[Cite as *State v. McShane*, 2009-Ohio-3455.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91367

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DELVON McSHANE

DEFENDANT-APPELLANT

[Inconsistent spellings of McShane's last name appear in the record. At times, his last name is spelled "McShan"]

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-505713

BEFORE: Blackmon, J., Cooney, A.J., and Sweeney, J.

RELEASED: July 16, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Drew Smith
2000 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Kerry A. Sowul
Assistant County Prosecutor
9th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

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).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Delvon McShane[1] appeals his convictions for assault on a peace officer and resisting arrest. He assigns the following error for our review:

> **"The convictions of appellant are against the manifest weight of the evidence."**

{¶ 2} Having reviewed the record and pertinent law, we affirm McShane's convictions. The apposite facts follow.

Facts

{¶ 3} On December 8, 2007, RTA Officer Ryan Fankhauser was assigned to the rapid station located at Tower City. He received a call that there was an altercation on one of the trains that was arriving at the Tower City station. As passengers departed the train, three men approached the officer and told him a woman had been assaulted and one of the persons involved was a male on the escalator with a black coat and bright green hat.

{¶ 4} The officer approached McShane on the escalator and told him that he needed to speak with him. McShane turned toward the officer and said, "whatever" and continued to exit the escalator. The officer tapped McShane on the shoulder and again informed him he needed to speak with him. McShane turned and punched the officer in the face, causing the officer to fall down. McShane jumped on the officer and began assaulting him. Thereafter, both men

[1]The trial court record consistently spells the appellant's last name as McShan. On appeal, his attorney spells the last name as McShane.

engaged in a struggle on the ground. Officer Fankhauser contended that McShane pulled on the officer's revolver, but let go after the officer continued to punch him. With the assistance of other officers, McShane was handcuffed and escorted to the security office. Several officers testified that McShane continued yelling and arguing as he was escorted from the scene.

{¶ 5} In his defense, McShane presented three witnesses who were on the train; they testified McShane was not involved in the altercation. However, one of the witnesses, Joletta Lashay Wade, testified that McShane was sitting with one of the women involved in the altercation, and from her observations, they obviously knew each other.

{¶ 6} Wade also testified that Officer Fankhauser acted out of character for a police officer by being loud and agitated when questioning people about the altercation on the train. She said that the officer seemed upset that no one would answer him. She stated that when McShane refused to answer the officer, the officer aggressively pushed McShane. According to Wade, the officer then grabbed McShane's collar, and they both fell to the ground. She stated she did not see McShane punch the officer or reach for the officer's weapon. Wade admitted she and McShane attended the same high school, but claimed that she was only a casual acquaintance of his.

{¶ 7} The jury found McShane guilty of assault on a peace officer and resisting arrest, but not guilty of aggravated robbery. The trial court sentenced McShane to six-months incarceration.

Manifest Weight of the Evidence

{¶ 8} In his sole assigned error, McShane contends his convictions were against the manifest weight of the evidence. In so arguing, he contends the only evidence in support of his convictions was the incredible testimony of Officer Fankhauser. We disagree.

{¶ 9} In *State v. Wilson*,[2] the Ohio Supreme Court recently addressed the standard of review for a criminal manifest weight challenge, as follows:

> **"The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins*, 78 Ohio St.3d 380, N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the**

evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. '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 factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."[3]

{¶ 10} 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."[4] Accordingly, reversal on manifest weight grounds is reserved for

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[2]113 Ohio St.3d 382, 2007-Ohio-2202.

[3]Id. at ¶25.

[4]*State v. Thompkins*, supra, at 387.

"the exceptional case in which the evidence weighs heavily against the conviction."[5]

1) Invalid Stop

{¶ 11} McShane contends Officer Fankhauser was not credible because he did not obtain the names of the three males who told him that McShane was involved in the altercation. He also argues the officer detained him without reasonable suspicion that McShane was involved in criminal activity. We disagree.

