[Cite as *Cleveland v. Bello*, 2009-Ohio-3899.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92074

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

LOUIS BELLO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2007 CRB 040263

BEFORE: Sweeney, J., Gallagher, P.J., and Jones, J.

RELEASED: August 6, 2009
JOURNALIZED:

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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Louis Bello ("defendant"), appeals his convictions for assault and menacing asserting that they were against the manifest weight of the evidence. For the reasons that follow, we affirm.

{¶ 2} Defendant was charged with assaulting and menacing a female victim, Charshawn, on May 26, 2007. During defendant's bench trial, the prosecution presented the testimony of several witnesses, including Charshawn and two other eyewitnesses: LaToya and a child who was six years old at the time of the incident.

{¶ 3} Charshawn testified that she, LaToya, and the child boarded the rapid at the Lewis Stokes Rapid Station. Charshawn noticed a man looking at them in a funny way. He began asking about the child and eventually made inappropriate comments about her. The man then began threatening Charshawn, saying he was going to beat her up. The two ladies and the child were getting off the rapid at West 98th and Detroit, when the man hit Charshawn in the eye and lip. The women told the rapid employees to close the doors and call the police. Although the doors were shut, the man was able to exit through the back of the transit. Charshawn described the assailant as wearing all black - black Timberland boots, black jeans, black jacket, and a black hat.

{¶ 4} Charshawn provided a statement that was reduced to a written report from the responding officer's notes. According to the report, the assailant was 5'6," 240 pounds, wearing "a black hat, black and jean jacket, and black jeans." Charshawn testified that the officers were rushing her because they were trying to

find the suspect. She was confident she would be able to identify her assailant if she saw him again. At trial, Charshawn thought she told the transit officer that the assailant was 6'5" tall.

{¶ 5} Charshawn recalled that LaToya took photographs of the injuries a few weeks later, just as they were beginning to heal. The photographs were not developed until October 11, 2007.

{¶ 6} On October 10, 2007, Charshawn, LaToya, and the child were again utilizing public transportation when they encountered defendant, who was wearing all black. They recognized defendant as the person who assaulted Charshawn in May and contacted the Lakewood police. Charshawn testified that she remembered the person who assaulted her.

{¶ 7} Charshawn gave a supplemental report on October 10, 2007 identifying defendant as her assailant. She repeatedly stated that she was positive that defendant was the man who hit her in May. Charshawn further testified that she believed the defendant, on October 10, 2007, even had "on some of the same things he had on when he hit [her]."

{¶ 8} The transit police officer who authored the May 2007 incident report also testified. He explained that he took general notes and then prepared the report. The officer said it is possible, but not likely, that he transposed the description of the assailant's height in his report. He disposed of his notes after the report was made. He stated that with a victim's description everything is approximate. He confirmed that Charshawn believed she could identify her assailant.

{¶ 9} LaToya also testified. Like Charshawn, she was "absolutely positive" that defendant was the person who assaulted Charshawn on May 26, 2007. LaToya noticed defendant on the RTA bus in October 2007. She testified that defendant boarded the bus at the 98th Cudell Rapid Station (the same location where the May assault occurred). She contacted Lakewood police and identified defendant as the person who hit Charshawn. LaToya confirmed that she had taken photographs of the injuries Charshawn sustained in the May attack.

{¶ 10} Another transit officer testified that he prepared a supplemental report on October 10, 2007. This officer testified that defendant was not arrested because he felt there was not enough to take him into custody at that time.

{¶ 11} The child, then seven years old, testified and stated she had never seen defendant before.

{¶ 12} The State rested its case, and the defense presented the testimony of defendant's grandmother and cousin. The grandmother testified that defendant was at her home on May 26, 2007, helping her move mattresses. She was working that day and reached defendant by phone at her home around 3:00 p.m. She arrived home around 6:00 p.m. to find defendant waiting on her porch. They moved furniture, ate, watched television, and then went to bed around 11:00 p.m. According to her, defendant never left her house.

{¶ 13} Defendant's cousin testified that she dropped him off on Detroit Road to catch the bus on October 10, 2007, and picked him up in Lakewood about an hour later. She did not see defendant on May 26, 2007.

{¶ 14} The trial court found defendant guilty of both counts. The judge found the women's testimony very believable. The evidence established that the encounter happened over an extended period of time, where the women were observing the assailant who was staring at them.

{¶ 15} Defendant appeals his convictions asserting the following sole assignment of error for our review:

{¶ 16} "I. The trial court's finding of guilt is against the manifest weight of the evidence."

{¶ 17} When a conviction is challenged on appeal as being against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact "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*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. A judgment should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 18} In arguing that his convictions were supported by the evidence, the State references the eight factors set forth in *State v. Mattison* (1985), 23 Ohio App.3d 10 (internal citations omitted), which are: "(1) Knowledge that even a reviewing Court of Appeals is not required to accept as true the incredible; (2) whether evidence is uncontradicted; (3) whether a witness was impeached; (4)

consideration of what was not proved; (5) the certainty of the evidence; (6) the reliability of the evidence; (7) the extent to which any of the witnesses may have an interest to advance or protect by their testimony; and (8) the extent to which the evidence is vague, uncertain, conflicting, fragmentary, or not fitting together in a [logical] pattern."

{¶ 19} Upon consideration of these factors and the record as a whole, the evidence does not weigh heavily against defendant's convictions. Defendant contends that the identification of him was not reliable; particularly given the apparent discrepancy between the suspect's height contained in the transit report and the victim's later testimony that the suspect was a foot taller. Other testimony in the record establishes that descriptions are approximate. Further, the eyewitnesses' certainty of their identification of defendant as the attacker must be taken into account. Both women were absolutely positive that defendant was the attacker. Their testimony never wavered on this point. The testimony further establishes that the women observed the attacker for a significant amount of time throughout the duration of the May incident. Charshawn always maintained she would be able to identify the person who hit her. There is no evidence in the record that these witnesses had any reason to falsely identify defendant as the attacker five months later. The court, which heard the testimony first-hand and had an opportunity to observe the demeanor of the witnesses, resolved the conflicts among the evidence within its province.

{¶ 20} While defendant offered the testimony of an alibi witness, it was his grandmother. The trier of fact is free to believe or disbelieve all or part of any witness's testimony. *State v. Antill* (1964), 176 Ohio St. 61, 67. We cannot say that the court, acting as trier of fact, clearly lost its way in convicting defendant of the charged offenses based on this record.

{¶ 21} Defendant's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from 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 Cleveland Municipal 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.

JAMES J. SWEENEY, JUDGE

SEAN C. GALLAGHER, P.J., and
LARRY A. JONES, J., CONCUR