[Cite as *State v. Miller*, 2010-Ohio-3821.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-10-138
	:	O P I N I O N
- vs -	:	8/16/2010
DAVID B. MILLER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MASON MUNICIPAL COURT
Case No. 09CRB00796

Bethany S. Bennett, City of Mason Prosecutor, Matthew Nolan, 5950 Mason Montgomery Road, Mason, Ohio 45040, for plaintiff-appellee

Michele L. Berry, The Citadel, 114 East 8th Street, Cincinnati, Ohio 45202, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, David B. Miller, appeals his conviction in the Mason Municipal Court for assault. For the reasons discussed below, we affirm appellant's conviction.

{¶2} The charges stemmed from events that occurred on August 19, 2009, when appellant and his companions were involved in a physical altercation with Joshua Smith and Jeremy Bishop.

{¶3} The same day, a complaint was filed in Mason Municipal Court, charging appellant with assault in violation of Mason Codified Ordinances 537.03(a), a first-degree misdemeanor. Appellant was convicted in a bench trial in October 2009.

{¶4} Appellant now appeals his conviction and sentence, raising four assignments of error for our review. For ease of discussion, appellant's assignments of error will be addressed out of order.

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MILLER'S MOTION FOR ACQUITTAL BASED ON INSUFFICIENT EVIDENCE OF MILLER'S (1) IDENTITY AND (2) ROLE IN THE ALTERCATION TO SUSTAIN A CONVICTION FOR ASSAULT OF BISHOP OR SMITH. AS A RESULT, THE TRIAL COURT VIOLATED MILLER'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 1 SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION."

{¶7} Assignment of Error No. 4:

{¶8} "MILLER'S CONVICTION OF ASSAULT IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 1 SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION."

{¶9} In his first and fourth assignments of error, appellant argues that the trial court erred in overruling his Crim.R. 29 motion for acquittal, there was insufficient evidence to support his conviction, and his conviction was against the manifest weight of the evidence. In support of those claims, appellant argues: (1) the state failed to produce any witnesses who could identify him as the assailant, and (2) appellant offered

"irrefuted [sic] testimony that he acted in self-defense."

{¶10} We decline to consider appellant's sufficiency arguments for the following reasons. First, a Crim.R. 29(A) motion for acquittal tests the sufficiency of the evidence. See *State v. Lloyd*, Warren App. Nos. CA2007-04-052, CA2007-04-053, 2008-Ohio-3383, ¶38. It is well-established that a failure to renew a Crim.R. 29(A) motion for acquittal at the close of all the evidence constitutes a waiver of any error relative thereto. Id. Although appellant moved for acquittal at the end of the state's case-in-chief, he failed to renew his motion at the close of all the evidence. Secondly, Crim.R. 29 has no application in a case tried to the bench. Id. at ¶39, citing *State v. Massie*, Guernsey App. No. 05CA000027, 2006-Ohio-1515, ¶23. Lastly, even if appellant had preserved this issue for appeal, our determination that appellant's conviction was supported by the manifest weight of the evidence would be dispositive of the issue of sufficiency. *State v. Bates*, Butler App. No. CA2009-06-174, 2010-Ohio-1723, ¶7.

{¶11} In determining whether a conviction was against the manifest weight of the evidence, an appellate court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines 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. Ligon*, Clermont App. No. CA2009-09-056, 2010-Ohio-2054, ¶23; *State v. Eckert*, Clermont App. No. CA2008-10-099, 2009-Ohio-3312, ¶16. However, while appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide. *Ligon* at ¶23; *Bates*, 2010-Ohio-1723 at ¶8. Therefore, when considering whether a judgment is against the manifest weight of the evidence in a bench trial, an appellate court will not reverse the conviction where the trial court could reasonably conclude from substantial evidence

that the state has proven the offense beyond a reasonable doubt. *Eckert* at ¶16; *State v. Tranovich,* Butler App. No. CA2008-09-242, 2009-Ohio-2338, ¶7.

{¶12} Appellant was convicted of assault in violation of Mason Codified Ordinances 537.03(a), which provides as follows: "No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn."

{¶13} Seven witnesses testified at appellant's bench trial: Abbey Meyer, Jeremy Bishop, Joshua Smith, and Officers Jeffrey Wyss and Michael Bishop testified for the state, while appellant and Matthew McCarthy testified for the defense.

{¶14} Abbey Meyer, the state's first witness, testified that at approximately 11:30 p.m. on August 18, 2009, she left the Fox and Hound Bar in Mason, Ohio, with her three companions, Jennifer Bowman, Jeremy Bishop, and Joshua Smith. As Bowman drove toward Interstate 71, Meyer testified that she and Bowman were verbally harassed by several intoxicated men riding in appellant's vehicle. Meyer testified that the men in both vehicles began to argue at a stop light, and when the light turned green, appellant's vehicle veered across several lanes of traffic and followed them onto the highway. Meyer testified that "[w]e were turning left and the next thing I know they were right behind [our vehicle], maybe three inches on the bumper with their lights on swerving back and forth." Meyer testified that both parties threw glass objects at each other on the highway, causing damage to both vehicles. As a result, Bowman followed appellant as he exited onto Western Row Road in order to report his license plate number to the police. According to Meyer, after Bowman parked, four men exited appellant's vehicle, approached Bowman's vehicle, opened the doors and began punching Bishop and Smith. Meyer testified that when she reached into Bowman's back seat in an effort to defend her friends, her engagement ring scratched one of the assailants. At trial, Meyer could identify only one of the assailants as Matthew McCarthy, and further testified that

she did not see appellant "do anything."

