” regarding her interaction with Walters. As noted above, the trial court sustained objections to this questioning based on a lack of foundation. On appeal, Walters insists that defense counsel laid an adequate foundation by establishing that Vernon and West saw each other weekly, that Vernon had observed West drinking before, and that he had seen West and Walters together socially.

{¶ 16} Regardless of the adequacy of the foundation, however, the State points out defense counsel's failure to proffer what Vernon would have said if he had been allowed to testify. Based on the record before us, we have no way of knowing how Vernon would have characterized West's personality while drinking or her "reputation" while interacting with Walters. Although we presume Vernon's testimony might have been unflattering to West, we cannot assess the impact of the excluded testimony or its relevance in this case.

{¶ 17} Under Evid.R. 103(A)(2), "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and * * * [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which the questions were asked." "If a party claiming error is unable to establish the first requirement, the error is deemed harmless. If the party is unable to establish the second requirement, the error is deemed waived." *Campbell v. Johnson* (1993), 87 Ohio App.3d 543, 551.

{¶ 18} In the present case, Walters has not established either of the foregoing requirements. The substance of Vernon's testimony was not made known to the trial court and the substance, as opposed to the subject-matter more generally, is not apparent from the context. Moreover, without knowing what Vernon would have said, we cannot find that exclusion of his testimony affected Walters' substantial rights, i.e., that it "affected the final determination of the case." *Id.* Accordingly, we overrule the second assignment of error and affirm the judgment of the Miamisburg Municipal Court.

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FAIN and GRADY, JJ., concur.

Copies mailed to:

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