

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2011-T-0043
DUSTIN A. BEACH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Girard Municipal Court, Case No. 2010 CRB 00546.

Judgment: Affirmed.

Robert L. Johnson, Girard City Prosecutor, 100 North Market Street, Girard, OH 44420
(For Plaintiff-Appellee).

Gregg A. Rossi, Rossi & Rossi, 26 Market Street, 8th Floor, P.O. Box 6045,
Youngstown, OH 44501 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Dustin A. Beach (“Beach”), appeals the Judgment Entry of the Girard Municipal Court, finding him guilty of Assault, sentencing him to 180 days in the Trumbull County Jail, and ordering him to pay a fine of \$1,000. The issue to be determined by this court is whether Beach’s conviction is against the manifest weight of the evidence. For the following reasons, we affirm the decision of the court below.

{¶2} On June 9, 2010, a Criminal Complaint was filed in Girard Municipal Court, charging Beach with Assault, a misdemeanor of the first degree in violation of R.C. 2903.13(B).

{¶3} On November 4, 2010, a bench trial was held on the charge. The following persons testified on behalf of the prosecution:

{¶4} Susan Ezzo-Cigolle testified that she is part-owner of the Mahoning Country Club, located on East Liberty Street, in Girard, Ohio. On May 15, 2010, the wedding reception for Dustin and Ashley A. Beach was held at the Country Club. At 11:00 p.m., Ezzo-Cigolle observed Beach come into the lobby in an agitated state. Beach “starts punching the walls, slapping the hangers *** shouldered [the lobby man] out of the way, punched a brick wall, hit the glass -- double glass doors -- two sets of them on the way out *** bangs his head on the pillar *** he proceeds to go out into the parking lot where all of our cars are parked and he’s kicking and punching cars.”

{¶5} Ezzo-Cigolle observed a large group of the wedding party at the far end of the parking lot. Beach was “fist fighting” with his father.

{¶6} Ezzo-Cigolle had a banquet boy call the police and summoned two bartenders, Everett P. Briggs and Terry J. Campbell. She asked the bartenders to go outside and “keep an eye on things” until the police arrived.

{¶7} Terry Campbell testified that, at about 11:15 p.m., he went into the parking lot of the Mahoning Country Club accompanied by Briggs. He observed a “melee” in the parking lot, with “a crowd around the groom.” Campbell went to break up an altercation in the bridal party and became separated from Briggs. When he turned back around to where Briggs was standing, he saw a commotion “like a rugby scru[m] with a

pileup.” He “ran over and started pulling people off.” Briggs was laying on his back at the bottom of the pile and Beach was on top of him.

{¶8} Everett Briggs testified that when they went into the parking lot that night, “there was a lot commotion and madness going on down in the middle of the parking lot.” When Campbell went to diffuse an altercation, he waited and observed the overall situation. Briggs noticed Beach coming toward him.

{¶9} And as he passed me, he kind of lifted up and he seen me and then he pushed me. And I kind of moved his arms out of the way. As he was pushing me, I kind of pushed his arms out of the way *** and he turned around. And that’s when he started saying stuff like, What MFer[sic]? You want to F with me? You want to F with me? And I told him that there was no sense of going to jail. The cops are on their way, you know. I was pretty much trying to stop him. Calm him down a little bit. The next thing I know I was struck *** in the side of the face. *** It was a closed fist. And it was in the middle of basically me explaining to him to calm down. So it caught me off guard. *** And I turned around and I tried to get him subdued, restrained, and *** that’s when we went to the ground. And *** that’s the last thing I remember is restraining him on the ground. *** The next thing I knew, I was getting up from *** five or six people on top of me.

{¶10} After regaining consciousness, Briggs noticed blood “spraying” from his nose. He was taken by ambulance to St. Elizabeth Heath Center. Briggs’ injuries included multiple fractures to the orbital bone, damage to his sinus cavity, and a deviated septum.

{¶11} The following persons testified on behalf of the defense:

{¶12} Zack Kosa, Beach’s best man, testified that he was in the bar and observed Briggs drinking when he, Kosa, was called outside because Beach was “ticked off.” He went outside along with Briggs and Campbell, and spoke with Beach until “everything was calmed down.” Kosa was then distracted by a “ruckus” involving

the family near the entrance to the Country Club. When Kosa returned his attention to Beach, he saw Briggs and Beach scuffling, with Briggs on top of Beach and pinning him to the ground. Kosa went over “to try to break it up but somebody else had already tried to grab the bartender [Briggs] to pull him off.” At this point, Briggs “got kicked from somewhere,” although he did not actually see the kick or where it came from.

{¶13} James Davis, a wedding guest, testified that he took at least eight shots of Black Velvet Whiskey with Briggs during the course of the evening.

