

[Cite as *State v. Johnson*, 2010-Ohio-145.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92310

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT JOHNSON, III

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-513124-A

BEFORE: Jones, J., Blackmon, P.J., and Boyle, J.

RELEASED: January 21, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

LARRY A. JONES, J.:

{¶ 1} Appellant-defendant, Robert Johnson, III (“Johnson”), through counsel, appeals the decision of the lower court. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the lower court.

STATEMENT OF THE CASE

{¶ 2} On July 14, 2008, the state of Ohio filed a three-count indictment against Johnson. The state alleged the following offenses: kidnapping, in violation of R.C. 2905.01(A)(2)/(3), a felony of the first degree; felonious assault, in violation of R.C. 2903.11(A)(1), a felony of the second degree; and domestic violence, in violation of R.C. 2919.25(A), a misdemeanor of the first degree. Johnson pled not guilty to the charges on July 17, 2008, and on September 15, 2008, the matter proceeded to a jury trial.

{¶ 3} Upon the motion of Johnson, and pursuant to Crim.R. 29, the trial court dismissed the domestic violence charge contained in Count 3 of the indictment. On September 18, 2008, the jury returned a verdict acquitting the defendant of Count 1 of the indictment, kidnapping in violation of R.C. 2905.01(A)(2)/(3). However, the jury did return a verdict convicting Johnson of Count 2, felonious assault, in violation of R.C. 2903.11(A)(1), a felony of the second degree. On October 3, 2008, the trial court sentenced Johnson to two years of community control sanctions. On October 27, 2008, Johnson filed his timely notice of appeal.

STATEMENT OF THE FACTS

{¶ 4} On May 26, 2008, Stephanie Blevins (“Blevins”), the victim in this case, went to the home of Johnson. Blevins and Johnson began dating in January 2007 and lived together during their one-and-one-half-year relationship. However, the relationship ended sometime in Spring 2008, and in May 2008, Blevins moved out of Johnson’s home. Despite Blevins moving out, she and Johnson attempted to reconcile their relationship, and the two were together on the night of May 24, 2008 talking about their relationship. Although Blevins had removed her physical person from Johnson’s house, her furniture and most of her clothing were still inside of Johnson’s home on May 26, 2008, the day she was assaulted by Johnson.

{¶ 5} On May 26, 2008, Blevins went to Johnson’s house to retrieve some of her clothing, specifically, her uniform as the coach of the Warrensville Heights Middle School gymnastics team. Blevins’s cousin drove her over to Johnson’s house, and it was approximately between 7:30 a.m. and 7:45 a.m. when Blevins arrived. Because there were too many cars parked in Johnson’s driveway for Blevins and her cousin to park in the driveway, they parked the car on the street where Blevins cousin waited until Blevins returned.

{¶ 6} Blevins testified that she went to the dining room window before proceeding to the door so she could knock on the glass and wake up Johnson, whom she assumed was sleeping at that time. After knocking on the glass, Blevins proceeded to the rear of the house. The house was described as a three-

family home, with Johnson living on the first floor — the second floor was unoccupied, and a gentleman occupied the third floor. There is a porch on the back of the house that acts as an entryway into the home. On the porch there is a screen door and a main door which leads to a common hallway.

{¶ 7} Upon entering the common hallway, access may be had to all three units. Blevins described the hallway as the main entrance in and out of the house. Blevins did have keys to both the outer porch door and the unit occupied by Johnson. Although Blevins had stayed overnight as recently as one week prior to the assault, she did not to use the keys to enter the house on that day because she “did not want to be rude.”¹

{¶ 8} Blevins rang the back porch doorbell outside the main entrance, but Johnson did not answer. However, the gentleman occupying the third floor came downstairs to let Blevins into the main hallway. Blevins walked approximately eight feet to reach the door to Johnson’s unit. Blevins then knocked on the door for approximately two minutes before Johnson finally answered. Johnson told Blevins to go away and then grabbed her collar, dragged her down the hallway, and threw her out onto the porch. Johnson proceeded to swing Blevins by her arms into items on the porch. Johnson then walked back through the door into the hallway, turned, and stood looking through the screen door laughing at Blevins.

¹Tr. 148.

{¶ 9} Blevins attempted to get up, but couldn't push herself up because her right arm was injured in the attack. Blevins was still on the porch when Johnson attempted to open the screen door to hit her again. Blevins then tried to kick the porch door shut to prevent Johnson from coming outside again. The end result was that the lower portion of the door was kicked in and Johnson got outside onto the porch to continue the assault. Johnson then proceeded to drag Blevins off the back porch down several stairs slamming her into the back of the house.

{¶ 10} Johnson continued to hit Blevins and threw her against the house. The force of the blows were so severe that they actually knocked one of Blevins's contact lens out of her eye. During the beating, 6' 6" 220 lb. Johnson, told 5' 2" 135 lb. Blevins how he had been having sex with her daughter the whole time that Blevins lived with him.² The beating did not stop until Johnson's mother came outside and told him to get off Blevins. Blevins was immediately driven to the hospital. Unfortunately, Blevins's cousin was unable to see what was occurring from his vantage point parked on the street.

