

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93652

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARK JOHNSTON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521086

BEFORE: Blackmon, J., Rocco, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: August 19, 2010

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Mark Johnston appeals from his conviction for felonious assault and assigns the following errors for our review:

“I. The trial court erred in denying appellant’s motion for acquittal as to the charge when the state failed to present sufficient evidence to sustain a conviction.”

“II. Appellant’s conviction is against the manifest weight of the evidence.”

{¶ 2} Having reviewed the record and pertinent law, we affirm Johnston’s conviction. The apposite facts follow.

Facts

{¶ 3} The Cuyahoga County Grand Jury indicted Johnston on one count of felonious assault, with a prior notice of conviction and a repeat violent offender specification attached. Johnston waived his right to a jury trial; the matter was tried to the bench.

{¶ 4} The victim and Johnston met at a homeless shelter where they became friends. Eventually, the victim was able to obtain housing at a house located at 114 East 64th Street. The victim lived in an efficiency unit on the second floor. At the end of January 2009, he allowed Johnston to stay at his apartment for a few days.

{¶ 5} On February 5, 2009, the victim and Johnston were in the victim's apartment drinking beer. According to the victim, Johnston asked if he could move in permanently. The victim told Johnston he was not ready to have a roommate, which angered Johnston. Because of the tension, the victim told Johnston it was time for him to leave and escorted him to the door.

As they both stood at the top of the stairs, Johnston pushed the victim down the stairs.

{¶ 6} The victim crawled out of the building to escape Johnston. Johnston followed him out and kicked him in the head several times with his combat boots. The victim claimed he lost consciousness and awoke at Huron Hospital. The victim suffered a broken jaw, facial fracture, suffered a concussion, and one tooth was knocked out.

{¶ 7} The victim's downstairs neighbor arrived home while the beating was taking place. He testified that he saw a tall, white, male standing over a shorter man, who he was kicking in the face. He told the assailant that he should take it somewhere else. The man walked up to the neighbor "like he was going to start something," but then walked away. When the police arrived, the neighbor told the police that the man was walking towards St. Clair Avenue. He described the male as white, tall, and wearing a grey coat. Johnston, who fit the description of the assailant, was arrested shortly thereafter. A prescription bottle with the victim's name was found in his pocket.

{¶ 8} The trial court found Johnston guilty of felonious assault. Although the state maintained that Johnston had a prior conviction for manslaughter, because no journal entry of the prior conviction was entered into evidence, the court found Johnston not guilty of the notice of prior conviction and repeat violent offender specification. The trial court sentenced Johnston to three years in prison.

Sufficiency and Manifest Weight

{¶ 9} We will address Johnston's two assigned errors together. Johnston contends insufficient evidence supported his conviction, and the evidence was against the manifest weight.

{¶ 10} The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus as follows:

“Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.”

{¶ 11} See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394; *State v. Davis* (1988), 49 Ohio App.3d 109, 113, 550 N.E.2d 966.

{¶ 12} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, in which the Ohio Supreme Court held:

“An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found

the essential elements of the crime proven beyond a reasonable doubt. (*Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)”

{¶ 13} Johnston contends the evidence was insufficient to support a felonious assault conviction because the victim’s injuries were the result of a “mutual combat.” We conclude that there was sufficient evidence presented that Johnston committed felonious assault.

{¶ 14} According to the victim, he and Johnston disagreed about Johnston moving in with him. Johnston then, without any physical provocation, pushed him down the stairs. The victim stated he did not have the opportunity to fight back because Johnston began kicking him in the head until he lost consciousness.

{¶ 15} The responding officers also testified that Johnston did not have any injuries consistent with a mutual fight. The neighbor also testified that he did not see the victim engage in any assault against Johnston. He only saw Johnston, “stomping” on the victim’s head. Even if the victim had fought back, once Johnston attacked him, his actions would have had no bearing upon Johnston’s culpability. *State v. Griggs*, 9th Dist. No. 24122, 2008-Ohio-4556.

{¶ 16} The trial court did not err in convicting Johnston of felonious assault. There is no dispute that the victim’s injuries were serious.

Johnston broke the victim's jaw, gave him a concussion, fractured his face, and knocked out a tooth. Due to his injuries he was in the hospital for four days and had his jaw wired shut for several months.

{¶ 17} Johnston nonetheless contends that the evidence was against the manifest weight because the victim's testimony was not reliable or credible and because Officer Crytzer admitted that there was a fight.

{¶ 18} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court 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* (1997), 78 Ohio St.3d 380, 678 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.”

{¶ 19} However, an appellate court may not merely substitute its view for that of the jury, but must find that “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.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541. Accordingly, reversal on manifest weight grounds is reserved for “the exceptional case in which the evidence weighs heavily against the conviction.” Id.

{¶ 20} As we stated, the victim testified that he did not engage in any aggressive behavior towards Johnston. Admittedly, both the victim and Johnston were intoxicated after having each drunk approximately six, 40

ounce beers. However, the trial court was aware that the victim was drunk and nonetheless believed that Johnston was solely responsible for the physical altercation. The court, acting as the finder of fact, may believe all, part, or none of a witness's testimony. *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096; *State v. Hairston* (1989), 63 Ohio App.3d 58, 577 N.E.2d 1144; *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimonies are credible. See *Seasons Coal Co. v. Cleveland* (1994), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273; *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. Here, the court obviously believed the victim's testimony that he did not physically provoke Johnston.

{¶ 21} While Johnston contends that Officer Crytzer admitted that there was a fight, a review of the record indicates otherwise. He testified that there was no evidence of an altercation inside the apartment and that Johnston did not show signs of being in a fight. He admitted that dispatch identified the situation as a "fight," but stated that he had no knowledge of how "mutual" the fight was because he did not witness the altercation. Accordingly, Johnston's first and second assigned errors are 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

KENNETH A. ROCCO, P.J., and
JAMES J. SWEENEY, J., CONCUR