[Cite as *State v. Logan*, 2009-Ohio-2899.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 08AP-881 (C.P.C. No. 07CR12-9254)
Charles A. Logan,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 18, 2009

Ron O'Brien, Prosecuting Attorney, and *Kimberly M. Bond*, for appellee.

Mark M. Hunt, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Charles A. Logan ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas entered upon a jury verdict convicting him of one count of felonious assault, a second-degree felony, a violation of R.C. 2903.11. For the following reasons, we affirm the judgment of the trial court.

{¶2} The following facts were adduced at trial. The victim in this case, Michael Sowell ("Sowell"), was a friend of appellant's wife, Teri Brooks ("Brooks"). On December 21, 2007, appellant and Brooks were going through a divorce, but were still residing together on Broadleigh Road in Columbus, Ohio. On December 21, 2007,

Sowell was at work when he received a phone call from Brooks in which Brooks asked to borrow money. Sowell testified that later in the evening he received another call which came from Brooks' phone. Appellant was on the line and cussed at him and told him not to call his home again. Sowell ended the conversation by hanging up, however, appellant called back and made threats to hurt Sowell if he kept calling his home.

{¶3} Sowell testified he got off work that evening at 11:00 p.m., and went to the bank to get money to loan Brooks. He testified that he drove past appellant's home that evening to place money for Brooks, as well as advertising for rental properties, under a rock at the corner of Broadleigh and Astor. Sowell stated that while he was out of his truck, appellant came up behind him. Sowell turned to face appellant and noticed appellant had one hand in his pocket. The two exchanged words and Sowell testified that he was blind-sided by appellant when he was struck in the face with a metal rod or baton. He was struck three or four times before being able to grab hold of the baton.

{¶4} The men struggled, with each man trying to "head-butt" the other. Sowell testified that appellant stated if Sowell let him go that he would get a gun and shoot him. Sowell testified that he bit appellant's ear in the fight.

{¶5} Sowell suffered a small gash on his head and a knee injury, as well as the loss of teeth and a slight concussion. (Tr. 37, 42.) Sowell denied having a sexual relationship with Brooks and denied being able to get in his car to leave once he was approached by appellant. Finally, Sowell testified to serving time in prison for a felonious assault conviction.

{¶6} Brooks testified that the baton appellant used belonged to her. She testified that after the phone call between appellant and Sowell, appellant and the

couple's daughter got into an argument, whereupon their daughter left the home. Brooks stated that while she was on the phone trying to locate her daughter she saw appellant run up the street. As she went up the street, she saw Sowell's truck four to five houses away. As she approached the truck, she heard arguing and saw Sowell and appellant physically fighting and "locked-up" together. She testified that she was not involved with Sowell, but with another man who is also named Michael. Finally, she testified that Sowell and appellant had been in an argument before and that she and appellant were divorced in February 2008.

{¶7} Officer Billy Marshall ("Marshall") of the Columbus Police Department testified that on the day in question, he responded to a call regarding two males fighting. At the time of his arrival, appellant and Sowell were arguing next to a pickup truck. He and another officer separated the two men. He testified that appellant was bleeding and missing a piece of his ear. He further testified that Sowell had blood on his teeth and lips. The officer stated that he noticed no injury to Sowell's mouth or teeth. He testified that, although he did not find the missing piece of appellant's ear, he did find an open baton at the scene. Marshall stated that he had been trained as a police officer on how to use a baton similar to the one found at the scene, and that the baton was capable of inflicting lethal force and could be used as a deadly weapon.

{¶8} The defense called Detective Glen Sinoff ("Sinoff") of the Columbus Police Department as a witness. Sinoff was the detective assigned to the assault squad of the homicide unit and was called to the scene. Sinoff took photos of the scene and the injury sustained by both men. He took photos documenting Sowell's face and other injuries that Sowell complained of, and of appellant's injured ear.

{¶9} Appellant took the witness stand in his own defense. He testified that earlier in the evening he had been at a friend's home drinking beer with friends, where he consumed three to four beers. Upon his return home, he discovered Brooks on the phone with Sowell and admitted that he listened to the conversation and told Sowell not to call his home any more. According to appellant, Sowell threatened to come to the house and fight him. Appellant admitted to being angry and jealous. He also admitted to calling Sowell back after that phone conversation had ended, telling him to come over and "we'll do it right now." He testified that he told Sowell he would be on his front porch, essentially waiting for him. He testified that his daughter told him he was wrong for calling Sowell.

{¶10} Appellant testified that he saw Sowell drive past his home, turn around, and then back his truck up. Appellant testified that he heard Sowell yell at him to "come on up here." Appellant testified that he went to the truck and took with him a metal baton he had hidden up his coat sleeve. He stated that he took the baton as an equalizer because he weighed approximately 80 pounds less than Sowell and the baton was intended for protection. Appellant claims he dropped his arm for the baton to come out of his sleeve only after Sowell took one large step away from the truck toward appellant. Appellant stated that because the baton did not come out of his sleeve smoothly, he was unable to make good defense strikes at Sowell, but admitted to trying to "deliberately" hit Sowell to hurt him. Ultimately, according to appellant, Sowell ended up with the baton. Appellant testified to a previous domestic violence conviction.

{¶11} The defense made Crim.R. 29 motions at the close of the state's case and at the close of the evidence. The trial court overruled both motions.

{¶12} The jury was instructed on felonious assault, the affirmative defense of self-defense, and on aggravated assault, a fourth-degree felony, as a "lesser included" offense.[1] The jury returned a verdict of guilty on the charge of felonious assault. Appellant was sentenced to three years in prison. On appeal, appellant advances a single assignment of error for our review:

> THE VERDICT IS AGAINST THE SUFFICIENCY AND MANIFEST WEIGHT OF THE EVIDENCE.

