

[Cite as *State v. Andrews*, 2010-Ohio-3864.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93104

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WALTER ANDREWS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-517170

BEFORE: Sweeney, J., Gallagher, A.J., and Rocco, J.

RELEASED AND JOURNALIZED: August 19, 2010
ATTORNEY FOR APPELLANT

Timothy R. Sterkel
1414 South Green Road
Suite 310
Cleveland, Ohio 44121

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: W. Mona Scott
Daniel T. Van
Assistant Prosecuting Attorneys
1200 Ontario Street
Cleveland, Ohio 44113

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Walter Andrews (“defendant”), appeals his felonious assault convictions. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} On December 19, 2007, defendant was fired from his job. As he was leaving the work site, he got into an altercation with a coworker, Jeffrey Laster. Defendant hit Laster on the shoulder with a baseball bat, then chased him outside. As Laster jumped into a van to get away from defendant, defendant hit Laster in the leg with the bat. Laster was treated at MetroHealth Medical

Center for an ankle fracture, a shin laceration that required stitches, and bruises on his hip and both shoulders.

{¶ 3} Defendant was charged with felonious assault in violation of R.C. 2903.11(A)(1) and felonious assault in violation of R.C. 2903.11(A)(2). On February 4, 2009, a jury found defendant guilty of both counts. The court sentenced defendant to two years in prison.

{¶ 4} Defendant appeals and raises five assignments of error for our review. We review the first two assignments of error together.

{¶ 5} “I. The trial court committed error when it denied defendant-appellant’s motion for acquittal made pursuant to Criminal Rule 29.

{¶ 6} “II. Appellant’s convictions were against the manifest weight of the evidence.”

{¶ 7} Specifically, defendant argues that there was insufficient evidence to sustain his felonious assault convictions because the State failed to produce the baseball bat that was allegedly used as a deadly weapon, and the State failed to admit into evidence any medical records of Laster’s alleged injuries. Defendant also argues that, for these same reasons, the jury lost its way in convicting him.

{¶ 8} When reviewing sufficiency of the evidence, an appellate court must determine “[w]hether, after viewing the evidence in a 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, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 9} The proper test for an appellate court reviewing a manifest weight of the evidence claim is as follows:

{¶ 10} “[T]he appellate court sits as the ‘thirteenth juror’ and, * * * reviewing the entire record, weighs * * * all reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in the evidence, the jury 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* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541. Determinations of witness credibility are primarily left to the trier of facts. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212.

{¶ 11} R.C. 2903.11 governs felonious assault, and it states in pertinent part: “(A) No person shall knowingly * * * (1) Cause serious physical harm to another * * * [or] (2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon * * *.”

{¶ 12} Physical harm is defined as “any injury, illness, or other physiological impairment, regardless of its gravity or duration.” R.C. 2901.01(A)(3). Serious physical harm means, inter alia, “[a]ny physical harm that involves permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity; * * * permanent disfigurement or * * * temporary, serious disfigurement; * * * acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.” R.C. 2901.01(A)(5)(c)-(e).

{¶ 13} R.C. 2923.11(A) defines deadly weapon in pertinent part as “any instrument, device, or thing capable of inflicting death, and * * * used as a weapon.”

{¶ 14} This Court has previously found that a baseball bat can be used as a deadly weapon. *State v. Green*, Cuyahoga App. No. 81232, 2003-Ohio-1722, ¶34. Furthermore, this Court has held that physical evidence is not necessary to prove a case, although it can be helpful. *State v. Martin*, Cuyahoga App. No. 90722, 2008-Ohio-5263, ¶42-43. In the instant case, the following evidence was presented at trial.

{¶ 15} Asked if he recalled what kind of baseball bat defendant hit him with, Laster testified as follows: “Aluminum, silver bat. I seen that bat so many times come past my face swinging it at me.”

{¶ 16} Milton Starks, who was defendant’s and Laster’s boss at the time of the incident, testified that he saw defendant running after Laster in the street. Defendant had something in his hand although Starks could not see what it was. As Laster got into Starks’s van, Starks heard a thump as if something hit Laster, and Laster began to holler. Starks further testified that Laster said, “[defendant] just come inside and beat me with a bat.”

