[Cite as *In re D.L.B.* , 2012-Ohio-3045.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

IN THE MATTER OF:	:	
D.L.B. III	:	CASE NO. CA2011-09-019
	:	O P I N I O N 7/2/2012
	:	

APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS,
JUVENILE DIVISION
Case No. 11DL0314

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HUTZEL, J.

{¶ 1} Appellant, D.L.B., III, appeals a decision of the Fayette County Court of Common Pleas, Juvenile Division, adjudicating him delinquent for committing felonious assault.

{¶ 2} On May 12, 2011, appellant, then 13 years of age, was charged by complaint in the juvenile court with one count of aggravated assault in violation of R.C. 2903.12(A)(2), a fourth-degree felony if committed by an adult. The charge resulted from an altercation on May 11, 2011, during which appellant twice threw a meat cleaver at Joseph Curnutte (the

victim).

{¶ 3} On July 26, 2011, another complaint was filed in the juvenile court charging appellant with one count of felonious assault in violation of R.C. 2903.11(A)(2), a second-degree felony if committed by an adult. The complaint, filed under a new case number (11DL0467), alleged the same facts as the facts alleged in the May 12, 2011 complaint. On August 4, 2011, Fayette County Juvenile Judge David B. Bender sua sponte issued the following judgment entry: "Amended Complaint was filed on July 26, 2011 to change the ORC to 2903.11A2 from 2903.12A2 and given a Case Number of 11DL0467 which was erroneously given to this case * * * as it should be Case Number 11DL0314." Presumably as a result of the judgment entry, the case number of the second complaint, 11DL0467, was crossed out and replaced, in blue ink, with the case number of the first complaint, 11DL0314. In addition, there is a handwritten annotation in black ink, "amended," at the top of the second complaint.

{¶ 4} On August 9, 2011, an adjudication hearing was held in the juvenile court before Fayette County Common Pleas Judge Steven P. Beathard. During the hearing, witnesses for the state testified that they first observed appellant hit David Duran, a friend of appellant's mother, with a metal pipe. The victim intervened, telling appellant to stop. Appellant then went into his house, came out armed with a meat cleaver, and twice threw the meat cleaver at the victim before leaving the scene with his mother. Appellant's mother, P.P., testified that it was David who attacked appellant, and David who brought out the meat cleaver. Appellant's mother further testified that after appellant took the meat cleaver away from David, the victim started taunting and screaming insults at appellant, in an attempt to provoke appellant into stabbing him. However, appellant threw the meat cleaver down to the ground, and not at the victim, before walking away. Appellant and his mother then drove away from the scene.

{¶ 5} At the conclusion of the hearing, Judge Beathard found that the complaint filed by the state on July 26, 2011 was a new complaint, and that Judge Bender had inadvertently considered it to be an amended complaint. As a result, Judge Beathard vacated Judge Bender's August 4, 2011 judgment entry. Judge Beathard then adjudicated appellant delinquent for committing felonious assault, sentenced him to one year detention which was suspended "upon condition of no further violations of probation or law," and placed him on community control.

{¶ 6} Appellant appeals, raising four assignments of error.

{¶ 7} Assignment of Error No. 1:

{¶ 8} THE TRIAL COURT ERRED BY IMPROPERLY AMENDING THE CRIMINAL COMPLAINT AGAINST APPELLANT.

{¶ 9} Appellant argues that the juvenile court erred by allowing the state to amend its complaint from aggravated assault to felonious assault in violation of Juv.R. 22(B).

{¶ 10} Juv.R. 22(B) provides in relevant part:

> Any pleading may be amended at any time prior to the adjudicatory hearing. After the commencement of the adjudicatory hearing, a pleading may be amended upon agreement of the parties or, if the interests of justice require, upon order of the court. A complaint charging an act of delinquency may not be amended unless agreed by the parties, if the proposed amendment would change the name or identity of the specific violation of law so that it would be considered a change of the crime charged if committed by an adult.

{¶ 11} Juv.R. 22(B) "prohibits the amendment of a pleading after the commencement or termination of the adjudicatory hearing unless the amendment conforms to the evidence presented and also amounts to a lesser included offense of the crime charged." 1994 Staff Notes, Juv.R. 22(B).

