

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

State of Ohio

Court of Appeals No. WD-09-088

Appellee

Trial Court No. 2009CR0129

v.

Joshua Baker

DECISION AND JUDGMENT

Appellant

Decided: September 30, 2010

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Gwen Howe-Gebers, Assistant Prosecuting Attorney, for appellee.

Mollie B. Hojnicky, for appellant.

* * * * *

COSME, J.

{¶ 1} This is an appeal from a judgment issued by the Wood County Court of Common Pleas following a bench trial which found appellant, Joshua Baker, guilty of felonious assault. Because we conclude that the evidence was insufficient to establish that appellant acted knowingly, i.e., that he was aware that his conduct would probably cause a certain result or probably be of a certain nature, we reverse.

FACTS

{¶ 2} Appellant was indicted on March 19, 2009, on one count of felonious assault, in violation of R.C. 2903.11(A)(1). The charge stemmed from allegations that, during an altercation at a bar, appellant threw a glass which struck and injured someone across the room.

{¶ 3} At a bench trial held on October 13, 2009, the following evidence was presented. The victim, Carmen Oemig, testified that on February 1, 2009, she had been at the Clazel bar in Bowling Green, Ohio, celebrating a friend's birthday. Just after 1:30 a.m., while getting ready to leave, she stated that she was hit in the face by a hard force, which was later discovered to be a glass. She bled heavily from the blow which knocked out some teeth. Friends sat her down on nearby stairs to await medical assistance. Her injuries ultimately required surgeries and other medical treatment.

{¶ 4} During trial, a video recording was played showing the impact of the glass, as well as the moments leading up to the injury. The relevant video portions included clips from two vantage points. The first clip showed the area closer to the altercation between appellant and another male. The other clip was a view taken from the opposite side of the room, closer to Oemig's location. Oemig identified herself, standing with friends in the bar near a stairway. She verified that the video of the area where she was standing accurately represented what had happened to her that evening. She acknowledged that prior to being struck, she did not see the glass or where it came from

and saw nothing of any activity between appellant and another man which were shown in the video.

{¶ 5} The next witness, Matthew Long, identified himself and appellant as the two men shown in the altercation on the video. Long claimed that he was about to leave the bar but was waiting for a friend when appellant confronted him, acting as if Long was someone he knew. The two exchanged words, and Long said he tried to walk away, but then turned back. Long denied being drunk or striking appellant, but acknowledged that he had also made confrontational statements to appellant.

{¶ 6} Appellant allegedly splashed Long with his drink, then punched Long. Long acknowledged that he did not actually see the glass thrown or where it landed. He stated that he was not hit by the glass and did not have any injuries from it. Long said the exchange with appellant was very quick and he was unaware that Oemig had been injured until he saw it on the video shown on television several days later.

{¶ 7} Banan Alkilani, a bar employee, then testified that he went to the two men during the altercation to defuse the situation. He claimed that he split up the parties and made appellant leave. He later assisted Oemig who was injured, but was unaware of how her injuries had occurred. He had employees clean up the broken glass, which was thrown away. Alkilani did not see the glass thrown or strike Oemig. The state then rested.

{¶ 8} Appellant presented several witnesses. Nicolas Boulis, Rick Wilson, and Phil Brown, friends of appellant, all testified that they were at the bar at the time of the

altercation. Boulis and appellant had gone to the bar together that night. Wilson and Brown happened to be at the bar, observed the incident, but were not actually with appellant and Boulis.

{¶ 9} Nicolas Boulis, while watching the video, stated that Long confronted appellant and asked if he wanted "to go outside." As they were walking outside, Long abruptly turned and the two men bumped into each other. The men continued to argue, and appellant splashed Long with his drink in his left hand and then hit him with his right hand. At that point, Boulis went to appellant and said, "Let's get out of here." Boulis said the two then voluntarily left the bar and did not return. Boulis called a friend to pick them up. Boulis said neither he nor appellant were aware that the glass had been thrown or caused injuries to Oemig. Boulis stated that, after seeing the news broadcast, however, appellant had called him, was very upset about what had happened to Oemig, and decided to turn himself in to police.

