[Cite as *State v. Hopson*, 2015-Ohio-2848.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- PEYTON HOPSON Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. Craig R. Baldwin, J. Case No. 2014CA00163 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from Stark County Court of Common Pleas, Case No. 2013CR1982
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 13, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO, Prosecuting Attorney, Stark County, Ohio By: RONALD MARK CALDWELL Assistant Prosecuting Attorney Appellate Section 110 Central Plaza South - Suite 510 Canton, Ohio 44702-1413	PEYTON HOPSON #662-444 2075 S. Avon-Belden Rd. Grafton, Ohio 44044

[Cite as *State v. Hopson*, 2015-Ohio-2848.]

Gwin, P.J.,

{¶1} Defendant-appellant Peyton Hopson appeals his conviction and sentence entered by the Stark County Court of Common Pleas, on one count of felonious assault, in violation of R.C. 2903.11, with a repeat violent offender specification. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On February 3, 2014, the Stark County Grand Jury indicted Appellant on five counts. Count One of the Indictment charged Appellant with felonious assault, in violation of R.C. 2903.11(A)(1) and/or (A)(2), with a repeat violent offender specification, a felony of the second degree. Count Two charged Appellant with rape, in violation of R.C.2907.02(A)(2), with repeat violent offender and sexually violent predator specifications, a felony of the first degree. Count Three charged Appellant with kidnapping, in violation of R.C. 2905.01(A)(2) and/or (3) and/or (4) and/or (B)(1) and/or (2), with repeat violent offender, sexually violent predator, and sexual motivation specifications, a felony of the first degree. Count Four charged Appellant with felonious assault, in violation of R.C. 2903.11(A)(1) and/or (A)(2), with a repeat violent offender specification, a felony of the second degree. Count Five charged Appellant with notice of change of address; registration of new address, in violation of R.C. 2950.05(A)(F)(1) and R.C. 2950.99(A), a felony of the third degree. Appellant appeared before the trial court for arraignment on February 7, 2014, and entered a plea of not guilty to all the charges. The trial court appointed Attorney Earl Wise, Jr. to represent Appellant. Appellant executed a waiver of time on February 21, 2014. The matter was scheduled for jury trial on May 19, 2014.

{¶3} On April 14, 2014, Appellant filed a motion to sever the counts for trial. Via Judgment Entry filed May 6, 2014, the trial court granted Appellant's motion to sever, ordering: "count one of the indictment be tried separately, that counts two, three, and four of the indictment be tried together, but separate from any other counts of the indictment, and that count five of the indictment be tried separately." May 6, 2014 Judgment Entry. In addition, the trial court noted, "This matter remains set for trial on May 19, 2014. The State of Ohio shall elect the charges that it wishes to present to the jury on * * * on or before May 9, 2014." *Id.* On May 14, 2014, the trial was rescheduled to May 29, 2014.

{¶4} Appellant filed a waiver of right to be represented by counsel on May 19, 2014. At a pretrial conducted the same day, the trial court informed Appellant the trial on Count One, felonious assault, would be continued until June 16th, and the trial on Count Five, failure to give notice of change of address, would be held on May 27, 2014.[1] The trial court then inquired of Appellant to determine his understanding of his request to represent himself:

> THE COURT: *Now, is it still your desire though with respect to the one count of failure to notify a change of address to proceed pro se or do you want Mr. Wise to represent you on that*?
>
> [APPELLANT]: I will go pro se.
>
> THE COURT: * * * Well, I'm going to make this inquiry of you, Mr. Hopson, and I want to ask you some questions. There's [sic] a lot of

[1] It is unclear from the record why the trial date was moved back from May 29, 2014, to May 27, 2014; however, the Assignment Notice contained in the trial court file indicated that it is a Final Pre-trial, not a trial that was to occur on May 27, 2014. *See,* Docket Entry 44.

questions I have to ask you. * * * If you have questions, you ask me and I'll answer them for you. And if at any point in time you decide that maybe that's not what you want to do, you let me know. Okay?

[APPELLANT]: Okay.

THE COURT: * * * I want you to understand that you do have a right to have a lawyer present with you and that the Court has appointed an attorney to represent you at no cost.

And have you thought this matter through and are you certain that you wish to proceed without a lawyer?

[APPELLANT]: Yes, Your Honor.

THE COURT: Okay. Do you understand that Mr. Wise has experience handling criminal matters, in particular handling criminal jury trials? You understand that?

[APPELLANT]: Yes, Your Honor.

THE COURT: Okay. And do you understand that you have a constitutional right to have a lawyer to advise and to represent you at all times? * * *

[APPELLANT]: Yes, Your Honor.

THE COURT: * * * Do you understand also, sir, that a Defendant who represents himself may impart to the jury a negative or bad feeling since a lawyer is not present to handle your case?

[APPELLANT]: I understand that.

* * *

THE COURT: * * * Now, Mr. Hopson, because we are doing this somewhat piecemeal in the fact that all the charges pending against you are not going to be tried at one time, I, *I, am at this point in time with respect to your request to proceed pro se dealing solely with the issue of failure to give notice of change of address. I'm not going to talk about the other charges because if we do in fact go through this trial and you may think perhaps maybe I should have an attorney*, if you – if we go through all that – we'll talk about whether or not you want to proceed pro se with just the rest of them, but just as far as this issue is before the Court I am dealing solely with the failure to give change of address and that is a felony of the third degree.

[APPELLANT]: Yes, ma'am.

* * *

THE COURT: Okay. Do you understand, Mr. Hopson, that it may be much easier for an attorney to contact any potential witnesses on your behalf, to gather evidence on your behalf and to question witnesses on your behalf than it may be for you to do so?

[APPELLANT]: Um, I, I was under the impressions, Your Honor, that I would at least be provided counsel who could gather my evidence and subpoena witnesses for me being that I'm incarcerated in the county jail.

THE COURT: Well, I will be appointing shadow counsel to represent you that – I'm going to have Mr. Wise stay on as counsel. * * *

While he may be able to contact those witnesses, it's a lot different – and ask them anything that you want him to ask them * * * it's a lot different than him being able to ask questions and prepare your defense. You understand that?

[APPELLANT]: I understand. I understand.

* * *

THE COURT: Okay. In our discussion here, Mr. Hopson, I believe that I must advise you that in almost every case it would be my opinion that a trained lawyer would defend you far better than you could represent yourself. It is almost always unwise of a Defendant on trial to try to represent themselves. I can tell you quite honestly if I was on trial I would not represent myself. * * * You are not familiar with the law. You are not familiar with handling a trial. You are not familiar with court procedures, and you are not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself. Do you understand my position on that issue?

[APPELLANT]: Yes, Your Honor.

* * *

THE COURT: Now, in light of the penalties that you might suffer if you are in fact found guilty and in light of the difficulties in representing yourself, *do you still desire to represent yourself and to give up your right to be represented by a lawyer*?

[APPELLANT]: *Yes, Your Honor*.

THE COURT: Okay. Are you making this decision freely and does it reflect your own personal desire?

[APPELLANT]: Yes, Your Honor.

THE COURT: Okay. Now, as I indicated to you earlier, I am going to have Attorney Wise stand on as shadow or standby counsel; * * * And what that means is that he's going to be present in the courtroom; * * * At any point in time you decide that this is too much, that you can't handle it, he will step in and represent you.

* * *

THE COURT: Okay. And are you sure you still want to do this? * * * You don't want to have an attorney represent you?

[APPELLANT]: No, Your Honor.

* * *

THE COURT: Okay. Now, you can change your mind about this at any time, okay. If you go back this afternoon and you start to think about all the things we've talked about and, and you think well, maybe yeah, I – this isn't wise, maybe I shouldn't exactly do this, you can change your mind at any time that includes during the trial itself as well.

Transcript of May 19, 2014 Hearing at 6-9, 14-15, 27-28, 30-33, 36, 38. (Emphasis added).

