

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-030303
	:	TRIAL NO. C-03CRB-2574
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
ROGER D. ROTH,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: January 30, 2004

Michael K. Allen, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*,
Assistant Prosecuting Attorney, for Appellee,

H. Fred Hoefle, for Appellant.

Please note: We have removed this case from the accelerated calendar.

MARK P. PAINTER, Judge.

{¶1} After a bench trial, the trial court found defendant-appellant Roger D. Roth guilty of domestic violence¹ for striking his wife, Carol Roth. The court sentenced Roth to 180 days' incarceration and suspended the sentence. We affirm.

The Argument

{¶2} On January 23, 2003, Carol Roth was sleeping on a couch in the home she shared with her husband. The couple had two children, a 17-year-old daughter and a 12-year-old son. The Roths had been married 18 years, but were in the middle of divorce proceedings.

{¶3} Roth woke Carol up and asked her to give money to their daughter, Kaitlyn, for food. Carol gave Kaitlyn some money, and Kaitlyn left the house. The Roths then began arguing about money and the upcoming sale of their house.

{¶4} Carol testified that, during the argument, Roth leaned towards her and blew smoke in her face. She testified that, as Roth leaned towards her, she noticed that he had a tape recorder in his shirt pocket. According to Carol, she reached for the tape recorder, and Roth began hitting her. Carol testified that he struck her with an open hand three times about the face and neck, and that she sustained a bump above her left eye.

{¶5} Montgomery Police Officer Michael Young testified that on January 23, 2003, he responded to a domestic-violence call at the Roths' residence. He testified that when he arrived, Carol Roth showed him an injury above her left eye that looked like “a

¹ R.C. 2919.25(A).

goose egg on her brow.” The state offered into evidence two photographs of Carol Roth on the evening in question, each showing a bump above her left eye.

{¶6} In contrast, Roth testified that, as he and Carol argued, he tried to keep his distance from her, but that she came closer and closer to him. He testified that he saw her look down, and that she began grabbing his shirt. Roth testified that he ordered her to get her hands off him, and that he pushed her away. Roth denied that he slapped her.

{¶7} At trial, both Roth and defense witness Patricia Buntain attempted to testify about Carol Roth’s prior acts of violence or aggression. Roth argued that such evidence was relevant to show that Roth was not the aggressor in the incident and that he had acted in self-defense.

{¶8} Buntain testified that once, when she was on the phone with Roth, she “heard the door to his office slam open.” Buntain continued, “I heard Mrs. Roth saying to Roger I will get alimony, you cannot stop me, and then the door closed. * * * She told him that she would take him for everything he had, that he would not have anything.” Buntain concluded her testimony by saying, “[S]he did say that she would do whatever she had to do.”

{¶9} The state objected at the start of Buntain’s testimony, arguing that it was not relevant. The court, before Buntain finished her testimony, stated, “[I]f this is going to show some violent physical act or some threat of violent physical act, she may testify. If it’s an argument, I don’t want to hear about it.” The court also stated, “If it was a threat to ruin someone’s business, I don’t want to hear about it.” After hearing Buntain’s entire testimony, the court sustained the state’s objection and excluded the testimony, reasoning that “[t]here’s nothing in it that goes to self-defense.”

{¶10} Roth testified about an incident in which Carol had attempted to take a digital camera away from him. Roth stated that he was sitting in his van when Carol “virtually leaped across my lap and was elbowing me and everything else to try to get the camera.” He testified that Carol also repeatedly blocked his vehicles in and out of the driveway. After this testimony, the state renewed its objection to evidence concerning Carol’s prior acts. The court sustained the objection, stating that Roth’s testimony presented no evidence of self-defense.

Not Violent Behavior

{¶11} In his first assignment of error, Roth argues that because he asserted the affirmative defense of self-defense, the trial court erred when it refused to admit evidence of Carol Roth’s propensity for threatening and violent behavior towards him.

{¶12} To establish self-defense in the use of nondeadly force, the burden was on Roth to show by a preponderance of the evidence that (1) he was not at fault in creating the situation giving rise to the affray; (2) he reasonably believed that he needed to use force to defend himself against the imminent use of unlawful force by the victim; and (3) the force used was not likely to cause death or great bodily harm.²

{¶13} The trial court has broad discretion in the admission of relevant evidence.³ Unless it has clearly abused its discretion and the defendant has been materially prejudiced, an appellate court should not disturb the decision of the trial court.⁴ Therefore, we confine our inquiry to determining whether the trial court acted

² *In re Maupin* (Dec. 11, 1998), 1st Dist. No. C-980094.

³ See *State v. Barnes*, 94 Ohio St.3d 21, 23, [2002-Ohio-68](#), 759 N.E.2d 1240.

