[Cite as *In re R.M.*, 2010-Ohio-3376.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

R.M.

ALLEGED DELINQUENT CHILD

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 2010CA0004

O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Juvenile Division, Case No. A20090687

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: July 15, 2010

APPEARANCES:

For Appellant

ERIN J. MCENANEY
21 West Church Street
Suite 201
Newark, OH 43055

For Appellee

RACHEL OKTAVEC
20 South Second Street
4th Floor
Newark, OH 43055

Farmer, P.J.

{¶1} On October 12, 2009, a complaint was filed alleging appellant, R.M., to be a delinquent child for committing the offense of felonious assault in violation of R.C. 2903.11. Said allegation arose from a fight between several individuals at a park.

{¶2} A hearing was held on November 16, 2009. The trial court found appellant to be delinquent. By judgment entry filed December 21, 2009, the trial court committed appellant to the custody of the Ohio Department of Youth Services for an indefinite term of one year and a maximum period not to exceed age 21.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "THE ADUDICATION (SIC) OF THE DEFENDANT-APPELLANT AS A DELINQUENT CHILD WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED BELOW."

I

{¶5} Appellant claims his adjudication was against the manifest weight of the evidence as his actions were in "self-defense" and as a result, he should have been acquitted. We disagree.

{¶6} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "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." *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶7} Appellant was adjudicated delinquent on a felonious assault charge in violation of R.C. 2903.11(A)(1) which states, "No person shall knowingly***[c]ause serious physical harm to another or to another's unborn."

{¶8} Appellant asserts that on the basic uncontested facts, the affirmative defense of self-defense was established.

{¶9} "To establish self-defense, the following elements must be shown: (1) the slayer was not at fault in creating the situation giving rise to the affray, (2) the slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from the danger was in the use of force, and (3) the slayer must not have violated any duty to retreat or avoid the danger. *State v. Melchior* (1978), 56 Ohio St.2d 15, 10 O.O.3d 8, 381 N.E.2d 195. The 'not at fault' requirement also means that the defendant must not have been the first aggressor in the incident. *State v. Robbins* (1979), 58 Ohio St.2d 74, 12 O.O.3d 84, 388 N.E.2d 755." *State v. Turner,* 171 Ohio App.3d 82, 2007-Ohio-1346, ¶23.

{¶10} R.C. 2901.05(A) provides:

{¶11} "Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused."

{¶12} In *State v. Melchior* (1978), 56 Ohio St.2d 15, 20, the Supreme Court of Ohio explained the following:

{¶13} "In construing the phrase 'burden of going forward with the evidence,' this court stated in *State v. Robinson* (1976), 47 Ohio St.2d 103, at pages 111-112, 351 N.E.2d 88, at page 91, that in order for the defendant to successfully raise an affirmative defense, '***evidence of a nature and quality sufficient to raise the issue must be introduced, from whatever source the evidence may come.' Evidence is sufficient where a reasonable doubt of guilt has arisen based upon a claim of self-defense. See *State v. Millett* (Me.1971), 273 A.2d 504, 510. If the evidence generates only a mere speculation or possible doubt, such evidence is insufficient to raise the affirmative defense, and submission of the issue to the jury will be unwarranted. See *People v. Harris* (1970), 7 Cal.App.3d 922, 87 Cal.Rptr. 46."

{¶14} As appellant correctly states, the basic facts are not in dispute. Six individuals converged at a park to engage in mutual combat. Appellant was with his cousin, Jeremy Allen, and the other four individuals were together, Chad Kimble, Shaquille Yates, Monique Evans, and another juvenile, A.B. The disagreement was between Mr. Allen and Mr. Kimble. T. at 19, 53. The women were along for the ride, while appellant and Mr. Yates were, for lack of a better term, "seconds." Mr. Kimble, Mr. Yates, and the two women did not have any weapons. T. at 53.

{¶15} It is from this point that the facts are not in agreement. Mr. Kimble testified he and Mr. Yates and the two women arrived at the park and were seated at a picnic table when appellant and Mr. Allen came running from the woods yelling and giving "war cries." T. at 23-25, 53, 55. Mr. Kimble stated Mr. Allen had a knife and a

hammer in his hand and appellant had a knife in his hand. T. at 26, 57. There was a face-off and Mr. Yates picked up a brick and Mr. Allen threw the hammer at A.B. T. at 29. Mr. Kimble picked up a metal pipe from the ground and threw it at Mr. Allen. T. at 29-30, 59. Mr. Yates put the brick down and Mr. Kimble and Mr. Yates started chasing Mr. Allen into the woods, but they stopped because it was dark and they were unfamiliar with the woods. T. at 30-31, 60. Upon returning to the area where the women were waiting, Mr. Kimble and appellant randomly "bumped into each other" and appellant stabbed Mr. Kimble in the side. T. at 35-36, 60. The wound was approximately "14 inches from the side to the middle of my back, and about three inches, four inches wide." T. at 39. Mr. Kimble punched appellant and "started whooping his ass so to say." T. at 36.

