[Cite as *State v. Clark*, 2016-Ohio-5143.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104076

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARIO CLARK

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-597878-A

BEFORE: E.A. Gallagher, P.J., S. Gallagher, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: July 28, 2016

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EILEEN A. GALLAGHER, P.J.:

{¶1} Defendant-appellant Mario Clark appeals his convictions entered in the Cuyahoga County Court of Common Pleas. We affirm the decision of the trial court.

Facts and Procedural Background

{¶2} Clark was charged in a single count indictment with the crime of felonious assault. Following a bench trial, Clark was found to be guilty as charged and sentenced to a prison term of four years with the advisement of the fact that he would be placed on three years of mandatory postrelease control.

{¶3} Tamara Addison testified that on May 29, 2015, she had attended the Euclid High School junior prom with approximately 25-30 family members to support her niece, a promgoer. When the dance concluded, Addison and her family went to her grandmother's home for dinner from where she left at approximately 10:30 p.m. after talking to neighbors outside.

{¶4} From her grandmother's home, Addison traveled to 2412 Cedar Avenue in Cleveland, Ohio to the home of her brother and his girlfriend, Shayla Kennedy, to discuss the prom with Kennedy. Upon her arrival at their home, Addison found Kennedy and others sitting on the porch-balcony of the home. While Addison and Kennedy were discussing the prom, appellant Clark, whom Addison had never seen before, was sitting on a railing and dropped his phone to the ground, a distance of approximately three feet. When the phone hit the ground, Clark looked at Addison and stated "B**** pick up my phone" to which Addison replied "Excuse me?" Appellant responded "B****, you heard

what I said, pick up my phone." Addison replied, "You don't know me" and continued her conversation with Ms. Kennedy. At that point, appellant left the porch, walked through, and exited the house and, upon approaching Addison, punched her in the face causing Addison to fall to the ground. She stood, "ran into his face" and, at that time, appellant struck her in the face a second time, causing her to fall into a mailbox. Kennedy and the others came off the porch and down to the ground where Addison lay. She was helped off the ground and began arguing with appellant before Kennedy and another person escorted her into Kennedy's house. Inside the home, attempts were made to clean the blood off of Addison's face and her clothing prior to her leaving to go to her own home.

{¶5} The following morning, while chewing her breakfast, Addison heard crunching noises and believed that her nose was broken. Upon looking into a mirror, she discovered both eyes were blackened and her face was swollen. She went then to St. Vincent Charity Hospital where she was treated for displaced nasal bone fractures and released.

{¶6} Thomas Hinkle, a detective with the CMHA police department testified that he investigated the reported offense, ascertained an identity of the perpetrator, prepared a photo array and made arrangements for a third person to display it to Addison at which time she positively identified appellant as her assailant.

{¶7} At the close of the state's evidence, Clark made a cursory motion for acquittal pursuant to Crim.R. 29(A), arguing that the state had failed to prove each and every element of the crime charged. The motion was summarily denied.

{¶8} No witnesses testified for the defense.

{¶9} This appeal followed. Clark has raised a sole assignment of error for review:

> It was error to indict Mario Clark for Felonious Assault, and the Court erred in finding Mario Clark guilty of Felonious Assault, rather than simple assault, or in the alternative Aggravated Assault.

Law and Analysis

{¶10} We dissect the assignment of error and address the first portion that claims error as to the indictment itself. The appellant presents no law or real argument that the indictment was faulty and does not truly challenge the indictment. Having failed to raise a challenge to the indictment prior to appeal appellant has waived all but plain error. *State v. Myers*, 97 Ohio St.3d 335, 780 N.E.2d 186 (2002).

{¶11} We find no evidence of plain error in this instance. The grand jury is empowered to return an indictment upon the presentation of sufficient evidence that establishes probable cause that a crime was committed and that the accused committed said crime. *United States v. Sells Eng., Inc.*, 463 U.S. 418, 103 S.Ct. 3133, 77 L.Ed. 2d 743 (1983).

{¶12} Furthermore, with respect to the state's charging decision, prosecutors are imbued with discretion in charging decisions. Absent some indication that a charging

decision was the result of vindictiveness, reviewing courts will not interfere with that decision. *State v. Nash*, 8th Dist. Cuyahoga No. 84044, 2004-Ohio-5037, ¶ 6-8, citing *State v. Wilson*, 47 Ohio App.3d 136, 547 N.E.2d 1185 (3rd Dist. 1988).

{¶13} As to Clark's claim that the trial court erred in finding him guilty of felonious assault rather than the lesser included offenses of aggravated assault or simple assault, it is unclear as to whether appellant is arguing that his conviction was against the manifest weight of the evidence or that the state failed to present sufficient evidence to support his conviction.

