

[Cite as *Columbus v. McDaniel*, 2010-Ohio-3744.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-879 (M.C. No. 2009 CR B 6320)
Thomas A. McDaniel,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 12, 2010

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, City Prosecutor, *Melanie R. Tobias*, and *Orly Ahroni*, for appellee.

R. William Meeks Co. L.P.A., and *David H. Thomas*, for appellant.

APPEAL from the Franklin County Municipal Court.

FRENCH, J.

{¶1} Defendant-appellant, Thomas A. McDaniel ("appellant"), appeals the judgment of the Franklin County Municipal Court convicting him of assault pursuant to a jury trial. For the following reasons, we affirm.

{¶2} Plaintiff-appellee, the city of Columbus, charged appellant for assaulting Dawn Haddox. Appellant pleaded not guilty to the charge, and a jury trial ensued.

{¶3} On March 14, 2009, Haddox finished her shift at work. Her boyfriend dropped her off at the home of his father, Cheyenne Lambert, Sr. Lambert is also appellant's stepfather, and appellant and his fiancée, Pammiejo Bennett, were also at the house. Haddox had been drinking alcohol, but she was alert and not drunk. Haddox accused Bennett of taking her bodywash, and an argument ensued. After the argument ended, appellant and Bennett approached Haddox. She thought that they were going to "jump" her. (Vol. I Tr. 148.) Appellant pushed Bennett into Haddox, and Haddox pushed Bennett back. The women fell to the floor, where they hit one another a single time each. Neither woman was "winning" the fight. (Vol. I Tr. 160.) Haddox felt someone jerk her very hard off Bennett. Her head hit a wall, and she fell on her back. While she was lying on the floor, appellant stomped on her face with his foot at least four times before she lost consciousness. Police and paramedics arrived after she regained consciousness. Appellant and Bennett had left the scene.

{¶4} Haddox's face was bleeding, and she claimed that it was her blood at the scene. Her face was swollen, her nose was broken, and her eyes were blackened, with one eye completely swollen shut. It felt like her "face was caved in," and she was unable to breathe. (Vol. I Tr. 166.) She identified photographs depicting her facial

injuries, and she reiterated that appellant caused them by stomping on her face. The prosecution sought to introduce photographs, labeled Exhibits 13, 14, and 16, depicting the injuries that Bennett caused to Haddox's shoulder and arm. Appellant objected to the photographs and testimony about these other injuries, but the trial court overruled the objection. Thereafter, Haddox testified to the injuries depicted in Exhibits 13 and 14, but the prosecution did not move for admission of the exhibits into evidence. The prosecution did not ask Haddox to testify about Exhibit 16, nor did it move for admission of that exhibit. On cross-examination, Haddox confirmed that appellant called the police and that when she spoke to the police, she did not mention appellant pushing Bennett into her.

{¶5} Columbus Police Officer Christopher Journey was dispatched to the location of the assault and testified as follows. Haddox told him that she was fighting with another woman until appellant grabbed Haddox by her hair, pushed her down, and stomped on her face. He does not recall Haddox telling him that she thought that she was going to get "jumped." (Vol. I Tr. 242.) He does recall, however, that Haddox said "she was getting the best of" Bennett. (Vol. I Tr. 220.)

{¶6} Detective Delbert Chapman also investigated the assault against Haddox and testified as follows. Chapman visited Haddox at the hospital during the early morning hours after the assault. She smelled like she had been drinking alcohol, but was coherent and could answer his questions. She told him that she was fighting with Bennett and "was getting the upper hand of the fight." (Vol. II Tr. 252.) She told him about appellant ultimately stomping on her face until she lost consciousness.

{¶7} On cross-examination, Detective Chapman said that Bennett gave different information about the source of Haddox's injuries. Based on hearsay objections however, the court did not allow Chapman to give the details of Bennett's account. Chapman neither talked to any other witnesses (besides Haddox) about Bennett's version of events, nor collected blood from the crime scene. Chapman recorded his interview with Bennett, and appellant wanted to admit into evidence portions of the recording that contained Bennett's version of the assault. Appellant argued that the recording was admissible "to prove [Chapman] was given an actual alternate theory to this case and * * * never followed up on it." (Vol. II Tr. 286.) Appellant wanted to redact portions of the recording referring to his felony record and prior domestic violence charge. The prosecution objected to the admission of the recording into evidence, and the trial court sustained the objection. On re-direct, Chapman noted that he did not find Bennett's information credible.

{¶8} The prosecution rested its case. Appellant raised a Crim.R. 29 motion for acquittal, which the court denied.

