[Cite as *State v. Trefney*, 2012-Ohio-869.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-P-0032**
- vs -	:	
JOSEPH J. TREFNEY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. R 2010 CRB 2294.

Judgment: Affirmed.

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

Lester S. Potash, 55 Public Square, Suite 1717, Cleveland, OH 44113-1901 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Joseph Trefney appeals from a judgment of the Portage County Municipal Court, Ravenna Division, which convicted him of domestic violence. He challenges the sufficiency of the evidence and raises several evidentiary issues. After a careful review of the record and pertinent law, we affirm the judgment of the trial court.

Substantive Facts and Procedural History

{¶2} Mrs. Trefney and Mr. Trefney were married for 28 years and they were experiencing marital difficulties at the time of the alleged incident. On August 23, 2010,

Mrs. Trefney filed a complaint of domestic violence in Ravenna Municipal Court, alleging Mr. Trefney grabbed her throat and choked her during an argument. Mr. Trefney was charged with domestic violence, in violation of R.C. 2919.25, a misdemeanor of the first degree. He pled not guilty and the matter was tried to a jury.

The Incident As Described By Mrs. Trefney

{¶3} While she was preparing dinner, Mr. Trefney came downstairs to the kitchen area and sat on the steps. They had taken their son to college days before, and he asked Mrs. Trefney about the physical forms required for their son's participation in the school's football team. Mrs. Trefney did not answer directly, which infuriated him. He became irate and started to swear at her, repeatedly using deprecating language and the f-word. As he continued to swear, Mrs. Trefney said, "Keep it up. Just keep it up," while making a hand gesture toward him. At that point Mr. Trefney exploded. He leapt off the steps, lunged at her, grabbed her by the throat with both hands, slammed her against the oven, and then turned her around and rammed her into the kitchen sink, with his hands still at her throat. Mrs. Trefney decided to stay calm instead of fighting him. Mr. Trefney eventually calmed down, released her, and went back to sit on the steps, as if nothing had happened.

{¶4} Mrs. Trefney, confused and shocked, finished the lasagna she was preparing and put it in the oven. She then went upstairs to her bedroom, retrieved her purse, and left the house. As she was leaving, Mr. Trefney asked her if she wanted a divorce and said it would cost her a lot of money. She replied, "Yes, I do." They had discussed divorce previously, and, according to Mrs. Trefney, the incident was the final straw.

{¶5} Mrs. Trefney went directly to the sheriff's department from her house. On the way there, she telephoned her grown daughter, who met Mrs. Trefney at the sheriff's department. Mrs. Trefney filed a report and the deputy took pictures of the bruise on her arm and the redness on her throat. She also had pictures taken of the bruise on the arm a few days later.

The Incident As Described By Mr. Trefney

{¶6} Mr. Trefney testified on his own behalf, defending on two bases. First, he claimed he did not have the physical capacity to have engaged in such an attack, as he has been on disability since 2007 due to a back injury from a truck accident. He also had stints inserted in 2004 to alleviate a heart condition

{¶7} Secondly, he explained that the bruising was caused when he and his wife moved their son to college the weekend before the incident. The day before the incident, he asked his wife about a bruise on her right arm and was told she had fallen while putting the sheets on the top bunk of their son's bed. He did not witness the fall.

{¶8} As for the events of the evening in question, Mr. Trefney stated that while his wife was making lasagna for dinner, he sat on the steps of the staircase and they got into an argument about their son's physical forms, yelling at each other. At one point, she walked into the dining room, and, when she came back to the kitchen, he said, "You wanted a divorce, don't you?" She then went to her closet, put on her shoes, and flung a long-strapped purse around her neck, which caused the redness around her neck. Before she left, she put some garlic bread in the oven and instructed him to take out the bread later. He described her as being in "one of her moods." He denies grabbing his wife by her throat or engaging in any physical altercation with her. He claimed his wife fabricated the incident.

{¶9} Mrs. Trefney conceded Mr. Trefney had numerous health issues, he had not worked for ten years due to his back problems, and he had problems moving about on occasions. However, she insisted that he did not have any apparent health issues at the time of the incident, and that he had helped her move their son into his dorm room two days earlier. When asked on cross-examination whether she told her husband she hurt her arm while in the dorm room, she stated there was no bruise on her arm before the kitchen incident, and further that such a conversation never took place.

