

[Cite as *State v. Goode*, 2010-Ohio-5347.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93475

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAMEL GOODE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART;
REVERSED AND REMANDED IN PART**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-517259

BEFORE: McMonagle, J., Rocco, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: November 4, 2010

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Damel Goode, appeals from his convictions for aggravated assault and resisting arrest, which were rendered after a bench trial. We affirm in part and reverse and remand in part.

I

{¶ 2} Goode was charged in October 2008 with two counts of felonious assault with one- and three-year firearm specifications and forfeiture specifications. He was also charged with resisting arrest. After he waived his right to a jury trial, the case was tried to the bench. At the conclusion of

the state's case, the defense made a Crim.R. 29 motion for acquittal, which was denied. The defense presented evidence and at the conclusion of the case renewed its Crim.R. 29 motion, which was again denied. The court found Goode guilty of two counts of aggravated assault with one-year firearm specifications and forfeiture specifications and resisting arrest.¹ Goode was sentenced to a two-year prison term.

II

{¶ 3} The two victims in this case were brothers Willie Pratt and Steven Evans. They both testified that on the day of the incident they were in the area of Southgate Mall in Maple Heights when they saw Goode with a female. Evans knew the female and stopped to say hello to her. Pratt told his brother that he should not talk to the female in front of Goode because it was disrespectful. Words were exchanged between Goode and Pratt and Pratt asked Goode if he wanted to fight.

{¶ 4} Pratt testified that he then saw Evans running, heard a “clicking” sound, and saw Goode had a gun. Goode then aimed the gun at Pratt’s head, between his nose and forehead, and said “[d]on’t act tough, big boy.” Pratt testified that Evans was hiding behind a car when Goode pulled the gun on him.

¹Although the court referred to aggravated assault as a lesser included offense of felonious assault, it is correctly denominated as an offense of an inferior degree of felonious assault. This distinction, however, does not affect our analysis.

{¶ 5} Evans testified that he ran because he saw that Goode had a gun. According to Evans, Goode “brought out a gun, but he had it pointed at like the floor and then he put it back up [in his pants].” Evans testified that he did not see the altercation between Pratt and Goode because he had left the immediate area by then.

{¶ 6} After the altercation, Pratt and Evans reconnected and went to a nearby grocery store, where they told a police officer in the store what had happened. Shortly thereafter, Goode was seen in the area by the police and, when approached, he ran. As he was running, the police observed Goode fumble with something in his waistband and drop what appeared to be a gun.

He continued to run until he was tackled by the police; he resisted their efforts to handcuff him. The gun was recovered from the area where Goode had been running; it was unloaded, but operable.

{¶ 7} Goode testified that he and the female were together on the day of the incident and that Evans stopped to talk to her. Goode admitted that words were exchanged between him and Pratt. He also admitted to having a gun on his person that day, but denied brandishing it in any manner or threatening Pratt. Goode admitted to throwing the gun during the chase with the police.

{¶ 8} In his first assignment of error, Goode contends that the court erred in denying his motions for acquittal. The charge before the court when it denied Goode's Crim.R. 29 motions was felonious assault. The court did not find him guilty of felonious assault and, therefore, this assignment of error is overruled as moot.

IV

{¶ 9} For his second assigned error, Goode contends that the weight of the evidence did not support his aggravated assault convictions.

{¶ 10} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "there is substantial evidence upon which a jury 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 jury 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, 2004-Ohio-6235, 818 N.E.2d 229, ¶81.

{¶ 11} R.C. 2903.12 governing aggravated assault provides that "[n]o person under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is

reasonably sufficient to incite the person into using deadly force, shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon * * *.”

{¶ 12} Goode contends that there was no evidence that he was attempting to cause physical harm to anyone with a firearm and cites the fact that the gun was unloaded.

{¶ 13} In *State v. Green* (1991), 58 Ohio St.3d 239, 569 N.E.2d 1038, the Ohio Supreme Court held that “[t]he act of pointing a deadly weapon at another coupled with a threat, which indicates an intention to use such weapon, is sufficient evidence to convict a defendant of the offense of ‘felonious assault.’” *Id.* at 241. In *State v. Meek* (1978), 53 Ohio St.2d 35, 372 N.E.2d 3241, the Ohio Supreme Court held that an unloaded gun used during a robbery is a deadly weapon. *Id.* at syllabus. Citing *Meek*, in *State v. Tate* (1978), 54 Ohio St.2d 444, 377 N.E.2d 778, the Court held that “[s]ince an unloaded gun used in a robbery has been determined to be a ‘deadly weapon,’ an unloaded gun used in an assault is likewise a ‘deadly weapon.’” *Tate* at 446.

{¶ 14} We are constrained here by the above, but note that *Tate* does not address the “cause or attempt to cause physical harm to another” portion of

the assault statutes.² In short, how could a gun known by the defendant to be unloaded simply pointed at another “cause or attempt to cause physical harm” to support assault?³

{¶ 15} Analyzing this case under the controlling law, the State proved that Goode committed an assault on Pratt, but not on Evans. Pratt testified that Goode aimed the gun at his head, between his nose and forehead, and said “[d]on’t act tough, big boy.” By Goode’s admission, words had been exchanged and by Pratt’s admission, he asked Goode if he wanted to fight. Although Goode denied making such a statement or aiming the gun at Pratt and we consider the credibility of the witnesses in a manifest weight challenge, we are mindful that the determination regarding witness credibility rests primarily with the trier of fact. *State v. Hill* (1996), 75 Ohio St.3d 195, 205, 661 N.E.2d 1068. The trier of fact is in the best position to view the witnesses and observe their demeanor, gestures, and voice inflections. Those observations are critical to a resolution of each witness’s credibility. *State v. Antill* (1964), 176 Ohio St. 61, 197 N.E.2d 548. Under

²R.C. 2903.11(A)(2), governing felonious assault, provides that “[n]o person shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon * * *.”

³See *Tate* at 446-447 (Celebrezze, J., dissenting): “Conspicuous by its absence is any reference, within the majority opinion, to evidence tending to prove the second element of the offense of felonious assault, viz., to cause or attempt to cause physical harm.”

Green, supra, the evidence supports an aggravated assault conviction with Pratt as the victim.

{¶ 16} In regard to Evans, however, the evidence does not support the conviction. Neither Pratt nor Evans testified that Goode pointed the gun at Evans or threatened him. Evans testified that Goode took the gun out, aimed it at the ground, and then put it away, causing him (Evans) to run away from the scene. Evans further testified that he did not witness the altercation between Goode and Pratt because he had removed himself from the scene. Likewise, Pratt testified that Evans was not on the scene when Goode pulled the gun on him and threatened him.

{¶ 17} In light of the above, the second assignment of error is overruled in part and sustained in part.

{¶ 18} Judgment affirmed in part and reversed in part. The case is remanded to the trial court with orders to vacate the conviction and sentence on Count 2.

It is ordered that appellant and appellee share 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 in part, any bail pending appeal is

terminated. Case remanded to the trial court for further proceedings consistent with this opinion.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

KENNETH A. ROCCO, P.J., and
MELODY J. STEWART, J., CONCUR