[Cite as *State v. Millan*, 2011-Ohio-331.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94723

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSE MILLAN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-530205

BEFORE: Kilbane, A.J., Boyle, J., and Rocco, J.

RELEASED AND JOURNALIZED: January 27, 2011

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MARY EILEEN KILBANE, A.J.:

{¶ 1} Defendant-appellant, Jose Millan, appeals from his conviction for two counts of assault on police officers and two counts of robbery. For the reasons set forth below, we affirm.

{¶ 2} On October 26, 2009, defendant was indicted on two counts of assault, in violation of R.C. 2903.13, with furthermore clauses alleging that the victims were peace officers; one count of robbery, in violation of R.C. 2911.02(A)(2) (theft while causing or attempting to cause physical harm to one of the officers); one count of robbery, in violation of R.C. 2911.02(A)(1)(with a

deadly weapon while attempting or committing a theft upon Bernadette McFadden); and one count of escape, in violation of R.C. 2921.34(A)(1).

{¶ 3} Defendant pled not guilty and waived his right to a jury. The bench trial began on January 26, 2010. For its case, the State presented the testimony of Bernadette McFadden and Cleveland Police Officers William Emerick, Kerry Novak, and Carlos Robles.

{¶ 4} Officers Emerick and Novak established that on October 15, 2009, they were dispatched to West 98th Street and Madison Avenue in response to a call that men were fighting outside a store, and one was waving a knife. Upon their arrival, the officers then observed a man and a woman walking northbound at West 98th Street and Madison Avenue. The officers told the man to approach the zone car and place his hands on the bumper bar. Officer Emerick explained to defendant that he was going to be patted down and detained, and asked him if he had any weapons. According to the officers, defendant hesitated then informed the officers that he had a large knife and instructed them to be careful. Officer Novak began to pat him down. She testified that she felt what appeared to be a thin, long knife, with a blade that seemed to be approximately seven inches long. She did not see the knife, however, and before she could retrieve it from his coat pocket, the defendant, who was partially handcuffed, turned away from the bumper, grabbed for the knife, and began flailing at the officers.

{¶ 5} Defendant punched officer Emerick in the chest, and the officer then stumbled backward on the curb and lost grip of the handcuff. He punched

Officer Novak in the head, and she then grabbed defendant from behind. Defendant grabbed Officer Novak's duty belt and began to yank her gun out of the holster. He pushed Officer Novak, and she released her hold upon him. He started to come at her again, and she took out her gun. At that point, defendant fled, and Officer Emerick chased after him with his taser.

{¶ 6} Officer Emerick next saw defendant confront a driver in the parking lot of a nearby recreation center. He ordered the defendant to move away from the driver and instructed the driver to pull away. Officer Emerick further testified that he feared that defendant would use the knife that he reportedly had to carjack the driver, so he took out his gun and pointed it at defendant. At this point, defendant fled northbound, and Officer Emerick pursued him.

{¶ 7} Bernadette McFadden, the driver of the car, testified that while she was in the parking lot of Cudell Recreation Center, the defendant ran up to her vehicle and demanded her car. She tried to roll up the window as defendant grabbed the outside door handle with his right hand and reached inside her car with his left hand. Defendant managed to open the car door, but then fled when confronted by police.

{¶ 8} At this point, Officer Emerick discharged the taser at defendant. He heard defendant scream, then he briefly lost sight of him in a garden area. Defendant next confronted the driver of a van, and it appeared that the defendant was being dragged by that vehicle. Defendant was eventually apprehended and taken into custody by Officer Robles, who was on basic patrol in the area. At

this time, he had only a small pocket knife with a one-inch blade, and no other weapons were recovered. Both Officer Novak and Officer Emerick went to the hospital for their injuries.

