[Cite as *State v. New*, 2005-Ohio-6471.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 05AP-262
v.	:	(C.P.C. No. 04CR-04-2500)
Rush New,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

O P I N I O N

Rendered on December 6, 2005

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Timothy Pirtle, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶1} Rush New, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court found appellant guilty of felonious assault, in violation of R.C. 2903.11, a second-degree felony.

{¶2} On February 18, 2004, appellant accompanied Dianne Stiles to the home of her then estranged husband, Leslie. Dianne had been estranged from Leslie since June 2002. Dianne and Leslie had been acquaintances of appellant for approximately ten

years, and all three worked together at the time of the incident. Leslie had just arrived home from work and was walking into his house when Dianne and appellant arrived in separate vehicles. Dianne claimed she was going to the house to pick up some furniture and that Leslie knew this, although Leslie denied such knowledge.

{¶3} Although Leslie's testimony of the events leading up to the confrontation differ from Dianne's and appellant's, it is agreed that a confrontation between appellant and Leslie ensued, during which appellant repeatedly punched Leslie in the head and struck Leslie with a board from the bed of his truck. Dianne claimed that appellant punched Leslie only after Leslie punched appellant in the face. Appellant claimed that he punched Leslie only after Leslie knocked off his glasses. Appellant also stated he struck Leslie with a board, but only in the hand, after Leslie wrestled a box cutter from Dianne. According to Leslie, appellant struck him repeatedly in the head with the board.

{¶4} Appellant left the scene in his vehicle and met Dianne at her apartment. Appellant had been wearing Kevlar gloves, which have a rough surface, during the incident, and appellant admitted he disposed of the bloody gloves in a dumpster. Appellant also admitted that Dianne drove his vehicle from the apartment to avoid being seen by police. The police eventually located appellant.

{¶5} Appellant was charged with felonious assault, and a jury trial was held on January 19, 20, and 21, 2005. Appellant claimed he acted in self-defense. Appellant was found guilty, and the trial court sentenced appellant to two years incarceration pursuant to a judgment entry filed on March 16, 2005. Appellant appeals the judgment of the trial court, asserting the following two assignments of error:

> 1. The verdict is unsupported by and against the manifest weight of the evidence.
>
> 2. While conviction required physical harm by means of a deadly weapon, there was no deadly weapon.

{¶6} Appellant appears to challenge both the sufficiency of the evidence and the manifest weight of the evidence in his first assignment of error. To determine whether the evidence before the trial court was sufficient to sustain a conviction, this court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 279. 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. Id., paragraph two of the syllabus. 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. Id. As sufficiency is required to take a case to the jury, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency. *State v. Ricker* (Sept. 30, 1997), Franklin App. No. 97APC01-96.

{¶7} Our function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. In order to undertake this review, we must sit as a "thirteenth juror" and review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. Id., citing *State v.*

Martin (1983), 20 Ohio App.3d 172, 175. If we find that the fact finder clearly lost its way, we must reverse the conviction and order a new trial. Id. On the other hand, we will not reverse a conviction so long as the state presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense were established beyond a reasonable doubt. *State v. Getsy* (1998), 84 Ohio St.3d 180, 193-194; *State v. Eley* (1978), 56 Ohio St.2d 169, syllabus. In conducting our review, we are guided by the presumption that the jury "is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶8} R.C. 2903.11 provides, in pertinent part:

> (A) No person shall knowingly do either of the following:
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> * * *
>
> (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

{¶9} Appellant also claimed he was acting in self-defense. Self-defense is an affirmative defense and the defendant must prove it by a preponderance of the evidence. R.C. 2901.05(A); *State v. Williford* (1990), 49 Ohio St.3d 247, 249. In order to prove self-defense, the defendant must prove: (1) that he was not at fault in creating the violent situation; (2) that he had a bona fide belief that he was in imminent danger of death or great bodily harm; and (3) that his only means of escape was the use of force. *State v. Thomas* (1997), 77 Ohio St.3d 323, 326. A defendant claiming self-defense must also prove that he retreated or avoided danger if at all possible. Id. Generally, the aggressor or

instigator of a fight cannot rely on self-defense. *State v. Davis* (1982), 8 Ohio App.3d 205, 208.

