[Cite as *State v. Jackson*, 2010-Ohio-4486.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93815

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID JACKSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-512849

BEFORE: Jones, J., Gallagher, A.J., and Kilbane, J.

RELEASED AND JOURNALIZED: September 23, 2010

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, David Jackson ("Jackson"), appeals his conviction. Finding no merit to the appeal, we affirm.

{¶ 2} In 2008, Jackson was charged with felonious assault with one- and three-year firearm specifications and having a weapon while under a disability. The matter proceeded to a trial before the bench, at which the following evidence was presented.

{¶ 3} On June 9, 2008, Brandon Vernon ("Vernon") was the passenger in a car being driven by a friend. Vernon's infant daughter was in the back seat. As they drove past a Burger King, a man later identified as Jackson, waved Vernon over. Vernon got out of the car and asked Jackson what was going on. Jackson

approached Vernon, pulling his pants up, which Vernon testified meant Jackson wanted to fight. Vernon's friend yelled "gun!" and Vernon saw that Jackson was holding a gun. Jackson said "What's up with this? This is what I mean" and pointed the gun at Vernon. Vernon fled and Jackson ran after him. Vernon's friend drove alongside him until Vernon was able to jump in the car and they drove to the house of Vernon's girlfriend.

{¶ 4} The girlfriend called 911 and the police responded to the scene. Vernon identified Jackson as the man who pointed the gun at him and gave the police a detailed description of the gun. A neighbor testified that he saw the car and one man chasing after another man, but he did not see a gun. A Burger King employee who had been outside smoking with Jackson, testified she saw Jackson flag down a car, yell at Vernon, and then run after him, but stated she could not see if Jackson had a gun in his hand.

{¶ 5} Jackson fled as soon as he saw the police pull into the Burger King parking lot, but was apprehended a short time later in a garage. Police immediately recovered the gun, which had been tossed in some shrubs along Jackson's flight path. The gun did not have any bullets in it. Vernon identified the gun as the one Jackson had pointed at him.

{¶ 6} The trial court convicted Jackson on all counts and sentenced him to five years in prison.

{¶ 7} Jackson now appeals, raising the following two assignments of error:

> "I. The trial court erred in denying appellant's criminal rule 29 motion for acquittal when there was insufficient evidence to prove the elements of felonious assault."
>
> "II. The appellant's conviction for felonious assault was against the manifest weight of the evidence."

{¶ 8} Although they involve different standards of review, these assignments of error will be discussed together because they involve the same evidence.

{¶ 9} When an appellate court reviews a record upon a sufficiency challenge, "the relevant inquiry is whether, 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. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶77, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 10} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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." (Internal quotes and citations omitted.) *Leonard* at ¶81.

{¶ 11} Jackson was charged with felonious assault, in violation of R.C. 2903.11(A)(2), which provides that no person shall "[c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance." Attempt is defined in R.C. 2923.02, which states:

{¶ 12} "(A) No 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."

{¶ 13} Jackson argues that there was insufficient evidence that he threatened Vernon with a gun.

{¶ 14} In *State v. Brooks* (1989), 44 Ohio St.3d 185, 542 N.E.2d 636, the Ohio Supreme Court concluded that the mere act of pointing a gun at someone, without additional evidence regarding the actor's intention, is insufficient for a conviction for felonious assault. Id., see, also, *State v. Goggans*, Cuyahoga App. No. 79578, 2002-Ohio-2249. However, the act of pointing a gun at someone when coupled with an overt act directed toward causing physical harm, such as a verbal threat, is sufficient evidence for felonious assault. Id. *State v. Green* (1991), 58 Ohio St.3d 239, 569 N.E.2d 1038. In *State v. Tate* (1978), 54 Ohio St.2d 444, 445-446, 377 N.E.2d 778, the Ohio Supreme Court found that an unloaded gun used in an assault was a "deadly weapon" even where the evidence showed that the gun was unloaded.

{¶ 15} In this case, the state presented sufficient evidence that Jackson took substantial steps in attempting to cause physical harm to Vernon.[1] Vernon testified that Jackson had a gun, pointed it at his chest and stated "What's up with this? This is what I mean." Vernon started to run away and Jackson chased after him holding the gun. Vernon's testimony that Jackson had a gun was substantiated by the fact that the police recovered a gun matching the victim's description within minutes after apprehending Jackson. And the police located the gun in the bushes along where Jackson was running.

{¶ 16} The evidence, when viewed in a light most favorable to the state, is sufficient to permit a rational trier of facts to find beyond a reasonable doubt all of the essential elements of felonious assault, including that Jackson attempted to cause physical harm to Vernon by means of a deadly weapon. See *State v. Jackson* (Dec. 11, 1997), Cuyahoga App. No. 72014.

{¶ 17} We also find that the conviction is not against the manifest weight of the evidence. In rendering its verdict, the trial court stated "[t]he defendant's statement, 'this is what I mean,' uttered at the same time he was pulling a gun on the victim* * * coupled with the defendant's action in running* * * brings this court to the conclusion that the state has met its burden* * *and finds the defendant guilty of felonious assault."

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[1] Jackson does not challenge his conviction for having a weapon while under a disability.

{¶ 18} The credibility of the witnesses and the weight to be given to their testimony were matters for the trier of facts to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. The trial court did not lose its way simply because it chose to believe the state's version of the events. Reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the trier of facts lost its way in choosing to believe the state's witnesses, or that a manifest miscarriage of justice has occurred.

{¶ 19} Therefore, the first and second assignments of error are overruled.

{¶ 20} Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant 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 common pleas court 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.

LARRY A. JONES, JUDGE

SEAN C. GALLAGHER, A.J., and
MARY EILEEN KILBANE, J., CONCUR