[Cite as *State v. DiFrancesca*, 2011-Ohio-3087.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-340 (M.C. No. 2008 CR B 031008)
Kristoffer M. DiFrancesca,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 23, 2011

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, City Prosecutor, *Melanie R. Tobias* and *Orly Ahroni*, for appellee.

Soroka & Associates, LLC, *Roger Soroka*, and *Jesse Philicia Kanner*, for appellant.

APPEAL from the Franklin County Municipal Court

CONNOR, J.

{¶1} Defendant-appellant, Kristoffer M. DiFrancesca ("appellant"), appeals from a judgment of conviction entered by the Franklin County Municipal Court following a bench trial in which the court rejected appellant's claim of self-defense and found appellant guilty of assault and disorderly conduct. For the following reasons, we affirm.

{¶2} Appellant and Dawna Wood ("Ms. Wood") are the parents of a toddler named Sam DiFrancesca ("Sam"). Pursuant to a custody order in effect in 2008, appellant was to have custody of Sam during the week from Wednesday to Friday. On

Wednesday, October 8, 2008, Ms. Wood and her mother, Margaret "Lynn" Lancaster ("Ms. Lancaster") drove from Lancaster, Ohio to an exchange center called "Welcome to Our Place" in Columbus, Ohio in order to transfer Sam to appellant. Due to the contentious nature of their relationship, and pursuant to a court order, appellant and Ms. Wood used Welcome to Our Place in order to exchange Sam.

{¶3} Upon arrival at the exchange center, Ms. Wood and Ms. Lancaster discovered the facility had closed unexpectedly, so there was no one present to facilitate the exchange of Sam. Appellant arrived at the exchange center shortly after Ms. Wood and her mother and also realized that the center was closed. An altercation ensued between appellant and Ms. Lancaster and Ms. Lancaster was pushed and fell to the ground. The police were called to the scene but did not charge anyone. The police directed the parties to visit the city prosecutor's office if either party wished to file charges.

{¶4} The city prosecutor's office initially declined to prosecute. However, Ms. Lancaster wrote an appeal letter, and as a result, appellant was then charged with disorderly conduct, a fourth-degree misdemeanor and a violation of Columbus City Code 2317.11(A)(1), and with assault, a first-degree misdemeanor and a violation of R.C. 2903.13(A).

{¶5} On October 26, 2009, appellant signed a waiver of trial by jury and the case was tried to the court. The State of Ohio presented the testimony of the victim, Ms. Lancaster, as well as the testimony of Ms. Wood.

{¶6} Ms. Lancaster testified that, upon discovering that the exchange center was closed, she decided she would perform the exchange anyway, since she had previously performed similar exchanges at the police department, and because Ms. Wood did not want to have physical contact with appellant, due to the no contact order.

{¶7} When appellant arrived and exited his vehicle, he walked over to Ms. Wood's vehicle and attempted to open the door where Ms. Wood was seated. However, the door was locked, so appellant walked over to the side of the vehicle from which Ms. Lancaster was just exiting. Appellant used his cell phone video camera to record parts of his interaction with Ms. Lancaster. Before Ms. Lancaster could even retrieve Sam from the vehicle, appellant began yelling repeatedly, "Give me my son." (Tr. 21.)

{¶8} Ms. Lancaster testified she told appellant several times, "I'll get Sam for you." (Tr. 21.) She testified she put her hand on appellant's shoulder and gave him a little push and told him again that she would get his son. At that point, appellant pulled back his arm and made a fist before turning towards her "with this look of pure rage on his face." (Tr. 22.) However, appellant then put his hand down and placed his hands on each of her arms and attempted to pick her up to move her. Being unable to do so, appellant threw and/or pushed Ms. Lancaster, causing her to stumble and fall on her right hip and elbow. Appellant repeatedly yelled, "don't touch me," even though Ms. Lancaster testified she was not anywhere near him. (Tr. 24.)

{¶9} As Ms. Lancaster was getting up off the ground, appellant approached Ms. Wood's SUV. He reached through the open front door and unlocked the back door. Ms. Lancaster could hear appellant yelling at her daughter. Ms. Lancaster attempted to close the door on appellant's legs to try to distract him. Appellant exited the SUV and Ms. Lancaster got back into the SUV and waited for the police to arrive.

