[Cite as *State v. Bates*, 2010-Ohio-1723.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-06-174
	:	O P I N I O N
- vs -		4/19/2010
	:	
GREGORY S. BATES,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-11-2044

Robin N. Piper III, Butler County Prosecuting Attorney, Daniel G. Eichel, Government Services Center, 345 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

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BRESSLER, P.J.

{¶1} Defendant-appellant, Gregory S. Bates, appeals from his conviction in the Butler County Court of Common Pleas for one count of felonious assault. For the reasons outlined below, we affirm.

{¶2} On October 9, 2008, after an intense windstorm blew through the area, Timothy Lickliter went to Tailg8tor's Sports Bar (Tailg8tor's) located in Butler County to

help repair the bar's outdoor "smoking area." However, shortly after he determined what materials were needed for the project, Lickliter was involved in an altercation that ultimately resulted in him receiving 19 stitches after being stabbed in the head. Following the subsequent police investigation, which indicated appellant stabbed Lickliter before leaving the scene with his sister, appellant was arrested and charged with felonious assault. Appellant was found guilty after a two-day jury trial and sentenced to serve five years in prison.

{¶3} Appellant now appeals his conviction and sentence, raising five assignments of error. For ease of discussion, and because they are identically worded, appellant's first and second assignments of error will be addressed together.

{¶4} Assignments of Error No. 1 & 2:

{¶5} "THE TRIAL COURT ERRED TO THE PREJUDICE OF [APPELLANT] WHEN IT DENIED HIS MOTION OF ACQUITTAL PURSUANT TO CRIMINAL RULE 29 AT THE CLOSE OF THE STATE'S EVIDENCE AND AT THE END OF THE TRIAL."

{¶6} In his first and second assignments of error, appellant argues that the trial court erred by denying his Crim.R. 29 motion for acquittal, that the state provided insufficient evidence to support his conviction, and that his conviction was against the manifest weight of the evidence. In support of these claims, appellant argues that "the record is devoid of proof that [he] was at fault in creating the situation giving rise to the incident," and, as a result, "clear that [he] acted in self defense." We disagree.

{¶7} As this court has previously stated, "a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." *State v. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶35; *State v. Urbin,* 148 Ohio App.3d 293, 2002-Ohio-3410, ¶31. In turn, while a review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally

distinct concepts, this court's determination that appellant's conviction was supported by the manifest weight of the evidence will be dispositive of the issue of sufficiency. *State v. Rigdon*, Warren App. No. CA2006-05-064, 2007-Ohio-2843, ¶30, citing *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52; see, e.g., *State v. Rodriguez*, Butler App. No. CA2008-07-162, 2009-Ohio-4460, ¶62.

{¶8} A manifest weight challenge concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *State v. Ghee,* Madison App. No. CA2008-08-017, 2009-Ohio-2630, ¶9, citing *Thompkins* at 387, 1997-Ohio-52. A court considering whether a conviction is against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of the witnesses. *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, ¶39; *State v. Lester,* Butler App. No. CA2003-09-244, 2004-Ohio-2909, ¶33; *State v. James,* Brown App. No. CA2003-05-009, 2004-Ohio-1861, ¶9. However, while appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide. *State v. Gesell,* Butler App. No. CA2005-08-367, 2006-Ohio-3621, ¶34; *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Therefore, upon review, the question is 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. *State v. Good,* Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25; *State v. Blanton,* Madison App. No. CA2005-04-016, 2006-Ohio-1785, ¶7.

{¶9} At trial, Lickliter testified that he went to Tailg8tor's to assess the damage to the bar's "smoking area" and determine what materials were needed for repairs. However, upon exiting the "gazebo," Lickliter testified that he saw appellant approach and heard him threaten "to F [him] up." Lickliter then testified that appellant, whom he did not

recognize at the time, "stabbed" him in the head with a knife and immediately left the scene.[1] When asked if he ever made contact with appellant during this confrontation, Lickliter testified that he "never touched him."

{¶10} In his defense, appellant, who admittedly lied to police during their subsequent investigation, testified that although he stabbed Lickliter in the head and quickly left the scene with his sister, he did so in self-defense.[2] According to appellant, Lickliter, "a guy that had jumped [him] a few years ago," "came at [him]," "hit [him] in the head," and "grabbed [him] by the neck" so he took out his knife and "swung" because he was "scared to death" and "feared for [his] life." Appellant then testified that he "hurried up and got in the car" after the stabbing because he "didn't know what [Lickliter] was going to do."

{¶11} After a thorough review of the record, and while appellant may claim that he acted in self-defense, it is well-established that "[w]hen conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony." *State v. Bromagen,* Clermont App. No. CA2005-09-087, 2006-Ohio-4429, ¶38; *State v. Lloyd,* Warren App. Nos. CA2007-04-052, CA2007-04-053, 2008-Ohio-3383, ¶51; *State v. Woodruff,* Butler App. No. CA2008-11-824, 2009-Ohio-4133, ¶25. As a result, because the state presented competent, credible evidence indicating appellant's attack on Lickliter was not an act of self-defense, the jury clearly did not lose its way so as to create such a manifest miscarriage of justice requiring

1. Lickliter testified that two weeks after this altercation occurred he realized appellant was the same man he had a confrontation with approximately seven years before. In describing this prior incident, Lickliter testified that appellant, after an exchange of words, came at him and "swung" so he "grabbed him," "threw him to the ground," and punched him "one time." On the other hand, appellant testified that during this previous altercation Lickliter "sucker punched [him]" and "whipped [his] ass."

2. Appellant initially told police that he did not have a knife. However, when asked on cross-examination if he "lied to the police when [he] said [he] didn't have a knife," appellant responded affirmatively. Appellant then stated: "When I said that I didn't have a knife, yes, that was a lie."

his felonious assault conviction to be reversed. See *State v. Brakeall*, Fayette App. Nos. CA2008-06-022, CA2008-06-023, 2009-Ohio-3542, ¶34-37; *State v. Clark*, Warren App. No. CA2007-03-037, 2008-Ohio-5208, ¶20-22; *State v. Robinson*, Butler App. No. CA2005-12-506, 2006-Ohio-6074, ¶22; *Gesell*, 2006-Ohio-3621 at ¶49. Therefore, as appellant's felonious assault conviction was not against the manifest weight of the evidence, we necessarily conclude that the state presented sufficient evidence to support the jury's finding of guilt. *Rodriguez*, 2009-Ohio-4460 at ¶62. Accordingly, appellant's first and second assignments of error are overruled.

{¶12} Assignment of Error No. 3:

{¶13} "THE TRIAL COURT ERRED TO THE PREJUDICE OF [APPELLANT] WHEN IT DENIED DEFENSE COUNSEL'S REQUEST TO IMPEACH VICTIM BY USE OF VICTIM'S PROBATION VIOLATION."

{¶14} In his third assignment of error, appellant argues that the trial court erred when it prohibited him from cross-examining Lickliter, the alleged victim, regarding his prior probation violation. This argument lacks merit.

{¶15} A trial court's decision to admit or exclude evidence will not be reversed by a reviewing court absent an abuse of discretion. *State v. Craft,* Butler App. No. CA2006-06-145, 2007-Ohio-4116, ¶48. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *Hancock,* 2006-Ohio-160 at ¶130. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *State v. Pringle,* Butler App. Nos. CA2007-08-193, CA2007-09-238, 2008-Ohio-5421, ¶17.

{¶16} In *State v. Greer* (1988), 39 Ohio St.3d 236, 243, the Ohio Supreme Court, noting that the term parole, by definition, implies a promise on the part of an individual released from jail to observe certain terms and conditions, found that any violation of the

individual's parole necessarily constitutes a specific instance of a failure to keep one's word, and therefore, is "almost always probative of truthfulness or untruthfulness." Id. at 243. Expanding upon the supreme court's holding in *Greer*, other Ohio courts have found that "a probation violation may be inquired into on cross-examination for the limited purpose of attacking the witness's credibility." *State v. Hurt* (Mar. 29, 1996), Franklin App. No. 95APA06-786, 1996 WL 145486 at *4; *State v. Bessick* (Sept. 11, 1996), Richland App. No. 95 CA 74, 1996 WL 570902 at *4-*5; *State v. Moore* (Mar. 6, 2000), Stark App. No. 1999CA00126, 2000 WL 329832 at *4; but, see, *State v. Sizemore* (May 26, 1992), Preble App. No. CA91-09-016, 4-8. However, even if such questioning is otherwise permissible, evidence regarding an individual's probation violation may still be excluded under Evid.R. 403(A) if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the jury. *Hurt* at *4; *State v. Barnett*, Butler App. No. CA2008-03-069, 2009-Ohio-2196, ¶44; see, e.g., *State v. Buchanan*, Brown App. No. CA2008-04-001, 2009-Ohio-6042, ¶57 (even if evidence was deemed admissible pursuant to Evid.R. 608[B], it would still have been excluded under Evid.R. 403[A]).

