[Cite as *State v. Chen*, 2010-Ohio-2289.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-P-0057**
- vs -	:	
JEREMY J. CHEN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 0622.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Stephen C. Lawson, 250 South Chestnut Street, #17, Ravenna, OH 44266 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Jeremy J. Chen, appeals from the August 13, 2009 judgment entry of the Portage County Court of Common Pleas, in which he was sentenced for felonious assault.

{¶2} On October 29, 2008, appellant was indicted by the Portage County Grand Jury on two counts: count one, aggravated burglary, a felony of the first degree, in violation of R.C. 2911.11(A)(1) and (B); and count two, felonious assault, a felony of

the second degree, in violation of R.C. 2903.11(A)(1). Appellant pleaded not guilty at his arraignment on November 3, 2008.

{¶3} On March 6, 2009, appellant filed a motion to bifurcate, which was granted by the trial court on March 18, 2009.

{¶4} On June 23, 2009, appellant filed a waiver of trial by jury, and a bench trial commenced that day on the felonious assault charge.

{¶5} At the bench trial, Ryan Gaughan ("the victim"), testified for appellee, the state of Ohio, that he was a student at Kent State University and had spent the evening with friends at the Brew House, a local bar, on September 12, 2008. Because one of his friends, Kirsten Gerry ("Kirsten"), was very intoxicated, the victim walked her home. According to the victim, Kirsten called appellant, her ex-boyfriend, and informed him that the victim was walking her home. The victim stated that Kirsten then handed him the phone and appellant asked him if he was having sex with her, to which he replied in the negative. The victim said that appellant asked where the two were and the victim gave their location. The victim testified that appellant told him that he was coming to "kick [his] ass."

{¶6} As the victim and Kirsten crossed Summit Street, the victim heard a person call out, "hey," and saw two people running towards him, one being appellant. The victim got punched and blacked out. The next thing he remembered was waking up covered in blood and Kirsten repeatedly apologizing to him. Police responded to the scene and the victim was transported by EMS to the hospital for treatment.

{¶7} Officer James D. Fuller ("Officer Fuller"), with the Kent City Police Department, testified for the state that he responded to the scene and saw the victim on

the sidewalk, “bloody and injured[.]” Officer Fuller called for an ambulance as well as a backup unit to photograph the victim’s injuries, and proceeded with the investigation. The victim told Officer Fuller that he had been unconscious and had just come to after being jumped.

{¶8} Dr. Kathryn Bulgrin (“Dr. Bulgrin”), emergency room physician at Robinson Memorial Hospital, testified for the state that she treated the victim for significant facial trauma on the night at issue. Her initial concerns were for underlying head injury as well as facial and spinal fractures. After conducting a physical examination of the victim, he received CT scans of his head, facial bones, and cervical spine. Although no spinal injury was found, there were numerous facial injuries, including: swelling and suspicion for a medical orbital fracture; multiple fractures on his facial bones; opacification of the right maxillary sinus and the ethmoid air cells; blowout fracture of the orbital floor; non-displaced fracture involving the posterior lateral wall of the maxillary sinus; marked soft tissue swelling overlying the right eye; and medial wall fracture of the orbit.

{¶9} Dr. Bulgrin indicated that the victim’s multiple facial fractures and swelling were consistent with blunt force trauma to the face, which would be painful. Her greatest concern was the fact that the victim suffered a closed head injury with loss of consciousness, meaning that the brain was jarred, which can cause problems with chronic headaches and long-term issues. Dr. Bulgrin stated that the victim suffered a serious, significant injury.

{¶10} David P. Hawk (“Hawk”), an eyewitness to the incident, testified for the state that he was sitting outside on a friend’s porch and heard a girl scream, “stop, you’re hurting him.” Because it sounded like a fight was in progress, he and a buddy

went to see what was happening. Hawk saw two shadowy figures that appeared to be one guy holding on to someone as the other guy was kicking and punching the person being held. As the two shadowy figures ran away, Hawk got closer and saw the victim lying on the ground. He stated that the victim was barely conscious, beat up pretty badly, and was bleeding badly from his face.

