[Cite as *State v. Hinzman*, 2010-Ohio-771.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92767

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WENDY HINZMAN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED
IN PART, AND REMANDED

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

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

RELEASED: March 4, 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).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Wendy Hinzman ("appellant"), appeals her conviction for aggravated assault and aggravated riot. After review of the record and pertinent case law, we affirm in part, reverse in part, and remand.

{¶ 2} On August 16, 2007, Susan Addleman ("Addleman") was working as a bartender at Sheehan's Pub. Eugina Chidsey ("Chidsey"), appellant's sister and co-defendant, and Chidsey's boyfriend, Peter Marcoff, III ("Marcoff"), another co-defendant, arrived at the bar between 10:00 and 11:00 p.m. Appellant and her boyfriend, Jason Dillon ("Dillon"),[1] arrived at the bar later that evening. At some point during the evening, another co-defendant, Shane Linnean ("Linnean"), also joined the group./

{¶ 3} Addleman testified that the group was drinking heavily throughout the evening. Addleman served the group several rounds of alcohol, and Chidsey went behind the bar on several occasions and served rounds of shots to the group. This was not considered unusual because Chidsey was also an employee of the bar.

{¶ 4} At approximately 1:00 a.m. on August 17, 2007, Jim Graziolli ("Graziolli"), the victim, arrived to help Addleman, his girlfriend at the time, close the bar. At approximately 2:15 a.m., Addleman called "last call," indicating to customers that they needed to finish their drinks and leave.

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[1] Dillon was also charged in this matter, but was acquitted in an earlier trial.

Addleman testified that all patrons in the bar complied with her request with the exception of appellant's party. After unsuccessfully attempting to get the group to leave, Addleman sought Graziolli's assistance. Graziolli approached the group and asked them to finish their drinks and leave. Graziolli and Dillon both testified that appellant and Graziolli got into a verbal altercation at this point. Once appellant refused to give up her drink, Graziolli became irritated and decided to wait for Addleman outside.

{¶ 5} After they had finished their drinks, appellant and Dillon left the bar. According to Graziolli's testimony, he and appellant then engaged in another verbal altercation. Graziolli testified that, as he was attempting to walk away from appellant, he was hit in the back of the head with appellant's high-heeled shoe. According to Graziolli, he then punched appellant. In defense of appellant, Dillon jumped on Graziolli's back and wrapped his arms around Graziolli's neck. At some point, Chidsey, Marcoff, and Linnean emerged from the bar. According to Graziolli, the four repeatedly punched and kicked him.[2]

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[2] This testimony directly conflicts with the testimony of Dillon. Dillon testified that after he and appellant left the bar, Graziolli overheard appellant making comments about Graziolli's behavior inside the bar. Dillon testified that Graziolli and appellant engaged in another verbal altercation, and Graziolli acted as if he were going to hit appellant. Dillon testified that, at this point, he was attempting to protect appellant, and he and Graziolli had a fistfight. According to Dillon, the other members of the group were only trying to get Graziolli off of Dillon and were not actually engaged in any sort of physical altercation with Graziolli.

{¶ 6} Addleman testified that, shortly after appellant's group had left the bar, she saw "hands moving" through a window in the bar. Addleman walked outside to investigate further and found all five members of appellant's group hitting and kicking Graziolli. Addleman then told the group that she was going to call 911 and ran inside to grab the phone. Addleman took the phone back outside and proceeded to call 911. Addleman testified that, while she was attempting to call 911, Chidsey put her hands around Addleman's throat and threatened her. According to Addleman, once the group realized that she was contacting the authorities, they all fled.

{¶ 7} Appellant, Chidsey, Marcoff, Dillon, and Linnean were indicted in a five-count indictment. The only counts that related directly to appellant were Count One, felonious assault in violation of R.C. 2903.11(A)(1); Count Two, felonious assault with a deadly weapon, namely a high-heeled shoe, in violation of R.C. 2903.11(A)(2); and Count Five, aggravated riot in violation of R.C. 2917.02(A)(1) and/or (A)(2), and/or (A)(3). Appellant pled not guilty, and the matter proceeded to a jury trial that began on November 10, 2008.

