

[Cite as *State v. Mitchell*, 2015-Ohio-4379.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102499

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID MITCHELL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-586300-A

BEFORE: McCormack, P.J., E.T. Gallagher, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: October 22, 2015

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TIM McCORMACK, P.J.:

{¶1} Defendant-appellant David Mitchell appeals his conviction for the assault of a peace officer. For the following reasons, we affirm the conviction.

{¶2} David Mitchell was charged with assault of a peace officer (Cleveland police officer Phillip Spears) in Count 1, assault of a peace officer (Cleveland police sergeant Paul Baeppler) in Count 2, and resisting arrest in Count 3. The charges stem from an incident that occurred on June 7, 2014, when officers responded to a call for assistance at Cleveland police officer Joseph Mitchell’s (“Joseph Mitchell”) residence. David Mitchell pleaded not guilty to the charges, and the matter proceeded to a jury trial.

{¶3} At trial, the state presented testimony from six witnesses: David Mitchell’s father, Joseph Mitchell; Officer Phillip Spears; Officer Herman Dotson; Sergeant Paul Baeppler; Detective Jarod Schlacht; and Tyler Hallquist, a paramedic from the Cleveland Emergency Services (“EMS”), who treated David Mitchell at the scene. David Mitchell testified on his own behalf.

{¶4} Joseph Mitchell testified that before leaving for his basic patrol duty on the morning of June 7, 2014, he attempted to settle a dispute between his two sons. David Mitchell had been drinking and arguing with his older brother. According to Joseph Mitchell, David Mitchell likes drinking and playing loud music. Joseph Mitchell repeatedly asked David Mitchell to turn down the music. When the loud music

continued, he asked David Mitchell to leave and to sober up at a friend's place. David Mitchell ultimately left the house. While on patrol, Joseph Mitchell stopped home and twice discovered David Mitchell there, and each time, he told David Mitchell to leave. The third time driving by his house, Joseph Mitchell discovered one of his neighbors in the Mitchell driveway, who told him that someone was breaking into Mitchell's house. Joseph Mitchell then noticed a ladder against his house and heard breaking glass. He surmised that David Mitchell had retrieved the ladder from the garage and broken his bedroom window in order to get back in the home.

{¶5} Joseph Mitchell testified that he found David Mitchell inside the house, sitting at the computer with the music turned up loudly. Joseph Mitchell told his son, once again, to leave the house. David Mitchell told his father that if he wanted him out of the house, he would have to call the police. Joseph Mitchell then called the police for assistance to deal with an unruly male.

{¶6} Officers Spears and Dotson responded to the call. When the officers arrived, they observed a ladder against the house, a broken window, and David Mitchell sitting down inside the house, with his father standing next to him. Officer Spears testified that Joseph Mitchell was having a "loud discussion" with his son and that David Mitchell appeared "in a rage." Officer Dotson testified that David Mitchell was agitated.

The officers asked the father what he wanted them to do. Joseph Mitchell told the officers that he just wanted his son to leave for the rest of the day.

{¶7} At that point, Officer Spears asked David Mitchell to stand up and ordered him to be quiet. Joseph Mitchell and the officers testified that David Mitchell began yelling that he was King David and the officers were Romans who killed Jesus. Joseph Mitchell explained that when his son drinks, he believes he is King David. Joseph Mitchell testified that when the officers approached his son, he “went behind the chair and got into a fighting stance,” meaning he “readied himself to fight.” Officer Spears testified that David Mitchell “stood up from the couch and lunged” at him, “swinging his right hand, striking [Spears] just on the edge of the temple.” The punch knocked Officer Spears off balance, as he was “slightly stunned.” Officer Spears stated that he was able to prevent a fall by catching himself on the couch with both hands.

{¶8} Officer Dotson testified that when his partner asked David Mitchell to stand up, he saw David Mitchell get up and lunge at Officer Spears with a closed fist to the side of the officer’s head, which caused the officer to fall. Officer Dotson then used a taser on David Mitchell, which caused him to fall to the floor. At that point, the officers were able to handcuff him, and they propped him up into a sitting position, with his hands cuffed behind his back.

{¶9} Officer Spears stated that David Mitchell’s breath “smelled of vodka,” and after he recovered from the taser, David Mitchell continued to curse at the officers. Officer Dotson stated that David Mitchell continued to be “combative and argumentative” after he was handcuffed. Officer Dotson also stated that he “smelled a little alcohol” and

thought David Mitchell was intoxicated. Thereafter, the officers called for a supervisor and EMS, as dictated by office protocol.

{¶10} Sergeant Baeppler arrived, and the officers placed David Mitchell under arrest and briefed their sergeant. Sergeant Baeppler then proceeded to interrogate David Mitchell, who again began shouting that he was King David. The sergeant assessed him in order to determine whether he was intoxicated or mentally unstable. Sergeant Baeppler testified that during his assessment, David Mitchell kicked him in the knee. He explained that it was a “glancing blow” and not a “direct shot.” Officer Dotson, who was standing nearby and still holding the taser in his hand because the taser’s probes were still attached to David Mitchell, ordered him to calm down because he remained agitated.

At that point, David Mitchell kicked Officer Dotson’s hand that held the taser, thus activating the taser again.

