[Cite as *State v. Hoopingarner*, 2010-Ohio-6490.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2010AP 07 00022
RONALD HOOPINGARNER	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Tuscarawas County Court, Case No. CRB 0900284A-C
JUDGMENT:	Affirmed in part; Vacated in part; Remanded
DATE OF JUDGMENT ENTRY:	December 29, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JAMES J. ONG 201 North Main Street, P.O. Box 272 Uhrichsville, OH 44683	DAVID L. BLACKWELL 3405 Curtis Road SE New Philadelphia, OH 44663

Gwin, P.J.

{¶1} Defendant-appellant Ronald Hoopingarner appeals the Judgment of the Tuscarawas County Court finding him guilty of assault in violation of R.C. RC 2903.13 (A)(1), disorderly conduct in violation of R.C. 2917.11 (B)(2) and resisting arrest in violation of R.C. 2921.33. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} During the morning of May 18, 2009, appellant telephoned the Dennison Police Report to complain that an acquaintance, Donald Coen, had taken or failed to return motorcycle parts belonging to appellant. Later that evening appellant confronted Mr. Coen at his home.

{¶3} Mr. Coen testified that appellant was intoxicated and a verbal altercation became physical when appellant took him to the ground, grabbed him by the face and jaw, and put him in a headlock. Mr. Coen testified that although he did not see any object in appellant's hands, appellant hit him on the side of the head with some object because from his "hairline clear to the bottom of my chin was all red." Mr. Coen momentarily lost consciousness. Mr. Coen went inside his house and called the police. Mr. Coen's face was bruised, red and swollen. Pictures were taken of his injuries.

{¶4} Officer Matt Grezlik of the Dennison Police department responded to Mr. Coen's residence to take the report. After obtaining Mr. Coen's statement, Officer Grezlik proceeded to appellant's house. Appellant was sitting on the front steps drinking a beer when the officer approached him. Officer Grezlik noted that appellant was intoxicated. Appellant told the officer that he had gone to Mr. Coen's house to inquire about the motorcycle parts when an argument ensued. Appellant told the officer

that Mr. Coen threw a punch at him and he dodged it. Appellant then grabbed Mr. Coen by the throat, pushed him back, got him in a headlock and took him to the ground.

{¶5} Appellant repeatedly attempted to demonstrate his response to the officer. On three separate occasions appellant placed his hands within a few inches of the officer's throat. Appellant was then placed under arrest.

{¶6} After appellant had been placed under arrest, he twice pulled away from the control of the arresting officer and advised the arresting officer that the arresting officer was not going to arrest him.

{¶7} Appellant was charged with assault, disorderly conduct and resisting arrest. The case proceeded to a bench trial on December 30, 2009. At the conclusion of the evidence, the trial court took the matter under advisement.

{¶8} By Judgment Entry filed January 6, 2010 the trial court found appellant guilty of all charges and set the case for sentencing. Appellant was given a suspended jail sentence, placed on a one-year term of Community Control Sanctions, ordered to complete sixty hours of community service, pay fines and court costs.

{¶9} Appellant initially filed a direct appeal of his conviction in case number 2010 AP 02 0009 This Court dismissed that appeal on March 3, 2010 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. Appellant has timely appealed from that sentencing entry in the above-captioned case. Appellant raises as his sole assignment of error:

{¶10} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION WHEN IT FAILED TO FIND THE APPELLANT NOT

GUILTY OF THE OFFENSES. THE TRIAL COURT'S DETERMINATION OF GUILT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE. THE STATE DID NOT PROVE THE OFFENSES BEYOND A REASONABLE DOUBT."

I.

{¶11} In his sole assignment of error, appellant maintains that his convictions are against the weight of the evidence and are based upon insufficient evidence. We disagree.

{¶12} Our standard of reviewing a claim a verdict was not supported by sufficient evidence is to examine the evidence presented at trial to determine whether the evidence, if believed, would convince the average mind of the accused's guilt beyond a reasonable doubt. The relevant inquiry 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 proven beyond a reasonable doubt, *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E.2d 492, superseded by State constitutional amendment on other grounds as stated in *State v. Smith* (1997), 80 Ohio St.3d 89, 684 N.E.2d 668..

{¶13} The Supreme Court has explained the distinction between claims of sufficiency of the evidence and manifest weight. Sufficiency of the evidence is a question for the trial court to determine whether the State has met its burden to produce evidence on each element of the crime charged, sufficient for the matter to be submitted to the jury.

