[Cite as *State v. Laney*, 2019-Ohio-2648.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WILLIAMS COUNTY

State of Ohio — Court of Appeals No. WM-18-004

Appellee — Trial Court No. 17CR000110

v.

Alan K. Laney — **DECISION AND JUDGMENT**

Appellant — Decided: June 28, 2019

* * * * *

Dave Yost, Ohio Attorney General, and Micah R. Ault, for appellee.

Karin L. Coble, for appellant.

* * * * *

ZMUDA, J.

I. Background and Procedure

{¶ 1} On June 6, 2017, police were called to the home of appellant, Alan Laney, to investigate injuries to his girlfriend's 17-month-old child, S.H. Laney lived at the home with his girlfriend, Alisha Underwood, along with two of his children, Kayla Harrold, his

adult daughter, and his newborn son, born to Underwood. Additionally, Underwood's three other minor children resided at the home with Laney.

{¶ 2} Jennifer Benson, Harrold's mother and Laney's ex-wife, placed the call to police after Harrold called her to come to the house to see S.H.'s injuries. Both Laney and Underwood were out at the time, and had left Harrold to babysit all of the children, including S.H. When Benson arrived, she found Harrold very distraught, and noted the bruising on S.H., covering the child from head to toe. While Benson was on the phone with the police dispatcher, Laney and Underwood returned home.

{¶ 3} When police arrived, they separated Harrold and Benson from Laney and Underwood for questioning. Harrold told police that she witnessed Laney strike and kick S.H., and spank her with a board and a flyswatter in the days preceding, and that she did not do anything at the time because she feared Laney. However, Laney claimed he did nothing to S.H., indicating instead that any injuries resulted from a fall down the outside stairs to the home.

{¶ 4} Officers noted bruising to S.H.'s face and a mark on her chest that appeared to match a flyswatter in the home. Police also noticed a paddle next to Laney's chair. They took photographs of the injuries and the scene, and collected the paddle and fly swatter as evidence. Police called Tracy Valentine, a Williams County Department of Job and Family Services investigator, to the scene. Valentine assisted in the investigation, took photographs of the injuries, and assisted in interviewing witnesses.

{¶ 5} Officers transported S.H. to the hospital for an examination by Dr. Francis Aona, who noted significant bruising from head to toe, with the bruising indicating injury over a period of time, displaying various stages of healing. Dr. Aona indicated that the injuries were not consistent with a fall down the stairs, and the bruise to the chest resembled a grid-like pattern, consistent with the flyswatter collected from the scene. In addition to bruising, Dr. Aona noted an injury to the right hand he identified as a second-degree burn from a cigarette. Dr. Aona declined to take x-rays or scans, so the next day, investigators also had S.H. examined at Toledo Hospital, where S.H. was examined a second time, and had x-rays and CT scans taken. The findings from the Toledo Hospital exam were consistent with S.H.'s initial examination.

{¶ 6} On September 19, 2017, Laney was indicted on 11 counts stemming from the abuse of S.H, including 2 counts of felonious assault, in violation of R.C. 2903.11(A)(1)(D)(1)(a), 2 counts of endangering children, in violation of R.C. 2919.22(B)(1)(E)(2)(d), felonies of the second degree, 6 counts of endangering children, in violation of R.C. 2919.22(B)(2)(E)(3), felonies of the third degree, and 1 count of endangering children, in violation of R.C. 2919.22(B)(4) and (E)(3), a felony of the third degree.

{¶ 7} The grand jury also indicted Underwood on two felony counts and one misdemeanor count of child endangering for her involvement in the abuse. As part of a plea agreement, Underwood entered a guilty plea to one count of attempted endangering children, a fourth-degree felony, and agreed to testify against Laney.

{¶ 8} Because the other minor children witnessed the abuse, the trial court conducted a voir dire examination of three of the minor children on April 23, 2018, prior to the trial, and determined two of the three were competent to testify. The matter proceeded to a bench trial on May 3, 2018. The trial court entered acquittals as to one of the felonious assault counts, one of the second-degree felony child endangering counts, and one of the third-degree felony child endangering counts. The trial court found Laney guilty as to the remaining counts, and after merging allied offenses, sentenced on Count 1 for felonious assault involving the cigarette burn, Count 6 for child endangerment involving strikes to the face, Count 9 for child endangerment involving strikes with a flyswatter and wooden paddle, and Count 10 for child endangerment involving injuries to the legs caused by stomping. The trial court ordered the sentences to run consecutively, for an aggregate prison term of seven and one-half years.

