

[Cite as *State v. Balis*, 2015-Ohio-1296.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101520

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RONALD L. BALIS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-581032-A

BEFORE: S. Gallagher, J., Kilbane, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: April 2, 2015

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SEAN C. GALLAGHER, J.:

{¶1} Appellant Ronald Balis appeals his conviction for felonious assault. For the reasons stated herein, we affirm.

{¶2} Appellant was indicted on one count of felonious assault in violation of R.C. 2903.11(A)(1), a felony of the second degree. He entered a plea of not guilty, and the case proceeded to a bench trial.

{¶3} The testimony and evidence at trial revealed the following. On November 24, 2013, appellant was at a bar in Parma, Ohio. He was seated at the bar with several other regular customers. The victim arrived and took a nearby seat at the bar. The victim joined the conversation and began exchanging words with appellant about a local media person. The exchange became louder, and appellant appeared to be getting angry.

Appellant approached the victim and got face-to-face with him. According to the victim, the appellant told him to get out of the bar or he would “beat the s*** out of [him].” The victim remained seated at the bar. The appellant slapped the victim in the face and then made a second slap that knocked off the victim’s hat. As the victim reacted with an attempted swing at appellant, appellant punched the victim in the face, knocking the victim to the ground. Appellant then hit the victim, dragged the victim out to the parking lot, and proceeded kicking the victim’s face.¹ The victim was knocked

¹ In his testimony, the victim indicated appellant was kicking him in the face, but others may have been involved in kicking him, too.

unconscious. The victim sustained orbital fractures, a hole in his right cheek, a broken nose, and multiple abrasions and swelling.

{¶4} A video of the incident as it occurred within the bar was shown at trial. Several witnesses testified to the incident. The detective who investigated the matter testified that appellant stated he started the incident, that he got in the victim's face, and that he was the only person who punched or kicked the victim. Although appellant informed the detective that the victim "swung on him," appellant did not report feeling threatened or that he was angry from a personal attack to him or his family.

{¶5} Before the verdict was rendered, defense counsel made arguments for the court to consider mitigating evidence to support a serious provocation claim and the inferior-degree offense of aggravated assault. The court considered the circumstances but determined the lesser-included offense was not warranted and found appellant guilty of felonious assault. Appellant timely filed this appeal.

{¶6} Under his sole assignment of error, appellant claims the trial court erred by disregarding evidence of serious provocation and not finding him guilty of the inferior-degree offense of aggravated assault.

{¶7} In a bench trial, we presume that the trial court considered inferior and lesser-included offenses. *State v. Masci*, 8th Dist. Cuyahoga No. 96851, 2012-Ohio-359, ¶ 24; *State v. Perez*, 8th Dist. Cuyahoga No. 91227, 2009-Ohio-959, ¶ 61. Balis was convicted of felonious assault in violation of R.C. 2903.11(A)(1), which provides that "no

person shall knowingly cause serious physical harm to another[.]” Aggravated assault is defined in R.C. 2903.12, which provides in relevant part:

(A) No person, while 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:

(1) Cause serious physical harm to another.

{¶8} Aggravated assault is an inferior-degree offense to felonious assault because its elements are identical to those of felonious assault except for the additional mitigating element of serious provocation. *State v. Deem*, 40 Ohio St.3d 205, 210-211, 533 N.E.2d 294 (1988). A defendant bears the burden of proving the mitigating factor by a preponderance of the evidence. *See State v. Rhodes*, 63 Ohio St.3d 613, 590 N.E.2d 261 (1992), syllabus; *State v. Williams*, 8th Dist. Cuyahoga No. 98210, 2013-Ohio-573, ¶ 21.

{¶9} An objective standard is applied to determine whether the provocation is reasonably sufficient to bring on sudden passion or a sudden fit of rage. *State v. Shane*, 63 Ohio St.3d 630, 634, 590 N.E.2d 272 (1992). For provocation to be serious, it must be “‘reasonably sufficient to bring on extreme stress and * * * reasonably sufficient to incite or to arouse the defendant into using deadly force.’” *State v. Deem*, 40 Ohio St.3d 205, 211, 533 N.E.2d 294 (1988), quoting *State v. Mabry*, 5 Ohio App.3d 13, 449 N.E.2d 16 (8th Dist.1982). Moreover, the provocation must be “sufficient to arouse the passions of an ordinary person beyond the power of his or her control.” *Shane* at 635.

{¶10} If the objective standard is met, then the inquiry shifts to a subjective standard to determine whether the defendant actually was under the influence of sudden

passion or in a sudden fit of rage. *Id.* at 634. The emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time are considered to determine whether the defendant was reasonably provoked by the victim. *Id.*

{¶11} Appellant claims that he was acting under the influence of sudden passion when the victim responded to the slap and knocking off of his baseball cap with an attempt to punch appellant. He argues the provocation of the victim was more serious than the initial force by appellant and that the trial court disregarded the evidence of serious provocation.

{¶12} A review of the transcript reflects that the court did not disregard the evidence. Rather, the court did consider the alleged provocation, but found the circumstances did not warrant a conviction on the inferior-degree offense of aggravated assault.

{¶13} The record shows that appellant and the victim were engaged in a verbal argument and that appellant became aggressive against the victim, while the victim remained seated at the bar. Appellant initiated the assault by getting into the victim's face, threatening the victim, and slapping him. Although the victim reacted with an attempt to swing at appellant, appellant engaged in a continuous attack upon the victim. He punched the victim, knocking him off his chair, hit him on the ground, dragged him outside, and stomped on him to the point of causing the victim to go unconscious and resulting in serious injuries to the victim.

{¶14} Indeed, the evidence did not demonstrate that the provocation was reasonably sufficient to bring on sudden passion or a sudden fit of rage. The alleged provocation in this case was an attempted punch that was in reaction to an aggressive assault initiated by appellant. Cases have recognized that a mere push or punch by the victim does not constitute sufficient provocation to warrant an aggravated assault instruction. *See State v. Arafat*, 8th Dist. Cuyahoga No. 85847, 2006-Ohio-1722, ¶ 97; *State v. Owens*, 5th Dist. Richland No. 2004-CA-87, 2005-Ohio-4402, ¶ 35; *State v. Bryan*, 4th Dist. Gallia No. 03CA3, 2004-Ohio-2066, ¶ 24-25; *State v. Pack*, 4th Dist. Pike No. 93CA525, 1994 Ohio App. LEXIS 2733 (June 20, 1994). Here, appellant's attempted punch did not constitute "serious provocation" that is reasonably sufficient to arouse the passions of an ordinary person beyond the power of his control and incite appellant into using deadly force.

{¶15} Further, the conditions and circumstances that surrounded the incident do not reflect that appellant was acting under the influence of sudden passion or a sudden fit of rage. Both witness testimony and the video demonstrated that appellant was the aggressor from the beginning and that it was a one-sided assault. Appellant did not report feeling threatened. His actions demonstrated a single mind-set of inflicting serious physical harm upon the victim.

{¶16} We find nothing in the record to suggest that the trial court did not give due and fair consideration to the inferior-degree offense of aggravated assault. Because the evidence fails to demonstrate the existence of adequate provocation, we are unable to

conclude that the trial court erred in this matter. Furthermore, we are unable to find that appellant's conviction for felonious assault is against the manifest weight of the evidence.

The appellant's sole assignment of error is overruled.

{¶17} 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, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR