

[Cite as *State v. Thomas*, 2009-Ohio-6311.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92762

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JORDAN THOMAS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART, VACATED IN PART AND
REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510304

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

RELEASED: December 3, 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 courts announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, J.:

{¶ 1} Defendant-appellant, Jordan Thomas ("appellant"), appeals his convictions and sentence for two counts of felonious assault. For the reasons

that follow, we affirm appellant's convictions, but remand to the trial court with instructions to vacate his sentence and for resentencing.

{¶ 2} On May 9, 2009, the Cuyahoga County Grand Jury indicted appellant on two counts: Count 1 alleged felonious assault in violation of R.C. 2903.11(A)(1) and Count 2 alleged felonious assault in violation of R.C. 2903.11(A)(2). Appellant pled not guilty to the charges.

{¶ 3} On November 20, 2008, Jermaine Patterson testified during a jury trial that on one day in April of 2008, he was visiting his cousin when he locked his keys in his vehicle. Appellant, who lived above his cousin's apartment on Harvey Avenue, assisted Patterson and used an antenna he broke from his own vehicle to jimmy open the lock of Patterson's car door. In response, Patterson offered to reimburse appellant for the broken antenna when he received his paycheck from work.

{¶ 4} Within days of that incident, appellant became hostile and pestered Patterson for the reimbursement. About a week later, on April 25, 2008, Patterson provided appellant with the money, but he nonetheless approached Patterson later that evening and punched him in the mouth. According to Patterson, appellant also stated "I don't appreciate you putting my business out in the street like that."

{¶ 5} Patterson immediately fled from appellant, who retreated to the backyard. While he was in the street, Patterson dialed 911. A review of the 911 tape reveals that while he was still on the phone with the operator, appellant

came towards Patterson with a stick in his hand that Patterson called a “bat.” During his testimony at trial, Patterson clarified that after viewing the apparatus closer, the object he believed to be a bat was actually the handle of a sledgehammer. Additionally, Patterson testified appellant was also carrying a brick. Patterson, fearing for his safety, began to run and appellant chased after him.

{¶ 6} During the pursuit, appellant threw a brick that hit Patterson’s left leg. As a result, he slipped on some rocks and fell to the ground. While he laid on the ground, appellant struck Patterson’s right knee twice with the handle of a sledgehammer. When appellant retreated to his home, Patterson again telephoned 911.

{¶ 7} Soon thereafter, Officers Mister Jackson and Joe Peck of the Cleveland Police Department arrived at the scene. Jackson testified that upon arrival he saw Patterson bleeding and lying in the street. He had injuries to his mouth and when Jackson assisted Patterson up from the ground, he stumbled because he was “hurt pretty bad.” Patterson immediately informed the officer of the incident. Within minutes, Officer Jackson found appellant on Harvey Avenue.

{¶ 8} Jackson immediately provided appellant with his *Miranda* rights. After inquiry, appellant admitted that, although Patterson did not provoke appellant in any way, he punched Patterson in the mouth as well as throwing a brick at the individual. At that point, Officer Jackson arrested appellant. Officer

Jackson also noticed many bricks lying throughout the yard.

{¶ 9} Detective Philmore Evans of the Cleveland Police Department testified that he took photographs of Patterson's injuries the day following the incident. The pictures demonstrated that appellant had a swollen and bloody lip, contusions to his elbow and forearm, as well as injuries to his right knee.

{¶ 10} Sometime thereafter, Patterson began experiencing pain to the right knee, which was struck with the sledgehammer handle. He explained that the knee began to swell, and he was having trouble walking. Patterson went to the hospital on May 8, 2008 and eventually was admitted.

{¶ 11} Dr. Jayantilal Bhimani, the treating physician, testified that Patterson suffered from a partial torn ligament and a joint effusion with a cyst to his right knee as well as a muscle strain to his right calf. Bhimani testified that the injuries in this case were consistent with Patterson's version of the events.

{¶ 12} At the close of the state's case and after appellant rested his own case, he moved for acquittal pursuant to Crim.R. 29(A). The trial court denied his request in both instances.

{¶ 13} On November 24, 2008, the jury found appellant guilty of both counts in the indictment. On January 6, 2009, the trial court conducted a sentencing hearing at which it imposed a three-year prison term for each count and ordered said terms to run concurrent. The trial court never informed appellant of post-release control or the consequences of violating said terms at the hearing. Nevertheless, in the journal entry, processed on January 8, 2009, the trial court

included with the aforementioned sentence three years of post-release control.

{¶ 14} Appellant now appeals and presents two assignments of error for our review. In his first assignment, appellant argues that his convictions for felonious assault were against the manifest weight of the evidence. For the reasons that follow, we disagree.