{¶5} During this conversation, the trial court also discussed Appellant's need to abide by the rules of evidence and the rules of criminal procedure; the standard to which Appellant would be held; the effects self-representations may have on his ability

to raise certain issues on appeal; the voir dire process and procedures; the presentation of the case from start to finish; as well as potential rights Appellant may be giving up. Appellant acknowledged his understanding of all matters addressed by the trial court.

{¶6} The trial court granted Appellant's request to waive counsel, finding, under the totality of the circumstances, Appellant knowingly, intelligently, competently, and voluntarily desired to waive his right to counsel. Thereafter, Appellant executed a waiver of counsel form. Prior to the conclusion of the hearing, the trial court noted: "[A]s I indicated, I am only considering this waiver as it applies to the case that is set for May 27th [sic]; that is the charge of the notice of change of address. * * * Once we go through that and once you see how hard it is, you have the right to change your mind and we'll go through it all with respect to the more serious charges that remain." May 19, 2014 Tr. at 45.

{¶7} On May 22, 2014, the state filed a motion to continue the trial on the ground that some of their witnesses were unavailable. See, Docket Entry 54; Transcript, May 22, 2014 at 12. The trial court conducted a status conference on the same day.

{¶8} During the hearing the Appellant indicated to the trial court that he had reconsidered his request to represent himself with respect to the felonious assault charge:

> [HOPSON]: I would like to ask the Court that, um, maybe um – that maybe I could be granted the, the, you know, the, the, the option of later having Attorney Graham to represent me with the other two cases?

[THE COURT]: Well, at this time I'm appointing him to represent you for the other two cases We haven't talked about whether or not you are going to proceed pro se with respect to those two cases, so I am –

[HOPSON]: Right.

[THE COURT]: - - appointing him to represent you in those two cases.

[HOPSON]: Thank you, Your Honor.

Transcript, May 22, 2014 at 7-8. The trial court continued:

Okay.

In the meantime, I am appointing Mr. Graham to represent you, Mr. Hopson, on the charges of - - all the remaining charges except for the notice of failure to register.

* * *

Transcript, May 22, 2014 at 15.

{¶9} Appellant reiterated his desire to represent himself on the charge of failure to notify. The trial court appointed Attorney Wayne Graham to represent Appellant on the remaining charges, and to act as shadow counsel on the notice charge. The trial court granted the state's motion to continue the trial. The trial court continued the trial on the notice charge to June 16, 2014. During the May 22, 2014 status conference, the trial court informed the parties "the State of Ohio has the right to elect what charge they are going to go forward on June the 16th. And I will instruct the State of Ohio to notify myself, Mr. Hopson and Mr. Graham on or before May 28th as to which charge they will

proceed with on June 16th, okay?" Transcript of May 22, 2014 Hearing at 15. Following a pretrial on June 25, 2014, the trial court rescheduled the trial to June 30, 2014.

{¶10} In a correspondence dated June 5, 2014, and filed June 11, 2014, Appellant advised the trial court he had not yet received notice from the State of Ohio as to which charge it would proceed at trial on June 16, 2014. Appellant filed a Motion to Set Trial Date, which was filed on June 18, 2014. On June 27, 2014, Appellant, through Attorney Graham, filed a motion for a continuance, which the trial court granted. The trial was scheduled for July 21, 2014. At some point, although it is unclear from the record before this Court as to when, the State elected to proceed to trial on the felonious assault charge as contained in Count One of the Indictment. Various pretrial's and status conferences were held during the course of the proceedings, but were not transcribed.

{¶11} On the morning of trial, Appellant advised the trial court he wished to proceed pro se. The following exchanged occurred between the trial court and Appellant:

> [APPELLANT]: Your Honor, actually I do want to proceed pro se with this case.
>
> THE COURT: Why?
>
> [APPELLANT]: I mean I believe it would be – I will be well within my rights, wouldn't I?
>
> THE COURT: No, you wouldn't be.
>
> [APPELLANT]: I wouldn't be?
>
> THE COURT: No.