{¶14} Manifest weight of the evidence claims concern the amount of evidence offered in support of one side of the case, and is a jury question. We must determine

whether the jury, in interpreting the facts, so lost its way that its verdict results in a manifest miscarriage of justice, *State v. Thompkins* (1997), 78 Ohio St. 3d 387, 678 N.E.2d 541, 1997-Ohio-52, superseded by constitutional amendment on other grounds as stated by *State v. Smith,* 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668. On review for manifest weight, a reviewing court is "to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment." *State v. Thompkins*, supra, 78 Ohio St.3d at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, syllabus 1.

{¶15} In *Thompkins*, the Ohio Supreme Court held "[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary." Id. at paragraph three of the syllabus. However, to "reverse a judgment of a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required." Id. at paragraph four of the syllabus; *State v. Miller* (2002), 96 Ohio St.3d 384, 2002-Ohio-4931 at ¶38, 775 N.E.2d 498

{¶16} In examining the record to determine this issue, we may give weight to the fact that the error occurred in a trial to the court, rather than in a jury trial. *State v. White* (1968), 15 Ohio St.2d 146, 151, 239 N.E.2d 65; *State v. Austin* (1976), 52 Ohio App.2d 59, 70, 368 N.E.2d 59. Indeed, a judge is presumed to consider only the relevant, material and competent evidence in arriving at a judgment, unless the contrary affirmatively appears from the record. *State v. White*, supra, 15 Ohio St.2d at page 151, 239 N.E.2d 65; *State v. Eubank*, 60 Ohio St.2d 183, 187, 398 N.E.2d 567, 569-570; *Columbus v. Guthmann* (1963), 175 Ohio St. 282, 194 N.E.2d 143, paragraph three of the syllabus.

{¶17} A. Self-Defense.

{¶18} Appellant first claims the trial court's finding of guilty of assault ignored the legal principle of self-defense.

{¶19} In the case at bar, appellant was convicted of assault. R.C. 2903.13 provides, in relevant part:

{¶20} "(A) No person shall knowingly cause or attempt to cause physical harm to another…."

{¶21} R.C. 2901.01 states, in relevant part:

{¶22} "(A) As used in the Revised Code:

{¶23} "* * *

{¶24} "(3) 'Physical harm to persons' means any injury, illness, or other physiological impairment, regardless of its gravity or duration."

{¶25} In the case at bar, there is no dispute that appellant took the victim to the ground, grabbed the victim by the face and jaw, and put the victim in a headlock. The

victim further testified that appellant hit him on the side of the head with some object. Mr. Coen's face was red, swollen and bruised.

{¶26} 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 Mr. Coen.

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

{¶28} "(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."

{¶29} 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).

{¶30} Appellant focuses on the issue of self-defense. 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. 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. The proper standard for determining whether a criminal defendant has successfully raised an affirmative defense is to inquire whether the defendant has introduced sufficient evidence which, if believed, would raise a question in the minds of reasonable men concerning the existence of the issue. *State v. Melchior,* 56 Ohio St.2d 15, 381 N.E.2d 195, 381 N.E.2d 190 at ¶ 1 of the syllabus.

{¶31} 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.

{¶32} 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.

{¶33} Clearly, the decision of the trier of fact involved the credibility of appellant, the arresting officer and the victim.

{¶34} 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.

{¶35} 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.

{¶36} 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.

{¶37} We conclude the trier of fact, in resolving the conflicts in the evidence, did not create a manifest miscarriage of justice so as to require a new trial. Viewing this evidence in a light most favorable to the prosecution, we further conclude that a rational

trier of fact could have found beyond a reasonable doubt that appellant was guilty of assault.

{¶38} B. Resisting Arrest.

{¶39} Appellant was also convicted of Resisting Arrest in violation of R.C. 2921.33(A), which states in relevant part,

{¶40} "(A) No person, recklessly or by force, shall resist or interfere with a lawful arrest of the person or another."

{¶41} In the case at bar, appellant, after being told by the arresting officer that he was under arrest[1], twice pulled himself away from the control of the arresting officer. Each time, appellant informed the arresting officer that the arresting officer was not going to arrest him. (Trial T. at 20-21; 36-37).

{¶42} 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 resisting arrest.

{¶43} We conclude the trier of fact, in resolving the conflicts in the evidence, did not create a manifest miscarriage of justice so as to require a new trial. Viewing this evidence in a light most favorable to the prosecution, we further conclude that a rational trier of fact could have found beyond a reasonable doubt that appellant was guilty of resisting arrest.

{¶44} C. Disorderly Conduct.

{¶45} Appellant was also convicted of Disorderly Conduct.

[1] We note appellant was charged with assault, in addition to disorderly conduct, which could form the basis for his arrest. R.C. 2901.01(A)(9); R.C. 2953.03.

{¶46} Disorderly Conduct in violation of R.C. 2917.11(B)(2) states in pertinent part as follows:

{¶47} "(B) No person, while voluntarily intoxicated, shall do either of the following:

{¶48} "* * *

{¶49} "(2) Engage in conduct or create a condition that presents a risk of physical harm to the offender or another, or to the property of another."

{¶50} Specifically, appellant contends that the state failed to produce sufficient evidence that he engaged in conduct or created a condition that presented a risk of physical harm to himself or another while voluntarily intoxicated.

{¶51} In the case at bar, the trier of fact heard testimony from the victim and the arresting officer that appellant was intoxicated at the time of the incident. Appellant, himself, admitting to consuming numerous beers prior to the incident. The arresting officer testified that appellant placed his hands very near the throat of the arresting officer. Appellant did this on two (2) occasions, despite being told by the arresting officer to cease with such actions after the initial movement. However, in the case at bar, Officer Grezlik testified,

{¶52} "A. The disorderly conduct by intox was for one, he was intoxicated and for putting his hand close to my throat three different times had nothing to do with him ripping his hand away from me, that was the resisting.

{¶53} "* * *

{¶54} "Q. And each time, each time I'm getting the understanding from you that you understand he's trying to demonstrate?

{¶55} "A. Yes, yes.

{¶56} "Q. Okay. In other words, he was not, I take it again from your testimony, correct me if I'm wrong, I'm taking it you did not believe he was literally going for your throat as such?

{¶57} "A. No.

{¶58} "Q. Okay.

{¶59} "A. He was close enough to where I didn't feel comfortable with him being that close but no. I didn't."

{¶60} (Trial T. at 30; 35)

{¶61} The law focuses, not on the drunken state of the accused, but rather upon his conduct while drunk. *State v. Pennington* (Nov. 16, 1998), 5th Dist. No.1998CA00137, 1998 WL 818632. The law requires some affirmative behavior on the part of the defendant and does not prohibit merely being intoxicated. *State v. Jenkins* (Mar. 31, 1998), 6th Dist. No. L-97-1303, 1998 WL 161190; *State v. Parks* (1990), 56 Ohio App.3d 8, 10-11, 564 N.E.2d 747. "Risk" is statutorily defined as "a significant possibility as contrasted with a remote possibility, that a certain result may occur or that certain circumstances exist." R.C. 2901.01(A)(7).

{¶62} Although there always exists some risk of harm when people are intoxicated, there was no "significant possibility" of harm. The testimony of Officer Grezlik does not establish the element of risk as required to prove a conviction for disorderly conduct under R.C. 2917.11(B)(2). Because the state failed to prove an essential element of the offense, we hold that appellants' conviction for disorderly

conduct was against the manifest weight of the evidence. *State v. Waters* 181 Ohio App.3d 424, 433, 909 N.E.2d 183, 189.

{¶63} On the authority contained in Section 3(B) (2), Article IV of the Ohio Constitution and R.C. 2953.07, the conviction and sentence on Count Three, disorderly conduct is vacated.

{¶64} The judgment of the Tuscarawas County Court is affirmed in part and is reversed in part. Pursuant to Section 3(B) (2), Article IV of the Ohio Constitution and R.C. 2953.07, the conviction and sentence on Counts Three, Disorderly Conduct is vacated, and this case is remanded for proceedings in accordance with our opinion and the law.

By Gwin, P.J.,

Wise, J., and

Delaney, J., concur

_____

HON. W. SCOTT GWIN

_____

HON. JOHN W. WISE

_____

HON. PATRICIA A. DELANEY

WSG:clw 1217

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RONALD HOOPINGARNER	:	
Defendant-Appellant	:	CASE NO. 2010AP 07 00022

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Tuscarawas County Court is affirmed in part and is reversed in part. Pursuant to Section 3(B) (2), Article IV of the Ohio Constitution and R.C. 2953.07, the conviction and sentence on Counts Three, Disorderly Conduct is vacated, and this case is remanded for proceedings in accordance with our opinion and the law. Costs to be divided equally between appellant and appellee.

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HON. W. SCOTT GWIN

_____

HON. JOHN W. WISE

_____

HON. PATRICIA A. DELANEY