

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 09-CA-118
DAN TAYLOR, JR.	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Richland County Court of Common Pleas, Case No. 2009-CR-373-D

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: May 4, 2010

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

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Gwin, P.J.

{¶1} Defendant-appellant Dan Taylor, Jr. appeals from the conviction and sentence in the Richland County Court of Common Pleas on one count of domestic violence a felony of the fourth degree in violation of R.C. 2919.25. The plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On April 29, 2009, Appellant was living with Hope Aijan, the mother of his two year old child. That evening, Appellant had been at home drinking when Hope returned from work sometime after 11:00 p.m. Appellant asked Hope to take him to the store to buy cigarettes. Hope did not feel like going because she was tired from work; however, she ultimately agreed.

{¶3} The couple drove to the Duke & Duchess/B.P. located at 680 North Main Street in Mansfield, Ohio sometime around 1:00 a.m. Hope put gas in her vehicle. The pair went up to the window to pay for the gas and to buy cigarettes. Store clerk, Matthew Soria, waited on the couple. Hope became angry when the Appellant told Mr. Soria that he wanted a case of beer in bottles, rather than the cigarettes. She became even angrier when the Appellant took his beer and returned to the vehicle without paying for her gas.

{¶4} Hope paid for the gas and returned to her vehicle. The couple began to argue. During the argument, Appellant used a beer bottle to smash the windshield of the vehicle. He then grabbed Hope by the throat. At trial, she testified that he squeezed her neck; however, he did not use enough force to leave marks.

{¶15} Hope managed to get out of the vehicle and ran to the convenience store for help. Matthew Soria was inside sweeping the floor when he heard Hope banging on the door and yelling that Appellant was trying to hurt her. Mr. Soria could not see Appellant from inside the store; however, he saw beer bottles flying through the air and smashing on the ground near Hope. Mr. Soria did not open the door to the store because he was afraid Appellant would follow Hope into the store. Instead, he called 9-1-1. While he was on the phone, he saw several more bottles smash on the ground near Hope.

{¶16} By the time the police arrived, Hope had gotten into her vehicle and drove away, and Appellant had fled on foot. The officers took a report from Mr. Soria, and left the scene. However, they were called back approximately twenty-five minutes later because Hope had returned and wanted to make a report. At that time, she provided a statement about what had occurred. The officers did not notice any visible injuries on her body; however, they did observe broken glass near the door to the convenience store and the shattered windshield on her vehicle.

{¶17} As a result of the April 29, 2009 incident, Appellant was indicted by the Richland County Grand Jury for one count of domestic violence. The offense was a felony of the third degree because he had three prior domestic violence convictions.

{¶18} The Appellant's jury trial was held on August 13, 2009. At the conclusion of the evidence, the jury found Appellant guilty of domestic violence as charged in the indictment. After considering the Appellant's prior record, including a misdemeanor drug abuse conviction in 1992, a misdemeanor domestic violence conviction in 1998, a felony domestic violence conviction in 1998, a felony drug possession conviction in

2002, and a felony domestic violence conviction in 2004, the trial court sentenced Appellant to four years in prison.

{¶9} Appellant timely filed the instant appeal and raises the following assignment of error for our consideration:

{¶10} “I. WHETHER AFTER REVIEWING THE EVIDENCE AND TESTIMONY IN A LIGHT MOST FAVORABLE TO THE PROSECUTION COULD ONE HAVE FOUND THE ESSENTIAL ELEMENTS OF DOMESTIC VIOLENCE PROVEN BEYOND A REASONABLE DOUBT.”

I.

{¶11} In his sole assignment of error appellant argues that his conviction for domestic violence is based upon insufficient evidence. We disagree.

{¶12} Our standard of reviewing a claim that a verdict was not supported by sufficient evidence is to examine the evidence presented at trial to determine whether the evidence, if believed, would convince the average mind of the accused’s guilt beyond a reasonable doubt. The relevant inquiry 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 proven beyond a reasonable doubt, *State v. Jenks* (1991), 61 Ohio St. 3d 259.

{¶13} The Supreme Court has explained the distinction between claims of sufficiency of the evidence and manifest weight. Sufficiency of the evidence is a question for the trial court to determine whether the State has met its burden to produce evidence on each element of the crime charged, sufficient for the matter to be submitted to the jury.

{¶14} Manifest weight of the evidence claims concern the amount of evidence offered in support of one side of the case, and is a jury question. We must determine whether the jury, in interpreting the facts, so lost its way that its verdict results in a manifest miscarriage of justice, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390, 678 N.E.2d 541, 548-549. (Citations omitted). On review for manifest weight, a reviewing court is “to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses 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 judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment.” *State v. Thompkins*, 78 Ohio St.3d at 387. (Citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175). Because the trier of fact is in a better position to observe the witnesses’ demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph 1 of the syllabus.