{¶10} Appellant's argument under this assignment of error consists largely of pointing out inconsistencies in the testimony and offering personal opinions on the witnesses' credibility. However, the jury was in the best position to weigh the credibility of the testimony. *Seasons Coal Co.*, at 80. Further, although our review of the manifest weight of the evidence involves a limited weighing of the evidence, inconsistencies in the testimony generally do not render the verdict against the manifest weight of the evidence. *State v. Raver*, Franklin App. No. 02AP-604, 2003-Ohio-958, at ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67; *State v. Craig* (Mar. 23, 2000), Franklin App. No. 99AP-739, citing *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09-1236 (observing that, while the jury may take note of the inconsistencies and resolve or discount them accordingly, such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence). Indeed, jurors need not believe all of a witness' testimony, but may accept only portions of it as true, and take note of inconsistencies and resolve them accordingly. *Raver*, at ¶21.

{¶11} Given the above standards, we cannot say the jury's verdict was against the manifest weight of the evidence. Appellant basically asserts that his and Dianne's versions of the facts were more believable than Leslie's version. At trial, Leslie testified that he, Dianne, and appellant worked for the same employer and had been friends for about ten years. He said that their friendship ended in June 2002, one week before he separated from Dianne. Leslie believed Dianne and appellant had an inappropriate relationship. Dianne started moving out on June 7, 2002, and continued to move things

out of the marital home for three months, after which, he says, she had no property remaining in the house. He wanted to reconcile with Dianne, but he felt appellant was standing between them.

{¶12} The day of the incident at issue, Leslie said he stopped after work to buy some beer and then proceeded to his home. When he got out of his car, he noticed the front storm door was open, and then two vehicles pulled into his driveway at a high rate of speed, blocking his car from leaving. Appellant jumped out of the truck wearing a pair of Kevlar gloves, smacking his fist in his other palm, and saying Leslie could tell "this" to his buddies at work. Leslie testified he tried to get inside his house, but Dianne and appellant stepped in front of him, and then appellant started punching him in the face. He fought back and believed he may have struck appellant once in the face, knocking off his glasses.

{¶13} Leslie testified that he fell to the ground and was able to get back up several times, but the third or fourth time he got up, appellant retrieved a board with nails sticking out of it from the bed of his truck and hit him in the face with it. He stated he slid a box cutter from his work tool belt but dropped it. Leslie stated that Dianne picked it up after appellant told Dianne that the box cutter would support a self-defense claim. Leslie tried to get the box cutter back but could not. Leslie stated he was hit four or five times total with the board and fell to the ground four or five times. Leslie then announced he was going to call the police, and appellant and Dianne left the scene.

{¶14} Leslie had no memory of an ice scraper being used that day. He said from the time appellant pulled into his driveway until he left, five to ten minutes elapsed. He

also stated that, at the time of the incident, Dianne had moved everything from the house and did not have a key to the new locks.

{¶15} On April 20, 2004, appellant asked to speak with Leslie at work, and Leslie told his supervisor, Aaron Smith, that he was intimidated. Smith agreed to meet with them. At this meeting, appellant offered Leslie $1,200.

{¶16} On cross-examination, Leslie admitted that he and Dianne had a fight in 1997, when the police were called to the house, but he denied that he pinched or kicked Dianne after they got back from a camping trip in June 2002. He also admitted that, in October or November 2002, he wielded a saucepan against appellant when appellant barged into his home with Dianne. However, Leslie said he brandished the saucepan only in self-defense and had to flee his home. With regard to the incident in question, he was "fairly sure" he did not grab his box cutter until appellant struck him with the board.

{¶17} Aaron Smith testified that, at the meeting between appellant and Leslie, appellant offered Leslie $1,200 to $1,500 for his medical expenses in exchange for dropping the charges. Smith stated that appellant apologized for losing his temper the day of the assault and said his hand still hurt from hitting Leslie. Leslie stated that this amount was insufficient, given his medical expenses, missed work time, and ongoing pain.

{¶18} Dianne testified that Memorial Day weekend 2002, she and Leslie went camping with appellant and his wife. She said Leslie pinched her hard on her leg because she did not agree with something he had said, and she was embarrassed because appellant and his wife saw it happen. When they returned from the camping trip, Leslie came into their bedroom and began kicking her. Dianne also testified that Leslie would

sometimes throw her across the room, hit her, kick her, throw things at her, and call her names. Appellant counseled her regarding this abuse.

{¶19} Dianne further testified that, in November 2003, appellant went to the former marital home with her to pick up some of her possessions, and Leslie attempted to strike appellant with a pan, but she intervened. She returned to the former marital home with appellant on the day of the incident in question to pick up more things. She claimed Leslie knew she was coming, despite the fact that she never mentioned such in the police report. She tried the door before Leslie arrived, but it was locked. As she and appellant left in their separate vehicles, they saw Leslie driving up the road, so they turned around.

{¶20} Dianne stated that, when she was getting out of her car, Leslie and appellant were already talking. She thought Leslie had told appellant earlier in the day that appellant had a nice house, and appellant was asking Leslie why he had been watching his house. She said Leslie pulled out the box cutter. After he dropped the box cutter, he struck appellant, knocking appellant's glasses off. She grabbed the box cutter when the two men started fighting. Appellant struck Leslie five to ten times. Dianne stated that appellant then went to his truck to leave and Leslie grabbed her from behind to get the box cutter. She testified that appellant then obtained the board from his truck and knocked the box cutter out of Leslie's hand, even though in the police report she stated that appellant kicked the box cutter out of his hand and never mentioned the board. Dianne stated that she was confused when she wrote the police report. She also stated that appellant never hit Leslie's head with the board. Leslie then put on a pair of gloves and ran at appellant, after which they started fighting again. Appellant then tried to leave again, but Leslie got an ice scraper from appellant's truck and started swinging it at

appellant. Leslie then threw the ice scraper in the back of appellant's truck, and appellant drove away.

{¶21} Dianne testified that, after the incident, she and appellant went to her apartment, and she took appellant's truck to the store. She denied that appellant told her to drive his truck in case the police came, but she admitted that this was the first time she had ever driven his truck. She stated that Leslie was a coward and she had never known him to hit another man – only women, dogs, and children – but she also said Leslie talked about how he was the ultimate soldier and a Golden Gloves boxer.

{¶22} Appellant's testimony related facts similar, but not identical, to those given by Dianne during her testimony. Appellant testified that, when he and his wife went camping with Dianne and Leslie, he observed Leslie pinching Dianne while Leslie was driving. Prior to the incident in question, Dianne told appellant that Leslie would sexually abuse her, throw things at her, smother her, and throw her. Appellant stated that, in November 2004, he went with Dianne to pick up some of her belongings from the marital home, and Leslie tried to hit him with a saucepan.

{¶23} On the day in question, appellant and Dianne went to the house, but the door was locked. As they were driving away from the house, appellant saw Leslie in his car, so he and Dianne turned their vehicles around and went back to the house. Appellant stated he did not pull into the driveway abruptly or intentionally block in Leslie. After appellant pulled into the driveway, he got out of his truck and asked Leslie about a comment he had made to him at work earlier about appellant's having a nice house. However, although appellant admitted questioning Leslie about his comment and stating such in the police report, he insisted during trial that he took the earlier comment as a

compliment and not a threat. He also denied punching his fist into his other palm threateningly.

{¶24} The two started screaming at each other, then Leslie punched appellant in the face. Although he testified he never saw a box cutter in Leslie's hand, appellant stated in the police report that Leslie told him he was going to "cut him" and was reaching for his pocket. He stated that he only wrote this because Dianne later told him that this is what had happened. The two then began fistfighting. After striking Leslie five to seven times, Leslie fell but kept kicking at appellant. Appellant then started kicking Leslie and hitting him in the face with his fist.

{¶25} Appellant stated he walked back to his truck to leave but saw Leslie near Dianne holding the box cutter. He tried to talk to Leslie, and Leslie never made any movement toward him. Appellant went to the back of his truck and retrieved a board. He approached Leslie, swung the board at his hand, knocked the box cutter away, and then returned to his truck. Leslie kept yelling at him, put on a pair of gloves, and then charged at him while swinging. Another fistfight ensued, during which appellant struck him five or six times. After they separated, Leslie grabbed an ice scraper from the back of appellant's truck but then put it back into the truck bed. Appellant was able to drive away while Leslie and Dianne were arguing.

{¶26} After the incident, appellant met Dianne at her apartment. He stated he threw the gloves in a dumpster because they were bloody. Appellant also admitted that Dianne took his truck to "throw off" the police when they came looking for him so they would not catch him.