{¶14} Rodney Dale Beach, Jr., Beach’s older brother, testified that he was standing near Beach and Kosa outside after the reception. Beach was intoxicated but under control. Rodney observed the two bartenders approach Beach. When they reached him, “there were some words exchanged” and Rodney began to walk over where Beach was standing. Rodney testified, “that’s when [Briggs] picked [Beach] up and slammed him on the ground” and got on top of him. When Rodney reached down to grab Briggs off of Beach, “somebody kicked him in the face.” Rodney did not observe who kicked Briggs.

{¶15} Monica Grachanin, Beach’s mother-in-law, testified that after the reception she was outside trying to convince Beach to leave. Beach was drunk and “could barely stand up.” According to Grachanin:

{¶16} [T]hen the bartender [Briggs] all of a sudden showed up, ripped his shirt off and said come on B. And then pushed him. Dustin pushed him back and then he pushed Dustin, knocked him to the ground and took me with him *** because I had Dustin’s arm.

{¶17} After returning to her feet, Grachanin went to fetch her husband while Kosa and Rodney tried to get Briggs off of Beach. Grachanin did not know how Briggs sustained his injuries.

{¶18} Ashley Beach, Beach's bride, testified that she observed Briggs take a shot of alcohol during the reception. She followed Beach outside because he was "very mad" and intoxicated. She noticed that the bartenders were walking alongside her and she asked Briggs what he was going to do. He replied that he was going to break up a fight. Ashley responded, "there isn't even a fight going on to be broken up so why are you going down there?" Briggs replied, "I just am," and began "to rip his clothing off." At this point, Campbell turned around, saying "I'm not going to be any part of this," and "if you want to go start a fight, that's on you."

{¶19} Ashley observed Briggs "tackle [Beach] to the ground," and Beach was "trying to wiggle out and Briggs [was] keeping a hold onto him." Ashley saw Briggs get kicked but did not know who did it, although it got "blood all over the gown."

{¶20} Beach testified that he had been drinking beer and shots that evening, as had Briggs. Beach complained to Briggs about making offensive comments to the bridesmaids when Briggs said, "he would have no problem taking my wife home and f-ing her." At first, Beach "called him outside and then it calmed down a bit." Briggs returned to bartending and Beach went outside. Beach testified that he was not hitting or banging his head against anything. Beach testified that he got into an argument with his father, who wanted to take his granddaughter (Beach's daughter) home because he thought Beach had had too much to drink. Beach denied any physical altercation with his father.

{¶21} Beach testified that Kosa and Rodney began talking to him to calm him down, when he noticed Briggs approaching:

{¶22} He was coming towards me with his shirt off ready to fight me. ***
He pushed me and then I pushed him back and then he tackled

me. I did shove him back. *** But once he tackled me, I was on the bottom and I know people were trying to get the kid off me. *** He was on top of me and I was just trying to keep his arms and my arms from moving. *** He was trying to hit me. The only mark I had was a big bump on my forehead where he hit me.

{¶23} Beach did not observe Briggs being kicked.

{¶24} On April 5, 2011, the municipal court issued a Judgment Entry, finding Beach guilty of an amended charge of Assault, in violation of R.C. 2903.13(A), sentencing him to 180 days in the Trumbull County Jail, and ordering him to pay a fine of \$1,000.

{¶25} On April 20, 2011, the municipal court issued a Judgment Entry, staying execution of the sentence pending appeal.

{¶26} On April 28, 2011, Beach filed his Notice of Appeal. On appeal, Beach raises the following assignment of error:

{¶27} “[1.] The trial court’s finding that appellant, Dustin A. Beach, was guilty of Assault, in violation of R.C. 2903.13(A), is against the manifest weight of the evidence and must be reversed.”

{¶28} A challenge to the manifest weight of the evidence involves factual issues. The “weight of the evidence addresses the evidence’s effect of inducing belief.” (Citation omitted.) *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25; *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997) (“[w]eight of the evidence concerns ‘the inclination of the *greater amount of credible evidence*, offered in a trial’”) (emphasis sic) (citation omitted). “In other words, a reviewing court asks whose evidence is more persuasive -- the state’s or the defendant’s?” *Wilson* at ¶ 25.

{¶29} “The [appellate] 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, 485 N.E.2d 717 (1st Dist.1983). “[T]he weight to be given to the evidence and the credibility of the witnesses are primarily for the trier of the facts.” *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), syllabus; *State v. Thomas*, 70 Ohio St.2d 79, 434 N.E.2d 1356 (1982), syllabus. However, when considering a weight of the evidence argument, a reviewing court “sits as a ‘thirteenth juror’” and may “disagree[] with the factfinder’s resolution of the conflicting testimony.” *Thompkins* at 387, citing *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). “The only special deference given in a manifest-weight review attaches to the conclusion reached by the trier of fact.” *Id.* at 390 (Cook, J., concurring).

{¶30} In order to convict Beach of Assault, the State had to prove, beyond a reasonable doubt, that he “knowingly cause[d] or attempt[ed] to cause physical harm to another.” R.C. 2903.13(A). With respect to persons, “physical harm *** means any injury, illness, or other physiological impairment, regardless of its gravity or duration.” R.C. 2901.01(A)(3).

{¶31} Initially, Beach takes exception to the municipal court’s factual findings that he “proceeded to violently kick Everett P. Briggs in the face to the point of unconsciousness,” and “jumped on top of Everett P. Briggs and proceeded to continue the beating.” Beach claims that there was no evidence presented by either party that he

kicked Briggs or hit him more than once. Similarly, Beach claims the municipal court convicted him because the defense witnesses were unable to identify the person who actually kicked Briggs and/or caused his injuries.

{¶32} The question of who caused Briggs' injuries is not strictly relevant to Beach's guilt for Assault. Briggs testified that Beach hit him in the side of the face with his closed fist. Briggs could not say whether or not this blow contributed to the injuries he suffered. It is well-established, however, that hitting or punching someone in the face constitutes an attempt to cause physical harm, regardless of the result of the blow. *State v. Blake*, 2nd Dist. No. 22437, 2008-Ohio-4728, ¶ 13 (“[a]lthough she may not have caused physical harm *** , one can infer that she attempted to cause physical harm due to the fact that she aimed her punch at Holt’s face”); *State v. Baker*, 2nd Dist. No. 22136, 2008-Ohio-3000, ¶ 32 (“[t]he eyewitnesses *** testified that Defendant punched Wilnessa Durham in the face/head area”; “[a]lthough Wilnessa Durham suffered no visible injury, that is not required to prove assault because a mere attempt to cause physical harm is sufficient to complete the offense”).

{¶33} Accordingly, the determinative issue in this appeal does not require us to consider who (if anyone) may have kicked Briggs in the face or how he suffered his injuries. Rather, if Briggs' testimony that Beach hit him in the face is credible, Beach's conviction is not against the manifest weight of the evidence.

{¶34} Beach argues that Briggs is not a credible witness. Beach cites to several discrepancies between Briggs' testimony and the testimony of the defense witnesses. For example, several defense witnesses testified that Briggs was drinking and Briggs denied consuming any alcohol. Defense witnesses testified that Briggs made offensive

comments toward/about the bridal party and Briggs denied doing so. Finally, defense witnesses testified that Briggs ripped his shirt off before attacking Beach, while Briggs testified that, after the altercation, his shirt “was almost off, *** not torn but *** bloody.”

{¶35} Beach also argues Briggs’ testimony is lacking in credibility because it does not explain why Beach would hit him without warning or provocation.

{¶36} Beach’s arguments fail to convince that the municipal court lost its way so that his conviction constitutes a miscarriage of justice. The discrepancies between Briggs’ testimony and the testimony of the defense witnesses have little bearing on either side’s credibility. These discrepancies are all ancillary to the fundamental question of whether Beach was the aggressor and punched Briggs in the face.

{¶37} Although Briggs was the only witness to testify that Beach hit him, there was considerable circumstantial evidence supporting Briggs’ account. Almost every witness on either side testified that Beach was intoxicated, while no witnesses testified that Briggs showed any signs of intoxication, regardless of whether he had been drinking.

{¶38} Ezzo-Cigolle testified that Beach was in an angry and violent temper as the reception was ending. She also described a physical altercation between Beach and his father. Several defense witnesses likewise testified that Beach was angry at the close of the evening. Beach admitted to being upset, citing offensive comments allegedly made by Briggs and his father’s proposal to take his daughter home as the reasons.¹

1. Assuming, arguendo, that Briggs did make offensive comments about Beach’s bride, this would constitute a motive for Beach to attack Briggs, rather than the other way around.

{¶39} The defense witnesses' testimony is at variance with the other bartender, Campbell's, testimony. They testified that the altercation occurred at a far end of the parking lot, by Beach's truck. Campbell, as well as Briggs, testified it occurred nearer the entrance of the Country Club. The defense witnesses testified that Campbell accompanied Briggs as he approached the truck. Campbell denied that either he or Briggs left the area in front of the Country Club. Finally, the defense witnesses consistently described Briggs being on top of Beach, whereas Campbell testified that Briggs was at the bottom of the pile.

{¶40} Moreover, the municipal court properly considered that the failure of any defense witness to be able to identify the person who allegedly kicked Briggs reflects adversely on their credibility.

{¶41} Considering all the testimony, Briggs' account of the event is credible, i.e., it is believable that an angry and intoxicated Beach could be readily provoked to punch someone standing in his way and suggesting that he would be going to jail if he did not calm down.

{¶42} The sole assignment of error is without merit.

{¶43} For the foregoing reasons, the Judgment Entry of the Girard Municipal Court, finding Beach guilty of Assault, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.