[Cite as *State v. Chadwick*, 2009-Ohio-2472.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- CRAIG O. CHADWICK Defendant-Appellant	JUDGES: Hon. John W. Wise, P. J. Hon. Julie A. Edwards, J. Hon. Patricia A. Delaney, J. Case No. 08 CA 15 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Mt. Vernon Municipal Court, Case No. 07 CRB 919
JUDGMENT:	Affirmed in Part; Reversed in Part and Remanded
DATE OF JUDGMENT ENTRY:	May 22, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN W. AEBI ASSISTANT CITY PROSECUTOR 5 North Gay Street Mount Vernon, Ohio 43050	CARLY F. BLACK ASSISTANT PUBLIC DEFENDER 1 Public Square Mount Vernon, Ohio 43050

Wise, P. J.

{¶1} Appellant Craig Chadwick appeals his conviction for misdemeanor assault in the Mount Vernon Municipal Court, Knox County. The relevant facts leading to this appeal are as follows.

{¶2} On September 6, 2007, Alvin A. Troyer, Jr., age 18, a member of the Amish faith, attended a wedding. He left the wedding with his girlfriend at approximately 11:00 p.m. As he drove his buggy down Woods Church Road in a rural area of Knox County, a black pickup truck drove up and down the road, passing and "hollering" at other buggies traveling in the same direction as Troyer.

{¶3} After Troyer dropped his girlfriend off at her home, he began heading home via Kirk Road. As he proceeded, the same black truck passed him from the opposite direction, and then turned around and passed him again. The truck then slid in front of Troyer and stopped. When Troyer stopped his buggy, one of the truck's occupants, Emanuel Wengerd, jumped up on the buggy's driver seat and grabbed the horse. Three other men jumped out of the truck and ordered Troyer off the buggy. When Troyer refused to do so, Appellant Chadwick and one of the other men grabbed his feet and tried to pull him off the buggy. Appellant asked Troyer if he wanted his leg broken. Appellant then held Troyer while the others hit him with a club, breaking his dentures and bruising his knuckles and arm. When appellant finally released his foot, the injured Troyer ran back to his girlfriend's house.

{¶4} The next morning Troyer was taken home by his girlfriend's brother. His horse and buggy were still positioned alongside the road, although the buggy's canvas

has been vandalized with a knife. Troyer's dentures, which had been broken in half, were still in the buggy.

{¶5} On November 9, 2007, appellant was charged with assault, a first-degree misdemeanor. On November 20, 2007, appellant entered a not guilty plea. A jury trial was held March 20 and 21, 2008. The jury found appellant guilty of assault. On April 22, 2008, the trial court sentenced appellant to six months in jail and fined him $500.00. One-hundred twenty days were ordered suspended on the following conditions:

{¶6} "i) The Defendant shall make restitution for the medical expenses incurred by the victim, Alvin Troyer, Jr.

{¶7} "ii) The Defendant shall report to jail to begin serving his jail sentence on or before 8:00 a.m. April 28, 2008.

{¶8} "iii. The Defendant shall successfully complete three (3) years of reporting probation.

{¶9} "iv. The Defendant shall have no similar offense for a period of three (3) years.

{¶10} "v. The Defendant shall pay a minimum of One Hundred Dollars ($100.00) per month towards his fines and costs, including other cases (if any), and

{¶11} "vi. The Defendant shall have no contact with the victim, Alvin Troyer, Jr., or his father, Alvin Troyer (Sr.) during the time he is on probation." Judgment Entry, April 22, 2008, at 1-2.

{¶12} On April 23, 2008, appellant filed a notice of appeal. He herein raises the following three Assignments of Error:

{¶13} "I. THE TRIAL COURT ERRED WHEN IT ADMITTED IMPEACHMENT EVIDENCE IN VIOLATION OF EVIDENCE RULE 609.

{¶14} THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SENTENCED APPELLANT TO THE LONGEST JAIL TIME AUTHORIZED FOR A MISDEMEANOR ASSAULT OFFENSE AND RESTITUTION OF AN UNSPECIFIED AMOUNT TO THE VICTIM.

{¶15} THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT WHEN THE CONVICTION WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE."

I.

{¶16} In his First Assignment of Error, appellant contends the trial court erred in admitting alleged impeachment evidence against him. We disagree.