{¶ 9} Laney filed a timely appeal of his conviction, asserting the following assignments of error:

> I. Because the conviction for felonious assault is based solely upon one burn which did not require treatment, the conviction is unsupported by sufficient evidence and is against the manifest weight of the evidence.
>
> II. Two of the three convictions for endangering are unsupported by sufficient evidence and are against the manifest weight of the evidence, when the state's expert opined that only one act cause "serious physical harm" and the child's mother admitted to lying about witnessing the acts.

II. Analysis

{¶ 10} Laney raises an evidentiary challenge to his conviction on felonious assault and his conviction on two of the three charges of child endangering, arguing the trial court lacked sufficient evidence to convict, and the convictions are also against the manifest weight of the evidence. While Laney combines the sufficiency and weight challenge, within each assignment of error, we address each challenge separately.

{¶ 11} "When a defendant challenges the sufficiency of the evidence, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Bies*, 74 Ohio St.3d 320, 324, 658 N.E.2d 754 (1996), quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1996).

{¶ 12} The function of the appellate court when reviewing a case for sufficiency of the evidence is "to examine the evidence admitted at trial to determine 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, 574 N.E.2d 492 (1991), citing *State v. Eley*, 56 Ohio St.2d 169, 172, 383 N.E.2d 132 (1978). When reviewing for sufficiency, "the appellate court will not weigh the evidence or assess the credibility of the witnesses." *State v. Tucker*, 6th Dist. Wood No. WD-16-063, 2018-Ohio-1869, ¶ 23, citing *State v. Walker*, 55 Ohio St.2d 208, 212, 378 N.E.2d 1049 (1978).

{¶ 13} In contrast, when reviewing a verdict on a claim that it is against the manifest weight of the evidence, "the appellate court must weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether the jury clearly lost its way in resolving evidentiary conflicts so as to create such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Tucker* at ¶ 24, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

{¶ 14} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Thompkins* at 387, citing *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). Reversal on manifest weight grounds occurs only for "the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 15} "Although under a manifest-weight standard we consider the credibility of witnesses, we must nonetheless extend special deference to the jury's credibility determinations given that it is the jury who has the benefit of seeing the witnesses testify, observing their facial expressions and body language, hearing their voice inflections, and discerning qualities such as hesitancy, equivocation, and candor." *Tucker* at ¶ 25, citing *State v. Fell*, 6th Dist. Lucas No. L-10-1162, 2012-Ohio-616, ¶ 14.

{¶ 16} Laney was convicted under R.C. 2903.11(A)(1) for felonious assault, a felony of the second degree. The assault involved a cigarette burn to a 17-month-old child. The statute prohibits causing serious physical harm, which is defined in R.C. 2901.01(A)(5) as including:

> (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
>
> (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

{¶ 17} In his first assignment of error, Laney argues that the state presented insufficient evidence to support this felonious assault conviction and that his conviction was against the manifest weight of the evidence because a cigarette burn does not constitute "serious physical harm."

{¶ 18} To support a conviction for felonious assault under R.C. 2903.11(A)(1), the state must prove that the defendant knowingly caused serious physical harm to another. R.C. 2901.22(B) defines "knowingly" as follows:

> (B) 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.

{¶ 19} For the state to prove Laney "acted 'knowingly,' it is only necessary that the serious physical harm is a 'reasonable and probable' result of his action." *State v. Powell*, 11th Dist. Lake No. 2007-L-187, 2009-Ohio-2822, ¶ 52, quoting *State v. Dixon*, 8th Dist. Cuyahoga No. 82951, 2004-Ohio-2406, ¶ 16.

{¶ 20} The trial court, in this case, heard testimony from Dr. Aona, who testified that the victim, S.H., suffered a second-degree burn to the hand caused by a lit cigarette. He testified that the burn required no future treatment as it was already healing at the time S.H. appeared at the hospital. Alisha Underwood testified that she witnessed Laney burn S.H. with the cigarette, and that S.H. cried when Laney burned her. While Laney attempts to call into question the credibility of Underwood, we do not weigh the evidence or assess the credibility of witnesses in a sufficiency review. *Tucker*, 6th Dist. Wood No. WD-16-063, 2018-Ohio-1869, at ¶ 23, citing Walker, 55 Ohio St.2d at 212, 378 N.E.2d 1049.

