

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2009-10-038
 :
 - vs - : OPINION
 : 9/27/2010
 :
 JOHN NICHOLS, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. 20062233

Jessica Little, Brown County Prosecuting Attorney, Mary McMullen, 200 East Cherry Street, Georgetown, Ohio 45121, for plaintiff-appellee

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POWELL, P.J.

{¶1} John Nichols brought a rifle to a family argument, and when he was relieved of the firearm in a subsequent scuffle, he switched to a knife. The ensuing melee ended with injuries to Nichols' brother (victim) and a criminal charge for Nichols. We affirm Nichols' felonious assault conviction because it was not against the manifest weight of the evidence and there was sufficient evidence that Nichols knowingly caused or attempted to cause physical harm with a deadly weapon. The restitution order, however, is reversed

and remanded.

{¶2} Nichols argues under his first assignment of error that the jury lost its way when it found him guilty of felonious assault because there was no evidence that he knowingly caused the victim serious physical harm. Nichols used the word, "recklessly" in his assignment of error, but argues "knowingly" in his brief. The case involved the mental state of "knowingly." Nichols also argues the "serious physical harm" aspect of the felonious assault statute. A review of the case indicates that Nichols was charged and convicted of a different statutory subsection of felonious assault, that is, causing or attempting to cause physical harm by means of a deadly weapon. We will assume both issues in his brief were clerical errors and address Nichols' challenge to the "knowingly" element of the charge.

{¶3} The felonious assault statute states, in pertinent part, that no person shall knowingly cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance.¹

{¶4} According to R.C. 2901.22(B), a person acts "knowingly," regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.²

{¶5} Deadly weapon is defined in R.C. 2923.11(A) as any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.³

{¶6} The following evidence was gleaned from the testimony of the various family

1. R.C. 2903.11(A)(2).

2. R.C. 2901.22(B).

3. See, also, R.C. 2903.11(E)(1).

members who gave their perspective after seeing all, some, or none of the altercation that took place in the kitchen of Nichols' father.

{¶17} The victim told the jury that Nichols called him at work on the morning of the incident to tell him that he was arguing with their father and to ask about living in the trailer belonging to the victim's friend. Nichols and his family were living at the time in another trailer on their father's property. According to the victim, Nichols said he had to find another place to live or he would "end up wupping dad" or something to that effect. The victim said the conversation got heated when the victim wouldn't immediately agree to Nichols' request to use someone else's trailer and the brothers threatened to "whip each other's butt." The victim eventually hung up and didn't take Nichols' calls for the rest of the day.

{¶18} Nichols' daughter was at Nichols' father's house that day. She said the victim called his father earlier in the day and was "fired up," but she did not know why. She said Nichols later left to look for the victim. She said Nichols said if the "motherf'er [the victim] was going to kill me, I'm gonna kill him first."

{¶19} Nichols apparently did not find the victim because the victim stopped by their father's house later in the afternoon. He said he stopped in to get some information about a side job. He was sitting with family members in the kitchen when Nichols came through the door of the kitchen with a rifle.

{¶110} The victim said Nichols pointed the gun at him and threatened to kill him. Their father, father's wife, and Nichols' son told the jury essentially the same thing. Nichols' daughter said Nichols pointed the gun at the victim, but she did not hear him say anything.

{¶111} Nichols' son and daughter left the kitchen when Nichols entered. The victim, their father, and father's wife agree that the gun was removed from Nichols' hands and

father's wife took the gun outside. At some point, Nichols, the victim, and their father were in a pile on the floor. The victim admits to throwing a coffee cup at Nichols during one of the fights. The victim left the kitchen.

{¶12} At some point after the gun was taken from the room, Nichols had a cleaver-type knife in his hand. Their father said he didn't see Nichols take the knife, but identified it as a knife from the block in his kitchen. The victim said he returned to the kitchen because he heard Nichols yelling at their father. Again, the three men ended up in a pile on the floor. Their father saw the knife "flash." The victim said Nichols was swinging the knife. The victim was stabbed or cut in the arm and the tips of two fingers were sliced through partially or completely.

{¶13} Nichols' daughter returned to the kitchen to find the victim sitting at the table with Nichols' wife, reportedly a nurse, attending to him. Nichols was standing in the kitchen, still holding the cleaver-like knife. She said he appeared "out of it." She asked him two or three times for the knife. He handed it to her and left.

{¶14} Nichols' wife told the jury that Nichols and father had a disagreement that day, but for different reasons than the father had stated. She agreed that Nichols entered the kitchen carrying the rifle, but she said he was holding it to his chest, was not pointing it, and did not threaten the victim.

