[Cite as *State v. Sims*, 2009-Ohio-2720.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91689

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHNETTA SIMS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-505981

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

RELEASED: June 11, 2009

JOURNALIZED:

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant Johnetta Sims brings this appeal challenging her convictions for aggravated assault. After a thorough review of the record, and for the reasons set forth below, we affirm.

{¶ 2} On January 29, 2008, a Cuyahoga County Grand Jury indicted appellant on two counts of felonious assault, violations of R.C. 2903.11(A)(1) and 2903.11(A)(2), stemming from her arrest on December 25, 2007. On April 29, 2008, a bench trial commenced. The state presented three witnesses.

{¶ 3} Robert Wagner, a Cleveland police officer, testified that in the early morning hours of December 25, 2007, he responded to a call at a residence on West 33rd Street, whereupon he interviewed the victim, Walter Hairston. Hairston complained of two lacerations, one on his left arm and one on his chest. Officer Wagner testified that Hairston identified appellant, who arrived at the scene shortly after the police, as the person who had attacked him. Officer Wagner stated that EMS transported Hairston to MetroHealth Medical Center ("MetroHealth"), and appellant was arrested. He also stated that two minor children, who were sitting in appellant's vehicle, were released to family members.

{¶ 4} On cross-examination, Officer Wagner testified that the police never recovered any weapon, including a baseball bat, knife, or razor; that the blood on appellant's coat was never tested to determine whether it was in fact blood, and if so, whose blood it was; and that the children were never interviewed about the events that occurred that morning.

{¶ 5} Walter Hairston testified that he lives with Kristin Brown and that Kristin Brown is the mother of 10-year old Dominique Brown. Appellant's now-deceased son is Dominique's biological father. Hairston testified that he considers himself Dominique's stepfather, even though he is not married to Ms. Brown and has no legal rights to Dominique.

{¶ 6} Hairston testified that appellant had taken her grandson, Dominique, without Hairston's or Ms. Brown's permission, on December 23, 2007. He testified that when appellant returned Dominique home after midnight on Christmas morning, he let Dominique in the house and closed the door on appellant and her two other grandsons, who were with her standing on the front steps. He testified that appellant and her grandsons began banging on the door, and when he opened it, one boy hit him with a baseball bat, and appellant took a box cutter from her purse and slashed Hairston through the front of his shirt. Hairston testified that when he finally went inside, he noticed that he was bleeding from a cut on his left arm and from a cut on his chest. He testified that Ms. Brown then called the police.

{¶ 7} When the police arrived, Hairston told them appellant had cut his arm and chest. He testified that appellant returned to the scene, the police apprehended her, and he was transported to MetroHealth by EMS. He testified that he had a three-inch laceration on his left arm and a six-to-seven-inch laceration on his chest. He also testified he did not remain at the hospital in order to receive treatment, but instead treated himself with antibiotic ointment and bandages the next day.

{¶ 8} On cross-examination, appellant's attorney questioned Hairston about why the EMS report states that Hairston told them his girlfriend had cut him with a steak knife. Hairston denied having told EMS that his girlfriend had attacked him, and he also denied leaving the hospital before treatment for fear he would be arrested on an outstanding warrant.

{¶ 9} Detective Beverly Fraticelli of the Cleveland Police Department testified that appellant's case was assigned to her for investigation. She testified that appellant told her Hairston struck her first, and she never stabbed or cut Hairston. Det. Fraticelli also testified that appellant never mentioned Hairston striking any of the boys. She also testified that she never met or spoke with Hairston. She only spoke with appellant over the phone, and she never attempted to speak with Dominique Brown or appellant's other grandsons.

{¶ 10} At the close of the state's case, appellant made a Crim.R. 29 motion, which the court denied. Appellant then testified on her own behalf.

{¶ 11} As noted by the trial court, appellant's testimony was markedly different from the victim's. Appellant testified that she is the grandmother of Dominique Brown, Jaymar Sims Jr., and Jason Sims.[1] Appellant testified that very early Christmas morning, she, Jaymar Jr., and Jason took Dominique back to his house because he wanted to show his mother the gifts his grandmother had given him for Christmas.

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[1]The father of all three children is Jaymar Sims, appellant's son, who is now deceased.

{¶ 12} Appellant testified that when she arrived with all three of her grandsons at the house on West 33rd Street, Hairston came after her and tried to poke her in the eyes; he hit her grandsons, and he kicked her truck, causing part of the paneling to fall off. Appellant also testified that, in trying to defend herself, she struck out at Hairston and could have scraped him, but she wasn't sure with what object. Although appellant admitted she probably did cut Hairston in the altercation while she was trying to defend herself and her grandchildren, she denied having or using a weapon of any type.

{¶ 13} At the close of the defense's case, appellant renewed her Crim.R. 29 motion, which the court denied. The trial court then found that the state had not met its burden of proof on the felonious assault charges. Instead, the court found appellant guilty of the lesser-included offense, aggravated assault, a fourth degree felony. The trial court reiterated that it found the testimony of both appellant and Hairston suspect and that it was hard to believe that appellant, who had difficulty even walking to the witness stand, was "capable of inflicting harm on a much younger and much stronger victim." The trial court found that the evidence was clear that appellant had inflicted serious physical harm upon Hairston, but then reduced the offense to aggravated assault because the evidence showed that appellant "was under either a sudden passion or serious provocation."

{¶ 14} On May 29, 2008, the trial court held a sentencing hearing. Appellant was sentenced to two years of community control, regular drug testing, 60 hours of community work, a $200 fine, and she was required to undergo anger management.

