

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-P-0016
MICHAEL J. FITZPATRICK,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. 2008 CRB 0351 R.

Judgment: Affirmed.

Victor V. Viglucci, Portage County Prosecutor and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Michael J. Fitzpatrick, Pro Se, 8742 Diagonal Road, Streetsboro, OH 44241 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} This appeal arises from a final judgment entered by the Portage County Municipal Court, Ravenna Division, after a trial to the bench, convicting appellant, Michael J. Fitzpatrick, of domestic violence. For the reasons herein, we affirm.

{¶2} In December of 2007, eighteen year old Kaylie Fitzpatrick moved in with her father, Michael J. Fitzpatrick. At the time, Kaylie was attending cosmetology school. On the afternoon of February 12, 2008, Kaylie returned home early from school due to

bad weather. After arriving home, she retreated to her room to rest. She testified she was fatigued because of a recent surgery she underwent to remove an ovarian cyst.

{¶3} While Kaylie was lying on her bed, appellant entered her room in what she believed to be a state of intoxication. According to Kaylie, appellant, with slurred speech, instigated an argument pertaining to her lack of tidiness. Kaylie testified she asked appellant to “[p]lease leave [her] alone” as she did not feel well; instead of leaving, appellant accused Kaylie of always feeling sick and “milking this kind of thing.” Kaylie became angry and accused him of being an irresponsible drunk, pointing out she hated the person he became when intoxicated. She testified appellant then “got in [her] face and grabbed [her] arm.” In turn, Kaylie punched appellant in the mouth. The blow knocked appellant back, splitting his lip. In the midst of the commotion, Kaylie fled to the bathroom where she locked to door.

{¶4} While in the bathroom, Kaylie called her boyfriend, Joshua Hartman, a firefighter/paramedic who was working as a 911 dispatcher on the day of the incident. Kaylie asked Hartman to come to the house; however, the dispatch center was thirty minutes from the home. Hartman testified he could hear appellant yelling and banging on the bathroom door while he was speaking with Kaylie. Hartman subsequently asked his partner to contact the Streetsboro police on a separate line.

{¶5} Soon after the call was placed, Officer Patricia Wain arrived at the scene with backup officers. Officer Wain recalled hearing appellant yelling from outside the house. Appellant initially refused to allow the officers entry. However, appellant eventually opened the door and, according to Wain, was highly cooperative. Once inside, Officer Wain testified that appellant appeared “highly intoxicated.” She stated his

speech was slurred and he projected a strong odor of alcoholic beverage. While the backup officers spoke with appellant, Officer Wain coaxed Kaylie from the locked bathroom and spoke with her. During their conversation, Officer Wain observed Kaylie “shaken and flustered” with red marks on her arms. Kaylie provided Officer Wain with an account of the incident.

{¶6} Appellant was subsequently arrested and a criminal complaint was filed in the Ravenna Municipal Court charging him with domestic violence, in violation of R.C. 2919.25, and a violation of a protection order. Appellant entered a plea of not guilty and the matter proceeded to a bench trial. The trial court eventually dismissed the charge relating to the protective order on defense counsel’s motion. However, appellant was found guilty of domestic violence. Appellant was sentenced to 180 days in jail, a fine of \$100 and court costs. The jail sentence was suspended and appellant was placed on probation for a term of one year. The court further ordered appellant to complete counseling and, if recommended, complete anger management as well as alcohol and substance abuse treatment. Appellant was further ordered to have no contact with Kaylie.

{¶7} After filing his notice of appeal, appellant moved the trial court for a stay of his sentence pending the resolution of the instant appeal. The motion was granted. Appellant now asserts two assignments of error for our review. His first assigned error reads:

{¶8} “The trial court erred to the prejudice of the defendant-appellant in overruling his motion to dismiss the charge of [d]omestic [v]iolence at the close of the state’s case in chief (T.p. 45, lines 8 – 9) and at the close of trial [and] by finding him

guilty of domestic violence R.C. 2919.25(A) when essential elements of the crime were lacking.”

{¶9} An appellate court reviewing whether the evidence was sufficient to support a criminal conviction examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the mind of the average juror of the defendant’s guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273. “A reviewing court may not reweigh or reinterpret the evidence; rather, the proper inquiry is, after viewing the evidence most favorably to the prosecution, whether the [trier of fact] could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Troisi*, 179 Ohio App.3d 326, 2008-Ohio-6062, at ¶9.

{¶10} R.C. 2919.25 defines the crime of domestic violence. Appellant was charged under subsection (A) of that statute, which provides:

{¶11} “No person shall knowingly cause or attempt to cause physical harm to a family or household member.”

{¶12} “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).

{¶13} Here, the state submitted evidence that appellant and Kaylie resided in the same home. On the date of the incident, appellant entered Kaylie’s room in an intoxicated condition and instigated a confrontation. During the confrontation, Kaylie exclaimed she hated appellant when he was drunk and accused him of being irresponsible while intoxicated. Appellant subsequently grabbed Kaylie’s arms causing

red, welted marks to appear. The evidence also revealed appellant is a 6'4" man. Given appellant's considerable stature, the degree of hostility which had arisen during the argument, and appellant's condition, it is reasonable to conclude appellant was aware that grabbing the arms of his much smaller daughter would likely result in red marks forming on her arms.

