

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

KENNETH J. PORTER

and

KEVIN PORTER

Appellants

C.A. Nos. 25203
 25204

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 09 07 2025

DECISION AND JOURNAL ENTRY

Dated: December 30, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Someone beat up Howard Mack. Kenneth Porter, Kevin Porter, and Johnny Boykin were present at the time of the beating. Mr. Mack’s injuries were so severe that hospital staff put him into a medically induced coma for nearly four weeks. The defendants, Kenneth and Kevin Porter, waived their right to a jury trial. Following a bench trial, the judge found them both guilty of felonious assault, sentencing Kenneth Porter to eight years in prison and Kevin Porter to four years in prison. This Court affirms because Kenneth Porter’s and Kevin Porter’s convictions are not against the manifest weight of the evidence.

BACKGROUND

{¶2} A large number of people, including Howard Mack, attended a birthday party for Traci Sheppard. Mr. Mack was dating Ms. Sheppard's sister, Paulette Wells. Kenneth and Kevin Porter are Ms. Wells's and Ms. Sheppard's brothers. After the initial gathering ended, many of the partiers moved to a club. Over the course of the evening, Mr. Mack and Ms. Wells became increasingly agitated with each other until Ms. Wells walked out of the club, and Mr. Mack followed her.

{¶3} Mr. Mack testified that he tried to continue talking with Ms. Wells, but members of her family followed them down the street and kept interfering. Mr. Mack testified that Mr. Boykin, one of the partygoers, grabbed Mr. Mack's shirt collar and hit him. According to Mr. Mack, he then punched Mr. Boykin.

{¶4} Mr. Boykin testified that he left the club around the same time as Ms. Wells. He said that, when he left the club, he saw a commotion on the street. He walked over and recognized Ms. Wells, who was crying. According to him, while he was standing there, Mr. Mack pulled up in his truck, got out, and sucker-punched him.

{¶5} All of the witnesses who testified agreed that, after hitting Mr. Boykin, Mr. Mack got in his truck and drove away. Mr. Mack testified that he drove to a club owned by his uncle but, being unable to find him, started to drive home. Turning onto his street, he saw three men standing on the sidewalk: Kenneth Porter, Kevin Porter, and Mr. Boykin. He testified that he thought he would stop and find out why Mr. Boykin had hit him. He said that he believed Kevin Porter would act as a mediator during the discussion.

{¶6} Kenneth and Kevin Porter testified that they had decided to check on Mr. Boykin to see how he was after having been punched by Mr. Mack. They found him at his girlfriend's

house. Mr. Boykin, Kevin Porter, and Kenneth Porter all agreed that, while they were standing outside the house, Mr. Mack pulled up in his truck and got out.

{¶7} All four men, Mr. Mack, Mr. Boykin, Kenneth Porter, and Kevin Porter, testified that Mr. Mack stopped of his own accord in front of Mr. Boykin's girlfriend's house. According to Mr. Mack's testimony, when he got out of his truck and started walking towards the other men, Kenneth Porter told him, "You are not going to be knocking nobody out." Mr. Mack testified that he realized that the situation was too volatile for a discussion with Mr. Boykin and turned back towards his truck. According to him, he approached the driver's seat and was struck in the back of the head with an object he identified as a gun based upon the way it felt when it struck him. He said he fell to his knees between his truck door and the driver's seat. He testified that Kenneth Porter struck him repeatedly with the object while he curled up in a fetal position attempting to protect his face. Mr. Mack testified that he was dragged into the middle of the street and beaten by multiple people.

{¶8} Kenneth and Kevin Porter told a different story. According to them, Mr. Mack pulled up, got out of his truck, and tore off his shirt. They said Kevin Porter told him to go home and he returned to his truck, but sat on the driver's seat with the door ajar and his leg dangling out. They testified that he repeatedly swore at them while sitting there. Kenneth Porter testified that he approached the side of Mr. Mack's truck. He said he was concerned that Mr. Mack might pull a gun from the vehicle and that Mr. Mack was giving him "bad vibes." Both Kevin and Kenneth Porter testified that, as Kenneth Porter approached the truck, Mr. Mack tried to punch him. They said that Kenneth Porter dodged the punch, grabbed hold of Mr. Mack's leg, and dragged Mr. Mack, who was four inches taller and more than fifty pounds heavier, from his truck.