Review and Analysis

{¶ 15} Appellant filed this timely appeal and cites two assignments of error for our review.

Crim.R. 29 Motion

{¶ 16} "I. The trial court erred when it denied appellant's Rule 29 motion for acquittal."

{¶ 17} In her first assignment of error, appellant argues that the state presented insufficient evidence to sustain a conviction for *felonious* assault. Of course, she is correct in view of the fact that the trial court did not find her guilty of felonious assault, but instead found her guilty of the lesser-included offense of *aggravated* assault. Appellant specifically argues that the victim's testimony was self-contradictory and incredulous regarding the chain of events that occurred that morning, which even the trial court acknowledged. We assume, for the sake of this appeal, that appellant is challenging the sufficiency of evidence on her aggravated assault convictions. Although the transcript reveals that neither the victim nor appellant is completely believable, we do not find merit in her argument.

{¶ 18} Under Crim.R. 29, a trial court "shall not order an entry of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus. "A motion for judgment of acquittal under Crim.R. 29(A) should only be granted where

reasonable minds could not fail to find reasonable doubt." *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394.

{¶ 19} Thus, the test an appellate court must apply in reviewing a challenge based on a denial of a motion for acquittal is the same as a challenge based on the sufficiency of the evidence to support a conviction. See *State v. Bell* (May 26, 1994), Cuyahoga App. No. 65356. In *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492, the Ohio Supreme Court set forth the test an appellate court should apply when reviewing the sufficiency of the evidence to support a conviction: "[T]he relevant inquiry on appeal is whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. In other words, an appellate court's function when reviewing the sufficiency of the evidence is to examine the evidence admitted at trial and determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Eley* (1978), 56 Ohio St.2d 169." See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 20} Assuming arguendo that appellant meant to make her argument here as to aggravated assault, as she does in her second assignment of error, we analyze her argument as follows.

{¶ 21} R.C. 2903.12 pertains to aggravated assault and states in relevant part: "(A) No 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: (1) Cause serious physical harm to another or to another's unborn (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code."

{¶ 22} The testimony of both Hairston and appellant herself was that appellant cut Hairston. As the trial court noted several times, the two stories are wholly inconsistent with each other as to how Hairston received his injuries; nonetheless, appellant clearly stated that she was responsible for cutting Hairston, leaving him with two permanent scars.

{¶ 23} We agree with the trial court that the evidence does not prove beyond a reasonable doubt that appellant committed felonious assault by knowingly causing or attempting to cause serious physical harm to the victim. Instead, by finding that appellant acted with sudden rage and passion to cause the victim serious physical harm, the trial court convicted her of aggravated assault. We find that there was sufficient evidence to support convictions for aggravated assault.

{¶ 24} Appellant's first assignment of error as it relates to aggravated assault is overruled.

Manifest Weight of the Evidence

{¶ 25} "II. The trial court erred when it convicted appellant against the manifest weight of the evidence."

{¶ 26} In her second assignment of error, appellant argues that her convictions for aggravated assault are against the manifest weight of the evidence because there was no evidence that she cut the victim. This argument has no merit.

{¶ 27} Article IV, Section 3(B)(3) of the Ohio Constitution authorizes appellate courts to assess the weight of the evidence independently of the fact finder. Thus, when a claim is assigned concerning the manifest weight of the evidence, an appellate court "has the authority and the duty to weigh the evidence and determine whether the findings of *** the trier of fact were so against the weight of the evidence as to require a reversal and a remanding of the case for retrial." *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, 345, 82 N.E.2d 709.

{¶ 28} The standard employed when reviewing a claim based upon the weight of the evidence is not the same standard to be used when considering a claim based upon the sufficiency of the evidence. The United States Supreme Court recognized these distinctions in *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652, where the court held that, unlike a reversal based upon the insufficiency of the evidence, an appellate court's disagreement with the jurors' weighing of the evidence does not require special deference accorded verdicts of acquittal, i.e., invocation of the double jeopardy clause as a bar to relitigation. Id. at 43.

{¶ 29} Upon application of the standards enunciated in *Tibbs*, the court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated: "There being sufficient evidence to support the conviction as a

matter of law, we next consider the claim that the judgment was against the manifest weight of the evidence. Here, the test is much broader. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the 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."

{¶ 30} Moreover, it is important to note that the weight of the evidence and the credibility of the witnesses are issues primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. Hence, we must accord due deference to those determinations made by the trier of fact.

{¶ 31} The victim's testimony was unwavering: appellant cut him on Christmas morning while the two of them were arguing. EMS and MetroHealth records state that Hairston presented with bleeding from two wounds, on his arm and chest, inflicted that morning. Hairston showed the court his scars at trial, which were consistent with the description in the medical reports.

{¶ 32} Furthermore, appellant testified she hit Hairston with her fists first, then stated, "I know I started swinging. I picked up something, I know I started swinging." She later testified that she cut him, possibly with her Bluetooth headset, and stated, "I don't know if I cut him or if I hit him with something that cut him." Appellant's own testimony, if believed, is evidence that she caused the victim serious physical injury.

{¶ 33} We note that the trial court found the stories of both appellant and Hairston somewhat incredible, but the court stated, in pronouncing appellant's guilt:

"It is clear from the testimony and the evidence in this case that [appellant] did inflict serious physical harm upon Mr. Hairston."

{¶ 34} We find that the trial court, as the fact finder in this case, did not lose its way in finding appellant guilty of the lesser-included offense of aggravated assault. Appellant's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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 common pleas court 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.

FRANK D. CELEBREZZE, JR., JUDGE

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