[Cite as *State v. Howard*, 2018-Ohio-973.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Patricia A. Delaney, P.J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	Case No. 2017CA00070
	:	
TORIANO DEONT'E HOWARD	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of Common Pleas, Case No. 2016CR2191

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: March 12, 2018

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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Delaney, P.J.

{¶1} Appellant Toriano Deont'e Howard appeals from the April 5, 2017 judgment entry of conviction and sentence entered in the Stark County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

The Escape

{¶2} This case arose on October 20, 2016, while appellant was on supervised probation with Probation Officer Nathan Clark. Appellant was on judicial release on an unrelated case and received and acknowledged his conditions of probation on August 24, 2016. These conditions required appellant, e.g., to report to Clark biweekly and to wear an ankle bracelet monitoring his location.

{¶3} On October 20, Clark called appellant and asked him to come into the probation office to discuss a matter that had arisen. Appellant reported as requested and spoke to Clark. Clark asked appellant to take a seat in the lobby of his office while Clark made some phone calls.

{¶4} While Clark was still on the phone, a staff member came in to report that the man waiting for Clark in the lobby left. Clark verified appellant left the building. He then called the electronic monitoring service and briefly tracked appellant's movements. The monitor soon alerted with notice of a "strap tamper:" appellant cut the ankle bracelet off approximately 15 minutes after he left the probation office.

{¶5} Clark called appellant's phone numbers with no response, and went to his reported last known address with no results. Clark requested a warrant for appellant's

arrest and was unaware of appellant's movements until he was arrested by Canton police a month later.

The Assaults

{¶6} Anthony Sylvester is a bail bondsman and his partner is Franklin Frasure. Sylvester's company posted bond for appellant on two separate criminal cases.

{¶7} Sylvester learned of the warrant for appellant's arrest and investigated several locations associated with appellant. At one such address in northeast Canton, Sylvester and Frasure spotted appellant getting into a vehicle. The bondsmen followed appellant a short distance to a gas station and both men followed appellant inside the station, intending to take him into custody.

{¶8} Inside the station, Sylvester called appellant's name and approached him; appellant did not recognize him and walked over, smiling. When Sylvester identified himself and stated his intention to arrest appellant, his demeanor changed and he became combative and argumentative. Appellant said he wasn't going anywhere. Sylvester and Frasure grabbed appellant and struggled with him briefly before subduing him. Sylvester asked the station attendant to call police and appellant stood by, no longer combative.

{¶9} During the struggle, Sylvester made the decision to cuff appellant's hands in front of his body, as opposed to behind his back. Sylvester thought appellant might hurt himself while struggling and cuffing in front was a "compromise."

{¶10} Canton police arrived quickly and prepared to take custody of appellant. Ptl. Brian Wasilewski and his partner, Ptl. Buie, each took one of appellant's arms and led him out of the station. Appellant was docile until they were outside, when he pulled

away from Wasilewski, who told him, “it’s over, you’re getting in the car.” Officers led appellant to the police S.U.V., but he stiffened when the door was opened, resisting and preventing officers from placing him inside the vehicle.

{¶11} A struggle again ensued as appellant refused to get into the car. Officers decided to keep appellant’s hands cuffed in front because it was too risky to remove and replace the cuffs with bystanders in the area. The officers maneuvered the top half of appellant’s body into the back seat of the S.U.V. but his legs were still outside the vehicle. Sylvester and Frasure observed the tussle and assisted police, also trying to place appellant in the vehicle.

{¶12} As the group fought with appellant, Wasilewski and Sylvester each found themselves in the backseat of the police vehicle with appellant, at different times. Appellant flailed, kicked, and bit the men as his hands remained cuffed in front of him. Appellant bit Wasilewski, Buie, and Sylvester. Wasilewski also sustained a cut above his right eye that required stitches. Frasure attempted to Tase appellant with a “drive stun” applied directly to his skin but the Taser had no effect. The officers were unable to subdue appellant and he kept working his way out of the vehicle.

{¶13} Wasilewski and Buie called for a K-9 officer and Ptl. Barnhouse arrived on the scene with his K-9. He observed a struggle taking place: Frasure was attempting to get appellant into the S.U.V., and Wasilewski and Buie had their arms around Frasure. Barnhouse therefore thought Frasure was the arrestee and gave his dog the “attack” command. The dog bit Frasure on his rear hip and buttocks and the officers screamed “wrong guy.”

{¶14} In the meantime appellant was again out of the vehicle and still fighting. When Barnhouse saw a clear path to appellant's hip, he gave the "attack" command again and the K-9 bit appellant in the pelvis. The dog remained "on" appellant, who continued to struggle.

