

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2011-P-0064
WILLIAM D. CHAPPELL,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2011 CR 0001.

Judgment: Affirmed.

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

Michael A. Partlow, 112 South Water Street, Suite C, Kent, OH 44240 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} William D. Chappell appeals from a judgment of the Portage County Court of Common Pleas finding him guilty of one count of simple assault and one count of felonious assault. Mr. Chappell argues that the manifest weight of the evidence does not support the trial court’s conviction, and he also challenges the state’s presentation of testimony concerning his post-arrest silence. Because the trial court’s finding is not against the manifest weight of the evidence, and because the state presented no

testimony related to Mr. Chappell's post-arrest silence, only his failure to cooperate and provide a statement prior to his arrest, we affirm the decision of the Portage County Court of Common Pleas.

Substantive Facts and Procedural History

{¶2} On October 31, 2010, Mr. Chappell and some friends were celebrating Halloween dressed as professional wrestlers. They migrated from Mr. Chappell's apartment to the parking lot of his apartment complex to watch two friends engage in a quickly escalating wrestling match. Just up the hill, on the neighboring property, Robert Roe and his wife, Jessica, were celebrating around a bonfire on his parents' property with some friends and family.

{¶3} As the wrestling match in the parking lot below escalated, and Mr. Chappell and a few friends worked to separate the two fighters, individuals on the Roe property began to heckle Mr. Chappell and his friends. Angered by the comments coming from the Roe property, Mr. Chappell charged up the hill, leading some of his friends onto the Roe's property to confront the hecklers. Mr. Chappell engaged verbally with Mr. Roe and his wife, who demanded they get off the property. Mr. Chappell then punched Mr. Roe and the two scuffled for a minute, punches flying, before they were pulled apart.

{¶4} Disengaged from Mr. Roe, Mr. Chappell then struck Robert Wolfe with his fist, fracturing Mr. Wolfe's orbital bone and nose in two places. At some point during the melee, Jessica Roe was pushed partway down the hill.

{¶5} The Portage County Grand Jury indicted Mr. Chappell on two counts of assault in violation R.C. 2903.12, a misdemeanor of the first degree, and one count of

felonious assault in violation of R.C. 2903.11, a felony of the second degree. The state alleged that Mr. Chappell punched Mr. Roe, shoved Jessica Roe, and punched Mr. Wolfe, causing him serious physical harm. Mr. Chappell entered a plea of not guilty and waived his right to a jury trial, opting for a bench trial.

{¶6} The trial court found Mr. Chappell not guilty of pushing Jessica Roe, but did find him guilty of assaulting Mr. Roe and feloniously assaulting Mr. Wolfe. After a presentence investigation was completed, the trial court sentenced Mr. Roe to community control sanctions with an eight-year stated prison term if he violated any conditions.

{¶7} Mr. Chappell filed a timely notice of appeal, and now brings the following assignments of error:

{¶8} “[1.] The appellant’s convictions for felonious assault and assault are against the manifest weight of the evidence.”

{¶9} “[2.] The trial court committed plain reversible error by permitting the appellee to elicit testimony regarding appellant’s alleged post-arrest silence.”

The Convictions are not Against the Manifest Weight of the Evidence

{¶10} In his first assignment of error, Mr. Chappell argues that his convictions for the assault of Mr. Roe and the felonious assault of Mr. Wolfe are against the manifest weight of the evidence because the state’s witnesses presented testimony that was completely inconsistent with one another, and inconsistent with their prior statements to police.

Standard of Review

{¶11} In determining whether a conviction is against the manifest weight of the evidence, “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 [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.” *State v. Higgins*, 11th Dist. No. 2005-L-215, 2006-Ohio-5372, ¶35, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). “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.” *State v. Fritts*, 11th Dist. No. 2003-L-026, 2004-Ohio-3690, ¶23.

{¶12} When examining witness credibility, “[t]he 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 that of the finder of fact.” *State v. Awan*, 22 Ohio St.3d 120, 123 (1986). A fact finder is free to believe all, some, or none of the testimony of each witness appearing before it. *State v. Thomas*, 11th Dist. No. 2004-L-176, 2005-Ohio-6570, ¶29.

{¶13} “When reviewing a judgment under a manifest-weight-of-the-evidence standard, a court has an obligation to presume that the findings of the trier of fact are correct. * * * This presumption arises because the trial judge had an opportunity to view the witnesses and observe their demeanor in weighing the credibility of the witnesses.” *State v. Reeves*, 11th Dist. No. 2006-T-0099, 2007-Ohio-4765, ¶14, citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 79-81 (1984).

