

[Cite as *State v. Malott*, 2015-Ohio-2968.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
<i>Plaintiff-Appellee</i>	:	Appellate Case No. 26420
	:	
v.	:	Trial Court Case No. 2014-CRB-66
	:	
TERESA MALOTT	:	(Criminal Appeal from
	:	Municipal Court)
<i>Defendant-Appellant</i>	:	
	:	

.....
OPINION

Rendered on the 24th day of July, 2015.

.....
RAYMOND DUNDES, Atty. Reg. No. 0041515, Prosecuting Attorney, 195 South Clayton Road, New Lebanon, Ohio 45345
Attorney for Plaintiff-Appellee

MELISSA REPLOGLE, Atty. Reg. No. 0084215, 2312 Far Hills Avenue, Suite 145, Dayton, Ohio 45419
Attorney for Defendant-Appellant

.....

WELBAUM, J.

{¶ 1} Defendant-appellant, Teresa Malott, appeals from her conviction in the Montgomery County Municipal Court, Western Division, for one count of domestic violence following a bench trial. Malott contends her conviction was against the manifest weight of the evidence because the evidence established that she was acting in self-defense. We disagree, and for the reasons outlined below, Malott's conviction will be affirmed.

{¶ 2} On January 16, 2014, Malott was charged with one count of domestic violence in violation of R.C. 2919.25, a misdemeanor of the first degree, as well as one count of theft in violation of R.C. 2913.02, also a misdemeanor of the first degree. The charges stemmed from a January 15, 2014 altercation between Malott and Stanley Smith, the father of Malott's thirteen-year-old son, M.S. Malott pled not guilty to the indicted charges and the matter proceeded to a bench trial on August 1, 2014. At trial, the State presented testimony from Smith and the investigating police officer, Eric White of the Trotwood Police Department. The defense presented testimony from Malott and M.S.

{¶ 3} During trial, it was established that Malott and Smith had a history of domestic violence, as each party had been previously charged with domestic violence toward the other; however, only Smith had been convicted. There was no dispute that on January 15, 2014, Smith had given Malott permission to visit his residence in Trotwood, Ohio, in order to pick up a video game console that he had purchased for M.S. Malott and Smith both testified that Smith had purchased the console in exchange for Malott giving Smith a flat-screen television. According to both parties, Malott had given

Smith the television prior to her picking up the video game console. When Malott went to pick up the console, she brought M.S., as well as her five-year-old daughter from another relationship. During the car ride to Smith's residence, Malott and M.S. got into an argument, thereby causing M.S. to be visibly upset when they arrived.

{¶ 4} Smith testified that when Malott arrived at his house she was arguing with both M.S. and her daughter. He claimed that Malott took a large metal spoon from his kitchen to spank her daughter, but he snatched the spoon from her hand and put it on the coffee table. Thereafter, Smith testified that Malott became angry at him and started to argue with him about M.S.'s behavior. Smith testified that he did not want to argue so he told Malott to leave his house and to not take the video game console, as it was his intention to send it home with M.S. According to Smith, Malott then grabbed the console's controller and ran outside leaving her purse behind. When Malott realized that she had left her purse, Smith testified that she went back inside to get it, but instead took the console. Smith then claimed that he put his arm across the door to prevent Malott from leaving with the console, to which Malott responded by elbowing him in the stomach. Smith testified that they began fighting over the console, and as he tried to jerk the console from her arms, Malott fell backwards onto his coffee table.

{¶ 5} After Malott fell onto the coffee table, Smith testified that he was able to grab the console from her. However, Smith claimed that after he retrieved the console, Malott grabbed the metal spoon from the coffee table and hit him with the spoon multiple times on the back of his head and above his eye. Smith then claimed that Malott went toward the front door and demanded her purse, which he threw outside. Smith thereafter called the police and told M.S. to stay with him. An ambulance eventually arrived at Smith's

house and provided him with medical assistance; however, Smith also drove himself to the hospital for further treatment. According to Smith, he had five stitches placed above his eye and a staple put in the back of his head as a result of Malott hitting him with the spoon. The State admitted photographic evidence of the metal spoon, Smith's injury, and the bloody scene left at Smith's house.

{¶ 6} Officer Eric White also testified at trial. White testified that he responded to the report of domestic violence at Smith's residence. When he arrived, he observed Smith bleeding from the face and being treated by paramedics. White testified that Smith had injuries above his eye and on the back of his head. While at the scene, White interviewed both Smith and M.S. Malott, however, was not present. White testified that based on his training and experience, and the information provided to him by Smith and M.S., he determined that Malott was the primary aggressor.

{¶ 7} Malott testified to a different series of events. According to Malott, Smith became angry when she arrived because he saw that M.S. was upset. Malott testified that she and Smith began to argue and call each other profane names. Malott then testified that Smith told her to leave his house. In response, Malott claimed that she told M.S. and her daughter to put on their coats, but Smith ordered M.S. to his bedroom. Malott then testified that Smith tried to push her out the door, but that she did not want to leave without M.S. or her purse. She claimed that Smith allowed her back inside his house to get her purse, but instead of getting her purse, she took the video game console.

{¶ 8} Upon taking the console, Malott testified that Smith grabbed her around the neck and choked her from behind. She also testified that Smith grabbed her around the waist with his left arm. Malott claimed that as she struggled to get away, she and Smith

fell over a chair and that Smith slammed her onto a coffee table. Because Smith was on top of her and refused to let her go, Malott testified that she picked up the metal spoon from the coffee table and hit Smith's head with the spoon multiple times in self-defense. In response, Smith picked her up, carried her out the house, and threw her to the ground. Malott also claimed that Smith threw her purse at her and spit blood in her face. After being removed from the house, Malott claimed that she ran to the neighbors to call 9-1-1 and waited an hour without a response; however, Malott eventually spoke with Officer White regarding the incident. According to Malott, Officer White asked her about hitting Smith with the spoon and then told her she was being charged with domestic violence.