{¶9} Bennett testified as follows for the defense. While at Lambert's house, she and Haddox started arguing after Haddox accused her of stealing her bodywash. Haddox was intoxicated. During the argument, Haddox flipped a cigarette in Bennett's face and punched her. Bennett swung back at Haddox. They rolled around the floor hitting each other several times, and the fight moved to the kitchen. Haddox kicked Bennett in the nose, which started bleeding. Bennett kicked and stomped on Haddox's head. Bennett became frightened because there was blood everywhere. She left with

appellant prior to police arriving because Haddox's boyfriend had returned and wanted to fight them. She did not seek medical treatment after the fight.

{¶10} Bennett provided Detective Chapman this same version of the assault during a recorded interview she had with him after she contacted him by phone. Chapman told her that she was not being charged because Haddox accused appellant of assault. Bennett admitted to the detective that she had lied to police on a previous occasion. She also testified that appellant was not with her when she spoke with Chapman. However, outside the presence of the jury, the trial court confronted Bennett with the fact that appellant's voice could be heard in the background of her recorded interview with Chapman, and it advised her against committing perjury. After that discussion, Bennett changed her testimony and admitted that appellant was present when she spoke with Chapman.

{¶11} Appellant gave testimony similar to Bennett's. He added that he told Bennett to stop fighting Haddox. He also said that he left the scene with Bennett before the police came because Haddox's boyfriend and several other individuals arrived and threatened to kill him. He denied assaulting Haddox and claimed that Haddox accused him of injuring her because she was upset with him for dating Bennett and because he had previously placed a call to police about her. He admitted, however, that he was angry with Haddox because she started the fight with his fiancée. He also testified that he was previously convicted of felony drug possession and was placed on probation. He was on probation at the time of the trial, and a term of his probation included not being convicted of other crimes.

{¶12} Appellant's brother, Christopher McDaniel, testified that appellant did not punch Haddox during the March 2009 incident. He said that appellant tried to end the altercation between Bennett and Haddox, who was very intoxicated. He admitted, however, that he was not in the room when the fight took place. He also confirmed that, when the incident ended, Haddox accused appellant of the assault when she talked to the police.

{¶13} Next, Lambert testified that the fight between Bennett and Haddox ended up in the kitchen and that appellant followed. He did not see appellant kick or stomp on Haddox, but admitted that he could not see into the kitchen. Lambert believed that Haddox was intoxicated because he smelled a slight odor of alcohol on her, and her speech was slightly slurred.

{¶14} Appellant rested his case and renewed the Crim.R. 29 acquittal motion, which the court denied. During closing argument, defense counsel criticized Detective Chapman for failing to investigate Bennett's version of the assault adequately. When the trial court instructed the jury, it said that if the jury found the prosecution failed to prove beyond a reasonable doubt all of the elements of assault, the verdict must be not guilty. Defense counsel told the trial court that the instruction should have included the phrase "any one of the elements," as opposed to "all of the elements," of the assault. (Vol. II Tr. 495-96.) The court re-read the instructions to the jury, using the language that the defense desired. Thereafter, the jury found appellant guilty of assault.

{¶15} Appellant appeals, raising the following assignments of error:

ASSIGNMENT OF ERROR NO. 1:

THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING STATE'S EXHIBITS 13, 14, AND 16 IN VIOLATION OF EVID.R. 401 AND EVID.R. 403 BECAUSE THE PHOTOGRAPHS WERE OF INJURIES NOT CAUSED BY APPELLANT AND ACTED TO PREJUDICE, CONFUSE, AND MISLEAD THE JURY, THEREFORE VIOLATING APPELLANT'S RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

ASSIGNMENT OF ERROR NO. 2:

THE TRIAL COURT ABUSED ITS DISCRETION IN SUSTAINING THE STATE'S HEARSAY OBJECTION TO ADMITTING AN AUDIO TAPE BECAUSE IT WAS NOT OFFERED FOR THE TRUTH OF THE MATTER ASSERTED, THEREFORE VIOLATING APPELLANT'S RIGHT TO PRESENT A FULL AND COMPLETE DEFENSE AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ASSIGNMENT OF ERROR NO. 3:

THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S CRIM.R. 29 MOTION FOR JUDGMENT OF ACQUITTAL, AND THEREBY DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NO. 4:

THE TRIAL COURT ERRED BY FINDING DEFENDANT GUILTY AND THEREBY DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION BECAUSE THE VERDICT OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶16} We begin with appellant's third assignment of error, in which he argues that the trial court erred by denying his original and renewed Crim.R. 29 motions for acquittal. We disagree.

