

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT**

LAKE COUNTY, OHIO

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|----------------------|---|----------------------------|
| STATE OF OHIO, | : | O P I N I O N |
| Plaintiff-Appellee, | : | CASE NO. 2008-L-169 |
| - vs - | : | |
| CRAIG A. RICCO, | : | |
| Defendant-Appellant. | : | |

Criminal Appeal from the Willoughby Municipal Court, Case No. 08 CRB 02692.

Judgment: Affirmed.

Michael P. Germano, City of Willoughby Hills Prosecutor, 35000 Kaiser Court, #306, Willoughby, OH 44094 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Craig A. Ricco appeals from the judgment of the Willoughby Municipal Court, finding him guilty of domestic violence, following bench trial. We affirm.

{¶2} Mr. Ricco and his then wife, Susan Ricco, agree that on the morning of July 6, 2008, they had an argument while Ms. Ricco served breakfast to Mr. Ricco and their daughter, Bridgette.¹ The argument centered on when and for how long they should attend the graduation party of their nieces, that afternoon and evening. Ms.

1. Ms. Ricco filed for divorce during the pendency of these proceedings below.

Ricco wished to attend for a short period later in the day; Mr. Ricco, for longer. Apart from this, their testimony at trial widely diverged.

{¶3} Ms. Ricco testified that Mr. Ricco was very angry, and grabbed her by the throat. She testified she then went to the basement to do laundry, and that her husband followed her. She testified he eventually picked her up and threw her over his shoulder, causing her to hit and cut her head on the electrical box. She also hit a foot on the slop sink, causing the foot to bleed. She testified that Mr. Ricco eventually threw her down between the washer and dryer, before leaving the basement (evidently on hearing their daughter return from the neighbors). She further testified that she continued to work around the house, before lying down, then passing out, in Bridgette's first floor bedroom that evening.

{¶4} Mr. Ricco testified that he was not angry. He admitted following his wife to the basement to continue discussing the party, but testified she first fell when trying to push past him to the stairs. He agreed he then picked her up and threw her over his shoulder, and that she exclaimed he had hurt her, but denied seeing any blood or hearing any further complaint. He testified he tried to set her down gently at the washer and dryer, but that she fell over. He then went and cut the lawn. He testified that he checked on Ms. Ricco about 6:00 p.m., to see if she was ready for the party, but that she told him she would wait for her eldest daughter Breanna to get off work before coming, so he went alone.

{¶5} Mr. Ricco further testified that he returned from the party about 10:30 p.m., to find the house empty, and blood on the floor of Bridgette's room. Being without a cell phone, and not finding the cordless phone used for the house, he decided to check at

Lake West Hospital, to discover whether his wife or daughter was injured. From Lake West, he called the Willoughby Hills Police Department. Officer Neath and Patrol Officers McDermott and Ours were dispatched to the Ricco house.

{¶6} Officer Neath and Patrol Officer McDermott testified at trial. They testified they entered the house with Mr. Ricco, to be struck by an overwhelming smell of gas. They contacted the fire department, and did a quick sweep of the house, finding nobody. Upon arrival, the fire department required the police and Mr. Ricco to evacuate the house. It transpired that the gas came from an open propane tank, near the air conditioning system. Eventually, Ms. Ricco's elder daughters, Breanna and Brittany arrived. Breanna stated she had received a phone call from her mother, who had said she was hiding in the house, and there were people moving about it. Eventually, the police found Ms. Ricco sprawled on the floor of Bridgette's room, half underneath the bed. She was wrapped in a blanket, and covered by a heavy comforter, sweating profusely. She was confused, and there was blood on her head and one foot, and marks on her arms and legs.

{¶7} Both officers testified regarding pictures taken of Ms. Ricco's injuries, over objection of defense counsel. They testified the injuries were consistent with Ms. Ricco's story of being beaten by her husband, and that the marks were fresh. On cross examination, defense counsel elicited admissions from the officers that the injuries depicted were consistent with other causes.

{¶8} One of the photographs of Ms. Ricco shows redness around her collarbone and upper breast. She attributed this to being grabbed by the throat by her husband. Defense counsel elicited an admission from Officer Neath that part of this

redness might be attributable to sunburn. Ms. Ricco strictly denied being outside on July 6, 2008. Further, Mr. Ricco and his sister, Deanna Lako, both testified that Ms. Ricco suffered from rosacea.

