[Cite as *State v. Jones*, 2015-Ohio-490.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-140241 TRIAL NO. C-13CRB-27949(A)
Plaintiff-Appellee,	:	*O P I N I O N.*
vs.	:	
ANTHONY JONES,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: February 11, 2015

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Judith Anton Lapp*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

James J. Whitfield, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

SYLVIA SIEVE HENDON, Judge.

{¶1} Following a jury trial, truck driver Anthony Jones was convicted of assault for his attack on another truck driver. In this appeal, he contends that the trial court imposed an excessive sentence, improperly refused a defense exhibit, and gave a jury instruction over his objection on the offense of disorderly conduct. He also claims that the weight of the evidence did not support his conviction. We conclude that none of these contentions have merit, and we affirm Jones' conviction.

I. Background

{¶2} At a local trucking company, truck drivers checked in and out with Benjamin Stephen, an attendant who sat at a desk behind an interior window. One morning, Jones approached the window, leaned to the side of it, and began talking and texting on his cell phone. When Stephen asked Jones what he needed, Jones told him to "hold on," and continued to talk on his phone. Two other drivers, Dan Reck and Brian Dutterer, got in line behind Jones.

{¶3} After several minutes of waiting and overhearing Jones' phone conversation, Reck understood that Jones did not have the information he needed to conduct business with Stephen. Jones was leaning on his shoulder against the side of the window, so Reck reached through the open window and gave Stephen his own paperwork. Then Reck stepped back two or three feet so as not to crowd Jones.

{¶4} Jones told Reck that he was rude, and then continued to talk on his phone. A few moments later, Jones stepped toward Reck and told him again that he was rude. Reck responded that Jones was rude to be on the phone while others waited to do business. Then Reck saw that Stephen was finished with his paperwork,

so he stepped to the side of Jones to go to the window. At that point, Jones punched Reck in the side of the head, knocking him unconscious. Reck fell backwards to the ground, and Jones kicked Reck in the head. When Dutterer stepped in between Jones and Reck, Jones struck him in the face. Matthew Cook, a dispatcher in an adjoining office, saw Jones kick the fallen Reck in the head, so he ran out to separate the men and the police were called.

{¶5} According to Reck, he had not touched Jones before the attack. And none of the state's witnesses had seen Reck touch Jones.

{¶6} However, Jones testified that Reck had pushed him aside to pass his paperwork through the window. He said that when he told Reck that he was rude, Reck pushed him again. According to Jones,

> When [Reck] pushed me, I leaned back and I threw three punches at him. Because I felt threatened. And [Dutterer] had stepped up to him. And when he fell, when I threw the three punches, [Reck] fell on the ground. I took my foot and held him down, anticipating that [Dutterer] was to engage, and he did. He charged me. And he charged me, running at me like that. And I threw a punch at him, and his momentum hit me and pushed me back across the room.

Jones admitted that Reck "was still on the floor, unconscious." He could tell that Reck was unconscious because "he wasn't moving. His eyes was closed. He wasn't moving."

{¶7} After the police arrived, Jones was arrested and Reck was taken by ambulance to a hospital for treatment.

{¶8} Jones was charged with assaulting both Reck and Dutterer. The jury convicted Jones of assaulting Reck, but acquitted him of assaulting Dutterer. The trial court sentenced Jones to 100 days' incarceration and imposed a $50 fine.

II. Self-Defense

{¶9} In his first assignment of error, Jones argues that his conviction was against the manifest weight of the evidence. He contends that he proved that he had acted in self-defense when he struck Reck.

{¶10} To prevail on a non-deadly-force affirmative defense, a defendant must prove by a preponderance of the evidence that (1) he was not at fault in creating the violent situation; (2) he reasonably believed that some force was necessary to defend himself against the imminent use of unlawful force; and (3) the force used was not likely to cause death or great bodily harm. *See In re Maupin*, 1st Dist. Hamilton No. C-980094, 1998 Ohio App. LEXIS 5907, *5-6 (Dec. 11, 1998), citing *Columbus v. Dawson*, 33 Ohio App.3d 141, 142, 514 N.E.2d 908 (10th Dist.1986); R.C. 2901.05(A).

{¶11} In this case, although Jones claimed that Reck had pushed him twice, several witnesses testified that Reck had not touched Jones. The jury was in the best position to determine the credibility of the witnesses, and it was entitled to believe that Jones had attacked without physical provocation and to reject Jones' testimony that he had acted in self-defense. Accordingly, we conclude that Jones' assault conviction was not against the manifest weight of the evidence. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). We overrule the first assignment of error.

III. A Defense Exhibit

{¶12} In his second assignment of error, Jones argues that the trial court erred by refusing to admit a defense exhibit, purportedly a document that had been provided in the state's response to his request for discovery. In its case, the defense called a police officer to testify. Counsel handed him a three-page document identified as "Defendant's Exhibit B," and asked, "Are those police reports?" The officer said no. The officer identified the first two pages of the exhibit as "the 527s. These are the arrest * * * documentation, correct, for the Justice Center." Counsel then asked, "And that third page, do you recognize that?" The officer did not. Counsel asked if the information on the third page was incorrect, and the officer responded that he had never seen it and that he did not "even know whose this was." The content of the third page was not discussed on the record, and the exhibit was not preserved for our review.

{¶13} At the close of the defense case, counsel sought to introduce defendant's exhibit B into evidence. In response to the state's objection, defense counsel argued that the documents had been provided by the state in discovery. Counsel did not state how the document may have been relevant or material to his defense. The trial court did not allow the exhibit into evidence.

{¶14} On appeal, Jones acknowledges that the exhibit had to be authenticated before it could properly have been introduced into evidence. But he claims, for the first time on appeal, that the state had prevented him from authenticating the document at trial "by refusing to have available the (only) witness who can authenticate" it. The record does not support Jones' contention that he was prevented from authenticating the document or that the state contributed in any way

to his failure to properly authenticate it. And Jones has failed to demonstrate that he was prejudiced as a result of the exhibit's omission. Consequently, we cannot say that the trial court abused its discretion by refusing to admit the document into evidence. *See State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 62. We overrule the second assignment of error.

IV. Jury Instructions

{¶15} In his third assignment of error, Jones argues that the trial court erred by allowing the jury to consider the charge of disorderly conduct as a lesser-included offense of assault. Jones contends that the instruction may have distracted the jury from the issues of assault and self-defense.

{¶16} Jones was charged with assault under R.C. 2903.13(A), which prohibits a person from knowingly causing or attempting to cause physical harm to another. In addition to instructing the jury on assault, the trial court, over Jones' objection, also gave an instruction on disorderly conduct under R.C. 2917.11(A)(1). That section prohibits a person from recklessly causing inconvenience, annoyance, or alarm to another by engaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior.

{¶17} We have held that disorderly conduct under R.C. 2917.11(A)(1) is a lesser-included offense of assault under R.C. 2903.13. *See State v. Reynolds*, 25 Ohio App.3d 59, 495 N.E.2d 971 (1st Dist.1985). Even if a defendant raises a complete defense to the charged crime, a trial court must give an instruction on a lesser-included offense if under any reasonable view of the evidence it is possible for the jury to find the defendant not guilty of the greater offense and guilty of the lesser

offense. *State v. Wine*, 140 Ohio St.3d 409, 2014-Ohio-3948, 18 N.E.3d 1207, ¶ 33-34.

{¶18} We conclude that based upon the evidence presented at trial, the jury could have found Jones guilty of disorderly conduct for engaging in violent behavior that caused alarm or annoyance, and not guilty of assault. The trial court did not err by instructing the jury on disorderly conduct. We overrule the third assignment of error.

V. Sentence

{¶19} In his fourth assignment of error, Jones argues that the trial court abused its discretion by imposing a sentence of 100 days' incarceration. He contends that the sentence was excessive.

{¶20} R.C. 2929.21 requires a trial court "to impose a sentence that fulfills the dual purposes of misdemeanor sentencing, which are to protect the public from future crimes and to punish the offender." *State v. Black*, 1st Dist. Hamilton No. C-060861, 2007-Ohio-5871, ¶ 19. And R.C. 2929.22 sets forth factors that a court must consider before imposing a misdemeanor sentence. *See id.* We presume that the court considered the sentencing criteria where the sentence imposed is within the statutory limits. *Id.* at ¶ 20; *see State v. Pate*, 1st Dist. Hamilton Nos. C-130109, C-130110 and C-130112, 2013-Ohio-3740, ¶ 9.

{¶21} Jones faced a potential sentence of 180 days' incarceration. R.C. 2929.24(A)(1). The trial court imposed 100 days. Given the violent nature of Jones' unprovoked attack, including kicking an unconscious Reck in the head, we conclude that the trial court did not abuse its discretion in sentencing Jones. We overrule the fourth assignment of error.

VI. Cumulative Error

{¶22} In his fifth and final assignment of error, Jones argues that the trial court's cumulative errors deprived him of a fair trial. Because Jones has failed to demonstrate any error by the trial court, the doctrine of cumulative error is not applicable in this case. *See State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 223–224. Consequently, we overrule this assignment of error and affirm the trial court's judgment.

Judgment affirmed.

CUNNINGHAM and **FISCHER, JJ.,** concur**.**

Please note:

The court has recorded its own entry on the date of the release of this opinion.