

[Cite as *State v. Macklin*, 2011-Ohio-87.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94482

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAWN D. MACKLIN

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-527481

BEFORE: Kilbane, A.J., Gallagher, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: January 13, 2011

ATTORNEY FOR APPELLANT

Patricia J. Smith
4403 St. Clair Avenue
The Brownhoist Building
Cleveland, Ohio 44103

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Mollie Ann Murphy
Assistant County Prosecutor
The Justice Center - 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY EILEEN KILBANE, A.J.:

{¶ 1} Defendant-appellant, Dawn Macklin, appeals from her conviction for aggravated assault. For the reason set forth below, we affirm.

{¶ 2} On August 11, 2009, defendant was indicted for one count of felonious assault, in violation of R.C. 2903.11(A)(1), and one count of felonious assault, in violation of R.C. 2903.11(A)(2). Defendant pled not guilty and waived her right to a jury trial.

{¶ 3} Trial to the bench began on October 29, 2009. The State presented the testimony of Lora Crider ("Crider"), Denise Dudley ("Dudley"), and Cleveland

Police officers Samuel Byrd (“Officer Byrd”) and Detective Stephen McGraw (“Detective McGraw”).

{¶ 4} Crider testified that on August 2, 2009, she was at her brother’s house until about 11:30 p.m., then went to her home on East 129th Street. She sat on her porch for a while, and around 1:30 a.m, she went across the street to Dudley’s home where people were playing music and drinking. The defendant, who lived upstairs from Dudley, was there at this time. After about an hour, the defendant and Dudley asked Crider to leave because she was “cussing too much,” so she went home and went to bed.

{¶ 5} Crider awoke at around 5:00 a.m. and noticed that Dudley’s door was open, so she returned to Dudley’s house. The defendant was there and, according to Crider, they “got to arguing, cussing each other bad names,” as they frequently did when they drank together. The argument eventually became physical and they began pushing each other and “tussling.” They fell on the bed and, according to Crider, defendant fell on top of her, grabbed a bowl and smashed her twice in the face. The bowl broke during this attack, and defendant continued to use it to strike at Crider. Crider blocked the blows with her arm. Crider testified that during the incident, she was simply trying to get the defendant off of her so that she could leave.

{¶ 6} Crider sustained a large gash across her face and a cut on her arm. She went home and her daughter called the police. The injury to Crider’s face

required 30 stitches and left an extensive, permanent scar. The injury to her arm required ten stitches.

{¶ 7} Crider admitted on cross-examination that she had around four beers earlier in the evening and two more during her first visit to Dudley's home. She stated that she had lived downstairs from Dudley until January 2008, and admitted having an altercation with one of the neighbors, Marcie Scott ("Scott"). Crider denied having an altercation with Dudley's landlord.

{¶ 8} Crider also acknowledged that she and defendant "used to always go back and forth together with each other," but never had any major problems and never had any physical altercations prior to this incident.

{¶ 9} Dudley testified that various people were at her house socializing. Crider, or "Nanny," arrived at around 7:00 p.m. She was intoxicated and began "cussing and carrying on" and was asked to leave. Crider came back and Dudley's son told her that she should not be there and asked her to leave. After a few hours, Crider came back for the third time and entered through an open door leading in from the porch. At this time, defendant got up and Crider grabbed her around the throat. Defendant pushed Crider's hands off and ordered her to leave. Crider reached at defendant again and they began fighting. Dudley saw defendant pull at Crider to get her out of the residence, but did not see how Crider's injuries occurred. Dudley then helped Crider leave. At this time, Crider was bloodied. The defendant had no injuries.

{¶ 10} Officer Byrd and Detective McGraw investigated the incident, which had a number one priority code. Officer Byrd observed that Crider was bleeding profusely from the nose and face area. He spoke to defendant, who stated that they had been tussling and she somehow cut Crider. Officer Byrd then arrested defendant. He noted in his report, however, that Crider had “gotten drunk, * * * began * * * calling [defendant] names and tried to smash [defendant] in the face with the plate in question.” Detective McGraw interviewed Crider and photographed the injuries to her face and arm. The officers were unable to obtain any additional statements.

{¶ 11} Defendant elected to present evidence. She testified on her own behalf and also offered the testimony of Charlene Barnes (“Barnes”), Dwayne Franklin (“Franklin”), and Scott.

{¶ 12} Defendant stated that Crider used to be her downstairs neighbor at the East 129th Street home and Crider occasionally visited her. The two were neighborly, but if Crider began to drink, she would use foul language and become aggressive. At this point, defendant would tell her to leave and Crider would generally comply. On July 4, 2009, Crider entered the home, walking past defendant, and began speaking with defendant’s boyfriend. Defendant told her that she was being disrespectful. Later, while the women were grilling food, Crider began insulting defendant. Defendant began “shooting it with her,” or responding in kind, and Crider eventually pointed the grilling fork in defendant’s face. Defendant then left in order to avoid any further confrontation.

{¶ 13} With regard to the instant matter, defendant stated that she had been at another event and had two beers, then arrived home at around 9:30 p.m.

Defendant had a vodka drink. Crider was there at this time and was intoxicated. Crider indicated that she did not want to speak with defendant, so defendant left her alone. Crider used foul and insulting language, so Dudley's son asked her to leave. At around 11:30 p.m., Crider returned. Defendant asked her why she was sitting on someone's pillow and Crider replied, "F— you, b—."

{¶ 14} Defendant went upstairs to get away from Crider. At around 2:30 a.m., the group asked Crider to leave. Shortly thereafter, defendant heard Crider, who was now across the street, yelling at her husband. By this time, defendant had returned to Dudley's apartment.

{¶ 15} At around 4:30 a.m., Crider returned to Dudley's apartment by crawling up to the porch door. She asked for a cigarette, but defendant told her that she had nothing for her. Crider retorted with a crude insult and then indicated that she did not want to speak with defendant. Defendant got up and told Crider to follow her outside. Crider immediately grabbed defendant around the neck and began to choke her. They fell on the bed and defendant kicked Crider to get her off of her. At this point, defendant got up, held Crider down, and then again ordered her to leave.

{¶ 16} Crider refused to leave and continued the fight. The women fell into a corner. Defendant got on top of Crider again and told Crider to stop picking on

her. Crider then hit defendant in the head with a bowl. As Crider attempted a second strike, defendant blocked it and took the bowl away. Defendant testified: “When she hit me, then I took it and hit her. It broke in her face.”

{¶ 17} Defendant maintained that Crider grabbed another bowl and continued to come at her, so she grabbed Crider by the collar and removed her from the apartment.

{¶ 18} On cross-examination, defendant maintained that she was in fear for her life and that she only grabbed the bowl after Crider had obtained another one and continued the altercation. Defendant then admitted that the altercation continued as follows:

“Q: Then you went back and hit her again?”

A: It was tit for tat. She hit me; I hit her back.

Q: You hit her again with the plate?

A: Yes.

Q: Then you tried to hit her a third time with the plate?

A: No. That’s the second time.

Q: Second time she put her arm up * * * in the defensive position, putting her arm up?

A: She’s hitting me with the plate and I just retaliate, hit her with the other plate. We both grabbed weapons. What am I supposed to do?”

{¶ 19} Barnes and Franklin testified that Crider drinks quite a bit and then becomes aggressive. At these times, she frequently “picks on” defendant by

cursing at her and calling her names. Crider has also threatened defendant, but their arguments did not escalate to physical altercations. At these times, defendant generally ignored Crider or walked away from her. Scott testified that Crider is aggressive when she drinks, and she previously has had altercations with Crider.

{¶ 20} Thereafter, on November 9, 2009, the trial court announced its ruling and stated:

“There is no doubt that the victim, Miss Crider, suffered serious physical harm, as to count one, felonious assault. The troubling part for the court was never, whether or not serious physical harm had been caused, but whether, in light of the defendant’s self-defense defense, that the force exerted was reasonable under the circumstances.

“And having agonized over this, I don’t believe it was reasonable force, but I am going to find her guilty of aggravated assault, [as a lesser offense of] felonious assault [under Count 1].”

{¶ 21} The remaining count of felonious assault was nolle. Defendant was sentenced to two years of community control sanctions. She now appeals and assigns the following error for our review:

{¶ 22} “The trial court erred when it found the appellant was guilty of aggravated assault where the weight of the evidence did not support such a verdict.”

{¶ 23} In this assignment of error, defendant maintains that the trial court lost its way in rejecting defendant’s claim of self-defense and convicting defendant of the offense of aggravated assault.

{¶ 24} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court explained a weight of the evidence evaluation as follows:

“[W]eight of the evidence addresses the evidence’s effect of inducing belief. * * * In other words, a reviewing court asks whose evidence is more persuasive — the state’s or the defendant’s?

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, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. ‘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, 175, 485 N.E.2d 717.

