

[Cite as *State v. McKelvy*, 2015-Ohio-2061.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 26269
	:	
v.	:	Trial Court Case No. 2013-CR-3204
	:	
DAVID F. MCKELVY	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

.....

OPINION

Rendered on the 29th day of May, 2015.

.....

MATHIAS H. HECK, JR., by TIFFANY C. ALLEN, Atty. Reg. No. 0089369, Montgomery County Prosecutor’s Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45402
Attorney for Plaintiff-Appellee

JOHN S. PINARD, Atty. Reg. No. 78595, 120 West Second Street, Suite 603, Dayton, Ohio 45402
Attorney for Defendant-Appellant

.....

FAIN, J.

{¶ 1} Defendant-appellant David McKelvy appeals from his conviction for

Felonious Assault, a second-degree felony, in violation of R.C. 2903.11(A)(1). McKelvy contends that his conviction is against the manifest weight of the evidence, and that the evidence in the record is insufficient to prove his guilt beyond a reasonable doubt.

{¶ 2} We conclude that there is evidence in the record that if believed, would persuade the average mind of McKelvy's guilt, beyond reasonable doubt. We further conclude that McKelvy's conviction is not against the manifest weight of the evidence. Accordingly, the judgment of the trial court is Affirmed.

I. The Assault

{¶ 3} In early September 2013, Dustin Eads met a friend at Roosters in Huber Heights for food and drinks. After his friend left, Eads engaged in a conversation with two other men at the bar, during which Eads agreed to go to a nearby restaurant, Cadillac Jacks, and purchase drugs for them. In the parking lot, Eads was assaulted after he told the two men that he had changed his mind about getting involved in a drug transaction. Eads was hit in the head with a Roosters beer glass and suffered cuts to his head and face that necessitated emergency care. Eads later identified McKelvy as his attacker, through a photo array. At the time of the incident, Eads did not know McKelvy's name, and did not have any direct conversation with him, although he had talked to the man who was with McKelvy, and was sitting close enough to see and recognize McKelvy's face. Eads admitted that he had consumed at least four beers and was intoxicated at the time of the conversation, the attack, and the emergency room treatment. However, Eads testified that he was cognizant of his surroundings and was able to accurately recall the events of the evening. The treating physician from the emergency room corroborated that Eads

was intoxicated, but testified that he was alert and oriented.

{¶ 4} The parties stipulated to a video of the interior of Roosters during the evening of the incident, which depicted Eads talking to two men at the bar. The video shows the two men leave about a minute and a half before Eads left; one of the two men was carrying a Roosters bar glass when he left Roosters. Tony Snowden, a friend of McKelvy, was called to view the video and agreed that the person identified as McKelvy resembled his friend, but Snowden was not at Roosters with McKelvy the night of the incident. Two police officers also testified that they watched the 23-minute video obtained from Roosters as part of their investigation, which led to the identification of McElvey as the offender because he was wearing a sleeveless Ohio State t-shirt and a ball cap. It was acknowledged that the color in the video was improper because it depicted many objects as green, when in fact they were red. However, McElvey was the only patron in the video wearing a sleeveless shirt. Later, McElvey admitted to the police detective that he had been at Cadillac Jack's in Huber Heights, wearing a red shirt and ball cap during the evening of the incident. There was no video of the assault or any eye witness, other than Eads, to the assault.

{¶ 5} The police detective explained that two photo arrays were prepared and shown to Eads. The photo array that included a photo of McElvey was developed after a still photo from the Roosters video was released to the media, asking the public for assistance in identifying the suspects. From an anonymous tip, the police were given McElvey's full name. A computer software program pulled five other photos to create an array of six photos, which was shown to Eads, who circled the photo of McElvey, identifying him as the person who assaulted him.

II. The Course of Proceedings

{¶ 6} McKelvy was indicted on one count of Felonious Assault. McKelvy moved to suppress the eye witness identification, which was overruled. Following the trial, the jury returned a verdict of guilty on the single charge of Felonious Assault. After a pre-sentence investigation, McKelvy was sentenced to serve three years in prison and ordered to pay restitution. McKelvy appeals from his conviction and sentence.

III. McKelvy's Conviction Is Supported by Sufficient Evidence and Is Not Against the Manifest Weight of the Evidence

{¶ 7} McKelvy raises two assignments of error as follows:

DEFENDANT'S CONVICTION IS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

THE JURY ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BECAUSE THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 8} McKelvy contends that the State did not present evidence sufficient to sustain his conviction. He further argues that the conviction is against the manifest weight of the evidence. Both claims are addressed to the evidence identifying him as Eads's assailant.

{¶ 9} We have set forth the tests for sufficiency- and weight-of-the-evidence review as follows:

A sufficiency-of-the-evidence argument challenges whether the

state has presented adequate evidence on each element of the offense to allow the case to go to the jury or to sustain the verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N .E.2d 541 (1997). The proper test to apply to the inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991): “An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.”

State v. Hammad, 2d Dist. Montgomery No. 26110, 2015-Ohio-622, ¶ 17, quoting *State v. Jones*, 2d Dist. Miami No. 14-CA-11, 2015-Ohio-196, ¶ 28. See also *State v. Henderson*, 2d Dist. Montgomery No. 26018, 2014-Ohio-4601, ¶ 22.

{¶ 10} “ [S]ufficiency’ is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.” *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). By contrast, when conducting a manifest-weight analysis, an appellate court “review[s] 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 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. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶71.

{¶ 11} When a defendant challenges the sufficiency of the evidence, he is arguing that the State presented inadequate evidence on at least one element of the offense to sustain the verdict as a matter of law. *State v. Hawn*, 138 Ohio App.3d 449, 471, 741 N.E.2d 594 (2d Dist. 2000). “An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Morefield*, 2d Dist. Montgomery No. 26155, 2015-Ohio-448, ¶ 18, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 12} McKelvy argues that the victim’s testimony was not credible, and that there was no credible eye-witness testimony to identify him as the offender. Even though Eads was intoxicated on the night of the incident, there is sufficient evidence for a reasonable jury to credit his testimony. The treating physician testified that Eads was alert and oriented on the night of the incident. There was also sufficient evidence for the jury to credit Eads’s identification of McElvey in the photo array, based on the credible testimony of the detective who explained how the photo array was created and utilized.

{¶ 13} We conclude that there is sufficient evidence upon which the jury could

reasonably rely in finding that McKelvy was the offender who assaulted Eads. There is evidence in the record, in the form of the State's witnesses, that if believed, would convince rational jurors of McElvey's guilt beyond a reasonable doubt. We further conclude that this is not the exceptional case where a jury lost its way in evaluating the evidence.

{¶ 14} The First and Second Assignments of Error are overruled.

IV. Conclusion

{¶ 15} Both of McKelvy's assignments of error having been overruled, the judgment of the trial court is Affirmed.

.....

FROELICH, P.J., and HALL, J., concur.

Copies mailed to:

Mathias H. Heck
Tiffany C. Allen
John S. Pinard
Hon. Mary K. Huffman