[Cite as *State v. Lambert,* 2019-Ohio-1226.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO, CITY OF YOUNGSTOWN

Plaintiff-Appellee,

v.

MATTHEW J. LAMBERT,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0131

Criminal Appeal from the
Youngstown Municipal Court of Mahoning County, Ohio
Case Nos. 16 CRB 27 and 16 CRB 28

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Dana Lantz, City Prosecutor, City of Youngstown Law Department, 26 Phelps Street, Youngstown, Ohio 44503, No brief filed, for Plaintiff-Appellee and

Atty. Wesley A. Johnston, P.O. Box 6041, Youngstown, Ohio 44501 for Defendant-Appellant.

Dated: March 18, 2019

Robb, J.

{¶1} Defendant-Appellant Matthew Lambert appeals the decision of Youngstown Municipal Court convicting him of criminal damaging and assault. The issues in this appeal are whether the city presented sufficient evidence for the case to proceed to the trier of fact and whether the guilty verdicts are against the manifest weight of the evidence. For the reasons expressed below, there was sufficient evidence produced and the verdict was not against the manifest weight of the evidence. The convictions are hereby affirmed.

Statement of Facts and Case

{¶2} In the afternoon of December 31, 2015 an altercation occurred between Jermaine Phipps and Appellant in the street in front of the residence located at 2902 Clingan Street, Youngstown, Ohio. 7/19/17 Trial Tr. 26, 34, 75. Ernestine Jackson was with Phipps when the altercation occurred. 7/19/17 Trial Tr. 26, 33, 77-79. Ernestine lived at 2902 Clingan Street with her boyfriend Arthur Norwood. 7/19/17 Trial Tr. 35, 75.

{¶3} Phipps and Jackson stopped at Jackson's home for her to pick up some clothes to wear later; she was planning on going out for New Year's Eve. 7/19/17 Trial Tr. 55. Phipps remained in his van with his four children waiting for Jackson to return to the van so they could leave. 7/19/17 Trial Tr. 42. While Jackson was inside the residence getting clothes, Norwood came outside with a gun, exchanged words with Phipps, and shot the gun into the air. 7/19/17 Trial Tr. 36, 57, 75. While this was occurring, Appellant approached Phipps' van. He and Phipps began a heated verbal exchange. 7/19/17 Trial Tr. 36-42.

{¶4} Phipps and Appellant had known each other since high school in the 1990s and were friends at one time. 7/19/17 Trial Tr. 31. However, at the time of this altercation there was "bad blood" between the two. 7/19/17 Trial Tr. 39, 88. The testimony indicates the dispute between Appellant and Phipps concerned Appellant's ex-wife and statements Phipps made at her memorial service in early December 2015. 7/19/17 Trial Tr. 38, 95.

{¶5} Part of the argument between Phipps and Appellant occurred while Appellant was standing at the passenger side of the van. 7/19/17 Trial Tr. 42-43, 77.

Jackson, at this point, had returned to the van and was seated in the front passenger seat; Phipps and Appellant were arguing across Jackson. 7/19/17 Trial Tr. 42-43, 77. During the argument, Appellant hit Jackson in the temple. 7/19/17 Trial Tr. 43, 77. Phipps and Jackson both testified that they believed Appellant was attempting to hit Phipps, but missed. 7/19/17 Trial Tr. 43, 60, 77, 81. Appellant also shot a mace pellet gun into the van; Jackson and the children began coughing and gagging. 7/19/17 Trial Tr. 19, 42, 78.

{¶6} Jackson urged Phipps to drive away before things escalated any further. 7/19/17 Trial Tr. 79. As they were pulling away, Appellant got a bat out of his truck. 7/19/17 Trial Tr. 45, 79. Appellant hit the front passenger windshield with the bat shattering part of the windshield. 7/19/17 Trial Tr. 46, 79, 81. The shattering glass, however, did not cause any injury to Jackson. 7/19/17 Trial Tr. 80-81.

{¶7} Phipps stopped his van and called the police. 7/19/17 Trial Tr. 47, 80. The 911 call was received at 2:50 p.m. on December 31, 2015 from the 2902 Clingan Street address. 7/19/17 Trial Tr. 10. Appellant left the scene before the police arrived. 7/19/17 Trial Tr. 49, 80.

{¶8} When the police arrived, Phipps and Jackson gave statements; two complaints were filed against Appellant. The first one was for assault and Jackson was named the victim. 1/8/16 Complaint Case No. 2016CRBY0027. The second complaint was for criminal damaging and it was alleged Appellant damaged Phipps' property. 1/8/16 Complaint Case No. 2016CRBY0028.

{¶9} The cases were tried together. Appellant entered not guilty pleas, waived his speedy trial time, and asked for the case to be tried in veteran's court. 4/6/16 Waiver of Speedy Trial Time; 9/21/16 Request for Veteran's Court. Appellant also filed a notice of alibi. 4/27/16 Notice of Alibi. The case did not proceed through Veteran's court and was returned to the regular docket. 1/4/17 Returned to Regular Docket. Appellant then waived his right to a jury trial and had the case tried to the bench. 5/10/17 J.E.

{¶10} At trial, the parties stipulated to Appellant's Exhibits 1, 2, and 3. 7/19/17 Trial Tr. 3-6. These exhibits were used during Appellant's testimony to support his alibi defense. 7/19/17 Trial Tr. 99, 100, 103. Appellant claimed he was not anywhere near 2902 Clingan Street on December 31, 2015. He asserted his exhibits evinced he was at work in Wheatland, Pennsylvania. The exhibits were his trucking log from Yourga

Trucking, a bill of lading from Bi-State Storage, and Google Location History. Defendant's Exhibits 1, 2, and 3. Appellant avowed he arrived at Yourga Trucking, in Wheatland, Pennsylvania at 10:46 a.m. on December 31, 2015. 7/19/17 Trial Tr. 100, 106. He then went next door to Bi-State Storage where he loaded coils onto his truck. 7/19/17 Trial Tr. 100-101. He claimed to have left Wheatland, Pennsylvania at 3:00 p.m. on December 31, 2015. 7/19/17 Trial Tr. 102, 106. Appellant's driver log matched his account. Defendant's Exhibit 1. Likewise, Google Location History confirmed Appellant's phone was in Wheatland, Pennsylvania from 10:46 a.m. to 3:00 p.m. on December 31, 2015. 7/19/17 Trial Tr. 106.

{¶11} The trial court found Appellant guilty of both charges and sentenced him to an aggregate sentence of 120 days. 7/20/17 2016CRBY0027 J.E.; 7/20/17 2016CRBY0028; J.E.; 8/31/17 2016CRBY0027 J.E.; 8/31/17 2016CRBY0028 J.E.; 7/19/17 Trial Tr. 128-130; 8/31/17 Sentencing Tr. 22. He received a 180-day jail sentence with 120 days suspended and a $1000 fine with $750 suspended for the assault conviction. 8/31/17 2016CRBY0027 J.E.; 8/31/17 Sentencing Tr. 19. For criminal damaging, he received a 60-day jail sentence and a $250 fine. 8/31/17 2016CRBY0028 J.E.; 8/31/17 Sentencing Tr. 20. The sentences were ordered to be served consecutive. 8/31/17 2016CRBY0027 J.E.; 8/31/17 2016CRBY0028 J.E.; 8/31/17 Sentencing Tr. 20. Appellant also received community control, was ordered to attend anger management classes, and pay restitution ($186.81 the cost to replace the windshield). 8/31/17 2016CRBY0027 J.E.; 8/31/17 2016CRBY0028 J.E.; 8/31/17 Sentencing Tr. 20. The trial court advised Appellant of the consequences for violating community control. 8/31/17 Sentencing Tr. 21.

{¶12} Appellant timely appealed his conviction.

Assignment of Error

"The evidence was insufficient to support the trial court finding Appellant guilty of assault and criminal damaging and the Appellant's convictions were against the manifest weight of the evidence."

{¶13} Appellant argues there was not sufficient evidence to support either the criminal damaging or assault charges and those convictions are against the manifest

weight of the evidence. He contends his alibi established he could not have committed the crimes.

{¶14} Sufficiency of the evidence and manifest weight of the evidence are different standards and as such, will be addressed separately.

1. Sufficiency of the Evidence

{¶15} Whether the evidence is legally sufficient to sustain a conviction is a question of law evaluating the adequacy of the evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). An evaluation of a witness's credibility is not involved in a sufficiency review as the question is whether the evidence, if believed, is sufficient to support the contested elements. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002–Ohio–2126, 767 N.E.2d 216, ¶ 79. In other words, sufficiency involves the state's burden of production rather than its burden of persuasion. *See Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring).

{¶16} In viewing a sufficiency of the evidence argument, the evidence and all rational inferences are evaluated in the light most favorable to the prosecution. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). A conviction cannot be reversed on grounds of sufficiency unless the reviewing court determines that no rational juror could have found the elements of the offense proven beyond a reasonable doubt. *Id*. The question is merely whether **any** rational mind could find the elements were established by the direct and circumstantial evidence. *State v. Getsy*, 84 Ohio St.3d 180, 193, 702 N.E.2d 866 (1998).

{¶17} Appellant was charged with and convicted of first-degree misdemeanor assault in violation of R.C. 2903.13(A)(C), and second-degree misdemeanor criminal damaging in violation of R.C. 2909.06(A)(1)(B).

{¶18} In order to establish its burden of production for assault, the state had to produce evidence that Appellant knowingly caused or attempted to cause physical harm to another. R.C. 2903.13(A). "Physical harm to persons" is defined as "any injury, illness, or other physiological impairment, regardless of its gravity or duration." R.C. 2901.01(A)(3).

{¶19} In order to establish its burden of production for criminal damaging, the state had to produce evidence Appellant "knowingly, by any means" caused or created a

substantial risk of physical harm to Phipps' property without Phipps' consent. R.C. 2909.06(A)(1). "Physical harm to property" is defined as "any tangible or intangible damage to property that, in any degree, results in loss to its value or interferes with its use or enjoyment." R.C. 2901.01(A)(4). "Substantial risk" means a strong possibility a certain result may occur. R.C. 2901.01(A)(8).

{¶20} For assault, the state provided evidence Appellant punched Jackson in the face; both Phipps and Jackson testified there was a heated verbal exchange between Appellant and Phipps and during this exchange Appellant punched Jackson in the face. 7/19/17 Trial Tr. 37-46, 60, 77-78. They both believed Appellant intended to punch Phipps, but missed and hit Jackson instead. 7/19/17 Trial Tr. 43, 81. This testimony establishes Appellant acted knowingly. Furthermore, given the evidence, it could be concluded punching someone in the face either causes physical harm or is an attempt to cause physical harm. *See State v. Hampton*, 8th Dist. No. 103373, 2016-Ohio-5321, ¶ 20 ("When one intentionally punches another in the face, that assailant intends the natural consequences that follow, including causing serious physical harm.") Furthermore, although Appellant may not have intended to hit Jackson, the doctrine of transferred intent is applicable. Under the doctrine of transferred intent, even if the victim was not the intended target, a defendant is as criminally culpable for the harm caused to the actual victim as he would be if the victim had been the intended target. *State v. Calhoun*, 2015-Ohio-5505, 57 N.E.3d 139, ¶ 16 (12th Dist.), citing *In re T.K.*, 109 Ohio St.3d 512, 2006-Ohio-3056, 849 N.E.2d 286, ¶ 16 (upholding a juvenile's adjudication for aggravated rioting and complicity to felonious assault where the juvenile's intent to harm one victim was transferred to two other victims). Since evidence produced could lead a rational mind to believe Appellant knowingly attempted to punch Phipps, Appellant's intent to harm Phipps is transferred to Jackson. *See State v. Free*, 2d Dist. No. 15901, 1998 WL 57373 (Feb. 13, 1998) (Doctrine of transferred intent applies to crimes with a mens rea of knowingly.). Accordingly, the state met its burden of production for assault.

{¶21} As for criminal damaging the state presented evidence Appellant during a heated verbal exchange with Phipps discharged a mace pellet gun inside Phipps' van and broke the passenger side windshield with a baseball bat. 7/19/17 Trial Tr. 36-37, 42, 45-46, 53, 78-79. It cost Phipps $186.81 to fix the windshield. Intentionally swinging a

baseball bat at a windshield and breaking the windshield qualifies as creating a substantial risk of physical harm to the van. Consequently, this evidence was sufficient for a rational person to conclude Appellant knowingly caused damage to Phipps' property.

{¶22} Admittedly, Appellant presented alibi evidence that he was at his job in Wheatland, Pennsylvania where he was employed by Yourga Trucking as a truck driver. He asserted he was in Wheatland, Pennsylvania from 10:46 a.m. to 3:00 p.m., which would mean it would have been impossible for him to have committed the offenses. We review sufficiency of the evidence in the light most favorable to the prosecution, and as such, alibi evidence which is not presented during the state's case in chief is irrelevant to our review of sufficiency of the evidence. *In re L.W.*, 9th Dist. No. 24632, 2009-Ohio-5543, ¶ 19.

{¶23} The state met its burden of production; Appellant's sufficiency argument fails.

2. Manifest Weight of the Evidence

{¶24} Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." *Thompkins*, 78 Ohio St.3d at 387 (it depends on the effect of the evidence in inducing belief but is not a question of mathematics). The appellate court is to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine 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. *State v. Lang*, 129 Ohio St.3d 512, 2011–Ohio–4215, 954 N.E.2d 596, ¶ 220, citing *Thompkins*.

{¶25} A weight of the evidence review involves the state's burden of persuasion. *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring). "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. Hunter*, 131 Ohio St.3d 67, 2011–Ohio–6524, 960 N.E.2d 955, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact occupies the best position from which to weigh the evidence and judge the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶26} The state presented evidence from both victims, Phipps and Jackson, that sometime around two in the afternoon on December 31, 2015 Appellant punched Jackson in the face, shot a mace pellet gun into Phipps' van while Phipps, Jackson, and Phipps' children were in the van, and broke the windshield of Phipps' van with a baseball bat. 7/19/17 Trial Tr. 42-43, 45-46, 78-79. At trial Phipps and Jackson identified Appellant as the perpetrator of the crimes, and testimony established Appellant, Phipps, and Jackson knew each other for many years. 7/19/17 Trial Tr. 31, 39, 81.

{¶27} Appellant gave notice of an alibi defense and at trial presented alibi evidence. He asserts he could not have committed the crimes because he was at work. He offered his driver's log from work and a bill of lading from Bi-State Storage, which indicated he was at Yourga Trucking and Bi-State Storage loading coils onto his truck. 7/19/17 Trial Tr. 94, 99-103. He offered Google Locator as evidence, which showed that his phone was at Yourga Trucking from 10:46 a.m. to 3:00 p.m. on December 31, 2015. 7/19/17 Trial Tr. 100-103.

{¶28} "The defense of alibi means that the defendant claims he was at some place other than the scene of the crime at the time the crime was taking place, and hence could not have been involved in the offense." *State v. Cloud*, 7th Dist. No. 98 CO 51, 2001-Ohio-3396. "Black's Law Dictionary defines an alibi as 'a defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the "relevant time."'" *State v. Carter*, 10th Dist. No. 03AP–778, 2005-Ohio-291, ¶ 49, quoting Black's Law Dictionary (7 Ed.Rev.1999) 72.

{¶29} Alibi is not an affirmative defense, but is an attack on the elements of the offenses, especially the identity of the offender; with an alibi defense, the burden of proof remains with the state. *State v. Robinson*, 47 Ohio St.2d 103, 108, 35 N.E.2d 88 (1976) (Alibi is not an affirmative defense.); *Columbus v. Hickman*, 10th Dist. No. 13AP-103, 2013-Ohio-4154, ¶ 17; *State v. Wilson*, 2d Dist. No. 24577, 2012-Ohio-3098, ¶ 115. *See State v. Childs*, 14 Ohio St.2d 56, 62–65, 236 N.E.2d 545 (1968). Alibi, if it raises a reasonable doubt in the minds of the jurors, should result in an acquittal. *Hickman*.

{¶30} As aforementioned, the state presented evidence Appellant committed the crimes. 7/19/17 Trial Tr. 42-43, 45-46, 78-79. Appellant presented evidence it was impossible for him to commit the crimes because he was at work. 7/19/17 Trial Tr. 94,

99-103. During the state's cross examination of Appellant, the state pointed out that Google Locator only shows where Appellant's phone was during the time the crimes were committed; it did not show where Appellant was at that time. 7/19/17 Trial Tr. 112-113.

{¶31} The case was tried to the bench. The trial court as the trier of fact was "patently in the best position to gauge the truth as to a defendant's advancement of an alibi." *State v. Luce*, 5th Dist. No. 17 COA 040, 2018-Ohio-3865, ¶ 41. When conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the trier of fact believed the state's evidence over the defendant's evidence. *State v. Peasley,* 9th Dist. No. 25062, 2010-Ohio-4333, ¶ 18; *State v. Cooper*, 170 Ohio App.3d 418, 2007-Ohio-1186, 867 N.E.2d 493, ¶ 17 (4th Dist.).

{¶32} While typically, a trier of fact does not explain its reasoning for believing one version over the other, in this case the trial court did explain. It stated:

> And the Court wants to preface its remarks by reciting that in this case it's impossible to reconcile the versions of the State's witnesses with that of the defendant. So somewhere in here there is a, there is an effort to frame or to – as characterized by the defense, or there is a whole lot of background manipulation going on.
>
> The Court finds that in this case, for it to adopt the defense position, would be simply untenable. The prospect that the defendant's – or that the State's witnesses, the victims – I'm going to characterize them as victims at this point, because I believe they were victimized, that is, Mr. Phipps and Ms. Jackson, that they contacted [sic] this elaborate scenario, including calling the police in, putting Mace on their vehicle to make it look like they had been Maced, breaking the windshield or having the windshield already in that state, which just would not seem plausible, that is simply beyond the ken. I, I don't see that. I don't see it one bit.
>
> The 911 call, they went through all of this, and for what? Now, there may have been some motive in that these parties were having bad blood feelings

> towards one another. But it's just too farfetched to believe that this was the product of the State's witnesses going about this.
>
> * * *
>
> The issue is: What happened here?
>
> And I believe Mr. Phipps, that Mr. Lambert had it in for him. And as far as the alibi, there's a – there's some potency here in the fact that it's not who testified in this case to a degree. The defendant doesn't have to prove anything, but it sure would have been awfully easy for the defense to have brought in somebody from the trucking company or from that place that was doing the loading to say that this gentleman was here all day. And that didn't happen.
>
> * * *
>
> The only issue in this case is: Was there an assault, criminal damaging with respect to this incident committed by Mr. Lambert at the time alleged on the people alleged?
>
> * * *
>
> So my decision is that the State has proved its case beyond a reasonable doubt on both charges, and Matthew Lambert's guilty of the criminal damaging and the assault, being a second degree misdemeanor and a first degree misdemeanor respectively and those two charges.

7/19/17 Trial Tr. 128-130.

{¶33} This reasoning is logical and since the trial court is in the best position to determine witnesses' credibility, we cannot conclude the court clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The convictions are not against the manifest weight of the evidence.

Conclusion

{¶34} The sole assignment of error is meritless; both the sufficiency of the evidence and manifest weight of the evidence arguments fail. The convictions are affirmed.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Youngstown Municipal Court of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.