{¶ 12} It is true Officer Fankhauser did not obtain the names of the men. However, if he took the time to do so, he would have been unable to locate McShane, who was quickly leaving the station. The men did not give the officer McShane's name, but pointed to the man on the escalator wearing a "black coat" and "bright green hat." Therefore, the officer did not know McShane's name until after he arrested him. The men's identification of McShane as being involved in the altercation was also not completely groundless given the fact that defense witness, Joletta Wade, testified that McShane was sitting with and appeared to know one of the women involved in the altercation.

{¶ 13} Additionally, the men's identification of McShane provided the officer with the reasonable suspicion of criminal activity needed to detain

[5]Id.

McShane for further investigation. In *Terry v. Ohio*,[6] the United States Supreme Court determined that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." However, for the propriety of a brief investigatory stop pursuant to *Terry*, the police officer involved "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[7] Such an investigatory stop "must be viewed in the light of the totality of the surrounding circumstances" presented to the police officer.[8]

{¶ 14} As the officer stated, three males pointed to McShane as one of the people involved in the altercation. Because the men were on the train and indicated they witnessed the incident, their identification provided the officer with reasonable suspicion to stop McShane. The officer stated that when he first sought to speak with McShane, it was not to arrest him, but to question him regarding the incident on the train. It was only after McShane punched him

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[6](1968), 392 U.S. 1, 22, 88 S.Ct. 1868, 20 L.Ed.2d 889.

[7]Id. at 21.

[8]*State v. Freeman* (1980), 64 Ohio St.2d 291, paragraph one of the syllabus.

that he made the decision to arrest him. Accordingly, we conclude the officer had reasonable suspicion to stop McShane for investigatory purposes.

2) Officer's credibility compared to that of the defense witnesses

{¶ 15} There is no dispute that a scuffle ensued when the officer tried to detain McShane. However, the evidence is conflicting concerning who was the aggressor. McShane argues that Officer Fankhauser's depiction of events was not credible compared to Wade's testimony.

{¶ 16} Officer Fankhauser testified that McShane was the aggressor because McShane punched him and jumped on him, resulting in the struggle on the ground. The officer also testified that during the scuffle, McShane attempted to grab his revolver. Officer Fankhauser and several other officers testified that McShane resisted being handcuffed; it took several officers to handcuff him.

{¶ 17} Wade testified that the officer was the aggressor. According to her, the officer grabbed McShane by the collar, causing him to fall to the ground. She stated that McShane did not punch the officer and did not attempt to grab the officer's weapon. She also stated the struggle on the ground resulted because the officer continued to hit McShane; McShane pleaded with the officer to get off of him.

{¶ 18} When there are two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one should be believed.[9] Rather, we defer to the jury who was best able to weigh the evidence and judge the credibility of witnesses by viewing the demeanor, voice inflections, and gestures of the witnesses testifying.[10] Therefore, we defer to the jury regarding the credibility of the witnesses. The jury may have disbelieved Wade's version of events because she knew McShane.

{¶ 19} McShane contends the jury obviously had problems determining the credibility of the witnesses based on the fact it notified the trial court twice that it was unable to reach a unanimous verdict. However, it is uncertain why the jury was indecisive. It could have been just as likely the jury had a dispute regarding the aggravated robbery count, of which the jury eventually acquitted McShane.

{¶ 20} McShane also contends the trial court did not find the officer credible based on its dismissal of the three-year firearm specification attached to the aggravated robbery count. However, the dismissal had nothing to do with the officer's credibility, but was based on the fact there was no evidence provided

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[9] *State v. Gore* (1999), 131 Ohio App.3d 197, 201.

[10] See *Seasons Coal Co. v. Cleveland* (1994), 10 Ohio St.3d 77, 80; *State v. DeHass* (1967), 10 Ohio St.2d 230, 231.

regarding the operability of the firearm. Accordingly, McShane's assigned error is overruled.

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 be sent to said 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.

PATRICIA ANN BLACKMON, JUDGE

COLLEEN CONWAY COONEY, A.J., and
JAMES J. SWEENEY, J., CONCUR