

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
LAWRENCE COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 14CA19
	:	
vs.	:	
	:	
ROBERT HARPER,	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
	:	
Defendant-Appellant.	:	<b>Released: 02/19/15</b>

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APPEARANCES:

Timothy Young, Ohio Public Defender, and Valerie Kunze, Assistant State Public Defender, Columbus, Ohio, for Appellant.

Brigham M. Anderson, Lawrence County Prosecuting Attorney, and Robert C. Anderson, Assistant Prosecuting Attorney, Ironton, Ohio, for Appellee.

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McFarland, A.J.

{¶1} This is an appeal from a Lawrence County Common Pleas Court judgment convicting and sentencing Appellant, after he was found guilty by a jury of one count of felonious assault, in violation of R.C. 2903.11(A)(1), a felony of the second degree. On appeal, Appellant contends that his conviction for felonious assault was against the manifest weight of the evidence. In arguing his sole assignment of error, Appellant concedes that he committed the crime of felonious assault, but argues that his conviction was against the manifest weight of the evidence because he presented

evidence supporting a claim of self-defense. However, a conviction is not against the manifest weight of the evidence simply because the jury rejected Appellant's version of the events and instead resolved the conflicting evidence in favor of the State. Further, the jury, as the trier of fact, was free to reject Appellant's version of the events, which it apparently did. As such, we cannot conclude that this is a case where the jury clearly lost its way or created a manifest miscarriage of justice. Accordingly, Appellant's sole assignment of error is overruled and the decision of the trial court is affirmed.

### FACTS

{¶2} Appellant was indicted for the felonious assault of Jason Smith on August 28, 2013. A review of the record and the transcript from the two-day jury trial that began on April 14, 2014, indicates that Appellant, Robert Harper, had been involved with and living with Kelly Smith, who was married to the victim, Jason Smith, at the time of the events leading to Appellant's indictment. A review of the record indicates that although Kelly and Jason were still married, they were separated and in the process of a divorce, they shared a child and also shared a business known as the Fuzzy Duck, a bar located in Lawrence County, Ohio. During the week leading up to the incident at issue herein, Kelly had been working at the bar in an

attempt to resolve some business-related financial issues that had arisen.

The night before the incident in question, Appellant and Kelly had a disagreement and Kelly left the residence she and Appellant shared, apparently taking Appellant's car and house keys with her.

{¶3} The next day, on July 21, 2013, Appellant went to the bar to retrieve his keys from Kelly. Kelly's father, James Greco, drove Appellant to the bar during the afternoon. It is unclear from the record whether the doors to the bar were locked at the time and whether the bar was open for business. However, the record indicates that Jason, Kelly and a few employees were present and that Kelly let Appellant and Greco in through the door. Jason Smith was seated on a barstool at the bar when Appellant entered the bar. There is conflicting testimony about the exchange that took place between Appellant and Jason Smith. Jason Smith testified that Appellant approached him, extended his hand and that is all he remembers. Greco and Kelly Smith both testified that they heard Jason Smith tell Appellant to get out of the bar and then they witnessed Appellant hit Smith and knock him off the bar stool and proceed to strike him several times more.

{¶4} Appellant testified that when he approached Jason Smith at the bar that Smith threatened to kill him. He further testified that he could see a

gun tucked into Smith's pants which he claimed caused him to fear for his life. He testified that he only hit Smith because he thought he was reaching for his gun. No one besides Appellant testified that there was a gun visible on Smith's person. Further, although Appellant gave a statement to law enforcement immediately after the incident, he said nothing about Smith having a gun or that he acted in self-defense. Prior to being transported to the hospital for treatment, a gun was removed from Smith's pants. Smith was treated and released, but sustained serious swelling to his jaw, a laceration on his head, and damage to his hearing, which at the time of trial had still not resolved.

{¶5} A review of the record reveals that the trial court determined Appellant was entitled to a jury instruction on self-defense and instructed the jury accordingly. Nonetheless, the jury found Appellant guilty of felonious assault, as charged in the indictment. Subsequently, the trial court issued a judgment entry on April 30, 2014, sentencing Appellant to a six-year term of imprisonment. It is from this order that Appellant now brings his timely appeal, assigning the following errors for our review.

#### ASSIGNMENT OF ERROR

“I. ROBERT HARPER'S CONVICTION FOR FELONIOUS ASSAULT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, IN VIOLATION OF MR. HARPER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH

AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION."

LEGAL ANALYSIS

{¶6} In his sole assignment of error, Appellant contends that his conviction for felonious assault was against the manifest weight of the evidence. When considering whether a conviction is against the manifest weight of the evidence, we must review the entire record, weigh the evidence and all reasonable inferences and consider the credibility of witnesses. *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 119. However, we must also bear in mind that credibility generally is an issue for the trier of fact. *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 191; *State v. Linkous*, 4th Dist. Scioto No. 12CA3517, 2013-Ohio-5853, ¶ 70. Accordingly we may reverse the conviction only if it appears that in its role as the fact-finder and judgment of credibility, 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.’ ” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541(1997); quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). Thus we will exercise our discretionary power to grant

a new trial “ ‘only in the exceptional case in which the evidence weighs heavily against the conviction.’ ” *Thompkins* at 387; quoting *Martin* at 175.