{¶ 8} The trial court granted appellant's Crim.R. 29 motion with regard to the charge of felonious assault with a deadly weapon, finding that the shoe did not meet the definition of a deadly weapon. The jury was, however, given instructions on the lesser-included offenses of assault and aggravated assault. Appellant was eventually found guilty of aggravated assault and aggravated

riot. Appellant was sentenced to 30 days in the county jail and three years of community control sanctions. This appeal followed.

{¶ 9} Appellant presents six assignments of error for our review.

{¶ 10} "I. "The trial court erred in enforcing a blanket policy that the defendant could not present evidence of a co-defendant's acquittal of the same charges."

{¶ 11} II. "The appellant's convictions for aggravated assault and aggravated riot are against the manifest weight of the evidence."

{¶ 12} III. "Appellant's conviction for aggravated riot is not supported by sufficient evidence where the government only presented evidence of the appellant's participation and the participation of three others."

{¶ 13} IV. "The conviction of aggravated riot is void in the instant case as the appellant may stand convicted by a non-unanimous jury verdict."

{¶ 14} V. "The conviction of aggravated assault is void in the instant case as the appellant may have been convicted by a non-unanimous jury."

{¶ 15} VI. "The appellant's constitutional rights to a grand jury indictment and due process of law were violated where the indictment failed to alleged [sic] the predicate felony offense and predicate offense of violence in count five."

Law and Analysis

{¶ 16} Appellant's arguments will be addressed out of order for ease of discussion.

Grand Jury Indictment

{¶ 17} In her sixth assignment of error, appellant argues that she was denied her constitutional right to a grand jury indictment when the indictment failed to specify the predicate felony offense or predicate offense of violence underlying her charge of aggravated riot. A similar issue was considered in *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162. In *Buehner*, the Ohio Supreme Court stated: "[W]e have previously rejected the argument that an indictment is defective for the state's failure to identify the elements of the underlying offense of the charged crime. *State v. Murphy* (1992), 65 Ohio St.3d 554, 583, 605 N.E.2d 884. This court has held that when the indictment sufficiently tracks the wording of the statute of the charged offense, the omission of an underlying offense in the indictment can be remedied by identifying the underlying offense in the bill of particulars. *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶30. Moreover, we expressly held that 'there is no requirement that the indictment demonstrate the basis for the grand jury's findings. The bill of particulars serves this function.' Id." Id. at ¶10.

{¶ 18} While it is notable that neither the indictment nor the bill of particulars specified the predicate felony or the predicate offense of violence required for an aggravated riot conviction, this constitutes harmless error. Any error will be deemed harmless if it did not affect the accused's substantial rights. Otherwise stated, the accused has a constitutional guarantee to a trial free from prejudicial error, not necessarily one free of all error. Before constitutional error can be considered harmless, we must be able to "declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California* (1967), 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.

{¶ 19} Appellant cannot logically argue that any perceived error in the indictment's omission of the predicate felony or predicate offense of violence were prejudicial error when she was also charged with two counts of felonious assault. These two charges put appellant on notice with regard to what underlying felony or underlying offense of violence she would be defending against, and any error was harmless. Accordingly, appellant's sixth assignment of error is overruled.

Refusal to Admit Evidence of Co-Defendant's Acquittal

{¶ 20} In her first assignment of error, appellant argues that the trial court committed reversible error in granting the state's motion in limine prohibiting discussion of Dillon's acquittal. In pretrial discussions, the state argued that Dillon's acquittal was not relevant in appellant's separate trial relying on the fact that this different jury could find appellant guilty regardless of Dillon's acquittal.

The state also argued that any relevance this evidence would have was outweighed by the danger of prejudice to the state. In response, the defense argued that fundamental fairness requires deference be given to criminal defendants rather than to the state.

{¶ 21} In ruling on this motion, the trial court noted that it did not see what relevance Dillon's acquittal would have in the trial of his co-defendants and stated: "I'll be willing to look at case law presented by the defense, but I am going to grant the motion in limine at this point.

{¶ 22} "There will be no reference during the jury selection and until case law is brought to me by the defense supporting their argument that they should be allowed to elicit the jury finding."

{¶ 23} After opening arguments but before any witnesses were called, the trial court made the following statements to counsel: "I have granted the motion in limine by the State that no evidence will be elicited as to the outcome of the trial of Jason Dillon, all right? Is that understood by everyone? * * * If it occurs, there will be severe sanctions for the person that does it. That is going to be kept out of this trial."