{¶ 9} At the close of the State's case, the trial court acquitted defendant of the offense of escape. Defendant then elected to present evidence, and presented the testimony of Darca Johnson. Johnson testified that she and defendant went to a convenience store at West 98th Street and Madison Avenue for cigarettes. Defendant had a verbal altercation with a man and woman in the store. The argument continued as defendant left the store. Four other people then emerged from a van and joined the argument against defendant. According to Johnson, defendant had only a small pocket knife. Johnson further testified that defendant had consumed at least 12 cans of beer that evening. Finally, Johnson claimed that after the police arrived in response to the fight, the female officer attempted to cuff defendant, while the male officer patted him down. At this point, defendant simply lifted his arm and this caused the female officer to lose control of him and fall backward. This seemed to shock the defendant who then "freaked out" and fled. Johnson denied that defendant struck either officer. She admitted, however, that defendant's roommate had a copy of the police report prepared in this matter, and that she had read parts of it before testifying.

{¶ 10} Defendant was subsequently convicted of the remaining charges. Prior to sentencing, defendant's trial attorney informed the court that, according to

hospital records, defendant had a blood alcohol level of .21 following this incident. Thereafter, the trial court sentenced defendant to a total of three years of imprisonment, plus postrelease control for up to three years. Defendant now appeals and assigns two errors for our review.

{¶ 11} Defendant's first assignment of error states:

> "**The evidence was insufficient to sustain a conviction for one count of robbery where there was no deadly weapon on or about the appellant's person during the attempt of the theft of the vehicle."**

{¶ 12} Sufficiency is the legal standard that is applied to determine whether the case may go to the jury or whether the evidence is adequate to support the jury verdict as a matter of law. *State v. Thompkins,* 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. When reviewing the sufficiency of the evidence to support a criminal conviction,

> **"[a]n appellate court's function * * * is to examine the evidence admitted 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." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.**

{¶ 13} R.C. 2911.02 defines the offense of robbery, in relevant part, as follows:

> **"(A) No person, in attempting or committing a theft offense * * * shall do any of the following:**

(1) Have a deadly weapon on or about the offender's person or under the offender's control[.]

*** * ***

(C) As used in this section:

(1) 'Deadly weapon' has the same meaning as in section 2923.11 of the Revised Code."

{¶ 14} R.C. 2923.11(A) defines "deadly weapon" as "[a]ny instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon."

{¶ 15} Thus, in order to be found guilty of robbery under R.C. 2911.02(A)(1), the State was required to prove that defendant had a deadly weapon under his control. *State v. Rogers,* Cuyahoga App. No. 90280, 2008-Ohio-4867. The State is not required to produce the deadly weapon in order to obtain a conviction, for "'[t]o do so would emasculate R.C. 2911.01, and reward those armed robbers who have the fortune to escape the scene of the crime, and the foresight to destroy or conceal the weapons before they are apprehended.'" Id., quoting *State v. Vondenberg* (1980), 61 Ohio St.2d 285, 401 N.E.2d 437. Further, there was sufficient circumstantial evidence presented to allow the trier of fact to reasonably infer that defendant had a deadly weapon on or about his person or under his control.

"Circumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof. When the state relies on circumstantial evidence to prove an essential element of the offense charged, there is no need for such evidence to be

irreconcilable with any reasonable theory of innocence in order to support a conviction." *Jenks,* paragraph one of the syllabus.

{¶ 16} In this matter, the record reflects that defendant told Officer Emerick that he had a large knife and instructed them to be careful. Officer Emerick in his testimony stated "[as] he put his hands on the push bumper, I put my right hand on his hand on the bumper and said, do you have a weapon on you. My partner will pat you down. He hesitated and then says, be careful, ma'am, I told your partner I have a large knife. It's sharp." (Tr. 34.) Officer Novak testified that, as she patted defendant down, she felt a thin, long knife in his coat pocket, and that it had a blade that seemed to be approximately seven inches long. (Tr. 71-72.) Further, there was no evidence that defendant discarded anything as Officer Emerick pursued him to the recreation center where defendant demanded McFadden's car.

