

[Cite as *Sate v. Flanigan*, 2004-Ohio-3096.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 20181

vs. : T.C. CASE NO. 03CRB1451

JOSEPH FLANIGAN: (Criminal Appeal from
Municipal Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 10th day of June, 2004.

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Vandalia City Prosecutor, 245 James E. Bohanan Memorial
Drive, Vandalia, Ohio 45377

Attorney for Plaintiff-Appellee

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Attorney for Defendant-Appellant

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GRADY, J.

{¶1} Defendant, Joseph Flanigan, was charged by
complaint in Vandalia Municipal Court with assault in
violation of R.C. 2903.13(A). Following a trial to the
court, Defendant was found guilty as charged. The trial
court sentenced Defendant to thirty days in jail plus a two
hundred fifty dollar fine, but suspended those sentences and

placed Defendant on one year of supervised probation.

{¶2} Defendant timely appealed to this court from his conviction and sentence. Defendant's appellate counsel filed an Anders's brief, *Anders v. California* (1967), 386 U.S. 738, stating that he could not find any meritorious issues for appellate review. We notified Defendant of his appellate counsel's representations and afforded him ample time to file a pro se brief. None has been received. This matter is now ready for decision.

{¶3} In his Anders brief appellate counsel has identified one potential issue for appeal:

{¶4} "THE TRIAL COURT'S GUILTY FINDING IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶5} A weight of the evidence argument challenges the believability of the evidence, and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15562, unreported. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶6} "[t]he 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 lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *State v.*

Thompkins, 78 Ohio St.3d 380, 1997-Ohio-52.

{¶7} The evidence introduced at trial portrays conflicting versions of the fight that gave rise to this assault charge. On or about June 1, 2003, Defendant was in the driveway of his home located at 4960 Hamlin Drive, Harrison Township, working on his truck, when he heard his car alarm go off. Defendant looked up and saw Jared Phillips walking away from his car. Defendant directed some harsh words toward Phillips about staying away from his car. Approximately one-half hour later Phillips returned to Defendant's home with his friend, Joseph Hammond.

{¶8} According to Hammond's version of the events, an angry and yelling Defendant came out of his house and got up in Hammond's face, threatening both him and Phillips because Phillips had been messing with his car. Defendant knocked Hammond's hat off his head. When Hammond turned to pick up his hat, Defendant began punching Hammond in the face. Defendant hit Hammond a total of fifteen or twenty times, fracturing Hammond's left jaw.

{¶9} According to Defendant's version of the events, when Phillips returned with Hammond, Defendant and his brother were still outside in the driveway working on Defendant's truck. Hammond came up and got in Defendant's face, demanding that Defendant apologize to Phillips. When Defendant refused to apologize, Hammond threw a punch at him. Defendant ducked that blow and then hit Hammond two or three times in self-defense.

{¶10} The trial court found Defendant guilty of "knowingly causing physical harm to another." R.C. 2903.13(A). The trial court correctly noted that this case was a credibility contest between the victim, Hammond, and Defendant. Each man accused the other of being the aggressor and starting the fight. Defendant complains on appeal because the trial court, sitting as the trier of facts, chose to believe Hammond's testimony rather than his.

{¶11} In *State v. Lawson* (August 22, 1997), Montgomery App. No. 16288, we observed:

{¶12} "[b]ecause the factfinder . . . has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *Id.*, at p. 4.

{¶13} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict. *State v. Bradley* (October 24, 1997), Champaign App. No. 97-CA-03.

{¶14} The trial court in this case did not lose its way

simply because it chose to believe Hammond's version of the events rather than Defendant's, which it was entitled to do. In reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the jury lost its way, or that a manifest miscarriage of justice has occurred. Defendant's conviction is not against the manifest weight of the evidence.

{¶15} In addition to the potential error raised by appellate counsel, we have conducted an independent review of the trial court's proceedings and have found no error having arguable merit. Accordingly, Defendant's appeal is without merit and the judgment of the trial court will be affirmed.

BROGAN, J., and YOUNG, J., concur.

Copies mailed to:

Vandalia City Prosecutor
Arvin S. Miller, Esq.
Acting Judge Cynthia Heck