

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	
	:	Case No. 08CA3250
v.	:	
	:	
JANET JARRELL	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
	:	
Defendant-Appellant.	:	File-stamped date: 7-23-09

APPEARANCES

Eric J. Allen, Columbus, Ohio, for appellant.

Mark Kuhn, Scioto County Prosecutor, and Danielle M. Parker, Assistant Scioto County Prosecutor, Portsmouth, Ohio, for appellee.

Kline, P.J.:

{¶1} Janet Jarrell appeals the decision of the Scioto County Court of Common Pleas, which rejected her motion to withdraw her guilty plea. On appeal, Jarrell contends that the trial court erred because the victim did not suffer serious physical harm, and thus, conviction is a manifest injustice. Because the injuries suffered by the victim could qualify as serious physical harm, we disagree. Jarrell next contends that the trial court erred because it refused to hold an evidentiary hearing and quashed the subpoenas of two defense witnesses. We disagree, because, even accepting Jarrell's facts in her motion as true, she has failed to demonstrate that allowing her conviction to stand would be a manifest injustice. Accordingly, we affirm the judgment of the trial court.

{¶2} On December 13, 2005, the Scioto County grand jury returned an indictment accusing Jarrell of felonious assault, a second degree felony, in violation of R.C. 2903.11(A)(1) & (A)(2). The State later amended this indictment to allege only a violation of R.C. 2903.11(A)(1). Jarrell entered a plea of guilty on October 6, 2006 to the lesser charge of aggravated assault, a fourth degree felony, in violation of 2903.12(A)(1).

{¶3} On January 10, 2007, the court imposed an agreed sentence as a part of the plea agreement. The court sentenced Jarrell to 90 days in the Scioto County Jail with 14 days credit for time served. The court also imposed 5 years of community control. Jarrell was ordered to have no contact with the victim and to stay at least 100 yards away from the victim.

{¶4} One year and almost five months later, Jarrell filed a motion to withdraw her plea in this case. The trial court held a hearing on July 2, 2008, but received no evidence. On July 28th, the trial court entered an order denying Jarrell's motion to withdraw her plea.

{¶5} Jarrell appeals from this order and raises the following assignments of error: I. "THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANTS [sic] MOTION TO WITHDRAW HIS [sic] GUILTY PLEA." II. "THE TRIAL COURT ERRED IN NOT HOLDING AN EVIDENTIARY HEARING REGARDING APPELLANT'S MOTION TO WITHDRAW HER PLEA." III. "THE TRIAL COURT ERRED BY STRIKING SUBPOENAS OF TWO DEFENSE WITNESSES WITHOUT CAUSE."

II.

{¶6} Jarrell contends in her first assignment of error that the trial court erred when it denied her motion to withdraw her guilty plea. She contends that the injuries she inflicted on the victim were minor and would not satisfy the statutory requirement of serious physical harm.

{¶7} Crim.R. 32.1 states: “A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.” “Manifest injustice” is an extremely high standard, which permits a defendant to withdraw his guilty plea only in extraordinary cases. *State v. Smith* (1977), 49 Ohio St.2d 261, 264. A defendant who seeks to withdraw his plea bears the burden of establishing a manifest injustice. *Id.* at paragraph one of the syllabus.

{¶8} The decision to grant or deny a post-sentence motion to withdraw a guilty plea is within the sound discretion of the trial court. *Id.* at paragraph two of the syllabus. Therefore, we will only reverse the trial court's decision if the court abused its discretion. *State v. Xie* (1992), 62 Ohio St.3d 521, 526. “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. In applying the abuse of discretion standard of review, we are not free to merely substitute our judgment for that of the trial court. *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 137-38, citing *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶9} As noted above, Jarrell pleaded guilty to violating R.C. 2903.12(A)(1). “No person, while under the influence of sudden passion or in a sudden fit of rage, either of

which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly: (1) Cause serious physical harm to another[.]” R.C. 2903.12(A)(1). Serious physical harm means, inter alia, “[a]ny physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement[.]” R.C. 2901.01(A)(5)(d).

{¶10} Jarrell contends the trial court should have permitted her to withdraw her guilty plea because the victim did not suffer serious physical harm within the terms of the statute. She also contends that allowing her conviction to stand would be a manifest injustice as she did not, therefore, commit the underlying offense.

{¶11} The victim in this case suffered “a minor orbital floor fracture on the right side with some maxillary sinus fullness” and “traumatic mic[r]ohyphema of the right eye.” Jarrell’s Brief at 4. “A hyphema is blood in the [anterior chamber of the eye] that forms a layer that is visible with the naked eye. In contrast, a microhyphema is blood in the [anterior chamber] where the hemorrhage is so small that only red blood cells floating in the [anterior chamber] are seen with the slit lamp, and no layer is visible.” Friedman & Kaiser, *Essentials of Ophthalmology* (2007) 193. Also included in the record before the court is a photograph attached to the victim’s medical record. The photograph confirms the existence of substantial bruising around the victim’s right eye, lip, and left forehead.

{¶12} Jarrell does not argue that the victim did not suffer these injuries but rather that the injuries do not qualify under the statute for serious physical harm.