{¶17} In its decision, the court prohibited appellant from cross-examining Lickliter regarding his prior probation violation. The probation violation was for Lickliter's *misdemeanor* domestic violence conviction while he was on probation for an earlier *misdemeanor* OVI conviction. The trial court determined that "even if [it] would find it would be admissible * * * the prejudice would be – would outweigh the probative value it would have." After a thorough review of the record, we find the trial court did not abuse its discretion in reaching this conclusion. Moreover, while Lickliter's credibility was central to his case, appellant has failed to demonstrate any prejudice resulting from the trial court's alleged error. In fact, appellant was permitted to attack Lickliter's credibility extensively on

cross-examination by highlighting his numerous prior inconsistent statements, as well as by calling Lickliter's ex-wife, to whom he had been married for nearly 16 years, to testify that she believed her ex-husband to be untruthful. Therefore, because we find the trial court did not err or abuse its discretion by prohibiting appellant from cross-examining Lickliter regarding his prior probation violation, appellant's third assignment of error is overruled.

{¶18} Assignment of Error No. 4:

{¶19} "THE TRIAL COURT ERRED TO THE PREJUDICE OF [APPELLANT] WHEN IT SENTENCED HIM."

{¶20} In his fourth assignment of error, appellant argues that the trial court erred by sentencing him to "more than a minimum sentence" following his felonious assault conviction. We disagree.

{¶21} Appellate review of felony sentencing is controlled by the two-step procedure outlined by the supreme court in *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912. Under *Kalish*, this court must first examine the trial court's sentence to determine if "the sentence is clearly and convincingly contrary to law," and then, if the first prong is satisfied, this court must review the sentence for an abuse of discretion. Id. at ¶4.

{¶22} The record indicates that before handing down its sentence the trial court properly considered the purposes and principles of sentencing under R.C. 2929.11, and balanced the seriousness and recidivism factors listed under R.C. 2929.12. See *State v. Wright*, Warren App. No. CA2008-03-039, 2008-Ohio-6765, ¶57. In addition, the record demonstrates that the trial court properly applied postrelease control, and sentenced appellant to a prison term falling squarely within the statutory range for the offense in question. *State v. Plummer*, Butler App. Nos. CA2009-06-148, CA2009-06-151 through CA2009-06-154, 2010-Ohio-849, ¶23; *Kalish* at ¶18. Therefore, we find appellant's five-

year prison sentence following his felonious assault conviction was not clearly and convincingly contrary to law.

{¶23} Furthermore, after a thorough review of the record, we find it clear that the trial court gave "careful and substantial deliberation to the relevant statutory considerations" before sentencing appellant to serve a five-year prison term for stabbing Lickliter in the head. *Kalish* at ¶20. The record is completely devoid of any evidence indicating that the court acted unreasonably, arbitrarily, or unconscionably in imposing the five-year prison sentence. See *Blanton*, 2009-Ohio-3311 at ¶22; *Wright*, 2008-Ohio-6765 at ¶58; *State v. Williams*, Warren App. No. CA2007-12-136, 2009-Ohio-435, ¶28. Therefore, appellant's fourth assignment of error is overruled.

{¶24} Assignment of Error No. 5:

{¶25} "THE PROSECUTOR PREJUDICIALLY AFFECTED THE SUBSTANTIAL RIGHTS OF [APPELLANT] BY REPEATEDLY MISSTATING THE LAW."

{¶26} In his final assignment of error, appellant argues that the prosecutor made repeated misstatements of the law during closing argument that prejudicially affected his substantial rights and denied him a fair trial. We disagree.

{¶27} When reviewing statements during closing arguments for prosecutorial misconduct, a prosecutor is granted a certain degree of latitude. *State v. Smith* (1984), 14 Ohio St.3d 13, 13-14. Prosecutorial misconduct will only be found when remarks made during closing were improper and those improper remarks prejudicially affected substantial rights of the defendant. *State v. Elmore,* 111 Ohio St.3d 515, 2006-Ohio-6207, ¶62. In order to determine whether the remarks were prejudicial, the prosecutor's closing argument is reviewed in its entirety. *State v. Treesh,* 90 Ohio St.3d 460, 464, 2001-Ohio-4.

{¶28} The Ohio Supreme Court has held that prosecutorial misconduct is not

grounds for reversal unless the defendant has been denied a fair trial because of the prosecutor's prejudicial remarks. *State v. Murphy,* Butler App. No. CA2007-03-073, 2008-Ohio-3382, ¶9, citing *State v. Maurer* (1984), 15 Ohio St.3d 239, 266. "We will not deem a trial unfair if, in the context of the entire trial, it appears beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments." *State v. Smith,* Butler App. No. CA2007-05-133, 2008-Ohio-2499, ¶9, citing *Smith*, 14 Ohio St.3d at 15.

{¶29} Initially, it should be noted that the jury was instructed that the statements made during closing argument were not evidence. See *State v. Smith*, Fayette App. No. CA2006-08-030, 2009-Ohio-197, ¶39; *State v. Myers*, Fayette App. No. CA2005-12-035, 2007-Ohio-915, ¶28. Therefore, we must presume that the jury followed the trial court's instructions. See *State v. Manns*, 169 Ohio App.3d 687, 2006-Ohio-5802, ¶93.

{¶30} While discussing the jury instructions that would be provided by the trial court during closing argument, the prosecutor stated the following:

{¶31} "[THE STATE]: The judge is also going to give you the flight instruction as we call it, consciousness of guilt."

{¶32} The prosecutor then showed the jury a slide that stated the following:

{¶33} "In regard to this evidence, you are instructed that flight from justice, concealment, and related conduct, in and of itself does not raise a presumption of guilt, but it may tend to show a consciousness of guilty on the part of the Defendant or a guilty connection with the crime.

{¶34} "If you find that the Defendant's conduct was not motivated by consciousness of guilt, or if you are unable to determine what the Defendant's motivation was, you should not consider this evidence for any purpose.

{¶35} "However, if you find that the testimony is true, and you find that the

Defendant's conduct was motivated by consciousness of guilt, you may consider that evidence in determining whether or not the Defendant is guilty of one or more of the offenses charged. You alone will determine the weight, if any, to be given to this evidence."[3]

{¶36} After the slide was briefly displayed to the jury, the following conversation occurred:

{¶37} "[APPELLANT'S TRIAL COUNSEL]: Your Honor, may we approach, please.

{¶38} "[THE COURT:] Okay.

{¶39} "[APPELLANT'S TRIAL COUNSEL]: Take that [i.e. the slide] down, please.

{¶40} "[THE STATE:] It's down."

{¶41} The parties then had the following sidebar conversation:

{¶42} "[APPELLANT'S TRIAL COUNSEL]: The Prosecution in its slide * * * just showed the * * * instruction that you were not going to give. He just put up his proposed instruction in front of the jury on this flight issue. When you said I'm going to give the one on OJI, the Court said they were giving that instruction out of OJI. He just showed to the jury the instruction that he had proposed, not the one you're giving and he can't put that up in front of the jury. They will see it. I'm sure they saw it and read it.

{¶43} "* * *

{¶44} "THE COURT: I'll tell the jury that it's my job to instruct them and the law comes from the Court and not the prosecutor and the defense attorney. They will take the

3. **{¶a}** The slide provided by the prosecutor was somewhat different than the flight instruction the court had previously determined would be given to the jury, which stated:

{¶b} "Testimony has been admitted indicating that the defendant fled the scene. You are instructed that fleeing the scene alone does not raise a presumption of guilt, but it may tend to indicate the defendant's consciousness of guilt. If you find that the facts do not support the defendant fleeing the scene, or if you find that some other motive prompted the defendant's conduct, or if you are unable to decide what the defendant's motivation was, then you should not consider this evidence for any purpose."

instructions that I give them and if what the attorneys say is inconsistent, they are to disregard what somebody else tells them."

{¶45} The trial court then provided the jury with the following curative instruction: "THE COURT: Okay. Ladies and gentlemen, let me give you some brief comments. It's the role and obligation of the Court to tell you what the law is, okay. It's not the obligation or the role of the attorneys to tell you what the law is and the instruction of law come from me. And I tell you what the law is. So if what the attorneys tell you the law is different than what I tell you, you are to believe me, okay, because that is my job, okay.

{¶46} "So please – as a courtesy to the attorneys, I provide them copies of my proposed instructions ahead of time. So they have some idea what I'll instruct, but the law comes from this court. If there are any differences, you'll accept what I tell you is the law, okay. Let's proceed."

{¶47} Thereafter, while the prosecutor attempted to provide a corresponding example for "the flight instruction," the following occurred:

{¶48} "[THE STATE]: In other words, someone runs away from the scene, that is sort [of] anti-common sense. If you're attacked and you're choked and you believe you're wrong and you commit a self-defense act, then –"

{¶49} "THE COURT: Let's approach the bench. That is not the law."