{¶ 9} M.S. testified to a slightly different version of events. According to M.S., shortly after he arrived at Smith's residence with Malott, Smith became angry upon seeing that he was upset and then called Malott a profane name. M.S. claimed that his parents began to argue and that Smith told him to go to his room; however, M.S. testified that he only went halfway down the hallway. M.S. also testified that Smith told Malott to leave the house, but instead of leaving, Malott grabbed the video game console. M.S. then saw his parents have a "tug of war" with the console. He claimed that Smith was able to jerk Malott's hands off the console and then laid the console on a chair. M.S. then testified that Smith tried to get Malott to leave the house by pushing her toward the open door, but that she continued to resist and wrestle with Smith.

{¶ 10} As Smith was trying to get Malott to leave, M.S. testified that he saw Malott throw elbows at his father's head and back. He claimed that due to Malott's elbowing, Smith grabbed Malott and threw her on the coffee table. M.S. further testified that he observed Malott grab the spoon and hit Smith with it as he was trying to get her out of the

house. M.S. testified that he never saw Smith with his hands around Malott's neck; however, he did see Smith pick up Malott and throw her outside. Thereafter, M.S. saw Malott run at the door multiple times to try and get her purse, which Smith eventually threw outside.

{¶ 11} Following trial, the trial court issued a decision and entry on August 19, 2014, finding Malott guilty of domestic violence, but not guilty of theft. Thereafter, on September 16, 2014, the trial court sentenced Malott to 180 days in jail, all of which were suspended, a \$500 fine, which was also suspended, five years of unsupervised community control, and court costs. Malott now appeals from her domestic violence conviction, raising the following assignment of error for review.

MS. MALOTT'S CONVICTION FOR DOMESTIC VIOLENCE WAS
CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 12} Under her sole assignment of error, Malott contends her domestic violence conviction was against the manifest weight of the evidence because, according to her, the evidence established that she was acting in self-defense during her physical altercation with Smith.

{¶ 13} "A weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive." (Citation omitted.) *State v. Wilson*, 2d Dist. Montgomery No. 22581, 2009-Ohio-525, ¶ 12. When evaluating whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, 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.” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). A judgment should be reversed as being against the manifest weight of the evidence “only in the exceptional case in which the evidence weighs heavily against the conviction.” (Citations omitted.) *Martin* at 175.

{¶ 14} “Under Ohio law, self-defense is an affirmative defense for which the defendant bears the burden of proof.” *State v. Fritz*, 163 Ohio App.3d 276, 2005-Ohio-4736, 837 N.E.2d 823, ¶ 20 (2d Dist.). “In order for a defendant to establish self-defense involving the use of nondeadly force, he must prove by a preponderance of the evidence (1) that the defendant was not at fault in creating the situation giving rise to the altercation and (2) that he had reasonable grounds to believe and an honest belief, even though mistaken, that he was in imminent danger of bodily harm and his only means to protect himself from such danger was by the use of force not likely to cause death or great bodily harm.” (Footnote and citations omitted.) *Id.* “There is no duty to retreat when nondeadly force is employed.” *Id.*, citing *State v. Marbury*, 2d Dist. Montgomery No. 19226, 2004-Ohio-1817, ¶ 22.

{¶ 15} Having reviewed the entire record, we believe the trial court’s decision to reject Malott’s self-defense claim was not against the manifest weight of the evidence. The weight of the evidence indicates that Malott created the situation giving rise to the physical altercation with Smith. All three witnesses at the scene testified that Smith told Malott to leave his house while they were arguing; however, instead of leaving through the open front door without incident, and rather than getting her purse, Malott chose to

grab the video game console, which instigated a physical struggle over possession of the console. During the struggle, both M.S. and Smith testified that Malott began elbowing Smith, which, according to Smith, resulted in him jerking the console from Malott's hands causing her to fall on the coffee table. According to M.S., Smith threw Malott down on the coffee table in response to her elbowing him in the head and back. Regardless of the differences in Smith and M.S.'s versions of events, both appear to indicate that Malott instigated the affray by failing to leave, taking the console when Smith told her not to, and elbowing Smith.

{¶ 16} While there is conflicting testimony as to who was the initial physical aggressor during the affray, the decision as to whose testimony to credit on that issue is for the finder of fact to resolve. *State v. Hammad*, 2d Dist. Montgomery No. 26057, 2014-Ohio-3638, ¶ 13, citing *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967). "This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the factfinder lost its way." (Citation omitted.) *State v. Bradley*, 2d Dist. Champaign No. 97 CA 03, 1997 WL 691510, *4 (Oct. 24, 1997). Here, the trial court was the finder of fact, and its decision indicates that it did not find Malott's version of events credible. Based on the testimony given by Smith, M.S., and Officer White, we do not find that the evidence weighs heavily against the trial court's decision rejecting Malott's self-defense claim. Accordingly, we do not find that the trial court clearly lost its way and created a manifest miscarriage of justice.

{¶ 17} Malott's sole assignment of error is overruled and the judgment of the trial court is affirmed.

.....

DONOVAN, J. and HALL, J., concur.

Copies mailed to:

Raymond Dundes
Melissa Replogle
Hon. Adele M. Riley