

[Cite as *State v. Mitchell*, 2012-Ohio-466.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	11AP-377 (C.P.C. No. 09CR-11-6952)
James D. Mitchell, Jr.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on February 9, 2012

Ron O'Brien, Prosecuting Attorney, and *Susan M. Suriano*,
for appellee.

W. Joseph Edwards, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Defendant-appellant, James D. Mitchell, Jr. ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which convicted him of felonious assault with a repeat violent offender specification. For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} Appellant's charge stems from him choking and beating Kim Beaver. Appellant pleaded not guilty and a trial ensued. A jury was empanelled to decide

whether appellant committed felonious assault, and the trial court was to decide whether appellant was a repeat violent offender.

{¶ 3} At trial, Beaver testified as follows. Appellant is the nephew (by marriage) of Beaver's mother, Osesie Frederick. Beaver and appellant dated around the year 1990. During this time, appellant told Beaver that he "messed this girl up really bad." (Tr. Vol. I, 56.) Appellant knew there was a warrant for his arrest, and he wanted Beaver to run away with him. Beaver refused and reported appellant to the police. The police arrested appellant, and afterward, he called Beaver and threatened to kill her. Appellant objected to Beaver's testimony about events linked to his prior criminal offense, and the court overruled it.

{¶ 4} Next, Beaver testified as follows about appellant assaulting her. On November 7, 2009, Beaver was in her bedroom when appellant came in and said that he wanted to talk. Beaver started to leave, but appellant threw her on the bed and said, "[Y]ou thought I was going to kill you 18 years ago." (Tr. Vol. I, 64.) He also choked her and punched her in the face while sitting on her chest. She screamed for help, and he left when her children and a friend, Vanya Clark, arrived.

{¶ 5} Beaver's left eye was hemorrhaging from the assault, and it was swollen shut for two months. She also had bruises around both eyes, and it took six to seven months for that injury to heal. In addition, she testified that the pain from appellant choking her was a ten on a scale from one to ten, and she indicated that the pain lingered for months. Finally, she admitted to consuming drugs and alcohol on the day of the assault, but she said they had no impact on her during the incident.

{¶ 6} Clark testified that she went to Beaver's bedroom after hearing a scream. She saw Beaver in the room with appellant, and Beaver was "beaten up really bad." (Tr. Vol. II, 10.) Frederick was living with Beaver on the day of the assault, and she testified that Beaver was "practically unconscious" on her bed after the incident. (Tr. Vol. II, 27.) She also noted that appellant had been in the bedroom with Beaver. Columbus Police Officer Jason Fischer was dispatched to Beaver's house after the assault, and he testified that he called for an ambulance to take Beaver to the hospital because of her injuries.

{¶ 7} The court admitted Beaver's hospital records into evidence. They confirm the injuries to her left eye, and they indicate that her nose was broken. In addition, they disclose that she had a high level of alcohol in her body and that she tested positive for cocaine. Lastly, in support of the repeat violent offender specification, Diane Smalley of the Franklin County Clerk of Courts testified, outside the presence of the jury, that appellant was convicted of involuntary manslaughter on March 19, 1991.

{¶ 8} After the prosecution rested its case, appellant moved for an acquittal, pursuant to Crim.R. 29(A), and the court denied the motion. The jury found appellant guilty of felonious assault, and the court labeled him a repeat violent offender. The court sentenced him to eight years in prison for the felonious assault conviction, but it did not impose an additional sentence for the repeat violent offender specification.

II. ASSIGNMENTS OF ERROR

{¶ 9} Appellant filed an appeal and assigns the following as error:

I. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE APPELLANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION.

II. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR ACQUITTAL PURSUANT TO CRIMINAL RULE 29.

III. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE APPELLANT WHEN THE CONVICTION [] WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.

IV. THE TRIAL COURT ERRED IN ALLOWING TESTIMONY REGARDING APPELLANT'S PRIOR CONVICTION IN VIOLATION OF THE OHIO RULES OF EVIDENCE THEREBY DEPRIVING APPELLANT OF HIS RIGHT TO A FAIR TRIAL UNDER THE OHIO AND FEDERAL CONSTITUTIONS.

III. DISCUSSION

A. Appellant's First and Second Assignments of Error

{¶ 10} We address together appellant's first and second assignments of error, in which he argues that his conviction for felonious assault is based on insufficient evidence and that the trial court erred by denying his Crim.R. 29(A) motion for an acquittal. We disagree.

{¶ 11} A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶ 37. That standard tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶ 192. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved beyond a reasonable doubt the essential elements of the crime. *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶ 34. We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484 (2001). In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *State v. Lindsey*, 190 Ohio App.3d 595, 2010-Ohio-5859, ¶ 35 (10th Dist.). *See also State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim).

{¶ 12} Appellant was convicted of felonious assault, pursuant to R.C. 2903.11(A), for knowingly causing serious physical harm to Beaver. Appellant contends that Beaver was not credible when she testified that he assaulted her. Questions of credibility are irrelevant to the issue of whether there is sufficient evidence to support a conviction, however. *See State v. Ruark*, 10th Dist. No. 10AP-50, 2011-Ohio-2225, ¶ 21. Instead, we conclude that Beaver's testimony, if believed, was sufficient to prove that appellant assaulted her.

{¶ 13} Next, appellant argues that the evidence failed to prove that he caused serious physical harm to Beaver. Under R.C. 2901.01(A)(5)(d), serious physical harm "involves some temporary, serious disfigurement." Also, under R.C. 2901.01(A)(5)(e), serious physical harm "involves acute pain of such duration as to result in substantial suffering or * * * any degree of prolonged or intractable pain." Pursuant to R.C. 2901.01(A)(5)(d) and (e), Beaver suffered serious physical harm when appellant (1) broke her nose, (2) caused her left eye to be swollen shut for two months and to hemorrhage, (3) gave her bruises that lasted six to seven months, and (4) made her endure acute and prolonged pain. *See State v. Jackson*, 10th Dist. No. 02AP-915, 2003-Ohio-2665, ¶ 23-25.

{¶ 14} For all these reasons, we conclude that appellant's conviction for felonious assault is based on sufficient evidence and that the trial court did not err by denying his motion for acquittal. We overrule appellant's first and second assignments of error.

B. Appellant's Third Assignment of Error

{¶ 15} In his third assignment of error, appellant asserts that his felonious assault conviction is against the manifest weight of the evidence. We disagree.

{¶ 16} When presented with a manifest weight challenge, we weigh the evidence 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. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶ 220. The trier of fact is afforded great deference in our review. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 26. And we reverse a conviction on manifest weight grounds for only the most exceptional case in which the evidence weighs heavily against a conviction. *Lang* at ¶ 220.

{¶ 17} Appellant contends that Beaver is not credible because Clark and Frederick failed to implicate him in the assault. But Clark and Frederick testified that appellant was with Beaver in the bedroom before they found her severely beaten. Accordingly, it was reasonable for the jury to infer from their testimony that appellant assaulted Beaver.

{¶ 18} Appellant also argues that Beaver could not accurately perceive what happened to her on November 7, 2009, because she consumed drugs and alcohol that day. Beaver said that the drugs and alcohol had no impact on her when the assault occurred, however. In any event, it was within the jury's province to believe Beaver's testimony that appellant assaulted her because Clark and Frederick corroborated it.

{¶ 19} To conclude, the trier of fact is in the best position to determine witness credibility. *State v. Cameron*, 10th Dist. No. 10AP-240, 2010-Ohio-6042, ¶ 43. Here, the jury accepted evidence proving that appellant committed felonious assault, and we discern no basis for disturbing the jury's conclusion. Accordingly, appellant's conviction for felonious assault is not against the manifest weight of the evidence. We overrule appellant's third assignment of error.

C. Appellant's Fourth Assignment of Error

{¶ 20} In his fourth assignment of error, appellant argues that the trial court abused its discretion by allowing Beaver to testify about events linked to his involuntary manslaughter offense. We disagree.

{¶ 21} Appellant first argues that Beaver's testimony was prohibited under Evid.R. 404(B), which states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Evidence of "other crimes, wrongs, or acts" is admissible, however, "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid.R. 404(B).

{¶ 22} The exception in Evid.R. 404(B) "must be construed against admissibility, and the standard for determining admissibility * * * is strict." *State v. Broom*, 40 Ohio St.3d 277 (1988), paragraph one of the syllabus. Nevertheless, the admission of evidence ultimately lies within the broad discretion of the trial court. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 62. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 23} Here, the record establishes that appellant's motive for assaulting Beaver developed from events linked to the involuntary manslaughter. Specifically, appellant threatened Beaver after she reported him to police when he confessed to the crime, and he referred to that threat when he later assaulted her. Consequently, Beaver's testimony about events linked to appellant's involuntary manslaughter offense was admissible under Evid.R. 404(B).

{¶ 24} Appellant also argues that R.C. 2945.59 barred Beaver's testimony. Under R.C. 2945.59, evidence of a defendant's prior criminal activity is admissible to show "his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system." "There is little difference between Evid.R. 404(B) and R.C. 2945.59." *State v. Horsley*, 10th Dist. No. 05AP-350, 2006-Ohio-1208, ¶ 22. Therefore, we reject appellant's argument under R.C. 2945.59 for the reasons we stated in our Evid.R. 404(B) analysis.

{¶ 25} Accordingly, the trial court did not abuse its discretion by allowing Beaver to testify about events linked to appellant's involuntary manslaughter offense. We overrule appellant's fourth assignment of error.

IV. CONCLUSION

{¶ 26} Having overruled each of appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and TYACK, JJ., concur.