{¶15} Appellant's hands were still cuffed in front and he struck the K-9 in the face with his cuffed hands. Barnhouse screamed at appellant to stop striking the dog and jumped on his back. Appellant bit Barnhouse in the arm and continued to fight, even as the dog continued to bite. Barnhouse testified at trial that he never saw an arrestee "take the bite" and continue fighting to the degree appellant fought.

{¶16} Appellee's Exhibit 6, video from an officer's body camera, shows Barnhouse flip appellant, himself, and the K-9 out of the vehicle and onto the pavement. Finally the officers were able to cuff appellant's hands behind him, and at that point appellant said "OK, I'm done." The dog remained "on" until appellant was cuffed and in compliance with officers' commands.

{¶17} Medics treated appellant at the scene and transported him to a hospital.

Indictment, Trial, and Conviction

{¶18} Appellant was charged by indictment as follows: one count of escape, a felony of the fifth degree pursuant to R.C. 2921.34(A)(3)(C)(2)(b) [Count I];[1] one count of assault, a felony of the fourth degree pursuant to R.C. 2903.13(A)(C)(5) [Count II]; one count of assault, a felony of the fourth degree pursuant to R.C. 2903.13(A)(C)(5) [Count III]; one count of vandalism, a felony of the fifth degree pursuant to R.C 2909.05(B)(1)(a)

[1] The original indictment stated the escape count was a felony of the third degree. The offense degree was amended by appellee's motion dated March 20, 2017 and judgment entry of the trial court dated March 22, 2017.

[Count IV]; one count of possession of heroin, a felony of the fifth degree pursuant to R.C. 2925.11(A)(C)(6)(a) [Count V]; and one count of assaulting a police dog, a misdemeanor of the second degree pursuant to R.C. 2921.321(A)(1) [Count VI].

{¶19} Appellee filed a motion to try multiple indictments together, referring to three separate criminal indictments, of which one is the instant case and two are unrelated. Appellant responded with a written objection and motion to sever. By judgment entry dated January 24, 2017, the trial court ruled the two other indictments[2] would be tried together but the instant case would be tried separately.

{¶20} On March 22, 2017, appellee entered a nolle prosequi on Counts III and IV, vandalism and possession of heroin.

{¶21} The matter proceeded to trial by jury. Appellant elected to represent himself and was found guilty as charged. He was sentenced to an aggregate prison term of 48 months, to be served consecutively with his sentences in Stark County Court of Common Pleas case numbers 2016CR1756 and 2016CR1803.

{¶22} Appellant filed a pro se motion for new trial which was overruled by the trial court on April 11, 2017.

{¶23} Appellant now appeals from the trial court's judgment entries of conviction and sentence dated April 5, 2017.

{¶24} Appellant raises one assignment of error:

ASSIGNMENT OF ERROR

{¶25} "APPELLANT'S CONVICTIONS WERE AGAINST THE SUFFICIENCY AND/OR MANIFEST WEIGHT OF THE EVIDENCE."

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[2] Stark County Court of Common Pleas case numbers 2016CR1756 and 2016CR1803.

ANALYSIS

{¶26} In his sole assignment of error, appellant argues his convictions are against the sufficiency and manifest weight of the evidence. We disagree.

{¶27} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, paragraph two of the syllabus. The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held, "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."

{¶28} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "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 jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered." *State v. Thompkins*, supra, 78 Ohio St.3d at 387. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶29} Appellant first challenges his conviction upon one count of escape pursuant to R.C. 2921.34(A)(3), which states: "No person, knowing the person is under supervised release detention or being reckless in that regard, shall purposely break or attempt to break the supervised release detention or purposely fail to return to the supervised release detention, either following temporary leave granted for a specific purpose or limited period, or at the time required when serving a sentence in intermittent confinement." Appellant argues the testimony of the probation officer, Clark, is insufficient to establish he broke detention because no corroborating evidence existed that appellant cut off the ankle bracelet. Appellee's evidence on this point was uncontroverted. The testimony of a single witness, if believed by the trier of fact, is sufficient to support a conviction. *State v. Cunningham,* 105 Ohio St.3d 197, 2004–Ohio–7007, 824 N .E.2d 504, at ¶ 51–57. The weight of the evidence and the credibility of the witnesses are determined by the trier of fact. *State v. Yarbrough,* 95 Ohio St .3d 227, 231, 2002–Ohio–2126, 767 N.E.2d 216, ¶ 79. We find appellant's escape conviction is supported by sufficient evidence and is not against the manifest weight of the evidence.

