

[Cite as *State v. Montgomery*, 2015-Ohio-2158.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 102043

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**KENNY MONTGOMERY**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-14-584876-A

**BEFORE:** McCormack, J., Jones, P.J., and Kilbane, J.

**RELEASED AND JOURNALIZED:** June 4, 2015

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TIM McCORMACK, J.:

{¶1} While celebrating his girlfriend's birthday, defendant-appellant Kenny Montgomery and his girlfriend got into a fight. She sustained injuries from the altercation. Montgomery was charged with felonious assault, and a jury found him guilty. On appeal, Montgomery claims his conviction was against the manifest weight of the evidence. Upon a thorough review of the record, we affirm his conviction.

{¶2} At trial, the victim, Veronica Carter, testified to the following events. On April 18, 2014, she and Montgomery were at her home, where he also resided, celebrating her birthday. Several of Montgomery's friends were also there. Carter and Montgomery started drinking in the afternoon, and both were intoxicated. At one point after midnight, Montgomery took Carter's phone and went out the door. Carter went after him to get her phone back. Montgomery threw her phone across the street and broke it, and Carter swung at him. The two began fighting. Montgomery hit Carter in her face and body. Hearing the commotion, the neighbors called the police. The police arrived and arranged for Carter to be transported to a hospital in an ambulance.

{¶3} Officer John Douglas testified at trial as well. He arrived at the scene of the incident close to midnight. Carter told him that she was the person he was looking for. Her face was swollen, and there was blood in her mouth. Her hand was also bloody. Officer Douglas called for an ambulance for Carter.

{¶4} In addition, Detective Sabrina Sudberry of the police department's domestic unit testified that she interviewed Carter a month after the incident. Carter had just returned from treatment at the hospital before the interview. Describing Carter's demeanor, Detective Sudberry testified that Carter still looked a bit shaken. She was upset and crying. Carter gave Detective Sudberry a verbal statement of the incident. The account, however, varied somewhat from her testimony at trial. According to Detective Sudberry, Carter stated she and Montgomery were arguing over her cell phone while still inside the house. He threw her cell phone to the floor, and the two began fighting. He punched her on her body, face, and upper torso. When she ran outside the house to get away from him, he chased her down the street.

{¶5} The state's exhibits included pictures taken of Carter's injuries while she was at the hospital, and her medical records from the hospital, which indicated a diagnosis of head injury and nasal fracture.

{¶6} The jury found Montgomery guilty of felonious assault, but not guilty of domestic violence or disrupting public service, which he was also charged with. Montgomery received three years of prison for his conviction of felonious assault. On appeal, he argues his conviction is against the manifest weight of the evidence.

{¶7} While the test for sufficiency of the evidence requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997). When reviewing a manifest-weight claim,

“[t]he 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.”

*Id.* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶8} “[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.” *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. When examining witness credibility, “the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact.” *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986). A factfinder is free to believe all, some, or none of the testimony of each witness appearing before it. *State v. Ellis*, 8th Dist. Cuyahoga No. 98538, 2013-Ohio-1184, ¶ 18.

{¶9} Montgomery was charged with felonious assault defined in R.C. 2903.11(A)(1). Under the statute, the state needed to prove that he knowingly caused “serious physical harm” to another. Montgomery argues that his conviction is

against the manifest weight of the evidence because the state did not prove he caused “serious physical harm” to Carter.

{¶10} “Serious physical harm” is defined in R.C. 2901.01(A)(5). It means any of the following:

- (a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
- (b) Any physical harm that carries a substantial risk of death;
- (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;
- (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
- (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

{¶11} “The degree of harm that rises to the level of ‘serious’ physical harm is not an exact science, particularly when the definition includes such terms as ‘substantial,’ ‘temporary,’ ‘acute,’ and ‘prolonged.’” *State v. Miller*, 8th Dist. Cuyahoga No. 98574, 2013-Ohio-1651, ¶ 18, quoting *State v. Irwin*, 7th Dist. Mahoning No. 06MA20, 2007-Ohio- 4996, ¶ 37.

{¶12} “Where injuries to the victim are serious enough to cause him or her to seek medical treatment, the finder of fact may reasonably infer that the force exerted on the victim caused serious physical harm as defined by R.C. 2901.01(A)(5).” *State v.*

*Lee*, 8th Dist. Cuyahoga No. 82326, 2003-Ohio-5640, ¶ 24, citing *State v. Wilson*, 8th Dist. Cuyahoga No. 77115, 2000 Ohio App. LEXIS 4295 (Sept. 21, 2000); accord *State v. Tolle*, 12th Dist. Clermont No. CA2014-06-042, 2015-Ohio-1414.

{¶13} Furthermore, “[w]here the assault causes a bone fracture, the element of serious physical harm is met.” *Lee* at ¶ 24, citing *State v. Thomas*, 9th Dist. Summit No. 18881, 1999 Ohio App. LEXIS 489 (Feb. 19, 1999); *State v. Childers*, 4th Dist. Jackson No. 96 CA 785, 1997 Ohio App. LEXIS 2599 (June 11, 1997); *State v. Manning*, 4th Dist. Adams No. 94 CA 582, 1995 Ohio App. LEXIS 2311 (May 26, 1995).

{¶14} Here, to establish that the victim sustained serious physical harm, the state presented the following evidence: (1) the victim’s testimony that Montgomery struck her in her face and body; (2) the responding police officer’s observation that the victim’s face was swollen and there was blood in her mouth, which prompted the officer to call for an ambulance to transport her to a hospital for medical treatment; (3) the photographs of the victim while at the hospital; and (4) the medical records from the hospital indicating a diagnosis of head injury and nasal fracture. The record also reflects the trial court properly instructed the jury on the statutory definition of “serious physical harm.” Given this record, we will not disturb the jury’s finding that Montgomery caused serious physical harm to the victim. This case is not one of the exceptional cases in which the evidence weighs heavily against the conviction, and therefore, we decline to exercise our discretionary power to grant a new trial.

{¶15} Judgment affirmed.

It is ordered that appellee recover of 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.

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TIM McCORMACK, JUDGE

LARRY A. JONES, SR., P.J., and  
MARY EILEEN KILBANE, J., CONCUR