[Cite as *State v. Melton*, 2010-Ohio-5352.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94128

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LARRY MELTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-525756-A

BEFORE: Blackmon, P.J., Dyke, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: November 4, 2010

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PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Larry Melton appeals his conviction for assault and assigns the following error for our review:

> **"The guilty verdict of assault was not based upon sufficient evidence and was against the manifest weight of the evidence."**

{¶ 2} Having reviewed the record and pertinent law, we affirm Melton's conviction. The apposite facts follow.

{¶ 3} Melton was indicted for felonious assault with a notice of a prior conviction for felonious assault and a repeat violent offender specification. He was also indicted for one count of domestic violence with a furthermore clause indicating he had a prior domestic violence conviction. Melton waived his right to a jury, and the matter was tried to the bench.

Trial

{¶ 4} On the evening of May 16, 2009, Deborah Forest went to a bar with a female friend. While there, she saw a family friend by the name of Curtis Houston. The friend she had arrived at the bar with had to work the next day, so she left early. Forest stayed with Houston until the bar closed. Houston then gave her a ride home on his motorcycle.

{¶ 5} When they arrived at her house, they remained outside visiting. All of a sudden, Larry Melton pulled up in a car at full speed. Forest and Melton have been married for six years, but no longer live together. In fact, at the time of the incident, Forest had not seen Melton for over a month.

{¶ 6} Melton hit Houston's motorcycle with the car. There is a dispute whether Houston was sitting on the motorcycle or standing next to it. Nonetheless, the force of the car hitting the motorcycle caused Houston to fall. According to Houston, the car pushed him and the motorcycle about ten feet.

{¶ 7} Houston attempted to get up, but Melton came at him and punched him repeatedly in the face. Melton yelled at Houston, "We family. You [sic] with my wife." Houston tried to explain that he only gave her a ride home, but Melton continued to beat him. When Forest approached Melton and asked what his problem was, Melton punched her in the mouth, splitting her lip. He told her, "I should kill you both." He then left.

{¶ 8} It is in dispute whether Melton returned while Houston was on the phone with the police or not. However, Melton returned to the scene several minutes later. According to Forest, when Melton approached them, she thought he had something in his hand. Fearing the worst, she told Houston to immediately call the police. Houston told Melton, "I'm calling the police." Melton responded, "Call the f******g police. I don't care. That's my wife." However, he then left. According to Forest, Melton appeared to be high or drunk. She stated that when he is under the influence of drugs or alcohol, he becomes aggressive.

{¶ 9} Houston suffered a cut to his nose and a bruised eye. He did not seek medical attention, but had pain for several weeks. Foster went to the hospital where she received six stitches in her lip.

{¶ 10} Houston reported the matter to the police because he sustained $2,800 in damages to his motorcycle. Forest, who operated a day care out of her home, did not want him to file the report because she thought she could

lose her day care license. Thus, it appears Houston may not have originally told the police the truth about what occurred, resulting in him being charged for filing a false report.

{¶ 11} The trial court found that Melton was not guilty of felonious assault, but concluded he was guilty of the lesser included offense of assault, along with the notice of prior conviction and repeat violent offender specification. The court also concluded he was guilty of domestic violence against Forest.[1] The trial court sentenced Melton to three years community control.

Sufficiency and Manifest Weight

{¶ 12} In his sole assigned error, Melton argues his assault conviction was supported by insufficient evidence and was against the manifest weight of the evidence.

{¶ 13} The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus as follows:

> **"Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as**

[1]Melton does not appeal the domestic violence conviction; therefore, we will not address the conviction.

> **to whether each material element of a crime has been proved beyond a reasonable doubt."**

See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394; *State v. Davis* (1988), 49 Ohio App.3d 109, 113, 550 N.E.2d 966.

{¶ 14} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, in which the Ohio Supreme Court held:

> **"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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. (*Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)"**

{¶ 15} Melton argues the evidence was insufficient to support a conviction for felonious assault because there was no evidence that Houston was on the motorcycle at the time it was hit and no evidence Houston

sustained "serious injury." We are perplexed why Melton would argue this as the trial court concluded he was not guilty of felonious assault, but guilty of assault pursuant to R.C. 2903.13.

{¶ 16} The elements of assault as set forth in R.C. 2903.13 are: "No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn." Under this section, "serious physical harm" is not required. Only evidence of "physical harm" is required. R.C. 2901.01(3) defines "physical harm" as "any injury, illness, or physiological impairment, regardless of its gravity or duration." The evidence clearly supports the assault conviction. Melton punched Houston repeatedly in the face causing bruising and swelling to the nose and a bruised eye. Thus, Melton caused physical harm to Houston.

{¶ 17} Melton also argues his conviction was against the manifest weight of the evidence. In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> **"The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both**

qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive — the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."

{¶ 18} However, an appellate court may not merely substitute its view for that of the jury, but must find that "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. Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." Id.

{¶ 19} Melton argues Houston's testimony was not credible because he was charged for filing a false police report in conjunction with the incident. The evidence indicated that Forest did not want her address to be named in the report as she operated a day care from her home and feared losing her license to operate. Thus, the court was aware that Houston was not totally forthcoming with his story to the police; however, it is within the court's discretion whether Houston was believable. Moreover, Forest's testimony supported Houston's claim that Melton repeatedly punched him in the face, and the photographs taken of Houston's nose several days later showed that it was swollen. Accordingly, we conclude Melton's sole assigned error is overruled.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

ANN DYKE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR