[Cite as *State v. Wilson*, 2010-Ohio-1394.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 09-CA-44
DANNY J. WILSON	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Fairfield Municipal Court, Case No. 08CRB2277
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 24, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
GENYLYNN COSGROVE 123 E. Chestnut Street Lancaster, OH 43130	JAMES L. DYE P.O. Box 161 Pickerington, OH 43147

Gwin, P.J.

{¶1} On September 11, 2008, a complaint was filed charging appellant Danny J. Wilson with assault, a misdemeanor in the first degree, in violation of R.C. 2903.13. Said charge arose from an incident wherein appellant had a physical confrontation with Harold Moneypenny. A bench trial was held in the matter on March 24, 2009.

STATEMENT OF THE FACTS AND CASE

{¶2} On September 07, 2008, at approximately 8:54 p.m., Officer Kyle Mears of the Lancaster Police Department responded to a local restaurant, TeeJays, on a report of an assault. Upon arrival at the TeeJay's parking lot, Officer Mears met with Harold Moneypenny who alleged that appellant had assaulted him earlier in the day at the residence of Mr. Wilson's mother, and Mr. Moneypenny's ex-wife, Shirley Wilson.

{¶3} Mrs. Shirley Wilson was at the time, bed-ridden and dying from terminal cancer. It was known that her time was short and that she required constant care and monitoring. Mr. Moneypenny was at his terminally ill former wife's residence taking care of her every day for 22-24 hours at a time. Appellant, on the day in question, had stopped at the home to visit and check up on his mother.

{¶4} Appellant arrived with his then girlfriend, Tracey Lewis. Appellant had an open beer in one hand and a box of beer in the other hand. The couple knocked on the door and Mr. Moneypenny answered. Upon seeing that appellant had brought alcohol with him, Mr. Moneypenny told appellant that Ms. Wilson had requested that he not bring any alcohol or drugs into the house. Mr. Moneypenny put his hands up and attempted to push appellant out of the doorway. A struggle ensued between appellant and Mr. Moneypenny. Mr. Moneypenny testified that appellant had his hand around

his throat to the point he could not breathe and pulled on his hand and arm to the point he damaged Mr. Moneypenny's finger and wrist. Also during the assault, Mr. Moneypenny suffered a scratch on his back from appellant's fingernail.

{¶5} Appellant was charged with one count of assault. The case was tried to the court on March 24, 2009. Appellant did not testify. At the conclusion of the presentation of evidence and testimony, the trial court found appellant guilty of assault.

{¶6} The court ordered a PSI[1] and set the matter for sentencing on May 27, 2009. On that date, the PSI recommended probation including counseling; however, the trial court sentenced appellant to 180 days in jail with 90 of those suspended and 90 actual days to serve.

{¶7} Appellant initially filed a direct appeal of his conviction in case number 2009-CA-0036. This Court dismissed that appeal on June 17, 2009 for lack of a final appealable order pursuant to the Ohio Supreme Court's decision in *State v. Baker* (2008), 119 Ohio St.3d 197. Thereafter, the trial court issued an amended sentencing entry on June 26, 2009, stating that the trial court had found the appellant guilty.

{¶8} Appellant has timely appealed from that sentencing entry in the above-captioned case raising the following assignments of error:

{¶9} "I. THE TRIAL COURT ERRED AND THEREBY DEPRIVED APPELLANT OF DUE PROCESS OF LAW AND CONFRONTATION AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION BY ALLOWING HEARSAY EVIDENCE.

[1] Pre-sentence investigation report.

{¶10} "II. THE TRIAL COURT ERRED AND THEREBY DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION BY OVERRULING APPELLANT'S CRIM. R. 29 MOTION FOR JUDGMENT OF ACQUITTAL, (Tr. Pg 85 - 87) AS THE PROSECUTION FAILED TO PROVE ALL THE ELEMENTS OF THE CHARGE OF ASSAULT.

{¶11} "III. THE TRIAL COURT ERRED AND THEREBY DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION BY FINDING APPELLANT GUILTY, AS THE VERDICT FOR THE CHARGES [sic.] OF ASSAULT WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I.