Observations of the Investigating Deputy Sheriff

{¶10} Deputy Stephanie Yugovich, a nine-year veteran of the Portage County Sheriff's Office, testified that she responds regularly to assault or domestic violence calls. She described Mrs. Trefney as "visibly shaken" when she filed the domestic violence complaint at the sheriff's office. She was crying and her cheeks were red from crying. She told Deputy Yugovich she was "choked and slammed around in the kitchen," and the deputy observed redness in her neck and on her upper arm. When asked to be specific about the injuries she observed, the deputy stated, "Her neck was completely red. On both sides were a deeper red than the rest of her – the front of her neck or her chest area. It was like something was [pressed] against the side of her neck."

{¶11} According to Deputy Yugovich, the redness she observed on Mrs. Trefney's neck was consistent with her account of the cause of the injury. The deputy also stated the redness was unlikely to be caused by a purse strap, because a strap would leave only a specific linear mark on the neck, unlike what she observed on Mrs. Trefney's neck, which had redness extending from her chin down to her shoulder. She

stated she had observed this kind of redness before with domestic violence or assault victims.

{¶12} Mrs. Trefney also complained of pain in her upper arm. The deputy observed some redness in her arm, but no specific bruise at the time. She explained, however, based upon her nine years of experience, that there would typically be no immediate discoloration for this type of injury on the first day. She testified the mark she saw on Mrs. Trefney's arm was consistent with her account of the cause of the injury.

{¶13} Deputy Yugovich located Mr. Trefney at his brother's house within the hour and arrested him for domestic violence. Because she believed she had sufficient probable cause to arrest him for domestic violence, she did not question him, and therefore did not advise him of his Miranda rights. When she found Mr. Trefney, he was not using a cane. He made no complaints of any physical problems nor did she observe any.

The Verdict and Its Appeal

{¶14} The jury found Mr. Trefney guilty and the court sentenced him to 180 days in jail, with 180 days suspended. He was also ordered to pay $1,000 in fines as well as costs, with $900 suspended. The court also placed him on probation for a year and ordered him to participate in a mental health evaluation and counseling. In addition, he was placed under house arrest for 45 days, and ordered to comply with the terms of a civil protection order.

{¶15} Mr. Trefney now appeals, raising the following assignments of error:

{¶16} "[1.] The trial court erred in permitting Deputy Yogovich to testify whether Joseph committed an act of domestic violence.

{¶17} "[2.] The trial court erred when overruling Joseph's motions for acquittal.

{¶18} "[3.] The trial court erred when permitting expert testimony by Deputy Yogovich [sic].

{¶19} "[4.] The trial court erred in refusing to permit Joseph to challenge and impeach Linda's testimony.

{¶20} "[5.] The trial court erred in refusing to permit Joseph to question Deputy Yogovich [sic] about her not inquiring of Joseph's version of events prior to and at the time of his arrest."

{¶21} For ease of discussion, we address the assignments of error out of order. Under the second assignment of error, Mr. Trefney argues the trial court should have granted his Crim.R. 29 motion for acquittal, because the state failed to establish causation of harm, an essential element of the offense of domestic violence.

Whether Expert Medical Testimony was Necessary to Establish Causation in Domestic Violence Cases

{¶22} A trial court shall grant a motion for acquittal when there is insufficient evidence to sustain a conviction. Crim.R. 29(A). When reviewing a challenge of the sufficiency of the evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. "The pertinent 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." *Id*. A sufficiency challenge requires this court to review the record to determine whether the state presented evidence on each of the elements of the offense. This test involves a

question of law and does not permit us to weigh the evidence. *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶23} Mr. Trefney was convicted of domestic violence, in violation of R.C. 2919.25(A). That statute states, "No person shall knowingly cause or attempt to cause physical harm to a family or household member." Mr. Trefney argues the state failed to present sufficient evidence that he caused the physical harm because there was no expert medical testimony establishing that the bruise on his wife's arm was caused in the manner she alleged. He claims that, absent proper medical testimony as to causation, the state did not establish that essential element.