{¶ 21} The state presented evidence that, if believed by the trial court, supported a finding that Laney knowingly caused serious physical harm by burning S.H. with a cigarette. Therefore, the trial court had a sufficient basis from which it could find Laney guilty beyond a reasonable doubt, and Laney's sufficiency challenge to Count 1, felonious assault, is without merit. *See Bies*, 74 Ohio St.3d at 324, 658 N.E.2d 754, quoting *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 22} Laney next argues that a cigarette burn does not constitute "serious physical harm," and therefore, his conviction was against the manifest weight of the

evidence. In support, Laney relies on authority involving a second-degree burn to a child, arguing that the verdict in that case was reversed on appeal for lack of evidence of "serious physical harm." *See State v. Jackson*, 8th Dist. Cuyahoga No. 95920, 2011-Ohio-5920. However, Laney misstates the holding of *Jackson*, as the Eighth District Court of Appeals reversed the conviction because the indictment was duplicitous and did not adequately delineate the counts charged, creating the possibility of convictions based on less than unanimous agreement by the jury as to any one charge. In addition, in *Jackson*, while the jury acquitted on the felonious assault charge, there is nothing within that case to indicate that a second-degree burn is not "serious physical harm" as a matter of law, as argued by Laney.

{¶ 23} Next, he argues that "serious physical harm" requires more severe or widespread burns, citing authority that involved extensive injuries, but did not require more extensive injury to satisfy this element, as a matter of law. *See, e.g., State v. Louis*, 4th Dist. Scioto No. 15CA3693, 2016-Ohio-7596, ¶ 60 ("serious physical harm" proven by scarring and rope burns, constituting both permanent disfigurement and temporary, serious disfigurement). Laney also relies on *State v. Burdine-Justice*, 125 Ohio App.3d 707, 718, 709 N.E.2d 551 (12th Dist.1998), but mischaracterizes the dissenting opinion as a majority's reversal of the conviction, in support of his argument.[1] In fact, the

[1] We find appellant's mischaracterization of case law troubling.

majority in *Burdine-Justice* affirmed the conviction, finding extensive bruising supported the element of "serious physical harm." *Burdine-Justice* at 715.

{¶ 24} In response, the state relies on two cases in which the state secured a conviction for felonious assault against a young child, based on a cigarette burn, arguing "Ohio case law is unanimous" in finding a cigarette burn constitutes "serious physical harm." Neither case cited by the state, however, demonstrates such "unanimous" and well-settled law in support of the position that a cigarette burn is "serious physical harm" as a matter of law.[2]

{¶ 25} In the state's first case, *State v. Moyer*, 7th Dist. Columbiana No. 06-CO-24, 2007-Ohio-598, the only issue on appeal related to the sentence, with no challenge based on whether a cigarette burn satisfied the "serious physical harm" requirement. Likewise, in *State v. Philpott*, 147 Ohio App.3d 505, 2002-Ohio-808, ¶ 42 (8th Dist.2002), the only reference to a cigarette burn pertained to Philpott's prior conviction for felonious assault in 1980, for Philpott's act of burning his infant son with a cigarette, and whether that conviction was a sexually-oriented offense.

{¶ 26} While the state's authority does not directly support its argument, there is otherwise authority to support a fact-finder's determination of "serious physical harm," based on an untreated, second-degree burn as in the present case. *See State v. Hill*, 2d Dist. Montgomery No. 24410, 2011-Ohio-5810, ¶ 65; *see also State v. Tyson*, 9th Dist.

[2] While the state's mischaracterization of authority in this case is less egregious, we remain concerned regarding any mischaracterization of the law.

Summit No. 13768, 1989 Ohio App. LEXIS 673 (Mar. 1, 1989) (where doctor observed a triangular injury, "sharply demarcated" and resembling "a household iron," the evidence supported the conviction for felonious assault.). This determination of the degree of harm necessary for a finding of "serious physical harm," however, is not based on any absolute measure or well-settled law, but instead requires consideration of qualifiers such as "substantial," "temporary," or "acute." *State v. Mango*, 8th Dist. Cuyahoga No. 103146, 2016-Ohio-2935, ¶ 33.

