

[Cite as *State v. Armstrong*, 2016-Ohio-2842.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103423

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

NICHOLAS L. ARMSTRONG

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-592615-A

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

RELEASED AND JOURNALIZED: May 5, 2016

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TIM McCORMACK, P.J.:

{¶1} Defendant-appellant Nicholas L. Armstrong appeals his conviction for having weapons while under disability. For the reasons that follow, we affirm.

Procedural History and Substantive Facts

{¶2} On January 26, 2015, Armstrong was charged with one count of felonious assault in violation of R.C. 2903.11(A)(1), one count of felonious assault in violation of R.C. 2903.11(A)(2), and one count of having weapons while under disability in violation of R.C. 2923.13(A)(2). The felonious assault charges contained firearm specifications, notice of prior conviction, and repeat violent offender specifications. Armstrong entered a not guilty plea to the charges.

{¶3} Prior to trial, Armstrong waived his right to a jury trial on the notice of prior conviction (Counts 1 and 2), repeat violent offender specifications (Counts 1 and 2), and the charge of having weapons while under disability in Count 3.

{¶4} On July 14, 2015, a jury trial commenced on the felonious assault charges. At trial, the state presented the testimony of the victim, Randy Courtwright; his helper, Jerald Rinaldi; and Cleveland police officer John Kramer. The state also presented the following exhibits: aerial pictures of the location of the incident; pictures of the victim, indicating injuries Courtwright sustained; the victim's medical records, to which defense counsel stipulated; and a journal entry concerning Armstrong's 2003 conviction for

robbery and attempted felonious assault in Cuyahoga C.P. No. CR-03-437552-A, to which defense counsel also stipulated.

{¶5} Randy Courtwright testified that on September 18, 2014, he was working for White Glove Delivery, with his helper, Jerry Rinaldi, delivering appliances and furniture. He and Rinaldi completed their delivery to the Bingham Apartment Building in downtown Cleveland around noon and ate their lunch in the building. Courtwright stated that while he was at the Bingham, he texted Armstrong, with whom he was “good friends,” about money that Armstrong owed him. Courtwright testified that he loaned Armstrong \$300 approximately three weeks prior to this day so that Armstrong could purchase equipment for a new job. According to Courtwright, Armstrong had agreed to repay the money “the next week,” but he had not done so. Courtwright contacted Armstrong about the money owed on September 18 because he needed the money. Courtwright testified that Armstrong indicated he had some of the money he owed.

{¶6} After “texting back and forth” with Armstrong, Courtwright and Rinaldi returned to the truck. Rather than head to his next delivery, Courtwright drove to Armstrong’s house on Holmden Avenue in Cleveland, arriving at approximately 1:00 p.m., and parked the truck in the vacant lot next door. Leaving Rinaldi in the truck, Courtwright proceeded to the back door of the house, because “no one uses the front door.” Courtwright stated that he had been to Armstrong’s house “a hundred [times] maybe.”

{¶7} Courtwright testified that when he arrived at the back door, he knocked and Armstrong was there. Courtwright entered into the kitchen from the doorway, “just a couple of steps,” when the two began to argue. Courtwright was upset because Armstrong only had approximately \$50, which Courtwright refused to take. According to Courtwright, there was a lot of yelling back and forth, Armstrong accused Courtwright of being petty, and they began to “tussle” or “wrestle.” Within minutes, Armstrong picked up a bat and attempted to hit Courtwright with it; however, Courtwright grabbed Armstrong and threw him onto the ground. Courtwright testified that he did not have a weapon when he met with Armstrong. When Armstrong got back up from the ground, he grabbed the bat and, once again, attempted to swing it at Courtwright, who threw him to the ground again. After throwing Armstrong to the ground for the second time, Courtwright stepped away from Armstrong, toward the door. Courtwright testified that Armstrong then pulled a black revolver from his pants pocket and shot him. According to Courtwright, when he asked Armstrong to call 911, Armstrong refused. Courtwright then returned to the truck and asked Rinaldi to drive him to the hospital. Courtwright stated that he passed out en route to the hospital.