[APPELLANT]: I'm not by law permitted to represent myself?

THE COURT: Well, you are if you can show me good cause as to why I should allow you to proceed pro se after I have given you a new counsel that you requested, and we are now five minutes after the trial should have started and you were just bringing this to my attention.

So tell me why I should allow you to go pro se.

[APPELLANT]: the last time I was in here was Friday. I had written you a letter, Your Honor. In that letter, I was asking to have pretrial conference with you concerning evidence and things of that nature.

When I was brought into the courtroom, neither you nor the prosecution were present at that time. I was then whisked off in the back room to have conference with my attorney over evidence that I felt he and I shouldn't discuss between us and not in an open courtroom or microphone and, you know.

So and then I asked my attorney, I said, Is the Judge present? Is the Prosecutor present? And he told me no. On the way out of the courtroom you were present.

THE COURT: Well, let me clarify that the Court set the matter for a pretrial at your request. The Court met with your appointed counsel and with the State of Ohio, discussed matters for this trial and gave your counsel the opportunity to discuss matters with you in private.* * *The Court was willing to make that accommodation for you.

> The fact that there is nothing put on the record does not mean that the State and the Court were not available.
>
> * * *
>
> The Court did discuss with counsel who had indicated that he spoke with you and indicated that his Motion in Limine * * *was sufficient to cover the concerns that you had with respect to the evidence that was presented in your handwritten motion.
>
> Now, the Court finds that at this time at this late stage you have not shown good cause as to why the Court should allow you to go pro se or allow alternative counsel to be present.
>
> The Court has made every accommodation for you, Mr. Hopson, to make sure that your rights are protected, and the Court will deny your motion at this time to proceed pro se.

Transcript of July 21, 2014 Trial at 10-14.

{¶12} Thereafter, the trial commenced with Attorney Graham representing Appellant. The following evidence was presented at trial.

{¶13} On the evening of December 15, 2013, Canton Police were dispatched to the residence of Shawn Jalloh, after receiving a 911 call advising Jalloh had been assaulted by Appellant, her boyfriend. Officer Jessie Gambs and his partner arrived at the residence and found Jalloh with a bleeding gash on her head. Jalloh was hesitant to tell Officer Gambs what had happened, but eventually informed him Appellant had assaulted her. Officer Gambs questioned Jalloh as to Appellant's whereabouts, but she could not answer. The officer could see Jalloh was fearful. She eventually pointed to her

bedroom, where Officer Gambs found Appellant. Jalloh identified Appellant as her assailant.

{¶14} Officer Gambs called for paramedics due to the large open, bleeding gash on Jalloh's forehead. While waiting for the paramedics to arrive, the officer noticed the left side of Jalloh's face was swollen around her eye and cheekbone, and she had a bite mark on her right hand. Jalloh told Officer Gambs Appellant became angry when she asked his brother to leave the residence, and they began to argue, which led to Appellant assaulting her. At the hospital, Jalloh provided Officer Gambs with a written statement about the incident.

{¶15} Jalloh testified she and Appellant were shopping at Walmart earlier in the day on December 15, 2013. On the way back, Jalloh told Appellant she was going to her mother's house to do laundry. Appellant did not want to accompany Jalloh, so she dropped him off at her apartment. When she returned home several hours later, she found Appellant and his brother, Parnell Stokes, watching football. She observed that the two brothers had been drinking. She left the room and went to the kitchen to cook dinner. Stokes entered the kitchen and gave Jalloh carnival masks as a gift. Stokes returned to the living room. As Jalloh prepared dinner, she heard Appellant ask Stokes to leave. Jalloh asked Appellant why he asked Stokes to leave. Appellant replied his brother was getting in his business.