{¶ 24} This assignment of error involves the trial court's decision to limit or exclude evidence. The standard for this is well defined in Ohio. "The admission or exclusion of evidence rests within the sound discretion of the trial court." *State v. Jacks* (1989), 63 Ohio App.3d 200, 207, 578 N.E.2d 512. Therefore, "[a]n appellate court which reviews the trial court's admission or exclusion of

evidence must limit its review to whether the lower court abused its discretion." *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107, 543 N.E.2d 1233. To constitute an abuse of discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. "'The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations.'" *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d 264, quoting *Spalding v. Spalding* (1959), 355 Mich. 382, 384-385, 94 N.W.2d 810, 811-812. In order to have an abuse of that choice, the result must be "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias." Id.

{¶ 25} The trial court in this case used its discretion to determine that evidence of Dillon's acquittal in a previous trial was not relevant to appellant's case. We agree. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401.

{¶ 26} Appellant argues, for the first time in this appeal, that Dillon's acquittal is relevant because a conviction for aggravated riot requires the participation of the defendant and four other individuals. Since appellant did not make this argument at the lower level, we must analyze it using a plain error

standard of review. To constitute plain error, the error must be obvious on the record, palpable, and fundamental, so that it should have been apparent to the trial court without objection. See *State v. Tichon* (1995), 102 Ohio App. 3d 758, 767, 658 N.E.2d 16. Moreover, plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court's allegedly improper actions. *State v. Waddell* (1996), 75 Ohio St.3d 163, 166, 661 N.E.2d 1043. Notice of plain error is to be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Phillips*, 74 Ohio St.3d 72, 83, 1995-Ohio-171, 656 N.E.2d 643.

{¶ 27} A co-defendant's acquittal cannot be used as evidence of an accused's innocence. See *State v. Tutt* (Apr. 12, 1986), Warren App. No. CA85-09-056 ("[a] codefendant's conviction can no more be used as evidence against an accused as a codefendant's acquittal could be used by the accused as evidence of his innocence"). In addition, although a conviction for aggravated riot requires the presence of the defendant and four other individuals, Dillon's acquittal has no bearing on whether the jury could find appellant guilty. In fact, Dillon testified at trial to his version of the events as they occurred on August 17, 2007. The jury heard this evidence and weighed it against the testimony of Graziolli and Addleman before finding appellant guilty of aggravated riot.

{¶ 28} In other words, Dillon's acquittal does not have the tendency to make a fact of consequence any more or less probable than it would be without the

evidence. The jury heard Dillon's side of the story and obviously disregarded it in finding appellant and the remaining co-defendants guilty of aggravated riot. We cannot find, based on the record and applicable case law, that the trial court abused its discretion in determining that evidence of Dillon's acquittal was inadmissible. No plain error occurred, and thus we overrule appellant's first assignment of error.

Unanimity of Appellant's Aggravated Assault Conviction

{¶ 29} In her fifth assignment of error, appellant argues that she was denied the right to a unanimous jury verdict because the trial court instructed the jury as to both subsections of Ohio's aggravated assault statute. Appellant's failure to object to this issue at trial waived all but plain error as defined above.

{¶ 30} In order for a criminal defendant to be convicted, the jury must return a unanimous guilty verdict. Crim.R. 31(A). The issue in this matter is whether this right was impermissibly interfered with when the jury was instructed as to both subsections of Ohio's aggravated assault statute. The critical inquiry then is whether this case involves "alternative means" or "multiple acts." *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶48.

{¶ 31} Alternative means denotes an offense that can be committed in multiple ways. Id. at ¶49. In such cases, the jury is required to unanimously decide the defendant is guilty, but is not required to unanimously agree on the means by which the crime was committed "so long as substantial evidence supports each alternative means." Id. "In reviewing an alternative means case,

the court must determine whether a rational trier of fact could have found each means of committing the crime proved by beyond a reasonable doubt." Id.

{¶ 32} In contrast, multiple acts cases are those where several acts are alleged, and any of those acts could constitute the crime charged. Id. at ¶50. In those cases, the jury must unanimously agree on which act constituted the crime. Id. In order to ensure a unanimous verdict in these cases, either the state must elect the act it will rely upon for the conviction, or the trial court must instruct the jury that it must agree that the same act was proven beyond a reasonable doubt. Id., quoting *State v. Jones* (2001), 96 Hawaii 161, 170, 29 P.3d 351.

{¶ 33} In clarifying the difference between alternative means and multiple acts cases, the Court discussed *State v. Johnson* (1989), 46 Ohio St.3d 96, 545 N.E.2d 636. "In *Johnson*, we held that if a single count of an indictment can be divided into two or more "'distinct conceptual groupings,'" the jury must be instructed specifically that it must unanimously find that the defendant committed acts within one conceptual grouping in order to reach a guilty verdict." *Gardner* at ¶52.

{¶ 34} We cannot find that the two subsections of the aggravated assault statute contain "distinct conceptual groupings." R.C. 2903.12(A)(1) states that no individual, while acting under the influence of sudden passion or rage, shall knowingly cause serious physical harm to another individual. R.C. 2903.12(A)(2) is conceptually similar, but requires the individual to cause or attempt to cause only physical harm, rather than serious physical harm, and also requires the use

of a deadly weapon or dangerous ordnance. Since these subsections are conceptually similar, we cannot find that the jury was required to specify which subsection appellant had violated. This does not end our analysis.

{¶ 35} After determining that this is an alternative means case, we must still determine whether there was substantial evidence to support a conviction under each subsection. Notably, the trial court had dismissed Count 2 of the indictment, which charged appellant with felonious assault while using a deadly weapon. It comes as no surprise then that no definition of deadly weapon or dangerous ordnance was provided in the jury's instructions.

{¶ 36} Deadly weapon is defined as "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon." R.C. 2923.11(A). While it is arguable that a high-heeled shoe, if adapted and used as a weapon, may constitute a deadly weapon, the jury could not find beyond a reasonable doubt that appellant possessed a deadly weapon when it had no way of knowing the legal definition of such. *City of Cleveland v. Barnes* (1984), 17 Ohio App.3d 30, 32, 477 N.E.2d 1237 ("The failure of the trial court to provide the statutory definition of a deadly weapon and to submit the nature of the alleged weapon as a factual question to the jury constitutes prejudicial error. We find that the court effectively foreclosed any consideration of this issue by the triers of fact").

{¶ 37} Because this was an alternative means case, the jury was only required to unanimously agree that appellant's actions constituted aggravated

assault. "In reviewing an alternative means case, the court must determine whether a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt." *Gardner* at ¶49. We cannot find that a rational trier of fact could have found appellant guilty under R.C. 2903.12(A)(2) when the jury was never provided with the definition of a deadly weapon, which is a necessary element for a conviction under that subsection. Such action on behalf of the trial court is plain error. Based on this analysis, appellant was not afforded her right to a unanimous jury verdict, and her fifth assignment of error is sustained.

{¶ 38} Our disposition of appellant's fifth assignment of error renders her remaining arguments moot as they relate to her aggravated assault conviction. See App.R. 12(A)(1)(c). Accordingly, the remaining assignments of error will be addressed only as they relate to appellant's aggravated riot conviction.

Unanimity of Appellant's Aggravated Riot Conviction

{¶ 39} In her fourth assignment of error, appellant argues that her aggravated riot conviction is void because she may have been convicted by a non-unanimous jury. Again, appellant failed to object to this issue at trial waiving all but plain error as defined above. In addition, this issue must be addressed using the same standard applied when we addressed appellant's fifth assignment of error.

{¶ 40} A similar issue was addressed in *State v. Skatzes*, supra. The defendant in *Skatzes* was challenging numerous issues with regard to jury

instructions, one of which was the trial court's failure to instruct the jury that it must reach a unanimous decision on which section of the aggravated riot statute was violated. Id. at ¶51. The Court first analyzed the defendant's arguments as they related to his kidnapping charge, finding that kidnapping involved alternative means and thus failure to require the jury's unanimous decision on which subsection was violated did not constitute plain error. Id. at ¶53-55. Although the Court in *Skatzes* did not conduct an independent analysis with regard to the defendant's aggravated riot conviction, the Court did say that "[f]or the same reason, plain error is absent in the trial court's failure to require unanimity from the jury on either of the two definitions of aggravated riot on which the jury was instructed." Id. at ¶56.

{¶ 41} In this case, appellant and her co-defendants were indicted under all three subsections of the aggravated riot statute in an and/or fashion. We recognize that subsection (A)(3) of the statute requires one of the participants to use or possess a deadly weapon or dangerous ordnance. R.C. 2917.02(A)(3). As indicated in our analysis of appellant's fifth assignment of error, the jury was never provided a definition of a deadly weapon, which on first glance, would appear to be problematic. A review of the transcript, however, reveals that the jury was never actually instructed with regard to subsection (A)(3) of the aggravated riot statute and thus no error occurred.

{¶ 42} When instructing the jury as to the aggravated riot charge, the court said:

{¶ 43} "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 with the purpose to commit or facilitate the commission of an offense of violence, to wit, felonious assault."

{¶ 44} In clarifying this jury charge, the court later informed the jury that it could also convict the defendants of aggravated riot if they found that the group engaged in disorderly conduct with the purpose to commit assault rather than felonious assault. Although the court had told the jury that the defendants were charged pursuant to all three subsections of the aggravated riot statute, any mention of a deadly weapon was noticeably missing from the jury's charge. As such, it is obvious that the jury did not convict appellant or her co-defendants pursuant to R.C. 2917.02(A)(3) and no error occurred with regard to the omission of the deadly weapon definition.

{¶ 45} As stated above, this is an alternative means issue. See *Skatzes* at ¶53-55. Accordingly, the jury was only required to unanimously agree that appellant was guilty; they were not required to delineate under which subsection appellant was being convicted. *Gardner* at ¶49-50. This is appropriate so long as sufficient evidence existed to convict appellant under either R.C. 2917.02(A)(1) or (A)(2). *Gardner* at ¶49. In order to determine whether such

evidence was present, we must analyze subsections (A)(1) and (A)(2) of Ohio's aggravated riot statute.

{¶ 46} Section 2917.02(A) of the Revised Code provides that "[n]o person shall participate with four or more others in a course of disorderly conduct in violation of section 2917.11 of the Revised Code:

{¶ 47} "(1) With purpose to commit or facilitate the commission of a felony;

{¶ 48} "(2) With purpose to commit or facilitate the commission of any offense of violence[.]"

{¶ 49} At trial, the jury considered the testimony of both Graziolli and Addleman. Both parties testified that appellant, Chidsey, Dillon, Markoff, and Linnean acted together in hitting and kicking Graziolli, causing extensive injuries. While claiming that appellant, Chidsey, Markoff, and Linnean were only attempting to assist him, Dillon testified that all individuals were also involved. Based on this evidence, the jury could easily find that appellant and four other individuals participated in a course of disorderly conduct to commit an offense of violence or a felony. As such, sufficient evidence existed for appellant's conviction under either R.C. 2917.02(A)(1) or (A)(2) and the trial court did not commit plain error in failing to have the jury specify under which subsection appellant was being convicted. Appellant's fourth assignment of error is overruled.

Manifest Weight of the Evidence

{¶ 50} In her second assignment of error, appellant argues that her aggravated riot conviction was against the manifest weight of the evidence. Article IV, Section 3(B)(3) of the Ohio Constitution authorizes appellate courts to assess the weight of the evidence independently of the factfinder. Thus, when a claim is assigned concerning the manifest weight of the evidence, an appellate court "has the authority and duty to weigh the evidence and to determine whether the findings of * * * the trier of the facts were so against the weight of the evidence as to require a reversal and a remanding of the case for retrial." *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, 345, 82 N.E.2d 709.

> The standard employed when reviewing a claim based upon the weight of the evidence is not the same standard to be used when considering a claim based upon the sufficiency of the evidence. The United States Supreme Court recognized this distinction in *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652, where the court held that unlike a reversal based upon the insufficiency of the evidence, an appellate court's disagreement with the jurors' weighing of the evidence does not require special deference accorded verdicts of acquittal, i.e., invocation of the double jeopardy clause as a bar to relitigation. Id. at 43.

{¶ 51} The court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated: "There being sufficient evidence to support the conviction as a matter of law, we next consider the claim that the judgment was against the manifest weight of the evidence. Here, the test is much broader. The court, 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 jury clearly lost

its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Martin* at 175. Moreover, it is important to note that the weight of the evidence and the credibility of the witnesses are issues primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. 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. *Martin*, supra.

{¶ 52} Appellant relies heavily on the fact that there were discrepancies in Graziolli's trial testimony and the statements he had previously provided to police. She specifically relies on the fact that Graziolli testified that he did not use drugs when his hospital records from the night in question indicated otherwise. Appellant also relies on the fact that Graziolli did not deny his drug usage in Dillon's trial and had given conflicting stories with regard to whether or not he struck appellant in the face. Finally, appellant points to discrepancies in Addleman's testimony with regard to whether or not she was afraid of appellant and Addleman's ability to recall exactly who was involved in the fight when she was purportedly running into the bar to call 911.

{¶ 53} Discrepancies often arise throughout the course of a trial and are not always sufficient to warrant a reversal of the defendant's conviction. In this case, Graziolli and Addleman unequivocally testified that appellant,

Chidsey, Dillon, Markoff, and Linnean all took part in beating Graziolli. This evidence, if believed, was sufficient to find appellant guilty of aggravated riot. Although there are certain discrepancies in Graziolli and Addleman's testimony, these discrepancies are trivial and inconsequential to appellant's conviction. After weighing the evidence, all inferences, and any discrepancies, we cannot find that a manifest miscarriage of justice occurred in this case. Accordingly, appellant's conviction for aggravated riot was not against the manifest weight of the evidence and her second assignment of error is overruled.

Sufficiency of the Evidence

{¶ 54} In her third assignment of error, appellant argues that her aggravated riot conviction was based on insufficient evidence. Appellant specifically argues that because the testimony showed that she and Dillon left the bar without the remainder of the group, the group could not have possessed the collective purpose of committing a felony or an offense of violence.

{¶ 55} The Ohio Supreme Court has recognized that "[i]n determining whether the evidence is legally sufficient to support the jury verdict as a matter of law, '[t]he 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.'"

State v. Robinson, 124 Ohio St.3d 76, 2009-Ohio-5937, 919 N.E.2d 190, ¶34, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. The Court, explaining further, stated: "In *Jenks*, we emphasized that '[w]here reasonable minds can reach different conclusions upon conflicting evidence, determination as to what occurred is a question for the trier of fact. It is not the function of an appellate court to substitute its judgment for that of the factfinder. Rather, upon appellate review, the evidence must be viewed in the light most favorable to the prosecution.'" Id., quoting *Jenks* at 279.

{¶ 56} Finally, we note that a judgment will not be reversed upon insufficient or conflicting evidence if it is supported by competent, credible evidence that goes to all the essential elements of the case. *Cohen v. Lamko* (1984), 10 Ohio St.3d 167, 462 N.E.2d 407.

{¶ 57} In order to address appellant's sufficiency argument, we must break down the aggravated riot statute and analyze it accordingly. The first portion of the statute requires that appellant and four or more other individuals engage in a course of disorderly conduct. R.C. 2917.02(A). Disorderly conduct was defined for the jury as "recklessly causing inconvenience, annoyance or alarm by another by engaging in fighting persons and/or creating a certain condition which presented a risk of physical

harm to persons by an act which served no lawful and reasonable purpose of the defendant."

{¶ 58} Based on the testimony of Graziolli and Addleman, as discussed above, ample evidence existed for the jury to find that appellant, Dillon, Markoff, Chidsey, and Linnean recklessly caused inconvenience to Graziolli by fighting and that they also presented a risk of physical harm to Graziolli by hitting and kicking him. Although the group may not have left the bar with the intention of fighting Graziolli, such an element is not a requirement for appellant to violate the first prong of Ohio's aggravated riot statute.

{¶ 59} In order to violate R.C. 2917.02(A)(1) or (A)(2), an individual must engage in the behavior prohibited above with the purpose to commit or facilitate the commission of a felony or offense of violence. "A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." R.C. 2901.22(A).

{¶ 60} The fact that appellant and Dillon left the bar before the remainder of the group is not dispositive. Regardless of when the purpose was formed, there was sufficient evidence to find that appellant, Dillon, and the remaining co-defendants repeatedly hit and kicked Graziolli. Both

Graziolli and Addleman testified that they were positive that all members of appellant's group engaged in this activity.

{¶ 61} Appellant also argues that, at most, the trial testimony only showed that appellant and three other individuals engaged in the event. While appellant's argument is unclear, she appears to be arguing that, because Dillon was acquitted, the state did not provide sufficient evidence that appellant and four others engaged in this event as required by R.C. 2917.02. Although this is a novel argument, it must fail.

{¶ 62} In order for Dillon's acquittal to have a dispositive affect on the outcome of appellant's trial, it must be given collateral estoppel or res judicata effect. This is impossible, however, because the case in which Dillon was acquitted did not involve the same parties as the instant matter. *State ex rel. Paneto v. Matos*, Franklin App. No. 08AP-926, 2009-Ohio-4845, ¶30 ("Res judicata operates to preclude the relitigation of a point of law or fact that was issued in a former action between the same parties and which was passed upon by a court of competent jurisdiction."); *State v. Adams*, Franklin App. No. 09AP-141, 2010-Ohio-171, ¶25 ("The doctrine of issue preclusion, a component of res judicata, 'provides that an issue of fact that was fairly, fully, and necessarily litigated and determined in a prior action may not be drawn into question in a subsequent action between the same parties or their privies.' *Swihart v. Ohio Adult Parole Auth.*, 10th Dist. No. 08AP-222,

2008-Ohio-6420, ¶18, citing *State ex rel. Stacy v. Batavia Local Sch. Dist. Bd. of Edn.*, 97 Ohio St.3d 269, 779 N.E.2d 216, 2002-Ohio-6322, ¶16; *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 671 N.E.2d 233; *State v. Dick*, 137 Ohio App.3d 260, 738 N.E.2d 456, 2000-Ohio-1685").

{¶ 63} In this case, Dillon was acquitted in a trial separate from each of his co-defendants; therefore, his acquittal has no bearing on whether the jury in this matter could find that appellant and four other individuals engaged in the actions prohibited by Ohio's aggravated riot statute. In fact, the jury heard Dillon's version of events, exclusive of the fact that he was acquitted, and chose to disregard it in finding appellant and the remaining co-defendants guilty.

{¶ 64} This decision was solely within the purview of the jury. The jury heard and weighed all of the evidence, finding it sufficient to convict appellant of aggravated riot. After thoroughly reviewing the record and pertinent case law, we cannot find that the jury lost its way such as to warrant a reversal of appellant's aggravated riot conviction; therefore, appellant's third assignment of error is overruled.

Conclusion

{¶ 65} Because appellant was indicted for felonious assault along with her aggravated riot conviction, appellant cannot logically claim she was denied the right to a grand jury indictment. In addition, the trial court did

not abuse its discretion in refusing to admit evidence of the acquittal of Jason Dillon, appellant's co-defendant, when the jury could lawfully find that Dillon participated in the event regardless of his acquittal.

{¶ 66} Appellant was denied her right to a unanimous jury verdict with regard to her aggravated assault conviction. The jury could not possibly have found appellant guilty of aggravated assault pursuant to R.C. 2903.12(A)(2) when the jury was not provided with the definition of a deadly weapon, as required for a conviction under that subsection. Accordingly, appellant must receive a new trial with regard to the charge of aggravated assault.

{¶ 67} Appellant was not denied her right to a unanimous jury verdict with regard to her aggravated riot conviction. The jury was only instructed as to the first two subsections of Ohio's aggravated assault statute, and sufficient evidence was presented at trial to find appellant guilty under each.

{¶ 68} Considering the evidence presented at trial, which included the testimony of Graziolli, Addleman, and Dillon, the jury did not lose its way and appellant's aggravated riot conviction was not based on insufficient evidence. Likewise, considering all discrepancies in the testimony, we cannot find that a manifest miscarriage of justice in this case so as to warrant reversing appellant's conviction as being against the manifest weight of the evidence.

{¶ 69} Based on the foregoing, appellant's aggravated riot conviction is sound and remains intact. Appellant's aggravated assault conviction, however, must be vacated and a new trial had, so as to ensure appellant receives the unanimous jury verdict to which she is entitled.

{¶ 70} This cause is affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said 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.

FRANK D. CELEBREZZE, JR., JUDGE

ANN DYKE, P.J., and
LARRY A. JONES, J., CONCUR