{¶ 25} The offense of aggravated assault is defined in R.C. 2903.12 as follows:

“No 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 * * *.”

{¶ 26} Under Ohio law, self-defense is an affirmative defense that an accused must prove 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. The accused must establish: (1) the accused was not at fault in creating the situation giving rise to the affray; (2) the accused had a bona fide belief that he or she was in imminent danger of death or great bodily harm and that the only means of escape from such danger was in the use of force; and (3) the accused must not have violated any duty to retreat or to avoid the danger. *Id.* Further, the “elements of self-defense are cumulative. * * * If the defendant fails to prove any one of these elements by a preponderance of the evidence he has failed to demonstrate that he acted in self-defense.” *State v. Jackson* (1986), 22 Ohio St.3d 281, 284, 490 N.E.2d 893.

{¶ 27} As to the degree of force that is permitted, the defendant is privileged to use that force that is reasonably necessary to repel the attack. *Williford*. If, however, the amount of force used is so disproportionate that it shows an “unreasonable purpose to injure,” the defense of self-defense is unavailable. *State v. Speakman*, Pickaway App. No. 00CA035, 2001-Ohio-2437; cf. *State v. Ward*, 168 Ohio App.3d 701, 2006-Ohio-4847, 861 N.E.2d 823.

{¶ 28} In this matter, it is essentially undisputed that defendant struck Crider with a bowl, causing serious physical harm. It is also undisputed that defendant was acting under a sudden fit of rage, brought on by serious provocation occasioned by the victim. The conviction for aggravated assault is, therefore, not against the manifest weight of the evidence, as it was established in the record that Crider insulted defendant, grabbed her by the neck and choked her,

and that defendant smashed Crider in the face and arm with a plate, creating large gashes that required a total of 40 stitches to repair. Accord *State v. DeV Vaughn*, Cuyahoga App. No. 86869, 2006-Ohio-3359 (intoxicated and belligerent victim “was trying to get” the defendant, who then hit the victim with a pipe). Rather, the salient question for our review is whether the trial court properly concluded that defendant failed to establish that the act occurred in self-defense. Accord *State v. Reed*, Cuyahoga App. No. 83434, 2004-Ohio-3124; *State v. Chaney*, Cuyahoga App. No. 81348, 2003-Ohio-1161.

{¶ 29} After reviewing the record, weighing the evidence, and considering the credibility of the witnesses, we conclude that the factfinder did not lose its way in rejecting the self-defense claim and convicting defendant of the offense of aggravated assault. We acknowledge that there was considerable evidence that Crider had a reputation for being aggressive when she drinks and has instigated numerous arguments with defendant in the past. In this matter, she repeatedly insulted defendant and returned to Dudley’s apartment after being asked to leave on at least two occasions. The greater weight of the evidence also demonstrated that Crider created the situation giving rise to the affray by repeatedly returning to Dudley’s home after being asked to leave, uttering vile insults at defendant, and then grabbing defendant around the neck and choking her. Nonetheless, the evidence of record, including defendant’s own testimony, clearly indicates that defendant had several opportunities to retreat and avoid Crider. Indeed, by her own admission, defendant was able to break free from

Crider. She was able to subdue Crider and also gained control of the situation following Crider's initial attack.

{¶ 30} Further, the trial court that viewed the witnesses was in the best position to evaluate their credibility and determine the proper weight to give their testimony. See *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus, concluding that defendant used greater force than was necessary to repel the attack. We agree with this assessment of the evidence. Although it is clear that Crider was the initial aggressor, and repeatedly came at defendant, the evidence of record, including defendant's own testimony, demonstrates that after defendant picked up a bowl, the altercation proceeded "tit for tat." Defendant admitted, "[s]he's hitting me with the plate and I just retaliate, hit her with the other plate. * * * When she hit me, then I took it and hit her. It broke in her face." Accordingly, although defendant was subjected to repeated abuse from Crider, and defendant could employ a degree of force in self-defense after Crider grabbed her by the neck, the degree of force implemented in this matter was beyond that which was reasonably necessary to repel the attack and became a separate attack, thus defeating the claim of self-defense. In this connection, we find it significant that Crider had a wound to her arm that was sustained in a defensive position and is consistent with defendant being the aggressor at the end of the confrontation. At this point, defendant's actions were disproportionate and show an "unreasonable purpose to injure." Therefore, we conclude that defendant's conviction for aggravated

assault was not against the manifest weight of the evidence. The sole assigned 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.

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

SEAN C. GALLAGHER, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR