[Cite as *State v. Starks*, 2010-Ohio-5980.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 25155
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
JAMES L. STARKS	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 09 06 1984

DECISION AND JOURNAL ENTRY

Dated: December 8, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} A customer punched a used car salesman in the face, breaking his jaw and causing permanent disfigurement. After the first jury hung, a second jury found the customer, James Starks, guilty of felonious assault, a felony of the second degree, and the trial court sentenced him to five years in prison. Mr. Starks has appealed, arguing that his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence because nobody saw him punch Faisel Dabbas. This Court affirms the conviction because it is supported by sufficient circumstantial evidence and is not against the manifest weight of the evidence.

BACKGROUND

{¶2} On July 11, 2008, Jason Garrett and Mr. Dabbas were working at the Best N Value Auto Sales lot on South Arlington Street in Akron when Mr. Starks and two other men arrived in a white Ford Taurus. Mr. Starks spoke first with Mr. Garrett and then with Mr.

Dabbas, the lot's owner, about buying a 1973 Buick Regal. Mr. Dabbas testified that, after he had discussed the car with Mr. Starks for at least five to ten minutes, Mr. Starks told him that he was going to go home and get some money to buy the car. Mr. Starks returned to the lot in the Taurus with at least another four men in another vehicle. According to Mr. Dabbas, there were seven men looking at cars in different parts of the lot. Initially, Mr. Garrett stayed near the Regal as Mr. Dabbas and Mr. Starks discussed the purchase. Later, Mr. Garrett stepped over to the next car to assist other potential customers.

{¶3} Mr. Garrett testified that, from his position near the neighboring car, he could not hear what Mr. Dabbas and Mr. Starks were saying, but he looked over at them when the conversation became louder. He had turned his attention back to his customers when he heard a "loud crack" and immediately turned back around. He saw Mr. Dabbas sitting on the ground and Mr. Starks "standing over him." According to Mr. Garrett, there was nobody else standing in the immediate vicinity of Mr. Dabbas and Mr. Starks at that moment.

{¶4} As Mr. Garrett ran toward Mr. Dabbas, he saw one of Mr. Starks's friends, Carlos Miller, running toward the two men from the other direction. Mr. Garrett said that he arrived first, shoved Mr. Starks away, and began to help Mr. Dabbas stand up. Mr. Miller soon began trying to kick Mr. Dabbas. Mr. Garrett heard Mr. Starks say to the driver of the Taurus, "get [me] out of here." Meanwhile, another employee of the car lot called the police while Mr. Miller continued to try to attack Mr. Dabbas until Mr. Dabbas picked up a large metal rod and chased Mr. Miller from the lot. Mr. Dabbas said that he saw Mr. Miller drop his cell phone as he jumped over a low fence around the property. Mr. Dabbas testified that he checked the phone for photographs and found several of Mr. Miller and one group shot that included Mr. Starks.

{¶5} Mr. Dabbas testified that, when the Taurus returned to the car lot that day, he went to speak with Mr. Starks about the Regal. Mr. Starks showed him a quantity of cash and offered $3500 for the car. Mr. Dabbas told him the price was $5700, and they began to negotiate. According to Mr. Dabbas, the conversation grew heated when Mr. Dabbas told Mr. Starks to go away and come back when he could afford to buy the car. After that, Mr. Dabbas walked toward the office to smoke a cigarette. He said that he saw Mr. Starks walking toward him, glanced back in the opposite direction for a moment, then was punched just as he began to look back toward Mr. Starks. He said that he lost consciousness briefly, but awoke on the ground with Mr. Starks crouching over him with both fists clenched. Mr. Dabbas testified that, when he saw Mr. Starks approaching him, he was not scared, but thought Mr. Starks wished to continue negotiating. He did not see Mr. Starks throw the punch, but he said that the two friends who had arrived with him in the Taurus stayed near the Regal while Mr. Starks walked toward him. Mr. Dabbas told the jury that he was absolutely certain that it was Mr. Starks who punched him and Mr. Miller who ran over afterwards and later dropped his cell phone.

{¶6} Police tracked down Mr. Miller and Mr. Starks through information gleaned from Mr. Miller's cell phone. The jury listened to an audio-recording of police interviewing Mr. Starks prior to his arrest. The recording revealed that Mr. Starks denied punching Mr. Dabbas and denied ever being at the car lot or even knowing Mr. Miller. The police officer confronted Mr. Starks with the fact that Mr. Miller had Mr. Starks's phone number and photograph in his cell phone, but Mr. Starks continued to claim that he did not know the man. The officer also told Mr. Starks that he had been to Mr. Miller's house and had found mail addressed to Mr. Starks at that address. Still Mr. Starks claimed that he did not know Mr. Miller. Both Mr. Garrett and Mr. Dabbas, on separate occasions, identified photographs of Mr. Starks and Mr. Miller. When both

Mr. Dabbas and Mr. Garrett were cross-examined about the fact that neither had seen Mr. Starks throw the punch, they both testified that they were certain it was Mr. Starks because he was the only person close enough to Mr. Dabbas to have done it.