{¶30} Appellant next challenges his convictions upon two counts of assaulting police officers pursuant to R.C. 2903.13(A) and (C)(5), which state:

> No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn.
>
> * * * *.
>
> If the victim of the offense is a peace officer * * * while in the performance of their official duties, assault is a felony of the fourth degree.

{¶31} Appellant first argues Wasilewski was unable to state exactly how and when appellant struck him during the altercation, and there was no corroboration of his injuries. Our review of the record indicates Wasilewski testified his injuries occurred when he was in the back of the S.U.V. with appellant. Appellant's hands were under the officer's vest and his name tag was ripped off. At the prosecutor's request, the officer demonstrated for the jury how appellant kicked him from the rear of the cruiser. Appellee's exhibits 4a and 4b are photos of Wasilewski's head and face, displaying a scratch to the right side of his face and a bloody cut to his right eyebrow. Wasilewski testified the cut required stitches.

{¶32} Appellant similarly argues that Barnhouse's testimony was too imprecise to establish appellant bit him intentionally. We note Barnhouse testified he grabbed appellant while he was in the back of the cruiser and flipped himself, appellant, and the attached K-9 onto the pavement outside the vehicle. During this process, while Barnhouse's arm was near appellant's face, he was bit in the arm. The "flipping" is evident in the video, appellee's Exhibit 6, and the bloody bite mark on Barnhouse's arm is evident in the photo entered as appellee's Exhibit 5a, bleeding through the officer's uniform sleeve. At the point at which appellant was "flipped," he continued to struggle and fight despite the fact that the dog was latched on. We find substantial evidence from the testimony, photos, and the video to conclude appellant intentionally bit Barnhouse.

{¶33} Finally, appellant argues that Barnhouse's testimony that appellant "pushed" the K-9 as the dog bit him in the pelvis does not establish the "knowingly" element of assaulting a police dog. R.C. 2921.321(A)(1) states, "No person shall knowingly cause, or attempt to cause, physical harm to a police dog * * * [if] [t]he police

dog * * * is assisting a law enforcement officer in the performance of the officer's official duties at the time the physical harm is caused or attempted." Any degree of harm is sufficient; R.C. 2921.321(H)(1) defines "physical harm" in this context as "any injury, illness, or other physiological impairment, regardless of its gravity or duration." A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. R.C. 2901.22(B).

{¶34} In the instant case, we find ample evidence that appellant knowingly attempted to cause physical harm to the police dog by striking at the dog's face during the struggle. Appellee's evidence was uncontroverted, and was corroborated by the video. The assault on the police dog occurred during a "dynamic" fight; appellant was not subdued but was fighting, kicking, and biting. In the chaos, unfortunately the dog first bit Frasure. As the officers yelled "wrong guy," appellant took the opportunity to exit the police vehicle again and continued to fight with Wasilewski and Buie. During this struggle, Barnhouse again commanded the dog to attack because he saw a "clear path" through the melee to appellant; appellant tried to "dodge" the dog but the dog bit him in the pelvis area. Appellant then used his cuffed hands to "jam" them into the dog's face and to hit the dog.

{¶35} Appellant's argument on appeal is that he was subjected to the "intense pain and agony" of the attack of a trained K-9, therefore his "natural, instinctual response" was to defend himself against the dog's bite. Appellant concludes, therefore, that his survival instincts do not equate to a knowing assault upon the animal, implying that his

actions against the dog were essentially self-defense and he did not knowingly attempt to cause harm to the dog.

{¶36} We find this argument to be unavailing. Appellant did not merely react in self-defense; he continued to actively fight the officers, biting Barnhouse and striking the dog, continuing to resist despite the dog attached to his leg.

{¶37} We have reviewed the video, appellee's Exhibit 6, which is from the perspective of the body camera of Ptl. Russ, an officer who arrived once the fight was already in progress. The video demonstrates a chaotic and violent scene. At first the view is dark but struggling is evident in the audio, which includes the voices of appellant, police, and the bondsmen, all yelling and breathless. The officers discuss whether they should use a Taser or pepper spray; two officers repeatedly request a dog and dispatch says the dog is on its way. Throughout the video, officers yell "Stop resisting" and caution each other appellant is still "cuffed in the front." During the sound of a struggle, someone commands "Tase him right now" and two Taser strikes are audible, along with appellant's observation that "[the Taser] didn't even hurt."

{¶38} Shortly thereafter Barnhouse arrives and the warning "K-9, K-9" is heard. Someone says "watch out, K-9" and then the sound of screaming is heard, followed by shouts of "wrong guy." Despite the introduction of the K-9 onto the scene, the fighting continues; Barnhouse clearly yells "stop hitting my dog" and events now come into focus: the video shows Barnhouse flip appellant, the dog, and himself out of the vehicle and onto the pavement. The three continue to struggle until eventually appellant is re-cuffed and subdued.

{¶39} Appellant implies he acted in self-defense when the dog bit him. Although he does not address the legal elements of self-defense, we find the following case instructive. In *Haile v. State*, 431 Md. 448, 471–73, 66 A.3d 600 (2013), the petitioner also argued he acted in self-defense when he struck and injured a police dog. The court reviewed the elements of Maryland's law of self-defense,[3] which is similar to Ohio's,[4] and concluded:

> Applying the [self-defense] standard to the case *sub judice,* it is readily apparent that the petitioner's assertion of self-defense cannot succeed because he invited ("provoked") the conflict, thus failing to meet the third required element. The facts are unambiguous. The stabbing victim named and identified the petitioner as his assailant. Upon being found, the petitioner was ordered by law enforcement to stop. Disregarding this order, he fled from police. Officer Davies and Bennie, his canine, who joined the

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[3] Maryland's law of self-defense states: (1) The accused must have had reasonable grounds to believe himself ... in apparent imminent or immediate danger of death or serious bodily harm from his ... assailant or potential assailant; (2) The accused must have in fact believed himself ... in this danger; (3) The accused claiming the right of self-defense must not have been the aggressor or provoked the conflict; and (4) The force used must have not been unreasonable and excessive, that is, the force must not have been more force than the exigency demanded. *Haile,* supra, citing *Roach v. State,* 358 Md. 418, 429–30, 749 A.2d 787, 793 (2000) (citations omitted).

[4] Ohio's law of self-defense states: To establish self-defense in the use of non-deadly force, the accused must show that: (1) he was not at fault in creating the situation giving rise the altercation and (2) that he had reasonable grounds to believe and an honest belief, even though mistaken, that he was in imminent danger of bodily harm and his only means to protect himself from such danger was by the use of force not likely to cause the death or great bodily harm. *State v. Galloway*, 5th Dist. No. 15 CAC 11 0089, 2016-Ohio-7767, 74 N.E.3d 754, ¶ 26, citing *State v. Batrez,* 5th Dist. Richland No. 2007–CA–75, 2008-Ohio-3117, 2008 WL 2587610.

> search efforts as back-ups, discovered the petitioner and ordered him to surrender and to keep his hands in unobscured view. He ignored those orders and refused to submit to arrest, even when repeatedly and explicitly warned that non-compliance would result in Bennie being released. It was only after this series of events, constituting consistent disregard for the law by the petitioner, that the canine was released.
>
> *Haile v. State*, 431 Md. 448, 472, 66 A.3d 600 (2013).

{¶40} We find appellee's video evidence to constitute compelling evidence of appellant's "consistent disregard for the law" in the instant case.

{¶41} We reject the implication that appellant has a legal affirmative defense excusing his attack on a police animal under these circumstances. Appellant's statement that his conviction is "barbarous" overreach by the state of Ohio overlooks the reality of the justified use of force during an arrest, and ignores the specific facts of this case: appellant continued to fight and injure police officers. Use of the dog was required by appellant's actions. "The calculus of reasonableness [of a particular use of force] must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 396–97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). As an officer testified, this arrest was a "dynamic" situation involving full bodily contact between officers and arrestee. Appellant fought officers with the tools that remained available with his hands cuffed in front: his hands, his legs, and his teeth. He was not deterred by a Taser. Officers realized

the situation required a dog, which under most circumstances would have deterred further resistance.

{¶42} Appellant, though, continued to fight as he "took the bite." He struck out and knowingly assaulted the K-9, just as he assaulted Wasilewski and Barnhouse.

{¶43} Appellant's hyperbolic claims that his conviction for assaulting the police animal are "unrealistic," "sadistic," and effectively require an offender to allow himself to "simply lay there being savaged" ignore the facts of this case. We note the dog was present as much for appellant's benefit as the officers.' "Indeed, instead of generally causing deadly force to be used to apprehend criminals, we believe that these dogs often can help prevent officers from having to resort to, or be subjected to, such force. * * * *. The use of dogs can make it more likely that the officers can apprehend suspects without the risks attendant to the use of firearms in the darkness, thus, frequently enhancing the safety of the officers, bystanders and the suspect." *Robinette v. Barnes*, 854 F.2d 909, 914 (6th Cir.1988). We reject appellant's argument that he had a privilege to "defend himself" against the dog.

{¶44} Appellant's convictions are supported by sufficient evidence and are not against the manifest weight of the evidence. His sole assignment of error is overruled.

CONCLUSION

{¶45} Appellant's sole assignment of error is overruled and the judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, P.J.,

Baldwin, J. and

Wise, Earle, J., concur.