{¶ 12} It is well-established that aggravated assault is not a lesser included offense of felonious assault. *State v. Deem*, 40 Ohio St.3d 205, 210 (1988); *State v. Chambers*, 12th

Dist. No. CA2004-03-069, 2005-Ohio-1682, ¶ 7. Rather, aggravated assault is an inferior degree of felonious assault because its elements are identical to those of felonious assault, except for the additional element of serious provocation. *Deem* at 210-211. "In other words, aggravated assault is the same conduct as felonious assault but its nature and penalty are mitigated by provocation." *State v. Parnell*, 10th Dist. No. 11AP-257, 2011-Ohio-6564, ¶ 20.

{¶ 13} Upon reviewing the record, we find that the complaint filed by the state on July 26, 2011 was not an amended complaint but rather a new complaint, and that the juvenile court, via Judge Beathard, did not amend the May 12 complaint from aggravated assault to felonious assault.

{¶ 14} The record shows that when the first complaint was filed on May 12, 2011, David D. Bender was the Fayette County Prosecutor. A few days later, he was sworn in as a Fayette County Juvenile Judge. He began his term on May 18, 2011. The record indicates that Judge Bender subsequently recused himself from appellant's case which was then assigned to Judge Beathard. On July 26, 2011, the state filed a separate complaint against appellant under a new case number, charging appellant with a different offense. At the adjudicatory hearing, the state explained that the second complaint was in fact a new complaint because (1) the new charge was a second-degree felony whereas the first charge was a fourth-degree felony, and (2) "complaints cannot be amended if the result of the amendment results [in] an escalation of the seriousness of the charge." At the hearing (and on appeal), the state took issue with Judge Bender's authority to sua sponte issue his August 4, 2011 judgment entry.

{¶ 15} When Judge Bender issued his judgment entry (thereby amending the first complaint), he had already recused himself from the case and was no longer assigned to the case. "An order signed by a judge who has recused himself or herself from a case is void because the judge possessed no authority to act on behalf of the court." *T.M. v. J.H.*, 6th

Dist. Nos. L-10-1014 and L-10-1034, 2011-Ohio-283, ¶ 73, citing *In re B.D.*, 11th Dist. Nos. 2009-L-003 and 2009-L-007, 2009-Ohio-2299. "A void judgment has no legal force or effect." *T.M.* at *id*. "A court has inherent power to vacate a void judgment because such an order simply recognizes the fact that the judgment was always a nullity." *Van DeRyt v. Van DeRyt*, 6 Ohio St.2d 31, 36; *Polster v. Webb*, 160 Ohio App.3d 511, 2005-Ohio-1857, ¶ 12 (8th Dist.).

{¶ 16} Once he was no longer assigned to this case, Judge Bender had no authority to act concerning this case; his August 4, 2011 judgment entry was therefore a nullity. *State v. Raypole*, 12th Dist. No. CA99-05-012, 1999 WL 1042574, *1 (Nov. 15, 1999). Further, as the properly assigned judge to the case, Judge Beathard had inherent authority to vacate the August 4, 2011 judgment entry. *Polster* at ¶ 13.

{¶ 17} Therefore, in light of the fact the state filed a separate complaint under a new case number on July 26, 2011, and the fact that Judge Beathard subsequently vacated Judge Bender's August 4, 2011 judgment entry, we find that the complaint filed on July 26, 2011 was a new complaint, and that neither the state nor Judge Beathard amended the complaint against appellant from aggravated assault to felonious assault.

{¶ 18} Appellant's first assignment of error is accordingly overruled.

{¶ 19} Assignment of Error No. 2:

{¶ 20} THE TRIAL COURT ERRED BY FAILING TO PROPERLY CONSIDER THE MITIGATING CIRCUMSTANCES SURROUNDING THESE EVENTS.

{¶ 21} Appellant argues that the trial court erred by failing to consider the inferior degree offense of aggravated assault when it adjudicated him a delinquent child. Appellant asserts that given the testimony of his mother, there was evidence of serious provocation by the victim, and thus, the trial court was required to consider the inferior degree offense of aggravated assault.