⁴ *Id.*

unreasonably when it excluded Roth's and Buntain's testimony regarding Carol's prior actions.⁵

{¶14} In *State v. Wetherall*,⁶ a recent decision by this court, we held that a defendant must be allowed to present evidence of a victim's propensity for violence when the defendant is putting forth the affirmative defense of self-defense. Therefore, Roth did have the right to present testimony about any prior instances of Carol Roth's violent behavior towards him in order to demonstrate his state of mind at the time of the incident. The state concedes the point.

{¶15} But the issue in this case is not whether testimony about prior violent behavior by Carol would have been admissible. Rather, the issue is whether the testimony about Carol's actions that was offered by Roth and Buntain involved violent or aggressive behavior. The trial court found that it did not. The court determined that the testimony concerned only verbal arguments and threats of a financial nature, and did not demonstrate violent behavior. The trial court therefore held that the testimony was not admissible.

{¶16} In *Wetherall*, the prior behavior of the victim-wife in a domestic-violence prosecution involved serious acts of physical violence. On one occasion, the wife had punched and scratched her husband around the eye and on his neck and chest. On another occasion, she had thrown a glass that hit him in the back of the head, shattered, and cut his back. In contrast, the alleged "violent" behavior by Carol Roth in this case consisted of threats to take all of Roth's money, slamming doors, and reaching across him to grab a camera.

⁵ Id.

⁶ 1st Dist. No. C-000113, [2002-Ohio-1613](#).

{¶17} We agree with the trial court that Roth's and Buntain's testimony about Carol Roth's prior behavior did not concern actions that rose to the level of violent or physically aggressive behavior. Only one specific instance even involved or threatened to involve physical contact. Given that the testimony concerned behavior by Carol Roth that did not show that she had a propensity for violence towards Roth, we conclude that it was not unreasonable that the trial court excluded the testimony from evidence.

{¶18} Therefore, we overrule Roth's first assignment of error.

Weight and Sufficiency

{¶19} In his second and fourth assignments of error, Roth argues that the trial court erred by not granting his Crim.R. 29 motion for acquittal and by entering a judgment of conviction based on insufficient evidence. In his third assignment of error, he argues that his conviction was against the manifest weight of the evidence.

{¶20} In criminal cases, the legal concepts of sufficiency of the evidence and weight of the evidence are distinct.⁷ A challenge to the sufficiency of the evidence attacks the adequacy of the evidence presented. Whether the evidence is legally sufficient to sustain a conviction is a question of law.⁸ The relevant inquiry in a claim of insufficiency is whether any rational factfinder, viewing the evidence in a light most favorable to the state, could have found the essential elements of the crime proved beyond a reasonable doubt.⁹

{¶21} A challenge to the weight of the evidence attacks the credibility of the evidence presented.¹⁰ When evaluating the manifest weight of the evidence, we must

⁷ See *State v. Thompkins*, 78 Ohio St.3d 380, 386, [1997-Ohio-52](#), 678 N.E.2d 541.

⁸ *Id.*

⁹ See *State v. Jones*, 90 Ohio St.3d 403, 417, [2000-Ohio-187](#), 739 N.E.2d 300; *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

¹⁰ See *State v. Thompkins*, *supra*, at 387.

review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the 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.¹¹ The discretionary power to reverse should be invoked only in exceptional cases “where the evidence weighs heavily against the conviction.”¹²

{¶22} The trial court found Roth guilty of domestic violence. The domestic-violence statute states, “No person shall knowingly cause or attempt to cause physical harm to a family or household member.”¹³

{¶23} Carol Roth testified that Roth had struck her with an open hand three times, causing her to suffer physical harm, specifically a bump above her left eye. The state offered two photographs of the bump above Carol’s left eye, taken the night of the incident, in addition to police officer Michael Young’s testimony that he had seen the bump above the eye that night. We conclude that a rational factfinder, viewing the evidence in a light most favorable to the state, could have found that the state had proved beyond a reasonable doubt that Roth had committed domestic violence. Therefore, the evidence presented was legally sufficient to support the court’s denial of Roth’s Crim.R. 29 motion for acquittal and to sustain Roth’s conviction.

{¶24} In his testimony, Roth offered a different version of the argument between him and his wife, claiming that he acted in self-defense. But the credibility of the witnesses and the evidence was the province of the trial court acting as the finder of fact. Our review of the record does not persuade us that the trial court clearly lost its way or

¹¹ See *id.*; *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

¹² See *State v. Martin*, *supra*.

¹³ R.C. 2919.25(A).

created a manifest miscarriage of justice in finding that Roth had not acted in self-defense and in finding that he was guilty of committing domestic violence.

{¶25} Accordingly, we overrule Roth’s second, third, and fourth assignments of error. Because we have overruled each of Roth’s assignments of error, we affirm the judgment of the trial court.

Judgment affirmed.

DOAN, P.J., and HILDEBRANDT, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.