{¶16} Jalloh was upset with Appellant because he had been drinking while she was doing laundry, and because he was noticeably drunk. While she continued cooking dinner, Appellant approached her and pushed her in the neck. Jalloh told Appellant to go home. She telephone the man Appellant stayed with, however, he did not answer his

phone. Jalloh repeatedly asked Appellant to leave, telling him he needed to go somewhere for a couple of days. Jalloh testified she knew it was “gonna end up all bad” if he stayed at her place and she “felt like something was about to happen.” Transcript of July 21, 2014 Trial at 138-139. To get Appellant out of her apartment, Jalloh asked him to go to the gas station with her. She hoped to convince Appellant to stay with a friend who lived near the gas station, but Appellant would not do so.

{¶17} When they returned to the apartment, Jalloh agreed to let Appellant stay, but insisted he sleep on the couch and leave in the morning. Appellant used Jalloh’s cell phone to make a couple of calls. Unable to reach anyone, Appellant threw the cell phone against the wall, breaking it. Jalloh retreated into her bedroom. Appellant followed her, telling her he was “tired of this shit” and that she talked too much. Appellant then jumped on Jalloh, pushing her down on the bed. He proceeded to beat her, striking her face, ears, and arms. Jalloh grabbed Appellant by the mouth and tried to throw him off the side of the bed. She struck her arm on the footboard of the bed. The two continued to struggle for a short time. Appellant then jumped up, grabbed a lamp, and hit Jalloh in the head with it. Jalloh asked Appellant how he could have done this to her. Appellant stated he was sorry and he loved her. Jalloh instructed him to leave, and proceeded to the bathroom because there was blood all over her bed. She then called 911, and informed the operator she had been struck by a lamp, but would not tell the operator who had hit her. Appellant remained at the apartment despite Jalloh’s continued insistence he leave. When the police and paramedics arrived, Jalloh told them what had transpired. Police located Appellant and placed him under arrest. Jalloh was transported to the hospital for treatment.

{¶18} Parnell Stokes testified on behalf of Appellant. Stokes, a repeat convicted felon who has served several lengthy prison terms, testified he visited Appellant on December 15, 1013, and the two drank and watched a football game. Stokes stated when Jalloh returned, he gave her a gift of carnival masks. He told Jalloh he and Appellant had been drinking. Stokes could tell from Jalloh's expression that she was not happy, and he grabbed his coat to leave with Appellant. Stokes recalled, as Appellant gathered his coat and belongings from the bedroom, Jalloh struggled with him in an attempt to get Appellant to stay. According to Stokes, Jalloh started to kick Appellant, but inadvertently kicked the lamp by the bed. The lamp flew in the air, crashing down on Jalloh's head. Appellant instructed Stokes to leave, and Stokes complied.

{¶19} Appellant, who testified in his own defense, recalled, after he and Jalloh finished shopping, he went to the apartment while Jalloh went to do laundry at her mother's house. Appellant invited his brother over to watch football and drink. When Jalloh returned home, she was visibly angry because he and his brother had been drinking. Appellant decided to leave with his brother because he could see Jalloh was in a bad mood. When he went into the bedroom to collect his coat and other things, Jalloh grabbed him and clawed his face. Appellant pushed Jalloh away, but the two fell to the bed because Jalloh would not let go of him. As the two struggled, Jalloh started kicking Appellant, then accidently kicking the lamp by the bed, which crashed on her. Jalloh called 911. Appellant stated he did not leave because Jalloh was seriously injured and he did not want to leave her alone. Appellant indicated he was not concerned about the police, as he had not done anything wrong. After the police arrived and spoke with Jalloh, Appellant was arrested.

{¶20} After hearing all the evidence and deliberating, the jury found Appellant guilty of one count of felonious assault as set forth in Count One of the Indictment. The trial court sentence Appellant to an aggregate prison term of 14 years, 8 years for the felonious assault and 6 years for the repeat violent offender specification.

{¶21} It is from his conviction and sentence Appellant appeals, raising the following assignments of error:

{¶22} "I. THE TRIAL COURT ERRED IN PREVENTING APPELLANT FROM ACTING AS HIS OWN COUNSEL FOR THE PURPOSES OF HIS JURY TRIAL.