{¶24} However, there is no case law authority requiring the state to produce expert medical testimony to establish causation in a domestic violence matter. *See State v. McClure*, 2d Dist. No. 92-CA-0078, 1993 Ohio App. LEXIS 3060, *5 (June 17, 1993). In many domestic violence cases, medical evidence is absent, and often the only evidence is the testimony of the victim.

{¶25} "Domestic violence merely requires a showing of 'physical harm' as defined in R.C. 2901.01(A)(3), which does not require evidence of visible injuries." *State v. Taliaferro*, 11th Dist. No. 2008-P-0060, 2009-Ohio-1317, ¶24, quoting *State v. Boldin*, 11th Dist. No. 2007-G-2808, 2008 Ohio 6408, ¶40.

{¶26} Here, the record shows the state presented testimony from Mrs. Trefney that Mr. Trefney caused the injury by grabbing her throat and slamming her body against the kitchen sink. The state also introduced photographs taken by Deputy Yugovich depicting the redness around Mrs. Trefney's throat, and the redness on Mrs. Trefney's arm and its subsequent discoloration. In doing so, the state met its burden of

production establishing the element of causation, and it was up to the jury to assess the credibility of the evidence and determine whether Mr. Trefney caused the harm.

{¶27} To support his claim that expert medical testimony is required to prove causation, Mr. Trefney cites *Douglas v. Ohio Bur. of Workers' Comp.*, 105 Ohio App.3d 454 (2d Dist.1995). That case is inapposite because it concerned the proof required for causation in establishing an injury compensable under the workers' compensation program.

{¶28} Viewing the evidence in a light most favorable to the prosecution, we conclude any rational trier of fact could have found the essential elements of domestic violence, in particular that the defendant caused the physical harm, proven beyond a reasonable doubt. Therefore, the trial court did not err in overruling Mr. Trefney's motion for acquittal.

{¶29} The first assignment of error is without merit.

{¶30} The remaining assignments of error concern the trial court's admission of certain testimony. We review these claims with the recognition that "[a]n appellate court which reviews the trial court's admission or exclusion of evidence must limit its review to whether the lower court abused its discretion." *State v. Finnerty*, 45 Ohio St.3d 104, 107-108 (1989).

The Deputy's Testimony Regarding Probable Cause

{¶31} Under the first assignment of error, Mr. Trefney argues the trial court erred in allowing Deputy Yugovich to answer a question regarding whether the defendant committed the offense. He directs us to the following colloquy in the trial transcript:

{¶32} "Q. All right. Based on your knowledge, training and experience, speaking with Linda and viewing the evidence, do you have an opinion as to whether the defendant committed an act of domestic violence on August 23rd, 2010?

{¶33} "A. Yes.

{¶34} "[DEFENSE COUNSEL]: Objection.

{¶35} "THE COURT: Overruled.

{¶36} "BY [PROSECUTOR]:

{¶37} "Q. And what is your opinion?

{¶38} "A. *That there was enough probable cause for me to type up the charge for Domestic Violence and place him under arrest.*

{¶39} "[DEFENSE COUNSEL]: Move to strike.

{¶40} "THE COURT: Overruled." (Emphasis added.)

{¶41} Mr. Trefney claims the deputy improperly expressed her opinion concerning his guilt, the ultimate issue to be decided by the trier of fact. He argues her testimony fell outside of Evid.R. 701 ("Opinion testimony by lay witnesses") and infringed on the role exclusively reserved for the trier of fact. We disagree.

{¶42} First, Evid.R. 704 allows opinion testimony which is otherwise admissible, even if the testimony embraces an ultimate fact to be decided by the trier of fact. Opinion testimony is not inadmissible per se because it pertains to an ultimate issue. *State v. Rohdes*, 23 Ohio St.3d 225, 229 (1986). If the opinion testimony is offered by a lay witness, the opinion must be (a) rationally based on the witness's perceptions, and (b) helpful to a clear understanding of the witness's testimony or the determination of a factual issue. Evid.R.701.

{¶43} Our reading of the challenged testimony in its context shows the prosecutor asked the deputy's opinion of Mr. Trefney's guilt as a part of the questioning regarding the circumstances leading to his arrest. Although the question was inartfully framed as one regarding the deputy's opinion of Mr. Trefney's guilt, the deputy's answer did not offer such an opinion. Rather, the deputy only testified about her preparation of the complaint against Mr. Trefney. Instead of giving her opinion of Mr. Trefney's guilt, Deputy Yugovich actually stated, "[T]here was enough probable cause for me to type up the charge for Domestic Violence and place him under arrest."