{¶13} Jarrell cites four cases for the proposition that an orbital fracture that does not require surgery does not qualify as serious physical harm. However, none of the

cases offered by Jarrell are persuasive. Of the four cases, only one of the cases actually considered the issue at hand, and in that case the court of appeals held that the injuries were sufficient to constitute serious physical harm. *State v. Phillips*, Medina App. No. 06CA0027-M, 2006-Ohio-6909, at ¶2, ¶16-18 (“a broken tooth” and “a fracture of the orbit bone that penetrated the sinus cavity” are sufficient to take the issue of serious physical harm to the jury). The remaining three cases do not consider whether the injuries constitute serious physical harm or not. *State v. Stewart*, Cuyahoga App. No. 81468, 2003-Ohio-2867, at ¶14, rev’d on other grounds by 104 Ohio St.3d 249, 2004-Ohio-6397 (the only argument the defendant raised was that she did not know her conduct could cause serious physical harm); *State v. Dorsey*, Cuyahoga App. No. 87580, 2006-Ohio-5918, at ¶17-19 (The defendant claimed the evidence was insufficient to show he had caused the injuries, that he should have been allowed an instruction on provocation, and that the trial court’s order of restitution was contrary to law.); *State v. McCleod*, Jefferson App. No. 00 JE 8, 2001-Ohio-3480, (the issue was whether the defendant could have had the requisite mens rea).

{¶14} Under certain circumstances, a bruise can constitute serious physical harm because a bruise may satisfy the statutory requirement for temporary serious disfigurement. *State v. Worrell*, Franklin App. No. 04AP-410, 2005-Ohio-1521, at ¶47-51, rev’d on other grounds by *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109. The question is whether the bruising is severe enough to qualify as serious disfigurement. In *Worrell*, the victim suffered “extensive bruising on her lower back and hip.” *Id.* at ¶50. Other Ohio courts of appeals have found similar injuries constituted serious physical harm. *State v. Barbee*, Cuyahoga App. No. 82868,

2004-Ohio-3126, at ¶60 (a bruise “three to four inches in length and approximately * * * two inches in width” and visible four days after the assault); *State v. Burdine-Justice* (1998), 125 Ohio App.3d 707, 715 (“profuse bruising across [the victim’s] buttocks extending into her back area” could reasonably be found to be serious physical harm); *State v. Krull*, 154 Ohio App.3d 219, 2003-Ohio-4611, at ¶23 (“bruising and marks on his buttocks and thighs that caused pain that likely lasted several days after being inflicted.”). But see *State v. Massey* (1998), 128 Ohio App.3d 438, 442 (“[Victim] had a slight bruise on her head, but the injury was inarguably minor.”).

{¶15} Based on the foregoing cases, it is certainly possible that the injuries the victim suffered could be found by a reasonable juror to be “serious physical harm.” However, Jarrell contends “[t]he [victim] in this case had to take antibiotics and refrain from school or work for a week. No surgery was required and after a period of time the doctor could find no indication of injury. The state would not be able to prove serious physical harm necessary for a felony conviction.” Jarrell’s Brief at 9.

{¶16} Here, Jarrell may have convinced a jury that the victim did not suffer serious physical harm. But the fact a jury may have acquitted Jarrell is an issue present in virtually every case where a defendant seeks to withdraw a guilty plea, and as noted above, courts only allow a defendant to withdraw a plea after the sentence has been imposed in extraordinary cases. *Smith* at 264.

{¶17} Jarrell pleaded guilty to a lesser charge and gave up the opportunity to contest this fact at trial in return for a conviction of a lesser offense. Under these circumstances, Jarrell has failed to carry her burden to demonstrate the withdrawal of

her plea is necessary to correct a manifest injustice, and the trial court did not therefore abuse its discretion in denying her motion to withdraw her plea.

{¶18} In addition, Jarrell contends that she was denied effective assistance of counsel because the trial counsel failed to investigate a potential defense related to the lack of serious physical harm. Jarrell's Brief at 9. However, Jarrell fails to preserve this issue in her assignments of error, and "[u]nless an issue is raised by an assignment of error, it will be ignored and not considered by the appellate court even if mentioned in the brief." Ohio Appellate Practice (2008) 99, Section 5:12, citing *Thompson v. Ghee* (2000), 139 Ohio App.3d 195.

{¶19} Accordingly, we overrule Jarrell's first assignment of error.

III.

{¶20} Jarrell contends in her second assignment of error that the trial court erred by failing to hold an evidentiary hearing.

{¶21} Under Crim.R. 32.1, a trial court need only hold a hearing "if the motion is justified; that is, if the facts, as alleged by the defendant, indicate a manifest injustice would occur if the plea of guilty or no contest were not allowed to be withdrawn." *State v. Moore*, Pike App. No. 01CA674, 2002-Ohio-5748, at ¶17, quoting *State v. Wilburn* (Dec. 22, 1999), Lawrence App. No. 98CA47, unreported.

{¶22} However, as noted above, the operative facts alleged by Jarrell fail to demonstrate a manifest injustice would occur if the plea were not allowed to be withdrawn. The relevant facts in this case are the nature of the injuries the victim suffered. There is no dispute on the nature of the victim's injuries. As noted above, the injuries in this case are sufficient to constitute serious physical harm, and so the facts as

alleged by Jarrell in her motion do not indicate a manifest injustice would occur if she could not withdraw her plea. Therefore, the trial court did not abuse its discretion in not holding an evidentiary hearing.

{¶23} Accordingly, we overrule Jarrell's second assignment of error.

IV.

{¶24} Jarrell contends in her third assignment of error that the trial court erred when it struck subpoenas of two defense witnesses without cause for the hearing. Based on our resolution of Jarrell's second assignment of error, i.e., Jarrell was not entitled to a hearing, we find her third assignment of error moot. See App.R. 12(A)(1)(c).

{¶25} Accordingly, we overrule Jarrell's third assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and Appellant shall pay the cost taxed herein.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J.: Concurs in Judgment and Opinion.
McFarland, J.: Concurs in Judgment Only.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.