{¶8} Rinaldi testified that he waited for Courtwright in the truck for approximately 15 to 20 minutes, when he finally saw him return from the back of the house. Courtwright was hunched over and holding his hand to his chest. Courtwright told him that he had been shot. Rinaldi stated that, at this time, he also saw a person standing at the gate from where Courtwright had come. He described the individual as a

5'9" white male with blonde hair. Rinaldi helped Courtwright into the truck, got into the driver's seat, and drove Courtwright to the hospital. Rinaldi testified that upon arriving at the hospital, Courtwright "came to" and was able to get himself out of the truck. Rinaldi met with a police officer at the hospital and took the officer back to the house where Courtwright had been shot. Upon returning to the hospital, he observed the police officer search the truck.

{¶9} Officer Kramer testified that he spoke with Rinaldi in the hospital and learned that Courtwright had been shot. After speaking with Rinaldi for approximately 20 minutes, he drove Rinaldi to Holmden Avenue in his patrol car, where Rinaldi directed the officer to the house where Courtwright was shot. Once there, Officer Kramer called for backup and searched the property. He walked around the house, checked a shed in the backyard, and knocked on the back door but received no response. Officer Kramer testified that he searched the property surrounding the home for a gun and casings but found neither.

{¶10} Courtwright testified that he remained in the hospital for more than three weeks and underwent one surgery while hospitalized. He further testified that the bullet had entered his spleen, traveled through his pancreas, hit his spine, and broke two vertebrae in his back. The bullet was surgically removed four months later.

{¶11} At the close of the state's evidence, defense counsel moved for Crim.R. 29 acquittal. The court granted counsel's motion for acquittal based upon Armstrong's "castle doctrine" defense.

{¶12} Having bifurcated the charges, the trial court dismissed the jury and continued to hear evidence on Count 3, having weapons while under disability. The state presented evidence of Armstrong's previous conviction in 2003, to which defense counsel stipulated. After asking the court to consider the testimony and evidence previously presented, the state rested. Defense counsel then moved for acquittal of the weapons charge, which the court denied. Thereafter, Armstrong testified on his own behalf.

{¶13} According to Armstrong, he did not know why Courtwright was texting him about money on September 18, stating that he did not owe Courtwright any money. He therefore ignored Courtwright's texts. He testified that he was home working in his yard, when he saw Courtwright approaching in his work truck. He then proceeded back into his house and, before he could enter the house and close the door, Courtwright had run from his truck, entered through the gate, and came into the house. Armstrong stated that Courtwright was holding a gun and "acting crazy." He told Courtwright to leave, and he reached for a baseball bat.

{¶14} At that point, he and Courtwright began to wrestle and Courtwright slammed Armstrong into the stove and refrigerator, at which point the bat and the gun fell to the ground. Armstrong then testified that after the second time Courtwright slammed him to the ground, he is not sure "if the gun even fell." He then stated that he got to his knees and Courtwright put him in a headlock, choking him. He stated that he then grabbed the gun that was nearby and shot Courtwright. Armstrong testified that after

firing the shot, he ran out of the house before Courtwright and he ran behind the shed in his backyard. Once behind the shed, he saw Courtwright proceed to his truck, walking “normally.” After Courtwright left, Armstrong went back to the house and looked for the gun, which he could not find. He then left his home until the next day. When he returned, he found his dog dead. Thereafter, he moved out of the Holmden Avenue residence.

{¶15} On cross-examination, Armstrong admitted that he did not call 911. He also stated that he did not call the police when he found his dog dead the next day. Rather, because he was afraid, he moved. Armstrong also admitted that he “had maybe an idea that there was a warrant” for him, yet he did not phone the police, as Courtwright did not look like he was shot. Finally, Armstrong testified that an attorney advised him not to make any statement to the police and not to turn himself in to the police.

{¶16} Following Armstrong’s testimony, defense counsel moved once again for Crim.R. 29 acquittal, which the court denied. The court found Armstrong guilty of having weapons while under disability as charged in Count 3 and sentenced him to 18 months community control sanctions.