{¶ 10} Rick Wilson testified that he was also at the Clazel that evening with Phil Brown, and identified himself and appellant in the video. As Wilson entered the bar with Brown, Wilson said Long looked over at him and confronted him, saying "What'd you say to me?" Wilson testified that Long acted drunk and seemed to be trying to pick a fight. Wilson and Brown went into the bar and moved up to a balcony area. Wilson was on his way back down to the first floor when he observed appellant and Long during the incident. Wilson testified that appellant splashed Long with his drink and then "slapped"

him. Shortly after, appellant and Boulis left the bar. Wilson was unaware that a glass had been thrown or that Oemig had been injured.

{¶ 11} Phil Brown testified that, prior to entering the bar, he saw Long confronting another person outside the entrance, allegedly trying to start trouble. Brown said when Long turned to go inside the bar, Long then "got in Rick's face" trying to "talk trash to him." Brown said he and Wilson explained that nobody said anything to him, and Long finally turned and went into the bar. Brown and Wilson then also entered the bar. Brown also viewed the video, identifying appellant and Long, and indicated where he and Wilson had been during the incident. Brown had been up in the balcony lounge area and saw Long confront appellant. As Wilson came downstairs with Brown, Wilson saw appellant, who was facing him, splash his drink and then throw a right punch or slap. Wilson said he could not see if appellant had an open hand or closed fist. Wilson did not see anything thrown and was six to ten feet from the two men.

{¶ 12} After appellant left, Wilson did see Oemig after she was injured, but thought it was a completely separate incident, because she was so far away from where the altercation had occurred. Wilson also said when he went outside to check on appellant, he noticed Long had joined with a group of friends and was following after appellant who was a block away. Wilson called Boulis and appellant to warn them and tell them they needed to leave the area.

{¶ 13} Appellant also called Bowling Green Police Patrolman Chris Garman who investigated the incident. In a supplemental police report, someone from management

had reported to him that Long had been struck by a glass that had bounced off his head and that Long had swelling to the left side of his face.

{¶ 14} Appellant then testified that he and Boulis had gone to the Clazel on the night of the incident. Appellant had been walking around looking at the bar renovations, since it had been a movie theater when he was there years before. Appellant was walking back to where Boulis was standing when Long looked over at him and said something to him. Appellant did not know Long, was unsure if he was speaking to him, and responded, "What?" When Long began confronting him, appellant said he told him, "I don't even know you." Long got "in his face" and acted very aggressively and threatening, asking if appellant had a "f-ing problem."

{¶ 15} Long then asked if appellant wanted to go outside and pointed. Appellant was nervous, but began to follow him outside. Appellant acknowledged that he wanted to just leave, but felt angry at being threatened. Long suddenly turned and bumped into appellant. Appellant said Long moved his hand up as if to punch him, so appellant splashed him with his drink and hit him. Appellant then remembered Boulis grabbing him and then they left the bar. They then called a friend who came and picked them up. Appellant was unaware that a glass hit Oemig or that she was injured. When he saw the news broadcast on television several weeks later, appellant said he was shocked about what had happened. He felt sorry for what had happened, but did not recall throwing any glass.

{¶ 16} Appellant also identified himself and Long on the video and explained what had happened as the video played. He acknowledged that in the video it appears that he had a glass in his hand, but denied that he intended to throw a glass. Appellant then rested.

{¶ 17} The court found appellant guilty of felonious assault in the second degree and sentenced him to eight years incarceration, with three years of postrelease control.

{¶ 18} Appellant now appeals from that judgment, arguing four assignments of error.

SUFFICIENCY OF THE EVIDENCE

{¶ 19} In his first assignment of error, appellant asserts that:

{¶ 20} "The evidence at appellant's trial was insufficient to support a conviction and appellant's conviction is against the manifest weight of the evidence."