{¶16} Ms. Evans testified the four arrived at the park and were sitting at the picnic table when Mr. Allen and appellant ran out of the woods yelling and carrying knives. T. at 69-70. Ms. Evans testified Mr. Allen threw something as he ran from the woods and then threw a knife at A.B. T. at 73-74. Mr. Yates picked up a brick or a rock and threw it in the direction of Mr. Allen and appellant. T. at 74. Mr. Kimble and Mr. Yates then chased Mr. Allen and appellant into the woods. T. at 75. They all came running out and appellant had a knife in his hand. Id. She then observed Mr. Kimble covered in blood punching appellant. T. at 76.

{¶17} Appellant testified they arrived at the park and Mr. Allen ran from the woods yelling and threw a hammer at a building. T. at 98. Appellant admitted that he had a knife on him, but it was in his pocket. Id. Mr. Kimble or Mr. Yates picked up the hammer and threw it back at Mr. Allen, but it missed. T. at 99. Mr. Allen threw his knife

at Mr. Yates who was holding a brick and ran into the woods. Id. Appellant testified he was standing at the edge of the woods just observing. T. at 99-100. After Mr. Allen ran into the woods, appellant ran away too. T. at 100. As appellant was running, he got hit in the back with a brick or a rock-like object. T. at 101, 105. Appellant pulled out his knife and observed Mr. Kimble "swinging right at me." Id. Appellant swung out once with the knife, as he was in fear for his life because he did not know how to fight. T. at 102. Appellant admitted to using a knife against an unarmed man, and he had a chance to leave the park. T. at 111, 115. Appellant corroborated the fact that Mr. Allen had a hammer and a knife. T. at 117. Appellant stated the last time he saw the brick was in Mr. Kimble's hand when they ran back into the woods, and the brick was never thrown at Mr. Allen. T. at 110.

{¶18} Mr. Allen testified he and appellant walked out of the woods and a verbal argument ensued. T. at 127-128. He threw a hammer in the direction of Mr. Kimble to distract him and ran into the woods. T. at 130. Mr. Kimble and Mr. Yates started chasing appellant and he observed Mr. Kimble hitting and kicking appellant. T. at 132-133. On cross-examination, Mr. Allen admitted to coming out of the woods yelling all "kinds of stuff" and carrying a hammer. T. at 135. Mr. Allen never saw appellant with a knife. T. at 138.

{¶19} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881. The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger,* 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶20} At the conclusion of the trial, the trial court found appellant to be a delinquent child for committing the offense of felonious assault, stating the following:

{¶21} "The Court does not believe the testimony of R.M. as it relates to his attempt to establish the affirmative defense of self-defense.

{¶22} "The Court also does not believe the testimony of Jeremy Allen." T. at 152.

{¶23} In reviewing this evidence, two facts stand out: 1) Mr. Kimble and Mr. Yates were unarmed and appellant and Mr. Allen were armed, and 2) appellant turned and engaged in a fight with Mr. Kimble while holding the knife. In taking these two facts into consideration, along with the contested issues resolved most favorably to the state, we find the trial court's decision is supported by the evidence.

{¶24} The sole assignment of error is denied.

{¶25} The judgment of the Court of Common Pleas of Licking County, Ohio, Juvenile Division is hereby affirmed.

By Farmer, P.J.

Wise, J. and

Delaney, J. concur.

_s/ Sheila G. Farmer___________________

_s/ John W. Wise______________________

_s/ Patricia A. Delaney_________________

JUDGES

SGF/sg 624

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	
	:	
R.M.	:	
	:	
ALLEGED DELINQUENT CHILD	:	JUDGMENT ENTRY
	:	
	:	
	:	
	:	CASE NO. 2010CA0004

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio, Juvenile Division is affirmed. Costs to appellant.

_s/ Sheila G. Farmer___________________

_s/ John W. Wise______________________

_s/ Patricia A. Delaney_________________

JUDGES