[Cite as *State v. Jackson*, 2012-Ohio-2985.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-619 (C.P.C. No. 10CR-07-4265)
Kishawna S. Jackson,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 29, 2012

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Kishawna S. Jackson ("appellant"), appeals from a June 24, 2011 judgment of conviction and sentence entered by the Franklin County Court of Common Pleas, following a jury trial in which the jury returned a verdict finding appellant guilty of one count of assault in violation of R.C. 2903.13, a felony of the fourth degree. For the following reasons, we affirm.

{¶ 2} On July 22, 2010, a Franklin County Grand Jury indicted appellant on one count of assault in violation of R.C. 2903.13. The indictment alleged that, on July 12, 2010, appellant did knowingly cause or attempt to cause physical harm to Richard Foster, a peace officer who was in performance of his official duties.

{¶ 3} On July 26, 2010, appellant entered a plea of not guilty as to the charge in the indictment.

{¶ 4} On May 10, 2011, a jury trial commenced, wherein Officer Richard Foster ("Officer Foster") and Nasir Suliman ("Suliman") testified on behalf of appellee, the State of Ohio ("the State"). Appellant did not call any witnesses to testify on her behalf.

{¶ 5} That same day, the jury returned a verdict of guilty of assault, and that Officer Foster was a peace officer engaged in the performance of his official duties. On June 23, 2011, the trial court sentenced appellant to community control for a period of 18 months, under the conditions that appellant: (1) obtain her GED, and (2) continue working with her counselor at Southeast Care. The trial court journalized its judgment entry on June 24, 2011.

{¶ 6} On July 20, 2011, appellant filed a timely notice of appeal setting forth a single assignment of error for our consideration:

> Appellant's conviction was against the manifest weight of the evidence.

{¶ 7} We note that although appellant phrases her assignment of error as a question regarding manifest weight of the evidence, her argument only addresses issues regarding sufficiency of the evidence.

{¶ 8} "Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict." *State v. Cassell*, 10th Dist. No. 08AP-1093, 2010-Ohio-1881, ¶ 36, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In reviewing a challenge to the sufficiency of the evidence, an appellate court must determine "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." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, superseded by constitutional amendment on other grounds as recognized in *State v. Smith*, 80 Ohio St.3d 89, 102 (1997). "In this inquiry, appellate courts do not assess whether the state's evidence is to be believed, but whether, if believed, the evidence admitted at trial supports the conviction." *State v. Gibson*, 10th Dist. No. 10AP-1047, 2011-Ohio-5614, ¶ 22, citing *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79-80.

{¶ 9} In the present matter, a jury found appellant guilty of one count of assault in violation of R.C. 2903.13. R.C. 2903.13(A) defines assault as follows: "No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn. Further, R.C. 2903.13(C)(3) states, in relevant part, that: "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." Additionally, R.C. 2901.22(B) defines the culpable mental state of knowingly as:

> A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

{¶ 10} Here, appellant argues that the State failed to prove that she knowingly, as opposed to recklessly or negligently, caused or attempted to cause physical harm to Officer Foster. *See* appellant's brief, at 4. In support of this argument, appellant alleged that striking Officer Foster was a "spontaneous response" due to Officer Foster possibly stepping on appellant's flip-flop as he attempted to escort her out of the store. *See* appellant's brief, at 5.

{¶ 11} In response, the State argues that the evidence sufficiently proved that appellant acted knowingly because: (1) she engaged in a verbal altercation with Officer Foster; (2) she refused to leave the convenience store upon request; (3) as Officer Foster escorted her out of the convenience store, she swung her arm and struck him in the face; and (4) she continued her attempts to punch Officer Foster after being subdued. *See* appellee's brief, at 5.

{¶ 12} In viewing the evidence in a light most favorable to the prosecution, we conclude that there is sufficient evidence to prove, beyond a reasonable doubt, that appellant knowingly caused or attempted to cause physical harm to Officer Foster, a peace officer who was in performance of his official duties, in violation of R.C. 2903.13(A) and (C)(3). The testimony of Officer Foster confirms that, in his attempt to respond to Suliman's call for assistance due to an alleged theft, and to escort appellant from the convenient store, appellant caused him physical harm by swinging her arms, punching

him in the face, and cutting his lip. Officer Foster testified regarding the incident as follows:

> Q. You said the manager called you because there was some sort of theft incident?
>
> A. Correct.
>
> Q. Please continue explaining what happened.
>
> A. Okay. So, he called about that incident and a disturbance. I guess the female would not give up her information. And initially the manager did not want to prosecute. He just wanted the female to leave and to be trespassed, meaning I would document her information and she would not be allowed to come back into the store again or she could be charged with trespassing.
>
> * * *
>
> Q. When you arrived at the scene, were you driving your cruiser?
>
> A. Yes, I was.
>
> Q. What was the first thing you did?
>
> A. I pulled up right in front of the store and exited and entered the Hudson Beauty.
>
> Q. What did you see when you got inside?
>
> A. I walked in the back where the manager was standing with the female. They were discussing - - I can't remember exactly which words they were using. They were talking among one another.
>
> The manager approached me and stated this was the female he was having problems with, and he would like to get her identification to be trespassed.
>
> Q. What did you do?
>
> A. At that time I asked her if she had any ID. She stated, no, I don't have my fucking license on me. And I asked her if she knew her social security number. She says she did not. Then

I asked her to step outside with me so I could get her information off of our computer in the car. That would be my cruiser.

She refused saying to just go ahead and take me to jail you fucking white pig. So, I asked her one more time to step outside with me and she refused. I got her into an escort position, which is common to escort people out. She came with me.

