[Cite as *State v. Horne*, 2009-Ohio-4199.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91797

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DESMOND HORNE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED
FOR CORRECTION OF JOURNAL ENTRY

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-504147

BEFORE: Kilbane, J., Cooney, A.J., and Rocco, J.

RELEASED: August 20, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, J.:

{¶ 1} Appellant, Desmond Horne (Horne), appeals his convictions for felonious assault and domestic violence. After reviewing the pertinent law and facts, we affirm.

{¶ 2} On December 4, 2007, Horne was charged in a three-count indictment as follows: Count 1, felonious assault, in violation of R.C. 2903.11(A)(1); Count 2, felonious assault, in violation of R.C. 2903.11(A)(2); Count 3, domestic violence, in violation of R.C. 2919.25. Each felonious assault count carried separate one- and three-year firearm specifications.

{¶ 3} On April 16, 2008, the case proceeded to a jury trial. Horne was found guilty of Count 2, felonious assault, and guilty of the accompanying one-year firearm specification, but not guilty of the accompanying three-year firearm specification. Horne was also found guilty of Count 3, domestic violence. He was found not guilty of Count 1, felonious assault.

{¶ 4} On April 30, 2008, counsel for Horne filed a motion for judgment of acquittal pursuant to Crim.R. 29(C), which the court granted in part by dismissing the one-year specification that accompanied the jury's finding of guilt as to felonious assault in Count 2.

{¶ 5} On June 9, 2008, the trial court sentenced Horne to a two-year term of incarceration. This appeal followed.

{¶ 6} At trial, Officer Joseph Rutkowski (Rutkowski) of the Cleveland Police Department testified to the following events.

{¶ 7} On the morning of October 15, 2007, at approximately 5:30 a.m., Rutkowski responded to a call from 1412 West 107th Street. Upon arrival, he noticed an EMS vehicle parked in front of the home. Inside the vehicle, he saw the victim, Marsharie Edwards (Edwards), being treated for injuries to her forehead. Rutkowski noticed she was bleeding from the head and had a "knot" on her forehead. Rutkowski testified that Edwards then told him that her live-in boyfriend, Desmond Horne, pistol-whipped her during an argument. Rutkowski and his partner searched the premises for the weapon, but were unsuccessful. Rutkowski further testified that Edwards asked him and his partner to escort an intoxicated male, later revealed to be Edwards's "play brother"[1] from the apartment. At the hospital, Rutkowski asked Edwards whether she intended to prosecute Horne; Edwards responded that she did not intend to do so.

{¶ 8} At trial, it was later revealed that Edwards initially had the gun during the fight with Horne and had previously fired the gun during their argument.

{¶ 9} Edwards testified that she is 31 years old and honorably discharged from the U.S. Army. While in the military, she worked as a

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[1]This individual was revealed in the record as "Eric," a man Edwards met in the U.S. Army and, according to Edwards's testimony, is like a brother to her; hence the name "play brother." See April 15, 2008, partial transcript of proceedings at 11, lines 17-23.

specialist in a warehouse. She and Horne lived together at the West 107th Street address for approximately four months before the incident in question. She stated that on October 14, 2007, she came home from work at 7:00 p.m. and found Horne waiting for her. She shared with Horne her concern that she would not be able to commute to work in the future because they lacked gas money for their car. Horne called his cousin, who agreed to lend them money.

{¶ 10} After filling the car with gas, they traveled to the grocery store to purchase cooking oil. An argument ensued when Horne went into the store and returned to the vehicle with beer and cigarettes, instead of cooking oil.

{¶ 11} Once home, Edwards began doing dishes while Horne and Edwards's "play brother" sat in the living room. Edwards testified that she was doing the dishes by candlelight, since the kitchen fixture was missing a light bulb. After this, she fell asleep.

{¶ 12} At approximately 5:00 a.m., she awoke to find Horne still in the living room, either watching television or playing video games. Another argument ensued, this time about their financial situation as it pertained to the electricity that was scheduled to be disconnected for nonpayment. During the argument, Edwards grabbed a bag that Horne had previously packed and threw it out the back door and down a flight of stairs, damaging its contents, including Horne's Wii video console. According to Edwards,

Horne became visibly upset and turned toward her. She testified that he was "ramping [sic] and raging" and that he was coming to "get her." At this point, Edwards pulled a gun from her waistband. (Tr. 170-172.)

{¶ 13} The testimony conflicts as to what happened next. According to Edwards, she fired the weapon once into the air in an attempt to stop Horne from coming at her. Horne, for his part, testified that Edwards leveled the weapon and fired directly at him, but missed, and that she was unable to continue firing because the gun jammed. The parties then separated, with Horne reentering the apartment while Edwards remained in the back stairwell.

{¶ 14} Another physical altercation ensued when Edwards reentered the apartment. Edwards testified that Horne approached her from behind and slammed her up against a wall as they struggled for the gun. According to Edwards, Horne wrestled the gun from her, held her by the neck against the wall, pointed the gun at her, and then hit her on the head with the gun. She awoke with Horne standing over her saying, "Bitch, I should have killed you."

{¶ 15} Upon cross-examination, Edwards admitted she initially told hospital workers she did not know what Horne hit her with, but later confided to a social worker that she had been pistol-whipped. She also admitted that she never told the police that she initially possessed the gun when the altercation began.

{¶ 16} Horne agreed with most of Edwards's testimony, but testified that when Edwards emerged from her bedroom at 5:00 a.m., she was carrying the gun. He testified that after she threw his bag out, he went down the back stairs to retrieve it, at which point, she fired the gun directly at him. He noticed that the gun jammed, and they fought for the gun. Horne testified further that he attempted to get the gun from her and kick it under the couch. When they separated after the fight, Horne testified that he noticed that Edwards had a cut on her head. He then left the home. Horne denied punching Edwards or hitting her in the forehead with the gun, and stated that he believed Edwards would have shot him if the gun had not jammed.

{¶ 17} Horne asserts the following sole assignment of error for our review:

> **"Appellant's felonious assault and domestic violence convictions were against the manifest weight of the evidence."**

{¶ 18} In *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, the court illuminated its test for manifest weight of the evidence as follows:

> **"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.*" Id., quoting Black's Law Dictionary (6 Ed. 1990) 1594. (Emphasis in original.)

{¶ 19} The court, reviewing the entire record, essentially sits as a "thirteenth juror," weighing the evidence and all reasonable inferences. See *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721. In so doing, we consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, "the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Id. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. Id.

{¶ 20} In this matter, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice in convicting defendant of the offenses. After reviewing Horne's arguments, we are not persuaded that the evidence in this matter weighs heavily against conviction.

{¶ 21} The thrust of Horne's appeal is that his version of events is more believable than Edwards's version. He argues that Edwards started the physical altercation and then exacerbated it by firing the gun, and that he was only defending himself. He argues that he never hit Edwards and that she must have sustained her injuries while they were wrestling for the gun.

{¶ 22} Horne also argues that the trial court's comments during the sentencing hearing bolster his argument that the jury lost its way. Specifically, Horne argues that the following comment at the sentencing hearing confirms the jury lost its way: "Frankly, had I, the Court[,] had I been the fact-finder on the case instead of the jury, might have come out differently than they did. I've taken a legal oath and I've got to follow the law." (Tr. 341.)

{¶ 23} Finally, Horne points to what he argues is an inconsistent verdict. On this point, he argues in essence that there is no logical way the jury could have found him guilty of felonious assault with a deadly weapon, but, in rejecting the three-year gun specification, also find that he did not commit the offense with such a weapon.[2]

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[2]We note that the journalized entry of the court indicates that "the jury returns a verdict of guilty of felonious assault, 2903.11(A)(2) with firearm specification -1-year (2941.141), firearm specification - 3-years (2941.145) as charged in count(s) 2 of the indictment. The jury returns a verdict of guilty of domestic violence 2919.25(A) M1 as charged in count(s) 3 of the indictment." However, the verdict form, as signed by all twelve jurors, specifically indicates that Horne was found not guilty of the three-year firearm specification, but guilty only of

{¶ 24} Because the trial court dismissed the one-year firearm specification in its June 4, 2008 journal entry partially granting Horne's Crim.R. 29(C) motion for acquittal, this argument is moot. However, even assuming that the trial court did not dismiss the one-year firearm specification, these arguments ignore the fact that Edwards told the investigating officer that she was pistol-whipped; that the jury did find Horne guilty of the one-year gun specification; and that the trial court, in making its comments, merely affirmed its legal oath to follow the law. They further ignore the medical record evidence that shows the laceration to Edwards's forehead that required sutures to close it. Those same records reveal that Edwards confided to the social worker at her bedside that she in fact was pistol-whipped by Horne. Based on the record before the trial court, Horne's self-defense argument fails.

{¶ 25} Further, we note that when assessing witness credibility "the 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 the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123, 489 N.E.2d 547. 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, 676 N.E.2d 547. Indeed, the court below is in a much

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the one-year firearm specification.

better position than an appellate court "to view the witnesses, to observe their demeanor, gestures and voice inflections, and to weigh their credibility." *Briggs*, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶ 26} Here, the jury, as the trier of fact, weighed the evidence, considered the facts and the credibility of the witnesses, and found Horne guilty.

{¶ 27} Because the evidence does not weigh heavily against conviction, we will not order a new trial.

{¶ 28} Horne's sole assignment of error is overruled.

{¶ 29} Judgment affirmed. However, this case is remanded to the trial court solely for correction of the journal entry of April 17, 2008, which incorrectly states that Horne was convicted of both the one-year and the three-year gun specifications accompanying his conviction for felonious assault in Count 2. The record demonstrates that he was convicted only of the one-year gun specification, and that the court later dismissed the gun specification on June 4, 2008, when it granted Horne's Crim.R. 29(C) motion in part. Journal entries must conform to the demonstrated record. See Crim.R. 36 and App.R. 9(E).

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, JUDGE

COLLEEN CONWAY COONEY, A.J., and
KENNETH A. ROCCO, J., CONCUR