[Cite as *State v. Sloan*, 2013-Ohio-1148.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 12AP-372 (C.P.C. No. 11CR-4497)
v.	:	(REGULAR CALENDAR)
Kenneth Leroy Sloan,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 26, 2013

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

W. Joseph Edwards, for appellant.

APPEAL from the Franklin County Court of Common Pleas

McCORMAC, J.

{¶ 1} Defendant-appellant, Kenneth Leroy Sloan, appeals from the judgment of the Franklin County Court of Common Pleas in which the court found him guilty, pursuant to a jury verdict, of aggravated assault, a violation of R.C. 2903.12, a fourth-degree felony.

{¶ 2} Appellant appeals and asserts the following assignments of error:

> I. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE APPELLANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION.
>
> II. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR ACQUITTAL PURSUANT TO CRIMINAL RULE 29.

> III. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE APPELLANT WHEN THE CONVICTION AND [SIC] WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> IV. THE SENTENCE IMPOSED BY THE TRIAL COURT IS INCONSISTENT WITH THE PRINCIPLES SET FORTH UNDER THE OHIO REVISED CODE AND THUS IS CONTRARY TO LAW.

{¶ 3} Appellant was indicted for felonious assault committed on August 14, 2011 for an alleged violation of R.C. 2903.11 involving serious knife wounds to the chest of Charles Groce. The crime is a felony of the second degree.

{¶ 4} Plaintiff-appellee, State of Ohio, presented three witnesses for its proof of the offense. The first witness was Charles Groce, who identified defendant. The offense occurred at the residence of Mildred Childs who, with the full knowledge of appellant, engaged in prostitution at that premises. There was also heavy drug and alcohol usage by all the participants in the events that gave rise to the charge against appellant.

{¶ 5} Groce testified that he had come to the house of Childs for sex and for drugs and that appellant was there in a bed under covers. Groce said that Childs asked appellant to leave the bedroom, but he did not leave. When Groce tried to get appellant to go, he accidently fell on appellant in the bed; appellant had a knife and stabbed him in the side. The two men tussled over the knife. Childs then came into the room and Groce moved out to the front room. Groce said that Childs tried to tend to his wounds. As Childs was helping Groce, appellant came into the room from the kitchen and stabbed him in the chest several times. Another man who was there then took Groce to a neighbor's door where they called an ambulance. Groce was in the hospital for about two weeks where immediate surgery was performed. Groce said that he had no weapons. He was shown two knives, a small knife that was broken which was described by Groce as the first one and a second knife, which was a large butcher knife that appellant used to stab him in the chest. Groce admitted that he did choke appellant, but said that was after he had been stabbed and that he was trying to keep appellant from stabbing him again.

{¶ 6} The second witness for the state was Terrell Collins, a man who knew both appellant and Groce, although he knew Groce only by a nickname, "Tone." (Tr. 52.) Collins said that when the police showed up because of the stabbing of Groce, he was

questioned and charged with possession of drugs, which case is still pending. Collins said he was sitting in a chair when Groce and Childs came into the house. He heard some cussing in the living room and fighting for about 30 to 45 seconds. He testified that appellant got a knife and came back toward Groce, Groce punched appellant in the face and fell on top of him, and "I guess that is when Tone stabbed him. I mean Sloan stabbed Tone." (Tr. 54.) He said that there was fighting and punches first, and that the fight occurred in the living room. Collins identified from the police photos blood on the living room carpet, which was not there before the stabbing occurred.

{¶ 7} The third witness for the state was Detective Rosch, who works with the Columbus Police Assault Squad and has done so for nine years. He received a phone call from patrol officers stating that there was an offense to investigate where somebody was stabbed and taken to Riverside Hospital. The detectives went to Riverside Hospital because they were told the victim was in serious condition. Hospital personnel told them that Groce was in critical condition and already in surgery. Detective Rosch identified photographs taken by his partner showing significant blood in the living room, which indicated that Groce was injured pretty severely. There was a lot of blood on the shoes of Groce near the neighbor's door where Groce went for help. Detective Rosch investigated the bedroom where the initial stabbing was alleged to have taken place and found only a small amount of blood there. He found both knives, the large one of which had a pretty good amount of blood on the tip of the knife, and a small broken knife on which he saw no blood. The photographs taken by the detective team were introduced into evidence without objection.

{¶ 8} The state rested their case, and defense counsel moved pursuant to Crim.R. 29 for dismissal of the case. His stated basis was "I think the two witnesses that testified this morning gave conflicting accounts as to what happened here. We don't know if the jury could find beyond a reasonable doubt how this assault occurred. With that, Your Honor, I would ask the case be dismissed." (Tr. 87.) The trial court denied the motion.

{¶ 9} Appellant's second assignment of error is that the trial court erred in overruling appellant's motion for acquittal pursuant to Crim.R. 29. Crim.R. 29(A) requires the court to "order the entry of a judgment of acquittal * * * if the evidence is insufficient to sustain a conviction." The standard for ruling on such motion is set forth in

State v. Bridgeman, 55 Ohio St.2d 261 (1978): "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *Id*. at syllabus. The evidence is to be viewed in a light most favorable to the state which bears the burden of proof. *State v. Wolfe*, 51 Ohio App.3d 215 (9th Dist.1988). Viewing the evidence most favorably to the state, a rational trier of fact could have found the essential elements of the crime of aggravated assault to have been proven beyond a reasonable doubt. Aggravated assault is defined in R.C. 2903.12, as follows:

> No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly: (1) Cause serious physical harm to another * * *; (2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance * * *.

{¶ 10} There is no doubt by the testimony that appellant caused serious physical harm to the victim, Groce, and appellant can take no issue with the evidence regarding the provocation element, which is required in order to convert the offense to the lesser-included degree of aggravated assault from felonious assault. Instead, however, appellant argues that Groce's testimony conflicts with that of Collins, which creates a reasonable doubt. However, the fact that there are some minor differences in the location or which knife was used to commit the serious wounds to Groce's chest do not affect the sufficiency of the evidence and, at most, only are sufficient to support a reduction of felonious assault to aggravated assault. Appellant's second assignment of error is overruled.

{¶ 11} Appellant offered only his own testimony in response to the state's case. Appellant stated he had been living with Childs for about six months, was aware that she worked as a prostitute to make her living, and that he was sharing the bills and helping with the rent. Appellant said several other people also lived there. Childs had drug dealers staying there and selling drugs out of the house when other people would visit her. Appellant said he was dating Childs on the day of the stabbing. On that day, there were about five other people there smoking and using drugs, such as crack cocaine, and

drinking beer and other types of alcohol. Appellant said he was not doing drugs then, but he had used drugs in the past.

{¶ 12} Groce and Childs left to have sex. Upon their return, there were people in the house that were high. Childs asked for drugs, and they would not give her any. She got angry and wanted everybody to leave. In a tussle over who was to leave, appellant said Groce fell or jumped on top of him and started choking him. Appellant said he was very fearful and grabbed a small knife that was next to him. They tussled over the knife, and he was scared to death, and started poking Groce with the knife. Others came in and took Groce off him. He dressed, went to the kitchen and got a bigger knife. When he went into the room where Groce was, he said that Groce hit him in the jaw and that he did not use the big knife at all.

{¶ 13} This case was submitted to the jury first as to whether appellant was guilty of felonious assault and, if they could not find him guilty of that offense beyond a reasonable doubt, they could consider the lesser offense of aggravated assault. Instructions were submitted to the jury without objection.

{¶ 14} The jury returned a verdict of not guilty of felonious assault and guilty of aggravated assault.

{¶ 15} Appellant's assignments of error one and three contend that the trial court erred when it entered judgment against appellant when evidence was insufficient to sustain a conviction, and that the conviction was not supported by the manifest weight of the evidence.

{¶ 16} The jury was also charged about self-defense. In *State v. Williford*, 49 Ohio St.3d 247 (1990), the Supreme Court of Ohio set forth the law related to self-defense. Self-defense is a form of defense. *State v. Martin*, 21 Ohio St.3d 91 (1986). To establish self-defense, appellant must show "(1) [he] was not at fault in creating the situation giving rise to the affray; (2) [he] 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 such danger was in the use of such force; and (3) [he] must not have violated any duty to retreat or avoid the danger." *State v. Robbins*, 58 Ohio St.2d 74 (1979), paragraph two of the syllabus. If appellant "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." (Emphasis sic.) *State v. Jackson*, 22 Ohio St.3d 281, 284 (1986).

{¶ 17} There is no dispute but that appellant caused serious physical harm to Groce by means of a deadly weapon. As stated before, the provocation element of aggravated assault was his burden of proof. Additionally, there is other conflicting evidence that shows that appellant did not sustain that burden, such as the location of the blood on the large knife and in the living room. In a sufficiency review, a court does not "resolve evidentiary conflicts." *State v. Sparks*, 10th Dist. No. 11AP-702, 2012-Ohio-2653, ¶ 40, citing *State v. Sexton*, 10th Dist. No. 01AP-398, 2002-Ohio-3617, ¶ 30-31. As for appellant's self-defense argument, sufficiency review does not apply to affirmative defenses. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160.