{¶17} The admission or exclusion of evidence rests in the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 180, 510 N.E.2d 343. Our task is to look at the totality of the circumstances in the particular case under appeal, and determine whether the trial court acted unreasonably, arbitrarily or unconscionably in allowing or excluding the disputed evidence. *State v. Oman* (Feb. 14, 2000), Stark App.No. 1999CA00027.

{¶18} Appellant recites Evid.R. 609, which addresses "impeachment by evidence of conviction of crime." The rule states in pertinent part:

{¶19} "(A) *** For the purpose of attacking the credibility of a witness:

{¶20} "(1) subject to Evid.R. 403, evidence that a witness other than the accused has been convicted of a crime is admissible if the crime was punishable by death or

imprisonment in excess of one year pursuant to the law under which the witness was convicted.

{¶21} "(2) notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the accused was convicted and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

{¶22} "(3) notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that any witness, including an accused, has been convicted of a crime is admissible if the crime involved dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance."

{¶23} In the case sub judice, prior to trial, Emanuel Wengerd had separately entered a plea to disorderly conduct (persisting), in order to resolve the assault charge against him, stemming from the same incident. During appellant's defense case, Wengerd was called as a witness. On cross-examination the prosecution questioned Wengerd, over defense counsel's objection, about his prior no contest plea to the charge of disorderly conduct relating to the incident involving Troyer. Tr. at 123-129.

{¶24} We find appellant's reliance on Evid.R. 609 is thus misplaced under these circumstances. "Rule 609 applies only when a prior conviction is offered to impeach a witness by showing character for untruthfulness. If the evidence is offered under an impeachment theory other than character, Rule 609 does not apply. Similarly, if evidence of prior conviction is offered for reasons other than impeachment, Rule 609

does not apply." *State v. Kraus*, Warren App.No. 2006-10-114, 2007-Ohio-6027, ¶74, quoting 1 Giannelli & Snyder, Evidence (2007) 458, Section 609.3. The State in this instance was not using the existence of Wengerd's prior no contest plea and disorderly conduct conviction to challenge his overall honesty or character; rather, the State was seeking to factually disprove Wengerd's claim at trial that he had not been involved in the attack on Troyer and had instead been playing pool with appellant on that night.

{¶25} We therefore find no abuse of discretion in the allowance of cross-examination by the State regarding Emanuel Wengerd's disorderly conduct charge stemming from the assault on Troyer.

{¶26} Appellant's First Assignment of Error is overruled.

II.

{¶27} In his Second Assignment of Error, appellant contends the trial court erred in sentencing him to the maximum sentence for his misdemeanor offense and ordering an unspecified restitution amount. We agree in part.

Maximum Sentence

{¶28} R.C. 2929.22(C) states, in pertinent part: " *** A court may impose the longest jail term authorized under section 2929.24 of the Revised Code only upon offenders who commit the worst forms of the offense or upon offenders whose conduct and response to prior sanctions for prior offenses demonstrate that the imposition of the longest jail term is necessary to deter the offender from committing a future crime."

{¶29} Subsequent to the Ohio Supreme Court's decision in *State v. Foster,* 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, judicial fact finding is no longer required before a court imposes non-minimum, maximum or consecutive prison terms in felony

cases. See *State v. Barrett,* Ashland App.No. 07COA014, 2008-Ohio-191, ¶ 6. We have applied the rationale of *Foster* to misdemeanor sentencing under the ranges set forth in R.C. 2929.24(A). See *State v. Vance*, Ashland App.No. 2007-COA-035, 2008-Ohio-4763, ¶123.

{¶30} Accordingly, we find the sole issue before us regarding appellant's misdemeanor jail sentence is whether an abuse of discretion occurred. Generally, misdemeanor sentencing is within the sound discretion of the trial court and will not be disturbed upon review if the sentence is within the limits of the applicable statute. *State v. Smith,* Wayne App. No. 05CA0006, 2006-Ohio-1558, ¶ 21, citing *State v. Pass* (Dec. 30, 1992), Lucas App. No. L-92-017. An abuse of discretion implies the court's attitude is "unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144.

{¶31} In the case sub judice, the trial court's sentence of one-hundred and eighty days for the first-degree misdemeanor of assault is within the statutory sentencing ranges under R.C. 2929.24, and as such, is proper. Further, upon review, we find the trial court's sentencing term is not unreasonable, arbitrary or unconscionable.

Restitution

{¶32} Appellant also argues that the trial court erred in ordering an unspecified amount of restitution.

