

[Cite as *State v. Paythress*, 2009-Ohio-2717.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91554

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

MALKIESE PAYTHRESS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-501123

BEFORE: Stewart, P.J., Dyke, J., and Jones, J.

RELEASED: June 11, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, P.J.:

{¶ 1} A jury found defendant-appellant, Malkiese Paythress, guilty of two counts of felonious assault for cutting his roommate in the face during a fight. Paythress complains that the state failed to produce sufficient evidence that he cut his roommate and that the court should have instructed the jury on the lesser included offense of aggravated assault because the roommate initiated contact with Paythress when the two were arguing. Neither contention has merit, so we affirm.

I

{¶ 2} Paythress first argues that the state failed to produce evidence from which the jury could have found that he used a cutting instrument on the roommate. He maintains that the police did not recover any type of knife or blade and that the roommate had been cut by glass from a broken mirror.

{¶ 3} When reviewing a claim that there is insufficient evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to determine whether 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, paragraph two of the syllabus.

{¶ 4} The elements of felonious assault as charged in this case are set forth in R.C. 2903.11(A) and state that no person shall knowingly (1) cause

serious physical harm to another or (2) cause or attempt to cause physical harm to another by means of a deadly weapon. As applicable here, “serious physical harm” is defined as “any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement.” See R.C. 2901.01(A)(5)(d). “Physical harm” means any injury, regardless of duration. See R.C. 2901.01(A)(3).

{¶ 5} The facts show that Paythress returned to his apartment following a meeting with an editor from a local newspaper. An agitated and upset Paythress told the roommate that he was upset with the editor because the editor altered an article that he submitted. During the course of an hour-long discussion that morphed into politics, Paythress became more upset and agitated, causing the roommate to tell Paythress to “drop it.” This remark only made Paythress more agitated, and he moved into the roommate’s face, yelling so loudly that spit from his mouth struck the roommate. Feeling uncomfortable, the roommate pushed Paythress away. That started a wrestling match in which both men found themselves outside the house. Paythress threw two punches that missed the mark. The roommate decided he no longer wished to fight so he went back in the house and locked the door. Paythress kicked in the door and entered the apartment, concealing both a box cutter and an X-Acto knife in his hands. He told the roommate that he was having family problems and, as he moved closer to the roommate, exposed the box cutter and X-Acto knife, saying that “he could

cut [him].” Not wishing to find out if Paythress was serious, the roommate grabbed Paythress’ hands. More wrestling ensued and the roommate felt blood running down his face. The roommate left the apartment and went to a gas station to seek help.

{¶ 6} A passing police car saw the roommate at the gas station and stopped to assist. An officer testified that the roommate had a three to four-inch cut on his face that appeared to be caused by a razor. As the roommate was transported to the hospital, the police pulled up to the apartment. They saw Paythress outside and asked him to approach the police car. They arrested Paythress after a short discussion, but did not enter the apartment to look for any cutting implements. Medical records show that the roommate required 60 stitches to close the cut. He also suffered a sprained finger and had minor cuts in his abdominal region and the back of his neck.

{¶ 7} The evidence amply proved that the roommate suffered serious physical harm from the attack. The medical records documented that the roommate sustained a cut that required 60 stitches to close. *State v. Churchwell*, Cuyahoga App. No. 88171, 2007-Ohio-1600, ¶28 (serious physical harm shown when victim received stitches around her eyes); *State v. Payne* (July 20, 2000), Cuyahoga App. No. 76539 (finding that a bloody cut and a swollen eye were sufficient to establish serious physical harm because the injuries were a temporary, serious disfigurement). Moreover, the trial transcript indicates that

the roommate was able to point out his injury to the jury, suggesting that he suffered some permanent disfigurement as a result of the attack. See *State v. Edwards* (1992), 83 Ohio App.3d 357, 360 (finding serious physical harm proven as a result of a two-centimeter cut above the victim's eye that caused a permanent scar).

{¶ 8} Paythress maintains that the state failed to prove that he had any cutting implements on him because none were recovered on the scene, but that argument goes to the weight and not the sufficiency of the evidence. When reviewing the sufficiency of the evidence, we are obligated to view it as favorably to the state as the record will permit. The roommate's testimony established the existence of both a box cutter and X-Acto knife. The testifying officer also stated that the cut he saw on the roommate was consistent with that caused by a razor blade. Paythress told the roommate that he would "cut" him. The medical records and obvious scarring on the roommate's face confirmed that he had been cut. Reasonable minds could view this evidence as establishing the deadly weapon element of felonious assault.

II

{¶ 9} Paythress next argues that the court erred by refusing to instruct the jury on the lesser included offense of aggravated assault because the evidence showed that the roommate pushed Paythress away, thus setting into motion the wrestling that led to the knife attack.

{¶ 10} A court must charge on a lesser included offense “only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense.” *State v. Thomas* (1988), 40 Ohio St.3d 213, paragraph two of the syllabus. Instructions on lesser included offenses, when applicable, are given because of the possibility that a jury may convict the defendant of the greater charged offense, even though not convinced of guilt beyond a reasonable doubt, simply because the evidence shows he was obviously guilty of some offense. *State v. Kidder* (1987), 32 Ohio St.3d 279, 281.

{¶ 11} The court is permitted to inquire into the sufficiency of the evidence to support a requested jury instruction and may reject the requested jury instruction if it is unwarranted by the evidence. *State v. Lessin*, 67 Ohio St.3d 487, 494-495, 1993-Ohio-52. We review the court’s action to determine whether it abused its discretion by finding that the evidence was sufficient to support the requested charge or that the requested instruction was pertinent to the crime charged. *State v. Wolons* (1989), 44 Ohio St.3d 64, paragraph two of the syllabus.

{¶ 12} Paythress maintains that the court should have instructed the jury on aggravated assault, as defined in R.C. 2903.12(A)(1). That section states that “[n]o person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the

victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause serious physical harm to another ***.”

{¶ 13} The court did not abuse its discretion by refusing to instruct the jury on the lesser included offense of felonious assault because there was no evidence that the roommate provoked Paythress. While it is true that the roommate pushed Paythress away during their argument, that act alone did not constitute serious provocation. To be serious, provocation must be “reasonably sufficient to bring on extreme stress and the provocation must be reasonably sufficient to incite or to arouse the defendant into using deadly force.” *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph five of the syllabus. We have held that pushing another is insufficient provocation to bring on the kind of stress that would arouse another to use the kind of deadly force employed by Paythress. See *State v. Johnson* (July 12, 2001), Cuyahoga App. No. 78327 (stating that the evidence failed to show that the defendant acted under a sudden fit of passion or rage when the defendant claimed that he struck the victim in response to the victim’s pushes). See, also, *State v. Bryan*, Galia App. No. 03CA3, 2004-Ohio-2066 (simple pushing or punching does not constitute sufficient provocation to warrant an aggravated assault instruction); *State v. Broadus*, Cuyahoga App. No. 81489, 2003-Ohio-3325, ¶38.

{¶ 14} Moreover, even if the roommate’s act of pushing Paythress away could be construed as constituting provocation sufficient to bring on extreme

stress, the evidence showed that the roommate ended the fight by locking Paythress out of the house. Instead of cooling off, Paythress escalated the fight from non-lethal wrestling to the use of deadly weapons. The court did not abuse its discretion by refusing to give a jury instruction on the lesser included offense of aggravated assault.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, PRESIDING JUDGE

ANN DYKE, J., and
LARRY A. JONES, J., CONCUR