{¶50} The parties then approached the bench for another sidebar conference, during which, the following conversation took place:

{¶51} "THE COURT: That is not the law I'm going to give and now you've done it twice.

{¶52} "[THE STATE]: Judge, this is the instructions from – that we use in all the other cases.

{¶53} "THE COURT: I don't care what we use in the other cases. I said I'm going

to use OJI in this case about other issues which are collateral. So I'm telling you, put it up a third time and –

{¶54} "[THE STATE]: Yes, sir.

{¶55} "THE COURT: -- and I assume it will be prosecutor misconduct.

{¶56} "[THE STATE]: Yes, Judge."

{¶57} In continuing his closing argument, the prosecutor stated the following:

{¶58} "[THE STATE]: Again, just so we're clear[,] the Judge's instructions are correct. If the attorneys accidentally misstate the law, you are to follow the Judge's instructions. As he told you, sometimes we get those in advance. Today we did not. The Judge is going to read what we call consciousness of guilt and what that means. Look at that, because if you believe that his conduct was not motivated by a consciousness of guilt, you disregard that instruction.

{¶59} "But if you believe that his conduct was motivated by a consciousness of guilt there are specific instructions that the judge will read you that you can then consider that. * * * It goes back to the whole point of he is saying he left the scene. He is saying that he was attacked. It was self-defense, yet he never called the police. And when he is finally brought into the police station, by his own admission, he lies about it."

{¶60} The remainder of the prosecutor's closing argument went without incident.

{¶61} Following appellant's closing argument, and after the jury had been excused for deliberations, the following discussion occurred:

{¶62} "[THE STATE]: First of all, it was certainly not malicious or intentional. That instruction that was on the screen as I indicated, has been given in other cases. And I understand that the court changed that in this case and that was merely a typo or a glitch that I let go through. * * *."

{¶63} In response, appellant's trial counsel stated:

{¶64} "[APPELLANT'S TRIAL COUNSEL]: Well, first of all, I did not state and would not state that there was any, you know, malice or anything else. * * * And I in no way assign any improper motive. I accept that it was a mistake. The only reason I rushed to the bench is I recognized it was a mistake. I just didn't want the jury to go through it after we discussed it.

{¶65} "But please understand, I in no way would impugn [the prosecutor's] integrity on this issue. I in fact, believe it was simply – you prepare an argument and sometimes things change in the meantime and so that is the way I believe it to be."

{¶66} In further explaining its concerns with the prosecutor's actions, the trial court stated, in pertinent part, the following:

{¶67} "THE COURT: I want to give people as much latitude as humanly possible. For two occasions, both times the instructions on flight were inaccurate as to what I was going to instruct them with. I'm not saying it was intentional. All I'm saying is if there was a third misstatement that went up there, that was going to greatly upset me, okay. And I didn't say it was prosecutorial misconduct. I said if it happened on third time, I have to consider that it goes beyond simple neglect. That's all I said. Okay."

{¶68} The parties then provided their exhibits to the bailiff, and began waiting for the jury to return a verdict.

{¶69} While we are certainly troubled by the prosecutor's apparent inability to adhere to the trial court's directives, after a thorough review of the record, we find that any prejudice resulting from the prosecutor's alleged misstatement of the law was remedied by trial court's curative instructions provided to the jury. [4] These instructions, which stated,

4. Although it should go without saying, and even though we are not implying that it occurred in this case, we remind the state that "a prosecutor has a duty to avoid making comments deliberately aimed at misleading the jury." *State v. Chambers*, Butler App. No. CA2006-07-178, 2007-Ohio-4732, ¶38; see, also, *State v. Crossty*, Butler App. No. CA2008-03-070, 2009-Ohio-2800, ¶45, citing *State v. Depew* (1988), 38 Ohio St.3d 275, 288.

among other things, that "if what the attorneys tell you the law is different than what [the court] tell[s] you, you are to believe [the court]," amply protected appellant's right to a fair trial. See *State v. Fuller*, Butler App. Nos. CA2000-11-217, CA2001-03-048, CA2001-03-061, 2002-Ohio-4110, ¶35; see, e.g., *State v. Benge* (Dec. 5, 1994), Butler App. No. CA93-06-116, 1994 WL 673126 at *13. Therefore, although we in no way condone the prosecutor's failure to follow the court's direction, the record is devoid of any evidence indicating appellant was denied a fair trial resulting from the state's alleged misstatement of the law. Accordingly, appellant's fifth assignment of error is overruled.

{¶70} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.

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