{¶44} The deputy's opinion testimony is proper under Evid.R. 701. First, it was rationally based on her perception. The trial transcript shows she has extensive experience in domestic violence matters. She has been a Portage County Deputy Sheriff since 2002, and, in her position, she responds to domestic violence or assault calls on a weekly basis. As part of her investigation of domestic violence complaints, she is often called upon to examine the injuries alleged by domestic violence victims and evaluate their account of the cause of the injuries. She personally observed the redness in Mrs. Trefney's neck and upper arm, which, in her assessment based on her experience, was consistent with Mrs. Trefney's account of the cause of the injuries. Second, the deputy's testimony regarding the probable cause to arrest Mr. Trefney based on her observation of the injury was clearly helpful to the trier of fact's determination of a fact in issue, namely, the cause of Mrs. Trefney's injury.

{¶45} As such, Deputy Yugovich's testimony that she believed she had probable cause to prepare the charge for domestic violence and arrest Mr. Trefney is permissible under Evid.R. 701. The trial court did not abuse its discretion in overruling the defense's objection to this testimony.

{¶46} In support of his claim, Mr. Trefney cites *State v. Edwards*, 1st Dist. No. C-050883, 2006-Ohio-5596, ¶33-36, *State v. Haney*, 7th Dist. No. 05MA151, 2006-Ohio-4687, and *State v. Webb*, 70 Ohio St.3d 325 (1994). The opinion testimony challenged in each of these cases involved the police officer's testimony of the defendant's guilt, which is distinguishable from the instant case.

{¶47} We note that even if the trial court admitted Officer Yugovich's testimony in error, it would constitute harmless error under Crim.R 52(A). This is because the state presented substantial evidence to establish the defendant's guilt, and therefore, the statement by Detective Yugovich that she had probable cause to prepare a complaint and arrest Mr. Trefney, given after she testified about the circumstances leading to it, would not affect the outcome of the trial. The first assignment of error is without merit.

Whether Expert Report Was Required By Crim. R. 16

{¶48} Under the third assignment of error, Mr. Trefney alleges Detective Yugovich improperly testified about the injury on Mrs. Trefney's arm as an expert, because the state did not submit a report as required by the new Crim.R. 16.[1]

{¶49} Our review of the trial transcript shows Deputy Yugovich testified about the discoloration of skin she had often observed in domestic violence victims, and about the bruising she saw on Mrs. Trefney's arm, which she believed was consistent with her complaint of pain, based on her knowledge, training, and experience. The trial court

1. New Crim.R. 16, effective July 1, 2010, states, in section (K): "An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial."

allowed the testimony over the defense's objections, explaining that the deputy was testifying from her experience as an officer, rather than offering a medical opinion. The record before us does not show that the detective was offering testimony as a medical expert, and therefore, the expert report requirement of the new Crim.R. 16 has no application here. The third assignment of error is without merit.

Whether Trial Court Properly Excluded Defendant's Testimony as Hearsay

{¶50} Under the fourth assignment of error, Mr. Trefney contends that the trial court should have allowed him to impeach Mrs. Trefney's testimony that she had not sustained any injury while in her son's dorm room. He directs us to the following excerpt of his direct examination, where he attempted to give his own account of the cause of the bruise:

{¶51} "Q. O.K. And where was this bruise at?

{¶52} "A. On the back side of her arm, back here. (Indicating)

{¶53} "Q O.K.

{¶54} "A. On this side.

{¶55} "Q. All right. And did she tell you how she got it?

{¶56} "A. She said she fell.

{¶57} "[PROSECUTOR]: Objection.

{¶58} "THE COURT: Sustained.

{¶59} "[PROSECUTOR]: Hearsay.

{¶60} "BY [DEFESNE COUSNEL]:

{¶61} "Q. Did you cause that bruise to be put on her arm?

{¶62} "A. No, I didn't.

{¶63} "Q Do you know how it came about?

{¶64} "A. Yes, I do.

{¶65} "Q. And how?

{¶66} "A. She fell off the bed.

{¶67} "Q. O.K. Where did she fall off the bed?

