

STATE OF OHIO                     )  
  )ss:  
COUNTY OF SUMMIT            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.       25094

Appellee

v.

THOMAS SOMMERVILLE

Appellant

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.     CR 2008-06-1996(B)

DECISION AND JOURNAL ENTRY

Dated: August 4, 2010

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WHITMORE, Judge.

{¶1} Defendant-Appellant, Thomas D. Sommerville, appeals from his conviction in the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} On June 24, 2008, Sommerville was indicted on one count of attempted murder, in violation of R.C. 2903.02(A), a first-degree felony, and one count of felonious assault, in violation of R.C. 2903.11(A)(1)/(2), a second-degree felony, stemming from the events that occurred in the early morning hours of June 11, 2008. At his jury trial, Sommerville testified that he acted in self-defense. The jury acquitted Sommerville of attempted murder and found him guilty of felonious assault. Sommerville was sentenced to seven years of incarceration and timely appealed. Because the trial court had erred in informing Sommerville about the terms of his post-release control, this Court vacated the trial court's sentencing entry and remanded the matter for resentencing. *State v. Sommerville*, 9th Dist. No. 24427, 2009-Ohio-4160. The trial

court resentenced Sommerville to seven years of incarceration and properly informed him of post-release control. Sommerville timely appeals his conviction, asserting two assignments of error for our review.

## II

### Assignment of Error Number One

“THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN ALLOWING IMPEACHMENT BY EVIDENCE OF A PRIOR CONVICTION FOR PERJURY THAT WAS BEYOND THE TEN-YEAR LIMITATION FOR SUCH EVIDENCE UNDER EVIDENCE RULE 609(B).”

{¶3} In his first assignment of error, Sommerville argues that the trial court abused its discretion by allowing the State to impeach his credibility through the use of a felony perjury conviction that occurred more than ten years ago. Sommerville argues that the prior conviction was inadmissible under Evid.R. 609(B) because: (1) the State failed to provide the requisite “facts and circumstances” to support questioning him about his conviction; (2) the trial court failed to make findings of specific facts and circumstances on the record to support its decision; (3) the State did not use the prior convictions to impeach, but as evidence of prior bad acts under Evid.R. 404(B); (4) the State failed to provide Sommerville with sufficient advance written notice of its intent to question him about the conviction; and (5) the probative value of the evidence did not substantially outweigh its prejudicial effect. We disagree.

{¶4} The Supreme Court has indicated that “Evid.R. 609 must be considered in conjunction with Evid.R. 403. The trial judge therefore has broad discretion in determining the extent to which testimony will be admitted under Evid.R. 609.” *State v. Wright* (1990), 48 Ohio St.3d 5, syllabus. Likewise, this Court has explained that “[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court.” *State v. Harmon*, 9th Dist.

No. 22399, 2005-Ohio-3631, at ¶13. Accordingly, unless the trial court has abused its discretion, this Court will not interfere with the trial court’s decision. *Id.*

{¶5} Evid.R. 609 governs the admission of prior convictions to impeach the accused. Generally, if the prior conviction is considered relevant under Evid.R. 403(B), it is admissible to impeach the accused “if the crime was punishable by death or imprisonment in excess of one year \*\*\* and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.” Evid.R. 609(A)(2). Evid.R. 609(B), however, imposes a time limit on the use of such information. Specifically, it provides that:

“Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement, \*\*\* unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.” Evid.R. 609(B).

The Fourth District has explained the interplay of the two subsections of Evid.R. 609 as follows:

“What we have here is a rule, an exception to the rule, and then, an exception to the exception. To attack a defendant’s credibility, evidence of his prior convictions may be introduced. This is the rule in Evid.R. 609(A)(2). Where the conviction is more than ten years old, however, it is not admissible. This is the exception in Evid.R. 609(B). Where the probative effect of the ten-year-old conviction [substantially] outweighs the prejudicial effect of its admission, the court may admit it. This is the exception to the exception.” *State v. Fluellen* (1993), 88 Ohio App.3d 18, 22.

The State acknowledged that its attempt to impeach Sommerville by questioning him about the perjury conviction fell within the “exception to the exception” of Evid.R. 609(B) when it filed a “Notice of Intent” on Friday, August 15, 2008, before trial was set to begin on the following Tuesday, August 19, 2008. *Id.* The notice indicated that in September 1995, Sommerville was

convicted of felony perjury, for which he was sentenced to one year of incarceration. The State maintained that Sommerville's prior perjury conviction was "highly probative of [Sommerville's] propensity for truthfulness" which substantially outweighed any prejudicial effect it might have. Further, the State argued that the jury should "be able to consider the fact that [Sommerville] ha[d] lied in the past under oath" when it was assessing the credibility of Sommerville's testimony in this matter.