{¶ 11} Contrary to Johnson's comments about Blevins owning a gun, Blevins was not carrying a weapon when she was assaulted. Blevins's injuries were significant. The state produced photographs at trial to help illustrate the injuries to the jury. The photos were taken one week after the attack and still showed clearly the injuries sustained by Blevins. There was major bruising to Blevins's

²Tr. 132.

right arm, bruises to her lower back, and a black eye. The medical records were also produced at trial. Blevins's diagnosis included a dislocated shoulder, fractured shoulder, bruising, and facial and scalp contusions. As of the trial date, which was three-and-one-half months after the beating, Blevins testified that she was still going through therapy for her shoulder at Marymount Hospital.

ASSIGNMENTS OF ERROR

{¶ 12} Johnson assigns four assignments of error on appeal:

{¶ 13} “[1.] The defendant was denied due process guaranteed by Article I, Section 10 of the United States Constitution, the Sixth and Fourteenth Amendments of the United States Constitution when the trial court failed to instruct the jury fully and completely on issues relating to self defense.

{¶ 14} “[2.] The defendant was denied his rights to effective assistance of counsel guaranteed by Article I, Section 10 of the Ohio Constitution and the Sixth and Fourteenth Amendment to the United States Constitution when his attorney failed to object to an incomplete instruction as it related to the issues of self defense.

{¶ 15} “[3.] The defendant was denied his due process right to a fair trial guaranteed by the Fourteenth Amendment to the United States Constitution because the verdict was based on insufficient evidence.

{¶ 16} “[4.] The defendant's rights to due process and a fair trial were violated when a verdict was returned that was against the manifest weight of the evidence, in violation of defendant's rights under the Fifth, Sixth and Fourteenth

Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution.”

LEGAL ANALYSIS

Jury Instructions and Ineffective Assistance of Council

{¶ 17} Due to the substantial interrelation between Johnson’s first and second assignments of error, we shall address them together. Johnson argues that the trial court failed to instruct the jury properly and his attorney failed to object to an incomplete instruction on self-defense. We disagree.

{¶ 18} Senate Bill 184 (also known colloquially as the “Castle Doctrine”) was passed seven days before the commencement of trial in this case. Under the Castle Doctrine, a person is presumed to have acted in self-defense when attempting to expel or expelling another from their home who is unlawfully present.

Further, under the Castle Doctrine, a person attempting to expel or expelling another is allowed to use deadly force or force great enough to cause serious bodily harm. There is also no duty to retreat inside one’s home anymore.

{¶ 19} Contrary to Johnson’s argument, the court in this case did instruct the jury concerning the Castle Doctrine as to Johnson’s right to a presumption that he acted in self-defense by giving the following instruction:

“Now, a person is presumed to have acted in self-defense when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the

residence or vehicle occupied by the person using the defensive force.”³

{¶ 20} Moreover, Johnson failed to provide any case law or evidence on behalf of the court or the legislature demonstrating that the Castle Doctrine was meant to be applied retroactively. The changes Johnson mentions did not exist at the time of the offense. The assault occurred on May 26, 2008, and S.B. 184 did not go into effect until September 2008. Johnson is unable to claim that he was acting in self-defense under the new S.B. 184 changes when the attack actually occurred before the changes went into effect.

{¶ 21} The Castle Doctrine was passed just a few days before the trial began. Accordingly, there was no case law as to the language required for any “new” or “necessary” jury instructions. Furthermore, defense counsel actually provided the trial court with a copy of the new Castle Doctrine and requested a jury instruction that complied with the copy of the Castle Doctrine he had just provided to the court:

Defense Counsel: “Your Honor - - I’m sorry. One thing I would like the Court to be aware of, I would ask for an instruction pursuant to the new Castle Doctrine which specifically says a person is presumed to act in self-defense. In this situation - - I’ve got it written here, but that’s what I would ask for as a instruct when the time came.”

The Court: “Do you have the new Castle Doctrine?”

Defense Counsel: “I have - - your Honor, in fact, I happen to have a copy of the statute. * * *.”⁴

³Tr. 294.

⁴Tr. 250-51.

{¶ 22} In this case, the jury instruction that was used was the one that was given to the trial court by defense counsel. “[A] party will not permitted to take advantage of an error which he himself invited or induced the trial court to make.” *State ex. rel. Bitter v. Missig* (1995), 72 Ohio St.3d 249. The jury instruction that was given at trial mirrors the exact language of the statute. We find no error concerning the trial court’s self-defense jury instructions.

