

2016 IL App (2d) 150983-U
No. 2-15-0983
Order filed April 21, 2016

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of McHenry County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 14-MR-667
)	
LARA COLER,)	Honorable
)	Michael T. Caldwell,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justice Spence concurred in the judgment.
Presiding Justice Schostok specially concurred.

ORDER

- ¶ 1 *Held:* The trial court properly denied the State’s complaint seeking to have defendant’s dogs deemed vicious under the Animal Control Act: specifically, the court’s ruling that the State did not show by clear and convincing evidence that the dogs caused an injury that rose to the level of a “serious physical injury” was not against the manifest weight of the evidence.
- ¶ 2 The State appeals the trial court’s denial of its complaint against defendant, Lara Coler, seeking a determination that her two pit bull dogs were vicious under the Animal Control Act (Act) (510 ILCS 5/15 (West 2014)). The trial court found that the State failed to show by clear

and convincing evidence that the dogs attacked a person and caused serious physical injury as required by the Act. We affirm.

¶ 3

I. BACKGROUND

¶ 4 This appeal arises from a September 9, 2014, incident in which defendant's pit bulls, Molly and Sawyer, attacked another dog, Addie, a golden retriever puppy. The State filed a complaint seeking a determination that the pit bulls were vicious dogs under the Act. In September 2015, a bench trial was held.

¶ 5 The State presented evidence that, on September 9, 2014, Steve Cuda was walking Addie near defendant's home. As he was walking on the opposite side of the street from the home, one of defendant's pit bulls came across the road and began biting Addie on the neck and haunches. Cuda attempted to separate the dogs, and defendant's other pit bull came to the scene and also began to bite Addie. Whenever Cuda was able to get one dog off of Addie, the other would be there to continue the attack. Cuda described one pit bull as more aggressive than the other one.

¶ 6 The pit bulls were being watched at the time by Rex Corley. Corley came out of the home and began trying to stop the altercation by wrestling with the more aggressive pit bull and continually punching the pit bull in the head as hard as he could. Cuda's wife, who had been nearby, also arrived at the scene with her vehicle and tried to separate the dogs.

¶ 7 At some point during the altercation, the three dogs went up in the air and undercut Cuda's legs when they landed. Cuda fell and suffered a separated shoulder. Cuda did not think that the dogs had tried to hurt him. Instead, the pit bulls were attacking his dog. Cuda also was bitten on the hand. However, Cuda was unable to state which particular dog bit him. He theorized that it was one of the pit bulls. Cuda's wife was also bitten on the hand during the altercation, but she also was unable to specify which dog bit her, though she told a person from

animal control that it was Addie that bit her. Eventually, the dogs were separated, and the Cudas got into their vehicle. Cuda was transported to the hospital by ambulance.

¶ 8 Cuda testified that, as a result of the altercation, his collar bone was separated from the right shoulder and bulged through the skin at the top of his chest and shoulder area. Cuda removed his shirt for the trial court to view his shoulder area and compare his right and left shoulders. The court noted a lump. Cuda testified that the lump was his collar bone, but that it could move around because of how it was separated and that it would continue to do so unless he chose to have surgery, which he had not chosen to do at that point. He stated that the surgery would be orthopedic surgery. The shoulder caused him pain and limited his activities in that it would ache and fatigue easily with repetitive movements lasting more than 5 or 10 minutes. He could feel it when he shaved and it also hindered his ability to play racquetball as intensely as he had played in the past. When asked if the injury created a protracted impairment of health, Cuda said that it bothered him all the time, but that having surgery would require a lengthy recovery. He then said that sometimes he took naproxen and he could go either days or weeks and get by, but then something would happen and it would hurt a lot. He agreed that it did not cause a risk of death, did not impair the function of a bodily organ, and did not require plastic surgery. He did not consider the lump on his shoulder a serious disfigurement. At trial his pain level on a scale of 1 to 10 was zero, though maybe it was a 3 when he shaved that morning. The injury to his hand did not impair him or cause disfigurement other than a scar on his knuckle.

¶ 9 Cuda's wife, who was not listed in the State's complaint, testified that she experienced numbness in her hand that she considered a protracted impairment of her health. The court also viewed a photograph of her hand that was taken after the altercation. No expert testimony was provided about Cuda's injuries or his wife's injuries.

¶ 10 Dr. Lisa Lembke, the administrator of McHenry County Animal Control, testified that, in her opinion, both Molly and Sawyer were vicious dogs. She admitted that she did not know which dog bit Cuda or his wife and stated that the best way to get bitten is to reach into the middle of a dog fight.

¶ 11 The trial court expressed concern about keeping pit bulls as pets and stated that it would love nothing more than to put the two pit bulls down. However, the court found that the State failed to meet its burden of proof. The court noted that a vicious dog under the Act is one that attacks a person and causes serious physical injury and found that the pit bulls attacked another dog instead of a person. The court found that everything that happened thereafter resulted from the attempts of people to break up the fight instead of from an attack on one of them. The court further found that, under the Act's definition of a serious physical injury, there was no significant risk of death, serious disfigurement, or protracted impairment of health. Thus, the court found that the State had not proven that the pit bulls were vicious. The State appeals.

¶ 12 II. ANALYSIS

¶ 13 The State contends that the trial court erred because (1) under the Act, the meaning of an “attack” on a “person” (510 ILCS 5/2.19b (West 2014)) can include instances where the dog creates a dangerous situation that causes injury to a person and (2) the court's finding that Cuda or his wife did not suffer a “serious physical injury” (510 ILCS 5/2.19a (West 2014)) was against the manifest weight of the evidence. We determine that the trial court's finding that the State failed to prove that the pit bulls caused a serious physical injury was not against the manifest weight of the evidence. As a result, we do not discuss the meaning of the words “attacks a person” under the Act.