{¶12} In his first assignment of error appellant contends the trial court erred in permitting damaging hearsay to be admitted. We disagree.

{¶13} In *Rigby v. Lake County* (1991), 58 Ohio St.3d 269, 271, 569 N.E.2d 1056, 1058, the Supreme Court reaffirmed the longstanding test for appellate review of admission of evidence:

{¶14} "Ordinarily, a trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence. The admission of relevant evidence pursuant to Evid.R. 401 rests within the sound discretion of the trial court. E.g., *State v.*

Sage (1987), 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343, paragraph two of the syllabus. An appellate court that reviews the trial court's admission or exclusion of evidence must limit its review to whether the lower court abused its discretion. *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107, 543 N.E.2d 1233, 1237. As this court has noted many times, the term 'abuse of discretion' connotes more than an error of law; it implies that the court acted unreasonably, arbitrarily or unconscionably. E.g., *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 482, 450 N.E.2d 1140, 1142".

{¶15} A reviewing court should be slow to interfere unless the court has clearly abused its discretion and a party has been materially prejudiced thereby. *State v. Maurer* (1984), 15 Ohio St.3d 239, 264, 473 N.E.2d 768, 791. The trial court must determine whether the probative value of the evidence and/or testimony is substantially outweighed by the danger of unfair prejudice, or of confusing or misleading the jury. See *State v. Lyles* (1989), 42 Ohio St.3d 98, 537 N.E.2d 221.

{¶16} "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C). Hearsay is generally not admissible unless it falls within one of the recognized exceptions. Evid.R. 802; *State v. Steffen* (1987), 31 Ohio St.3d 111, 119, 509 N.E.2d 383.

{¶17} "The hearsay rule…is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which

these dangers are minimized for in-court statements-the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine-are generally absent for things said out of court." *Williamson v. United States* (1994), 512 U.S. 594, 598,114 S.Ct. 2431, 2434.

{¶18} In the case at bar, appellant asserts that the trial court allowed prejudicial hearsay when it permitted Mr. Moneypenny to testify that he was attempting to keep the appellant out of the home because "his mother had requested him not to bring any alcohol or, or [sic.] drugs into the house, mostly the alcohol." (T. March 24, 2009 at 22).[2]

{¶19} This was a bench trial. Accordingly, the danger of unfair prejudice, of confusion of the issues, or of misleading the Trier of fact was minimal. In addition, testimony which explains the actions of a witness to whom the statement was made, and is offered to show why the witness acted in a particular manner rather than to prove the truth of the statement, is not hearsay. *State v. Maurer* (1984), 15 Ohio St.3d 239, 262-264, 473 N.E.2d 768, 789-791; *State v. Thomas* (1980), 61 Ohio St.2d 223, 232, 400 N.E.2d 401; *State v. Price* (1992), 80 Ohio App.3d 108, 110, 608 N.E.2d 1088, 1089; *State v. Blevins* (1987), 36 Ohio App.3d 147, 149, 521 N.E.2d 1105, 1108-1109.

{¶20} In *State v. Blevins,* supra the court observed that although statements that are offered to explain an officer's conduct are not hearsay, "the potential for abuse in admitting such statements is great where the purpose is merely to explain an officer's

[2] We note that no objection was raised as to this initial response. It was not until the prosecutor asked Mr. Moneypenny a second time why he did not want appellant to come into the home that an objection was raised. (T. March 24, 2009 at 23-24).

conduct during the course of an investigation." Id. at 149, citing McCormick, Evidence (3 Ed. Cleary Ed.1984), 732, 734, Section 249.

{¶21} Given the potential for abuse, the courts have imposed certain conditions before such statements may be admitted. See *Blevins* at syllabus; *State v. Culley* (Aug. 31, 1989), 10th Dist. No. 89AP-153; *State v. Faris* (Mar. 24, 1994), 10th Dist. No. 93APA08-1211; *State v. Humphrey,* 10th Dist. No. 07AP-837, 2008-Ohio-6302 at ¶11; *State v. Trent*, Stark App. No. 2004CA00360, 2005-Ohio-5793 at ¶ 39. Specifically, the conduct to be explained must be relevant, equivocal, and contemporaneous with the statements. See, *Trent.* [Citing *Blevins*]. Further, the statements must meet the standard of Evid.R. 403(A). Id. Finally, "when the statements connect the accused with the crime charged, they should generally be excluded." *Humphrey* at ¶ 11, citing *Culley; Blevins* at 149-150, 521 N.E.2d 1105.

{¶22} Upon consideration of the above law and the facts in the case sub judice, this court finds the evidence offered to explain Mr. Moneypenny's reason for not letting appellant into the house was not unfairly prejudicial. The statement was offered merely to explain Mr. Moneypenny's behavior. *State v. Bailey,* 8th Dist. No. 81498, 2003-Ohio-1834 at¶ 27-28. We find this testimony satisfies the requirements of *Blevins* and *Thomas.* The trial court did not err in admitting this testimony.

{¶23} Appellant's first assignment of error is overruled.

II & III

{¶24} Because appellant's second and third assignments of error each require us to review the evidence, we shall address the assignments collectively.

{¶25} In his second assignment of error appellant alleges that the trial court erred in not granting his Crim. R. 29 motion for acquittal at the conclusion of the State's case. In determining whether a trial court erred in overruling an appellant's motion for judgment of acquittal, the reviewing court focuses on the sufficiency of the evidence. See, *e.g., State v. Carter* (1995), 72 Ohio St.3d 545, 553, 651 N.E.2d 965, 974; *State v. Jenks* (1991), 61 Ohio St.3d 259 at 273, 574 N.E.2d 492 at 503.

{¶26} When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. See *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541, 546 (stating, "sufficiency is the test of adequacy"); *State v. Jenks* (1991), 61 Ohio St.3d 259 at 273, 574 N.E.2d 492 at 503. The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational Trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781; *Jenks,* 61 Ohio St.3d at 273, 574 N.E.2d at 503.

{¶27} In his third assignment of error appellant maintains that his conviction is against the manifest weight of the evidence.

{¶28} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Wilson,* 713 Ohio St.3d 382, 387-88, 2007-Ohio-2202 at ¶ 25-26; 865 N.E.2d 1264, 1269-1270. "In other words, a reviewing court asks whose evidence is more persuasive--the state's or the defendant's? Even though there may be sufficient evidence to support a conviction, a reviewing court can still re-weigh the evidence and

reverse a lower court's holdings." *State v. Wilson,* supra. However, an appellate court may not merely substitute its view for that of the jury, but must find that "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*, supra, 78 Ohio St.3d at 387. (Quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721). Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins,* supra.

{¶29} Employing the above standard, we believe that the State presented sufficient evidence from which a jury could conclude, beyond a reasonable doubt, that appellant committed the offense of assault.

{¶30} In the present case, to find appellant guilty of assault, the Trier of fact would have to find that appellant knowingly caused or attempt to cause physical harm to another. R.C. 2901.01 states, in relevant part: "(3) 'Physical harm to persons' means any injury, illness, or other physiological impairment, regardless of its gravity or duration."

{¶31} In the case at bar, the evidence established the injuries to Mr. Moneypenny. Mr. Moneypenny suffered injuries to his wrist and to his back. Photographs were admitted into evidence to document the injuries. Additionally, Mr. Moneypenny testified that appellant had his hands around Mr. Moneypenny's throat chocking him to the point that he was unable to breathe. (T., March 24, 2009 at 21-22).

{¶32} Viewing the evidence in the case at bar in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that appellant had caused physical harm to another.

{¶33} R.C. 2901.22 defines "knowingly" as follows:

{¶34} "(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."

{¶35} Whether a person acts knowingly can only be determined, absent a defendant's admission, from all the surrounding facts and circumstances, including the doing of the act itself." *State v. Huff* (2001), 145 Ohio App.3d 555, 563, 763 N.E.2d 695. (Footnote omitted.) Thus, "[t]he test for whether a defendant acted knowingly is a subjective one, but it is decided on objective criteria." *State v. McDaniel* (May 1, 1998), Montgomery App. No. 16221, (citing *State v. Elliott* (1995), 104 Ohio App.3d 812, 663 N.E.2d 412).

{¶36} Appellant focuses on the issue of self-defense. [Appellant's Brief at 7-8]. Self-defense is a "confession and avoidance" affirmative defense in which the defendant admits the elements of the crime but seeks to prove some additional element that absolves the defendant of guilt. *State v. Batrez*, Richland App. No. 2007-CA-75, 2008-Ohio-3117 at ¶ 22; *State v. White* (Jan. 14, 1998), Ross App. No. 97 CA 2282. The affirmative defense of self-defense places the burden of proof on a defendant by a preponderance of the evidence. *In re: Collier* (Aug. 30, 2001), Richland App. No. 01 CA 5, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667. To establish

self-defense in the use of non-deadly force, the accused must show that (1) he was not at fault in creating the situation giving rise to the altercation; (2) that he had reasonable grounds to believe and an honest belief, even though mistaken, that some force was necessary to defend himself against the imminent use of unlawful force, and (3) the force used was not likely to cause death or great bodily harm. *State v. Vance,* Ashland App. No. 2007-COA-035, 2008-Ohio-4763 at ¶77. (Citing: *In Re: Maupin* (Dec. 11, 1998), Hamilton App. No. C-980094, unreported; *Columbus v. Dawson* (1986), 33 Ohio App.3d 141, 142, 514 N.E.2d 908; R.C. 2901.05(A); *State v. Walker* (Feb. 20, 2001), Stark App. No.2000CA00128). If any one of these elements is not proven by a preponderance of the evidence, the theory of self-defense does not apply. *State v. Williford* (1990), 49 Ohio St.3d 247, 551 N.E.2d 1279.

{¶37} In the case at bar, Mr. Moneypenny testified unequivocally that he told appellant not to come into the house with alcohol. He further attempted to block appellant's path. Appellant did not testify. Appellant was forty-eight (48) years old at the time of the confrontation. Mr. Moneypenny was eighty-two (82) years old at the time. There was no testimony or evidence that appellant had reasonable grounds to believe and an honest belief, even though mistaken, that some force was necessary to defend himself against the imminent use of unlawful force by Mr. Moneypenny.

{¶38} The judge is in the best position to determine the credibility of witnesses, and his conclusion in this case is supported by competent facts. See *State v. Burnside* (2003), 100 Ohio St.3d 152, 154-55, 797 N.E.2d 71, 74. Reviewing courts should accord deference to the trial court's decision concerning the credibility of the witnesses because the trial court has had the opportunity to observe the witnesses' demeanor,

gestures, and voice inflections that cannot be conveyed to us through the written record, *Miller v. Miller* (1988), 37 Ohio St. 3d 71. In *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 81, 461 N.E.2d 1273, the Ohio Supreme Court explained: "[a] reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." See, also *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

{¶39} Clearly, the decision of the Trier of fact involved the credibility of Mr. Moneypenny and Tracey Lewis. Obviously, the trial court, upon observing the testimony, candor, and demeanor found Mr. Moneypenny to be more credible than Ms. Lewis. Absent a showing of a manifest miscarriage of justice, we cannot substitute the trial court's decision with our own judgment. *State v. Frazier,* Delaware App. No. 04 CAC 10071, 2005-Ohio-3766 at ¶ 13.

{¶40} The testimony of one witness is sufficient to prove a fact. Therefore, a finding of guilty upon the testimony of one witness, although it may be contradicted by another, is sufficient to support the finding if the Trier of fact finds said witness more credible. *Frazier, supra* at ¶ 14.

{¶41} Upon review, we find sufficient credible evidence, if believed, to support the conviction, and no manifest miscarriage of justice. We find the trial court did not lose its way in finding appellant guilty of assault.

{¶42} Appellant’s second and third assignments of error are overruled.

{¶43} The judgment of the Municipal Court of Fairfield County, Ohio is affirmed.

By Gwin, P.J.,

Farmer, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

_____
HON. SHEILA G. FARMER

_____
HON. PATRICIA A. DELANEY

WSG:clw 0310

[Cite as *State v. Wilson*, 2010-Ohio-1394.]

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DANNY J. WILSON	:	
Defendant-Appellant	:	CASE NO. 09-CA-44

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Municipal Court of Fairfield County, Ohio is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. PATRICIA A. DELANEY