{¶15} In *State v. Thompkins* supra, the Ohio Supreme Court held “[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary.” *Id.* at paragraph three of the syllabus. However, to “reverse a judgment of a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three judges on the court of appeals

panel reviewing the case is required." *Id.* at paragraph four of the syllabus; *State v. Miller* (2002), 96 Ohio St.3d 384, 2002-Ohio-4931 at ¶38, 775 N.E.2d 498.

{¶16} Appellant argues that the State failed to present sufficient evidence to prove that he knowingly caused or attempted to cause physical harm to Hope Ajian.

{¶17} Appellant argues his conduct did not create a situation in which Ms. Ajian would experience physical harm. Further, she did not testify that she feared for her safety only that she felt scared. He concludes that his behavior combined with the lack of physical marks on her indicating abuse means that the state failed to prove that he knowingly caused or attempted to cause physical harm. We disagree.

{¶18} To find appellant guilty of domestic violence the trier of fact would have to find that appellant knowingly caused or attempted to cause physical harm to a family or household member. R.C. 2919.25(A). Appellant does not dispute that the Ms. Ajian was a “family or household member.”

{¶19} Physical harm to persons is defined as “any injury, illness, or other physiological impairment, regardless of its gravity or duration.” R.C. 2901.01(A) (3).

{¶20} This court has previously held that “no showing of actual trauma or injury is needed to satisfy the ‘physical harm’ element of assault. The qualification of the physical contact as ‘physical harm’ is a matter to be determined by the trier of fact”. *State v. Robinson* (Sept. 30, 1985), 5th Dist. No. CA-6649; *State v. Dansby* (June 15, 1988), 5th Dist. No. 87AP090068. See, also *State v. Perkins* (March 27, 1998), 11th District No. 96-P-0221 (“When there is no tangible, physical injury such as a bruise or cut, it becomes the province of the jury to determine whether, under the circumstances, the victim was physically injured, after reviewing all of the evidence surrounding the

event”); *State v. Bowers*, 11th Dist. No. 2002-A-0010, 2002-Ohio-6913 at ¶15 (“In the instant case, the victim attested that appellant tackled him without his permission causing him to fall to the ground. The victim stated that he was not injured or bruised as a result of the incident; however, he attested that he experienced pain in his stomach and side when he was tackled. Reviewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that appellant inflicted physical harm on Boggs, as provided in R.C. 2901.22, and knowingly caused Boggs physical harm, as provided in R.C. 2901.01(A)(3)”).

{¶21} R.C. 2901.22 defines “knowingly” as follows:

{¶22} “(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.”

{¶23} Whether a person acts knowingly can only be determined, absent a defendant's admission, from all the surrounding facts and circumstances, including the doing of the act itself.” *State v. Huff* (2001), 145 Ohio App. 3d 555, 563, 763 N.E.2d 695. (Footnote omitted.) Thus, “[t]he test for whether a defendant acted knowingly is a subjective one, but it is decided on objective criteria.” *State v. McDaniel* (May 1, 1998), Montgomery App. No. 16221, (citing *State v. Elliott* (1995), 104 Ohio App.3d 812, 663 N.E.2d 412).

{¶24} R.C. 2923.02(A) provides a definition of attempt: “[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the

commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

{¶25} The Ohio Supreme Court has held that a criminal attempt occurs when the offender commits an act constituting a substantial step towards the commission of an offense. *State v. Woods* (1976), 48 Ohio St.2d 127, 357 N.E.2d 1059, paragraph one of the syllabus, overruled in part by *State v. Downs* (1977), 51 Ohio St.2d 47, 364 N.E.2d 1140; See also, *State v. Ashbrook*, 5th Dist. No.2004-CA-00109, 2005-Ohio-740, reversed on other grounds and remanded for re-sentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856; *In re: Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St. 3d 313, 2006-Ohio-2109. In defining substantial step, the *Woods'* Court indicated that the act need not be the last proximate act prior to the commission of the offense. *Woods* at 131-32, 357 N.E.2d 1059. However, the act "must be strongly corroborative of the actor's criminal purpose." *Id.* at paragraph one of the syllabus. This test "properly directs attention to overt acts of the defendant which convincingly demonstrate a firm purpose to commit a crime, while allowing police intervention, based upon observation of such incriminating conduct, in order to prevent the crime when the criminal intent becomes apparent." *Woods*, *supra* at 132, 357 N.E.2d at 1063. In other words, a substantive crime would have been committed had it not been interrupted. R.C. 2923.02(D) provides that: "[i]t is an affirmative defense to a charge under this section that the actor abandoned his effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."

