

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-08-1325

Appellee

Trial Court No. CR0200802210

v.

Jerry Johnson

DECISION AND JUDGMENT

Appellant

Decided: July 17, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Timothy F. Braun, Assistant Prosecuting Attorney, for appellee.

Patricia Horner, for appellant.

* * * * *

SHERCK, J.

{¶ 1} This is a criminal appeal of a felonious assault conviction from the Lucas County Court of Common Pleas. After a jury trial, appellant, Jerry Johnson, was convicted of felonious assault, a felony of the second degree. He was also charged with aggravated robbery, but acquitted. The trial court imposed a sentence of five years incarceration.

{¶ 2} On April 15, 2008, Johnson had been at the residence of a friend, Anita Autry. Because of the congestion there that night, Autry asked Johnson to tell her nephew that he must leave. Johnson and the nephew disagreed, Johnson became angry, and Autry asked Johnson to leave instead.

{¶ 3} When Johnson left the house, he did not go far down the street before encountering Eugene Dunahoo. Dunahoo and Johnson had known each other for several years prior to this incident. The two also had a past history of disagreements. According to testimony, a few years earlier, Johnson had felt cheated by Dunahoo in the amount of \$50, and every time that the two had seen each other since then, Dunahoo paid Johnson a few dollars toward the debt. Further, Dunahoo was an alcoholic and Johnson testified that the two had gotten into arguments in the past because Dunahoo was known to be aggressive after drinking. Dunahoo testified that he was a boxer and had gotten into many fights in his lifetime.

{¶ 4} Upon seeing each other on Autry's street that night, the two became involved in a skirmish. Dunahoo was severely beaten. Johnson, who left the scene when Dunahoo was unconscious, went to another friend's house with a few cuts on his face. One eyewitness, a stranger to both men who was walking to the bus stop at the time, testified that he saw Johnson punch Dunahoo "ten or more" times and kick him fifteen times while he was lying on the ground, not moving. The witness said, of Dunahoo, "he was out" after Johnson punched him once in the chin, knocking him to the ground. The

same witness testified that Johnson started to walk away after Dunahoo was on the ground, but came back and started kicking him in the head.

{¶ 5} Autry also came onto the scene after hearing commotion outside. Though she did not see how the fight started, when she arrived she observed Dunahoo "laying there still" on the ground while Johnson was "stomping and hitting him."

{¶ 6} Dunahoo was taken via ambulance to the hospital. He was unconscious and had four broken bones in his face. One of the police officers who arrived on the scene testified that Dunahoo "almost looked unrecognizable" and "almost didn't look human." As a result of a previous injury sustained while working as a roofer, Dunahoo had been diagnosed with concussion syndrome, which caused him to blackout and fall down on occasion. These blackouts typically lasted for a few seconds. Dunahoo was unconscious for two days following his encounter with Johnson.

{¶ 7} At trial, how the fight started was a matter of controversy. The eyewitness who was walking to the bus stop testified that Johnson initiated the physical contact, pushing Dunahoo. He said that after he saw this happen, Dunahoo pushed back, and then both began punching each other. However, Johnson testified that it was Dunahoo who started the fight, and that he was just protecting himself. Dunahoo could not remember how the brawl began, but admitted at trial that he may have pushed Johnson before he was punched.

{¶ 8} Johnson raises one assignment of error:

{¶ 9} "Defendant's conviction was against the manifest weight."

{¶ 10} When asked to overturn a conviction as against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether the jury clearly lost its way and whether the resulting miscarriage of justice requires a new trial. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. "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.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Upon review of Johnson's argument, the applicable law, and the entire record, we find his conviction was not against the manifest weight of the evidence.

{¶ 11} Johnson requested and received a jury instruction on self-defense. On appeal, he argues that the evidence shows he acted in self-defense. Self-defense is an affirmative defense that must be proven by a preponderance of the evidence. *State v. Jackson* (1986), 22 Ohio St.3d 281, 283. A defendant must show that (1) he was not at fault in creating the violent situation; (2) he had a bona fide belief that he was in imminent danger of death or great bodily harm and the only means of escape was to use force; and (3) he did not violate any duty to retreat or to avoid the danger. *State v. Thomas* (1997), 77 Ohio St.3d 323, 326. With respect to the second element, the defendant's belief may be mistaken, so long as it is in good faith. *State v. Morris*, 7th Dist. No. 03 MO 12, 2004-Ohio-6810, ¶ 22. With respect to the third element, there is no

duty to retreat before using nondeadly force. *City of Columbus v. Dawson* (1986), 33 Ohio App.3d 141, paragraph two of syllabus.

{¶ 12} There are limitations to the application of self-defense. The defense is not available unless the defendant shows that the force used to repel the danger was not more than the situation reasonably demanded. *Close v. Cooper* (1877), 34 Ohio St. 98, 100. "One may use such force as the circumstances require." *Chillicothe v. Knight* (1992), 75 Ohio App.3d 544, 550. The defense is not applicable "if the force is so grossly disproportionate to [the] apparent danger as to show revenge or an evil purpose to injure." *State v. Weston* (July 16, 1999), 4th Dist No. 97CA31. "The force used to defend must be objectively necessary and reasonable under the facts and circumstances of the case and in view of the danger apprehended." *Martin v. Cent. Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 93. When one uses a greater degree of force than is necessary under all the circumstances, it is not justifiable on the ground of self-defense. *State v. McLeod* (1948), 82 Ohio App. 155, 157.

{¶ 13} In a remarkably similar case to the one at hand, the court in *State v. Damron*, 4th Dist. No. 06CA2903, 2007-Ohio-1187, said that kicking an unconscious person in the head is excessive force. The facts and circumstances of this case do not differ in such a way that would cause us to reach a different conclusion.

{¶ 14} The record may not be clear about who started the fight, but multiple witnesses testified to watching Johnson pummel an unconscious Dunahoo. By one

account, Dunahoo was punched ten times and kicked fifteen more times, all while lying helpless and unconscious on the ground. A second witness corroborated this, observing Johnson stomp and punch Dunahoo, who was lying on the ground, not moving at the time. The police officer who arrived at the scene testified that this was one of the worst beatings he had seen in his career. Clearly, the jury did not lose its way in disallowing a self-defense claim. In fact, they had more witnesses and evidence to rely on in making their decision than did the jury in *Damron*.

{¶ 15} Accordingly, appellant's sole assignment of error is not well-taken, and his conviction is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

State of Ohio v.
Jerry Johnson
L-08-1325

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James R. Sherck, J.
CONCUR.

JUDGE

Judge James R. Sherck, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.