{¶ 27} Laney appears to argue, however, that "serious physical harm" is not a determination for the trier of fact, and instead cites to the expert testimony of Dr. Aona, who opined that he did not consider the second-degree cigarette burn to constitute "serious physical harm." Proof of "serious physical harm," however, does not require expert medical testimony; rather, it is an element, like any other, that the state must prove beyond a reasonable doubt. *See State v. Stansel*, 2d Dist. Clark No. 2018-CA-076, 2019-Ohio-1906, ¶ 29, citing *State v. Redman*, 3d Dist. Allen No. 1-15-54, 2016-Ohio-860, ¶ 24, citing *State v. Petty*, 10th Dist. Franklin Nos. 11AP-716, 11AP-766, 2012-Ohio-2989, ¶ 29; *see also State v. Driesbaugh*, 11th Dist. Portage No. 2002-P-0017, 2003-Ohio-3866, ¶ 46 ("Appellant does not cite any case law in support of her proposition [requiring expert medical testimony] and our research has not revealed any.").

{¶ 28} Reversal based on a manifest weight challenge to the felonious assault conviction requires a finding that the trial court "clearly lost its way in resolving evidentiary conflicts so as to create such a manifest miscarriage of justice." *Tucker*, 6th

Dist. Wood No. WD-16-063, 2018-Ohio-1869, at ¶ 24, citing *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. Here, however, Dr. Aona's opinion regarding "serious physical harm" does not create contradictory evidence on the issue. Instead, the trial court correctly considered the evidence, including Underwood's testimony that she witnessed Laney burn S.H. on her hand with a cigarette and Dr. Aona's testimony that the second-degree burn on the victim's hand was caused by a cigarette. Therefore, considering the evidence before the trial court, we do not find that the conviction resulted from the trial court losing its way in resolving any evidentiary conflicts in determining that a second-degree cigarette burn on the hand of a 17-month-old child constituted "serious physical harm," as defined by R.C. 2901.01(A)(5). Accordingly, we find Laney's first assignment of error not well-taken.

{¶ 29} In his second assignment of error, Laney challenges two of his three convictions for child endangering as unsupported by sufficient evidence and against the manifest weight of the evidence. Counts 9 and 10, at issue here, arose from Laney hitting S.H. with a flyswatter and stomping on S.H.'s leg, in violation of R.C. 2919.22(B)(2), a felony of the third degree. A conviction on these counts required evidence demonstrating torture or cruel abuse of a victim under the age of 18. *See* R.C. 2919.22(B)(2).

{¶ 30} In challenging these convictions, Laney again relies on the testimony of Dr. Aona, opining that only one act of Laney resulted in "serious physical harm." As previously noted, the state need not present expert medical testimony to demonstrate "serious physical harm." Furthermore, Laney's argument is based on the false premise

that the state needed to prove "serious physical harm" as an element of child endangering, a felony of the third degree under R.C. 2919.22(B)(2). Instead, Counts 9 and 10 lacked the additional charge that the offense resulted in serious physical harm, which would have raised the offense from a third-degree felony to a second-degree felony under R.C. 2919.22(E)(3).

{¶ 31} To sustain a conviction for child endangering in Counts 9 and 10, the state was required to demonstrate "torture or cruel abuse." R.C. 2919.22(B)(2); *State v. Dayton*, 3d Dist. Union No. 14-17-03, 2018-Ohio-3003, ¶ 17. Torture, as used in the statute, has been defined as "the infliction of severe pain or suffering (of body or mind)." *State v. Nivert*, 9th Dist. Summit Nos. 16806, 16843, 1995 Ohio App. LEXIS 4666, *5 (Oct. 18, 1995), citing XI Oxford English Dictionary, 169-170 (2d Ed.1933). "Abuse" has been defined as "ill-use, maltreat; to injure, wrong or hurt." *Nivert* at 6, citing I Oxford English Dictionary at 44-5. Cruel treatment has been described as "demonstrate[ing] indifference to or delight in another's suffering" or "treat severely, rigorously, or sharply." *Id.*, citing II Oxford English Dictionary at 1216-17.

{¶ 32} In *State v. Wainscott*, 12th Dist. Clermont No. CA2015-07-056, 2016-Ohio-1153, ¶ 26-30, the Twelfth District Court of Appeals affirmed child endangerment convictions where the defendant forced the victims to stand in a corner for hours and beat them if they moved, with several witnesses testifying to seeing the defendant commit these acts. In *State v. Tate*, 8th Dist. Cuyahoga No. 104342, 2016-Ohio-8309, ¶ 6, the Eighth District Court of Appeals affirmed a conviction upon a plea for child

endangerment where the defendant repeatedly hit the two-year-old victim with a stick. In *State v. Brooks*, 8th Dist. Cuyahoga Nos. 75711 and 75712, 2000 Ohio App. LEXIS 1354 (Mar. 30, 2000), the Eighth District affirmed another conviction for child endangerment where the victim suffered brain injuries and the defendant opted not to seek medical attention.