{¶ 21} We will first determine whether the conviction was supported by sufficient evidence. On appeal, the question of whether a conviction is supported by sufficient evidence is a question of law that is reviewed de novo. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. The relevant inquiry is whether the prosecution has met its burden of production by presenting sufficient evidence to sustain a conviction. *Id.* at 390. In reviewing the evidence, an appellate court does not evaluate credibility and must make all reasonable inferences in favor of the state. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, superseded by constitutional amendment on other grounds in *State v. Smith* (1997), 80 Ohio St.3d 89. Sufficient evidence is presented when viewing the evidence in a light

most favorable to the prosecution, it allows a reasonable jury to conclude that the essential elements of the charged crime were proven beyond a reasonable doubt. *Jenks*, supra, paragraph two of the syllabus.

{¶ 22} R.C. 2903.11(A)(1) provides that "[n]o person shall knowingly * * * cause serious physical harm to another * * *." "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶ 23} In other words, a defendant acts knowingly, when, although not intending the result, he or she is nevertheless aware that the result will probably occur. *State v. Edwards* (1992), 83 Ohio App.3d 357, 361. Whether a person acts knowingly can only be determined, absent a defendant's admission, from all the surrounding facts and circumstances, including the doing of the act itself. *State v. Huff* (2001), 145 Ohio App.3d 555, 563, citing to *State v. Adams* (June 8, 1995), 4th Dist. No. 94CA2041. "Because the intent of an accused person is only in his mind and is not ascertainable by another, it cannot be proven by direct testimony of another person but must be determined from the surrounding facts and circumstances." See *Adams*, supra; *State v. Paidousis* (May 1, 2001), 10th Dist. No. 00AP-1118.

{¶ 24} For example, the intentional firing of a firearm into a place where one or more persons are at risk of injury supports an inference that an assailant acted knowingly. *State v. Gregory* (1993), 90 Ohio App.3d 124, 131. Moreover, intent may be inferred

from relevant circumstantial evidence, so long as such an inference is not based on the mere stacking of inference upon inference. *State v. Taylor* (Feb. 9, 2001), 7th Dist. No. 98-JE-31, citing *State v. Cowans* (1999), 87 Ohio St.3d 68, 78.

{¶ 25} In this case, after reviewing the testimony and video, we conclude that the state failed to present sufficient evidence that appellant *knowingly* caused the injuries to the victim. The videotape indicates conversation and then physical interaction between appellant and Long. In a quick succession of actions, the video shows Long abruptly turn around to face appellant, the splash of the drink, and appellant's punch to Long. Long stated that he did not see appellant throw a glass, even disputed that the glass hit or bounced off of him in any way, and was unaware that anyone else had been struck by a glass.

{¶ 26} The whole incident took place in a matter of seconds. There is no audio to the blurry, grainy video, which indicates only that something was propelled and injured the victim. There was also no testimony which demonstrates that when he either splashed his drink or hit Long, appellant intended to throw the glass. Finally, there was no testimony or evidence that appellant was aware that his actions would probably cause a glass to fly across the room and then probably cause injuries to anyone. We certainly do not discount the serious injuries caused to the victim, Oemig, as a result of the propelled glass. Under the facts and circumstances of this particular case, however, the

evidence presented simply was not sufficient to show that appellant knowingly caused her injuries.¹

{¶ 27} Therefore, we conclude that the state failed to meet its burden, and that the evidence was insufficient to support appellant's conviction. The remainder of appellant's first assignment of error is moot.

{¶ 28} Accordingly, appellant's first assignment of error is well-taken. His second, third, and fourth assignments of error² are rendered moot.

{¶ 29} The judgment of the Wood County Court of Common Pleas is reversed. Appellant's conviction is vacated. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

¹The evidence may have showed negligent or reckless behavior at best. With regard to simple assault under R.C. 2903.13(B), a person acts *recklessly* when, "with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." R.C. 2901.22(C).

²"Second Assignment of Error: The trial court erred when it did not allow defendant to testify regarding admissible character evidence.

"Third Assignment of Error: The Court erred when it improperly questioned a witness.

"Fourth Assignment of Error: The trial court's imposition of the maximum sentence was contrary to law and constituted an abuse of discretion."

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

Mark L. Pietrykowski, 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:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.