¶ 14 “We will not reverse the trial court’s vicious-dog determination unless it was against the manifest weight of the evidence.” *People v. Tara*, 367 Ill. App. 3d 479, 483 (2006). “A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on the evidence.” *Id.* This is in part because the trial judge, as the trier of fact, is in a superior position to the reviewing court to observe witnesses while testifying, to assess their credibility, and to determine the weight their testimony should receive. *Id.*

¶ 15 Under section 2.19b of the Act, a “ ‘vicious dog’ means a dog that, without justification, attacks a person and causes serious physical injury or death.” 510 ILCS 5/2.19b (West 2014). Section 2.19a of the Act defines “serious physical injury” as “a physical injury that creates a substantial risk of death or that causes death, serious disfigurement, protracted impairment of health, impairment of the function of any bodily organ, or plastic surgery.” 510 ILCS 5/2.19a (West 2014). The State must prove that the dog is a vicious dog by “clear and convincing evidence.” 510 ILCS 5/15(a) (West 2014). “Clear and convincing evidence is ‘the quantum of proof that leaves no reasonable doubt in the mind of the fact finder as to the truth of the proposition in question,’ *i.e.*, more than a preponderance while not quite approaching the degree of proof necessary for a criminal conviction.” *Baker v. Jewel Food Stores, Inc.*, 355 Ill. App. 3d 62, 69-70 (2005) (quoting *Bazydlo v. Volant*, 164 Ill. 2d 207, 213 (1995)).

¶ 16 Relying on *Tara*, the State argues that Cuda’s continuing pain and his wife’s numbness in her hand were serious physical injuries because they involved protracted impairments of health. In *Tara*, a dog-bite victim suffered an extremely painful and deep puncture wound all the way to the bone. Expert testimony was provided at trial that the victim’s skin was an organ that was impaired by the wound. The victim also had a hard lump of scar tissue that caused burning pain

more than once per month, and plastic surgery was required to remove the scar. The trial court found that the victim suffered a serious physical injury, and we affirmed. *Tara*, 367 Ill. App. 3d at 490. We noted that the trial court was able to observe the scar, which measured one-quarter to one-half inch wide, and, under the facts, could have found a serious physical injury based on a protracted impairment of health, impairment of the function of a bodily organ, or the need for plastic surgery. *Id.* at 486-87.

¶ 17 Here, unlike in *Tara*, there was no evidence that the wounds to Cuda or his wife impaired the function of a bodily organ or required plastic surgery. Indeed, Cuda admitted that his wounds did not fall under either factor. He also admitted that he did not view his wounds as a serious disfigurement. As to a protracted impairment of health, Cuda testified that he had continuing pain when he engaged in repetitive motions for longer than 5 to 10 minutes, that he felt it when shaving, and that he could not play racquetball as intensely as before. Yet he could still undertake activities such as racquetball, albeit less intensely. He testified that the pain was alleviated by taking naproxen, that he could go either days or weeks and get by, and that he had no pain when he was testifying. The trial court was also able to view the injury and observe Cuda's movement in the courtroom and thus was in the best position to evaluate his testimony about the effect of the injury. Therefore, there was a basis for the court to find that the State failed to show by clear and convicting evidence that the injury was a protracted impairment of health such that it was a serious physical injury under the Act.

¶ 18 As for Cuda's wife, the court viewed a photograph of her hand taken after the altercation and was also able to observe her movements in court. Further, the State did not present evidence affirmatively showing that she was bitten by one of the pit bulls as opposed to her own dog. Accordingly, the trial court's determination that the State failed to prove that the pit bulls caused

her a serious physical injury was not against the manifest weight of the evidence. In any event, we note that her injury was also not a basis for the State's complaint.

¶ 19

III. CONCLUSION

¶ 20 We determine that the trial court's finding that the State failed to prove that the pit bulls caused a serious physical injury was not against the manifest weight of the evidence. Because of that determination, we need not, and do not, address whether the court erred when it found that the State failed to prove that an attack on a person occurred. Accordingly, the judgment of the circuit court of McHenry County is affirmed.

¶ 21 Affirmed.

¶ 22 PRESIDING JUSTICE SCHOSTOK, specially concurring:

¶ 23 The injuries that Steve Cuda and his wife suffered were the result of the defendant's two pit bulls attacking Cuda's dog. Had the defendant's two pits bulls not attacked his dog, Cuda and his wife would not have been bitten while trying to separate the dogs and Cuda would not have suffered a separated shoulder. It is not lost on me that the defendant's dogs caused Cuda and his wife pain and suffering and placed them in a terrifying situation. Nonetheless, as the majority points out, the trial court's determination that the State did not establish that the pit bulls were indeed vicious was not against the manifest weight of the evidence. In order to support a finding that the dogs were vicious, the State had to prove that the dogs caused someone to suffer a serious physical injury as defined under the Act. See 510 ILCS 5/2.19a (West 2014). Cuda's testimony did not support a finding that he had suffered such an injury. Further, although Cuda's wife's testimony may have supported such a finding, her injury could not be considered because the State failed to name her as a person who had been injured in its complaint. Thus,

although the facts of this case suggest that Cuda and his wife should be entitled to some type of relief, their recourse is not under the Act.