{¶9} A complaint charging Mr. Ricco with domestic violence in violation of R.C. 2919.25(A), a first degree misdemeanor, was filed July 7, 2008. He pleaded not guilty that same day. July 8, 2008, the trial court granted a domestic violence criminal temporary protection order in favor of Ms. Ricco and her daughters. The matter came on for bench trial October 1, 2008. By a judgment entry filed October 3, 2008, the trial court found Mr. Ricco guilty.

{¶10} On appeal, Mr. Ricco assigns three errors:

{¶11} “[1.] THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT WHEN IT FAILED TO LIMIT LAY OPINION TESTIMONY IN VIOLATION OF THE DEFENDANT-APPELLANT’S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND FAIR TRIAL.

{¶12} “[2.] THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT’S WHEN IT REFUSED TO EXCLUDE A POTENTIAL WITNESS FROM TRIAL IN VIOLATION OF THE DEFENDANT-APPELLANT’S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND FAIR TRIAL.

{¶13} “[3.] THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT WHEN IT RETURNED A VERDICT OF GUILTY AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶14} By his first assignment of error, Mr. Ricco alleges the trial court erred in allowing Officer Neath and Patrol Officer McDermott to testify regarding Ms. Ricco’s

injuries. Both officers reviewed the photographs taken of Ms. Ricco's injuries while testifying, and stated the photographs depicted the injuries they saw the evening of July 6, 2008. They further testified that the injuries appeared to be the result of trauma, were fresh, and seemed consistent with Ms. Ricco's description of her beating.

{¶15} Mr. Ricco objects that, pursuant to Evid.R. 602, lay witnesses may only testify to matters of which they have personal knowledge, and that any testimony of the officers in this case regarding the causation of Ms. Ricco's injuries could not be based on personal knowledge, as the officers were not at the Ricco residence when the injuries allegedly occurred.

{¶16} Mr. Ricco further objects that lay witnesses, pursuant to Evid.R. 701, are limited to giving opinions or making inferences "which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." In this case, Mr. Ricco argues that any testimony by the officers regarding the freshness of Ms. Ricco's injuries was impermissible pursuant to Evid.R. 701(2), since the court had before it the photographs of those injuries. He further objects that any testimony by the officers regarding causation was in the nature of expert, not lay, opinion, and required the testimony of qualified medical personnel.

{¶17} "Decisions regarding the admissibility of evidence are within the broad discretion of the trial court. *** A decision to admit or exclude evidence will be upheld absent an abuse of discretion. ***." *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, at ¶20. (Internal citations omitted.) "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. Regarding this standard, we recall the term “abuse of discretion” is one of art, essentially connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. When reviewing evidentiary rulings, “[e]ven in the event of an abuse of discretion, a judgment will not be disturbed unless the abuse affected the substantial rights of the adverse party or is inconsistent with substantial justice.” *Beard* at ¶20.

{¶18} We find no abuse of discretion in the trial court’s admission of the officers’ testimony in this case. They personally observed Ms. Ricco’s injuries; they interviewed her regarding how her injuries occurred. Ohio’s appellate courts have regularly allowed police officers who have seen a victim’s injuries, and interviewed the victim and/or suspect, to testify pursuant to Evid.R. 701 whether the injuries appear consistent with the recounts given. Cf. *State v. Craig* (Oct. 13, 1998), 5th Dist. No. 1998CA00043, 1998 Ohio App. LEXIS 5234, at 7-8; *State v. Fricke* (June 14, 1993), 12th Dist. No. CA92-09-080, 1993 Ohio App. LEXIS 3008, at 5-6. The weight to be given such testimony is up to the trier of fact. *Fricke* at 6. In this case, defense counsel thoroughly cross examined the officers, and gained their admissions that Ms. Ricco’s injuries were consistent with many possible causes, apart from the alleged beating. Regarding the argument that the officers’ testimony about the freshness of Ms. Ricco’s injuries was redundant, since the photographs of those injuries were in evidence, we simply note that the error alleged in admitting the testimony (if any) would be harmless.

{¶19} The first assignment of error lacks merit.

{¶20} By his second assignment of error, Mr. Ricco contends the trial court erred in allowing Ms. Ricco to remain in the courtroom during the testimony of Officer Neath and Patrol Officer McDermott. Defense counsel moved at the commencement of proceedings for a separation of witnesses, which motion the trial court granted; prior to the questioning of the officers, defense counsel asked that Ms. Ricco, who remained at the state's table, remove herself, since she was a potential witness. This request the trial court denied. On appeal, Mr. Ricco points out his counsel attempted to elicit from the officers that some of Ms. Ricco's alleged injuries appeared consistent with sunburn. When she took the stand, Ms. Ricco repeatedly and stoutly denied going out in the sun that day. Mr. Ricco contends her testimony on this issue may have been influenced by hearing his counsel's examinations of the officers.

