[Cite as *State v. Smith*, 2015-Ohio-1610.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- ADRIAN A. SMITH Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P .J. Hon. Sheila G. Farmer, J. Hon. John W. Wise, J. Case No. 14 CA 83 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 13 CR 625
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 24, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KENNETH W. OSWALT LICKING COUNTY PROSECUTOR RACHEL E. DAEHLER ASSISTANT PROSECUTOR 20 South Second Street, Fourth Floor Newark, Ohio 43055	STEPHEN T. WOLFE WOLFE VAN WEY & ASSOCIATES 1350 West 5th Avenue Suite 124 Columbus, Ohio 43212

Wise, J.

{¶1}. Appellant Adrian A. Smith appeals his conviction, in the Court of Common Pleas, Licking County, on one count of felonious assault. Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2}. Appellant Adrian Smith and Destiny Daniels, the victim in this matter, started dating in March 2013. According to Destiny, they had "trust issues" and both had "cheated" in the relationship. Tr. at 247-248. From late in the evening on October 13, 2013, into the early morning of October 14, 2013, appellant and Destiny engaged in several argument-filled telephone conversations, during which appellant *inter alia* threatened to harm Destiny by hitting her with a bat.

{¶3}. On October 14, 2013, at approximately 7:00 AM, Destiny left for work. As she walked to her car, she saw a shadowy figure nearby to her right, standing up from a crouched position. Frightened, she began running toward the safety of a group of students waiting for a bus near the corner of Eddy and Hoover. She was chased by someone wearing all black, who eventually struck on her shins and thighs with a crowbar. It was still dark outside; Destiny could only see the eyes of her attacker, but she recognized the man as appellant. Tr. at 253-254. As a result of the crowbar assault, Destiny suffered bruises on her legs. When Destiny's mother, Angela Martin, came out to assist after the attack, she observed that Destiny could not walk. Tr. at 174. Destiny for a time told her she thought her leg was broken. *Id.*

{¶4}. Two teenage minors, G.B. and T.J., were waiting at the bus stop near where the incident took place. However, neither one could later identify the assailant. *See* Tr. at 113, 126. A neighbor, Joseph Corathers, later found a crowbar in the street.

{¶5}. On January 9, 2014, the Licking County Grand Jury indicted appellant on one count of Felonious Assault, R.C. 2903.11(A)(2), a felony of the second degree. The matter proceeded to a jury trial on September 10 and 11, 2014.

{¶6}. At the close of the State's case, appellant unsuccessfully moved for acquittal pursuant to Crim.R. 29. Tr. at 300. The motion for acquittal was renewed at the close of appellant's case and again after closing. The trial court denied the motion in both instances. The jury found appellant guilty of the count of felonious assault. The trial court thereupon sentenced appellant to three years in prison, to be served consecutive to his prison term in another case, as well as three years of post-release control.

{¶7}. On October 3, 2014, appellant filed a notice of appeal. He herein raises the following three Assignments of Error:

{¶8}. "I. THE JURY'S VERDICTS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶9}. "II. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUPPORT THE CONVICTIONS.

{¶10}. "III. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR ACQUITTAL PURSUANT TO CRIM.R. 29."

{¶11}. We will address the above assigned errors out of sequence.

II., III.

{¶12}. In his Second and Third Assignments of Error, appellant contends his conviction was not supported by sufficient evidence and that the trial court erred in

declining to grant his motion for acquittal under Crim.R. 29. We disagree on both counts.

{¶13}. An appellate court reviews a denial of a Crim.R. 29 motion for acquittal using the same standard used to review a sufficiency of the evidence claim. *See State v. Carter* (1995), 72 Ohio St.3d 545, 553, 651 N.E.2d 965, 1995-Ohio-104. Thus, "[t]he relevant inquiry is whether, after viewing the evidence in a 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, paragraph two of the syllabus.

{¶14}. Appellant was convicted of felonious assault under R.C. 2903.11(A)(2), which states as follows: "No person shall knowingly * * * [c]ause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance." Physical harm to persons is defined in the Revised Code as "any injury, illness, or other physiological impairment, regardless of its gravity or duration." R.C. 2901.01(A)(3).

{¶15}. Appellant first directs us to the element of physical harm in the felonious assault statute at issue. At trial, the State called a physician and a nurse who had both treated Destiny at the emergency room. Each testified that she had suffered a bruise to her leg. *See* Tr. at 199, 211. The jury was also shown photographs of the bruising. Furthermore, although Destiny was able to return to work the day after the attack, she had extreme difficulty walking for three or four days. Tr. at 284-285. Thus, we first conclude that sufficient evidence was presented to demonstrate "physical harm" beyond a reasonable doubt.

{¶16}. Appellant secondly challenges the sufficiency of the evidence regarding the involvement of a deadly weapon. "A deadly weapon is defined as an instrument capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon." *State v. Isles*, 5th Dist. Stark No. 2009-CA-00290, 2010-Ohio-4847, ¶ 21, citing R.C. 2923.11(A).

{¶17}. Appellant points out that the treating physician. Dr. Matthew Bromley, testified that an attack of the type brought against Destiny, i.e., a crowbar strike to the legs, would be unlikely to cause death. Tr. at 213-214. Appellant thus urges that the crowbar in the case sub judice cannot be a deadly weapon when used in such a manner. However, we find no merit in this claim. "A crowbar is a solid iron or steel bar with a wedged end, commonly used as a pry or lever." *Commonwealth v. McCombs*, 304 S.W.3d 676, 681 (Ky. 2009), citing *Merriam-Webster's Collegiate Dictionary* (10th Ed. 2002). Clearly, according to the victim's testimony, the crowbar in question was not being used for its normal mechanical purposes and was instead being utilized as a weapon nonetheless "capable of" inflicting death.

{¶18}. Upon review, viewing the evidence in a light most favorable to the prosecution, we hold there was sufficient testimony and evidence to support a conclusion by the jury, beyond a reasonable doubt, that appellant caused physical harm to Destiny by means of a deadly weapon.

{¶19}. Appellant's Second and Third Assignments of Error are therefore overruled.

I.

{¶20}. In his First Assignment of Error, appellant contends his conviction for felonious assault was against the manifest weight of the evidence. We disagree.

{¶21}. 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.

{¶22}. In the case sub judice, the State called ten witnesses, including the victim, Destiny. She agreed that she had previously told the grand jury she was "99.9 percent" sure it was appellant, who ultimately apologized to her for what had happened. Tr. at 259, 294. As mentioned in our recitation of facts, two teenage minors, G.B. and T.J., testified they were waiting at the bus stop near where the incident took place. G.B. heard a scream and saw a female get hit by “that metal thing”, but he could not identify the assailant due to the pre-dawn darkness. Tr. at 114, 118-119. T.J. could not identify the assailant and did not actually see the attack, although he observed a figure running from the scene. Tr. at 126, 135. A neighbor, Joseph Corathers, found a crowbar in the street (which ultimately showed no fingerprints), but he did not see the attack or the attacker. Tr. at 144-148, 227.

{¶23}. The crux of appellant's "manifest weight" argument is that the jury lost its way in failing to account for the alibi defense presented via the testimony of appellant's mother, Tracy Allen, with whom appellant resided at the time *See* Tr. 301 *et seq*. Tracy testified at trial that on the morning of the incident in question, she woke up at 6:30 AM, and called for their dog, which was sleeping in appellant's bedroom. She claimed this woke appellant up, but he was still in bed at 7:15 AM when she departed for work. *See* Tr. at 306-310. Tracy was not further questioned about and did not detail her basis for knowing he was still inside the house when she left. *See* Tr. at 308. While her workday schedule was consistent during the time period surrounding the assault on Destiny, Tracy admitted on cross-examination that she was not even aware of the date of the incident until she was informed by appellant in a recorded telephone call. *See* Tr. at 317. In this phone call, Tracy can be heard telling appellant, regarding the identity of the specific day of the incident, that "it doesn't matter what day, you were home." *See* State's Exhibit 9.

{¶24}. Even in addressing a manifest weight claim, we remain mindful that the jurors, as the firsthand triers of fact, are patently in the best position to gauge the truth. *See State v. Durbin,* 5th Dist. Holmes No. 13 CA 2, 2013–Ohio–5147, ¶ 53. Upon review, we hold the jury's decision and its rejection of an alibi did not create a manifest miscarriage of justice requiring that appellant's conviction be reversed and a new trial ordered.

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

{¶26}. For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Licking County, Ohio, is hereby affirmed.

By: Wise, J.

Hoffman, P. J., and

Farmer, J., concur.

JWW/d 0324