[Cite as *Columbus v. Hawkins*, 2011-Ohio-4517.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
		No. 10AP-1150
v.	:	(M.C. No. 2010 CRB 008226)
Kenyata Hawkins,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 8, 2011

Richard C. Pfeifer, *Jr.*, City Attorney, *Lara N. Baker*, Chief Prosecutor, and *Melanie R. Tobias*, for appellee.

Yeura R. Venters, Public Defender, *Allen V. Adair*, and *Dawn M. Steele*, for appellant.

APPEAL from the Franklin County Municipal Court.

BROWN, J.

{¶1} Kenyata Hawkins, defendant-appellant, appeals from a judgment of the Franklin County Municipal Court, in which the court found her guilty, pursuant to a jury verdict, of assault in violation of Columbus City Code ("C.C.C.") 2303.13(A), a first-degree misdemeanor.

{¶2} Appellant's daughter, Kiyami McAffee, was 13 years old during the pertinent events. On March 15, 2010, two classmates, Morgan Gaines and H.F., directed taunts and gestures at Kiyami, suggesting they wanted to fight her. Morgan and H.F. were apparently mad at Kiyami because Kiyami had recently gone on a date with the boyfriend

of Lakresha Jeter, a friend of Morgan's and H.F.'s. At the end of the school day, Kiyami called appellant and asked her if she could pick her up because she feared Morgan and H.F. wanted to fight her. Because appellant did not believe she could get to the school in time, Kiyami decided to walk with two friends, Shamarkay Freeman and Alonya Morris, to Shamarkay's house. H.F. and her friend Sandra Sallee walked ahead of Kiyami's group.

{¶3} At some point during the walk home, Morgan's father pulled up in his van, and H.F. and her friend started to get into the van. At the same time, Shamarkay's mother, Frances, and two adult sisters, Shavette and Shavonne arrived in a vehicle, and the three exited their vehicle. Shamarkay and H.F. started to fight, and Shavette, Shavonne, and Frances intervened. At the same time, Sandra and Alonya began to fight. Appellant then arrived at the scene in her vehicle.

{¶4} The stories diverge as to what happened next. Appellant claims she, with her two-year-old son in tow, retrieved Kiyami and a girl named Quiniece, and they returned to her van and drove home. Other witnesses testified that, after the fighting had largely ceased, appellant approached H.F. as she lay on the ground and kicked her. H.F. also claimed that appellant, along with others, kicked her while she was in the midst of the fight with Shamarkay. The fight ended after Margaret Davey, a teacher, arrived on the scene and told everyone that the police were on the way.

{¶5} Appellant was charged with assault, in violation of C.C.C. 2303.13(A). Appellant was also charged with a second count of assault, but that charge was tried separately. A jury trial on the present assault count commenced November 8, 2010, and the jury subsequently found appellant guilty of assault. Sentencing was continued until after the trial of the second assault charge, which resulted in a not guilty verdict. The trial

court sentenced appellant on the present assault conviction to a jail term of 180 days, with 135 days suspended on condition of two years probation. Appellant appeals the judgment of the trial court, asserting the following assignment of error:

> APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶6} Appellant argues in her sole assignment of error that the trial court's judgment was against the manifest weight of the evidence. This court's function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. In order to undertake this review, we must sit as a "thirteenth juror" and review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. Id., citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. If we find that the fact finder clearly lost its way, we must reverse the conviction and order a new trial. Id. On the other hand, we will not reverse a conviction so long as the state presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense were established beyond a reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193-94, 1998-Ohio-533.

{¶7} In addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. See *Martin* at 175. However, in conducting our review, we are guided by the presumption that the jury, or the trial court in a bench trial, is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Thus, a

reviewing court must defer to the factual findings of the jury or judge in a bench trial regarding the credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Concerning the issue of assessing witness credibility, the general rule of law is that "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. Indeed, the fact finder is free to believe all, part, or none of the testimony of each witness appearing before it. *Hill v. Briggs* (1996), 111 Ohio App.3d 405, 412. If evidence is susceptible to more than one construction, reviewing courts must give it the interpretation that is consistent with the verdict and judgment. *White v. Euclid Square Mall* (1995), 107 Ohio App.3d 536, 539. Mere disagreement over the credibility of witnesses is not sufficient reason to reverse a judgment. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202.

{¶8} C.C.C. 2303.13(A) provides, in pertinent part:

> No person shall knowingly cause or attempt to cause physical harm to another.

{¶9} In the present case, appellant's main argument centers on the issue of witness credibility. Appellant maintains that only she and her daughter, Kiyami, provided credible accounts of the events. Appellant raises the following points to demonstrate why her and her daughter's testimony was more credible than the testimony of the other witnesses: (1) Neither H.F. nor Sandra noticed appellant was holding her two-year-old child at the time she allegedly kicked H.F.; (2) H.F. contradicted Sandra's testimony as to who was able to get up first after the fights ended; (3) Davey gave confusing identification

testimony that contradicted her earlier statements to counsel that she could not identify the woman who kicked H.F.

{¶10} With regard to appellant's first two points, neither of these factual differences directly affected H.F.'s and Sandra's ultimate conclusions that it was appellant who kicked H.F. as she lay on the ground. Regardless, what appellant asks this court to do is second-guess the credibility determination of the jury, which we are reluctant to do absent a compelling reason to do so. We do not believe these two points raised by appellant are sufficient to overturn the jury determination. As to the testimony regarding who got up from the ground first, the testimony was very vague on this issue. At one point, H.F. testified that, after she got up, she ran to Sandra, who was in worse condition. At another point, H.F. testified that, when she walked over to Sandra after her own fight, Sandra was on the ground. Although Sandra testified that she got up before H.F., she never said what happened to her next. Specifically, Sandra never said she did not return to the ground to gather herself before H.F. eventually walked over to her. Therefore, the testimony of these two girls did not necessarily conflict. With regard to H.F.'s and Sandra's failure to notice that appellant was holding her young child during the incident, appellant's contention presupposes that appellant was, in fact, holding her child. The only evidence in the record that appellant was holding her child came from appellant and Kiyami. Because the jury may well have believed that appellant did not have her child with her at the time, we cannot overturn the jury's verdict on the basis that neither Sandra nor H.F. saw appellant's child.

{¶11} Furthermore, H.F. and Sandra both testified that they had been friends with Kiyami, so they knew appellant. Although she was uncertain as to who had come back to

kick her after the fight had ended, H.F. was 100 percent sure that appellant had kicked her during the fight. Likewise, Sandra said she was 100 percent sure that appellant was kicking H.F. during the fight. Sandra was also certain that appellant came back after the fight was over and kicked H.F. while she was lying on the ground. Thus, the jury could have found the testimony of H.F. and Sandra convincing.

{¶12} Appellant also argues that Davey gave "confusing" identification testimony that contradicted her earlier statements to counsel that she could not identify the woman who kicked H.F. Appellant's argument actually raises two issues: (1) Davey's testimony was "confusing"; and (2) Davey's in-court identification of appellant as the person who kicked H.F. conflicted with the prosecutor's comment in opening statements that Davey would not be able to identify the woman who kicked H.F. Davey's pertinent testimony was as follows:

> A. Then everybody leaves, and she's just laying there; and that's when somebody came back and – I work in middle school, and when the kids are playing and somebody is down, they play like they're kicking someone, and they just keep kicking. It's one of those – That's what it was. It was an adult that came back and kicked the child. It was just one of those things, you know; you just can't believe it happens because it's the movies, you know.
>
> Q. Now, what do you remember about this adult that kicked the child?
>
> A. That it's the same person that picks up Kiyami. And then they left, and they got in the white car.
>
> And across the street from the house where they were actually fighting – And the guy that owned the house was actually standing in the doorway, like –
>
> Q. Let's go back to – You just said that, you know, that the person who kicked [H.F.] is the same person that –

> A. Picks her up.
>
> Q. – that picks up – Now you have me forgetting her name.
>
> A. I know. I'm sorry.
>
> Q. It's like Shamarkay –
>
> A. All the names kind of – And I tried not to – Like when this happened, I couldn't listen to anyone else; I didn't want anyone telling me any names. So if I don't know her name, it's not because I didn't care. I just didn't want to investigate it, because I wanted to just say what I seen and just keep it honest. And so I'm sorry if I don't –
>
> Q. No. No. Just be honest. That's all we ask. Just be honest.
>
> So I'm going to go back again and ask you about this. You just testified that the person who picks up Kiyami from school, that drives a white car, you're sure that's the same person who kicked [H.F.] If you have to say you don't know, that's fine.
>
> A. There were two women in the car. It's the woman that always picks her up. I don't know. I mean, I wouldn't – I don't know.
>
> Q. Do you see that woman in the courtroom today?
>
> A. Yeah, that picks up Kiyami.
>
> Q. Please point to her and describe what she's wearing, please.
>
> A. She's right there with the black coat and boots. (Indicating.)
>
> THE COURT: The record will reflect that the witness has identified Miss Hawkins, the defendant.

