

[Cite as *State v. Milton*, 2010-Ohio-159.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93039

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CALVIN MILTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-514677

BEFORE: Gallagher, A.J., Kilbane, J., and McMonagle, J.

RELEASED: January 21, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Patrick E. Talty
20325 Center Ridge Road
Suite 512
Rocky River, Ohio 44116-4386

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Jennifer W. Kaczka
Diane Smilanick
Assistant Prosecuting Attorneys
The Justice Center, 8th Floor
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), 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).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant, Calvin Milton, appeals his conviction in the Cuyahoga County Court of Common Pleas for felonious assault. For the reasons stated herein, we affirm.

{¶ 2} On August 26, 2008, Milton was indicted on one count of felonious assault in violation of R.C. 2903.11(A)(1) and one count of kidnapping in violation of R.C. 2905.01(A)(3). He entered a plea of not guilty to the charges. The case proceeded to a bench trial on March 11, 2009.

{¶ 3} At trial, the victim testified that she lives near Milton and knew him for about three years. On June 28, 2008, Milton stopped by the victim's apartment to inquire about an electrical scooter she had. The victim was sitting on her porch. She stated that after exchanging words with Milton about the scooter, he said "I'm going to throw your old ass in the dumpster," and she responded "drunk as you is I doubt if you can do it."

{¶ 4} The victim testified that after about 20 or 30 minutes, and after drinking one beer, she went to the dumpster to throw away an empty beer bottle. She stated that at the dumpster she saw Milton, who grabbed her, wrestled with her, and tried to throw her into the dumpster. While Milton was attempting to throw her in, she struck her head twice on the dumpster.

{¶ 5} The victim testified that after Milton was unsuccessful at getting her into the dumpster, he threatened to knock her out. She stated: "I

started kicking at him. He stayed back. That's when he hit me in my stomach and I released everything I had down there. Then, next thing I know, he bust me in my eye, then he bust me in my other eye. I don't know what to do. I was in shock."

{¶ 6} The victim stated that she was stunned and that every time she turned around Milton would hit her again. At one point, Milton punched her in the mouth, loosening a tooth. Eventually, the victim was "knocked out."

{¶ 7} After help arrived and an ambulance was called, the victim declined being transported to a hospital. The responding paramedic testified and confirmed that the victim did not wish to go to the hospital. He indicated that the victim had a positive loss of consciousness and a knot on the back of her head. He did not document any signs of intoxication.

{¶ 8} Later, the victim began experiencing pain, having migraines, and vomiting. On or about July 1, 2008, the victim reported to work. The victim stated that her mouth and both eyes were swollen and she had a knot on the back of her head. Her supervisor noticed these injuries and indicated that the victim was "very lethargic" and "her speech was a little bit slurred and slow." A co-worker took the victim to the hospital, where she spent three days. The victim stated that she was treated for "blood on my brain, a concussion, and stomach injuries."

{¶ 9} Milton testified on his own behalf. He stated that on the evening in question, he saw the victim at the dumpster. He had been drinking and stated he “was kind of drunk[.]” He stated that he and the victim had spoken about a scooter earlier in the day. Milton claimed that at the dumpster, the victim demanded the money he owed her and she punched him in the eye. He stated that he backed away and then the victim “charged me coming behind the dumpster and when I looked up I swung. I hit her one time. She fell and that was it. After I hit her I realized that she was passed out[.] * * * That’s when I helped her up because she was trying to get up and * * * she kept falling.” Milton then told somebody to call an ambulance. Milton also testified that he was arrested for breaking a window in an unrelated incident later that night.

{¶ 10} The medical records reflect that the victim had a large hematoma on her posterior scalp, a frontal hemorrhagic contusion, and facial and occipital contusions. She also presented with a headache and intermittent pain.

{¶ 11} The trial court found Milton guilty of felonious assault as charged and not guilty of kidnapping. The court sentenced Milton to four years in prison with postrelease control. The sentence was ordered to run concurrent with a sentence in another case.

{¶ 12} Milton has appealed his conviction. He raises one assignment of error for our review that challenges his conviction of felonious assault as being against the manifest weight of the evidence.

{¶ 13} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether “there is substantial evidence upon which [the trier of fact] could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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.” (Internal citations and quotations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 68, 2004-Ohio-6235, 818 N.E.2d 229.

{¶ 14} Milton was convicted of felonious assault in violation of R.C. 2903.11(A)(1). The statute provides as follows: “[n]o person shall * * * knowingly [c]ause serious physical harm to another * * *.”

{¶ 15} Milton claims that there was conflicting testimony as to who was the initial aggressor and that there was sufficient testimony to establish that he acted in self-defense.

{¶ 16} Self-defense is an affirmative defense, and the defendant must prove it by a preponderance of the evidence. R.C. 2901.05(A); *State v.*

Williford (1990), 49 Ohio St.3d 247, 249, 551 N.E.2d 1279. “[A] defendant claiming self-defense must prove ‘(1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) that the defendant did not violate any duty to retreat or avoid the danger.’” *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 491, 492, 2009-Ohio-3626, 912 N.E.2d 595, quoting *State v. Barnes*, 94 Ohio St.3d 21, 24, 2002-Ohio-68, 759 N.E.2d 1240.

{¶ 17} Our review of the record reflects that Milton admitted having an exchange of words with the victim over a scooter and having a physical altercation with the victim that resulted in the victim becoming unconscious. Although the testimony of the victim and Milton differed as to who was the aggressor in the altercation, the evidence presented reflected that the victim sustained injuries consistent with her version of events. The EMS paramedic confirmed that the victim had a knot on the back of her head, and the victim’s supervisor testified that she observed a knot on the victim’s head, as well as two black eyes. Although the victim initially declined treatment, she began suffering migraines, vomiting, and experiencing pain. She was eventually hospitalized for three days. Medical records were introduced that support the victim’s account of her injuries. There was also evidence that

Milton had been drinking, and he admitted he was “kind of drunk.” He was arrested later that evening for breaking a window in an unrelated incident.

{¶ 18} The record reflects that substantial, credible evidence was presented whereby the trial court could reasonably find that Milton committed the felonious assault and did not act in self-defense. The trier of fact was free to believe the testimony of the state’s witnesses and discredit Milton’s self-defense testimony. After carefully reviewing the evidence presented at trial, we conclude that the trial court did not clearly lose its way or create a manifest miscarriage of justice by finding Milton guilty of felonious assault. Consequently, Milton’s conviction is not against the manifest weight of the evidence.

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.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and
CHRISTINE T. MCMONAGLE, J., CONCUR