{¶ 15} In *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541, the Ohio Supreme Court illuminated its test for manifest weight of the evidence as follows:

{¶ 16} “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.” Black’s Law Dictionary (6 Ed.1990), at 1594.

{¶ 17} 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.*, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 2220, 72 L.Ed.2d 652, 663. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of 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. See *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721.

{¶ 18} The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id.*

{¶ 19} Appellant challenges the credibility of Patterson's statement, arguing his testimony contradicts itself and that it is not corroborated by any other evidence. We disagree with appellant's assertions and find that the verdict is supported by the manifest weight of the evidence.

{¶ 20} First, Patterson consistently testified that appellant punched him in the mouth causing it to swell and bleed. Officer Jackson confirmed that, upon arrival at the scene, he noticed said injuries. Additionally, photographs depict these injuries. Finally, appellant admitted to Officer Jackson that he, unprovoked, struck Patterson in the mouth. Accordingly, the manifest weight of the evidence demonstrates that appellant committed a felonious assault in violation of R.C. 2903.11(A)(1).

{¶ 21} Next, the greater amount of credible evidence demonstrates that appellant committed felonious assault with a deadly weapon in violation of R.C. 2903.11(A)(2). A review of the record indicates that Patterson never wavered in his testimony that appellant first threw a brick at his left calf, causing him to fall to

the ground and sustain injuries not only to his calf but also to his elbows and hands. Officer Jackson's testimony, as well as photographs, confirm that Patterson did in fact have scrapes and cuts to his elbows. Moreover, Officer Jackson testified that appellant admitted that he threw the brick at Patterson. Weighing the foregoing evidence, we believe, as did the trial court, that appellant committed a felonious assault upon Patterson with the deadly weapon of a brick.

{¶ 22} Moreover, we find the manifest weight of the evidence establishes that a felonious assault was committed against Patterson with the handle of a sledgehammer. Patterson consistently testified that appellant struck him with a stick in his right knee and, as a result, his leg began to swell causing him to seek treatment at the hospital on May 8, 2008. In this regard, appellant first argues that Patterson's testimony is inconsistent with respect to the type of weapon used to inflict his injuries. A review of the transcript, however, indicates that Patterson explained the reason for the original statement to the 911 operator that the object was a bat and the differing statement at trial that it was the handle of a sledgehammer. Patterson testified that as appellant ran towards him, he believed the stick looked like a bat, but when appellant was striking Patterson in the right knee, Patterson was able to get a closer look and more accurately label the stick as the handle of a sledgehammer. As did the trial court, we find such explanation credible.

{¶ 23} We also find it irrelevant that Patterson waited two weeks before seeking treatment to his knee. As Patterson explained, the injury to the leg was

the kind that originally was not cumbersome but progressively worsened. Furthermore, despite appellant's assertions to the contrary, there is no indication other than the defense's speculation that the evidence more accurately indicates that the injuries to Patterson's calf and knee were due to participation in athletic activities and not the incident with appellant. Dr. Bhimani opined that the injuries to Patterson's knee were consistent with his testimony that appellant struck the knee with a stick. Patterson also unequivocally denied that the injuries to his knee were the result of an athletic injury. Moreover, photographs taken by Detective Evans the day following the incident depict trauma to Patterson's right knee.

{¶ 24} Finally, appellant questions Patterson's credibility because he did not present other witnesses at trial. We find this argument flawed as the state, not the victim, decides the trial strategy.

{¶ 25} After reviewing the entire record, we cannot conclude that the jury lost its way. Appellant's convictions are affirmed, and his first assignment of error is overruled.

{¶ 26} In his second assignment of error, appellant maintains that the trial court erred when, during the sentencing hearing, it failed to inform him of post-release control or the penalties associated with a violation of post-release control.

{¶ 27} In *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, the court provided:

{¶ 28} “When a trial court fails to notify an offender about post-release control at the sentencing hearing but incorporates that notice into its journal entry imposing sentence, it fails to comply with the mandatory provisions of R.C. 2929.19(B)(3)(C) and (d), and therefore, the sentence must be vacated and the matter remanded to the trial court for re-sentencing.”

{¶ 29} Here, there is no dispute that the trial court failed to inform appellant of postrelease control and the consequences of violating said terms, even though it imposed a term of three years postrelease control in its journal entry. Therefore, the matter is remanded to the trial court to vacate the sentence and for resentencing.

{¶ 30} Convictions affirmed, sentences reversed and remanded for vacating and resentencing.

It is ordered that appellee and appellant split the 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.

ANN DYKE, JUDGE

MELODY J. STEWART, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR