**[Cite as *State v. Strider-Williams*, 2010-Ohio-6179.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| State of Ohio, | : | |
| Plaintiff-Appellee, | : | |
| v. | : | No. 10AP-334<br>(C.P.C. No. 09CR04-2007) |
| Derek Strider-Williams, | : | (REGULAR CALENDAR) |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on December 16, 2010

*Ron O'Brien*, Prosecuting Attorney, and *Sarah W. Creedon*, for appellee.

*W. Joseph Edwards*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

**{¶1}** Defendant-appellant, Derek Strider-Williams, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. Because appellant's conviction is supported by sufficient evidence and is not against the manifest weight of the evidence, we affirm that judgment.

**{¶2}** Sometime in February 2009, Barbara Riley discovered that her cell phone was missing. Riley was later contacted by a man who identified himself on the phone as

"Derek." The man told Riley that he had found a phone and wanted to return it to her. The conversation ended without any plans for the man to return the phone to Riley.

**{¶3}** However, on the evening of February 15, 2009, the same man called Riley again and told her that he was driving on the north side of Columbus and wanted to give her the phone. The two met on a street close to Riley's home. Riley approached the man's van and asked him for her phone. The man gave her a phone, but Riley knew from the phone's appearance that it was not her phone. Riley told the man that the phone was not hers and that he would not get the phone back until she got her phone. She then walked away from the van. As Riley got to the other side of the street, she heard a man yell, and then she was hit in the back of the head. She turned around and saw the man from the van. The man hit Riley again and she fell to the street. The man then kicked Riley repeatedly in the face. She curled up her body to protect herself. The man took the cell phone back and left her on the street. Riley later identified appellant as the man who attacked her.

**{¶4}** As a result of these events, a Franklin County Grand Jury indicted appellant with one count of aggravated robbery in violation of R.C. 2911.01, one count of robbery in violation of R.C. 2911.02, and one count of felonious assault in violation of R.C. 2903.11. Appellant entered a not guilty plea to the charges and proceeded to a jury trial.

**{¶5}** Riley testified to the events described above. Appellant testified to a different version of events. He testified that Riley contacted him and told him that he had her cell phone. Appellant operated a garage on the south side of Columbus and did, from time to time, acquire cell phones from people in the neighborhood. He agreed to meet Riley to return the phone. The two met as Riley described, and appellant gave her a

phone. Riley told him that the phone was not hers. Appellant apologized for the inconvenience, told her that he would call her if he ever found her phone, and asked for the phone back. Riley told him that she would not give the phone back until she got her phone.

**{¶6}** Riley walked away from the van. Appellant got out of the van and followed her to the other side of the street to take back his phone. When he caught up to her, he "sweep kicked" her, and she fell face first on the street. He looked for his phone but then noticed that Riley was in pain. He went to help her, but she began screaming and kicking him. Appellant admitted that he punched Riley after she kicked him in the groin. Appellant then found his phone on the ground, got back into the van, and left the area.

**{¶7}** The trial court instructed the jury that it could find appellant guilty of aggravated assault, an inferior degree of felonious assault, if it concluded that he acted under serious provocation. R.C. 2903.12(A)(1). The jury found appellant guilty of felonious assault. The jury found appellant not guilty of the other charges. The trial court sentenced appellant accordingly.

**{¶8}** Appellant appeals and assigns the following error:

> THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE APPELLANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION AND WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.

**{¶9}** Appellant contends in his assignment of error that his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence. We disagree.

**{¶10}** The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins* (1997), 78 Ohio St.3d 380, paragraph two of the syllabus. The Supreme Court of Ohio delineated the role of an appellate court presented with a sufficiency of the evidence argument in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after 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. * * *

**{¶11}** Whether the evidence is legally sufficient is a question of law, not fact. *Thompkins* at 386. Indeed, in determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. A verdict will not be disturbed unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484; *Jenks* at 273.

**{¶12}** A manifest weight of the evidence claim requires a different review. The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *State v. Brindley,* 10th Dist.