{¶ 22} The case at bar was a bench trial. It is well-established that a trial court is presumed to know the applicable law and apply it accordingly. *State v. Lloyd*, 12th Dist. Nos. CA2007-04-052 and CA2007-04-053, 2008-Ohio-3383, ¶ 28. Moreover, in a bench trial, a trial court is also presumed to have considered any inferior degree offense or lesser-included offense warranted by the evidence. *Id.* at ¶ 33.

{¶ 23} The juvenile court heard all of the evidence, including appellant's evidence of serious provocation, as illustrated by his mother's testimony. "Absent any indication to the contrary, we see no reason why the court in a bench trial would not automatically consider any * * * inferior degree offense warranted by the evidence." *State v. Williams*, 12th Dist. No. CA92-07-133, 1993 WL 185611, *3 (June 1, 1993). There is no indication that the juvenile court, as the fact-finder, did not consider the alleged provocation and decided it was insufficient to reduce the offense from felonious assault to aggravated assault. Appellant's second assignment is accordingly overruled.

{¶ 24} Assignment of Error No. 3:

{¶ 25} THE TRIAL COURT ERRED BY FINDING APPELLANT DELINQUENT BASED UPON INSUFFICIENT EVIDENCE.

{¶ 26} Assignment of Error No. 4:

{¶ 27} THE TRIAL COURT ERRED BY FINDING APPELLANT DELINQUENT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 28} Appellant argues that given a state witness' testimony that appellant merely threw the meat cleaver to the ground and not at anyone directly, and the fact he was taunted and threatened by the victim and David, the juvenile court's decision adjudicating him delinquent for felonious assault is not supported by sufficient evidence and is against the manifest weight of the evidence.

{¶ 29} The standards of review applied in determining whether a juvenile court's

finding of delinquency is supported by insufficient evidence or is against the manifest weight of the evidence are the same standards applied in adult criminal convictions. *In re P. G.*, 12th Dist. No. CA2006-05-009, 2007-Ohio-3716, ¶ 13-14.

{¶ 30} "In reviewing the sufficiency of the evidence supporting a criminal conviction, an appellate court examines the evidence in order to 'determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt.'" *State v. Smith*, 80 Ohio St.3d 89, 113 (1997). 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. *In re P.G.* at ¶ 13. In such a review, a reviewing court must not substitute its evaluation of the witnesses' credibility for that of the trier of facts. *Id.*

{¶ 31} "In determining whether a conviction is against the manifest weight of the evidence, the 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 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). When reviewing the evidence under a manifest weight challenge, an appellate court must be mindful that the original trier of fact was in the best position to judge the credibility of witnesses and the weight to be given the evidence. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus.

{¶ 32} The discretionary power to overturn a conviction based on the manifest weight of the evidence should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction or adjudication. *In re J.R.W.*, 12th Dist. No. CA2010-02-013, 2010-Ohio-2959, ¶ 13, citing *Thompkins* at 387.

{¶ 33} Because a finding that a conviction is supported by the manifest weight of the

evidence also necessarily includes a finding that it is supported by sufficient evidence, the determination that a juvenile court's delinquency finding is supported by the manifest weight of the evidence will also be dispositive of an appellant's sufficiency claim. *In re P.G.*, 2007-Ohio-3716 at ¶ 16; *In re K.F.*, 12th Dist. No. CA2009-08-209, 2010-Ohio-734, ¶ 11.

{¶ 34} Appellant was charged by complaint with felonious assault in violation of R.C. 2903.11(A)(2), which provides: "No person shall knowingly * * * cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance."

{¶ 35} Three state witnesses testified about the meat cleaver incident: Larry Cooper, who lives across the street from appellant, Heather Cooper (Larry's sister), and Jack Alltop, Jr. (Heather's boyfriend). On the day of the incident, Larry was home with Heather, Jack, and the victim. Heather and Jack both testified that as they were leaving Larry's house, they observed appellant and David arguing. Appellant was hitting David with a metal pipe. The victim walked toward appellant and David to stop the fight. The victim was yelling at appellant. The fight between appellant and David stopped; David crossed the street and went inside Larry's home. Appellant went into his house, came out with the meat cleaver, and walked toward Larry's house.