* * *

Q. After you placed her in the escort position you said that she was going with you out the building?

A. Yes, towards the front of the door. She was still calling me names and yelling at me, but she was complying by walking with me.

Q. Okay. What happened next?

A. We exited the door. Right outside the door, right here in front of the store, you can see where the car is parked with the door opened.

* * *

And she turned on me swinging her purse hitting me in the mouth. And she was yelling get off me you fucking white pig.

At that time she continued to flail her arms trying to punch me. I was able to deflect her punches, grabbed her, and placed her on the ground placing her into handcuffs.

* * *

Q. After you placed her on the ground - - you said she is flailing trying to hit you with her fist. How did you know she was trying to hit you?

A. She was squared up in a fighting stance with me and throwing her fist along with her purse.

Q. Did you get hit in the face with her purse?

A. Yes.

> Q. Did it hurt?
>
> A. I wouldn't say it hurt. It cut my lip a little bit. I have been hit harder.
>
> Q. But it did cut your lip a little bit?
>
> A. It did.

(Tr. 24-30.) Further, Suliman testified that when Officer Foster and appellant got by the door, appellant threw "herself out of his arm and swinging her arm backwards and hit him in the neck or face area." (Tr. 64.)

{¶ 13} As stated above, pursuant to R.C. 2901.22(B), a person acts knowingly, regardless of her purpose, when she is aware that her conduct will *probably* cause a certain result or will *probably* be of a certain nature. Here, although appellant alleges that striking Officer Foster may have been a reflexive act, there is no evidence in the record to support that theory. However, the record clearly shows that appellant (1) became verbally abrasive with Officer Foster; (2) refused to cooperate with his line of questioning; and (3) swung her arm at his face as he escorted her from the convenience store. Based upon these facts, we believe appellant knew that swinging her arm back at Officer Foster's face would probably cause him injury.

{¶ 14} Therefore, pursuant to R.C. 2903.13(A) and (C)(3), and for the reasons stated above, we find sufficient evidence in the record to uphold appellant's assault conviction and that, during the assault, Officer Foster was a peace officer engaged in the performance of his official duty.

{¶ 15} Appellant also contends that her assault conviction was against the manifest weight of the evidence. "While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief." *Cassell* at ¶ 38, citing *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, citing *Thompkins* at 386. "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting

testimony." *Thompkins* at 387, citing *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). " 'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury 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, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). 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.

{¶ 16} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967). The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶ 58; *State v. Clarke*, 10th Dist. No. 01AP-194 (Sept. 25, 2001). The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson*, 10th Dist. No. 01AP-973 (Mar. 19, 2002); *State v. Sheppard*, 1st Dist. No. C-000553 (Oct. 12, 2001). Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶ 22; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶ 17.

{¶ 17} We note that although appellant alleged that her conviction was against the manifest weight of the evidence, appellant failed to set forth any specific arguments regarding the same. However, based upon the testimony of Officer Foster and Suliman, the jury could have reasonably believed that appellant knowingly caused or attempted to cause physical harm to Officer Foster.

{¶ 18} Further, in its jury instructions, the trial court explained:

> You are the sole judges of the facts, the credibility of the witnesses and the weight of the evidence.
>
> To weigh the evidence you must consider the credibility of witnesses. You will apply the tests of truthfulness which you apply in your daily lives.
>
> These tests include the appearance of each witness upon the stand; the witness' manner of testifying; the reasonableness of the testimony; the opportunity that the witness had to see, hear and know the things concerning the testimony; the accuracy of the witness' memory; frankness or lack of it; intelligence; interest and bias, if any; together with all of the facts and circumstances surrounding the testimony. Applying these tests, you will assign to the testimony of each witness such weight as you deem proper.
>
> You are not required to believe the testimony of any witness simply because he or she was under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief.
>
> You should not decide any issue of fact merely on the basis of the number of witnesses who testify on each side of an issue. Rather, the final test in judging evidence should be the force and weight of the evidence, regardless of the number of witnesses on each side who testify to an issue.

(Tr. 88-90.)

{¶ 19} Here, the jury heard testimony from Officer Foster regarding the details of the incident leading up to appellant striking him in the face. In his testimony, Officer Foster explained that he has been a police officer for seven and one-half years. (Tr. 22.) Further, Officer Foster described how appellant verbally attacked him by repeatedly calling him a "fucking white pig." (Tr. 26, 29.) Finally, Officer Foster testified that as he escorted appellant from the convenience store, she hit him in the face and cut his lip. (Tr. 29, 30.) In addition, the jury heard testimony from Suliman that appellant threw herself out of Officer Foster's arms, swung herself backwards, and hit Officer Foster in the neck or face area. (Tr. 64.)

{¶ 20} As previously stated, "[t]he determination of weight and credibility of the evidence is for the trier of fact." *State v. Shamblin*, 10th Dist. No. 06AP-249, 2006-Ohio-6001, ¶ 22. Further, "[t]he trier of fact is free to believe or disbelieve all or any of the testimony." *Id*.

{¶ 21} We decline to substitute our judgment for the trier of fact regarding the credibility of the witnesses or the weight to be given to their testimony. After reviewing the record in its entirety, we conclude there is nothing to indicate that the trier of fact clearly lost its way or that any miscarriage of justice resulted in convicting appellant of assault in violation of R.C. 2903.13(A) and (C)(3). Consequently, we do not find that the jury's verdict is against the manifest weight of the evidence.

{¶ 22} Accordingly, appellant's single assignment of error is overruled.

{¶ 23} Having overruled appellant's single assignment of error, the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BROWN, P.J., and BRYANT, J., concur.