{¶17} Armstrong now appeals his conviction, assigning two errors for our review: the state failed to present sufficient evidence to support his conviction and the conviction is against the manifest weight of the evidence.

Sufficiency and Manifest Weight

{¶18} In his first assignment of error, Armstrong contends that the state failed to present sufficient evidence to sustain a conviction for having weapons while under disability. In his second assignment of error, he contends that the conviction is against the manifest weight of the evidence.

{¶19} When assessing a challenge of sufficiency of the evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. "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." *Id.* A reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997).__

{¶20} While the test for sufficiency of the evidence requires a determination 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. *Thompkins* at 390. Also unlike a challenge to the sufficiency of the evidence, a manifest weight challenge raises a factual issue.

"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.”

Id. at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). A finding that a conviction was supported by the manifest weight of the evidence, however, necessarily includes a finding of sufficiency. *State v. Howard*, 8th Dist. Cuyahoga No. 97695, 2012-Ohio-3459, ¶ 14, citing *Thompkins* at 388.

{¶21} “[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.

{¶22} Armstrong was convicted of having weapons while under disability in violation of R.C. 2923.13(A)(2), which provides that “[n]o person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if * * * [t]he person is under indictment for or has been convicted of any felony offense of violence.” This statute prohibited Armstrong from using a firearm because he had been convicted of the felony offenses of robbery and attempted felonious assault in 2003. Armstrong argues, however, that because he acted in self-defense, his conviction must be reversed.

{¶23} This court has held that the “prohibitions of R. C. 2923.[13] do not restrict the right of an individual under disability from acting in self-defense, when he did not knowingly acquire, have, carry or use a firearm previously.” *State v. Hardy*, 60 Ohio App.2d 325, 330, 397 N.E.2d 773 (8th Dist.1978). In *Hardy*, the defendant, while under disability, was employed in a beverage store, where he was the victim of a robbery. In order to stop the aggressive armed robber, the defendant seized a rifle from the counter (to which all employees had access) and shot the robber. *Id.* at 325-326. We found that prior to firing the gun, the defendant lacked the type of possession of the gun contemplated by the disability statute. *Id.* at 328. “A legitimate act of self-defense is much more a mere reflex action than one committed voluntarily.” *Id.* at 329.

{¶24} This “self-defense exception,” is applied in very limited circumstances:

The so-called self-defense exception to the charge of carrying a weapon while under disability is an extremely narrow exception. Implicit in this court’s decision in *Hardy* is the recognition that all individuals, including those under disability, have a right to defend themselves against an immediate threat of deadly force, provided, however, they did not knowingly acquire, have, carry or use the firearm previously.

State v. Fryer, 90 Ohio App.3d 37, 45, 627 N.E.2d 1065 (8th Dist.1993); *State v. Martin*, 8th Dist. Cuyahoga No. 63153, 1993 Ohio App. LEXIS 4660 (Sep. 30, 1993) (finding the trial court did not err by refusing to give the self-defense charge for the disability count where the defendant was under no immediate threat of death or great bodily harm).

{¶25} The self-defense exception does not apply in circumstances where the defendant had possession of the weapon prior to the incident giving rise to the charges or in anticipation of a confrontation. *State v. Hawthorne*, 8th Dist. Cuyahoga No. 89345,

2008-Ohio-1815 (refusing to apply *Hardy* exception where the defendant knowingly possessed the weapon prior to the incident); *State v. Gripper*, 10th Dist. Franklin No. 12AP-396, 2013-Ohio-2740, ¶ 26 (conviction for having weapons while under disability upheld where evidence showed the defendant obtained the gun “in anticipation of the confrontation, not in response to the confrontation”); *State v. Martz*, 163 Ohio App.3d 780, 790, 2005-Ohio-5428, 840 N.E.2d 648 (5th Dist.) (finding defendant’s “mere possession” of the weapon in anticipation of a possible confrontation sufficient evidence to support the conviction of having weapons while under disability); *State v. Escoto*, 10th Dist. Franklin No. 98AP-481, 1999 Ohio App. LEXIS 512 (Feb. 18, 1999) (*Hardy* exception not applicable where defendant brought the gun into the situation).