{¶ 36} Larry testified that at that point, appellant threw the meat cleaver at the victim from over his head. The victim was standing in the middle of the street five feet away from appellant. After picking up the meat cleaver, appellant threw it again at the victim who was now ten feet away. The meat cleaver landed "right beside Jack." It was then picked up by the victim. Larry testified that the victim kept screaming at appellant during their confrontation. However, Larry did not know what the victim was saying as he was not listening to him.

{¶ 37} According to Jack, after the victim went to stop the fight between appellant and David, appellant and the victim got into an argument. Appellant then went into his house

where he retrieved the meat cleaver. Appellant first swung the meat cleaver back and forth, and then threw it at the victim who was about five feet away. The meat cleaver missed the victim. Appellant picked up the meat cleaver. Although he did not see appellant throw it the second time, Jack saw the meat cleaver fly right past his shoulder, about three inches away. Afraid for his life, Jack went back into Larry's house. Jack testified that appellant was not playing around or throwing the meat cleaver accidentally. Rather, appellant was throwing it out of anger and was "screaming and cussing" while doing so.

{¶ 38} Heather testified that as appellant came out of his house with the meat cleaver, the victim stood in front of appellant. Heather was standing next to the victim. Appellant "took a swing" with the meat cleaver, "and almost got [them] both in the stomach with it." Appellant then threw the meat cleaver over into the grass, picked it up, threw it again, this time toward Jack, and almost hit Jack. The meat cleaver landed about a foot away from Jack. The victim subsequently picked it up.

{¶ 39} Heather testified she did not think appellant was trying to hit the victim when he swung the meat cleaver. Rather, appellant was just mad. Heather also testified she believed appellant was merely throwing the meat cleaver away, rather than at the victim, when he threw it twice.

{¶ 40} Appellant's mother testified that as a result of an argument between David and her, appellant came to her defense which, in turn, resulted in a heated exchange and ultimately a physical altercation between appellant and David. The altercation between appellant and David started in appellant's house and continued outside of the house. At some point, David went into a garage where he kept "[his] metal and junk," and picked up a meat cleaver. Armed with the meat cleaver, David told appellant he would kill his mother if she got in a truck and left. Appellant's mother testified that David was trying to swing the meat cleaver around appellant to cut her. Eventually, appellant was able to knock it out of

David's hand. David then retreated to Larry's house. By then, the state witnesses and the victim were outside.

{¶ 41} Appellant's mother testified that the victim then started to scream insults at appellant in an attempt to provoke appellant into stabbing him. Appellant responded by throwing the meat cleaver into some bushes and telling the victim he did not have "any beef" with him as he was not the one who had hurt his mother. Appellant's mother denied appellant threw the meat cleaver at anyone or swung it at the victim. She further testified appellant only threw it once. Appellant's mother denied appellant tried to cause physical harm to the victim. After the meat cleaver landed past Jack, the victim went to pick it up and told appellant and his mother he had the evidence and he was calling the police.

{¶ 42} With regard to the metal pipe incident, appellant's mother testified appellant did not hit David with a metal pipe. Rather, David and appellant each had a metal pipe and were playing together. In addition, the event took place three days before the meat cleaver incident.

{¶ 43} Upon thoroughly reviewing the record, we cannot say the juvenile court lost its way in adjudicating appellant delinquent for committing felonious assault. It is well-established that when conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the trier of fact believed the prosecution testimony. *State v. Lunsford*, 12th Dist. No. CA2010-10-021, 2011-Ohio-6529, ¶ 17. Further, "[t]he 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." *State v. Rhines*, 2d Dist. No. 23486, 2010-Ohio-3117, ¶ 39 (upholding a conviction for aggravated menacing following a bench trial).

{¶ 44} The state presented evidence that appellant, while angry, threw the meat cleaver at the victim twice. The juvenile court, as the trier of fact, was free to believe the

testimony offered by the state and reject the testimony offered by appellant. *State v. Walton*, 8th Dist. No. 96133, 2011-Ohio-5662, ¶ 19. We therefore find that the juvenile court's decision adjudicating appellant delinquent for felonious assault is not against the manifest weight of the evidence. As a result, we also find sufficient evidence to support the juvenile court's decision. Appellant's third and fourth assignments of error are overruled.

{¶ 45} Judgment affirmed.

HENDRICKSON, P.J., and PIPER, J., concur.