

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-10-138
- vs -	:	<u>OPINION</u>
	:	<u>ON RECONSIDERATION</u>
	:	11/15/2010
DAVID B. MILLER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MASON MUNICIPAL COURT
Case No. 09CRB00796

Bethany S. Bennett, Mason City 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} This matter is before the court on a timely motion for reconsideration filed by appellant, David B. Miller, pursuant to App.R. 26(A). Appellant requests that we reconsider a judgment rendered August 16, 2010, in which we affirmed appellant's assault conviction. *State v. Miller*, Warren App. No. CA2009-10-138, 2010-Ohio-3821, ¶10 ("*Miller I*"). For the reasons outlined below, we modify our prior decision in *Miller I*,

but affirm appellant's assault conviction.

{¶12} The test for deciding a motion for reconsideration in the court of appeals is "whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration which was either not considered at all or was not fully considered by the court when it should have been." *Grabill v. Worthington Industries, Inc.* (1993), 91 Ohio App.3d 469, 471, quoting *Columbus v. Hodge* (1987), 37 Ohio App.3d 68, paragraph one of the syllabus. Because appellant calls to our attention an error in *Miller I*, we hereby grant his motion for reconsideration.

{¶13} In *Miller I*, we addressed facts relating to a physical altercation between appellant and alleged victims, Joshua Smith and Jeremy Bishop. As a result of the altercation, appellant was charged with one count of assault under Mason Cod. Ord. 537.03(a), providing: "No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn." During a bench trial, appellant moved for acquittal pursuant to Crim.R. 29(A) at the close of the state's case-in-chief, but the trial court denied the motion. At the close of all evidence, the trial court convicted appellant of assault.

{¶14} On appeal, appellant argued, in pertinent part: (1) the trial court erred in overruling his Crim.R. 29 motion, (2) there was insufficient evidence to support his conviction, and (3) his conviction was against the manifest weight of the evidence. In *Miller I*, this court declined to consider appellant's arguments relating to Crim.R. 29 and sufficiency of the evidence. In so holding, this court relied on our decision in *State v. Lloyd*, Warren App. Nos. CA2007-04-052, CA2007-04-053, 2008-Ohio-3383, for the following propositions of law:

{¶15} "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.

[*Lloyd* at ¶38.] 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." *Miller I* at ¶10.

{¶6} Upon further reflection and additional review of pertinent case law, we conclude these statements were a misstatement of law regarding Crim.R. 29 motions made during bench trials. Instead, the dominant rule regarding a Crim.R. 29 motion in a bench trial is as follows: "[t]he defendant does not waive any error committed in the overruling of a motion for judgment of acquittal by failing to renew the motion at the close of all evidence where the case is not tried to a jury but to a court." 29B Ohio Jur. 3d (2000), Waiver of Error, Section 3780. See, also, *Dayton v. Rogers* (1979), 60 Ohio St.2d 162, 163, overruled on other grounds, *State v. Lazzaro*, 76 Ohio St.3d 261, 266, 1996-Ohio-397.

{¶7} In *Rogers*, the Ohio Supreme Court stated the following proposition of law pertaining to bench trials:

{¶8} "The purpose of a motion for judgment of acquittal is to test the sufficiency of the evidence and, where the evidence is insufficient, to take the case from the jury. *In the non-jury trial, however, the defendant's plea of not guilty serves as a motion for judgment of acquittal and obviates the necessity of renewing a Crim.R. 29 motion at the close of all the evidence.* *Id.* at 163." (Emphasis added.)

{¶9} Thus, appellant was not required to renew his Crim.R. 29 motion at the close of all evidence during his bench trial to preserve sufficiency of the evidence claims on appeal. Therefore, we will now consider appellant's first assignment of error relating to sufficiency of the evidence on its merits:

{¶10} "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."

{¶11} As appellant requests, this court will review the sufficiency of evidence presented during the state's case-in-chief. Appellant argues the trial court erred in denying his Crim.R. 29 motion at the close of the state's case-in-chief because the record was "devoid of any evidence that [appellant] punched or attempted to punch the named victims."

{¶12} "A motion for acquittal at the close of the state's case tests the sufficiency of the evidence. Pursuant to Crim.R. 29(A), a trial court must construe the evidence in a light most favorable to the state and determine whether reasonable minds could reach different conclusions concerning whether the evidence proves each material element of the crime beyond a reasonable doubt." *State v. Adams*, Butler App. No. CA2006-07-160, 2007-Ohio-2583, ¶19, citing *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 263. An appellate court "will not reverse the trial court's judgment unless reasonable minds could only reach the conclusion that the evidence failed to prove all elements of the crime beyond a reasonable doubt." *Adams* at ¶19.

{¶13} In its case-in-chief, the state presented the following circumstantial evidence tending to prove appellant assaulted the alleged victims, Joshua Smith and Jeremy Bishop. Abbey Meyer, the front-seat female occupant of the victims' vehicle, testified that while driving on the highway, the intoxicated occupants of appellant's vehicle verbally harassed her and the female driver. Meyer further testified appellant

swerved across several lanes of traffic and drove "three inches on [their] bumper with the lights on swerving back and forth." As a result of glass objects subsequently thrown between the vehicles, the victims followed appellant as he exited onto Western Row Road with the intent of reporting appellant's license plate number to the police. According to the testimony of Meyer and each victim, three or four men subsequently exited appellant's vehicle, opened the victims' doors, and began punching the victims. During the scuffle, one of the attackers was scratched by Meyer's engagement ring. While Meyer's testimony was somewhat unclear as to whom she scratched, Officer Michael Bishop testified appellant was "[a]ll scratched up" following the fight. Specifically, Officer Bishop testified:

{¶14} "I asked [appellant] about some markings and things that were on his arms and that's when we got to talking about the altercation that took place at the intersection. I said who got out of the car? [Appellant] said that he got out of the car and had gone back to the other. He said that he was involved in the fighting, but he said it was mutual combat. * * * I explained that it's pretty obvious to me what has happened here. All scratched up and you didn't get all scratched up sitting in the driver's seat of the car. And [appellant] admitted, 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."

{¶15} While the evidence against appellant is mainly circumstantial, viewing this evidence in a light most favorable to the state, we conclude a rational trier of fact could find the elements of assault were proved beyond a reasonable doubt. See *State v. Barnett*, Butler App. No. CA2008-03-069, 2009-Ohio-2196, ¶53 ("A conviction based on circumstantial evidence is no less sound than one based on direct evidence[.]"). Accordingly, we hold the trial court did not err in overruling appellant's Crim.R. 29 motion for acquittal.

{¶16} Because the state presented sufficient evidence to support appellant's assault conviction, his first assignment of error is overruled. Accordingly, appellant's assault conviction is affirmed.

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