The Trial Court’s Decision is Supported by the Manifest Weight of the Evidence

{¶14} A review of the trial transcript in this case reveals that the trial court's determination of guilt was supported by the manifest weight of the evidence. Giving due deference to the trial court's determination of witness credibility, we note that the trial judge specifically stated at the end of trial, just before rendering her verdict, that she did not find the defense witnesses credible, but did find the state's witnesses to be credible. "Again, it is clear to me that the witnesses for the Defendant had a script, they did not tell the entire truth and that the State's witnesses for the most part told the truth."

The State's Evidence

{¶15} A number of witnesses provided testimony which supported a conviction. The state presented testimony of Mr. Roe, Jessica Roe, and Mr. Wolfe, as well as from the arresting officer, an emergency room physician, and three eyewitnesses to the events of that evening.

{¶16} Mr. Roe testified that when the heckling started, he observed a man "taking off their shirt and charging into my backyard to get into my wife's face." He stated that he told this man to get off his property and was then struck in the face by the shirtless man. Mr. Roe testified further that he then tackled the shirtless man to the ground where he continued to be punched by the shirtless man. Mr. Roe stated that he and the shirtless man were eventually separated, and that is when he saw the same shirtless man strike Mr. Wolfe in the face. He did concede on the stand that the statement he provided to police that evening differed somewhat from his trial testimony, but defended it as less detailed, rather than contradictory. Mr. Roe identified the shirtless man as Mr. Chappell, both to the arresting officer on the night of the incident and in court.

{¶17} Jessica Roe also stated that the shirtless man threw punches at her husband upon being told to get off their property. She stated that she was already lying on the hill, having been pushed, when Mr. Wolfe was punched. In court, she identified Mr. Chappell as the shirtless man who aggressively engaged and then punched her husband. She also stated that Mr. Chappell pushed her down the hill.

{¶18} On the stand, Mr. Wolfe stated that he observed an individual run up the hill and tackle Mr. Roe, but that he was unable to identify the individual. He testified further that he was hit once from the left side and a bit behind, causing fractures to his nose and orbital bone. He did not know who hit him.

{¶19} The arresting officer, Martin Gilliland, testified that, on the night of the assault, Mr. Roe stated to him that he had been struck by the same individual who had struck Mr. Wolfe. Mr. Roe was clear it had been Mr. Chappell.

{¶20} Jennifer Stanley, a guest at the Roe's party and witness to the events, identified Mr. Chappell as one of the individuals who came up through the woods aggressively. She observed Mr. Chappell throwing punches, although she stated that she did not personally see Mr. Chappell strike Mr. Roe or Mr. Wolfe. Ms. Stanley also stated that she did not observe guests of the Roes throwing punches, only individuals who had charged up the hill from the parking lot.

{¶21} Jason Grubb, another guest of the Roes, stated that he observed Mr. Chappell fighting with Mr. Roe, although he did not personally observe the actual strike. Further, Mr. Grubb testified that he did not see who had struck Mr. Wolfe, but that he believed Mr. Wolfe had already been struck when Mr. Chappell and Mr. Roe began to fight.

{¶22} Amanda Grubb, Jason Grubb's wife, identified Mr. Chappell as the first person up the hill and stated that he began swinging as soon as he arrived. She observed Mr. Wolfe fall to the ground after having been punched, and then observed Mr. Chappell standing about a foot in front of Mr. Wolfe, bringing his right arm down with a clenched fist; she did not personally see Mr. Chappell's fist make contact with Mr. Wolfe's face, however. She stated that no one else was close by.

{¶23} Dr. Klich testified that Mr. Wolfe had suffered serious physical harm to the face, and indicated that further surgeries would be required to correct the damage.

The Defense's Evidence

{¶24} Mr. Chappell presented testimony from four of his friends and an investigator with the Portage County Prosecutor's Office. He also took the stand in his own defense. The investigator provided no substantive testimony.

{¶25} All four of Mr. Chappell's friends provided the same account of what had occurred that evening. They all stated that they had been heckled by people on the Roes' property, and that Mr. Chappell and a friend intended to walk up the hill to let their neighbors know it was "cool" and they were done fighting. They stated that Jessica Roe, in a profanity-laced statement, told them to get off the property, and that Mr. Chappell responded by telling her to get out of his face. They testified that Mr. Chappell was then tackled from the right by Mr. Roe and punched. As soon as Mr. Chappell regained his footing, Mr. Chappell was approached from the left by an individual with a clenched hand, and Mr. Chappell, in defense, struck this second man once and retreated down the hill.

{¶26} Mr. Chappell provided essentially the same testimony as his four friends. He claimed he did not approach the neighbors' property aggressively, and had no intention of hurting anyone, striking Mr. Wolfe purely in self defense.