SUFFICIENCY

{¶7} Mr. Starks's first assignment of error is that his conviction is not supported by sufficient evidence because there was no direct evidence that he was the one who punched Mr. Dabbas. Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶33. We must determine whether, viewing the evidence in a light most favorable to the prosecution, it could have convinced the average finder of fact of Mr. Starks's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991).

{¶8} Section 2903.11(A)(1) of the Ohio Revised Code provides that, "[n]o person shall knowingly . . . [c]ause serious physical harm to another . . . ." "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 evidence showed that Mr. Dabbas suffered serious physical harm. Nima Patel, a plastic surgeon, testified that Mr. Dabbas presented with a broken jaw, requiring multiple surgeries. After the first surgery, he spent weeks drinking through a straw while his jaw was wired shut, then acquired an infection, necessitating additional surgery. At the time of trial, more than a year after the injury, Mr. Dabbas's face remained asymmetrical due to a failure of the bones to heal correctly.

{¶9} Mr. Starks has argued only that this is a case of mistaken identity. He has argued that, without any direct evidence that he punched Mr. Dabbas, the conviction is not supported by sufficient evidence. He has cited the Eighth District decision in *State v. Saah*, 67 Ohio App. 3d 86, 97 (1990), for the proposition that, "when the state relies on circumstantial evidence alone, that evidence must be consistent solely with guilt and irreconcilable with any reasonable theory of innocence." Just one year after *Saah*, however, the Ohio Supreme Court released its decision in *State v. Jenks*, 61 Ohio St. 3d 259 (1991), overruling *State v. Kulig*, 37 Ohio St. 2d 157 (1974). In *Jenks*, the Court "join[ed] a multitude of other courts, both federal and state, which no longer make th[e] distinction [between circumstantial and direct evidence]." *Id.* at 283. The Supreme Court held that "[c]ircumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof. When the state relies on circumstantial evidence to prove an essential element of the offense charged, there is no need for such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction." *Id.* at paragraph one of the syllabus. Therefore, Mr. Starks's argument that circumstantial evidence alone was insufficient to support his conviction is incorrect.

{¶10} Viewed in a light most favorable to the prosecution, the evidence the State presented at trial could have convinced the average finder of fact of Mr. Starks's guilt beyond a reasonable doubt. See *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991). Although Mr. Starks told police that he had never been to the Best N Value Auto Sales lot, the evidence, including two witness identifications, tended to show that he was there with Mr. Miller on July 11, 2008. Although neither eyewitness saw Mr. Starks punch Mr. Dabbas, they both offered circumstantial evidence that he had. Mr. Dabbas said that he was standing alone in the

parking lot when he saw only Mr. Starks approaching him. According to Mr. Dabbas, there was nobody else near him when Mr. Starks approached and Mr. Starks was the last thing he saw before the punch. When he regained consciousness, he saw Mr. Starks standing over him with fists clenched. Mr. Garrett testified that he looked over immediately after hearing a "loud crack" and saw Mr. Starks standing over Mr. Dabbas with nobody else nearby. Thus, the State presented sufficient evidence that Mr. Starks knowingly caused Mr. Dabbas serious physical harm by punching him in the face. Mr. Starks's first assignment of error is overruled.

MANIFEST WEIGHT OF THE EVIDENCE

{¶11} Mr. Starks's second assignment of error is that his conviction is against the manifest weight of the evidence. If a defendant argues that his conviction is against the manifest weight of the evidence, this 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. Otten*, 33 Ohio App. 3d 339, 340 (1986).

{¶12} According to the investigating police officer, both Mr. Dabbas and Mr. Garrett identified Mr. Starks from a photo array without any hesitation or doubt. Despite Mr. Starks's continued denials to the police, there was significant evidence that he was friends with Mr. Miller, who had dropped his cell phone while running from Mr. Dabbas after the attack. Mr. Miller's cell phone, containing photos of him and Mr. Starks, was admitted at trial. The jury may have reasonably concluded that if Mr. Starks had lied to the police about being friends with Mr. Miller, then he probably also lied about whether he was present at the time of Mr. Dabbas's injury and whether he had caused it. The jury may have reasonably believed the consistent

testimony of Mr. Dabbas and Mr. Garrett, as supported by that of the police officer who investigated the case, over the claims Mr. Starks had made to the police. The jury did not lose its way and create a manifest miscarriage of justice by finding that Mr. Starks knowingly struck Mr. Dabbas, breaking his jaw. Mr. Starks's second assignment of error is overruled.

CONCLUSION

{¶13} Mr. Starks's first assignment of error is overruled because the State presented sufficient circumstantial evidence to support his conviction. His second assignment of error is overruled because the conviction is not against the manifest weight of the evidence. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

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.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
MOORE, J.
CONCUR

APPEARANCES:

JEFFREY N. JAMES, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN R. DIMARTINO, assistant prosecuting attorney, for appellee.