{¶26} However, the abandonment must be "complete" and "voluntary" in order to exculpate a defendant. Where one abandons an attempted crime because he fears detection or realizes that he cannot complete the crime, the "abandonment" is neither "complete" nor "voluntary." *Woods*, supra, 48 Ohio St. 2d at 133.

{¶27} Precisely what conduct will be held to be a substantial step must be determined by evaluating the facts and circumstances of each particular case. *State v. Group* (2002), 98 Ohio St.3d 248, 262, 2002-Ohio-7247 at ¶100, 781 N.E.2d 980, 996.

{¶28} The intent with which an act is committed may be inferred from the act itself and the surrounding circumstances, including acts and statements of a defendant. *State v. Garner* (1995), 74 Ohio St.3d 49, 60, 1995-Ohio-168, 656 N.E.2d 623, 634; *State v. Wallen* (1969), 21 Ohio App.2d 27, 34, 254 N.E.2d 716, 722.

{¶29} Upon careful review of the record, we are persuaded that the state adduced credible probative evidence on each element of the offense of domestic violence that would enable a reasonable juror to find that appellant took a substantial step in a course of conduct planned to culminate in the commission of domestic violence. *State, ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, 345; *State v. Woods*, supra.

{¶30} Matthew Soria, an employee at the Duke & Duchess/B.P., testified that he was interrupted by screaming and banging on the front door. He saw Hope Ajian trying to open the door. She was yelling, "help, help, he's trying to hurt me." When Mr. Soria looked out the window, he did not see the Appellant; however, he caught a glimpse of someone running off to the right of the door, out of his range of vision. At that point, Mr. Soria saw beer bottles flying past the window in the direction of where Ms. Ajian was

standing. Mr. Soria testified that the bottles were landing within one foot of where Ms. Ajian was standing. He described her demeanor during the incident as hysterical, and indicated that she was screaming and crying while she banged on the door trying to get inside the store.

{¶31} Ms. Ajian testified that while she and the Appellant were arguing inside her Ford Explorer, he used a beer bottle to break her windshield. The Appellant also put his hand up around her neck and squeezed. Hope indicated that he was not forceful enough to leave marks on her skin; however, she was scared enough to get out of the vehicle. Ms. Ajian testified that some of the bottles were landing “pretty close” to her, and she was scared.

{¶32} Although appellant cross-examined the witnesses and argued that he did not knowingly inflict, attempt to inflict, or threaten to inflict physical harm, and further that had he wished to hit Ms. Ajian with his athletic ability he could have done so, the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881.

{¶33} The jury was free to accept or reject any and all of the evidence offered by the parties and assess the witness’s credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence". *State v. Craig* (Mar. 23, 2000), Franklin App. No. 99AP-739, citing *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09-1236 Indeed, the trier of fact need not believe all of a witness' testimony, but may accept only portions of it as true. *State v.*

Raver, Franklin App. No. 02AP-604, 2003- Ohio-958, at ¶ 21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.; *State v. Burke*, Franklin App. No. 02AP-1238, 2003-Ohio-2889, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096. Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E. 2d 492.

{¶34} The jury is in the best position to determine the credibility of witnesses, and their conclusion in this case is supported by competent facts. See *State v. Burnside* (2003), 100 Ohio St.3d 152, 154-55, 797 N.E.2d 71, 74. Reviewing courts should accord deference to the trial court's decision concerning the credibility of the witnesses because the trial court has had the opportunity to observe the witnesses' demeanor, gestures, and voice inflections that cannot be conveyed to us through the written record, *Miller v. Miller* (1988), 37 Ohio St. 3d 71.

{¶35} In *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St. 3d 77, 81, 461 N.E. 2d 1273, the Ohio Supreme Court explained: "[a] reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." See, also *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

{¶36} We conclude the trier of fact, in resolving the conflicts in the evidence, did not create a manifest miscarriage of justice so as to require a new trial. Viewing this evidence in a light most favorable to the prosecution, we further conclude that a rational trier of fact could have found beyond a reasonable doubt that appellant knowingly

caused or attempted to cause physical harm to a family or household member. The jury appears to have fairly and impartially decided the matters before it. The jury heard the witnesses, evaluated the evidence, and was convinced of appellant's guilt.

{¶37} Appellant's first assignment of error is overruled.

{¶38} For the foregoing reasons, the judgment of the Court of Common Pleas, of Richland County, Ohio, is affirmed.

By Gwin, P.J.,

Wise, J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. JOHN W. WISE

HON. PATRICIA A. DELANEY