{¶11} Shortly thereafter, the paramedic, Tyler Hallquist, arrived to examine David Mitchell and remove the taser’s probes. Hallquist assessed David Mitchell and determined that he was “alert and oriented times three” and his vital signs were good. Hallquist stated that David Mitchell was able to recall his name, his address, the day of the week, and what happened. He testified that David Mitchell indicated he had no complaints resulting from the taser injury and he refused to go to the hospital. The paramedic further stated that David Mitchell was uncooperative when he first arrived; however, when the officers told David Mitchell to allow the paramedic to examine him, he cooperated.

{¶12} Detective Schlacht arrived on the scene as the paramedic was examining David Mitchell. He observed that the left side of Officer Spears's face was "very red and irritated" and Sergeant Baeppler was limping. The detective admitted that he did not include these observations in his report, explaining however, that he did not need a report to refresh his recollection regarding his officers' injuries. The detective also observed that David Mitchell was very vocal, yelling that he was King David and the officers killed Jesus. He testified that David Mitchell's behavior improved, however, when the officers or David Mitchell's father calmed him down long enough to allow the paramedic's examination. He stated that David Mitchell's behavior escalated again, once the examination was completed.

{¶13} Following his examination, David Mitchell was placed in the back seat of a patrol car. Officer Spears testified that because David Mitchell was still behaving "horrib[ly]" at this point, cursing and claiming he was the son of God, the officers asked David Mitchell's father to ride with them to the police station in order to keep David Mitchell "relaxed and controlled." Officer Dotson testified that there were no further problems with David Mitchell's behavior during transport.

{¶14} In his own defense, David Mitchell admitted that he was intoxicated the morning of June 7, 2014, and he admitted to "scuffling" with the officers as they "tried to detain [him]." On cross-examination, David Mitchell explained that he scuffled with the police in order to avoid going to jail; however, he does not remember why he was being arrested.

{¶15} After trial, the jury found Mitchell guilty of assault in Count 1 (assaulting Officer Spears) and not guilty of the remaining charges. The court sentenced Mitchell to 18 months community control sanctions.

{¶16} Mitchell now appeals his conviction, assigning one error for this court's review: his conviction was against the manifest weight of the evidence. Mitchell essentially contends that the police officers' testimony was contradictory and the evidence presented failed to show he acted knowingly when he reacted to the presence of the officers.

{¶17} A manifest weight challenge raises a factual issue and questions whether the state has met its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997). An appellate court reviewing a challenge based on the manifest weight of the evidence sits as a thirteenth juror to the proceedings:

“The court, reviewing the entire record, weighs the evidence and 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.”

Id. at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶18} “[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.” *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. When examining witness credibility, “the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact.” *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986). A factfinder is free to believe all, some, or none of the testimony of each witness appearing before it. *State v. Ellis*, 8th Dist. Cuyahoga No. 98538, 2013-Ohio-1184, ¶ 18.

{¶19} David Mitchell was convicted of assaulting a police officer, in violation of R.C. 2903.13(A), which provides that “[n]o person shall knowingly cause or attempt to cause physical harm to another * * *.” A person acts “knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.” Voluntary intoxication does not negate the “knowing” state of mind required for a conviction of assault. *State v. Koballa*, 8th Dist. Cuyahoga No. 100664, 2014-Ohio-3592, ¶ 25, citing *State v. Melton*, 8th Dist. Cuyahoga No. 97245, 2012-Ohio-2386; R.C. 2901.21(C).

{¶20} Here, we find no merit to David Mitchell’s claim that his conviction for assaulting Officer Spears was against the manifest weight of the evidence. Joseph Mitchell testified that when Officer Spears approached David Mitchell, David Mitchell got into a “fighting stance” and “readied himself to fight.” Officer Spears testified that

David Mitchell stood up from the couch, lunged at him, and then swung his right hand and struck him on the face. Officer Dotson also testified that David Mitchell lunged at Officer Spears, striking him on the side of the officer's head with a closed fist. Detective Schlacht observed that one side of Officer Spears's face appeared "very red and irritated."

The witnesses testified that David Mitchell had been agitated, combative, or argumentative, cursed the officers, and he smelled of alcohol. David Mitchell admitted that he was intoxicated and scuffled with the officers in order to avoid going to jail.

{¶21} David Mitchell claims that the evidence failed to show that he acted knowingly when he reacted to the police presence. Joseph Mitchell testified that his son's behavior that morning was typical behavior when he had been drinking, especially in shouting that he is King David. David Mitchell's intoxication, however, does not negate the "knowing" state of mind necessary to support a conviction for assault. Furthermore, the evidence showed that he was able to control his behavior. The witnesses testified that when Joseph Mitchell or the officers told David Mitchell to calm down and allow the paramedic to examine him, he acquiesced. The paramedic also testified that David Mitchell was alert and oriented during the examination and was able to tell the paramedic what happened.

{¶22} To the extent that David Mitchell claims the officers' testimony was contradictory, we note that the choice between credible witnesses and conflicting testimony rests solely with the jury, who is free to believe all, some, or none of the testimony of the witnesses. Moreover, the jury found David Mitchell not guilty on

Counts 2 and 3, demonstrating that the jury carefully considered the evidence presented and properly weighed that evidence before reaching its verdict. We therefore cannot say 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.

{¶23} David Mitchell's sole assignment of error is overruled.

{¶24} The judgment of the trial court 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.

TIM McCORMACK, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
SEAN C. GALLAGHER, J., CONCUR