{¶13} Appellant asserts by his single assignment of error that his conviction for felonious assault is not supported by sufficient evidence and is against the manifest weight of the evidence. Appellant does not dispute that he assaulted Sowell. Rather, he argues the evidence shows by a preponderance of the evidence that he was not guilty of felonious assault, but instead was guilty of the offense of aggravated assault. Appellant argues that his conduct was brought on by a sudden fit of rage while under the influence of passion, based on the fact that he came home and found his wife talking on the phone to Sowell, and that the physical assault occurred only after Sowell charged appellant. Alternatively, appellant argues that he is not guilty because he acted in self-defense.

{¶14} "A conviction based on insufficient evidence constitutes a denial of due process." *State v. Rawls*, 10th Dist. No. 03AP-41, 2004-Ohio-836, ¶25, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. The Supreme Court of Ohio

[1] Although the jury was instructed that the offense of aggravated assault was a lesser included offense of the offense of felonious assault, we note that such is not the law. Rather, the offense of aggravated assault is an inferior degree of felonious assault because its elements are identical to or contained within the offense of felonious assault, coupled with the additional presence of one or both mitigating circumstances of sudden passion or a sudden fit of rage brought on by serious provocation occasioned by the victim. *State v. Deem* (1988), 40 Ohio St.3d 205.

outlined the role of an appellate court presented with a sufficiency of evidence argument in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus:

> 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.

See also *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789.

{¶15} This test raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Rather, the sufficiency of evidence test "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson* at 319, 99 S.Ct. 2789. Accordingly, the weight given to the evidence and the credibility of witnesses are issues primarily for the trier of fact. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. The reviewing court does not substitute its judgment for that of the fact finder. *Jenks* at 279.

{¶16} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a "thirteenth juror." Under this standard of review, the appellate court weighs the evidence in order to determine whether 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." *Thompkins* at 387. The appellate court, however, must bear in mind the trier of fact's superior, first-hand perspective in judging the demeanor and credibility of witnesses. See *State v. DeHass* (1967), 10

Ohio St.2d 230, paragraph one of the syllabus. The power to reverse on "manifest weight" grounds should only be used in exceptional circumstances, when "the evidence weighs heavily against the conviction." *Thompkins* at 387.

{¶17} Appellant was convicted of felonious assault, in violation of R.C. 2903.11, which provides, in pertinent part:

> (A) No person shall knowingly do either of the following:
>
> (1) Cause serious physical harm to another or to another's unborn;
>
> (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

{¶18} The crime of aggravated assault contains the same elements, but also includes a mitigating element. R.C. 2903.12 provides, in pertinent part:

> (A) No person, **while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force**, shall knowingly:
>
> (1) Cause serious physical harm to another or to another's unborn;
>
> (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance * * *.

(Emphasis added.)

{¶19} Appellant does not dispute that the evidence adduced at trial was sufficient to prove the elements set forth in R.C. 2903.11. Rather, he argues that the evidence proves the existence of the mitigating element in R.C. 2903.12, making him guilty only of the inferior degree offense of aggravated assault. He contends that the evidence

demonstrated that he acted under the influence of sudden passion, or in a sudden fit of rage, brought on by serious provocation occasioned by Sowell, and that the provocation was reasonably sufficient to incite him into using deadly force.

{¶20} Initially, we note that the jury heard two somewhat different versions of how the events unfolded outside Sowell's truck and about the physical confrontation between the two men. The jury, as fact finder, was in the best position to determine the witnesses' credibility. "A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was offered at trial. The trier of fact is free to believe or disbelieve any or all of the testimony presented. The trier of fact is in the best position to take into account the inconsistencies in the evidence, as well as the demeanor and manner of the witnesses, and to determine which witnesses are more credible. Consequently, although appellate courts must sit as a 'thirteenth juror' when considering a manifest weight argument, it must also give great deference to the trier of fact's determination on the credibility of the witnesses." (Citations omitted.) *State v. Favor*, 10th Dist. No. 08AP-215, 2008-Ohio-5371, ¶10.

{¶21} Appellant argues that the following facts establish that he is guilty not of felonious assault, but of aggravated assault: he came home to find his wife talking on the telephone to a man who he suspected was having an affair with his wife, and who he had argued with in the past about contact with his wife; Sowell threatened appellant over the telephone and then drove by appellant's house, yelling "come on"; and when the two began a verbal altercation down the street from appellant's house, Sowell escalated it by charging at appellant.

{¶22} Even if the jury had credited appellant's testimony as being an accurate description of the events surrounding the assault, his testimony does not establish the mitigating element of aggravated assault. When appellant arrived home to find his wife on the phone with a man with whom he suspected she was having an affair, he became angry and jealous. But such a suspicion does not constitute serious provocation for purposes of R.C. 2903.12. *State v. Cayson*, 11th Dist. No. 2004-T-0118, 2006-Ohio-2011, ¶23.

{¶23} Appellant walked down the street to confront Sowell, approached him with a metal baton, and used it to hit him after Sowell stepped away from his truck toward appellant. Appellant stated that Sowell "got in his face," but did not attribute any act of violence or aggression to Sowell besides stepping toward appellant. On this evidence, the jury did not lose its way or render a verdict that was against the manifest weight of the evidence when it rejected appellant's contention that he acted under the influence of sudden passion or in a sudden fit of rage brought on by serious provocation by Sowell.

{¶24} For all the foregoing reasons, we find appellant's conviction to be supported by sufficient evidence and not against the manifest weight of the evidence. Accordingly, appellant's single assignment of error is overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and BROWN, JJ., concur.

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