{¶11} According to Kirsten, who testified for the state, she witnessed the victim being hit in the face by appellant. Specifically, she said that appellant hit the victim, the victim fell to the sidewalk, and appellant continued to punch him a couple more times. Kirsten indicated that the victim did not fight back, since she was pretty sure that he went unconscious after the first or second hit.

{¶12} The victim further testified that he was unable to see out of his right eye because it was swollen shut, black and blue, sore to the touch, and painful. The victim indicated that the next few days following the incident, he was unable to sleep, his eye oozed discharge and he suffered pain. He continued to cough up blood and had to seek medical treatment for two months following the incident. At the time of the trial, the victim reported a permanent blind spot in his right eye.

{¶13} On cross-examination, the victim testified that the hospital records correctly stated his level 3 pain level on a scale of 1 to 10. However, he said that the pain scale rating of a 3 was after he received pain medication in the emergency room.

{¶14} Robin Heinrich ("Heinrich") testified for appellant that he accompanied appellant in meeting up with Kirsten and the victim on the night at issue. Heinrich stated that they encountered Kirsten and the victim holding hands, appellant yelled, "hey," then hit the victim. In order to protect Kirsten, Heinrich held her back as appellant hit the

victim a second time. Heinrich could then not see the rest of the incident. When Heinrich and appellant ran away, he said that the victim was lying on the ground holding his hand in front of his face, but did not seem unconscious.

{¶15} Appellant testified that after the incident, the victim seemed to be coherent, but kind of "dazed." He indicated, on cross-examination, that the victim never hit him back, as appellant did not let him throw any punches.

{¶16} Following the bench trial, the trial court found appellant guilty of felonious assault, and referred him to the Adult Probation Department for a presentence investigation. On July 27, 2009, the trial court entered a nolle prosequi on count one, aggravated burglary.

{¶17} Pursuant to its August 13, 2009 judgment entry, the trial court sentenced appellant to 90 days in jail with a work release; placed him on the general control of the Adult Probation Department in the Intensive Supervision Program for 2 years and an additional 3 years under the General Division, or until notification that he satisfied all conditions of community control; ordered him to undergo a mental health evaluation and follow all recommendations; notified him that if he violated the terms of community control, he will serve a prison term of 3 years; and indicated that if he were ever found with a firearm, he could be prosecuted by federal authorities and subject to imprisonment. It is from that judgment that appellant filed a timely appeal, raising the following assignment of error for our review:

{¶18} "THE VERDICT OF THE TRIAL COURT IN FINDING THE APPELLANT COMMITTED FELONIOUS ASSAULT AND NOT SIMPLE ASSAULT IS AGAINST THE MANIFEST WEIGHT AND THE SUFFICIENCY OF THE EVIDENCE."

{¶19} In his sole assignment of error, appellant argues that his conviction was not supported by the sufficiency or the manifest weight of the evidence.

{¶20} As this court stated in *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at 13-14:

{¶21} "'Sufficiency' challenges whether the prosecution has presented evidence on each element of the offense to allow the matter to go to the [trier of fact], while 'manifest weight' contests the believability of the evidence presented.

{¶22} "'"(***)The test (for sufficiency of the evidence) is whether after viewing the probative evidence and the inference[s] drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence*. ***"'

{¶23} "In other words, the standard to be applied on a question concerning sufficiency is: when viewing the evidence 'in a light most favorable to the prosecution,' *** '(a) reviewing court (should) not reverse a *** verdict where there is substantial evidence upon which the [trier of fact] could reasonably conclude that all of the elements of an offense have been proven beyond a reasonable doubt.' ***" (Emphasis sic.) (Citations omitted.)

{¶24} "*** [A] reviewing court must look to the evidence presented *** to assess whether the state offered evidence on each statutory element of the offense, so that a rational trier of fact may infer that the offense was committed beyond a reasonable doubt." *State v. March* (July 16, 1999), 11th Dist. No. 98-L-065, 1999 Ohio App. LEXIS

3333, at 8. The evidence is to be viewed in a light most favorable to the prosecution when conducting this inquiry. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Further, the verdict will not be disturbed on appeal unless the reviewing court finds that reasonable minds could not have arrived at the conclusion reached by the trier of fact. *State v. Dennis* (1997), 79 Ohio St.3d 421, 430.

{¶25} In *Schlee*, supra, at 14-15, we stated:

{¶26} "*** '[M]anifest weight' requires a review of the weight of the evidence presented, not whether the state has offered sufficient evidence on each element of the offense.

{¶27} "'In determining whether the verdict was against the manifest weight of the evidence, "(***) 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 [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (***)"' (Citations omitted.) ***" (Emphasis sic.)

{¶28} A judgment of a trial court should be reversed as being against the manifest weight of the evidence "'only in the exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶29} In the case at bar, with respect to the sufficiency of the evidence, R.C. 2903.11(A)(1), the felonious assault statute, provides: "[n]o person shall knowingly *** [c]ause serious physical harm to another ***[.]"

{¶30} The culpable mental state of "knowingly" provides: "[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." R.C. 2901.22(B).

{¶31} R.C. 2901.01(A)(5)(a)-(e) provides:

{¶32} "(5) 'Serious physical harm to persons' means any of the following:

{¶33} "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶34} "(b) Any physical harm that carries a substantial risk of death;

{¶35} "(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶36} "(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶37} "(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."

{¶38} Here, the state presented ample evidence from which the trier of fact could have found appellant knowingly caused serious physical harm to the victim. Again, according to the victim, appellant told him over the telephone that he was coming to "kick [his] ass." The victim saw appellant punch him before blacking out and becoming unconscious. Kirsten, an eyewitness, testified that appellant hit the victim in the face several times, even after he fell to the ground. She indicated that the victim did

not fight back because he went unconscious very quickly. Hawk, another eyewitness, saw the incident in progress, which resulted in the victim lying on the ground, badly beaten up and bleeding from his face. Officer Fuller responded to the scene and saw the victim on the sidewalk, "bloody and injured[.]" Photographs of the victim's injuries were taken at the scene and submitted to the trial court.

{¶39} Dr. Bulgrin testified that she treated the victim for significant facial trauma and indicated he suffered numerous facial injuries. She stated that the victim's multiple facial fractures and swelling were consistent with blunt force trauma to the face, which would be painful. Dr. Bulgrin's greatest concern was the fact that the victim suffered a closed head injury with loss of consciousness, meaning that the brain was jarred, which can cause problems with chronic headaches and long-term issues. Dr. Bulgrin stated that the victim suffered a serious, significant injury. The victim continued to cough up blood and had to seek medical treatment for months following the incident. At the time of the trial, the victim reported a permanent blind spot in his right eye.

{¶40} Pursuant to *Schlee*, supra, considering the evidence in a light most favorable to the prosecution, the trier of fact could have found appellant guilty of felonious assault beyond a reasonable doubt.

{¶41} With regard to the manifest weight of the evidence, we note that the trier of fact is in the best position to assess the credibility of witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Here, the trier of fact chose to believe the state's witnesses. Based on the evidence presented, we cannot say that the trier of fact clearly lost its way in finding appellant guilty of felonious assault.

{¶42} Pursuant to *Schlee* and *Thompkins*, supra, the trier of fact did not clearly lose its way in convicting appellant of felonious assault.

{¶43} For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgment of the Portage County Court of Common Pleas is affirmed. The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDELL, J.,

TIMOTHY P. CANNON, J.,

concur.