{¶21} "A victim has a constitutional and statutory right to be present during the trial unless the court determines that exclusion of the victim is necessary to protect the defendant's right to a fair trial. Ohio Constitution Article I, Section 10(a); R.C. 2930.09. The Ohio Constitution in Article I, Section 10(a) specifically provides victims constitutional rights to 'reasonable and appropriate notice, information, access, and protection and to a meaningful role in the criminal justice process.' The Ohio Legislature recognized that it is difficult to have a meaningful role in the criminal justice process if the victim is banished from the courtroom; therefore, R.C. 2930.09 was enacted. It provides:

{¶22} "A victim in a case may be present whenever the defendant (***) in the case is present during any stage of the case against the defendant (***) that is conducted on the record, other than a grand jury proceeding, unless the court

determines that exclusion of the victim is necessary to protect the defendant's (***) right to a fair trial (***)).

{¶23} “Furthermore, Evid.R. 615 makes clear that even when there is a separation of witnesses, the victim has the right to be present in accordance with the criminal statutes. Specifically, Evid.R. 615(B)(4) states:

{¶24} “(B) This rule does not authorize exclusion of any of the following persons from the hearing:

{¶25} “(***)

{¶26} “(4) [I]n a criminal proceeding, a victim of the charged offense to the extent that the victim's presence is authorized by statute enacted by the General Assembly.” *State v. Hines*, 3d Dist. No. 9-05-13, 2005-Ohio-6696, at ¶19.

{¶27} It is the defendant's burden to show that the presence of the alleged victim compromises the defendant's right to a fair trial. *Hines* at ¶22. Mr. Ricco fails to meet this burden. We note that this was a bench trial: the learned trial judge could certainly discount Ms. Ricco's testimony about whether or not she had been outside, if he chose. He could study the photographs, and make his own determination of whether the redness on Ms. Ricco's chest and collarbone was sunburn, or the result of being grabbed forcefully by the neck. Further, the trial court had many pictures of Ms. Ricco's alleged injuries before it, most of which did not involve the alleged sunburn.

{¶28} The second assignment of error lacks merit.

{¶29} By his third assignment of error, Mr. Ricco challenges the trial court's verdict as being against the manifest weight of the evidence. In support, he points to various inconsistencies and peculiarities in Ms. Ricco's testimony. Thus, he notes that,

while Ms. Ricco claimed he cut her foot by hitting it against the slop sink in the basement, and the indications are the foot bled profusely, no blood was found in the basement. He notes that Ms. Ricco seemed unsure whether her knee was hurt during the alleged beating, or on another day. He points to Ms. Ricco's testimony that she could only wear "flats" or flexible shoes in the days following the alleged beating – whereas his sister, Mrs. Lako, testified Ms. Ricco wore high heels to the hearing on the protection order, shortly thereafter. He remarks that Ms. Ricco appeared to claim he hit her at trial – only to recant when her prior, inconsistent testimony from the protection order hearing was shown to her.

{¶30} 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 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. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶31} "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175. The role of the appellate court is to engage in a limited weighing of the evidence introduced at trial in order to determine whether the state appropriately carried its burden of persuasion. *Thompkins* at 390 (Cook, J., concurring). The reviewing court must defer to the factual findings of the trier of fact as to the weight to be given the

evidence and the credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, at paragraph one of the syllabus.

{¶32} When assessing witness credibility, “[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact.” *State v. Awan* (1986), 22 Ohio St.3d 120, 123. “Indeed, the factfinder is free to believe all, part, or none of the testimony of each witness appearing before it.” *Warren v. Simpson* (Mar. 17, 2000), 11th Dist. No. 98-T-0183, 2000 Ohio App. LEXIS 1073, at 8. Furthermore, if the evidence is susceptible to more than one interpretation, a reviewing court must interpret it in a manner consistent with the verdict. *Id.*

{¶33} Application of these standards indicates the trial court’s judgment was not against the manifest weight of the evidence. A reading of the transcript indicates that Ms. Ricco frequently had trouble limiting her answers to the questions asked, thus requiring counsel to repeat or rephrase. But the resulting inconsistencies are insufficient to render her testimony unbelievable. The trial judge, as trier of fact, was entitled to rely upon it. Indeed, we note that at sentencing, the trial judge explicitly warned Mr. Ricco that his testimony had not been credible.

{¶34} The third assignment of error lacks merit.

{¶35} The judgment of the Willoughby Municipal Court is affirmed.

{¶36} The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.