{¶17} A trial court grants a Crim.R. 29 motion for acquittal if the evidence is insufficient to sustain a conviction. *Columbus v. Myles*, 10th Dist. No. 04AP-1255, 2005-Ohio-3933, ¶17. Conversely, a trial court shall not grant a motion for acquittal if reasonable minds can reach different conclusions as to whether the prosecution has proved each material element beyond a reasonable doubt. *Id.* Moreover, in a motion for acquittal, the weight and credibility of the evidence is not a factor. *Id.* at ¶19. See also *State v. Jackson* (Feb. 20, 2001), 10th Dist. No. 00AP-183, quoting *State v. Kline* (1983), 11 Ohio App.3d 208, 213 (noting that with a motion for acquittal, the analysis of the evidence " 'focuses not upon its weight or credibility, * * * but rather its quantitative sufficiency to establish beyond a reasonable doubt each element of the offense' "). An appellate court applies de novo review to the trial court's decision on a Crim.R. 29 motion. *Myles* at ¶18. The trial court's decision to deny a motion for acquittal will only be reversed if, after viewing the evidence in a light most favorable to the prosecution, the appellate court determines that reasonable minds could only conclude that the evidence failed to prove all the elements of the crime beyond a reasonable doubt. *Id.*

{¶18} Appellant was convicted of assault, pursuant to R.C. 2903.13(A), for knowingly causing physical harm to Haddox by throwing her to the floor and repeatedly stomping on her face until she became unconscious. Haddox testified that appellant caused her facial injuries in the manner alleged, and photographs of her facial injuries

were admitted into evidence. Haddox's testimony also established the knowing element of the assault offense, given that appellant repeatedly and deliberately stomped on her face during the altercation. See R.C. 2901.22(B) (stating that "[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"). Appellant asserts that no physical evidence connects him to the assault, but a victim's testimony alone is sufficient to sustain a conviction if, as here, it proves all the elements of the offense. See *State v. Bibb* (June 28, 2001), 10th Dist. No. 00AP-1144. Appellant also challenges the credibility of the evidence against him, but that issue is not relevant to motions for acquittal. *Myles* at ¶19. Accordingly, we conclude that the trial court did not err by denying appellant's Crim.R. 29 motions for acquittal. Therefore, we overrule his third assignment of error.

{¶19} We next address appellant's fourth assignment of error, in which he argues that his conviction is against the manifest weight of the evidence. We disagree.

{¶20} In determining whether a verdict is against the manifest weight of the evidence, we sit as a "thirteenth juror." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. *Id.* Additionally, we 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.' " *Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. We reverse a conviction on manifest weight grounds for only the most

" 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶21} Appellant first argues that Haddox was not credible because she became unconscious during the March 2009 incident. Haddox testified that appellant assaulted her before she lost consciousness, however. Appellant also argues that Haddox was not credible because other witnesses described her as drunk during the incident. Haddox admitted that she drank alcohol before the altercation, but she said she was alert and not drunk. And Detective Chapman noted that, although he smelled alcohol on Haddox after the incident, she was coherent and answered his questions. Therefore, the jury could have reasonably concluded that Haddox's alcohol consumption did not interfere with her ability to observe and recall that appellant assaulted her.

{¶22} Next, appellant contends that Haddox did not provide a consistent version of events. To be sure, there are minor discrepancies between what Haddox testified to and what she told Officer Journey and Detective Chapman. However, she unequivocally stated at trial and to Journey and Chapman that appellant caused her facial injuries after he repeatedly stomped on her face. Christopher McDaniel also

overheard Haddox tell police that appellant assaulted her. Therefore, the jury did not lose its way in believing her consistent claim that appellant assaulted her in the face.

{¶23} Appellant also argues that the jury lost its way in not believing his testimony that Bennett caused Haddox's facial injuries. It was within the province of the jury, however, to not believe appellant's self-serving claim. For instance, appellant admitted that his felony probation could be revoked if he were convicted of assault, and, therefore, he had a bias and motive to shift culpability for the assault onto someone else. See Evid.R. 616(A) (stating that a witness's credibility may be impeached for bias, prejudice, interest or any motive to misrepresent). The jury also could have concluded reasonably that appellant had a motive to assault Haddox because he was angry with her for starting a fight with his fiancée, Bennett. See *State v. Curry* (1975), 43 Ohio St.2d 66, 70-71 (noting that motive is generally relevant in all criminal trials, even though the prosecution need not prove motive in order to secure a conviction). The jury also could have concluded reasonably that, by leaving the scene, appellant established furtive conduct reflective of a consciousness of guilt. See *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶86.

{¶24} It was also within the province of the jury not to believe Bennett's testimony that she assaulted Haddox in the face. For instance, the jury may have concluded that Bennett was biased in favor of appellant, her fiancée, and had an interest in him not having his felony probation revoked for an assault conviction. Evid.R. 616(A). Bennett admitted to lying to police on a previous occasion. After the trial court

warned her about committing perjury, Bennett also changed her testimony about whether appellant was present when she talked to Detective Chapman on the phone.

