

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO,
CITY OF BARBERTON

C.A. No. 24941

Appellee

v.

SHAWN GATES

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
BARBERTON MUNICIPAL COURT
COUNTY OF SUMMIT, OHIO
CASE No. 08 CRB 03421

DECISION AND JOURNAL ENTRY

Dated: June 30, 2010

BELFANCE, Judge.

{¶1} Defendant-Appellant Shawn Gates appeals from his convictions in the Barberton Municipal Court. For the reasons discussed below, we affirm.

BACKGROUND

{¶2} In November 2008, Shawn Gates, Carlos Rodriguez, and Nicky Cruz got into an altercation at a CVS parking lot. Rodriguez instigated the altercation, and Gates responded. Rodriguez received the majority of the blows, and Rodriguez and Cruz fled in their vehicle. However, Gates followed and rear-ended them. Rodriguez drove to a nearby Giant Eagle to seek assistance from firemen who happened to be responding to a call there. Cruz remained in the car and Gates approached the car, punched the window of the car out, and tried to pull Cruz out of the car. Rodriguez saw this occurring and yelled to Gates, who then began to charge at Rodriguez. Rodriguez picked up a brick and “tried to take [Gates’] head off with it because [Rodriguez] was in fear for [his] life.” A chase around the vehicle ensued until police arrived

and ordered the three men to the ground. When Gates refused to comply after multiple requests, he was tasered. Gates was then arrested and taken to the jail for booking. When officers refused to provide Gates with medical treatment, he threatened to commit suicide and allegedly attempted to hang himself. The officers who arrested Gates were called back to the jail due to Gates' threats. When Gates saw the officer who tasered him, he began swearing at the officer and started to run at him. A second officer tasered Gates to prevent him from injuring the other officer.

{¶3} Gates was charged with assault in violation of R.C. 2903.13(A), a misdemeanor of the first degree, resisting arrest in violation of R.C. 2921.33, a misdemeanor of the second degree, criminal damaging in violation of R.C. 2909.06, a misdemeanor of the second degree, and menacing in violation of R.C. 2903.22, a misdemeanor of the fourth degree. The case was tried to the court. The trial court granted Gates' Crim.R. 29 motion on the resisting arrest charge and found Gates guilty of the remaining counts. Specifically, the trial court concluded that Gates committed an assault when he rear-ended Rodriguez's vehicle, committed criminal damaging when punched out the car window, and committed menacing when he swore at the officer who tasered him and tried to run at him.

{¶4} Gates has appealed, raising three assignments of error for our review, which we have consolidated for ease of analysis.

MANIFEST WEIGHT OF THE EVIDENCE

{¶5} In Gates' first assignment of error he argues his conviction for assault is against the manifest weight of the evidence because he established that he acted in self-defense. In Gates' second and third assignments of error he makes the same argument with respect to his convictions for criminal damaging and menacing.

{¶6} When determining whether a conviction is supported by the manifest weight of the evidence,

“an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses 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.” *State v. Cepec*, 9th Dist. No. 04CA0075-M, 2005-Ohio-2395, at ¶6, quoting *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

We must only invoke the discretionary power to grant a new trial in “extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant.” *State v. Flynn*, 9th Dist. No. 06CA0096-M, 2007-Ohio-6210, at ¶9, citing *Otten*, 33 Ohio App.3d at 340. When reviewing a conviction pursuant to the manifest weight standard, we must determine whether the State met its burden of persuasion. *Cepec* at ¶6.

{¶7} A defendant has the burden of establishing the affirmative defense of self-defense by a preponderance of the evidence. *State v. Hatfield*, 9th Dist. No. 23716, 2008-Ohio-2431, at ¶8. The State, in its merit brief, proposes that this Court employ the general definition of self-defense adopted by the Supreme Court, which includes self-defense scenarios involving deadly force. Gates has not articulated the elements of self-defense in his brief. In general, to establish self-defense, including self-defense involving deadly force, the defendant must prove that:

“(1) the defendant was not at fault in creating the situation giving rise to the affray; (2) the defendant has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) the defendant must not have violated any duty to retreat or avoid the danger.” *State v. Tucker*, 9th Dist. No. 06CA0035-M, 2006-Ohio-6914, at ¶4, citing *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph two of the syllabus.

However, if the defendant uses non-deadly force to defend himself this Court has held that,

“the defendant must prove: (1) he was not at fault in creating the situation which gave rise to the event in which the use of non-deadly force occurred; (2) he had honest and reasonable grounds to believe that such conduct was necessary to

defend himself against the imminent use of unlawful force; and (3) the force used was not likely to cause death or great bodily harm.” *Hatfield* at ¶9, quoting *State v. Tanner*, 9th Dist. No. 3258-M, 2002-Ohio-2662, at ¶21.

Thus, in general, “one may use such force as the circumstances require to protect oneself against such danger as one has good reason to apprehend.” *Akron v. Dokes* (1986), 31 Ohio App.3d 24, 25; see, also, *State v. Williford* (1990), 49 Ohio St.3d 247, 249. Here, it is unclear which standard the trial court utilized; however under the facts of this case, the result of our analysis would be the same applying either.

Assault

{¶8} Gates was convicted of assault in violation of R.C. 2903.13(A), which provides that “[n]o person shall knowingly cause or attempt to cause physical harm to another or to another's unborn.” “A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.” R.C. 2901.22(B). The trial court concluded that Gates committed assault against Rodriguez when he rear-ended the vehicle Rodriguez and Cruz were driving. This conclusion is not against the manifest weight of the evidence, as the fact finder could have reasonably concluded that Gates was not acting in self-defense.

{¶9} The testimony revealed that during the late evening hours of November 8, 2008, or the early morning hours of November 9, 2008, Rodriguez was driving a rented Jeep Patriot in Barberton, and was accompanied by his cousin, Cruz. The two came upon Gates, who was driving an old model Impala that he had purchased from Rodriguez’s brother. Rodriguez began talking to Gates at a stoplight and asking Gates to give Rodriguez money for his brother who was in prison and needed money for his family. Gates refused, but agreed to continue the discussion

in the parking lot of a nearby CVS. Gates drove to the parking lot and Rodriguez left his vehicle and followed Gates on foot. Cruz proceeded to drive the Jeep to the parking lot. Before Cruz arrived, Rodriguez and Gates continued to argue about money. Rodriguez became angry and kicked Gates' car. Rodriguez alleged that Gates then sucker punched him in the forehead, and then Gates proceeded to repeatedly hit him. Rodriguez and Cruz maintained that while Rodriguez did strike Gates' car first, Gates was the first to strike a person. Cruz testified that he then attempted to break up the fight. Gates, however, claimed that after Rodriguez kicked Gates' car, Rodriguez head butted Gates and the fight ensued from there with both Rodriguez and Cruz ganging up on Gates. Rodriguez testified that he was getting beat up pretty badly; so, he and Cruz got in the Jeep to leave when they had the opportunity.

{¶10} An independent witness noticed the Impala in the CVS parking lot and saw that the Jeep was parked behind it. The witness pulled into CVS and observed the Jeep leave and the Impala take off after it. The witness saw the Impala ram into the Jeep. The witness testified that the Jeep slowed down to turn, but did not come to a stop. He further testified that he did not see the Impala apply the brakes or slow down prior to hitting the Jeep. He indicated that he would have noticed brake lights because it was dark outside. Rodriguez testified that after leaving the CVS he started to head towards the Giant Eagle to seek assistance from the fire trucks that were there, due to his injuries from the fight. As he was driving there, Gates rammed into the Jeep twice. Gates claimed to have been following Rodriguez and Cruz to get a license plate number in order to call the police. Before he could do so, he claimed that Rodriguez slammed on the brakes, causing him to rear-end the Jeep.

{¶11} We conclude that the trier of fact did not lose its way in convicting Gates of assault and in concluding that Gates' self-defense argument was without merit. Assuming,

without deciding, that Gates was privileged to defend himself in the CVS parking lot because Rodriguez initiated the initial confrontation, that confrontation ended when Rodriguez and Cruz fled in the Jeep. Gates decided to follow them. In light of the testimony of the independent witness who saw the Impala that Gates was driving ram the Jeep without applying the brakes, it was not unreasonable for the court to conclude that Gates knowingly attempted to cause Rodriguez physical harm. At the point in time that Gates was following Rodriguez and Cruz in the Impala, it would be reasonable to conclude that Gates could not possibly be in imminent fear of any type of harm from Rodriguez and Cruz, thus defeating Gates' self-defense argument. See *Williford*, 49 Ohio St.3d at 249, quoting *State v. Jackson* (1986), 22 Ohio St.3d 281, 284 ("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."); see, also *State v. Grubach* (Dec. 9, 1999), 8th Dist. No. 75022, at *2 ("Defendant claims he acted in self-defense in all counts, including this one. Although the jury found defendant acted in self-defense on four of the five charged counts, it could reasonably find there had been a temporal break between the acts of self-defense and the punch forming the basis of the felonious assault conviction."). Gates' first assignment of error is overruled.

Criminal Damaging

{¶12} Additionally, Gates was convicted of criminal damaging in violation of R.C. 2909.06(A), which provides that "[n]o person shall cause, or create a substantial risk of physical harm to any property of another without the other person's consent: (1) [k]nowingly, by any means; (2) [r]ecklessly, by means of fire, explosion, flood, poison gas, poison, radioactive material, caustic or corrosive material, or other inherently dangerous agency or substance." The

trial court found Gates committed the offense of criminal damaging when he broke the window of Rodriguez's Jeep.

{¶13} The testimony revealed that after Gates rammed the Jeep with his Impala, Rodriguez and Cruz drove the Jeep to the nearby Giant Eagle. After pulling into the parking lot, Rodriguez ran to the fire trucks stationed at the Giant Eagle to seek assistance, and Cruz remained in the Jeep. Gates had followed Rodriguez and Cruz to the Giant Eagle. Gates left his vehicle running, which subsequently rolled into a lamppost, and went over to the Jeep. He attempted to remove Cruz from the vehicle. Gates first tried to open the door of the vehicle and then proceeded to punch out the window. According to Cruz, Gates then tried to pull Cruz out of the vehicle. Cruz exited the vehicle and Gates began to follow him around it. Rodriguez testified that he saw Gates attempting to hit Cruz in the Jeep and so he yelled Gates' name. Gates then charged at Rodriguez "like a bull." Rodriguez picked up a brick and "tried to take his head off with it because [he] was in fear for [his] life."

