

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

State of Ohio

Court of Appeals No. WD-09-061

Appellee

Trial Court No. 2008CR0538

v.

Joshua A. Johnson

DECISION AND JUDGMENT

Appellant

Decided: July 9, 2010

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Aram Ohanian and David E. Romaker, Jr., Assistant Prosecuting Attorneys, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas that found appellant guilty of two counts of felonious assault. For the following reasons, this court affirms the judgment of the trial court.

{¶ 2} Appellant sets forth four assignments of error:

{¶ 3} "I. The trial court abused its discretion by improperly precluding Appellant from conducting thorough cross examination of witnesses thereby denying Appellant's right to due process.

{¶ 4} "II. The trial court committed error when it failed to instruct the jury on the lesser offense of Aggravated assault.

{¶ 5} "III. Appellant received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Constitution of the State of Ohio.

{¶ 6} "IV. Appellant's conviction was against the manifest weight of the evidence presented by the State and contrary to law."

{¶ 7} The charges in this case arose from an incident which occurred at Wil's bar in Fostoria, Ohio, on October 2, 2004, when appellant and some friends became involved in an argument with Tom Kitchen, the victim in this case. The men involved in the altercation were asked to leave the bar and the argument continued outside. Eventually, appellant's party drove away and headed to Slammer's, another nearby bar; Kitchen left on his motorcycle. When Kitchen pulled into the parking lot of Slammer's, followed by appellant and his friends in a van, the altercation continued. Almost immediately, Kitchen was assaulted by two men wielding golf clubs. The two men who assaulted Kitchen then drove away, leaving Kitchen with injuries to his head, jaw, neck and chest. Appellant's friend, Terry Norville, was later charged with felonious assault in connection

with the attack on Kitchen and pled to the charges. Appellant moved from Fostoria after the assault and eventually was arrested on a warrant in 2008. On October 16, 2008, appellant was indicted on two counts of felonious assault in violation of R.C. 2903.11(A)(1) and (A)(2), both second-degree felonies.

{¶ 8} Appellant entered pleas of not guilty and the case was set for trial before a jury on April 22 and 23, 2009.

{¶ 9} The state presented the testimony of nine witnesses to the events surrounding the assault on Thomas Kitchen. Terri Deal, a friend of Kitchen's, testified that after the group was asked to leave Wil's they drove to Slammer's. Deal, her fiancé, and Kitchen's wife arrived at Slammer's first and waited outside for Kitchen, who drove separately on his motorcycle. Within moments, Deal saw Kitchen coming down the road with a van following behind him. Deal heard Kitchen scream for help as he pulled into the parking lot. Kitchen parked and jumped off the motorcycle as the van pulled up "very close" to him. Kitchen then ran toward the back of the bar; two men who had gotten out of the van chased him, both holding something in their hands. As Deal followed the men, she heard screaming and a "terrible sound." When she got to the back of the bar, she saw appellant and his friend, whom she recognized from the first bar, kicking Kitchen and beating him with golf clubs while Kitchen lay on the ground. Deal then noticed that a woman driving the van had pulled behind the bar. As Deal and Kitchen's wife approached, the two men got back into the van. Deal then ran toward the van, hoping to

see the license plate number, and was hit in the leg with a golf club. Deal identified appellant as one of the men who assaulted Kitchen.

{¶ 10} Terri Deal's fiancé, Michael Benjamin, described the verbal confrontation at the first bar and testified that he, Deal and Kitchen's wife arrived at the second bar before Kitchen. Benjamin testified that he saw Kitchen pull into the parking lot followed closely by a van. He then saw Kitchen park his motorcycle and run toward the back of the bar, yelling that someone was chasing him. Benjamin saw that two men who had gotten out of the van had "clubs of some sort." Benjamin followed Kitchen, opened the back door of the bar and yelled for someone to call the police; when he turned around, he no longer saw Kitchen. Benjamin ran toward the front of the bar and saw two men hit Kitchen, who was lying on the ground. He then saw the men get in the van and leave. Benjamin further testified that both of the men hitting Kitchen were "swinging something." After the men left in their van, Benjamin followed in his truck.