{¶23} "II. THE APPELLANT'S CONVICTION FOR ONE COUNT OF FELONIOUS ASSAULT WAS AGAINST HE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

I

{¶24} In his first assignment of error, Appellant maintains the trial court erred in preventing him from acting as his own counsel for the purpose of his jury trial.

{¶25} Criminal defendants enjoy the constitutional right to self-representation at trial provided that the right to counsel is knowingly, voluntarily, and intelligently waived after sufficient inquiry by the trial court. *State v. Johnson,* 112 Ohio St.3d 210, 2006-Ohio-6404, at ¶ 89. “If a trial court denies the right to self-representation, when properly invoked, the denial is per se reversible error.” *State v. Cassano,* 96 Ohio St.3d 94, 2002-Ohio-3751, at ¶ 32, citing *State v. Reed,* 74 Ohio St.3d 534, 535, 1996-Ohio-21; *McKaskle v. Wiggins* (1984), 465 U.S. 168, 177. “To establish an effective waiver of the right to counsel, ‘the trial court must make sufficient inquiry to determine whether [the] defendant fully understands and intelligently relinquishes that right.’ " *Cassano* at ¶ 32,

quoting *Gibson* at paragraph two of the syllabus (alteration in original). Further, the invocation of the right to self-representation must be 'clear and unequivocal.' " *State v. Hadden,* Trumbull App. No.2008-T-0029, 2008-Ohio-6999, at ¶ 62, citing *Cassano* at ¶ 38; *United States v. Frazier-El* (C.A.4, 2000), 204 F.3d 553, 558. It must also be timely made, and self-representation may be properly denied when requested in close proximity to trial or under circumstances indicating that the request is made for purposes of delay or manipulation. *State v. Vrabel,* 99 Ohio St.3d 184, 2003-Ohio-3193, at ¶ 50.

{¶26} In the case at bar, the trial was originally scheduled for May 19, 2014, but rescheduled to May 29, 2014. Appellant filed a waiver of right to be represented by counsel on May 19, 2014. At a pretrial conducted that same day, the trial court discussed Appellant's request solely with respect to the failure to give notice of change of address charge. The trial court advised Appellant, "I'm not going to talk about the other charges because if we do in fact go through this trial and you may think perhaps maybe I should have an attorney, if you – if we go through all that – we'll talk about whether or not you want to proceed pro se with just the rest of them." Transcript of May 19, 2014 Hearing at 15. Thereafter, the trial court found, under the totality of the circumstances, Appellant knowingly, intelligently, competently, and voluntarily desired to waive his right to counsel. Prior to the conclusion of the hearing, the trial court reiterated: "[A]s I indicated, I am only considering this waiver as it applies to the case that is set for May 27th [sic]; that is the charge of the notice of change of address." *Id.* at 45.

{¶27} However, Appellant clearly reconsidered his request to represent himself with respect to the felonious assault charge during the March 22, 2014 hearing when he asked the trial court to appoint Attorney Graham for the other charges. We find that, at the very least, Appellant led the trial court to believe that he wanted Mr. Graham to represent him on the felonious assault charge subsequent to the filing of his notice of self-representation. Clearly, Appellant failed to object to the trial court's appointment in court when he had the opportunity to do so.

{¶28} In the case at bar, the trial of the felonious assault charge commenced on July 21, 2014. In a July 16, 2014 letter to the judge, Appellant requested a pre-trial conference with "my defense counsel, the prosecution and myself..." A final pre-trial was held on July 18, 2014. Thus, Appellant again gave the trial court the appearance that he was accepting and working with Mr. Graham to prepare for trial as little as three days prior to the start of the jury trial. Appellant again did not inform Mr. Graham or the trial court that he wanted to proceed pro se on the felonious assault charge when he clearly had the opportunity prior to the start of the jury trial.

{¶29} Accordingly, we find that the Appellant's request the morning of trial to represent himself in the felonious assault case was not timely made. *State v. Neyland,* 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.2d 1112, ¶76*; State v. Cassano,* 96 Ohio 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶40.

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

II

{¶31} In his second assignment of error, Appellant challenges his conviction as being against the manifest weight and sufficiency of the evidence.

{¶32} Our review of the constitutional sufficiency of evidence to support a criminal conviction is governed by *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which requires a court of appeals to determine 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 beyond a reasonable doubt." Id.; *see also McDaniel v. Brown*, 558 U.S. 120, 130 S.Ct. 665, 673, 175 L.Ed.2d 582(2010) (reaffirming this standard); *State v. Fry*, 125 Ohio St.3d 163, 926 N.E.2d 1239, 2010–Ohio–1017, ¶146; *State v. Clay*, 187 Ohio App.3d 633, 933 N.E.2d 296, 2010–Ohio–2720, ¶68.

{¶33} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997), *superseded by constitutional amendment on other grounds as stated by State v. Smith,* 80 Ohio St.3d 89, 684 N.E.2d 668, 1997-Ohio–355. Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue, which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief." (Emphasis sic.) Id. at 387, 678 N.E.2d 541, quoting Black's Law Dictionary (6th Ed. 1990) at 1594.

{¶34} When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "'thirteenth juror'" and disagrees with the fact finder's resolution of the conflicting

testimony. Id. at 387, 678 N.E.2d 541, *quoting Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). 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*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720–721 (1st Dist. 1983). Accordingly, reversal on manifest weight grounds is reserved for "'the exceptional case in which the evidence weighs heavily against the conviction.'" Id.

> "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts.
>
> * * *
>
> "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment."

Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

{¶35} Appellant was convicted of felonious assault, in violation of R.C. 2903.11(A)(1), which provides:

> (A) No person shall knowingly do either of the following:
>
> (1) Cause serious physical harm to another or to another's unborn;

{¶36} Appellant contends the State failed to meet its burden of establishing he caused the harm suffered by Shawn Jalloh. Appellant and his brother testified Appellant never struck Jalloh, and her injuries were caused by a lamp, which fell on her when she kicked the bedside table. However, Jalloh testified Appellant physically assaulted her, and during the attack, he hit her with a lamp, which caused a large gash on her forehead. Officer Gambs testified he was dispatched to Jalloh's residence where he found her with a bleeding gash on her forehead. After some hesitation, Jalloh told the officer Appellant had assaulted her.

{¶37} Viewing the evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that Appellant committed the crime. We hold, therefore, that the state met its burden of production regarding each element of the crime of felonious assault, and, accordingly, there was sufficient evidence to support Appellant's conviction

{¶38} As an appellate court, we are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence, upon which the fact finder could base his or her judgment. *Cross Truck v. Jeffries*, 5th Dist. Stark No. CA–5758, 1982 WL 2911(Feb. 10, 1982). Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence*. C.E. Morris Co. v. Foley Construction*, 54 Ohio St.2d 279, 376 N.E.2d 578(1978). The Ohio Supreme Court has emphasized: "'[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be

made in favor of the judgment and the finding of facts. * * *.'" *Eastley v. Volkman*, 132 Ohio St.3d 328, 334, 972 N.E. 2d 517, 2012-Ohio-2179, quoting Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, *quoting* 5 Ohio Jurisprudence 3d, Appellate Review, Section 603, at 191–192 (1978). Furthermore, it is well established that the trial court is in the best position to determine the credibility of witnesses. *See, e.g., In re Brown*, 9th Dist. No. 21004, 2002–Ohio–3405, ¶ 9, *citing State v. DeHass*, 10 Ohio St .2d 230, 227 N.E.2d 212(1967).

{¶39} Ultimately, "the reviewing court must determine whether the appellant or the appellee provided the more believable evidence, but must not completely substitute its judgment for that of the original trier of fact 'unless it is patently apparent that the fact finder lost its way.'" *State v. Pallai*, 7th Dist. Mahoning No. 07 MA 198, 2008-Ohio-6635, ¶31, *quoting State v. Woullard*, 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E.2d 964 (2nd Dist. 2004), ¶ 81. In other words, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. Mahoning No. 99 CA 149, 2002-Ohio-1152, at ¶ 13, *citing State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125(7th Dist. 1999).

{¶40} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212(1967), paragraph one of the syllabus; *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶118. *Accord, Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Marshall v. Lonberger*, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

{¶41} The jury as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Craig*, 10th Dist. Franklin No. 99AP-739, 1999 WL 29752 (Mar 23, 2000) *citing State v. Nivens*, 10th Dist. Franklin No. 95APA09-1236, 1996 WL 284714 (May 28, 1996). Indeed, the jury need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶21, *citing State v. Antill,* 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964); *State v. Burke*, 10th Dist. Franklin No. 02AP-1238, 2003-Ohio-2889, citing State v. Caldwell, 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist. 1992). Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks, supra*.

{¶42} We find that this is not an "'exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541, *quoting Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. The jury neither lost his way nor created a miscarriage of justice in convicting Appellant of the charge.

{¶43} Based upon the foregoing and the entire record in this matter, we find Appellant's conviction is not against the sufficiency or the manifest weight of the evidence. To the contrary, the jury appears to have fairly and impartially decided the matters before them. The jury as a trier of fact can reach different conclusions concerning the credibility of the testimony of the state's witnesses and Appellant and his witnesses. This court will not disturb the jury's finding so long as competent evidence

was present to support it. *State v. Walker*, 55 Ohio St.2d 208, 378 N.E.2d 1049 (1978). The jury heard the witnesses, evaluated the evidence, and was convinced of Appellant's guilt.

{¶44} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed, proves all the elements of the crime beyond a reasonable doubt.

{¶45} Appellant's second assignment of error is overruled.

{¶46} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio is affirmed.

By: Gwin, P.J. and

Baldwin, J. concur;

Hoffman, J. concurs

separately

Hoffman, J., concurring

{¶47} I concur in the majority's analysis and disposition of both of Appellant's assigned errors.

{¶48} I write separately, in part, to note my disagreement with the trial court's assertion a defendant must show "good cause" to represent himself. A defendant has a constitutional right to represent himself provided he has knowingly, intelligently and voluntarily waived his right to counsel. I know of no case law mandating a defendant must have "good cause" to exercise his right to self-representation

{¶49} I also write separately to address the timeliness of Appellant's attempt to exercise his right of self-representation. The trial court specifically noted Appellant's request was made "five minutes after the trial should have started and you [Appellant] were just bringing this to my attention." Later, the trial court noted the request was made "at this late stage." While never mentioning the word "untimely," it is clear, in addition to finding no good cause existed, the trial court found the request untimely.

{¶50} Based upon the authority of *Cassano*, I agree with the majority Appellant's request was properly denied as being untimely.[2] *Cassano* finds, without any further limitation or qualification, a defendant's request for self-representation made three days before trial was to start was untimely. But, I note, in doing so, the Supreme Court cited as support two federal appellate court decisions which criticize untimeliness as a tactic for delay.

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[2] Upon review, I find the other case relied upon by the majority, *Neyland,* distinguishable. Therein, the Ohio Supreme Court found the request for self-representation untimely because it was not made until just before the beginning of the trial-phase closing arguments. The *Neyland* Court also determined the defendant had not clearly invoked his right to self-representation.

{¶51} I recommend the hard-and-fast three-day rule of *Cassano* ought to be revisited. I recommend any request for self-representation made prior to commencement of trial is timely made unless shown to be a tactic for delay or manipulation of the proceeding.[3] Such would preserve a defendant's constitutional right to self-representation and the court's right to efficiently control its docket and prevent inconvenience to all concerned.

[3] I find nothing in the record to indicate Appellant's request was made for purposes of delay or manipulation. Appellant's brother had been subpoenaed for Appellant's defense when the matter was originally scheduled for trial, was present on the day of trial and shadow counsel was in place. Appellant did not ask for a continuance and there is no indication he was not prepared to go forward with trial.