{¶10} Ms. Lancaster testified that she went to the emergency room after the incident. As a result of the fall, she suffered severe bruising on her thigh, as well as bruising on her elbow and arm. She also experienced wrist pain and had to wear a brace on her wrist.

{¶11} Counsel for appellant cross-examined Ms. Lancaster regarding the purported inconsistencies between her trial testimony and the information she provided in her appeal letter and to the police at the time of the incident. The most significant inconsistencies asserted by defense counsel were Ms. Lancaster's denial that she pushed appellant, despite a statement to police that she had pushed appellant, and her "new" testimony alleging that appellant had attempted to get inside the SUV and get to her daughter by pulling on the locked door handles. Ms. Lancaster also stated she was five feet, four inches tall.

{¶12} Ms. Wood testified that appellant exited his vehicle and was trying to open the back door to her SUV as her mother was exiting the front passenger side. Realizing the door was locked, appellant tried to lean inside the SUV through the open passenger door. Appellant was screaming, "Give me my son." (Tr. 66.) Appellant was also yelling, "Don't touch me." (Tr. 66.) Ms. Wood heard her mother advise appellant to back away, since he was not supposed to be near Ms. Wood, due to the no contact order. Ms. Wood heard Ms. Lancaster repeatedly telling appellant she would get Sam for him. However, appellant became infuriated. Appellant pulled back his arm and looked at Ms. Lancaster. At that point, Ms. Wood called 911.

{¶13} Although she feared appellant was about to punch her mother in the face, Ms. Wood observed appellant instead grab Ms. Lancaster, shake her, and throw her, which caused Ms. Lancaster to fall to the ground. Appellant then unlocked the back door to the SUV and began to enter the vehicle. Ms. Wood laid Sam on the bench seat in the back of her SUV and tried to shield Sam. She was fearful of appellant, who was pulling at her and demanding to have Sam. Ms. Wood testified that some of what happened was a

blur. Eventually, appellant backed away and Ms. Lancaster got back into the SUV and they waited for the police to arrive.

{¶14} On cross-examination, Ms. Wood denied that her mother pushed appellant, claiming that she had only tapped him on the shoulder. In addition, Ms. Wood testified that the no contact order between herself and appellant was still in effect, despite appellant's belief to the contrary.

{¶15} Appellant presented the testimony of several witnesses. However, only appellant's own testimony, as well as that of Officer Darren Egelhoff, is particularly relevant to this appeal.

{¶16} Officer Egelhoff testified he was called out to a disturbance and possible assault at Welcome to Our Place. Officer Egelhoff and another officer separated both parties and began interviewing them. Officer Egelhoff stated that both parties claimed there had been an assault, which he described as "more like a shoving match between both parties." (Tr. 108.)

{¶17} In reading from his report, Officer Egelhoff testified that Ms. Lancaster stated she had yelled at appellant several times to back away, due to a stay away order, and that she pushed appellant back, telling him she would give him the child, but appellant grabbed her and pushed her to the ground, causing bruising. Officer Egelhoff also read from his report regarding appellant's version of the events. Officer Egelhoff testified appellant claimed Ms. Lancaster pushed him away from the SUV and in his defense, he pushed her back, causing her to fall.

{¶18} Officer Egelhoff testified that both parties were referred to the city prosecutor's office. He also stated that when he ran appellant through LEADS, he did not find any evidence of a CPO or stay away order.

{¶19} On cross-examination, Officer Egelhoff was asked about the police department's policy on filing charges for misdemeanor offenses. He testified that in a situation involving a misdemeanor offense, if the officers did not witness the commission of the offense, it was police policy to refer the matter to the city prosecutor's office.

{¶20} Appellant testified on his own behalf and asserted the affirmative defense of self-defense. Appellant stated that Ms. Lancaster began yelling at him to leave as soon as he exited his vehicle. Because he had previously experienced contentious exchanges of his son, appellant had his cell phone ready to record any problems. Appellant followed Ms. Lancaster to the rear door of the SUV. Ms. Lancaster was telling him to back up and said he couldn't be there. At that point he began recording the events. Ms. Lancaster then grabbed his hand and began controlling the cell phone video camera, trying to keep him from recording anything important. Simultaneously, Ms. Lancaster was pushing him back from the SUV.

{¶21} Appellant testified he backpedaled away from the SUV and repeatedly asked Ms. Lancaster to stop touching him. He also asked Ms. Lancaster to give him his son. As her attack on him was becoming more and more aggressive, appellant twisted his wrist and pushed back to create some distance between himself and Ms. Lancaster, believing that once she was out of arm's reach, he would be safe and she would no longer be able to strike him. He testified that when Ms. Lancaster was grabbing and pushing, he felt threatened and believed she could have hurt him, given that she outweighed him by 50 pounds. When he pushed back, Ms. Lancaster fell. Appellant then backed away from her and began preparing to record the event with his cell phone again.

{¶22} After Ms. Lancaster got up, she headed back to the SUV and appellant started recording again, repeatedly asking her to get his son and stating that she

assaulted him. Ms. Lancaster accused him of pushing her and denied touching him. Appellant testified that Ms. Lancaster got into the SUV and closed the door, so he got into his vehicle and moved it so that he was no longer blocking a driveway. He waited there until officers arrived. Appellant informed the police that he was trying to defend himself and that he did not intend to harm Ms. Lancaster. The officers referred all of them to the prosecutor's office in the event they wished to file charges. In addition, one of the officers facilitated the exchange with Sam.

{¶23} Appellant also testified the no contact order prohibiting direct contact was no longer in effect and that there was a final custody order in effect which permitted direct contact for the exchange of Sam. Appellant further testified that, based upon his knowledge of cars and his experience as a mechanic, Ms. Lancaster's and Ms. Wood's testimony claiming he had been inside the SUV was implausible. He testified it would have been physically and logistically impossible for him to be standing outside the SUV and still lean inside the SUV, reach over the car seat and grab Ms. Wood.

{¶24} During the trial, appellant also identified the three 30-second video clips he recorded during the altercation.

{¶25} On cross-examination, appellant acknowledged that he was 30 years old and six feet, one inch tall and Ms. Lancaster was approximately 62 years old. He admitted Ms. Lancaster had never previously been physical with him. Prior to the point when she was pushing him back, she did not scratch, swing at or punch him, or threaten to do any of those things, and her act of pushing him backwards did not physically hurt him. He also admitted that he did not contact the police to assist with the exchange when things started to become heated.

{¶26} The trial judge rejected appellant's self-defense claim and found appellant guilty of both charges. Appellant filed a motion for new trial, which was denied following a hearing. Appellant was sentenced on March 26, 2010. On the assault charge, appellant was sentenced to 180 days with 118 days suspended and credit given for 2 days of time already served. Appellant was ordered to serve 60 of the remaining days on house arrest with work release privileges. He was also ordered to pay a $100 fine and court costs, stay away from Ms. Lancaster, and pay restitution in the amount of $263.83. In addition, he was placed on probation for 3 years. On the disorderly conduct charge, appellant was ordered to pay a $50 fine plus court costs.

{¶27} Appellant has filed a timely appeal and now asserts a single assignment of error for our review:

ASSIGNMENT OF ERROR

> [I.] APPELLANT'S CONVICTION FOR ASSAULT AND DISORDERLY CONDUCT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶28} In his sole assignment of error, appellant argues his convictions are against the manifest weight of the evidence, claiming he acted in self-defense in protecting himself from Ms. Lancaster's aggressive behavior. Appellant argues he proved the affirmative defense of self-defense by a preponderance of the evidence. The State of Ohio, on the other hand, argues appellant failed to prove all of the elements of self-defense by a preponderance of the evidence and, therefore, appellant's challenge must fail.

{¶29} The criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶25, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. Under

the manifest weight of the evidence standard, a reviewing court must ask the following question: whose evidence is more persuasive - the state's or the defendant's? Id. at ¶25. In cases involving a bench trial, " 'the trial court assumes the fact-finding function of the jury.' " *State v. Banks*, 10th Dist. No. 09AP-13, 2009-Ohio-4383, ¶9, quoting *Cleveland v. Welms*, 169 Ohio App.3d 600, 2006-Ohio-6441, ¶16.

{¶30} In determining whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving any conflicts in the evidence, the fact-finder clearly lost its way and thereby created such a manifest miscarriage of justice that the conviction must be reversed and a new trial must be ordered. *Thompkins* at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶31} A conviction should be reversed on manifest weight grounds only in the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, the determination of the weight and credibility to be afforded the evidence is a question for the trier of fact. *State v. Trembley*, 10th Dist. No. 10AP-132, 2010-Ohio-6528, ¶17. A defendant is not entitled to a reversal on manifest weight grounds simply because there was inconsistent testimony presented at trial. Id.; and *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21.

{¶32} Under Ohio law, self-defense has two different forms. *State v. Juntunen*, 10th Dist. No. 09AP-1108, 2010-Ohio-5625, ¶21. One form concerns the use of non-deadly force, while the other involves the use of deadly force. Id. The form involving the use of non-deadly force is applicable here.

{¶33} To establish self-defense involving non-deadly force, a defendant must prove: (1) he was not at fault in creating the situation that gave rise to the affray, (2) he had both reasonable grounds to believe and an honest belief, even if mistaken, that he was in imminent danger of bodily harm, and (3) the only means of protection from that danger was the use of force not likely to cause death or great bodily harm. *State v. McGowan*, 10th Dist. No. 08AP-55, 2008-Ohio-5894, ¶26. "If the defendant fails to prove *any one* of these elements by a preponderance of the evidence he has failed to demonstrate that he acted in self-defense." (Emphasis sic.) *State v. Jackson* (1986), 22 Ohio St.3d 281, 284. Furthermore, "[t]he degree of force permitted depends upon what is reasonably necessary to protect that individual from the imminent use of unlawful force." *State v. Puckett*, 10th Dist. No. 06AP-330, 2006-Ohio-5696, ¶22.

{¶34} Self-defense is an affirmative defense, and the burden of going forward with the evidence of self-defense, and the burden of proof for demonstrating self-defense, rests with the accused. *State v. Palmer*, 80 Ohio St.3d 543, 563, 1997-Ohio-312; and R.C. 2901.05(A). The proper standard for determining whether the accused has successfully raised the affirmative defense of self-defense is to inquire whether he has introduced sufficient evidence, which, if believed, would raise a question in the mind of a reasonable fact-finder as to the existence of such an issue. *State v. Mechior* (1978), 56 Ohio St.2d 15, paragraph one of the syllabus.

{¶35} In the case subjudice, we find appellant has failed to prove, by a preponderance of the evidence, all of the elements of the affirmative defense of self-defense. Therefore, his convictions are not against the manifest weight of the evidence.

{¶36} First, appellant has not demonstrated by a preponderance of the evidence that he was not at fault in creating the situation that gave rise to the affray. If the trial

court believed the testimony of Ms. Lancaster and Ms. Wood, which was within its prerogative, appellant was the one who initiated the physical confrontation when he balled up his fist as if to punch Ms. Lancaster, changed his mind, and then grabbed her arms and threw or pushed her to the ground.

{¶37} Alternatively, even if we consider and presume the validity of the testimony that Ms. Lancaster "pushed" appellant, there is still evidence to demonstrate that appellant was at fault in creating the situation which gave rise to the altercation.

{¶38} Instead of maintaining his distance in light of the no contact order, appellant parked only a few feet away from Ms. Wood's SUV. Appellant approached the SUV and ignored requests to back away from the SUV. Appellant's claim that the no contact order was no longer in effect, and thus there was no reason for him to back away, are belied by the nature of the elaborate exchange system put in place to facilitate the transfer of Sam.[1] Rather than staying near his vehicle while Ms. Lancaster retrieved Sam, appellant immediately approached Ms. Lancaster as she exited the SUV and repeatedly demanded that she get his son. The video clips introduced into evidence demonstrate that appellant demanded numerous times that Ms. Lancaster get Sam and Ms. Lancaster can be heard saying that she will get him. They also demonstrate appellant's proximity to the SUV. Additionally, there was testimony from both Ms. Lancaster and Ms. Wood that appellant attempted to open the back door of the SUV where Ms. Wood was seated.

[1] There was testimony from Ms. Lancaster, Ms. Wood, and a representative from Welcome to Our Place, establishing that, in using the facility to make the exchange, the parties arrived and left at staggered times and were placed in different rooms, and that a facility staff member made the exchange involving Sam so that appellant and Ms. Wood did not have to deal with or see one another. In addition, appellant himself testified that, pursuant to a court order, if Welcome to Our Place was closed and Ms. Lancaster was not present with Ms. Wood to facilitate the exchange, the visit had to be cancelled and rescheduled for the next day.

{¶39} Based upon the foregoing, we cannot say that the trial court lost its way when it rejected appellant's self-defense claim and instead determined that the testimony of Ms. Lancaster and Ms. Wood was more credible than that of appellant. There is evidence to support a determination that appellant's actions gave rise to the altercation.

{¶40} Second, appellant has not demonstrated by a preponderance of the evidence that he had both reasonable grounds to believe, and an honest belief, even though mistaken, that he was in imminent danger of bodily harm and his only means of protection was through the use of force not likely to cause death or great bodily harm.

{¶41} Even if we accept appellant's testimony describing Ms. Lancaster as having one of her hands on his hand, thereby controlling where he was pointing the cell phone video camera, and her other hand was on his chest, pushing him back from the SUV, this does not demonstrate reasonable grounds to believe he was in imminent danger or that the use of force was the only means available to protect himself.

{¶42} Appellant admitted that he was not physically hurt by Ms. Lancaster pushing him back. He further acknowledged that Ms. Lancaster did not scratch, punch, swing at, or threaten him. While appellant argued that Ms. Lancaster outweighed him by 50 pounds and that he felt threatened by her, the trial court was free to consider the fact that appellant was a 30-year old, six foot, one inch mechanic, while Ms. Lancaster was a five foot, four inch, 62-year old woman in determining whether or not it was reasonable for appellant to believe he was in "imminent danger of bodily harm." In reviewing the evidence, such a belief was not reasonable.

{¶43} Additionally, the fact that appellant continued to demand Sam and approached the SUV again after Ms. Lancaster fell, all while recording the events with his cell phone video camera, gives further credence to the trial court's apparent belief that

appellant did not feel threatened by Ms. Lancaster. Also, appellant could have easily left the immediate area or called police for assistance, rather than reacting with force.

{¶44} Appellant has further asserted that Ms. Lancaster should not be believed because she gave inconsistent testimony. Appellant argues Ms. Lancaster's testimony was inconsistent in that, at trial, she denied pushing appellant, while at the time of the incident, she reported to Officer Egelhoff that she had pushed appellant back and away from the SUV. Appellant further argues that because Ms. Lancaster's trial testimony presented the additional assertion that appellant had tried to get to her daughter by pulling on the door handles of the SUV when he first exited his vehicle, and because that fact was not set forth in her appeal letter, Ms. Lancaster's testimony is not credible and is therefore unreliable. We disagree.

{¶45} As previously noted, the fact that there may have been some inconsistencies in the testimony of Ms. Lancaster and/or Ms. Wood does not require a reversal on manifest weight grounds. The trier of fact is in the best position to take into account any inconsistencies, along with the witnesses' demeanor and manner of testifying, and determine whether or not the testimony is credible. *State v. Chandler*, 10th Dist. No. 05AP-415, 2006-Ohio-2070, ¶9, citing *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; and *State v. Stewart*, 10th Dist. No. 08AP-33, 2009-Ohio-1547, ¶17. Furthermore, appellant is not entitled to a reversal on manifest weight grounds simply because there was inconsistent evidence presented at trial. See *Trembley* at ¶17; and *Raver* at ¶21. The finder of fact may believe all, part, or none of a witness' testimony. Id. at ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶46} Much of the relevant testimony provided by Ms. Lancaster and Ms. Wood is inconsistent with the testimony provided by appellant. Yet, the trial court clearly found the

testimony of Ms. Lancaster and Ms. Wood to be more credible than that provided by appellant. We have reviewed the record, weighed the evidence, and considered the credibility of the witnesses and resolved all conflicts in the evidence, and we cannot find that the trial court so clearly lost its way that it created such a manifest miscarriage of justice as to warrant a reversal. This is not the exceptional case in which the evidence weighs heavily against the conviction.

{¶47} Accordingly, we overrule appellant's single assignment of error. The judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

BROWN and KLATT, JJ., concur.