{¶ 23} The standard for determining whether a defendant has been deprived of the effective assistance of counsel is essentially the same under Article I, Section 10 of the Ohio Constitution and the Sixth Amendment to the United States Constitution. *State v. Bradley* (1989), 42 Ohio St.3d 137, 142. “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Strickland v. Washington* (1984), 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674. “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison*, 449 U.S. 361, 364-365, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981).” *Id.*, at 691. To warrant reversal, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*, at 694.

{¶ 24} The burden is on the appellant to prove ineffectiveness of counsel. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128. Trial counsel is strongly presumed to have rendered adequate assistance. *Id.* Moreover, this court will not second-guess what could be considered to be a matter of trial strategy. *Id.*

{¶ 25} We find Johnson's claims that his attorney did not provide him with effective assistance because he did not request a jury instruction on self-defense addressing new information in S.B. 184 to be inaccurate. A review of the aforementioned evidence in this case demonstrates that Johnson failed to show that his attorney's representation fell below an objective standard of reasonableness.

{¶ 26} Accordingly, we find no error on the part of the trial court regarding the jury instructions relating to self-defense and we find no error on the part of defense counsel's actions concerning the jury instructions on self-defense.

{¶ 27} Accordingly, Johnson's first and second assignments of error are overruled.

Insufficient Evidence and Manifest Weight

{¶ 28} Johnson argues in his third and fourth assignments of error that his verdict was based on insufficient evidence and was also against the manifest weight of the evidence. Due to the substantial interrelation between Johnson's last two assignments of error we shall address them together.

{¶ 29} “The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different.

{¶ 30} “With respect to sufficiency of the evidence, ‘sufficiency’ is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law. In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. (Internal citations omitted.)

{¶ 31} “Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may, nevertheless, conclude that the judgment is against the weight of the evidence. 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 jurors that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, their verdict 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*.

{¶ 32} “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 fact-finders resolution of the conflicting testimony.” *Id.*

{¶ 33} As to a claim that a judgment is against the manifest weight of the evidence, 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. 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. *State v. Martin* (1983), 20 Ohio App.3d 172, 20 Ohio B. 215, 20 Ohio App.3d 172, 485 N.E.2d 717. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212.

{¶ 34} Johnson was convicted of felonious assault. Felonious assault is defined by R.C. 2903.11(A)(1) as follows: “(A) No person shall knowingly do either of the following: “(1) Cause serious physical harm to another or to another’s unborn.”

{¶ 35} To prove the charge of felonious assault the state must prove that Johnson knowingly caused serious physical harm to Blevins. Significant evidence establishing Johnson’s guilt was presented at the trial court level. Blevins testified that after knocking on Johnson’s door, he grabbed her by the

collar and pushed her back eight feet before throwing her on the porch. This was certainly “knowing” conduct.

{¶ 36} After throwing Blevins on the porch, Johnson pulled her arms over her head as she lay on the ground and dragged her out of the hallway, purposely swinging her body into items on the porch. While on the porch, Johnson continued to hit Blevins — actually hitting her hard enough to cause her contact lens to pop out of her eye. Johnson also threw Blevins to the ground and grabbed her arm hard enough to cause injuries to her arm, back, and other areas.

{¶ 37} Serious physical harm was defined for the jury and that definition includes “any permanent physical incapacity, whether partial or total, or which involves some temporary substantial incapacity; [* * *] any physical harm which involves some permanent disfigurement or involves some temporary, serious disfigurement; or [* * *] any physical harm which involves acute pain of such duration as to result in substantial suffering, or which involves any degree of prolonged or intractable pain.”⁵

{¶ 38} The medical records were stipulated to at trial. The medical records list injuries to Blevins as a dislocated and fractured shoulder, and facial and scalp lacerations. In addition, the state provided photographs depicting the bruising to Blevins eye, shoulder and back. Blevins was still going through physical therapy

⁵Tr. 290.

for her shoulder approximately three-and-one-half months after the incident. The bruising and swelling was certainly a temporary disfigurement, and the dislocated and fractured shoulder were obviously painful and resulted in Blevins still seeking physical therapy on her arm over three months after the attack.

{¶ 39} In addition, the evidence demonstrates that the state proved by a preponderance of the evidence that Johnson was not acting in self-defense. Blevins was unarmed, knocked on the door instead of using her key, and was substantially smaller and weaker than Johnson. Moreover, the evidence further demonstrates that Blevins was not the aggressor. Accordingly, Johnson's conduct knowingly and certainly caused serious physical harm to Blevins.

{¶ 40} We find the evidence legally sufficient to sustain the trial court's convictions for felonious assault. In addition, when the evidence is viewed in a light most favorable to the state, we find that all essential elements of Johnson's convictions were proven beyond a reasonable doubt. Moreover, nothing in the record demonstrates that the trial court lost its way in convicting Johnson.

{¶ 41} Accordingly, appellant's third and fourth assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover of 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.

LARRY A. JONES, JUDGE

PATRICIA A. BLACKMON, P.J., and
MARY JANE BOYLE, J., CONCUR