{¶ 33} In arguing insufficient evidence, Laney compares the evidence in his case to the evidence presented in *State v. Brown*, 9th Dist. Summit No. 23737, 2008-Ohio-2956. In *Brown*, the Ninth District Court of Appeals reversed a conviction for child endangerment, in violation of R.C. 2912.22(B)(2), finding four strikes to the bottom with a belt, leaving no deep bruising, "was more consistent with normal discipline" of a child than with torture or cruel abuse. *Brown* at ¶ 15. The facts in this case, however, do not reflect "normal discipline" of S.H.

{¶ 34} Here, the trial court found that Laney hit S.H. with a flyswatter with enough force to leave a grid-like pattern on her chest, and he used his foot, while wearing shoes, to stomp on S.H.'s leg, causing visible bruising. The evidence offered against Laney, if believed, provided a sufficient basis from which the trier of fact could find him guilty beyond a reasonable doubt, satisfying a sufficiency review. *Bies*, 74 Ohio St.3d at 324, 658 N.E.2d 754, quoting *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781, 61 L.E.2d 560.

{¶ 35} Regarding the manifest weight of the evidence challenge, Laney points only to Underwood's testimony as contradictory, describing her inconsistency as a witness as proof she lacked credibility, requiring reversal based on the manifest weight of

the evidence. Laney fails to address other testimony, however, and Harrold testified that she witnessed Laney stomp on S.H.'s ankle twice and hit her with the flyswatter on the chest. Considering the evidence, we afford the trial court deference in determining the credibility of the witnesses, including Underwood. *Tucker*, 6th Dist. Wood No. WD-16-063, 2018-Ohio-1869 at ¶ 25, citing *Fell*, 6th Dist. Lucas No. L-10-1162, 2012-Ohio-616, ¶ 14.

{¶ 36} In *State v. Mayes*, the appellant also challenged the credibility of witnesses in arguing that the verdict was against the manifest weight of the evidence. *State v. Mayes*, 10th Dist. Franklin No. 03AP-1154, 2005-Ohio-1769. In that case, and here, "defense counsel cross-examined the State's witnesses and brought any inconsistencies within their testimony to the jury's attention." *Id.* at ¶ 23. With regard to the testimony, "'[t]he jury was free to believe all, part, or none of the testimony of each witness.'" *Id.*, quoting *State v. Colvin*, 10th Dist. Franklin No. 04AP-421, 2005-Ohio-1448, ¶ 34. *See also Fell* at ¶ 14; *State v. Dotson*, 6th Dist. Wood No. WD-15-060, 2016-Ohio-8085, ¶ 33, citing *State v. Barnhart*, 6th Dist. Huron No. H-10-005, 2011-Ohio-2693, ¶ 55.

{¶ 37} Considering Laney's claim of inconsistencies, "any weight that should be given to alleged inconsistencies in the witnesses' testimony were determinations within the province of the jury, and such inconsistencies do not render a conviction against the manifest weight of the evidence." *Mayes* at ¶ 23, citing *State v. Raver*, 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Nivens*, 10th Dist. Franklin No. 95AP-1236, 1996 Ohio App. LEXIS 2245, *7 (May 28, 1996). *See also State v.*

Lamb, 6th Dist. Fulton No. F-17-002, 2018-Ohio-3089, ¶ 87; *State v. Gott*, 6th Dist. Lucas No. L-11-1070, 2013-Ohio-4624, ¶ 48; *Fell* at ¶ 14.

{¶ 38} Upon review of the record, this is not "the exceptional case in which the evidence weighs heavily against the conviction" that would warrant reversing the convictions. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541, quoting *Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. Accordingly, we find Laney's second assignment of error not well-taken.

III. Conclusion

{¶ 39} For the foregoing reasons, the judgment of the Williams County Court of Common Pleas is affirmed. Appellant is assessed the costs of this appeal, pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Christine E. Mayle, P.J. _____
JUDGE

Gene A. Zmuda, J. _____
CONCUR.
JUDGE