

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-01-002
- vs -	:	<u>OPINION</u> 5/16/2011
KENNETH L. SMITH,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT
Case No. 2010CRB01041

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Rittgers & Rittgers, Nicholas D. Graman, 12 East Warren Street, Lebanon, Ohio 45036, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Kenneth L. Smith, appeals from his conviction in the Warren County Court for domestic violence. For the reasons outlined below, we affirm.

{¶2} On October 5, 2010, Leann Fisher sustained injuries to her arm following an alleged physical altercation with appellant at her Warren County residence. Appellant was subsequently charged with domestic violence in violation of R.C. 2919.25(A), a first-degree

misdemeanor. Following a bench trial, appellant was convicted and sentenced to serve ten days in jail, ordered to pay a fine of \$100, and placed on probation for one year.

{¶3} Appellant now appeals from his conviction, raising two assignments of error for appeal. For ease of discussion, appellant's two assignments of error will be addressed together.

{¶4} Assignment of Error No. 1:

{¶5} "THE JURY ERRED WHEN IT ENTERED A JUDGMENT AGAINST THE APPELLANT WHICH WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE TO FIND HIM GUILTY."

{¶6} Assignment of Error No. 2:

{¶7} "THE JURY ERRED WHEN IT ENTERED A JUDGMENT AGAINST APPELLANT WHICH WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL."

{¶8} In his two assignments of error, appellant argues that his conviction was not supported by sufficient evidence and that his conviction was against the manifest weight of the evidence. We disagree.

{¶9} As this court has previously stated, "a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." *State v. Perkins*, Fayette App. No. CA2009-10-019, 2010-Ohio-2968, ¶9; *State v. Urbin*, 148 Ohio App.3d 293, 2002-Ohio-3410, ¶31. In turn, while a review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct concepts, this court's determination that appellant's conviction was supported by the manifest weight of the evidence will be dispositive of the issue of sufficiency. *State v. Rigdon*, Warren App. No. CA2006-05-064, 2007-Ohio-2843, ¶30, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52; see, e.g., *State v. Rodriguez*, Butler App. No. CA2008-07-162,

2009-Ohio-4460, ¶62.

{¶10} A manifest weight of the evidence challenge concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *State v. Ghee*, Madison App. No. CA2008-08-017, 2009-Ohio-2630, ¶9, citing *Thompkins* at 387, 1997-Ohio-52. A court considering whether a conviction is against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of the witnesses. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶39; *State v. Lester*, Butler App. No. CA2003-09-244, 2004-Ohio-2909, ¶33; *State v. James*, Brown App. No. CA2003-05-009, 2004-Ohio-1861, ¶9. The credibility of witnesses and weight given to the evidence are primarily matters for the trier of fact to decide. *State v. Gesell*, Butler App. No. CA2005-08-367, 2006-Ohio-3621, ¶34; *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Upon review, the question is whether in resolving conflicts in the evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Good*, Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25; *State v. Blanton*, Madison App. No. CA2005-04-016, 2006-Ohio-1785, ¶7.

{¶11} As noted above, appellant was charged with domestic violence in violation of R.C. 2919.25(A), a first-degree misdemeanor, which prohibits any person from "knowingly caus[ing] or attempt[ing] to cause physical harm to a family or household member." "Physical harm," as defined by R.C. 2901.01(A)(3), "means any injury, illness, or other physiological impairment, regardless of its gravity or duration."

{¶12} Initially, appellant argues that the state failed to prove Fischer, the alleged victim, was his "family or household member." We disagree.

{¶13} Pursuant to R.C. 2919.25(F)(1)(b), a "family or household member" includes "[t]he natural parent of any child of whom the offender is the other natural parent[.]"

{¶14} At trial, Fisher testified that appellant was the biological father of her two-year-old son. In addition, appellant testified that he had previously gone to Fisher's residence "to see his children." This evidence, if believed, is sufficient to establish the elements necessary to prove Fisher, the alleged victim, was appellant's "family or household member." See *State v. Hess*, Seneca App. No. 13-03-30, 2004-Oho-534, ¶15; see, also, *State v. Mills*, Montgomery App. No. 21146, 2005-Ohio-2128, ¶15-18; *State v. Bently*, Montgomery App. No. 19743, 2004-Ohio-2740, ¶8. Therefore, because we find the trial court did not clearly lose its way by finding Fisher was appellant's "family or household member," appellant's first argument is overruled.

{¶15} Next, appellant argues that "[n]o rational trier of fact could have found the essential elements of domestic violence proven beyond a reasonable doubt based on Fisher's made-up story." We disagree.

{¶16} In this case, Fisher testified that she was involved in a physical altercation with appellant at her home at approximately 3:00 p.m. on October 5 after learning appellant was seeing another woman. During this altercation, Fisher testified that appellant "twisted her arm" causing her to sustain bruises on her wrist and arm for which she prescribed medication and "placed in a splint for three weeks."

{¶17} In his defense, appellant testified that he did not go to Fisher's residence on the day in question, but instead, after riding to work with his brother, he "hung out in Forest Park" until "Joe," his neighbor and childhood friend, gave him a ride to meet with his probation officer. Appellant further testified that Fisher's allegations against him were untrue.

{¶18} After a thorough review of the record, and although appellant may claim that he did not see Fisher on the day in question, it is well-established that "[w]hen conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony." *State v. Bromagen*, Clermont

App. No. CA2005-09-087, 2006-Ohio-4429, ¶38; *State v. Bates*, Butler App. No. CA2009-06-174, 2010-Ohio-1723, ¶11. It was within the trial court's "province to determine whether or not to believe appellant's alibi evidence." *State v. Wilson* (Apr. 17, 2000), Clermont App. No. CA99-08-083, at 9. In turn, because the state presented sufficient competent, credible evidence indicating appellant knowingly caused physical harm to Fisher, the mother of his two-year-old son, during an altercation regarding appellant's new girlfriend, the trial court did not clearly lose its way thereby creating such a manifest miscarriage of justice requiring his domestic violence conviction be reversed. Therefore, appellant's second argument is overruled.

{¶19} In light of the foregoing, because appellant's domestic violence conviction was not against the manifest weight of the evidence, we necessarily conclude that the state presented sufficient evidence to support the trial court's finding of guilt. Accordingly, appellant's first and second assignments of error are overruled.

{¶20} Judgment affirmed.

POWELL, P.J., and PIPER, J., concur.

[Cite as *State v. Smith*, 2011-Ohio-2346.]