{¶14} A manifest weight challenge attacks the credibility of the evidence presented and questions whether the state met its burden of persuasion at trial. *State v. Whitsett*, 8th Dist. Cuyahoga No. 101182, 2014-Ohio-4933, ¶ 26, citing *State v. Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541 (1997); *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13. "When considering an appellant's claim that a conviction is against the manifest weight of the evidence, the court of appeals sits as a 'thirteenth juror' and may disagree 'with the factfinder's resolution of conflicting testimony."' *Thompkins* at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). The reviewing court must examine the entire record, weigh the evidence and all reasonable inferences, consider the witnesses' credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins* at 387, citing *State v. Martin*, 20 Ohio App.3d 172, 485

N.E.2d 717 (1st Dist.1983). In conducting such a review, this court remains mindful that the credibility of witnesses and the weight of the evidence are matters primarily for the trier of fact to assess. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraphs one and two of the syllabus. Reversal on manifest weight grounds is reserved for the "exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387, quoting *Martin*, *supra*.

{¶15} In evaluating a sufficiency of the evidence argument, courts are to assess not whether the state's evidence is to be believed but whether, if believed, the evidence against a defendant would support a conviction. *State v. Givan*, 8th Dist. Cuyahoga No. 94609, 2011-Ohio-100, ¶ 13, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. The relevant inquiry then 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*.

{¶16} Initially, we will address the crime of assault, a misdemeanor, which appellant suggests would have been the more appropriate verdict in this case.

{¶17} Pursuant to R.C. 2903.13, no person shall knowingly cause or attempt to cause physical harm to another or another's unborn or to recklessly cause serious physical harm to another or another's unborn.

{¶18} The evidence refutes Clark's argument that his conduct more appropriately fell within the definition simple assault because 1) Clark caused serious physical harm to the victim and 2) he acted knowingly rather than recklessly.

{¶19} "Physical harm" has been defined in R.C. 2901.01 as "any injury, illness, or other physiological impairment, regardless of its gravity or duration." Among other things, "serious physical harm" as defined in R.C. 2901.01, means 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.

{¶20} This court has held that "[t]he degree of harm that rises to level of 'serious' physical harm is not an exact science" given that the definition uses terms such 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. The extent or degree of a victim's injuries is "normally a matter of the weight rather than the sufficiency of the evidence." *Irwin* at ¶ 37, citing *State v. Salemi*, 8th Dist. Cuyahoga No. 81091, 2002-Ohio-7064, ¶ 34.

{¶21} This court has "historically" applied a liberal interpretation of "serious physical harm to persons." *State v. Davis*, 8th Dist. Cuyahoga No. 81170, 2002-Ohio-7068, ¶ 20. This court has held that, in general, a trial court does not err in finding serious physical harm where the evidence demonstrates that the victim sustained injuries necessitating medical treatment. *Id*.; *see also Miller* at ¶ 18 ("when a victim's injuries are serious enough to cause the victim to seek medical treatment, it may be reasonably inferred that the force exerted on the victim caused serious physical harm.").

{¶22} Serious physical harm has been found where a victim sustains a bloody cut and/or significant swelling to the face, even where there is no evidence stitches were

required. *See, e.g., State v. Payne*, 8th Dist. Cuyahoga No. 76539, 2000 Ohio App. LEXIS 3274, *9-10 (July 20, 2000) (bloody, cut and swollen right eye was sufficient to establish serious physical harm because the injury was a temporary, serious disfigurement).

{¶23} In this instance, serious physical harm was established in the record by way of evidence that Addison suffered fractures to her left and right nasal bones.

{¶24} Clark's conduct also does not fall within the definition of assault under R.C. 2903.13 by way of "recklessly" causing serious physical harm. There is no evidence in the record to suggest that Clark's actions were committed recklessly. A person acts knowingly, regardless of his or her purpose, "when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). Clark acted intentionally in twice punching Addison in the face. We find no merit in Clark's argument that his conduct more appropriately constituted simple assault under R.C. 2903.13.

{¶25} Aggravated assault is an inferior offense of felonious assault. Its elements are identical to felonious assault except that aggravated assault prohibits any person, while under the influence of sudden passion or in a sudden fit of rage, either of which was brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, from knowingly causing serious physical harm to another. R.C. 2903.12(A); *State v. Henry*, 8th Dist. Cuyahoga No. 102634, 2016-Ohio-692, ¶ 29.

{¶26} That is not the case herein. The appellant, after using profanity toward the victim and demanding her to comply with an order that he pronounced, struck the victim in the face with his fist. After words were exchanged between the two, appellant struck her, again, in the face with his fist.

{¶27} There is no evidence that the victim, in any way, provoked the appellant let alone acted in any manner that could be construed as serious provocation. The only evidence that the victim interacted with the appellant is her own testimony that she "ran into his face" and they argued after he struck her the first time. Words alone will not constitute reasonably sufficient provocation to incite the use of force in most situations. *State v. Shane*, 63 Ohio St.3d 630, 637, 590 N.E.2d 272 (1992).

{¶28} Furthermore, we know not which of the two punches that appellant struck upon the victim caused her serious physical harm. In as much as Addison had no interaction with the appellant prior to him striking her for the first time, he cannot now claim that she provoked him.

{¶29} Appellant's assignment of error is overruled.

{¶30} Judgment affirmed.

It is ordered that appellee recover from appellant the 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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EILEEN A. GALLAGHER, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
ANITA LASTER MAYS, J., CONCUR