

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 12AP-632
v.	:	(C.P.C. No. 12CR-03-1164)
	:	
Robert J. Westmoreland, Sr.,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 11, 2013

Ron O'Brien, Prosecuting Attorney, and *Michael P. Walton*,
for appellee.

Thomas F. Charlesworth, for appellant.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendant-appellant, Robert J. Westmoreland, Sr. ("appellant"), appeals from his conviction in the Franklin County Court of Common Pleas of criminal offenses charged against him based on his actions in a physical altercation with his brother, Roy Rivers ("Rivers"). Appellant waived his right to a jury, and the trial court, as the finder of fact, found appellant guilty of felonious assault. The court sentenced appellant to six years of prison. Appellant contends that his conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. We reject these contentions and affirm appellant's conviction and sentence.

{¶ 2} As its only witness, the state called Rivers, who was then 59 years of age. Rivers testified that appellant was approximately four years younger than he, that the two men had had a strained relationship since they were both "little kids" (Tr. 26), and that

appellant believed that Rivers had, many years earlier when they were both under the age of 21, broken appellant's jaw. Rivers testified that appellant had once told him that he had not gotten over that incident.

{¶ 3} Rivers testified that, on the date of the dispute, February 26, 2012, he and his girlfriend were at the home of Daisy Elzie ("Elzie"), the mother of both men. Appellant at that time was residing with Elzie. Rivers testified that he observed appellant looking down at Rivers' girlfriend, who was lying on the couch in the family room, and that a verbal interchange ensued between the two men concerning appellant "looking at" Rivers' girlfriend. Rivers further testified that appellant then went to the dining room and opened a silverware drawer, returned to the family room, stabbed Rivers in his left leg with a knife, put the knife near Rivers' neck, and cut Rivers behind his ear, eventually leaving a scar. Rivers stated that their mother came downstairs, grabbed appellant, and pulled him away from Rivers. Rivers testified that appellant then left the house and that he, Rivers, called 911. Police and an emergency squad arrived, and the squad transported Rivers to the hospital emergency room. Police detectives took photographs of Rivers' injuries, which the court accepted into evidence. Rivers denied having a knife in his possession on the night of the incident.

{¶ 4} The defense called as its first witness Elzie, the men's mother. Elzie acknowledged that Rivers had long ago broken appellant's jaw, requiring it to be wired shut. She described Rivers as being someone who "likes to get in an argument." (Tr. 68.)

{¶ 5} As to the incident here at issue, Elzie stated that she heard the two arguing and attempted to intervene by getting between the two men. She testified that Rivers then pushed her down, and she fell to the floor. She did not see a knife and did not see appellant put his hand around Rivers' neck. Elzie further testified that Rivers "always had a knife" (Tr. 76), and that he sometimes put it under the couch or on the television stand. She stated, however, that she had never seen Rivers' knife in her couch. She stated that Rivers told her that appellant had stabbed him and she did see a "little bitty hole" in Rivers' leg (Tr. 77), but that there was not very much blood. She did not see appellant stab Rivers. Elzie, who was 79 years of age at the time of trial, acknowledged that she could not see or hear well and sometimes had difficulty remembering things.

{¶ 6} The defense also called a third brother, Timothy Westmoreland ("Westmoreland"), age 51. Westmoreland testified that Rivers frequently carried knives and box cutters and kept them under the pillow on their mother's couch before sleeping on it. Westmoreland described feeling a knife underneath him while sitting on the couch in his mother's home on an occasion prior to the February 26 incident. Westmoreland testified that Rivers acknowledged the knife as his when Westmoreland asked about it.

{¶ 7} Finally, appellant testified in his own behalf. He stated that he was 53 years of age and lived in his mother's home on the date of the incident. He stated that he had returned to the home shortly before the dispute. As did Rivers, appellant testified that Rivers had asked appellant why appellant was looking at Rivers' girlfriend. Appellant described Rivers as then "running his mouth." (Tr. 117.) Appellant testified that he initially "tried to ignore" Rivers but that Rivers was agitating him. (Tr. 118.) Appellant testified that their mother intervened just as the two men began "getting ready to tussle," (Tr. 119) and that Rivers then pushed both appellant and their mother, causing their mother to fall and appellant to get "hyped" (Tr. 120) and upset. Appellant stated that, at that point, he pushed Rivers in the chest, causing Rivers to fall hard back onto the couch and that Rivers then uttered an expletive. Appellant acknowledged that his hands were "up around [Rivers'] face" (Tr. 121) during what he described as the tussle and that, after their mother fell, he might have scratched Rivers behind the ear with his fingernails. Appellant denied ever picking up a knife, seeing a knife, or stabbing Rivers with a knife. He denied seeing a puncture wound or blood. He testified that he generally tried to avoid Rivers and "had no relationship with him." (Tr. 124.) He stated that Rivers had broken his jaw sometime in the mid-1970s and that he, appellant, could forgive but not forget that.

{¶ 8} The trial court considered the foregoing evidence and found appellant guilty of felonious assault, in violation of R.C. 2903.11. The court explained that the case ultimately required a determination concerning the witnesses' credibility. The court found that the state had established that appellant was angry and that no knife was found in or around the couch after the incident, supporting the state's theory that appellant took the knife that caused Rivers' leg injury. The court concluded that a grudge between the two brothers had existed for decades. The court did not find it credible that Rivers' injuries were a fabrication or that Rivers was accidentally injured when he sat down on the

couch. The court concluded that the state had proven beyond a reasonable doubt that appellant acted knowingly and intentionally to stab Rivers and cause him serious physical harm and that he used a deadly weapon, i.e., a knife, in doing so.

{¶ 9} Appellant assigns the following error for this court's review:

Appellant's conviction was not supported by sufficient evidence
and was against the manifest weight of the evidence.

Sufficiency of the Evidence

{¶ 10} We first consider whether sufficient evidence supported appellant's conviction of felonious assault in violation of R.C. 2903.11, which provides that "no person shall knowingly * * * [c]ause serious physical harm to another." A challenge to the sufficiency of the evidence is a legal standard that tests whether the evidence is legally adequate to support a verdict. *State v. Ingram*, 10th Dist. No. 11AP-1124, 2012-Ohio-4075, ¶ 18. The inquiry presents a question of law, not fact. *Id.*

{¶ 11} In determining whether the evidence is legally sufficient to support a conviction, "'[t]he 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" ' [and] * * * [a] verdict will not be disturbed unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact." *Id.*, quoting *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶ 34, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. Moreover, in a sufficiency of the evidence inquiry, appellate courts do not assess whether the prosecution's evidence is to be believed but whether, if believed, the evidence supports the conviction.

{¶ 12} Thus, in determining whether sufficient evidence existed to support appellant's conviction, we examine whether the testimony of the victim, Rivers, supported appellant's conviction of felonious assault. It clearly did. Rivers testified that appellant intentionally retrieved a knife which he used to stab Rivers in the leg and to cut him on the neck behind his ear. That testimony, if believed, was sufficient to support the trial court's findings that appellant knowingly caused serious physical harm to Rivers through the use of a deadly weapon.

Manifest Weight of the Evidence

{¶ 13} In reviewing an assertion that a trial court has convicted a defendant contrary to the manifest weight of the evidence, an appellate court sits as a thirteenth juror. *State v. Clouse*, 10th Dist. No. 11AP-857, 2012-Ohio-3471, ¶ 11, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). "An appellate court should reverse a conviction as against the manifest weight of the evidence in only the most 'exceptional case in which the evidence weighs heavily against the conviction,' instances in which the [fact finder] 'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Clouse*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). We are "guided by the presumption that the jury, or the trial court in a bench trial, 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" ' and we afford great deference to the fact finder's determination of witness credibility." *In re B.K.*, 10th Dist. No. 12AP-343, 2012-Ohio-6166, ¶ 11, quoting *State v. Cattledge*, 10th Dist. No. 10AP-105, 2010-Ohio-4953, ¶ 6, quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). *See also State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus (credibility determinations are primarily for the trier of fact).

{¶ 14} The trial court evaluated the credibility of all the witnesses and found Rivers' testimony that appellant stabbed him and cut him with a knife to be more consistent with the physical evidence than the testimony of the defense witnesses. Nothing in the record persuades us that we should not defer to that evaluation. Appellant's conviction does not represent a manifest miscarriage of justice, nor is it an exceptional case in which the evidence weighs heavily against the conviction. We therefore reject appellant's contention that his conviction was against the manifest weight of the evidence.

{¶ 15} For the foregoing reasons, we overrule appellant's assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT, P.J., and SADLER, J., concur.
