[Cite as *State v. Chidsey*, 2009-Ohio-6638.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92593

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EUGINA CHIDSEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-511283

BEFORE: Jones, J., Dyke, P.J., and Celebrezze, J.

RELEASED: December 17, 2009

JOURNALIZED:

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Eugina Chidsey ("Chidsey"), appeals the decision of the lower court. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm.

STATEMENT OF THE CASE AND THE FACTS

{¶ 2} Chidsey was indicted along with four other people in case number CR-511283. Jason Dillon, one of Chidsey's co-defendants, had an earlier separate trial and was found not guilty. Chidsey was indicted for knowingly causing serious physical harm to Jim Graziolli; felonious assault, in violation of R.C. 2903.11(A)(2); assault, in violation of R.C. 2903.13(A); intimidation, in violation of R.C. 2921.03(A); and aggravated riot, in violation of R.C. 2917.02(A)(1) and/or (A)(2) and/or (A)(3).

{¶ 3} A jury trial was held beginning on November 10, 2008. Chidsey was found not guilty of Count 1, felonious assault, R.C. 2903.11(A)(1); not guilty of the inferior offense, aggravated assault, R.C. 2903.12(1) and/or (2); not guilty of the lesser included offense, assault, R.C. 2903.13(A); not guilty of Count 2, assault, R.C. 2903.13(A); not guilty of Count 3, intimidation; but guilty of Count 4, aggravated riot, R.C. 2917.02(A)(1) and/or (A)(2) and/or (A)(3). Accordingly, the

{¶ 4} only charge Chidsey was found guilty of was the aggravated riot count.[1] Chidsey now appeals.

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[1]The indictment lists five counts. However, the first count is simply listed as "did knowingly cause serious physical harm to Jim Graziolli." Count 2 is listed as felonious assault; Count 3 is listed as assault; Count 4 is listed as intimidation; and Count 5 is listed as aggravated riot.

{¶ 5} On August 17, 2007, Susan Addleman arrived for work as a bartender at Sheehan's Pub at about 8:20 p.m. Chidsey arrived there between 10:00 and 11:00 p.m. with her boyfriend and co-defendant, Peter Marcoff, III. They were celebrating Marcoff's birthday. Chidsey's sister and co-defendant, Wendy Hinzman, also arrived at Sheehan's that night. Her boyfriend, Jason Dillon, showed up at the bar later that night. Another friend, Shane Linnean, was also present.

{¶ 6} They were drinking heavily. Chidsey, who also worked at the bar, went behind the bar about five or six different times and helped herself to six or seven drinks each time. These drinks were for the people at her table and for other people at the bar that she wanted to give drinks to.

{¶ 7} At approximately 1:00 a.m., Jim Graziolli arrived to help Addleman close the bar. Graziolli drank one beer. Addleman called, "last call" at 2:15 a.m. Everyone except for Chidsey's group complied and left at closing. Addleman and Graziolli were unsuccessful in getting the group to leave. Eventually, Graziolli gave up and went outside. Chidsey's group immediately followed and attacked Graziolli. Addleman wondered where Graziolli was and went outside. While outside, Addleman saw Graziolli being beaten by all five members of Chidsey's group. Addleman pleaded with the group to stop, however they kept hitting and kicking Graziolli, so Addleman ran in the bar and called 9-1-1. Chidsey followed Addleman into the bar threatening her and telling her to end the 9-1-1 call.

Assignment of Error

{¶ 8} Chidsey assigns three assignments of error on appeal:

{¶ 9} "[1.] The trial court erred in denying Appellant's motion for acquittal as to the charges when the state failed to present sufficient evidence to sustain a conviction.

{¶ 10} "[2.] Appellant's conviction is against the manifest weight of the evidence.

{¶ 11} "[3.] Appellant's constitutional rights to a grand jury indictment and constitutional rights to due process were violated when her indictment omitted the specific predicate felony offense, specific offense of violence and any specific crime."

LEGAL ANALYSIS

Sufficient Evidence and Manifest Weight of the Evidence

{¶ 12} Chidsey argues in her first assignment of error that the trial court erred in denying her motion for acquittal and the state failed to present sufficient evidence to sustain a conviction. Chidsey further argues in her second assignment of error that her conviction is against the manifest weight of the evidence. Because of the substantial interrelation between appellant's first two assignments of error, we shall address them together.

{¶ 13} "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. With respect to sufficiency of the evidence, 'sufficiency' is a term of art meaning that legal

standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process.

{¶ 14} "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence. [W]eight 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*.'

{¶ 15} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a '"thirteenth juror"' and disagrees with the factfinder's resolution of the conflicting testimony." 386-387 (Internal citations omitted.) *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541.

{¶ 16} As to the weight of the evidence, the issue is whether the jury created a manifest miscarriage of justice in resolving conflicting evidence, even though the

evidence of guilt was legally sufficient. *State v. Issa* (2001), 93 Ohio St.3d 49, 67, 752 N.E.2d 904; see, also, *Thompkins*, supra.

{¶ 17} The proper test to be used when addressing the issue of manifest weight of the evidence is set forth as follows:

{¶ 18} '"Here, the test [for manifest weight] is much broader. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the [fact finder] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. * * * "' *State v. Moore*, Cuyahoga App. No. 81876, 2003-Ohio-3526, at ¶8, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717; see, also, *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652.

{¶ 19} "The power to reverse a judgment of conviction as against the manifest weight must be exercised with caution and in only the rare case in which the evidence weighs heavily against the conviction." *Moore* at ¶8, citing *Martin*, supra.

{¶ 20} It is with the above standards in mind that we now address appellant's first and second assignments of error. There is nothing in the record demonstrating that the evidence in this case is anything but legally sufficient to support the verdict. Furthermore, there is nothing in the record suggesting that the trial court lost its way and created a miscarriage of justice requiring reversal of appellant's conviction.

{¶ 21} Chidsey asserts that the evidence does not support the lower court's ruling. However, contrary to Chidsey's claims, the evidence in the record does demonstrate that the trial court acted properly regarding the evidence presented.

{¶ 22} There is sworn testimony in this case that Susan Addleman called "last call" at 2:15 a.m. and everyone, except for Chidsey's group, complied and left.[2] Susan Addleman and Jim Graziolli remained in the bar. Addleman asked the group to give up their drinks and leave; however, the group just laughed and continued drinking.

{¶ 23} Because Addleman was having problems getting the group to leave, she asked Graziolli to help collect the drinks. Addleman testified that she never saw Graziolli touch anyone in the bar that night.[3] Graziolli was unable to get the group to give up their drinks, and he eventually went outside. Minutes after Graziolli left, Chidsey and her party left the bar.

{¶ 24} Addleman noticed that Graziolli did not return, and she went outside looking for him. Addleman testified that she saw all five people in Chidsey's group beating up Graziolli. All of them were punching, hitting, and kicking Graziolli. Addleman begged them to stop, but they just laughed. Addleman ran inside and called 9-1-1. Chidsey went inside, saw Addleman on the phone and

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[2]Tr. 460.

[3]Tr. 465.

grabbed her by the throat.[4] Chidsey tried to end the 9-1-1 call and made threats to Addleman.

{¶ 25} Addleman testified that Chidsey threatened her by saying, "Don't do this to me. You better not come back here."[5] Chidsey and her group then ran away and left Graziolli laying on the ground unconscious and covered in blood. Graziolli was taken to the hospital by ambulance. He stayed over night at the hospital, received multiple sutures to his head, and missed eight weeks of work. Although Chidsey's friends were involved in the attack, only Graziolli was injured enough to seek medical attention. In addition, Jason Dillon testified on behalf of the defense and admitted that their group left right after Addleman called 9-1-1.

{¶ 26} We find the evidence legally sufficient to sustain the trial court's conviction for aggravated riot. In addition, when the evidence is viewed in a light most favorable to the state, we find that all essential elements of appellant's conviction were proven beyond a reasonable doubt. Moreover, nothing in the record demonstrates that the trial court lost its way in convicting Chidsey.

Due Process

{¶ 27} Chidsey argues in her third assignment of error that her rights to due process were violated when her indictment omitted the specific predicate felony offense, specific offense of violence, and any specific crime. We do not find merit in Chidsey's argument.

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[4]Tr. 473.

[5]Tr. 473.

{¶ 28} R.C. 2917.02(A)(1) – (3), Aggravated Riot, provides the following:

> "(A) No person shall participate with four or more others in a course of disorderly conduct in violation of section 2917.11 of the Revised Code:
>
> "(1) With purpose to commit or facilitate the commission of a felony;
>
> "(2) With purpose to commit or facilitate the commission of any offense of violence;
>
> "(3) When the offender or any participant to the knowledge of the offender has on or about the offender's or participant's person or under the offender's or participant's control, uses, or intends to use a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code."

{¶ 29} Chidsey was indicted for aggravated riot in Count 5 as follows:[6]

> "Count Five – Aggravated Riot R.C. 2917.02(A)(1) and/or (A)(2) and/or (A)(3), Defendants: Peter Marcoff III, Wendy Hinzman, Shane Linnean, Eugina Chidsey and Jason Dillon.
>
> "The Grand Jurors, on their oaths, further find that the Defendant(s) unlawfully did participate with four (4) or more others in a course of disorderly conduct in violation of Section 2917.11 of the Revised code, with purpose to commit or facilitate commission of an offense of violence, in violation of Section 2917.02 of the Ohio Revised Code, with purpose to commit or facilitate the commission of a felony; and/or with purpose to commit or facilitate the commission of an offense of violence: and/or when the said Peter Marcoff III and/or Wendy Hinzman and/or Shane Linnean and/or Eugina Chidsey and/or Jason Dillon, or a participant to their knowledge, used or intended to use a deadly weapon or dangerous ordnance, to wit: a shoe."

{¶ 30} A review of the indictment demonstrates that it clearly has all of the elements listed in R.C. 2917.02 of the Ohio Revised Code. Moreover, the trial

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[6]Please note that in the transcript the parties refer to the aggravated riot count as count 4, while in the indictment the aggravated riot count is listed as count 5.

court provided additional clarification regarding what offenses of violence the jury would be looking at given the facts of the case:

> "* * * There is a typo in the instructions with regards to the aggravated riot charge.
>
> "Before you can find any one or all of the Defendants guilty, you must find, beyond a reasonable doubt, that on or about the 17th day of August 2007 in Cuyahoga County, Ohio, the Defendants participated, with four or more others, in the course of disorderly conduct with the purpose to commit or facilitate the commission of an offense of violence, with the purpose to commit or facilitate the commission of a felony, and/or commission of an offense of violence, assault.
>
> "I had previously indicated felonious assault. If you find the defendants guilty of the lesser included assault, they can still, under this statute, be found guilty of aggravated riot in the event you do make those findings. So either the felonious assault, which is a felony, or assault. Does that suffice?"

Tr. 736-737.

{¶ 31} The jury was instructed as to multiple acts, i.e., the subparts of aggravated riot, in an "and/or" fashion so a potential unanimity problem was presented. However, the state's focus was that defendant committed this offense through the commission of an offense of violence and made it clear that the jury had to agree upon the underlying act. Cf. *State v. Gardner*, 118 Ohio St3d 420, 429, 2008-Ohio-2787, 889 N.E.2d 995.

{¶ 32} In addition, the indictment covered every possible type of aggravated riot listed in the statute with the focus on violence and terms such as "commission of a felony." The argument that a statute number must be listed within the paragraph, or that this indictment was confusing, fails.

{¶ 33} A review of the record demonstrates that the jury found Chidsey guilty of all three subsections in R.C. 2917.02(A). All three subsections, (A)(1), (2), and (3) were listed in the indictment, listed in the journal entry, and mentioned in the transcript by the judge prior to sentencing.[7]

> "MR. SCHROTH: Judge, on the aggravated riot, there are two different subsections. Could you indicate which ones they've found them guilty of?
>
> "THE COURT: (A)1.2917.02(A)1 and/or (A)2 or (A)3. That's what the - - so it wasn't specified. That's how the verdict forms read.
>
> "All right. Anything else at this time?
>
> "All right. John will provide you with the sentencing date."

(Emphasis added.)

{¶ 34} Accordingly, the judge informed counsel that the jury found Chidsey guilty, just the way the verdict forms read, on all three subsections. Because the jury verdict forms specify each subsection with "and/or" language, both words "and" and "or" can be used in sentencing Chidsey.

{¶ 35} Therefore, unless the court specified otherwise with specific language limiting the charges to only one subsection, Chidsey would be found guilty of all three subsections. Here, *the indictment, the jury verdict forms, and the trial judge did not provide any language limiting Chidsey's exposure to only one subsection*

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[7]Tr. 822.

of 2917.02(A). In fact, all three subsections of 2917.02(A) were listed without any limiting language in the indictment, the journal entry, or the record.

{¶ 36} The indictment does specify the misconduct and satisfies the Ohio Revised Code. There is no limiting language in the record and we find no error on the part of the trial court.

{¶ 37} Chidsey's third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of 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. Case remanded to the trial court for execution of sentence.

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

LARRY A. JONES, JUDGE

ANN DYKE, P.J., CONCURS;
FRANK D. CELEBREZZE, JR., J., CONCURS
IN JUDGMENT ONLY