{¶14} The firemen confirmed that Rodriguez, who was shirtless and shoeless, came to ask for help. One of the firemen, who observed two men fighting in a vehicle, decided to call 911. The two men who were arguing exited the vehicle and the one man, identified as Gates, began to follow the other around the car. Additionally, the one fireman saw Rodriguez try to hit Gates with a brick or rock.

{¶15} Gates testified that he ran to the Jeep to prevent Cruz from exiting the vehicle so that Cruz could not attack him. Cruz closed the door and locked the vehicle. Gates then admitted to punching out the window of the Jeep and attempting to drag Cruz from the vehicle. He confirmed that after Cruz exited the vehicle, he was following Cruz around it. He also averred that Rodriguez came after him with a brick.

{¶16} In light of the foregoing, we cannot conclude that the evidence weighed heavily in favor of Gates with respect to the criminal damaging charge. Gates admitted to knowingly punching out the window, resulting in damage to Rodriguez's property. In order for self-defense to even possibly be applicable, Gates' action of breaking the window would have had to have been in response to some imminent danger posed by Cruz. That is not the case here. Gates stated that he approached Rodriguez's vehicle to prevent Cruz from attacking him. However, Cruz was in the Jeep at the time, and rolled up the window when Gates approached. It is unclear how Cruz posed any kind of imminent danger to Gates. Gates' actions of punching out the window and attempting to pull Cruz from the vehicle are not consistent with self-defense. Cruz had not attacked Gates and it does not appear from the testimony that Cruz had any intention of doing so. Again, we cannot conclude that the trier of fact lost its way in convicting Gates of criminal damaging and discounting his self-defense argument. Gates' second assignment of error is overruled.

{¶17} Additionally, we note that Gates contends on appeal with respect to his first and second assignments of error that because no documentation of the damage to Rodriguez or the vehicle was presented, it was improper for the trial court to award restitution. However, we decline to address these arguments as they were not contained in separate assignments of error and Gates did not support the arguments with citations to authorities. See App.R. 16(A)(7); Loc.R. 7(B)(7).

Menacing

{¶18} Gates was additionally convicted of menacing in violation of R.C. 2903.22(A) which provides that "[n]o person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of the other person, the other person's unborn, or a

member of the other person's immediate family.” Gates’ conduct at the jail resulted in his conviction for menacing.

{¶19} Shortly after Rodriguez tried to strike Gates with a brick in the Giant Eagle parking lot, the police arrived. Officers ordered the three men to the ground. Rodriguez and Cruz were immediately compliant. Gates, however, was not and continued to yell. Police repeatedly informed Gates that if he did not get down, he would be tasered. When Gates continued to refuse, Lieutenant Morber tasered Gates.

{¶20} Gates was arrested and taken to the Barberton jail. Gates claimed to have repeatedly requested medical attention, which was denied. During booking, Gates asserted that he was suicidal in order to get medical attention, and then, according to police, proceeded to try to hang himself. Due to Gates’ threats, the officers who arrested Gates, including Lieutenant Morber were called to the jail. When Gates saw Lieutenant Morber, Gates began swearing at Lieutenant Morber and according to Morber and another officer, Gates then began running at Lieutenant Morber through the open jail door. Gates denied initiating any aggressive behavior, aside from swearing at Lieutenant Morber. The other officer with Lieutenant Morber then tasered Gates to prevent him from attacking Lieutenant Morber. Lieutenant Morber testified that Gates’ action caused him to fear for his physical safety; he averred that he knew that Gates could cause him physical harm.

{¶21} After reviewing the testimony, we cannot conclude that the trial court erred in convicting Gates of menacing or in discounting any self-defense argument he made. The trial court’s decision to find the officers’ testimony credible with respect to Gates’ actions was not unreasonable. In addition, it was not unreasonable to conclude that Gates did not act in self-defense when he yelled at Lieutenant Morber and then ran at him when there was no testimony

that either officer was doing anything at the time to cause Gates to believe that he was about to be confronted with any type of force. Accordingly, Gates' third assignment of error is overruled.

CONCLUSION

{¶22} In light of the foregoing, we overrule Gates' assignments of error and affirm the judgment of the Barberton Municipal Court.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Barberton Municipal Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

DICKINSON, P. J.
CONCURS

CARR, J.

CONCURS IN JUDGMENT ONLY SAYING:

{¶23} I concur in judgment only as I would address appellant's argument regarding restitution. R.C. 2929.18(A)(1) controls the award of restitution and does not require documentation.

APPEARANCES:

KERRY O'BRIEN, Attorney at Law, for Appellant.

HOLLY REESE, Assistant Prosecuting Attorney, for Appellee.