{¶68} "A. At the dorm. They have bunk beds and my son had the bunk bed at the top, and she was putting sheets on there. My son and I were laughing about it because my wife is a little on the klutzy side.

{¶69} "Q. O.K. She fell. Is that when she hurt herself?

{¶70} "A. That's what she told me, and that's what she said.

{¶71} "[PROSECUTOR]: Objection. I move to have all of that stricken. This is –

{¶72} "[THE COURT]: *** he can testify as to what he observed. Not to what somebody else told him.

{¶73} "[Defense counsel]: I should be able to get her to testify. I asked her directly how did she hurt herself at Bowling Green.

{¶74} "THE COURT: And she said she was not hurt there. But if he observed it, he can testify to anything he observed.

{¶75} "BY [DEFENSE CONSEL]:

{¶76} "Q. Did you observe her fall off?

{¶77} "A. No.

{¶78} "Q. O.K."

{¶79} Our reading of this excerpt shows that the trial court excluded as hearsay Mr. Trefney's testimony regarding what Mrs. Trefney allegedly stated to him as to the source of the bruise.

{¶80} Evid.R. 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Although Mr. Trefney claims he offered the statement solely for the purpose of attacking Mrs. Trefney's credibility, it is apparent that the statement allegedly made by Mrs. Trefney – that she injured her arm when she fell in the dorm – was offered substantively, i.e., to prove the truth of the matter asserted, as it goes directly to the theory of the defense.

{¶81} Mr. Trefney argues he should have been allowed under Evid.R. 613 ("Impeachment by self-contradiction") to impeach Mrs. Trefney, by testifying about what she had told him about the dorm incident, citing *State v. Pierce*, 2d Dist. No. 24323, 2011-Ohio-4873.

{¶82} Pursuant to Evid.R. 613(B), a party may introduce extrinsic evidence of a witness's prior inconsistent statement to impeach the witness's credibility. The rule states, in pertinent part:

{¶83} "Extrinsic evidence of a prior inconsistent statement by a witness is admissible if both of the following apply:

{¶84} "(1) If the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require;

{¶85} "(2) The subject matter of the statement is one of the following:

{¶86} "(a) A fact that is of consequence to the determination of the action other than the credibility of a witness[.]"

{¶87} The extrinsic evidence of a prior inconsistent statement Mr. Trefney attempted to introduce, i.e., his own testimony that Mrs. Trefney told him she injured herself in the dorm, does not meet the requirement of Evid.R. 613, because it is not testimony "offered solely for the purpose of impeaching the witness" – it is the theory of defense *itself*.

{¶88} In *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, appellant argued his trial counsel should have introduced a certain prior inconsistent statement under Evid.R. 613(B) to impeach a witness's credibility, because that prior inconsistent statement would have corroborated a defense theory. The court rejected that claim, explaining the impropriety of the use of Evid.R. 613(B) for substantive purposes:

{¶89} "[Appellant's] argument disregards the difference between using a prior statement to impeach its maker under Evid.R. 613(B) and using it as substantive evidence – i.e., to prove the truth of the matter asserted in the statement – under Evid.R. 801(D)(1)(a). [Appellant] cites Evid.R. 613(B), which permits extrinsic evidence of a prior inconsistent statement only to impeach. * * *

{¶90} "Substantive use of a prior inconsistent statement is covered by Evid.R. 801(D)(1)(a). Under that rule, there are limited circumstances in which a prior inconsistent statement is not hearsay and may be used as substantive evidence – i.e., to prove the truth of the matter asserted in the statement. A prior inconsistent statement is not hearsay if it 'was given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.' Evid.R. 801(D)(1)(a). *See State v. Julian* (1998), 129 Ohio App.3d 828, 836, 719 N.E.2d 96, fn. 12." *Bethel* at ¶182-183.

{¶91} Therefore, Mr. Trefney's attempt to introduce an out-of-court statement for its truth under the guise of Evid.R. 613(B) was properly recognized as such by the trial court, and the court did not abuse its discretion in sustaining the prosecutor's objection to the statement as hearsay. The fourth assignment of error lacks merit.