{¶27} Appellant testified that he met with Leslie after work and offered him money because he felt badly about what had happened. He admitted that he also wanted Leslie to drop the charges. He did not know the severity of Leslie's injuries at the time. He also admitted that he told Leslie that he lost his temper.

{¶28} Appellant's sole argument under this assignment of error is that his and Dianne's testimony was more credible than Leslie's testimony. In arguing Leslie's testimony was false, appellant raises several issues. However, we find none of the issues, separate or together, to be so convincing as to demonstrate that the jury clearly lost its way and created a manifest miscarriage of justice. Although some of the testimony indicated by appellant could be interpreted the way appellant urges, it could just as likely be interpreted in favor of the state. For instance, appellant asserts that it was inconsistent for Leslie to claim he was intimidated by appellant because they had been working together every day. However, appellant admitted he worked out, was in better shape, was taller, and could overpower Leslie. Dianne even testified that she had never seen Leslie fight another man. Thus, it is conceivable that Leslie was intimidated by appellant.

{¶29} Appellant also argued by way of an open-ended question, asking in general why he would go to Leslie's house to assault him for no reason. However, appellant admitted that Leslie had said something to him earlier that day about his house, the implication being that Leslie had been watching appellant's house. It was the first thing about which appellant questioned Leslie after getting out of his truck, and appellant stated in the police report that it was the first thing about which they spoke. Further, Leslie testified that, in November 2002, he was forced to arm himself with a saucepan after Dianne and appellant barged their way into his house and appellant clenched his fist to

punch him. Thus, it is apparent that these two men had an acrimonious relationship prior to the incident that could have provided the necessary motivation for appellant to commit the assault.

{¶30} Further, appellant contends that it goes against common sense that Leslie could have been beaten by fists in Kevlar gloves and then by a board without sustaining worse injuries. Although appellant claims that no person could remain conscious after so many punches, appellant himself admitted that he punched Leslie five to seven times, later kicked Leslie while he was on the ground and hit him in the face with his fist, and then struck Leslie five or six more times in a third bout. On the whole, appellant's version of the number of punches thrown is not significantly different from Leslie's version. Additionally, a review of the photographs admitted at trial reveals that Leslie's face was significantly bruised, cut, and abraded. Appellant also admitted that it was difficult to recognize Leslie from the photographs. Thus, we find appellant's contention, in this respect, to be unpersuasive.

{¶31} Appellant also asserts Leslie's claim that the beating lasted ten minutes is not credible. First we note that Leslie did not testify that the beating lasted ten minutes. Leslie's actual testimony was that five to ten minutes elapsed from the time appellant arrived at the house until he left. Also, none of the witnesses' versions of the events claimed that punches were thrown continuously throughout the span of the entire incident. Rather, all of the witnesses said there were periods of talking, yelling, and contacts other than punches and beatings with the board. Further, despite appellant's claims to the contrary, neighbors or passersby would not have necessarily witnessed even a ten-minute conflict, particularly given the time of day, which was about 3:20 p.m.,

when most would presumably still be at work. The jury may have properly taken any of these factors into account in weighing the credibility of the testimony.

{¶32} The remainder of appellant's arguments consist mainly of pointing out differences between the testimony of Leslie and that of appellant and Dianne without offering any reason why Leslie's testimony should not be believed. We have reviewed the testimony of the witnesses and, although this court can engage in some limited weighing of the evidence in a manifest weight review, we have no reason to disregard the credibility determination of the jury. Further, the jury may have found appellant's testimony not credible, given that he admittedly fled the scene, told Dianne to take his vehicle so the police would not find him, and disposed of his bloody gloves in a dumpster. These actions are more congruent with one who realizes he acted inappropriately rather than one who believes he acted in self-defense. Appellant also admitted that he and Dianne had discussed the day's events on several occasions in order to piece together the story of what had happened, which raises a question as to the independence of their testimony. The jury may also have not believed Dianne's testimony, as she denied she drove appellant's truck from her apartment to evade police, yet appellant admitted this was true. Dianne also told police that appellant kicked the box cutter out of Leslie's hand and never mentioned a board, which appellant admitted was not accurate. The jury was in the best position to weigh the credibility of all of the testimony, and appellant fails to present a persuasive reason why the jury's determination should be disregarded. See *Seasons Coal Co.*, at 80.