{¶15} She said the father and the victim jumped on Nichols in a pile. She said the victim twice left the kitchen after the gun was removed. The first time she said the victim returned to the kitchen, taunted Nichols, and eventually hit Nichols in the head with the coffee cup.

{¶16} Nichols' wife said the victim left the kitchen again and returned with a "masonry level" and swung it at Nichols' head, barely missing her and Nichols. She said Nichols grabbed the knife from the block and was immediately tackled first by the father

and then the victim, who was punching Nichols. She said Nichols was not swinging the knife at the victim. She said the scuffle ended when the victim jumped up and said he was cut. When the fight ended, Nichols was still holding the knife in his hand with a "glazed over" look in his eyes.

{¶17} A paramedic who was called to the scene would later tell the jury that she believed the victim's injuries at the scene required a level one trauma hospital, and the victim was airlifted to University Hospital in Cincinnati.

{¶18} Nichols' mother said Nichols came to her door immediately after the incident, and looked like he was in shock. She said his eye was swollen shut and he had a big "knot" on his head.

{¶19} The indictment in this case specifically identifies the cleaver or knife as the deadly weapon at issue.

{¶20} A court considering whether a conviction is against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses.⁴ The question is 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.⁵

{¶21} The Ohio Supreme Court has said the discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.⁶ We must be mindful that the original trier of fact was in the best position to judge the credibility of witnesses and the weight to be given the

4. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶39.

5. *Id.*; *State v. Blanton*, Madison App. No. CA2005-04-016, 2006-Ohio-1785, ¶7.

6. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52.

evidence.⁷ A unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required to reverse a judgment on the weight of the evidence in a jury trial.⁸

{¶22} We cannot say that the jury, in resolving the conflicts in the evidence, clearly lost its way when it found that Nichols knowingly caused or attempted to cause physical harm by means of a deadly weapon. Nichols threatened the victim with a gun, and when relieved of the gun, grabbed a knife and the victim was cut in the ensuing tussle. The jury could certainly form a reasonable inference that Nichols used the large knife he was holding to cut the victim. The jury found that Nichols was aware that his conduct of using a knife in a fight would cause a certain result or be of a certain nature. Nichols' first assignment of error is overruled.

{¶23} Nichols argues under his second assignment of error that the trial court erred in overruling his Crim.R. 29 motion for acquittal at the end of the state's case.

{¶24} Our review of a trial court's denial of a Crim.R. 29 motion for acquittal is governed by the same standard used for determining whether a verdict is supported by sufficient evidence.⁹

{¶25} When reviewing a challenge to the sufficiency of the evidence to support a criminal conviction, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.¹⁰

{¶26} The evidence presented by the state in its case involved the evidence we

7. See *State v. DeHass* (1967), 10 Ohio St.2d 230, 231.

8. *Thompkins* at 389.

9. *State v. Haney*, Clermont App. No. CA2005-07-068, 2006-Ohio-3899, ¶14.

10. *Hancock*, 2006-Ohio-160, at ¶34.

outlined previously, excluding the testimony of Nichols' wife and mother. After viewing the evidence in a light most favorable to the state, any rational trier of fact could have found beyond a reasonable doubt that Nichols knowingly caused or attempt to cause physical harm to the victim by using a knife, which was an instrument capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.¹¹ Nichols' second assignment of error is overruled.

{¶27} Nichols argues in his final assignment of error that the trial court erred when it ordered restitution because there was no evidence of damages presented. The state concedes that there is no indication in the record of the restitution amount ordered or that a restitution hearing was held.

{¶28} R.C. 2929.18(A)(1) permits a trial court, as part of a sentence, to order restitution to the victim of the offender's crime in an amount based on the victim's economic loss.¹² Before a trial court may impose this financial sanction, the court must consider the offender's present and future ability to pay the sanction.¹³ The court must determine the amount of restitution to a reasonable degree of certainty, ensuring that the amount is supported by competent, credible evidence.¹⁴

{¶29} The record shows that the trial court erred in not setting a specific amount for restitution. We sustain Nichols' third assignment of error. Nichols' conviction is affirmed in part, reversed in part as to the issue of restitution, and remanded for the trial court to properly determine restitution.

RINGLAND and HENDRICKSON JJ., concur.

11. R.C. 2903.11(A)(2); R.C. 2923.11(A); R.C. 2901.22(B).

12. *State v. Stamper*, Butler App. No. CA2009-04-115, 2010-Ohio-1939, ¶16.

13. R.C. 2929.19(B)(6).

14. *Stamper* at ¶17.

[Cite as *State v. Nichols*, 2010-Ohio-4566.]