{¶25} Next, appellant argues that the evidence against him is not credible because Detective Chapman did not talk to witnesses, other than Haddox, about Bennett's claim that she assaulted Haddox. Chapman explained, however, that he did not find Bennett's information credible, and it was within the jury's province to accept this explanation. Similarly, appellant contends that his conviction cannot stand because Chapman did not have the blood from the assault scene tested so that its origin could be determined. However, the presence of Bennett's blood at the scene would not have proven that she assaulted Haddox in the face. Rather, it would have confirmed the undisputed fact that Bennett was involved in the March 2009 altercation in some manner. In addition, there was no testimony that appellant was injured during the assault, so the absence of his blood at the scene would have resolved nothing. Appellant also complains that Chapman failed to document crucial conversations he had when investigating the assault, but he is only speculating that this prejudiced him. Lastly, appellant contends that the trial court's initial instruction on not guilty verdicts confused the jury. After appellant challenged that original instruction, however, the court re-read it with language appellant desired.

{¶26} In the final analysis, the trier of fact is in the best position to determine witness credibility. *State v. Carson*, 10th Dist. No. 05AP-13, 2006-Ohio-2440, ¶15. The jury accepted Haddox's testimony that appellant assaulted her in the face, and appellant has not demonstrated a basis for disturbing the jury's conclusions. See *Brown* at ¶10.

Accordingly, we hold that appellant's assault conviction is not against the manifest weight of the evidence, and we overrule appellant's fourth assignment of error.

{¶27} We now address appellant's first assignment of error, which concerns Exhibits 13, 14, and 16. In his merit brief, appellant argued that the trial court erred by admitting these exhibits into evidence. Appellee responded, and we agree, that these exhibits were not admitted into evidence. Nevertheless, in his reply brief, appellant argued that Haddox's testimony about what the exhibits depict caused him prejudice. We disagree.

{¶28} First, there was no testimony about Exhibit 16 and, therefore, no prejudice to appellant regarding this exhibit. Haddox testified, however, that Exhibits 13 and 14 depict injuries that Bennett caused to her shoulder and arm. Appellant argues that testimony about these exhibits was irrelevant to the issue of who assaulted Haddox in the face. The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, 180. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶29} In addition, even though appellant objected to testimony about Exhibits 13 and 14, the harmless error standard applies. Crim.R. 52(A); *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶15. Under this review, any "[e]rror in the admission or exclusion of evidence in a criminal trial must be considered prejudicial unless the court can declare, beyond a reasonable doubt, that the error was harmless, and unless there

is no reasonable possibility that the evidence, or the exclusion of evidence, may have contributed to the accused's conviction." *State v. Jones*, 10th Dist. No. 07AP-771, 2008-Ohio-3565, ¶13, citing *State v. Bayless* (1976), 48 Ohio St.2d 73, 106, vacated on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3135. The prosecution bears the burden of demonstrating harmless error; if the prosecution meets its burden, we disregard the error and do not correct it. *State v. Douglas*, 10th Dist. No. 09AP-111, 2009-Ohio-6659, ¶41. When Haddox testified about the injuries depicted in Exhibits 13 and 14, she clearly indicated that Bennett, not appellant, caused them. Thus, the jury had no basis to use that testimony against appellant in determining whether he was guilty of assaulting Haddox in the face. Therefore, trial error, if any, in the admission of testimony about Exhibits 13 and 14 was harmless. Accordingly, we overrule appellant's first assignment of error.

{¶30} Lastly, in his second assignment of error, appellant argues that the trial court's decision to exclude the recorded interview between Detective Chapman and Bennett caused him prejudice. We disagree.

{¶31} Appellant argues that the recorded interview was relevant to impeach the prosecution's evidence because Detective Chapman did not investigate Bennett's statement that she assaulted Haddox in the face. But Bennett testified that she told Chapman her version of the assault, and, therefore, the recorded interview with the detective would have merely been cumulative evidence. In addition, appellant was able to assert his defense challenging the way Chapman responded to Bennett's information. Specifically, defense counsel questioned Chapman about neither collecting blood from

the scene for testing, nor talking to other witnesses about Bennett's information. Furthermore, during closing argument, defense counsel criticized Chapman's failure to investigate Bennett's information adequately. Therefore, the trial court's decision to exclude the recorded interview between Chapman and Bennett did not cause prejudice to appellant. See Crim.R. 52(A). Accordingly, we overrule appellant's second assignment of error.

{¶32} In summary, we overrule appellant's four assignments of error. Therefore, we affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

BRYANT and KLATT, JJ., concur.