{¶14} Despite this evidence, appellant points out that Kaylie sustained no injury requiring medical attention. However, the quality of an injury is irrelevant in a domestic violence case. The issue is whether appellant knowingly caused or attempted to cause Kaylie physical harm. Hence, even if a victim sustains only minor injuries (or even no injuries due to a failed attempt), a defendant may be found guilty of domestic violence.

{¶15} Under these circumstances, testimony indicated appellant forcefully grabbed his daughter causing red marks on her arms. Kaylie also testified her father's actions caused her physical discomfort for approximately "an hour, hour and a half." Viewed in a light most favorable to the prosecution, the state submitted sufficient evidence to prove the crime of domestic violence beyond a reasonable doubt.

{¶16} For his second assignment of error, appellant alleges:

{¶17} "The decision of the trial court finding the defendant guilty of domestic violence was against the manifest weight of [the] evidence and contrary to law."

{¶18} "When reviewing a claim that a judgment was against the manifest weight of the evidence, an appellate court must review the entire record, weigh both the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving conflicts, the trier of fact clearly lost its way and created

such a manifest miscarriage of justice that a new trial must be ordered.” *State v. Pesec*, 11th Dist. No. 2006-P-0084, 2007-Ohio-3846, at ¶74.

{¶19} The trier of fact is the primary assessor of the persuasive force of the evidence submitted at trial. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Hence, “[c]onvictions are not against the manifest weight of the evidence merely because there is conflicting evidence presented at trial.” *State v. Gregg*, 11th Dist. No. 2006-A-0013, 2007-Ohio-1201, at ¶45, quoting *State v. Serrano*, 164 Ohio App.3d 103, 2005-Ohio-5606, at ¶18.

{¶20} Under this assignment of error, appellant claims the trial court lost its way in concluding the greater weight of credible evidence supported the state’s theory of the case.

{¶21} At trial, appellant testified on his own behalf and provided a different rendition of events than the state. Appellant testified that, subsequent to Kaylie’s arrival home from school, he entered her bedroom, found her lying on her bed talking on the phone. He told her to clean up a mess she had made in the kitchen but, according to appellant, she rebuffed his instructions with abusive language. Appellant testified he then attempted to take the phone from Kaylie when she jumped from her bed and punched him in the face. According to appellant, he then grabbed Kaylie’s arm in an attempt to restrain her from further punching him. Appellant’s testimony therefore indicated that, while he did grab Kaylie’s arms, it was *after* he was hit and he did so only to the extent necessary to restrain her in the defense of his person.

{¶22} In addition to his different account, appellant points out, in his brief, that although Officer Wain testified she saw red marks on Kaylie’s arm, she was unable to

recall whether the marks were on her upper or lower arm. Appellant apparently believes the officer's inability to recall the location of the injuries nullifies the credibility of her testimony.

{¶23} Finally, appellant notes that the state's contention that he was highly intoxicated was unsupported by any test results. He acknowledges consuming five beers, but points out that the slurred speech Officer Wain noticed could have been a result of his fat lip, not the alcohol.

{¶24} Initially, the officer's testimony that appellant was "highly intoxicated" is admissible irrespective of whether tests were taken to determine his actual blood alcohol content. It is well established that a police officer may provide lay testimony as to his or her opinion regarding a defendant's lack of sobriety. See, e.g., *State v. Holland* (Dec. 17, 1999), 11th Dist. No. 98-P-0066, 1999 Ohio App. LEXIS 6143, *14. Furthermore, intoxication is fundamentally irrelevant to proving the crime of domestic violence and thus the degree to which appellant was under the influence of alcohol was not crucial to the state's case. Appellant's intoxication (or the level of influence alcohol exercised over appellant's conduct) simply provided a circumstantial detail to the factual tableau in which the incident occurred. The trier of fact was therefore free to consider the fact of intoxication and determine its weight or ignore it as inconsequential.

{¶25} That said, there are two principal accounts of the incident: Kaylie's version and appellant's version. Kaylie's rendition of events pegged appellant as the aggressor who was struck only after he physically seized her arms. Alternatively, appellant maintains he physically restrained her arms only after Kaylie suddenly and unpredictably belted him in the mouth. Consistent in both versions is the fact that

Kaylie's arms were, at some point, grabbed. As a result, Officer Wain's inability to recall where she saw the marks does not weigh against her credibility.

{¶26} The trial court considered the competing accounts as well as the additional evidence submitted via Hartman's and Wain's testimony. In doing so, we hold the trial court did not lose its way creating a patent miscarriage of justice in finding Kaylie's version more credible. Thus, appellant's conviction for domestic violence is not against the manifest weight of the evidence.

{¶27} Appellant's second assignment of error is overruled.

{¶28} For the reasons discussed in this opinion, appellant's two assignments of error are overruled and the judgment of the Portage County Municipal Court, Ravenna Division, is accordingly affirmed.

MARY JANE TRAPP, P.J.,

DIANE V. GRENDALL, J.,

concur.

