

[Cite as *State v. Sims*, 2015-Ohio-5454.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	
PLAINTIFF-APPELLEE,)	
)	CASE NO. 14 MA 27
V.)	
)	OPINION
ROBBIE SIMS,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Youngstown
Municipal Court of Mahoning County,
Ohio
Case No. 2013CRB2622

JUDGMENT: Affirmed in part
Reversed and remanded in part

APPEARANCES:
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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L Waite
Hon. Mary DeGenaro

Dated: December 16, 2015

DONOFRIO, P.J.

{¶1} Defendant-appellant Robbie Sims appeals his conviction and sentence entered in the Youngstown Municipal Court for assault, following a bench trial.

{¶2} Sims was driving his truck with the victim, Brittany Watson, as a passenger when the two got into an argument and physical altercation on the evening of November 15, 2013. Watson ran from the vehicle and called the police to report that Sims had assaulted her. Youngstown Police Officers Jerry Fulmer and Robert John Gentile Jr. were dispatched to the area of Marion and Edwards near where Watson had called the police. The officers encountered Watson, who was carrying a wrench. Watson told the officers that she got into an argument with Sims while in his truck and that as she tried to get out of the truck, he struck her in the back with the wrench but was able to take it from him. She was visibly upset and complained of back pain.

{¶3} Meanwhile, Sims arrived in the area which is also near his home. The officers approached him and asked him what had happened between him and Watson. He acknowledged that they got into an argument, but denied ever striking her. Rather, he claimed that she had hit him with a drill, tearing his shirt and showed the officers a tear in his shirt.

{¶4} At Watson's request, an ambulance arrived and attended to her. The officers issued a summons for first-degree misdemeanor assault in violation of R.C. 2903.13 to both Sims and Watson for assault. The ambulance transported Watson to the hospital.

{¶5} On November 18, 2013, Sims appeared in court, pleaded not guilty, and was appointed counsel. Thereafter, Sims waived speedy-trial time limits and the docket reflects that the case was reset for trial at Sims's request to February 12, 2014. On February 3, 2014, nine days before the date set for trial, Sims filed a jury demand. Citing to Crim.R. 23's requirement that a jury demand must be filed not less than ten days prior to the date set for trial, the state filed a motion to deny Sims's jury demand since he filed the demand one day late. On February 7, 2014, the trial court denied Sims's jury demand as untimely filed.

{¶16} The case proceeded to a bench trial as scheduled on February 12, 2014. The state called Officer Fulmer, Officer Gentile, and Watson to testify. Watson testified reluctantly, asserting that she was the one who had started the fight between herself and Sims, acknowledging that they were still in a relationship, and indicating that she did not want to see him go to jail.

{¶17} The court found Sims guilty and sentenced him to 30 days in jail, a \$100 fine, costs, and one year of reporting probation. The court granted Sims a 30-day stay of execution of the sentence pending an appeal which followed. As for Watson's case where she was charged with the offense of assaulting Sims, she pleaded no contest prior to Sims's trial. (Tr. 36, 58.)

Weight of the Evidence

{¶18} Sims presents two assignments of error. Sims's first assignment of error states:

This is an extraordinary case, an exceptional circumstance, where the alleged victim's statements clearly indicate that the trial court's decision is against the manifest weight of the evidence[.]

{¶19} Weight of the evidence concerns the inclination of the greater amount of credible evidence to support one side of the issue over the other. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In reviewing a manifest weight of the evidence argument, the reviewing court examines 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 trial court clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Id.*

{¶10} A reversal on weight of the evidence is ordered only in exceptional circumstances. *Id.* In fact, where a criminal case has been tried by a jury, only a unanimous appellate court can reverse on the ground that the verdict was against the manifest weight of the evidence. *Id.* at 389, 678 N.E.2d 541, citing Section 3(B)(3), Article IV of the Ohio Constitution (and noting that the power of the court of appeals is

limited in order to preserve the jury's role with respect to issues surrounding the credibility of witnesses). However, when a criminal case is tried to the trial court and not to a jury, as was the case here, a simple majority of the judges on the reviewing panel could reverse an appellant's conviction as being against the manifest weight of the evidence. *Id.*; see also *Struthers v. Williams*, 7th Dist. No. 07 MA 55, 2008-Ohio-6637, ¶ 10.

{¶11} When there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not the reviewing court's province to choose which one should be believed. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999). Rather, the reviewing court defers to the trier-of-fact which was best able to weigh the evidence and judge the credibility of witnesses by viewing the demeanor, voice inflections, and gestures of the witnesses testifying before it. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1994); *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967).

{¶12} Here, R.C. 2903.13 defines misdemeanor assault as "No person shall knowingly cause or attempt to cause physical harm to another * * *."

{¶13} Sims argues that neither of the responding police officers did anything to substantiate Watson's claims that Sims had assaulted her. Specifically, he repeatedly suggests that the officers should have had Watson lift her shirt or observed the ambulance personnel examination of her so they could see for themselves if there were any injuries. He also contends that the officers' description of Watson's demeanor was inconsistent and, alternatively, assuming it was inconsistent, demonstrates that Watson is a schizophrenic, calling into question her credibility.

{¶14} Next, Sims points out Watson's own testimony that she was intoxicated at the time of the incident. He also notes that Watson did not present any testimony concerning her own visual inspection of her injuries. He argues that her testimony was inconsistent in that she testified to being hit in the back as she exited Sims's truck, but could not identify the wrench as being the object that struck her or how she

was able to get it from him.

{¶15} Lastly, at oral arguments on this matter, Sims's appellate counsel also claimed there were six instances where the trial court judge unfairly limited Watson's testimony.

{¶16} Upon review, we find that Sims's conviction for assault was not against the manifest weight of the evidence. Both Officer Fulmer and Officer Gentile testified that Watson told them that Sims had struck her with the wrench as she was attempting to get out of his truck. (Tr. 8, 19-20.) The record supports Sims's assertion that the officers did not observe any injuries to Watson's back. However, they were never given a reasonable opportunity to do so. Given that Watson was a victim of the opposite sex from the investigating officers, it does not seem unreasonable that the officers did not have her lift her shirt or attempt to oversee her examination by the ambulance personnel. In addition to her own statement at the time of the incident indicating that she was injured, the fact that she felt it necessary for the ambulance to transport her to the hospital is additional evidence from which it could be inferred that she was indeed injured.

{¶17} Sims characterizes Watson's testimony concerning the assault itself or how she was assaulted as inconsistent. On direct examination, Watson testified that Sims struck her in the back with the wrench as she tried to get out of his truck. (Tr. 28, 33, 35, 45.) Under cross-examination, Watson acknowledged that she was turning her back to him to try to get out of Sims's truck when he struck her, so she did not actually see him strike her or see the wrench. (Tr. 36.)

{¶18} Sims mischaracterizes the import of Watson's testimony in this regard. Her testimony was consistent in that she stated she was struck in the back as she was trying to get out of Sims's truck. Sims was the only other person in the truck and the wrench Watson took from him was the one he used to start and stop the truck with. Taken together, this constituted evidence from which it could be reasonably inferred that Sims struck Watson in the back with the wrench as she was trying to exit the vehicle.

{¶19} Furthermore, concerning Sims's arguments in this regard, it was worth

noting that “[i]t is * * * well-settled under Ohio law that a defendant may be convicted solely on the basis of circumstantial evidence. [P]roof of guilt may be made by circumstantial evidence as well as by real evidence and direct or testimonial evidence, or any combination of these three classes of evidence. All three classes have equal probative value, and circumstantial evidence has no less value than the others. Circumstantial evidence is not less probative than direct evidence, and, in some instances, is even more reliable.” (Internal citations and quotations omitted.) *State v. Nicely*, 39 Ohio St.3d 147, 151, 529 N.E.2d 1236 (1988).

{¶20} Turning to the issue of Watson’s intoxication at the time of the incident, she admitted that she was “highly intoxicated.” (Tr. 28.) Such evidence is certainly relevant and reflects on her credibility. *Jackson v. St. Elizabeth Hosp. Med. Cen.*, 7th Dist. No. 97 CA 117, 1999 WL 756424, *6 (Sept. 22, 1999), citing *Kenney v. Fealko*, 75 Ohio App.3d 47, 598 N.E.2d 861 (11th Dist.1991). However, as indicated, it is well settled that a reviewing court defers to the trier of fact on questions of credibility. *State v. Kirkland*, 140 Ohio St. 3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 132.

{¶21} Additionally, as indicated, Watson was reluctant to testify due to her ongoing relationship with Sims and testified that she had started the argument with him. (Tr. 28.) As the State correctly noted during oral arguments, the defense of mutual combat does not exist in Ohio. *State v. Lynch*, 8th Dist. No. No. 95770, 2011-Ohio-3062, ¶ 16.

{¶22} Lastly, concerning Sims’s argument that the trial court judge unfairly limited Watson’s testimony, a review of the record lends no support to that argument. Each time the court curtailed Watson’s testimony it was only after she had answered the question that was asked and tried to veer off and offer testimony that was not in response to the question asked by counsel. It was usually instances of where she was trying to offer duplicative testimony concerning her intoxicated state at the time of the incident and attempts to divert fault from Sims to herself.

{¶23} In sum, the inclination of the greater amount of credible evidence supports that Sims assaulted Watson by hitting her in the back with the wrench as she was attempting to exit his vehicle. The inconsistencies highlighted by Sims, even

if they could be construed as such, are relatively minor and, as indicated, the reviewing court defers to the fact-finder who is best able to weigh the evidence and judge the credibility of witnesses by viewing the demeanor, voice inflections, eye movements, and gestures of the witnesses testifying before it. See *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984); *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967). Upon review, this case does not present one of exceptional circumstances.

{¶24} Accordingly, Sims’s first argument is without merit.

Allocution

{¶25} Sims’s second assignment of error states:

The court erred when it denied the Defendant his absolute right of allocution[.]

{¶26} Under this assignment of error, Sims argues that he was denied his right of allocution when the trial court failed to address him directly and offer him the opportunity to speak before pronouncing sentence. In response, the state essentially argues that the trial court complied with Crim.R. 32 by hearing statements from defense counsel and the prosecutor.

{¶27} Ohio Crim.R. 32(A)(1) provides that at the time of imposing sentence, the trial court “shall afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.” An absolute right of allocution is conferred by Ohio Crim.R. 32(A)(1). *State v. Green*, 90 Ohio St.3d 352, 358, 738 N .E.2d 1208 (2000).

{¶28} “The right of allocution applies to both the defendant and his attorney.” *State v. Land*, 7th Dist. 00-C.A.-261, 2002-Ohio-1531, ¶ 24 citing *Defiance v. Cannon* (1990), 70 Ohio App.3d 821, 827-828, 592 N.E.2d 884; Crim.R. 32(A)(1). “A sentencing court is required to ask the defendant personally if he wants to make a statement or present information in mitigation.” *State v. Clunen*, 7th Dist. 12 CO 30, 2013-Ohio-5525, ¶ 18 citing Civ.R. 32(A)(1). “Trial courts must painstakingly adhere

to Crim.R. 32 guaranteeing the right of allocution. A Crim.R. 32 inquiry is much more than an empty ritual: it represents a defendant's last opportunity to plead his case or express remorse." *Green*, 90 Ohio St.3d, 359-360.

{¶29} Here, a review of the record demonstrates that the trial court did not address Sims directly. After finding Sims guilty, the trial court proceeded immediately to sentencing. Beginning at the bottom of page 59 of the transcript, the trial court clearly gave Sims's defense counsel the opportunity to speak prior to sentencing. However, at no point did the trial court ever address Sims directly or personally and ask if he wished to make a statement on his own behalf or present any information in mitigation of punishment.

{¶30} Accordingly, Sims's second assignment of error has merit.

{¶31} The judgment of conviction is affirmed and the judgment of sentence is reversed and this matter remanded for resentencing.

Waite, J., concurs.

DeGenaro, J., concurs.