{¶26} Armstrong first contends that the state failed to present sufficient evidence supporting his conviction for having weapons while under disability. Specifically, he claims that there is no evidence that he acquired, had, or used a firearm for purposes other than defending himself in his own home.

{¶27} When considering a challenge to the sufficiency of the evidence, we review 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.” *Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph two of the syllabus.

{¶28} Here, the victim testified that upon entering Armstrong’s home, the two began to argue, which progressed into wrestling. “Within minutes,” Courtwright stated that Armstrong picked up a bat and attempted to hit him with it, but Courtwright was able

to throw Armstrong to the ground twice. Courtwright testified that after Armstrong's second failed attempt to hit him with the bat, Courtwright stepped away from Armstrong, toward the door. At that point, according to Courtwright, Armstrong pulled a black revolver from his pants pocket and shot Courtwright. The state produced evidence of Courtwright's injuries through medical records. Finally, the state produced evidence of Armstrong's prior conviction, to which defense counsel stipulated.

{¶29} In light of the foregoing, we find that any rational trier of fact could have found the essential elements of having weapons while under disability proven beyond a reasonable doubt. The evidence is sufficient for the trier of fact to find that Armstrong had in his possession a weapon and he had a prior conviction. The evidence also shows that Armstrong had the weapon prior to the altercation with Courtwright, arguably in anticipation of a confrontation. Armstrong's first assignment of error is therefore overruled.

{¶30} Armstrong also contends that his conviction is against the manifest weight of the evidence. He claims that he acted in self-defense and, therefore, his conviction must be reversed.

{¶31} In determining whether a verdict is against the manifest weight of the evidence, we must review the entire record, weigh the evidence and all reasonable inferences, and determine whether, in resolving any conflicts in the record, the factfinder clearly lost its way. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. "Weight of the

evidence concerns the inclination of the greater amount of credible evidence * * * to support one side of the issue rather than the other.” *Id.*

{¶32} Here, Courtwright testified that he had no weapon on the afternoon of September 18, when he went to see Armstrong about the money he was owed. He further testified that after wrestling with Armstrong, and having thrown Armstrong to the ground for the second time, he backed away from the defendant and proceeded toward the door. At that point in time, Armstrong reached into his pants pocket, retrieved a black revolver, and shot Courtwright. Courtwright then left the house and headed toward his truck, hunched over and holding his chest. Rinaldi also testified that Courtwright did, in fact, approach the truck in a hunched manner, holding his chest. He further testified that he saw a white male with blonde hair standing at the gate from where Courtwright had come.

{¶33} On the other hand, Armstrong testified that Courtwright entered his home, holding a gun and acting crazy. In response, he picked up a bat, the two began to wrestle, and the gun fell to the ground. He also testified that he was not sure if the gun had fallen to the ground. Armstrong stated that Courtwright began to choke him, so he grabbed the gun and shot Courtwright. Armstrong then ran out of the house before Courtwright, and he hid behind his shed. He testified that Courtwright walked “normally” to the truck. Finally, he testified that rather than call 911, he left his home for the night.

{¶34} Where both Courtwright and Armstrong testified, their testimony necessarily invokes a credibility determination. And in finding Armstrong guilty, the trial court stated that it found Courtwright's version of the events more credible, which it was free to do. The factfinder has the benefit of viewing the witnesses and observing their demeanor, gestures, and voice inflections and to use these observations to weigh credibility. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶35} After reviewing the record and deferring to the trier of fact's credibility assessment, we are unable to conclude that the trier of fact lost its way and created such a manifest miscarriage of justice that a new trial is warranted. The evidence in this case demonstrated that Armstrong was in possession of a weapon and he had been previously convicted of a felony. The evidence further demonstrated that Armstrong had possession of the revolver prior to the altercation with Courtwright, and therefore, the self-defense exception to a weapons while under disability charge is not available under these circumstances. Armstrong's second assignment of error is overruled.

{¶36} 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.

TIM McCORMACK, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
PATRICIA ANN BLACKMON, J., CONCUR