{¶ 11} Janine Kitchen, the victim's wife, testified that she did not witness any of the argument that occurred inside the first bar. When everyone left that bar, she observed some of the men arguing outside. Janine testified that when she and the rest of her group decided to go to the second bar, she rode with Terri Deal and Michael Benjamin in their truck. Janine recalled that when her husband pulled into the parking lot on his motorcycle, he said someone had just tried to run him down. She further testified that what happened immediately after that was "a blur" until she looked over and saw two men with clubs hitting someone on the ground. Janine did not realize right away that the

man being beaten was her husband. As she ran toward the man on the ground, the two men stopped beating him. One of the men swung at her as she approached, and at that moment she realized they had been beating her husband. Janine testified that her husband was not holding a weapon of any kind.

{¶ 12} Jacqueline Matthews testified that she went to Wil's on the evening of October 2, 2004, with her boyfriend, Terry Norville, and appellant, who was Norville's friend. She stated that when her group drove to Slammer's after being asked to leave Wil's, they saw that Kitchen and his group were already there. Matthews testified that they started to pull away from the bar when someone came up to their van and punched out the driver's side window. Matthews stated that no one was hurt by the broken glass. At that point, appellant grabbed two golf clubs and he and Norville got out of the van and "disappeared." Matthews got in the driver's seat and was about to leave the parking lot because she did not know what was happening. When Matthews began to pull away, Norville ran back to the van; a few minutes later, appellant came back and got in. As they were leaving, Matthews heard appellant say that he believed he "got him good." Matthews further testified that over the next few days she heard appellant and Norville discussing how they had hit Kitchen and his girlfriend. Matthews stated that she saw a golf bag full of clubs in the van at the start of the evening.

{¶ 13} Marsha Kunkelman, an emergency room nurse at Fostoria Community Hospital, and Dr. James Young both testified that they were working the night Kitchen presented for treatment. Kunkelman recalled that Kitchen presented with a broken jaw, a

laceration on his chin, lacerations on his scalp and ear, and multiple contusions. She stated that Kitchen's injuries were consistent with having been assaulted with a golf club. The wounds on Kitchen's scalp and ear were sutured. Dr. Young referred Kitchen to a plastic surgeon for further treatment of his fractured jaw.

{¶ 14} Matt Noftz testified that at the time of the assault he was employed as a police officer with the city of Fostoria. Noftz was the first officer to respond to the scene after being dispatched on a report of a fight at Slammer's bar. When Noftz arrived, he found Kitchen sitting on the ground bleeding from the top of his head and other locations. Noftz located three parts of a broken golf club at the scene. Later that night, Noftz looked at the van appellant and Norville had been driving and saw that one of the passenger side windows was broken. The officer also saw a golf club on the floor between the driver's and passenger's front seats and another club on one of the back seats.

{¶ 15} Thomas Kitchen testified that when he and his friends left the first bar and headed to Slammer's, he thought the original confrontation was over. As he was riding his motorcycle to Slammer's, Kitchen noticed that the van was following him. He stated that when he pulled into Slammer's, the van was right behind him, trying to run into him. It is not clear from Kitchen's testimony, but appears that shortly after he stopped or parked his bike he punched the van window. At that time, the van stopped and two men got out with golf clubs. Kitchen ran toward the bar and tripped. The next thing he recalled was being "continually hit with golf clubs." He further testified that he did not have any type of weapon and lay on the ground trying to protect himself. Kitchen

testified that his mouth was wired shut for six weeks as a result of his jaw being broken. Kitchen identified appellant and Norville as his assailants.

{¶ 16} Defense witness Terry Norville testified that after the van window was broken he grabbed a golf club and got out of the van. When he saw Kitchen come around the side of the van, he hit Kitchen several times with the club until Kitchen fell to the ground. He testified that he wanted Kitchen on the ground because Kitchen "was a threat." Norville then ran after Kitchen's friend briefly before returning to the van. He saw appellant get out of the van at that time but did not recall seeing appellant with a golf club in his hand.

{¶ 17} Appellant was found guilty of both counts. At appellant's sentencing on June 19, 2009, the trial court merged the two convictions, finding that they were allied offenses. Appellant was sentenced to four years incarceration.

{¶ 18} In his first assignment of error, appellant asserts that the trial court improperly prevented defense counsel from conducting a thorough cross-examination of the state's witnesses. In support of this claim, appellant argues that counsel was prevented from effectively cross-examining state's witness Matthew Noftz, who was the first officer to respond to the scene of the assault, to establish possible bias in the officer's investigation of the case.

{¶ 19} This court has stated that "[t]he constitutional right of cross-examination includes the right to impeach a witness's credibility." *State v. Rock*, 6th Dist. No.

E-08-070, 2009-Ohio-3195, ¶ 18, citing *State v. Green* (1993), 66 Ohio St.3d 141.

Further, any denial of a defendant's right to full and effective cross-examination of his accuser is the denial of a fundamental constitutional right essential to a fair trial. *State v. Hannah* (1978), 54 Ohio St.2d 84.

{¶ 20} However, the United States Supreme Court has held that trial courts have wide latitude in imposing reasonable limits on the scope of cross-examination based upon concerns about harassment, prejudice, confusion of the issues, the witness's safety, or repetitive, marginally relevant interrogation. *Delaware v. Van Arsdall* (1986), 475 U.S. 673. *Rock*, supra, at ¶ 18-19.

{¶ 21} While criminal defendants enjoy the right to cross-examine witnesses as provided by Evid.R. 611(B), the scope of cross-examination is a matter within the discretion of the trial court. *Green*, supra, at 147. Additionally, R.C. 2945.03 provides that trial courts "control all proceedings during a criminal trial, and shall limit the introduction of evidence and the argument of counsel to relevant and material matters with a view to expeditious and effective ascertainment of the truth regarding the matters in issue."

{¶ 22} Our review of the trial court's decision to limit the extent of cross-examination is based on an abuse of discretion standard. *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, ¶ 109. The term "abuse of discretion" implies that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 23} When defense counsel questioned Noftz during recross, it appeared that counsel was attempting to show that the police exhibited bias in favor of the victim by not charging him with a crime in connection with breaking the window in appellant's van. Appellant also argues that counsel should have been able to cross-examine the officer about the actions of witness Michael Benjamin after the assault, when Benjamin followed appellant and his friends as they drove away from the scene. Additionally, defense counsel attempted to question Noftz regarding the failure to perform either DNA or fingerprint analysis on the golf clubs. When the state objected to counsel's questions on recross, the trial court properly ruled that counsel's questions went beyond the scope of redirect. After a discussion at the bench, the court stated that "* * * at some point in time we need to focus on the offense that happened here rather than all these extraneous side issues that are in my opinion designed to confuse the jury."

{¶ 24} The trial court's rulings clearly were intended to control the proceedings so as not to confuse the jury. Accordingly, upon review of the foregoing, this court finds that the trial court did not abuse its discretion by limiting the introduction of evidence and argument of counsel to relevant and material matters. Appellant's first assignment of error is not well-taken.

{¶ 25} In support of his second assignment of error, appellant asserts that the trial court erred by failing to instruct the jury on the charge of aggravated assault as an offense of an inferior degree to felonious assault. Appellant argues that such an instruction was required because the evidence at trial showed that the victim's act of breaking a window

in appellant's van immediately before the assault constituted "serious provocation," which is one of the elements of aggravated assault.

{¶ 26} Appellant was charged with two count of felonious assault in violation of R.C. 2903.11(A)(1) and (A)(2). The statute reads as follows:

{¶ 27} "(A) No person shall knowingly do either of the following:

{¶ 28} "(1) Cause serious physical harm to another or to another's unborn;

{¶ 29} "(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶ 30} R.C. 2903.12 defines aggravated assault as follows:

{¶ 31} "(A) No person under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly:

{¶ 32} "(1) Cause serious physical harm to another or to another's unborn;

{¶ 33} "(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance * * *."

{¶ 34} The essential elements of felonious assault, with which appellant was charged, and aggravated assault are identical. It is the mitigating circumstance of "serious provocation occasioned by the victim" that distinguishes the two offenses and makes aggravated assault an offense of inferior degree. Given the proper evidence, an accused can be found guilty of aggravated assault under R.C. 2903.12 when he is charged with felonious assault under R.C. 2903.11. Appellant asserts there was sufficient

evidence of serious provocation to warrant a jury instruction on aggravated assault. See *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph four of the syllabus.

{¶ 35} Generally, requested jury instructions should be given if they are a correct statement of the law as applied to the facts of the case. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585. "* * * [A] court's instructions to the jury should be addressed to the actual issues in the case as posited by the evidence and the pleadings." *State v. Guster* (1981), 66 Ohio St.2d 266, 271. Further, a determination as to jury instructions is a matter left to the sound discretion of the trial court. *Id.* "In reviewing a record to ascertain the presence of sufficient evidence to support the giving of an * * * instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction." *Feterle v. Huettner* (1971), 28 Ohio St.2d 54, syllabus.

{¶ 36} "Provocation, to be serious, must be reasonably sufficient to bring on extreme stress and the provocation must be reasonably sufficient to incite or to arouse the defendant into using deadly force. In determining whether the provocation was reasonably sufficient to incite the defendant into using deadly force, the court must consider the emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time." *State v. Mabry* (1982), 5 Ohio App.3d 13, paragraph five of the syllabus.

{¶ 37} Appellant did not present sufficient evidence of provocation to warrant a jury instruction on aggravated assault. The trial court heard testimony that the victim

broke one of the windows in appellant's van with his fist when appellant pulled into the parking lot at Slammer's. There was no testimony as to whether appellant was sitting next to the window as it was broken or whether appellant was injured by flying glass, which together might have arguably supported a claim of serious provocation.

{¶ 38} The trial court denied appellant's request for an instruction on aggravated assault, stating that "* * * [t]he court doesn't find the breaking a window is ever sufficient to incite someone to use deadly force. I'm not inclined to grant the proposed jury instruction given that alone." We agree and find that having a window in his van punched out was not reasonably sufficient, as a matter of law, to incite or arouse appellant to use deadly force against the victim. Thus, an instruction to the jury on aggravated assault was not warranted by the evidence presented in this case and was properly refused. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 39} In support of his third assignment of error, appellant asserts that trial counsel was ineffective for failing to move the trial court to obtain certain grand jury transcripts in advance of trial. Appellant argues that the transcripts could have been used to show prior inconsistent statements of two witnesses.

{¶ 40} To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. The standard requires appellant to satisfy a two-prong test. First, appellant must show that counsel's representation fell below an objective standard of reasonableness. Second,

appellant must show a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668. This test is applied in the context of Ohio law that states that a properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153.

{¶ 41} The record reflects that, during the state's case in chief, trial counsel moved to review the grand jury testimony of one of the state's witnesses, citing possible inconsistencies between the testimony that had just been given and testimony that may have been given during grand jury proceedings. The issue was addressed as follows:

{¶ 42} "MS. RIDDLE: * * * I sent out a discovery request specifically asking that any written or recorded statements be prepared for trial and in anticipation of this for prior consistent [sic] statements.

{¶ 43} "THE COURT: There is no motion of the Court. The Court's the one that has to order any grand jury testimony to be transcribed, and I never received such a motion if you want to get a written statement * * *."

{¶ 44} Counsel, the prosecutor and the trial court then discussed the possible merits of defense counsel's argument that the grand jury transcript would support a claim of inconsistent statements by at least one of the witnesses. The trial court indicated that counsel's specific assertions did not tend to indicate inconsistencies.

{¶ 45} In response to counsel's request, the trial court stated: "* * * I don't recall there was any request from the defense that testimony be transcribed. I don't even know if [this witness] testified." Counsel again stated that she had filed a discovery request

asking that any written or recorded statements be prepared for trial. Counsel further indicated that she would be satisfied with a recording of the grand jury testimony in lieu of a written transcript. The trial court responded: "Counsel, if you want to do that, it was appropriate to do that before a trial. If the Court found there was just cause to invade the secrecy of the grand jury. I'm not prepared to do it in the middle of trial after the witness has testified. If counsel wants that, should have been inquired into way before this point in time. I'll overrule you."

{¶ 46} "Grand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts either before or during trial unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy." *State v. Greer* (1981), 66 Ohio St.2d 139, at paragraph two of the syllabus. A "particularized need" exists "when the circumstances reveal a probability that the failure to provide the grand jury testimony will deny the defendant a fair trial * * *." *State v. Sellards* (1985), 17 Ohio St.3d 169, 173. The disclosure of grand jury testimony is governed by Crim.R. 6(E), and the decision whether to release grand jury testimony is within the trial court's discretion. *Greer*, supra, at paragraph one of the syllabus.

{¶ 47} Upon consideration of this issue, Ohio courts have reasoned that if the use of grand jury testimony were permitted simply because a defendant claims that the prior statements of a witness could be used for impeachment purposes, virtually all grand jury

testimony would be subject to disclosure. See, e.g., *State v. Carr*, 2d Dist. No. 22603, 2009-Ohio-1942; *State v. Cherry* (1995), 107 Ohio App.3d 476.

{¶ 48} Appellate counsel speculates that the grand jury testimony of at least one of the state's witnesses possibly contradicted testimony given at trial. In light of the case law summarized above and the failure of defense counsel to make any showing during trial of a particularized need for disclosure of the grand jury testimony, we cannot find that counsel was ineffective for failing to request the release of grand jury testimony prior to trial. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 49} As his fourth assignment of error, appellant asserts that the evidence presented by the state was insufficient to support convictions on both counts of the indictment, that the trial court erred by overruling his motion for acquittal, and that the verdict was against the manifest weight of the evidence. In support of these claims, appellant simply refers this court to the "foregoing arguments" presented in his brief.

{¶ 50} This court has thoroughly reviewed the record of proceedings in the trial court, including the transcript of appellant's trial as summarized above. Based on our review, we find that the state presented sufficient evidence from which, when viewed in a light most favorable to the state, a rational trier of fact could have found appellant guilty beyond a reasonable doubt of felonious assault in violation of R.C. 2903.11(A)(1) and (A)(2). See *State v. Jenks* (1991), 61 Ohio St.3d 259, syllabus. Therefore, appellant's challenge as to the sufficiency of the state's evidence has no merit.

{¶ 51} As to appellant's claim that his conviction was against the manifest weight of the evidence, this court has consistently affirmed that the trier of fact is vested with the discretion to weigh and evaluate the credibility of conflicting evidence in reaching its determination. It is not within the scope of the appellate court's responsibility to judge witness credibility. *State v. Hill*, 6th Dist. No. OT-04-035, 2005-Ohio-5028, ¶ 42. Based on the testimony summarized above and the applicable law, this court cannot say that the jury clearly lost its way or created a manifest miscarriage of justice by finding appellant guilty of the charge of felonious assault. See *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172. This argument is therefore without merit.

{¶ 52} This court has held that the standard of review for a Crim.R. 29 motion is "the same standard as is used to review a sufficiency of the evidence claim." *State v. Witcher*, 6th Dist. No. L-06-1039, 2007-Ohio-3960, ¶ 20. Accordingly, having already concluded that appellant's challenge as to the sufficiency of the evidence is without merit, we find appellant's claim that the trial court should have granted his Crim.R. 29 motion for acquittal is without merit as well.

{¶ 53} Based on the foregoing, appellant's fourth assignment of error is not well-taken.

{¶ 54} On consideration of the foregoing, this court finds that substantial justice was done the complaining party. The judgment of the Wood County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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

Peter M. Handwork, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

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:
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