{¶ 18} Appellant's argument that the guilty verdict was against the manifest weight of the evidence is also without merit. Substantial evidence other than conflicts of testimony of Groce and appellant support the fact that appellant used the large knife to stab Groce in the living room in a second stabbing episode. The location or knife used was a relatively unimportant detail. All of the evidence supports the fact that two weapons were used and that appellant was the one who stabbed Groce. The remaining issue is whether a jury must accept as true appellant's version, that he stabbed Groce only because Groce was choking him and he was afraid for his life.

{¶ 19} In determining whether a verdict is against the manifest weight of the evidence, this court acts as a "thirteenth juror." This role allows the court to weigh the evidence in order to determine whether 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. Thompkins*, 78 Ohio St.3d 380, 387 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). The power to reverse on manifest-weight grounds should only be used in exceptional circumstances, i.e., when " 'the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175.

{¶ 20} An appellate court acting in is role as "thirteenth juror" also must keep in mind the trier of fact's superior, first-hand position in judging the demeanor and credibility of witnesses. "On the trial of a case, either civil or criminal, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the

facts." *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. A court of appeals cannot reverse a jury verdict on manifest-weight grounds unless all three appellate judges concur. *Thompkins* at 389 and paragraph four of the syllabus.

{¶ 21} As this court stated in *State v. Favor*, 10th Dist. No. 08AP-215, 2008-Ohio-5371, ¶ 10:

> A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was offered at trial. The trier of fact is free to believe or disbelieve any or all of the testimony presented. The trier of fact is in the best position to take into account the inconsistencies in the evidence, as well as the demeanor and manner of the witnesses, and to determine which witnesses are more credible. Consequently, although appellate courts must sit as a 'thirteenth juror' when considering a manifest weight argument, it must also give great deference to the trier of fact's determination on the credibility of the witnesses.

(Citations omitted.) "[A] reviewing court may not second guess the jury on matters of weight and credibility." *State v. Woodward*, 10th Dist. No. 03AP-398, 2004-Ohio-4418, ¶ 18. "[T]he jury [is] in a much better position * * * to view the witnesses and observe their demeanor, gestures and voice inflictions, and use those observations in weighing the credibility of the testimony." *State v. Tolliver*, 10th Dist. No. 02AP-811, 2004-Ohio-1603, ¶ 84.

{¶ 22} Appellant's first and third assignments of error are overruled.

{¶ 23} The trial court ordered and received a presentence investigation. On April 19, 2012, a sentencing hearing was held where both parties were represented by attorneys. The court allowed counsel an opportunity to speak on behalf of appellant. The court also afforded appellant an opportunity to make a statement on his own behalf in the form of mitigation and to present information regarding the existence or non-existence of the factors the court would consider and weigh.

{¶ 24} The court considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. In addition, the court weighed the factors as set forth in the provisions of R.C. 2929.13 and 2929.14. The court found that a prison term is not mandatory pursuant to R.C. 2929.13(F). The court sentenced appellant

to serve 17 months at the Ohio Department of Rehabilitation and Correction and imposed no fine or court costs due to appellant's indigency.

{¶ 25} In appellant's fourth assignment of error, he asserts that the sentence imposed by the trial court is inconsistent with the principles set forth under the Ohio Revised Code and thus is contrary to law.

{¶ 26} The trial court sentenced appellant to a determinative term of 17 months and granted appellant 249 days of jail-time credit. Appeal of that sentence is not de novo. An appellate court may modify or vacate a sentence only if it is clearly and convincingly contrary to law. R.C. 2953.08(G)(2). *State v. Rivera*, 10th Dist. No. 10AP-945, 2012-Ohio-1915. Appellant does not dispute that the trial court had discretion to impose a criminal prison term. Since aggravated assault is an offense of violence, there is no requirement that the trial court impose community control. R.C. 2929.13(B)(1)(a). Moreover, appellant caused serious physical harm with a deadly weapon, which is a factor supporting the imposition of a prison term on a fourth-degree felony. R.C. 2929.13(B)(2)(a) and (b). Appellant's argument boils down to a contention that the non-minimum 17-month prison term is too long. Appellant argues that because of his age, the absence of any prior violent offenses in his record, and his expression of remorse, the principles and purposes of felony sentencing set forth in R.C. 2929.11 require the trial court to impose a shorter prison term. We reject that argument. Trial courts have full discretion to impose non-minimum prison terms. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus. Moreover, absent specific evidence to the contrary, a trial court is presumed to have complied with R.C. 2929.11 and 2929.12. *State v. Glass*, 8th Dist. No. 83950, 2004-Ohio-4495. The record affirmatively shows that the trial court did comply with these provisions. Appellant has failed to show that the trial court's sentence is clearly and convincingly contrary to law, and appellant's fourth assignment of error is overruled.

{¶ 27} Appellant's four assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT, P.J., and BROWN, J., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of the Ohio Constitution, Article IV, Section 6(C).