(Tr. 102-04.)

{¶13} Although appellant did not identify the precise nature of the alleged "confusion" in the argument portion of her brief, in the facts section of her brief, appellant asserts that Davey's testimony suggested she may have meant to say the person who

kicked H.F. was the person who picked up Shamarkay, rather than the person who picked up Kiyami. We do not agree with appellant's reading of the testimony. Davey never mentioned Shamarkay, it was the prosecutor who mentioned the name Shamarkay, and because Davey interrupted the prosecutor, it is uncertain why the prosecutor was mentioning the name "Shamarkay." All of Davey's testimony before and after the prosecutor's mention of the name "Shamarkay" was clear and was not confusing at all: The woman who kicked H.F. was the same woman who picked up Kiyami from school, and that woman was the same person who was on trial. Therefore, we find appellant's argument, in this respect, without merit.

{¶14} The other part of appellant's argument is that Davey's in-court identification of appellant as the person who kicked H.F. conflicted with the prosecutor's comment in opening statements that Davey would not be able to identify the woman who kicked H.F. However, we fail to see a conflict so clear that it should subject the verdict to reversal or diminish the believability of the rest of Davey's testimony. In the prosecutor's opening statement, the prosecutor indicated that Davey was not going to testify that she knew appellant was the person who kicked H.F., because Davey was "not sure." Although Davey clearly identified appellant in court, Davey also testified she did not know the name of the person who kicked H.F. or her actual identity, other than that she was the woman who picks up Kiyami from school. Thus, the only thing Davey knew about the adult who kicked H.F. was what she looked like. Otherwise, Davey could not say who she was or what her name might be. Therefore, Davey's testimony did, in fact, reflect uncertainty as to the actual identity and name of appellant, which is not so contradictory to the

prosecutor's opening statement that we should negate Davey's identification testimony. Therefore, this argument is without merit.

{¶15} Appellant also argues that the jury lost its way in arriving at a guilty verdict, relying upon information her attorney gleaned during post-verdict juror interviews. At trial, appellant testified that the reason she had not tried to break up the fight was because her daughter was not involved in it, and, where she comes from, one does not break up someone else's fight. At the sentencing hearing, appellant's counsel explained that, during the post-verdict juror interviews, the jurors stated that they were persuaded that appellant must have been involved in the fight by one of the members of the jury who said he knew the rules of the "hood." This juror told them during deliberations that he believed appellant was involved in the fight because, in the "hood," you only get involved in a fight if one of "your people" is involved in the fight; otherwise, you do not break up a fight. During the post-verdict interviews, it came to light that this juror, applying his knowledge of "hood" protocol and procedures, had come to the conclusion that appellant must have been involved in the fight based upon his mistaken belief that appellant's daughter was involved in the fight. The other jurors then told appellant's counsel that they had mistakenly believed that by "other people" the juror had meant other adults, so that was why they had also come to the conclusion that appellant was involved in the fight. In other words, the jurors thought, mistakenly, that because a rule of the "hood" was to get involved in a fight only if other adults were involved in the fight, appellant must have been involved in the fight because other adults were, in fact, involved in the fight.

{¶16} However, appellate review is strictly limited to the record, and this court cannot consider matters outside the record that were not part of the trial court

proceedings. See *State v. Ishmail* (1978), 54 Ohio St.2d 402 (an appellate court can reach its decision only upon facts which are adduced in the trial court proceeding and cannot base that decision on allegations founded upon facts from outside the record). We have no evidence of these jurors' statements outside of the comments made by defense counsel. In sum, what appellant asks of this court is to overturn a jury verdict based upon the manifest weight of the evidence using an unsworn comment describing alleged post-verdict statements made by every juror recounted in a summary fashion at a sentencing hearing for the sole purpose of mitigating the sentence. Appellant asks too much. The allegations of appellant's defense counsel were founded upon facts outside the record, and this court may not rely upon them. See id. Even if we could somehow consider defense counsel's comments, a " 'firmly established common-law rule * * * flatly prohibit[s] the admission of juror testimony to impeach a jury verdict." *State v. Robb* (2000), 88 Ohio St.3d 59, 79, quoting *Tanner v. United States* (1987), 483 U.S. 107, 117, 107 S.Ct. 2739, 2745. Therefore, we find this argument without merit. The judgment was not against the manifest weight of the evidence, and appellant's assignment of error is overruled.

{¶17} Accordingly, appellant's single assignment of error is overruled, and the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

BRYANT, P.J., and FRENCH, J., concur.

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