[Cite as *State v. Copley*, 2010-Ohio-2340.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92784

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

IRA COPLEY

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-516568

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

RELEASED: May 27, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Ira Copley ("Copley"), appeals the decision of the lower court finding him guilty on one count of felonious assault. Having reviewed the arguments of the parties and the pertinent law, we hereby reverse and remand to the lower court.

STATEMENT OF THE CASE

{¶ 2} A grand jury returned a one-count indictment in Case No. CR-516568 against Copley for felonious assault, in violation of R.C. 2903.11(A)(2) (deadly weapon, to wit: automobile), a felony of the second degree. At his arraignment, Copley entered a plea of not guilty. After commencement of a jury trial, Copley filed a motion for dismissal. The motion was denied.

{¶ 3} At the close of all the evidence, the prosecutor requested an instruction of the lesser included offense of assault. Although the trial judge included the instruction, the jury found Copley guilty of felonious assault, as indicted. At sentencing, defense counsel stated that although Copley had some prior problems with the law, it had been six years, and he has been a productive citizen since that time. The trial court judge sentenced Copley to the minimum sentence of two years in prison, gave him credit for time served, and waived the fine and costs. Copley now appeals from that conviction.

STATEMENT OF THE FACTS

{¶ 4} On September 22, 2008, Copley was driving his white work van. In the van with Copley were his brother, seated in the front passenger seat, and

Copley's two employees in the back seat. Meanwhile, Joshua McLaughlin ("McLaughlin") was riding his bicycle to work traveling on Detroit Road. Detroit Road has one lane going each way and a middle turning lane at the location where the incident occurred. McLaughlin testified that he was riding his bike at around 8:30 a.m. when he heard a voice from behind him on a loud speaker. McLaughlin testified that the voice said, "Nice bike faggot," and "I'm going to get you off the road."[1] McLaughlin testified that he heard the voice two more times stating something similar, but he was unable to remember the exact words.[2]

{¶ 5} McLaughlin further testified that as he heard the comments the third time, he was looking at the van because it was directly next to him. McLaughlin looked into the van and saw Copley and some sort of speaker device. McLaughlin stated that later, a couple of blocks down the road, traffic had stopped, and he rode into the side lane and tapped on the mirror of the van and said, "what's the deal?"[3]

{¶ 6} After hitting the mirror and making his comment, McLaughlin proceeded through the green light. Copley also proceeded through the green light and his van sideswiped McLaughlin. McLaughlin estimated that Copley was traveling approximately 10 to 15 m.p.h. at the time of the incident. McLaughlin testified that he had no time to avoid the van when Copley sideswiped him. As a result of this incident, McLaughlin suffered a sprained ankle.

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[1]Tr. 114.

[2]Tr. 115.

[3]Tr. 116.

{¶ 7} After the incident, Copley continued driving his van. McLaughlin called 9-1-1 from his cell phone and followed Copley's van. McLaughlin testified that by the time he was able to catch up to the van, Copley had exited the van and was standing by the van, holding something McLaughlin perceived to be a weapon, and threatening him.

{¶ 8} Contrary to McLaughlin's testimony, Copley denies having anything in his hand and denies threatening McLaughlin.[4] After catching up to the van, McLaughlin waited for the police to arrive. When the police arrived, McLaughlin told Officer Elmer Walling what happened.

ASSIGNMENTS OF ERROR

{¶ 9} Copley assigns four assignments of error on appeal:

{¶ 10} "[1.] The state failed to present sufficient evidence that appellant committed this crime.

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

{¶ 12} "[3.] Appellant was denied a fair trial by the police officer's improper comments while testifying.

{¶ 13} "[4.] Appellant was denied effective assistance of counsel as guaranteed by Section 10, Article I, of the Ohio Constitution and the Sixth and Fourteenth Amendments to the United States Constitution when defense counsel

[4]Tr. 212.

failed to object to the assistant prosecutor's questions to Officer Walling regarding his opinions on the truthfulness of the state's witness."

LEGAL ANALYSIS

Insufficient Evidence

{¶ 14} Appellant argues in his first assignment of error that the state failed to present sufficient evidence that he committed this crime. We agree.

{¶ 15} "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different.

{¶ 16} "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." (Internal citations omitted.) *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 17} Copley was found guilty of felonious assault, in violation of R.C. 2903.11(A)(2). R.C. 2903.11(A)(2) provides the following: "* * * Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶ 18} R.C. 2901.22, culpable mental states, subsection (B), provides the following: "(B) A person acts knowingly, regardless of his purpose, when he is

aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶ 19} Here, a review of the record and evidence demonstrates that there is insufficient evidence to convict Copley of felonious assault. A review of the record fails to show that Copley knowingly attempted to cause physical harm or knew of the risk of physical harm to McLaughlin. Additional review demonstrates that it is unclear if Copley had knowledge of the circumstances such that he was aware of where McLaughlin was in the road at the time.

{¶ 20} Further review demonstrates Copley was not aware that the circumstances probably existed. He was unaware of the specific circumstances surrounding the exact location of the biker and his relation to the van in the road at the time. Accordingly, he was unaware that his conduct would probably cause a certain result or would probably be of a certain nature. He did not have knowledge of the circumstances.

{¶ 21} Although it is not dispositive of this case, it is still important to note the fact that thorough review of the pictures and additional evidence does not demonstrate any injury to McLaughlin's ankle beyond a slight redness in color; no lacerations, no bleeding, no bruising, no swelling. It is also worth noting that although McLaughlin sprained his ankle, the injury was minor enough that he was able to have the strength and stamina to stay on his bike and give chase to the van.

{¶ 22} This court notes the low level of injury only to demonstrate possible lack of cause to harm, or intention to harm, on the part of Copley. We do not note the lack of lacerations, bleeding, bruising, swelling or other physical manifestations to somehow infer that the seriousness, or lack of seriousness, of an injury determines the conviction or outcome in this case.

{¶ 23} In that same regard, we further note it is undisputed that McLaughlin never fell off his bike during the incident. It is also undisputed that McLaughlin rode up to the van and hit the mirror in some fashion and then engaged in argumentative words with the driver of the van.

{¶ 24} We find the evidence to be insufficient to sustain appellant's conviction for felonious assault. When the evidence is viewed in a light most favorable to the state, we find that all essential elements of appellant's conviction were not proven beyond a reasonable doubt.

{¶ 25} Accordingly, we find Copley's first assignment of error to be well taken. Copley's conviction for felonious assault is hereby reversed and this cause is remanded for further proceedings consistent with this opinion.

{¶ 26} Due to the disposition of appellant's first assignment of error, all remaining assignments of error are moot. App.R. 12(A)(1)(c).

Judgment reversed and remanded.

It is ordered that appellant recover of appellee 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.

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., DISSENTS
WITH SEPARATE OPINION

FRANK D. CELEBREZZE, JR. J., DISSENTING:

{¶ 27} I respectfully dissent from the majority's conclusion in this case.

{¶ 28} The majority points out that Copley and Mr. McLaughlin exchanged words before Copley used his van to run Mr. McLaughlin off the road just moments later, but then notes that "[a] review of the record fails to show that Copley knowingly attempted to cause physical harm or knew of the risk of physical harm to McLaughlin. Additional review demonstrates that it is unclear if Copley had knowledge of the circumstances such that he was aware of where McLaughlin was in the road at the time." Copley made threats that he would get Mr. McLaughlin off the road and then proceeded to do just that. The jury heard the evidence and found appellant guilty of felonious

assault. This court should not overrule that finding unless an element of the charge was supported by insufficient proof. Here, that is not the case.

{¶ 29} As the majority notes, the felonious assault statute states that "one must '[c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon * * *.'" The majority finds that Copley did not know the risk of physical harm.

{¶ 30} "In establishing the second element of felonious assault, 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, 464 N.E.2d 159. "It is the *risk of physical harm* and the *attempt to cause physical harm* that must be capable of proof beyond a reasonable doubt * * *." (Emphasis sic.) *State v. Johnson*, Cuyahoga App. No. 81814, 2003-Ohio-4180, ¶29.

{¶ 31} Copley used his van as a weapon and attempted to remove Mr. McLaughlin from the road by force. The act of ramming a large van into a cyclist at 10 to 15 miles per hour is a sufficient overt act to constitute an assault with a deadly weapon.

{¶ 32} The majority also states that "[Copley] was not aware that the circumstances probably existed." The record informs us otherwise.

{¶ 33} "The Supreme Court of Ohio has addressed what conduct constitutes a 'substantial step' demonstrating an intent to commit a felonious assault. In *State v. Brooks* (1989), 44 Ohio St.3d 185, 542 N.E.2d 636, the court held that '[t]he act of pointing a deadly weapon at another, without additional evidence regarding the actor's intention, is insufficient evidence to convict a defendant of the offense of "felonious assault" as defined by R.C. 2903.11(A)(2).' Id. at syllabus. Nonetheless, the act of pointing a deadly weapon at another 'coupled with a threat, which indicates an intention to use such weapon,' is sufficient evidence to support a conviction for felonious assault. *State v. Green* (1991), 58 Ohio St.3d 239, 569 N.E.2d 1038, syllabus." *State v. Jones* (Sept. 7, 1999), Butler App. No. CA98-10-222, *5.

{¶ 34} Copley, using his van's PA system, yelled that he would get Mr. McLaughlin off the road. In pedestrian accident cases such as this, it is often difficult to divine the intent of a defendant. However, appellant's threats, made just before the incident, provide sufficient evidence that appellant knowingly attempted to cause physical harm to Mr. McLaughlin. Copley's own statements provide clear evidence of intent. The threat, along with Copley's van colliding with Mr. McLaughlin's bike, constitutes a substantial overt act directed at accomplishing an assault with a deadly weapon.

{¶ 35} If we view the evidence in a light favorable to the state, as the majority claims they are, it is clear that each element of the crime of felonious

assault is supported by evidence sufficient to demonstrate Copley's guilt. Simply because Copley testified he did not see Mr. McLaughlin does not negate the testimony of Mr. McLaughlin as this court should defer matters of credibility to the finder of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. Each element of felonious assault is supported by evidence in the record; therefore, I would uphold Copley's conviction.