{¶15} Additionally, Jeremy Bishop, Meyer's fiancé, testified that he threw a glass at appellant's vehicle on the highway because "they had thrown things at [Bowman's] car and were driving recklessly around us and the only thing I thought to do was just to throw something at them to get them to stop." According to Bishop, when Bowman parked on Western Row Road, three or four men approached Bowman's vehicle on both sides and punched him "probably 20 times." Bishop also identified Matthew McCarthy as one of the assailants, but explained that he could not identify any other men involved because he was "curled up" in the "fetal position" to protect his face.

{¶16} Joshua Smith also testified that after Bowman followed appellant's vehicle onto Western Row Road, she parked her vehicle "probably ten * * * [or] fifteen feet" behind appellant's vehicle. Smith testified that at this point, three or four men from appellant's vehicle ran toward Bowman's vehicle and began punching him and Bishop inside the vehicle.

{¶17} Officer Michael Bishop of the City of Mason Police Department testified that he spoke with appellant during the course of his investigation on August 19, 2009. According to Officer Bishop, appellant "admitted that he was one of the people that went back [to Bowman's vehicle] and was involved in the physical altercation." Officer Bishop further testified that he observed scratches on appellant's arm, stating "it's pretty obvious to me what has happened here. All scratched up and [appellant] didn't get all scratched up sitting in the driver's seat of the car."

{¶18} Witnesses for the defense testified that a different series of events occurred after both vehicles parked on Western Row Road. Appellant testified that he exited the highway with the intention of assessing the damage to his vehicle caused by the glass thrown by Jeremy Bishop. Appellant testified that after he parked, Bowman's

vehicle came "flying up" behind him, and shortly thereafter, a man exited Bowman's vehicle and attempted to hit appellant. Appellant testified that he ducked to avoid the hit, punched his assailant in self-defense, and subsequently returned to his vehicle and drove to a friend's house.

{¶19} Matthew McCarthy, appellant's friend, testified that when he exited appellant's vehicle to help assess the damage, "two guys * * * got out and like came towards us, and I looked over and I saw [appellant] already kind of getting into it with [one] guy." McCarthy testified that his four other companions remained inside appellant's vehicle during the entire altercation.

{¶20} Appellant argues that there was no evidence identifying him as Bishop or Smith's assailant and that the state's "inferential arguments attempting to prove [appellant] as the assailant" were tenuous and unreasonable.

{¶21} "In order to warrant a conviction, the evidence presented must establish beyond a reasonable doubt the identity of the accused as the person who actually committed the crime." *State v. Raleigh*, Clermont App. Nos. CA2009-08-046, CA2009-08-047, 2010-Ohio-2966, ¶45, quoting *State v. Harris,* Butler App. No. CA2007-11-280, 2008-Ohio-4504, ¶12. "The identity of the accused may be established by direct or circumstantial evidence." *Harris* at ¶12. See, also, *State v. Dewberry*, Fayette App. No. CA2007-01-004, 2007-Ohio-5394, ¶18; *State v. Nicely* (1988), 39 Ohio St.3d 147, 151 (circumstantial evidence and direct evidence inherently possess the same probative value, and there is no separate standard of review for circumstantial evidence).

{¶22} After reviewing the entire record, we find that appellant's conviction for assault was not against the manifest weight of the evidence. The state presented substantial circumstantial evidence to prove appellant's assault conviction beyond a reasonable doubt. Abbey Meyer testified her engagement ring scratched one of the

assailants as she attempted to block his punches. Further, Officer Bishop testified that he observed scratches on appellant's arms on the date of the incident. Further, appellant admitted to Officer Bishop "yes, I did get out of my car and went back to the car that was behind us and that is when we began to fight. * * * We were fighting."

{¶23} While appellant may claim that he fought in self-defense, it is well-established that "[w]hen conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the [trier of fact] believed the prosecution testimony." *Bates*, 2010-Ohio-1723 at ¶11. Rather, we find it reasonable that the trial court believed the state's version of the events, disbelieved the defense and convicted appellant accordingly. It is clear that the trial court found the prosecution's witnesses' testimony to be plausible and supported by other circumstantial evidence. Therefore, we find that appellant's assault conviction was not against the manifest weight of the evidence.

{¶24} Accordingly, appellant's first and fourth assignments of error are overruled.

{¶25} Assignment of Error No. 2:

{¶26} "THROUGH HIS UNREBUTTED TESTIMONY MILLER PROVED BY A PREPONDERANCE OF EVIDENCE THAT HE ACTED IN SELF DEFENSE; THEREFORE THE TRIAL COURT ABUSED ITS DISCRETION BY CONVICTING MILLER AFTER HE DEMONSTRATED A COMPLETE DEFENSE." [sic]

{¶27} In his second assignment of error, appellant argues that the trial court abused its discretion by convicting him because he successfully established all essential elements of self-defense. We disagree.

{¶28} An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *State v. Atkinson*, Warren App. No. CA2009-10-129, 2010-Ohio-2825, ¶7. When applying the

abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. Id.

{¶29} Under Ohio Law, self-defense is an affirmative defense. See *State v. Ford*, Butler App. No. CA2009-01-039, 2009-Ohio-6046, ¶19. To establish self-defense, the defendant must establish by a preponderance of the evidence: "(1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) that the defendant must not have violated any duty to retreat or avoid the danger." Id.; *State v. Robbins* (1979), 58 Ohio St.2d 74, 79-80. See, also, R.C. 2901.05(A). The Ohio Supreme Court has held that the "elements of self-defense are cumulative. * * * 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. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, ¶73; *State v. Jackson* (1986), 22 Ohio St.3d 281, 284.

{¶30} Our review of the record indicates that appellant failed to provide sufficient evidence to warrant a finding that he acted in self-defense. Although appellant contends that he was not at fault in creating the situation that gave rise to the physical altercation, the evidence presented demonstrated otherwise. Abbey Meyer, Joshua Smith and Jeremy Bishop each testified that three or four individuals exited appellant's vehicle, approached Bowman's vehicle, and repeatedly punched Smith and Bishop inside the vehicle. Further, the record reveals Bowman's frantic conversation with a 911 operator, in which she exclaimed, "[A] bunch of guys got out of their car and * * * got in my car and kept throwing stuff at my car. * * * I want to press charges because * * * they got inside my car and attacked [my friend] and he's bleeding all over. * * * They just

stopped at the red light and got out of the car and attacked us." Further, appellant told Officer Bishop that "I did get out of my car and went back to the car that was behind us and that is when we began to fight. * * * We were fighting." Even though appellant testified to a different version of the events at trial, that version was clearly contradicted numerous times.

{¶31} As previously discussed, while some witnesses contradicted others at trial, the trial court was in the best position to judge the credibility of these witnesses. See, e.g., *Bates*, 2010-Ohio-1723 at ¶8. Upon review, because appellant failed to establish the first element of self-defense we find that the trial court did not abuse its discretion in rejecting appellant's claim of self-defense.

{¶32} Accordingly, appellant's second assignment of error is overruled.

{¶33} Assignment of Error No. 3:

{¶34} "THE TRIAL COURT COMMITTED PLAIN AND REVERSIBLE ERROR BY IMPROPERLY PLACING THE BURDEN OF PROOF ON MILLER TO DEMONSTRATE THAT HE ACTED IN SELF-DEFENSE AS OPPOSED TO PLACING THE BURDEN ON THE STATE TO REBUT THE PRESUMPTION THAT HE ACTED IN SELF-DEFENSE. IN DOING SO, THE TRIAL COURT VIOLATED MILLER'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 1 SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION."

{¶35} In his third assignment of error, appellant argues that the trial court improperly placed the burden of proving self-defense upon appellant, rather than the state. Specifically, appellant argues under "Ohio's castle doctrine, when a person is being attacked in his car or home, he is presumed to have acted in self-defense, a presumption that the state must rebut by a preponderance." We disagree.

{¶36} Pursuant to R.C. 2901.05(B)(1), a rebuttable presumption exists that a person "acted in self defense * * * when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force."

{¶37} However, by his own admission to Officer Bishop, appellant was not occupying his vehicle at the time the physical altercation occurred. Rather, appellant admitted that he "got out of [his] car and went back to the car that was behind [him] and * * * began to fight." Despite appellant's subsequent testimony to the contrary, this court has previously held that statements made closer in time to an incident can be more reliable than contradictory statements made later, during trial. See, e.g., *Matter of McCoy* (Dec. 27, 1993), Fayette App. No. CA93-06-016, at 3.

{¶38} Because (1) appellant admittedly did not occupy his vehicle during the physical altercation, and (2) competent and credible evidence existed to support the conclusion that appellant was at fault in creating the situation leading to the altercation, the rebuttable presumption that appellant acted in self-defense under R.C. 2901.05(B)(1) does not apply. Cf. *State v. Franklin*, Summit App. No. 22771, 2006-Ohio-4569, ¶12-13 ("a defendant may not raise a claim of self-defense if she is at fault in creating the confrontation. * * * the castle doctrine only applies if the defendant is not at fault").

{¶39} Accordingly, appellant's third assignment of error is overruled.

{¶40} Judgment affirmed.

YOUNG, P.J., and POWELL, J., concur.