{¶33} The trial court ordered, as a partial condition of suspending one-hundred twenty days of the one-hundred eighty day jail sentence, that "[t]he Defendant shall make restitution for the medical expenses incurred by the victim, Alvin Troyer, Jr." Judgment Entry at 1.

{¶34} Revised Code § 2929.18(A)(1), *Financial sanctions,* provides in pertinent part:

{¶35} "*** If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. ***."

{¶36} Pursuant to this Court's rationale in *State v. Hall*, Morgan App.No. 06 CA 9, 2007-Ohio-3428, ¶ 27-36, we find the trial court erred in its restitution order, and we hereby reverse the restitution order and remand the matter to the trial court to determine a fixed amount. See, also, *State v. Schultz,* Ashland App. No. 04 COA 008, 2004-Ohio-4303. As we noted in *Hall*, while we are cognizant of the trial court's problem in pre-determining future costs of care and suffering, an assault victim has the available remedy of seeking damages against the assailant in a civil suit, assuming the statute of limitations has not expired.

{¶37} Appellant's Second Assignment of Error is therefore overruled in part and sustained in part.

III.

{¶38} In his Third Assignment of Error, appellant contends his conviction for misdemeanor assault is against the manifest weight of the evidence. We disagree.

{¶39} Our standard of review on a manifest weight challenge to a criminal conviction is stated as follows: "The 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." *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d

717. See also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175, 485 N.E.2d 717.

{¶40} The victim in this case, Troyer, testified that he left the wedding at about 11 PM on September 6, 2007. As he traveled in the buggy with his girlfriend, he recognized the black truck that had passed some of the other buggies earlier. He clearly identified appellant at trial as the man who held onto his foot and twisted his leg while the others beat him. Tr. at 27-28.

{¶41} During the defense phase of the case, appellant asserted the theory that Troyer had been drinking and arguing with other people at the wedding, which Troyer had denied in his testimony, except for conceding that he had drunk two or three beers over the course of the day. Appellant further presented alibi witnesses. Emanuel Wengerd, who owns a black Ford F-150, testified that he was with appellant, Melvin Wengerd, and Johnny Keim at Kat Compton's house playing pool on the night of the attack.[1] He testified that he did not leave the Compton house until he took appellant home at 12:30 or 1:00 AM. Tr. at 116-119. Testimony along these lines was also taken from Melvin Wengerd, Johnny Keim, and Kat Compton. However, the impact of Emanuel's testimony was weakened by the fact of his no contest plea to disorderly conduct stemming from the attack on Troyer (see discussion in Assignment of Error I, supra).

{¶42} Appellant, who at age forty-six is roughly twice the age of the aforecited persons, also maintained that he had been at Compton's house at the time of the

[1] Compton is Melvin Wengerd's girlfriend.

attack. He testified that he had had a bad day at work, and brought beer with him to the Compton house, even though he claimed to conduct weekly Bible studies for Keim and the Wengerd brothers, and rarely drank alcohol. Appellant, who has never been a member of the Amish religious community, theorized that Troyer blamed him for the assault at the behest of Troyer's father, who allegedly dislikes him and has labeled him a drug dealer. Tr. at 164, 173.

{¶43} The attack on Troyer took place at night on a rural road, and there were no additional witnesses to the actual incident. The jury was thus tasked with weighing Troyer's recounting of the event against the aforementioned alibi witnesses. It is well established that the trier of fact, as opposed to this Court, is in a far better position to weigh the credibility of witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. Upon review, we cannot conclude the jury's verdict led to a manifest miscarriage of justice. We therefore hold the assault verdict was not against the manifest weight of the evidence.

{¶44} Appellant's Third Assignment of Error is overruled.

{¶45} For the reasons stated in the foregoing opinion, the judgment of the Mount Vernon Municipal Court, Knox County, Ohio, is hereby is hereby affirmed in part, reversed in part, and remanded for a new restitution/sentencing hearing.

By: Wise, P. J.

Edwards, J., and

Delaney, J., concur.

/s/ JOHN W. WISE_____

/s/ JULIE A. EDWARDS_____

/s/ PATRICIA A. DELANEY_____

JUDGES

JWW/d 49

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
CRAIG O. CHADWICK	:	
Defendant-Appellant	:	Case No. 08 CA 15

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Mount Vernon Municipal Court, Knox County, Ohio, is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

Costs to be split 75% to appellant and 25% to the State of Ohio.

/S/ JOHN W. WISE_____

/S/ JULIE A. EDWARDS_____

/S/ PATRICIA A. DELANEY_____

JUDGES