[Cite as *State v. Buckman*, 2004-Ohio-6353.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 04AP-56 (C.P.C. No. 02CR11-6499)
Gregory R. Buckman,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

O P I N I O N

Rendered on November 30, 2004

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Tyack, Blackmore & Liston Co., L.P.A., and *Thomas M. Tyack*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BOWMAN, J.

{¶1} Defendant-appellant, Gregory R. Buckman, was indicted on one count of felonious assault, alleging that he had attempted to cause physical harm to a police officer by means of a deadly weapon in violation of R.C. 2903.11. After a jury trial,

appellant was found guilty and sentenced to three years of incarceration. Appellant filed a notice of appeal and raises the following assignments of error:

> I. THE JUDGMENT OF CONVICTION IS NOT SUPPORTED BY THE SUFFICIENT EVIDENCE AS REQUIRED BY LAW.
>
> II. THE JUDGMENT OF CONVICTION IN THIS CASE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶2} By the assignments of error, appellant contends that the conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. The standard of review for sufficiency of the evidence is if, while viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

{¶3} The test for determining whether a conviction is against the manifest weight of the evidence differs somewhat from the test as to whether there is sufficient evidence to support the conviction. With respect to manifest weight, the evidence is not construed most strongly in favor of the prosecution, but the court engages in a limited weighing of the evidence to determine whether there is sufficient competent, credible evidence which could convince a reasonable trier of fact of appellant's guilt beyond a reasonable doubt. See *State v. Conley* (Dec. 16, 1993), Franklin App. No. 93AP-387.

> * * * 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. It indicates clearly to the jury that the party having the burden

> of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*." (Emphasis added.) Black's [Law Dictionary (6th Ed.1990)] at 1594). *Thompkins,* at 387.

{¶4} The evidence provided at trial included the testimony of Stephen A. Wilkinson, a sergeant with the Columbus Police Department. Sergeant Wilkinson testified that, on October 26, 2002, at approximately 1:00 a.m., he was dispatched to an automobile accident with injuries. When he arrived, he saw a small pickup truck against the curb that looked as if it had a front tie-rod broken and a flat tire. The truck was on the wrong side of the road. After parking his cruiser, he approached the driver's side window and inquired if appellant was okay and appellant replied, "I live here," although there were no residences in that area. (Tr. at 25.) Appellant slurred his words, had bloodshot eyes and smelled of alcohol, so Sergeant Wilkinson asked him to exit the vehicle. After appellant exited the vehicle, he made a movement with his right hand behind him. Sergeant Wilkinson immediately grabbed appellant's hand and appellant made a couple forward movements with his arms. One of the other two officers, Joe Riddle, who had arrived shortly after Sergeant Wilkinson initiated contact with appellant, started yelling: "Knife, knife, he's got a knife. He's got a knife." (Tr. at 32.) Sergeant Wilkinson pinned appellant against the truck and the three officers put appellant on the ground. The officers were giving appellant commands, such as, "get on the ground" and "[g]ive us the knife." (Tr. at 34.) The officers were attempting to get appellant's hands out from underneath him. Appellant was screaming: "Die you mother fucker. Die cop. Die, die, die." (Tr. at 35.) Officer Riddle used mace and the officers were able

to retrieve the knife and handcuff appellant. Sergeant Wilkinson testified that he did not ask appellant if he had any weapons.

{¶5} Officer Riddle testified that he arrived shortly after Sergeant Wilkinson exited his cruiser. The truck was leaning toward the curb, the front left tire was flat and there was damage to the front left fender. From appellant's mannerisms and speech, Officer Riddle could tell that he was intoxicated. Officer Riddle stated that, as soon as appellant stepped out of the vehicle, his facial expression changed and appellant looked angry. Appellant reached behind him and Officer Riddle saw a clip on appellant's back pocket and started yelling, "knife, knife, knife, knife, knife." (Tr. at 66.) Sergeant Wilkinson pinned appellant against the truck, and the officers and appellant struggled. Appellant was using an aggressive tone and cussing at them. After Officer Riddle used chemical spray on appellant, Officer James Null was able to pry appellant's fingers off the knife. After being handcuffed, appellant was still resisting. Officer Riddle testified that appellant never opened the knife and the entire struggle lasted approximately ten seconds.

{¶6} Officer Null testified to essentially the same facts as Sergeant Wilkinson and Officer Riddle. Officer Null confirmed he saw appellant's facial expression change to an angry one as he exited the truck. Appellant was cussing at the officers and would not release the knife. Although Officer Null testified that, when he first approached appellant, appellant was holding the knife in such a manner that it could not be opened unless appellant changed his grip or the position of the knife, the knife was spring-loaded and easily opened.