{¶6} The transcript from the proceeding reflects that the trial court permitted Sommerville to argue his objection to the use of such evidence prior to the start of jury selection. Sommerville renewed his objection before he took the stand in his own defense. In both instances, the trial court determined that the perjury conviction could be used for purposes of impeachment. When making its ruling during trial, the court considered Sommerville's prior criminal record, noting that he "had a string of encounters with the law" and that it is "more probative of his truthfulness th[a]n not." Thus, Sommerville was afforded a "fair opportunity to contest the use of such evidence." Evid.R. 609(B). Despite Sommerville's claims that the State failed to provide him with sufficient advance notice under Evid.R. 609(B), that it failed to articulate any grounds for questioning him about the conviction, or that the trial court failed to properly consider this matter, the record reveals otherwise.

{¶7} Sommerville also argues that the prejudicial effect of questioning him about his prior conviction largely outweighed its probative value. This Court has previously noted that "crimes of deceit are subject to a less stringent standard of admissibility" and "[w]here credibility is at issue, evidence of a conviction of a crime of dishonesty is especially relevant and material to the trier of fact." *State v. Evans*, 9th Dist. No. 07CA0057-M, 2008-Ohio-4772, at ¶9, quoting *State v. Wright* (June 24, 1998), 7th Dist. No. 96-C0-34, at \*2. In fact, a defendant's

conviction for dishonesty is automatically admissible if it occurred within ten years of the present offense. Evid.R. 609(A)(3) (providing that “notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that \*\*\* [the] accused, has been convicted of a crime is admissible if the crime involved dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance”). See, also, *State v. Caver*, 8th Dist. No. 91443, 2009-Ohio-1272, at ¶56 (concluding that “evidence involving a prior conviction for a crime of dishonesty is automatically admissible \*\*\* without consideration of unfair prejudice under Evid.R. 403”). It is only because Sommerville’s perjury conviction and subsequent incarceration occurred more than ten years before the present offense that the trial court was required to weigh the prejudicial effect of such questioning. Evid.R. 609(B). In light of Sommerville’s assertion that he acted in self-defense on the night in question, his credibility was central to the jury’s determination in this case. Thus, a prior perjury conviction, despite having occurred nearly thirteen years ago, would have substantial probative value in this case. Accordingly, the trial court did not abuse its discretion in admitting such evidence to impeach Sommerville. Sommerville’s first assignment of error lacks merit and is overruled.

#### Assignment of Error Number Two

“SOMMERVILLE’S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶8} In his second assignment of error, Sommerville argues that his conviction is against the manifest weight of the evidence. Specifically, he argues that the admission of testimony surrounding his prior conviction for perjury had a prejudicial effect on the jury and caused it to lose its way when convicting him in light of the evidence presented in his favor at trial. Sommerville points to the consistency in testimony between the State and the defense witnesses, who both stated Sommerville repeatedly questioned whether the dispute was really

“that serious.” He argues this testimony supports a conclusion that that he was not the aggressor in the situation, but was the one being attacked, which required he exercise self-defense. We disagree.

{¶9} In determining whether a conviction is against the manifest weight of the evidence an appellate court:

“[M]ust 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. Otten* (1986), 33 Ohio App.3d 339, 340.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the “thirteenth juror” and disagrees with the factfinder’s resolution of the conflicting testimony. *Id.* Therefore, this Court’s “discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶10} A person is guilty of felonious assault when he “knowingly \*\*\* [c]ause[s] serious physical harm to another \*\*\* [or][c]ause[s] or attempt[s] to cause physical harm to another \*\*\* by means of a deadly weapon or dangerous ordnance.” R.C. 2903.11(A)(1)/(2). “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). In order to prevail on a claim of self-defense, a defendant must prove, by a preponderance of the evidence:

“(1) that he was not at fault in creating the situation giving rise to the affray, (2) that he had 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 deadly force, and (3) that he did not violate any duty to retreat or avoid the danger.” *State v. Caldwell* (1992), 79 Ohio App.3d 667, 679.

“If the defendant fails to prove any one of the pertinent elements of that defense, then he has failed to demonstrate that he acted in self-defense.” *Id.*

{¶11} At trial, Vinson, the victim, testified that he and Sommerville had gotten into an argument several days earlier about one of the women who worked at the neighborhood convenience store. In the early hours of June 11, 2008, Vinson went to the convenience store to buy a beverage. Sommerville was at the store with his sister’s significant other, Fatima Deas. According to Vinson, while he was in line waiting outside to check out at the exterior walk-up window of the convenience store, he and Sommerville began arguing about the same woman again. The two kept arguing as they left the cashier line and Vinson started to leave the parking lot. Sommerville, who was holding a knife Deas had given him earlier that day, called Vinson back to the side of the parking lot where the two continued to argue, at which point Sommerville stabbed Vinson on the side of his neck. Sommerville and Deas left the parking lot and the paramedics arrived shortly thereafter. Vinson did not think his injuries were serious and wanted to go home, but the paramedics insisted on taking him to the hospital. The stab to Vinson’s neck resulted in punctures to his jugular vein and carotid arteries. Vinson spent five days in intensive care after he had surgery to repair the damage caused by the stab wound.

