

[Cite as *State v. McPherson*, 2010-Ohio-64.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92481

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DUANE MCPHERSON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-509941

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

RELEASED: January 14, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Defendant-appellant, Duane McPherson, appeals his conviction from the Cuyahoga County Court of Common Pleas.

{¶ 2} The victim, Samuel Frazier, testified that he worked for the Cuyahoga County Sheriff's Department as a relief officer in the county jail. On March 9, 2008, while making his rounds, the victim noticed McPherson's cell window was covered. The victim went to McPherson's cell to check things out, and because he was entering the cell, he told McPherson to sit. The victim spoke with McPherson. McPherson indicated that he wanted to talk to the corporal. The victim said okay and started to walk out of the cell.

Before he got out, McPherson tackled the victim from the side, pushing him into the cell wall, where he hit his head and lost consciousness.

{¶ 3} McPherson left the cell, closing the door and locking the victim in. McPherson walked to the dispensary and told the nurse, "You better get the CO some help. I had to hit him and first, I had to push him. I had to hit him. He needs some help down there."

{¶ 4} McPherson was charged with felonious assault with a peace officer specification, and kidnapping. He waived a jury and was tried to the bench. At the Crim.R. 29 hearing, the peace officer specification was dismissed. McPherson was found not guilty of kidnapping and guilty of assault in a correction facility, a felony of the fifth degree. He was sentenced

to ten months in prison, which was ordered to run consecutive to the two-year sentence imposed on his probation violation. McPherson appeals, advancing three assignments of error for our review, which will be addressed out of order for clarity.

{¶ 5} McPherson's third assignment of error states the following:

{¶ 6} "Appellant's constitutional rights to a grand jury indictment and constitutional rights to due process were violated when the court added an additional element to the charge of which he was convicted."

{¶ 7} McPherson was charged with felonious assault under R.C. 2903.11(A)(1), which states that "no person shall knowingly cause serious physical harm to another." The court found McPherson guilty of reckless assault under R.C. 2903.13(B), which prohibits a person from recklessly causing serious physical harm to another. Reckless assault is the lesser included offense of felonious assault as defined by R.C. 2903.11(A)(1) because reckless assault carries a lesser penalty than felonious assault, and felonious assault cannot be committed without also committing a reckless assault. See *State v. Conroy* (Sept. 24, 1998), Cuyahoga App. No. 72987; *State v. Jackson* (Dec. 8, 1994), Franklin App. No. 94APA04-531.

{¶ 8} The trial court also made a finding that the assault occurred on the grounds of a correction facility under R.C. 2903.13(B)(2)(b). This factual finding elevated the offense from a misdemeanor to a fifth degree felony.

McPherson argues that he cannot be convicted of the elevated offense because it requires the finding of an additional element that was not included in the indictment. We disagree.

{¶ 9} McPherson's case is similar to *State v. Smith*, 121 Ohio St.3d 409, 2009-Ohio-787. In *Smith*, the defendant was charged with robbery but was convicted of the lesser included offense of theft. The trial court made the additional finding that the value of the property stolen was between \$500 and \$5,000, elevating the theft from a misdemeanor to a fifth degree felony. The defendant argued that she could be convicted only of a misdemeanor theft because the value was not alleged in the indictment. The Ohio Supreme Court disagreed, explaining that Smith was charged with robbery, which put her on notice of the possibility that she could be found guilty of a lesser included offense without being indicted for each separate lesser included offense.

{¶ 10} As to the theft being a felony of the fifth degree based on the value of the stolen property, the Ohio Supreme Court reasoned that the special findings (i.e., value of property, type of property) identified in the statute affect the punishment available upon conviction for the offense, but are not part of the definition of the crime of theft as set forth in R.C. 2913.02(A), concluding that the value of the property is not an essential element of the offense. The court concluded that "because theft is a lesser

included offense of robbery, the indictment for robbery necessarily included all of the elements of all lesser included offenses, together with any of the special, statutory findings dictated by the evidence produced in the case.” *Id.* at 411. The court noted, however, that had Smith been indicted with the theft offense, due process would require that the indictment contain notice of the value of the property involved or the degree of the offense pursuant to R.C. 2945.75(A). *Id.*

{¶ 11} In the case at bar, the special finding (occurring on the grounds of a correctional facility) set forth in R.C. 2903.13(B)(2)(b) only affected the punishment available upon conviction, and is not part of the crime of assault as set forth in R.C. 2903.13(B); therefore, the finding is not an essential element of the offense. Since McPherson was charged with felonious assault, he was put on notice that he could be found guilty of all lesser included offenses, together with any of the special, statutory findings dictated by the evidence produced in the case.

{¶ 12} We find that the evidence adduced at trial indicated that the assault occurred on the grounds of a correctional facility, and thus the trial court properly convicted him in conformity with the evidence and the law. Accordingly, McPherson’s third assignment of error is overruled.

{¶ 13} McPherson’s first and second assignments of error state the following:

{¶ 14} “The trial court erred in denying appellant’s motion for acquittal as to the charges when the state failed to present sufficient evidence to sustain a conviction.”

{¶ 15} “Appellant’s conviction is against the manifest weight of the evidence.”

{¶ 16} When an appellate court reviews a claim of insufficient evidence, “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, 67, 2004-Ohio-6235, 818 N.E.2d 229, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 17} 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 citations and quotations omitted.) *Leonard*, supra, at 68.

{¶ 18} Under these two assignments of error, McPherson contends that his convictions cannot be upheld because there is no evidence that he assaulted the guard. We disagree.

{¶ 19} The victim testified that he went into McPherson's cell at the Cuyahoga County Jail to talk with McPherson. When the victim was leaving the cell, McPherson came at him from the side and pushed him into the wall where he hit his head. The victim sustained a head injury, including a bruise on the brain, dizziness, and vertigo. McPherson admitted that he pushed and hit the victim. We find the evidence sufficient to sustain a conviction for assault on the grounds of a correction facility, and his conviction is not against the manifest weight of the evidence. McPherson's first and second assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from 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.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

**CHRISTINE T. MCMONAGLE, J., and
LARRY A. JONES, J., CONCUR**