{¶9} Kenneth Porter testified that Mr. Mack grabbed his jacket, which made him afraid for his safety. He said he punched Mr. Mack repeatedly in an attempt to force him to let go of his jacket. He further testified that he was wearing diamond rings, which he used to strike Mr. Mack. Kevin Porter testified that he watched the fight but did not become involved. He said that his brother struck Mr. Mack many times.

{¶10} Latecha Franklin, a woman who lived down the street from where the beating occurred, contradicted the Porters' stories. She testified that her brother woke her, saying that there was a man being beaten in the street. She looked out her window and saw four or five men beating up a shirtless man in the middle of the street. She called the police and described the scene to them. Officer Robert Patrick, one of the two officers to first arrive at the scene, testified that he found Mr. Mack "basically covered in blood from head to toe" and disoriented. When Officer Patrick questioned Mr. Mack about what had happened, he named Mr. Boykin and Kenneth Porter.

{¶11} As a result of the beating, Mr. Mack suffered nasal bone fractures, a septal fracture, and fractures of his left maxillary sinus, hard palate, and right mandibular. He also had a closed head injury, dental trauma, and multiple facial lacerations. He suffered both respiratory failure and renal failure. He was kept heavily sedated for almost four weeks. When he awoke from his coma, he was diagnosed with traumatic brain injury.

KENNETH PORTER

{¶12} Kenneth Porter's sole assignment of error is that his conviction for felonious assault is against the manifest weight of the evidence. When a defendant argues that his conviction is against the manifest weight of the evidence, this Court "must review 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 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. Otten*, 33 Ohio App. 3d 339, 340 (1986).

{¶13} Kenneth Porter was convicted of felonious assault. Section 2903.11(A)(1) of the Ohio Revised Code provides that “[n]o person shall knowingly . . . [c]ause serious physical harm to another” “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.” R.C. 2901.22(B).

{¶14} There is no dispute that Mr. Mack suffered serious physical harm. Kenneth Porter testified that he repeatedly punched Mr. Mack. By his own testimony, Kenneth Porter admitted to the elements of assault. He argued at trial, however, that he acted in self-defense.

{¶15} In order to prevail on a claim of self-defense, a defendant must show “(1) that he was not at fault in creating the situation which gave rise to the affray, (2) that he had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of deadly force, and (3) that he did not violate any duty to retreat or avoid the danger.” *State v. Vint*, 9th Dist. No. 23510, 2008-Ohio-1685, at ¶9 (quoting *State v. Caldwell*, 79 Ohio App. 3d 667, 679 (1992)). If non-deadly force is used, the defendant must only show that, in addition to not being at fault for creating the situation, “he had honest and reasonable grounds to believe that such conduct was necessary to defend himself against the imminent use of unlawful force; and . . . the force used was not likely to cause death or great bodily harm.” *State v. Hamrick*, 9th Dist. No. 09CA009628, 2010-Ohio-3796, at ¶13 (quoting *State v. Tanner*, 9th Dist. No. 3258-M, 2002-Ohio-2662, at ¶21). “If the defendant fails to prove any one of these elements by a preponderance of the evidence he has failed to

demonstrate that he acted in self-defense.” *State v. Williford*, 49 Ohio St. 3d 247, 249 (1990) (quoting *State v. Jackson*, 22 Ohio St. 3d 281, 284 (1986)) (emphasis removed).

{¶16} Regarding the first element, while Kenneth and Kevin Porter both testified that Mr. Mack threw a punch at Kenneth Porter, the trial court did not have to believe their testimony. No other witness supported the Porters’ version of events. Mr. Boykin testified that he did not see the beginning of the fight, and Mr. Mack testified that he never threw a punch and, in fact, was attacked from behind. Additionally, every account has Mr. Mack either seated in or returning to his truck with Kenneth Porter approaching him.

{¶17} Further, the trial court noted that the Porters admitted on cross-examination that they had submitted notices of alibi and had planned to testify that they were not at the scene of the beating. When Mr. Boykin agreed to testify for the prosecution, however, both men withdrew their notices of alibi. Kenneth Porter admitted that he had planned to claim he was not at the scene of the assault but reversed course when Mr. Boykin agreed to testify that he was. The trial court found that this called their general credibility into question.

{¶18} In judging whether a defendant has a bona fide belief that he is in danger and honest and reasonable grounds to believe his defensive conduct was necessary, the trier of fact relies upon the defendant’s testimony to determine his mindset. Concerns about Kenneth Porter’s credibility made it reasonable for the trial court to discount his testimony concerning his state of mind. When he testified that he approached Mr. Mack because he was afraid Mr. Mack would produce a gun, the trial court was not required to believe his testimony. Further, Kenneth Porter’s actions do not bolster his claim of fearing bodily harm. Instead of holding his ground or backing away, Kenneth Porter approached Mr. Mack.