{¶27} As the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact, we will not substitute our own judgment for that of the trial court. On the evidence presented, and taken in a light most favorable to the prosecution, we cannot conclude that the trier of fact lost its way in determining that Mr. Chappell committed the assaults on both Mr. Roe and Mr. Wolf. The trial court specifically found Mr. Chappell's witnesses not entirely credible, but tended to believe the state's witnesses. Mr. Roe specifically identified Mr. Chappell as the man who punched both him and Mr. Wolfe, and Mr. Wolfe sustained substantial injuries to the face, which will require additional surgeries to correct. Therefore, the evidence supports the trial court's finding of guilt as to one count of assault and one count of felonious assault. The first assignment of error is without merit.

Mr. Chappell's Post-Arrest Silence

{¶28} In his second assignment of error, Mr. Chappell argues that the trial court committed reversible plain error when it allowed the state to elicit testimony regarding Mr. Chappell's post-arrest silence. A review of the record, however, demonstrates that no testimony was offered regarding post-arrest silence. Rather, Officer Gilliland testified regarding Mr. Chappell's *pre*-arrest silence, only.

{¶29} There is no question that any comment by the state during trial on post-arrest, post-*Miranda* warnings silence is violative of the Fifth Amendment to the United States Constitution. See *State v. Smith*, 11th Dist. No. 2008-T-0023, 2008-Ohio-6998,

¶72, citing *State v. Treesh*, 11th Dist. No. 95-L-057, 1998 Ohio App. LEXIS 4886, *102-103 (Oct. 16, 1998), quoting *State v. Rowe*, 92 Ohio App.3d 652, 670 (10th Dist.1993). “The use for impeachment purposes of a defendant’s post-arrest silence, after receiving *Miranda* warnings, violates the Fifth Amendment right against self-incrimination as applied to the states through the Due Process Clause of the Fourteenth Amendment.” *State v. Brown*, 9th Dist. Nos. 90CA004836 and 90CA004838, 1991 Ohio App. LEXIS 2010, *8 (May 1, 1991).

{¶30} In reviewing the trial transcript, we find no testimony regarding any post-arrest, post-*Miranda* warnings silence by Mr. Chappell. Instead, we find a poorly formed question by the prosecutor (“Now, the Defendant, did he make any statements to you prior to or before or after he was arrested about what happened?”), and testimony from Officer Gilliland related only to his *pre-arrest* investigation of what had occurred and Mr. Chappell’s unwillingness to cooperate or answer any questions. We also note an absence of objection by Mr. Chappell’s attorney to this line of questioning, and, further, that Mr. Chappell’s attorney engaged in a similar line of questioning during cross-examination of Officer Gilliland. Thus, we analyze under a plain error standard. Crim.R. 52(B).

{¶31} Officer Gilliland indicated that, during the course of his investigation, he had Mr. Chappell stand by the cruiser as he began to sort out the scene, and then asked Mr. Chappell if he had anything to say on the matter. He asked Mr. Chappell a few times whether he had been involved in a physical altercation and whether he wanted to make a statement. Mr. Chappell declined to do so. Officer Gilliland testified that “[h]e wasn’t really going to talk about what was going on. He wouldn’t answer any

specific questions concerning what was going on or why he was even up into the property up behind the Roe's residence * * *."

{¶32} Upon gathering statements from the Roes, who expressed a desire to press charges, Officer Gilliland then arrested Mr. Chappell, and he was transported to the police station. Officer Gilliland had no further contact with Mr. Chappell after placing him in the transport vehicle.

{¶33} No testimony was elicited regarding Mr. Chappell's post-arrest silence and any assertion of his Fifth Amendment rights. There was only testimony regarding Mr. Chappell's failure to cooperate with Officer Gilliland's on-scene investigation. Caution is warranted in the use of such testimony because the Supreme Court of Ohio has held that an individual's pre-arrest silence may not be used as substantive evidence of a defendant's guilt at trial. *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147. It may, however, be used to impeach a defendant. *Leach* at ¶33. *See also Jenkins v. Anderson*, 447 U.S. 231 (1980). It appears to be the case here that evidence of Mr. Chappell's refusal to cooperate or to provide a statement to Officer Gilliland regarding the night's events was elicited neither as substantive evidence nor for impeachment; rather, it was simply mentioned within the context of Officer Gilliland describing the course of investigation. The state never relied on this evidence in closing arguments to support its allegations of guilt.

{¶34} Further, and most importantly for purposes of a plain error analysis, this case was tried to the bench. We fail to see how this line of questioning and the answers elicited from Officer Gilliland could possibly have prejudiced Mr. Chappell to such a degree that the outcome would have been different but for the presentation of this

testimony. “[I]n a trial to the bench, the judge is presumed to consider only relevant and competent evidence.” *State v. Alghaben*, 8th Dist. No. 86044, 2005-Ohio-6490, ¶41.

Therefore, the assignment of error fails under plain error.

{¶35} The second assignment of error is with merit, and the judgment of the Portage County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.