{¶ 17} A witness for the defense testified that, after the incident, defendant told her that he beat Laster with a bat because Laster stole his wallet and owed him money. Additionally, defendant took the stand and testified that after he was fired he went to the work site to retrieve his tool belt. He and Laster exchanged

words about a wallet and some money, and Laster came up behind defendant. Laster had a baseball bat in his hand. Laster swung at defendant and the two began fighting over the bat. Eventually, defendant got the upper hand with the bat and hit Laster a couple of times while trying to protect himself.

{¶ 18} In the instant case, defendant could have been convicted solely on Laster's testimony as to what happened. However, Laster's testimony was corroborated by eyewitness testimony, parts of defendant's testimony, and the treating physician's testimony. Additionally, this Court has repeatedly held that it is not error to find serious physical harm when "the evidence established the victim suffered injuries necessitating medical treatment." *State v. Morris*, Cuyahoga App. No. 90820, 2008-Ohio-5469, ¶30.

{¶ 19} The doctor who treated Laster's injuries testified that Laster sustained a fractured ankle, a deep cut on his shin, and several contusions or bruises as a result of defendant hitting Laster with a baseball bat. The doctor testified that an orthopedic surgeon examined Laster's fracture and placed his right lower leg in a splint. Additionally, Laster needed three sutures to close the cut on his shin and was prescribed pain medication upon his release from MetroHealth.

{¶ 20} Furthermore, Laster testified about his injuries, stating that immediately after the incident, he was in pain, he was bleeding, and he could not walk, so his boss called an ambulance. Laster also testified that he could not

return to work until four to six weeks after the incident because the injuries prevented him from heavy lifting.

{¶ 21} From the trial testimony, the jury could have easily found sufficient evidence that Laster suffered serious physical harm as a result of defendant beating him with a baseball bat. Defendant's convictions for felonious assault are not against the manifest weight of the evidence.

{¶ 22} Assignments of Error I and II are overruled.

{¶ 23} "III. The trial court committed error when it failed to instruct the jury on the lesser included offenses of aggravated assault and simple assault."

{¶ 24} Specifically, defendant argues that he was provoked by Laster into "sudden passion and rage" when he swung the bat, or in the alternative, defendant acted recklessly when he swung the bat while defending himself against attack by Laster.

{¶ 25} The Ohio Supreme Court set forth a three-part test for analyzing lesser included offenses: "An offense may be a lesser included offense of another if: (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense."

State v. Deem (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, at paragraph three of the syllabus.

{¶ 26} If the evidence presented at trial reasonably supports an acquittal on the crime charged and a conviction on the lesser included offense, the court must instruct the jury on the lesser included offense. *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286.

{¶ 27} In the instant case, defendant was charged with and convicted of two counts of felonious assault in violation of R.C. 2903.11, as defined earlier in this opinion: “(A) No person shall knowingly * * * (1) Cause serious physical harm to another * * * [or] (2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon * * *.”

{¶ 28} Aggravated assault is defined in R.C. 2903.12, which states as follows: “(A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly: (1) Cause serious physical harm to another * * *; (2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon * * *.”

{¶ 29} Although aggravated assault is an inferior offense of felonious assault, rather than a lesser included offense, the Ohio Supreme Court held in *Deem* that “in a trial for felonious assault, where the defendant presents sufficient evidence of serious provocation * * * an instruction on aggravated assault * * * must be given.” *Deem*, 40 Ohio St.3d at 211, 533 N.E.2d 294.

{¶ 30} Simple assault is defined in R.C. 2903.13: “No person shall knowingly cause or attempt to cause physical harm to another * * * [or] recklessly cause serious physical harm to another * * *.” Simple assault is a lesser included offense of felonious assault. See *State v. Tolbert* (1991), 60 Ohio St.3d 89, 573 N.E.2d 617.

{¶ 31} Upon review, we find no evidence showing that defendant was influenced by passion or rage, nor do we find evidence that Laster provoked defendant into beating him with a baseball bat. Rather, defendant testified that he acted in self-defense when swinging at Laster, and the court instructed the jury on self-defense. Generally, a self-defense instruction is inconsistent with a serious provocation theory. *State v. Crim*, Cuyahoga App. No. 82347, 2004-Ohio-2553.

{¶ 32} Furthermore, the evidence in this case shows that defendant acted knowingly, rather than recklessly. The difference between these two states of mind can be found in R.C. 2901.22. “A person acts knowingly * * * when he is aware that his conduct will probably cause a certain result * * *.” R.C. 2901.22(B). “A person acts recklessly when, with * * * indifference, he perversely disregards a known risk that his conduct is likely to cause a certain result * * *.” R.C. 2901.22(C).

{¶ 33} Hitting someone with an aluminum baseball bat will “probably” cause serious physical harm. Accord *State v. Crespo*, Cuyahoga App. No. 85298, 2005-Ohio-4008 (upholding a felonious assault conviction and concluding that “[i]t

is obvious that, in a physical fight of this magnitude, injury is more than likely to occur”).

{¶ 34} Accordingly, the court did not err by failing to instruct the jury on aggravated and simple assault.

{¶ 35} Assignment of Error III is overruled.

{¶ 36} “IV. The trial court committed error when it denied appellant’s motion for a mistrial.”

{¶ 37} During defendant’s cross-examination, the State asked defendant if he and his brothers attempted to intimidate Laster into not testifying against defendant at trial. Defendant argues that this line of questioning was improper because the issue was beyond the scope of defendant’s direct examination. Defendant further argues that the intimidation issue was not raised during Laster’s testimony.

{¶ 38} Pursuant to Crim.R. 33(A), a new trial may be granted for the following reasons: “(1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial; (2) Misconduct of the * * * prosecuting attorney * * *.” In *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293, the Ohio Supreme Court held that “[t]he test for prosecutorial misconduct is whether remarks are improper and, if so, whether they prejudicially affected the substantial rights of the accused.” We review a motion for a new trial under an

abuse of discretion standard. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343.

{¶ 39} Our review of defendant's trial testimony shows that on direct examination, defendant brought up a conversation he had with Laster outside of a barbershop on Kinsman, in June 2008. On cross-examination, the State questioned defendant about this conversation, alleging that this is when defendant intimidated Laster. In denying defendant's motion for a new trial, the court stated the following outside the presence of the jury:

{¶ 40} "Again, that information was elicited after direct testimony in which the defendant did testify that he ran into Mr. Laster at the barbershop on Kinsman. * * * I believe the State then is certainly within its right to inquire further on cross-examination as to the nature and extent of that conversation and can suggest in that conversation at least the facts as a reasonable belief would have occurred. * * * I believe that under the circumstances, the questions were raised in good faith. It is not grounds for prosecutorial misconduct and any potential prejudice to the defendant certainly is not apparent, given other testimony that's already been elicited in this particular case."

{¶ 41} Given the overwhelming evidence that defendant assaulted Laster with a baseball bat, we find that the court did not abuse its discretion in denying defendant's motion for a mistrial.

{¶ 42} Assignment of Error IV is overruled.

{¶ 43} “V. The trial court committed error when it failed to merge appellant’s two counts of felonious assault.”

{¶ 44} Specifically, defendant argues that both of the felonious assault charges he was convicted of stem from one attack involving one victim and should merge as allied offenses for sentencing purposes.

{¶ 45} The Ohio Supreme Court has held that “convictions for felonious assault defined in R.C. 2903.11(A)(1) and felonious assault defined in R.C. 2903.11(A)(2) are allied offenses of similar import, and therefore a defendant cannot be convicted of both offenses when both are committed with the same animus against the same victim.” *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882, ¶20. See, also, R.C. 2941.25.

{¶ 46} The State concedes that there is one victim in this case; however, the State argues that there were two separate attacks against Laster. First, defendant hit Laster in the shoulder area when they were inside the house. The State alleges that Laster then ran outside to get away from defendant, and defendant chased him. The second attack occurred when defendant struck Laster in the leg as Laster was trying to get into the van.

{¶ 47} This Court has held that felonious assault pursuant to R.C. 2903.11(A)(1) and 2903.11(A)(2) are allied offenses when the defendant acted with a single animus when he “fired multiple shots at one victim in rapid succession * * *.” *State v. Goldsmith*, Cuyahoga App. No. 90617,

2008-Ohio-5990, ¶37. See, also, *State v. Wilson*, 182 Ohio App.3d 171, 2009-Ohio-1681, 912 N.E.2d 133.

{¶ 48} The instant case, however, is distinguishable from *Goldsmith* and *Wilson*, because there is a clear demarcation between the attack inside the house and the subsequent attack at the van. Defendant's initial attack was interrupted when Laster ran outside, evidencing a clear end to the first assault. Defendant went after Laster, and, acting under a separate animus, hit him with the bat again. Finding that defendant's assault convictions are not allied offenses, we overrule his final assignment of error.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

SEAN C. GALLAGHER, A.J., and
KENNETH A. ROCCO, J., CONCUR