{¶12} Vinson admitted Sommerville had walked away from the argument at different times, but maintained that he only re-approached Sommerville because Sommerville had called him over again. Vinson admitted that Sommerville had displayed a knife and had repeatedly asked Vinson if the argument was “that serious,” in reference to the knife. Vinson responded

that he “didn’t have time for this” and needed to leave, but did tell Sommerville that “if you stab me, you better kill me.” Vinson denied ever swinging a fist or throwing anything at Sommerville.

{¶13} Shantel Jackson, who was the cashier on duty at the convenience store that night, testified she saw Sommerville, Vinson, and Deas, in the parking lot outside the store but was unable to see the argument because she was working. Her first indication that there was a problem was when Vinson came to the cashier’s window holding his neck. He told her that he had just been stabbed, so she immediately called 911. Douglas Price, the paramedic who responded to the scene, testified that Vinson’s neck was extremely swollen but was not otherwise bleeding. Upon examining Vinson, Price realized that he had a quarter-inch cut on the side of his neck and that blood was pooling under the skin in the area near his jugular vein, so he was taken to the hospital immediately.

{¶14} The State introduced the convenience store’s video recordings of the area which showed the men leaving the cashier’s line and walking over to the side of the parking lot for a period of time before Vinson approached the cashier holding his neck. Photographs of the area where the argument took place evidenced two dumpsters near the side of the parking lot, neither of which were obstructed, despite Sommerville’s claim otherwise.

{¶15} Sommerville testified to the following at trial. Sommerville explained the argument that he and Vinson had the week prior to the stabbing. According to Sommerville, he and Deas attempted to walk away from Vinson at the convenience store the night of the stabbing, but Vinson walked “up in [his] face,” mentioning their previous argument from the past week. Sommerville and Deas started to walk away again, but Vinson continued after them. At that point, Sommerville showed Vinson that he had a knife. Sommerville testified that, in an effort to



dispel any further violence, he repeatedly asked Vinson if “it is this serious” when showing Vinson the knife in his hand. Vinson pushed Deas aside and continued toward Sommerville despite Sommerville’s display of the knife. Vinson was carrying a twenty-four-ounce beverage can in his hand as he approached Sommerville. Vinson then “squared off” toward Sommerville and raised his hand, as if he was preparing to throw the beverage can at Sommerville. According to Sommerville, he was backed against the dumpster and could not retreat because there were bushes to one side of him and boxes and crates stacked beside the dumpster on the other side of him. Sommerville then stabbed Vinson in the neck, but asserted that he did so in self-defense because he thought Vinson was going to throw the twenty-four-ounce beverage can at his head. Sommerville believed the can could have killed him if Vinson threw it at him.

{¶16} Upon cross-examination, Sommerville denied ever calling Vinson over to continue their argument but admitted that Vinson did not have a gun or knife with him at the time, nor had Vinson ever threatened to kill him. Sommerville acknowledged that he could have killed Vinson with his knife, but felt he had no choice other than to use it at the time, given Vinson’s continued pursuit and readiness to throw the beverage can at his head. Sommerville argued that he did only what was necessary to protect himself and pointed to the fact that he did not try to twist or deeply stab Vinson, but inflicted only a very small, straight cut when stabbing him. Sommerville admitted, however, that he initially lied to the police and told them that Vinson’s wound was the result of Sommerville’s ring hitting Vinson’s neck when Sommerville punched him.

{¶17} Deas also testified on behalf of Sommerville. Accordingly to Deas, Vinson started the argument with Sommerville and Sommerville attempted to walk away but Vinson pursued him, backing Sommerville toward the store’s dumpster. As Vinson walked toward

Sommerville, Deas tried to step in and stop the altercation, but Vinson pushed her away and kept arguing with Sommerville. Deas testified that Vinson then “hit [Sommerville] with a bottle.”

{¶18} Based on the foregoing testimony, we cannot conclude that the jury lost its way in convicting Sommerville of felonious assault. Sommerville admitted he stabbed Vinson in the neck with a knife following their argument. Even if Vinson was the aggressor and initiated the argument, Sommerville admitted that Vinson’s only weapon was the beverage can he held in his hand. Despite Sommerville’s claims that he considered the beverage can in Vinson’s hand to constitute deadly force and that he was unable to otherwise safely retreat, “the jury [was] free to believe, all, part, or none of [his] testimony.” *State v. Luks*, 9th Dist. No. 05CA0046-M, 2006-Ohio-920, at ¶35, quoting *Prince v. Jordan*, 9th Dist. No. 04CA008423, 2004-Ohio-7184, at ¶35. Moreover, this Court will not reverse a conviction where the jury chose to believe the testimony of the State’s witnesses over that of the defendant’s. *State v. Cremeans*, 9th Dist. No. 22009, 2005-Ohio-261, at ¶7. Sommerville’s conviction for felonious assault is not against the manifest weight of the evidence. Accordingly, Sommerville’s second assignment is overruled.

### III

{¶19} Sommerville’s two assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, 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.

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BETH WHITMORE  
FOR THE COURT

CARR, J.  
DICKINSON, P. J.  
CONCUR

APPEARANCES:

NICHOLAS SWYRYDENKO, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.