{¶7} R.C. 2903.11(A)(1) defines the offense of felonious assault and provides in pertinent part as follows: “(A) No person shall knowingly do either of the following: (1) Cause serious physical harm to another or to another's unborn[.]” In raising his sole assignment of error, however, Appellant essentially concedes that the State proved all of the elements of felonious assault beyond a reasonable doubt. Instead, Appellant contends his conviction was against the manifest weight of the evidence because he presented evidence supporting a claim of self-defense.

{¶8} “Self-defense is an affirmative defense that requires a defendant to prove three elements by a preponderance of the evidence: ‘(1) the defendant was not at fault in creating the violent situation, (2) 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 was the use of force, and (3) that the defendant did not violate any duty to retreat or avoid the danger.’ ” *State v. Goff*, 128 Ohio St.3d 169, 2010-Ohio-6317, 942 N.E.2d 1075, ¶ 36; quoting *State v. Thomas*, 77 Ohio St.3d 323, 326, 673 N.E.2d 1339 (1997); R.C. 2901.05(A). The elements of self-defense are cumulative, thus “[i]f the defendant fails to prove any one of these elements \* \* \* he has failed to

demonstrate that he acted in self-defense.” (Emphasis sic.) *State v. Jackson*, 22 Ohio St.3d 281, 284, 490 N.E.2d 893 (1986).

{¶9} To support his claim of self-defense, Appellant relies on his own version of events, which differs from the testimony of the witnesses on behalf of the State. Appellant, for instance, directs us to the portion of the trial testimony where he testified that the victim threatened him during a conversation between the two just before Appellant hit him. Appellant points out that Smith denied any conversation at all, but also concedes that Smith testified that he did not remember much of the incident. Appellant also directs our attention to the fact that although Kelly Smith and James Greco both denied hearing the substance of the conversation between Appellant and Jason Smith, they both testified that there was a conversation. Appellant further directs us to his testimony indicating that he saw a gun in Jason Smith's pants, that he feared for his life when he saw the gun and therefore hit Jason Smith, allegedly to prevent his own death.

{¶10} Contrary to Appellant's testimony, however, Jason Smith testified that the gun was concealed in his pants and was not visible due to the fact that he was sitting on a bar stool. Jason Smith testified that although he does not remember much related to the incident, primarily due to the injuries he sustained as a result, Appellant walked up to him and extended

his hand and then hit him. Both Kelly Smith and James Greco testified that the incident occurred very quickly and according to Greco was like “lightning.” Additionally, and of importance, although Appellant gave a statement to law enforcement immediately after his arrest, he mentioned nothing regarding Jason Smith having a gun or indicating that he feared for his life. In fact, Appellant walked outside the bar and waited on law enforcement to arrive and essentially turned himself in. Appellant testified that he decided not to give any information regarding the gun until he had obtained counsel.

{¶11} As set forth above, Appellant argues that he proved he acted in self-defense and therefore his conviction for felonious assault was against the manifest weight of the evidence. A review of the record indicates that the trial court determined Appellant was entitled to a jury instruction on self-defense and instructed the jury accordingly. In Ohio, a defendant has both the burden of production, i.e. going forward with evidence, and the burden of persuasion on affirmative defenses. See R.C. 2901.05(A). In making his argument on appeal, Appellant seems to overlook the fact that the jury was free to believe all, part or none of any witness's testimony. *State v. Tyson*, 4th Dist. Ross No. 12CA3343, 2013-Ohio-3540, ¶ 22. Thus, the jury was free to conclude Appellant failed to carry his burden of persuasion.



{¶12} For instance, the jury could have concluded that even if there was a conversation between Appellant and Jason Smith, that Smith did not threaten him and that the gun Smith was carrying was not visible to Appellant. The jury could have also discredited Appellant's testimony that he saw a gun in Appellant's pants and only hit him because he feared for his life. When conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the testimony presented by the state. *Tyson*, 4th Dist. Ross No. 12CA3343, 2013-Ohio-3540, ¶ 21. Because the jury is in the best position to assess witness credibility by observing their demeanor, gestures, and voice inflections, we cannot say that this is a case where the jury clearly lost its way or created a manifest miscarriage of justice. See *State v. Grube*, 2013-Ohio-692, 987 N.E.2d 287, ¶ 31, 32 (4th Dist.). The jury can simply reject the defendant's defense and find the evidence in the state's case-in-chief more persuasive. That appears to be precisely what happened in this case. Thus, we reject Appellant's sole assignment of error and it is overruled. Accordingly, the decision of the trial court is affirmed.

**JUDGMENT AFFIRMED.**

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

**IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT**, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: \_\_\_\_\_  
Matthew W. McFarland,  
Administrative Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**