{¶7} Dan Badeaux testified that he is a civilian who was participating in the ride-along program in Sergeant Wilkinson's cruiser. His testimony was essentially the same as the officers' testimony. He saw appellant reach toward his back pocket and the officers struggled to get the object away from appellant. Appellant never got the knife open, but would not let go of it and continued struggling with the officers.

{¶8} Finally, appellant testified that he had worked approximately 16 hours and then went to a bar with some co-workers where he consumed approximately seven beers. He carried the knife because he used it at work, which was approximately 100 yards from where his truck was stopped. When he left his work parking lot, he decided he was too tired to drive but he hit the curb as he tried to park. He fell asleep but was awakened by Sergeant Wilkinson. He got out of the vehicle and Sergeant Wilkinson asked him if he had any weapons, so he reached back to give him the knife. Then the officers pinned him against the truck and struggled to get the knife. He stated he did not attempt to stab the officer and he did not make any statements to them, such as "die, die, die." (Tr. at 141.) He stated that he did not release the knife because he knew that, if he had control of it, no one would be hurt.

{¶9} Appellant argues that the conviction was not supported by the evidence and was against the manifest weight of the evidence. R.C. 2903.11 defines "felonious assault," as follows:

> (A) No person shall knowingly * * *
>
> * * *
>
> (2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance.

{¶10} A person acts "knowingly" when "he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). "Deadly weapon" is defined as "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon." R.C. 2923.11(A). In *State v. Woods* (1976), 48 Ohio St.2d 127, paragraph one of the syllabus, the Ohio Supreme Court defined "criminal attempt," as follows:

> A "criminal attempt" is when one purposely does or omits to do anything which is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. To constitute a substantial step, the conduct must be strongly corroborative of the actor's criminal purpose.

{¶11} See, also, *State v. Powell* (1990), 49 Ohio St.3d 255, 261. In establishing "an attempt to cause physical harm, the prosecution bears the burden of proving beyond a reasonable doubt that the defendant did some overt act, some substantial but ineffectual concomitant movement, directed toward executing or accomplishing the assault through the use of a deadly weapon." *State v. Kline* (1983), 11 Ohio App.3d 208, 214.

{¶12} Appellant contends that he was polite and not aggressive or angry when he was approached by Sergeant Wilkinson. Sergeant Wilkinson testified that he did not touch appellant, yet the other officers testified that Sergeant Wilkinson grabbed appellant's left arm and helped him out of the truck. Appellant testified that he was only reaching for the knife in response to Sergeant Wilkinson's inquiry whether he had any weapons, but the knife was not open and Officer Null testified that appellant was holding the knife in such a manner that it could not be opened unless appellant changed his grip

or the position of the knife. Sergeant Wilkinson received no physical injury. Appellant argues that reaching into his pocket and removing an unopened knife cannot be considered a substantial step toward the offense of felonious assault.

{¶13} However, Sergeant Wilkinson testified that he did not ask appellant if he had any weapons. Both Officers Riddle and Null testified that, as soon as appellant exited the truck, his facial expression changed and appellant looked angry. Sergeant Wilkinson testified that, after reaching for the knife, appellant made a couple forward movements with his arms. Sergeant Wilkinson felt as if appellant was trying to thrust the knife toward him two or three times until Sergeant Wilkinson was able to pin him against he truck. All the officers testified that appellant was aggressive, cussing, struggling and refused to release the knife. During the struggle, appellant was yelling: "Die cop. Die, die, die." (Tr. at 35.) These actions constitute substantial steps toward an attempt to cause physical harm to Sergeant Wilkinson. In the substantial step analysis, the focus is on what actions were done by appellant, not what remains to be done to accomplish the crime. *State v. Brooks* (1989), 44 Ohio St.3d 185, 191. Given this evidence, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt and there is sufficient competent, credible evidence which could convince a reasonable trier of fact of appellant's guilt beyond a reasonable doubt. The existence of conflicting evidence does not render the evidence insufficient as a matter of law. *State v. Murphy* (2001), 91 Ohio St.3d 516, 543. Nor is a conviction against the manifest weight of the evidence solely because the jury heard inconsistent testimony. *State v. Kendall* (June 29, 2001), Franklin App. No. 00AP-1098. The trier of fact makes determinations of credibility and the weight to be given to the

evidence. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Appellant's conviction is supported by sufficient evidence and is not against the manifest weight of the evidence. Appellant's two assignments of error are not well-taken.

{¶14} For the foregoing reasons, appellant's assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT and McCORMAC, JJ., concur.

McCORMAC, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.