Whether Trial Court Improperly Limited Cross-Examination of the Deputy

{¶92} Under the fifth assignment of error, Mr. Trefney contends the trial court erred in "refusing to permit [him] to question Deputy Yogovich [sic] about her not inquiring of [his] version of events prior to and at the time of his arrest." He claims he should be allowed to cross-examine the deputy thoroughly regarding whether she allowed him to make any statement at the time of his arrest.

{¶93} Mr. Trefney cites *State v. Ajumu*, 8th Dist. No. 95285, 2011-Ohio-2520, in support of his argument. In that case, appellant complained that the state improperly commented on the exercise of his post-arrest right to remain silent. The court explained that, among the post-arrest rights that attach to a defendant is the right to remain silent, citing *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). "Under *Miranda*, the state may not use at trial 'the fact that [the defendant] stood mute or claimed his privilege in the face of accusation.'" *Ajumu* at ¶22, citing *Miranda* at 468, fn. 37. "[I]mplicit in the Miranda warnings is an assurance that silence carries no penalty, and, due to the warnings, every post-arrest silence is insolubly ambiguous." *Id*., citing *Doyle v. Ohio*, 426 U.S. 610, 617, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). We fail to see the relevance of this case.

{¶94} Mr. Trefney refers us to the following testimony by the deputy under cross-examination:

{¶95} "Q. *** [Y]ou made up your mind that he's going to be charged and that's – that's it. You arrested him and took him to jail; is that correct?

{¶96} "A. I had probable cause to place him under arrest.

{¶97} "Q. Did you talk to him? Mr. Trefney.

{¶98} "A. Initially at the house?

{¶99} "Q. Yes.

{¶100} "A. He didn't say anything about whether or not it happened or not.

{¶101} "Q. Did you question him as to what had happened? You never questioned him, did you?

{¶102} "A. I did not read him Miranda Rights.

{¶103} "Q. You didn't question him because you didn't care.

{¶104} "[Prosecutor]: Objection.

{¶105} "THE COURT: Sustained. That remark is stricken. The jury is to disregard that remark.

{¶106} "BY [DEFENSE COUNSEL]:

{¶107} "Q. Well, he was a suspect. You didn't want his side of the story told to you; is that correct?

{¶108} "A. Didn't want to?

{¶109} "Q. Yeah.

{¶110} "A. I had enough probable cause to place him under arrest.

{¶111} "Q. O.K. So you had made up your mind he is to be arrested and that's the end of it; is that correct?

{¶112} "A. If there's physical injury and there is probable cause, yes.

{¶113} "Q. And you chose to – you chose at this time not to give him his Miranda Rights? You chose not to question him?

{¶114} "[PROSECUTOR]: Objection. We've been in this circle. It's all the same questions over and over again

{¶115} "THE COURT: Yes. This is getting repetitious. Sustained."

{¶116} We do not see how the prohibition against a prosecutor's commenting on a defendant's right to remain silent has any bearing on this case. The prosecutor in this case did not comment on Mr. Trefney's "silence" regarding the incident before or during his arrest. Rather, it was his own counsel who elicited the testimony from the deputy that he did not make any statement about the incident. As the transcript shows, Mr. Trefney did not make any statement because the deputy did not question him regarding the incident – as she explained, she had sufficient probable cause to arrest him for domestic violence based on her interview of the victim and her observation of the injury. Under the circumstances of this case, a defendant's post-arrest right to remain silent pursuant to *Miranda* and the prohibition against the state's commenting on such silence is simply not implicated.

{¶117} Furthermore, our review of the transcript shows the court did not limit the defense's cross-examination as to the circumstances surrounding the arrest. The prosecutor first objected when the defense counsel remarked, "You didn't question him because you didn't care." The court sustained the objection and instructed the jury to disregard the remark. As the remark was clearly inflammatory, the court was within its direction to exclude it from the jury's consideration. The prosecutor objected again when the defense counsel, after already eliciting testimony from the deputy that she did not administer the *Miranda* warnings, commented again, "You chose at this time not to

give him his Miranda Rights?" The court sustained the objection on the ground the testimony was repetitious, which was within its discretion.

{¶118} We find no support in the record for Mr. Trefney's claim that the trial court improperly limited his cross-examination of the deputy surrounding his arrest. The fifth assignment of error is without merit.

{¶119} Judgment of the Portage County Municipal Court, Ravenna Division, is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.