{¶ 17} Construing this evidence in a light most favorable to the prosecution, reasonable minds could conclude that defendant was in possession of a knife with a thin, long blade at the time of the police patdown, and that he remained in possession of this weapon at the time he confronted McFadden and demanded her car. Accordingly, the State's evidence, though circumstantial, was sufficient to establish that defendant had a dangerous ordnance about his person when he demanded McFadden's car. The conviction for robbery, in violation of R.C. 2911.02(A)(1) is supported by sufficient evidence.

{¶ 18} The first assignment of error is without merit.

{¶ 19} Defendant's second assignment of error states:

> **"The weight of the evidence does not support the convictions for two counts of assault on police officers where the appellant did not have the intent to knowingly cause harm."**

{¶ 20} In determining whether a conviction is against the manifest weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 54, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652. The reviewing court 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." Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 21} The appellate court may not merely substitute its view for that of the jury, and reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." Id., quoting *Martin*.

{¶ 22} In this matter, defendant was convicted of the offense of assault, in violation of R.C. 2903.13, which states:

> **"(A) No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn.**
>
> *** * ***

(C) Whoever violates this section is guilty of assault, and the court shall sentence the offender as provided in this division and divisions (C)(1), (2), (3), (4), (5), and (6) of this section. Except as otherwise provided in division (C)(1), (2), (3), (4), or (5) of this section, assault is a misdemeanor of the first degree.

*** * ***

(4) If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation and if the victim suffered serious physical harm as a result of the commission of the offense, assault is a felony of the fourth degree, and the court, pursuant to division (F) of section 2929.13 of the Revised Code, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the fourth degree that is at least twelve months in duration."

{¶ 23} In this matter, defendant asserts that his convictions for this offense are against the manifest weight of the evidence because he had been drinking and did not have the requisite intent to commit an assault upon the officers.

{¶ 24} In *State v. Fuote*, Cuyahoga App. No. 87846, 2007-Ohio-80, this court rejected the defense of voluntary intoxication where the defendant was convicted of assault on a police officer, and explained as follows:

"The Ohio Supreme Court has held, '[t]he general rule in Ohio is that voluntary intoxication is not a defense to any crime.' *State*

> ***v. Fox*** **(1981), 68 Ohio St.2d 53, [428 N.E.2d 410]. While** ***State v. Wolons*** **(1989), 44 Ohio St.3d 64, [541 N.E.2d 443], recognizes that an exception exists when specific intent is an essential element of the crime, the instant case does not support such an exception. To serve as a defense, the intoxication must be at such a level that it precludes the formation of specific intent. See** ***State v. Mundy*** **(1994), 99 Ohio App.3d 275, [650 N.E.2d 502].**
>
> *** * * Fuote continually threatened the officers he came into contact with on the night of the incident, yet acknowledged that he was wrong. These actions do not indicate that his intoxication rose to such a level as to serve as a defense.**
>
> **Since Fuote has failed to show that his intoxication acted to preclude the formation of intent, this argument must fail."**

{¶ 25} Similarly, in this matter, although there was evidence to demonstrate that defendant had been drinking prior to the assaults, the record does not support the conclusion that he was so intoxicated that he was incapable of acting "knowingly," the culpable mental state required for this offense. To the contrary, defendant was initially compliant with the officers' requests to go over to the zone car and place his hands on the bumper bar, and he told them about the knife. Then, while Officer Emerick began to handcuff him, defendant suddenly became combative and broke away from the officers. Accordingly, we cannot hold that the court lost its way and created a manifest miscarriage of justice in determining that defendant acted knowingly in this matter. The convictions for assault on police officers is not against the manifest weight of the evidence. See, also, *State v. Gimenez* (Sept. 4, 1997), Cuyahoga App. No. 71190 (although the evidence established that the defendant consumed a large quantity of alcohol on

the night of the offenses, it is not sufficient to establish that appellant was inebriated to an extent that rendered him incapable of forming the mental state required for commission of the offenses).

{¶ 26} The second assignment of error is without merit.

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.

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

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., and
KENNETH A. ROCCO, J., CONCUR