{¶33} In sum, appellant did not prove by a preponderance of the evidence that he acted in self-defense. Appellant failed to prove he was not at fault for creating the

situation, had a bona fide belief that he was in imminent danger of death or great bodily harm, and that his only means of escape was the use of force. See *Thomas*, at 326. Importantly, appellant also failed to prove he retreated or avoided danger. See id. Even if the incident took place as appellant described it, which the jury apparently did not believe, the beating could not be justified as self-defense. It is undisputed that appellant's truck was available to drive away during most of the incident, while Leslie's car was blocked in the driveway. Appellant also admitted that he had knocked Leslie onto the ground at several points, was confident he could overpower Leslie, and had attacked Leslie with the board when Leslie was not making any movement toward him with the box cutter. Appellant stated several times that he was obviously "getting the best" of Leslie and was not afraid of him. Thus, appellant failed to demonstrate he acted in self-defense. For these reasons, the trial court's judgment was not against the manifest weight of the evidence. Further, our conclusion that appellant's conviction was not against the manifest weight of the evidence is dispositive of the issue of sufficiency. See *Ricker*. Appellant's first assignment of error is overruled.

{¶34} Appellant argues in his second assignment of error that there was no physical harm by means of a deadly weapon. R.C. 2903.11(E)(1) provides that the definition of "deadly weapon" is the same as used in R.C. 2923.11(A), which states, " '[d]eadly weapon' means any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon." Appellant maintains the board was not "designed or specially adapted for use as a deadly weapon" and was not "used as a weapon."

{¶35} Regardless of whether the board was "designed or specifically adapted for use as a deadly weapon," we find the board was a deadly weapon because it was a "thing capable of inflicting death" and "used as a weapon." In his testimony at trial, appellant specifically conceded that one could kill someone with the nail-studded board he used. Thus, the board met the first statutory requirement that the "thing" be capable of inflicting death. Further, although appellant argues the board was not "used as a weapon" because it was used to defend himself, it is apparent from our discussion of appellant's first assignment of error that the jury did not believe he was acting in self-defense. The way in which the item is employed is the key to determining whether the item is "used as a weapon." See *State v. Sommerfeld*, Cuyahoga App. No. 84154, 2004-Ohio-6101, at ¶38; see, also, *State v. Deboe* (1977), 62 Ohio App.2d 192 (the manner of use of the instrument, its threatened use, and its nature determine its capability to inflict death). Whether the item was "wielded" as a weapon and used to seek a fight with the victim are factors to determine whether the item was used as a weapon. Id. Here, it is clear that appellant used the board as a weapon by swinging it at Leslie and, according to Leslie's testimony, striking him in the head with it, causing bruises, cuts, and lacerations. See *State v. Berry*, Cuyahoga App. No. 82772, 2003-Ohio-6642, at ¶38 (a stick was a deadly weapon because it was of sufficient weight to knock victim to the ground, inflict bruising and multiple lacerations, and cause headaches and blurred vision); *State v. Dixon* (May 30, 2001), Summit App. No. C.A. 20268 (a board with nails protruding from it is a deadly weapon when used to strike the victim); *State v. Williams* (June 8, 1989), Cuyahoga App. No. 55490 (by the manner in which a 2x4 board was used to beat the victim, it may be inferred that the board constituted a deadly weapon); *State v. Bowling*

(June 13, 1984), Hamilton App. No. 830739 (the size of the board and the severity of the injuries inflicted were proof enough that a board was capable of inflicting death and was possessed or used as a weapon); *State v. Gordon* (Feb. 14, 1979), Hamilton App. No. C-780107 (board wielded by appellant was capable of inflicting death and was used as a weapon, thus, a deadly weapon). Whether the board was a deadly weapon was a question of fact for the jury, which it resolved in the affirmative. See *State v. Watters*, Cuyahoga App. No. 82451, 2004-Ohio-2405, at ¶35 (whether the knife was a deadly weapon was a question of fact for the jury); *State v. Evans*, Franklin App. No. 01AP-1112, 2002-Ohio-3322, at ¶22 (whether automobile was used as a deadly weapon was a question of fact for the jury), citing *State v. Gimenez* (Sept. 4, 1997), Cuyahoga App. No. 71190. For the above reasons, we agree with the jury that the board used by appellant was a deadly weapon within the definition in R.C. 2923.11(A) because it was a "thing capable of inflicting death" and "used as a weapon." Therefore, appellant's second assignment of error is overruled.

{¶36} Accordingly, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and McGRATH, JJ., concur.

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