{¶19} Additionally, Kenneth Porter has not claimed he was unable to retreat. When Mr. Mack returned to his truck, Kenneth Porter followed him. According to Kenneth Porter, when Mr. Mack threw a punch, he dodged the punch. Instead of making an effort to disengage, Kenneth Porter grabbed Mr. Mack by the leg and dragged him from the truck. While Kenneth Porter possibly could no longer have retreated once Mr. Mack grabbed hold of his jacket, the manifest weight of the evidence is not such that the trial court, even if it believed Kenneth Porter's testimony, had to conclude that he fulfilled his duty to retreat from the confrontation.

{¶20} If Kenneth Porter had shown that “the force [he] used was not likely to cause death or great bodily harm,” he would not have had to prove that he did not violate a duty to retreat. *State v. Hamrick*, 9th Dist. No. 09CA009628, 2010-Ohio-3796, at ¶13 (quoting *State v. Tanner*, 9th Dist. No. 3258-M, 2002-Ohio-2662, at ¶21). The injuries sustained by Mr. Mack, however, weigh heavily against a finding of non-deadly force. The manifest weight of the evidence is not such that the trial court would have had to find that the force used by Kenneth Porter was unlikely to cause great bodily harm.

{¶21} While Kenneth Porter's own testimony leaves enough doubt, the trial court also heard testimony from Mr. Mack and Ms. Franklin. Mr. Mack testified that he was attacked from behind. Ms. Franklin testified that she witnessed multiple men beating a single man, who was not fighting back. Mr. Mack's testimony conflicts with Kenneth Porter's claims of not being the aggressor and having an honest and reasonable fear of bodily harm. Ms. Franklin's testimony conflicts with a claim of the force being for protection or that it was unlikely to cause great bodily harm. The trial court was entitled to believe Mr. Mack and Ms. Franklin and disbelieve the Porters. Kenneth Porter's conviction for felonious assault is not against the manifest weight of the evidence, and his assignment of error is overruled.

KEVIN PORTER

{¶22} Kevin Porter’s sole assignment of error is that his conviction for felonious assault is against the manifest weight of the evidence. He was convicted of felonious assault under Section 2903.11(A) of the Ohio Revised Code. Under Section 2903.11(A)(1), “[n]o person shall knowingly . . . [c]ause serious physical harm to another” “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.” R.C. Section 2901.22(B).

{¶23} Kevin Porter testified that he was not involved in the assault in any way. The trial court, however, found the testimony of Ms. Franklin, that she saw multiple men beating a single man in the street, persuasive. Combined with other testimony, the trial court concluded that one of the men Ms. Franklin saw beating Mr. Mack in the street was Kevin Porter. This Court cannot say that the trial court lost its way in reaching that conclusion.

{¶24} Kevin Porter has argued that the trial court’s finding that he would not have let his brother fight the larger Mr. Mack alone, risking Mr. Mack seriously injuring him, proves his actions were justified as being in defense of another. At trial, however, he did not claim he acted in self-defense or defense of another. Rather, he denied any involvement in the fight. The Ohio Supreme Court has “characterized the defense of self-defense as a ‘justification for an admitted conduct.’” *State v. Martin*, 21 Ohio St. 3d 91, 94 (1986) (quoting *State v. Poole*, 33 Ohio St. 2d 18, 19 (1973)). “[T]his defense admits the facts claimed by the prosecution and then relies on independent facts or circumstances which the defendant claims exempt him from liability.” *Martin*, 21 Ohio St. 3d at 94 (citing *Poole*, 33 Ohio St. 2d at 19). A claim of self-defense is contradictory to denial of involvement. The same is true for a claim of defense of another.

Kevin Porter cannot claim to have acted in defense of another when, at trial, he denied acting at all.

{¶25} Kevin Porter never claimed in the trial court that he acted to defend his brother, nor did he attempt to prove any part of a defense of family claim. The trial court's finding that Kevin Porter took part in the assault was not a finding that his actions were justified. This Court cannot say that the trial court lost its way in finding Kevin Porter guilty of felonious assault. Kevin Porter's assignment of error is overruled.

CONCLUSION

{¶26} Kenneth Porter's and Kevin Porter's convictions for felonious assault are not against the manifest weight of the evidence. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellants.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

CHARLES R. QUINN, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN R. DIMARTINO, assistant prosecuting attorney, for appellee.