No. 01AP-926, 2002-Ohio-2425, ¶16. When presented with a challenge to the manifest weight of the evidence, an appellate court, after " 'reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " *Thompkins* at 387 (quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175). An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " Id.

**{¶13}** A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. Neither is a conviction against the manifest weight of the evidence because the trier of fact believed the state's version of events over the appellant's version. *State v. Gale,* 10th Dist. No. 05AP-708, 2006-Ohio-1523, ¶19; *State v. Williams,* 10th Dist. No. 08AP-719, 2009-Ohio-3237, ¶17. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson* (Mar. 19, 2002), 10th Dist. No. 01AP-973; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. The trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams,* 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. Consequently, an appellate court must ordinarily give great deference to the fact finder's determination of the witnesses'

credibility. *State v. Covington,* 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶28; *State v. Hairston,* 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶74.

**{¶14}** To find appellant guilty of felonious assault, the state had to prove beyond a reasonable doubt that appellant knowingly caused Riley serious physical harm. R.C. 2903.11(A)(1). Although raised in his assignment of error, appellant does not argue that there was insufficient evidence to support his conviction for felonious assault. Indeed, Riley's testimony alone, viewed in a light most favorable to the state, is sufficient to prove the offense. *State v. Woods*, 10th Dist. No. 09AP-667, 2010-Ohio-1586, ¶17. Instead, appellant contends that he should have been found guilty of aggravated assault, not felonious assault, because the weight of the evidence proves that Riley provoked the situation by walking away from him, not returning his cell phone, and kicking him after he knocked her down. We disagree.[1]

**{¶15}** The offense of aggravated assault is described in R.C. 2903.12(A)(1), which provides, in relevant part, that "[n]o person, while 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 [c]ause serious physical harm to another." Aggravated assault is an inferior degree of felonious assault, because its elements are the same as felonious assault, except for the additional mitigating element of serious provocation. *State v. Hancher*, 2d Dist. No. 23515, 2010-Ohio-2507, ¶54. An appellant bears the burden of persuading the fact finder, by a preponderance of the evidence, that he or she acted

[1] Moreover, appellant's claim that he should have been found guilty of aggravated assault rather than felonious assault at least implicitly concedes the sufficiency of the state's evidence of felonious assault. *State v. Moore*, 2d Dist. No. 20005, 2004-Ohio-3398, ¶51.

under serious provocation. *State v. Cunningham*, 8th Dist. No. 84960, 2005-Ohio-3007, ¶17 (citing *State v. Rhodes* (1992), 63 Ohio St.3d 613, 620).

**{¶16}** 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. *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph five of the syllabus. Classic examples of serious provocation are assault and battery, mutual combat, illegal arrest, and discovering a spouse in the act of adultery. *State v. Shane* (1992), 63 Ohio St.3d 630, 635.

**{¶17}** In support of his claim that he acted under serious provocation, appellant testified that he assaulted Riley only after she walked away from him and kicked him in the groin. However, the state presented the jury with a different version of events. Riley testified that appellant knocked her to the ground with two punches to the head. He then repeatedly kicked her in the face as she lay on the ground. She tried to protect herself by curling her body up and could not kick or punch appellant. Additionally, two neighbors who witnessed at least some of the incident testified that Riley did not hit or kick her attacker. This version of events refutes appellant's claim of serious provocation. The jury was free to disbelieve appellant's version of events and believe Riley's version of events. That decision was within the province of the jury. *State v. Parker*, 4th Dist. No. 03CA43, 2004-Ohio-1739, ¶23 (jury free to disbelieve defendant's version of physical altercation); *State v. Williams,* 10th Dist. No. 08AP-719, 2009-Ohio-3237, ¶18-19 (jury's decision to reject defendant's version of events and believe prosecution's version of events not against manifest weight of the evidence). Given the conflicting evidence presented at trial, this is not the exceptional case in which the evidence weighs heavily against the

conviction. Accordingly, appellant's conviction is not against the manifest weight of the evidence.

**{¶18}** Appellant's felonious assault conviction is supported by sufficient evidence and is not against the manifest weight of the evidence. Accordingly, we overrule appellant's assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN and CONNOR, JJ., concur.