

[Cite as *State v. Perkins*, 2009-Ohio-6696.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 23036
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-1411
v.	:	
	:	
JESSE E. PERKINS	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 18<sup>th</sup> day of December, 2009.

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FAIN, J.

{¶ 1} Defendant-appellant Jesse E. Perkins appeals from his conviction and sentence upon five counts of Felonious Assault. Perkins contends that the State did not present sufficient evidence to support the convictions, and that the jury verdict is

against the manifest weight of the evidence.

{¶ 2} We conclude that there is evidence in the record upon which a reasonable trier of fact could rely to find the essential elements of the crime proven beyond a reasonable doubt. We further conclude that the convictions are not against the manifest weight of the evidence.

{¶ 3} Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 4} This case involves a barroom brawl at Belmont Billiards in March, 2008. Three men, Adam Volkerding, Timothy Wiley and Kurt Darding, were injured during the scuffle. Wiley and Darding identified Perkins as the person causing their injuries. Another witness, Matthew Ficklin, identified Perkins as the person who assaulted Adam Volkerding. Volkerding and Wiley required medical treatment. Specifically, Volkerding suffered a broken nose, fractured skull and lacerations to the face. Wiley suffered deep lacerations to his face that required the removal of shards of broken glass and numerous sutures.

{¶ 5} Perkins was charged with five counts of Felonious Assault, each with a repeat-violent-offender specification. Specifically, he was charged with two counts for assaulting Volkerding (deadly weapon in violations of R.C. 2903.11(A)(1) and serious physical harm in violation of R.C. 2903.11(A)(2) ); two counts for the assault of Wiley (deadly weapon and serious physical harm); and one count for the assault of Darding (deadly weapon).

{¶ 6} Perkins pled not guilty. A jury convicted Perkins on all charges. The

trial court made a finding that Perkins is a repeat violent offender, pursuant to R.C. 2941.149. The trial court sentenced Perkins to a prison term of eight years for each offense. Counts One and Two, regarding Adam Volkerding, were merged, as were Counts Three and Four, pertaining to Timothy Wiley. All of the sentences were ordered to run concurrently. The trial court declined to sentence Perkins to any additional prison time for the repeat violent offender specifications. Perkins was also ordered to pay restitution, in the amount of \$14,000, to Wiley.

{¶ 7} From his conviction and sentence, Perkins appeals.

## II

{¶ 8} Perkins's sole assignment of error states as follows:

{¶ 9} "THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT COMMITTED THE CHARGED OFFENSES, AND THE JURY'S GUILTY VERDICT AMOUNTS TO A MANIFEST MISCARRIAGE OF JUSTICE."

{¶ 10} Perkins contends that the State did not present evidence sufficient to support his convictions. He further contends that the jury verdict is against the manifest weight of the evidence. In support, he argues that the police officers responding to the scene performed a "shoddy investigation." He further claims that "none of the initial witness descriptions of the assailant remotely describe [him] in any way." He also notes that he presented the testimony of ten witnesses at trial, all of whom testified that they did not observe Perkins involved in the fighting.

{¶ 11} When the issue before the reviewing court is sufficiency of the

evidence, “the relevant inquiry is, after viewing the evidence in the light most favorable to the prosecution, whether any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt .” *State v. Jenks* (1991), 61 Ohio St.3d 259, 273 Sufficiency is a question of law, which we review de novo, with no deference to the finder of fact. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

{¶ 12} When reviewing a claim that a judgment is against the manifest weight of the evidence, “[t]he 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.” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52 (citation omitted).

{¶ 13} Felonious Assault is proscribed in R.C. 2903.11, which provides in pertinent part:

{¶ 14} “(A) No person shall knowingly do either of the following:

{¶ 15} “(1) Cause serious physical harm to another or to another's unborn;

{¶ 16} “(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.”

{¶ 17} 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.

{¶ 18} “Deadly weapon” is defined as “any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.” R.C. 2923.11(A).

{¶ 19} Serious physical harm to persons is defined in R.C. 2901.01 and means any of the following:

{¶ 20} “(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶ 21} “(b) Any physical harm that carries a substantial risk of death;

{¶ 22} “(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶ 23} “(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶ 24} “(e) 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.”

{¶ 25} Perkins does not dispute that the pool cue and the beer bottle used to harm the victims are deadly weapons. Furthermore, he does not dispute that Volkerding and Wiley suffered serious physical harm; indeed the parties stipulated to the element of serious harm.

{¶ 26} The only real issue raised by Perkins with regard to either the sufficiency-of-the evidence or the manifest-weight claim is his contention that the State failed to prove that he committed the offenses. Perkins claims that any

identification of him as the assailant is inherently incredible, because the police did not conduct an adequate investigation at the scene, the eyewitnesses were intoxicated and did not correctly describe him, and because his witnesses testified that he was not involved in the fight.

{¶ 27} We begin by addressing the claim that none of the identifications made by the eyewitnesses are believable. First, Perkins notes that all the eyewitnesses who identified him as the assailant admitted that they had been consuming alcohol prior to the fight. Second, he contends that none of the initial descriptions were correct because the witnesses described him as taller and heavier than his actual weight of one hundred and five pounds and his actual height of “about five feet three inches.” Matthew Ficklin, a witness to the fight, initially told the police that the assailant was approximately five feet nine inches tall, weighed about one hundred seventy to one hundred ninety pounds, had blond hair and was wearing a long-sleeved white shirt. Darding initially informed the police that the assailant was approximately five feet eight inches tall and weighed around one hundred fifty to one hundred sixty pounds. Wiley’s initial statement indicated that the attacker was about six feet tall and approximately one hundred and fifty pounds.

{¶ 28} Neither the fact that the witnesses were drinking, nor the discrepancies in their initial descriptions is enough to compel the conclusion that the verdicts are against the manifest weight of the evidence. While a “weight-of-the-evidence argument permits a reviewing court to consider the credibility of witnesses, that review must be tempered by the principle that weight and credibility questions are primarily for the trier of fact.” *State v. Youngblood*, Clark App. No. 07-CA-118,

2009-Ohio-118. “Because the factfinder \* \* \* has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness.” *Id.*, quoting *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 29} Our review of the record, including the transcript of the victims’ testimony, does not lead us to conclude that their identifications were so lacking in credibility that no rational jury could rely upon that identification testimony, or that the jury lost its way in doing so. The eyewitnesses readily acknowledged that they had been in the bar, and that they had consumed alcohol. All of the eyewitnesses acknowledged that their estimates of height and weight could be incorrect, but they further noted that they recognized Perkins by his face, which they had clearly observed.<sup>1</sup>

{¶ 30} There is evidence in this case to support a finding that Perkins struck Volkerding in the head with a pool stick, that he broke a beer bottle on Darding’s head, and that he then used the broken bottle to cut Wiley’s face. Ficklin was shown a photo spread from which he identified Perkins as Volkerding’s assailant. Ficklin also identified Perkins at trial. Darding did not know Perkins prior to the fight. A

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<sup>1</sup> We also note that Perkins did not put his actual height and weight into evidence so as to corroborate his claim of discrepancies in the descriptions.

friend of Darding's informed him of two website addresses on which he might find the assailant's picture. The friend also gave Darding the initials "J.P." Darding did not find a person he recognized as his assailant on the first website, but did recognize an individual on the second website, and informed the police of the fact. Within three days after the incident, Darding was shown a photo spread from which he identified Perkins as his assailant. At trial, Darding testified that the person he observed attacking Volkerding with a pool stick was the same person who attacked him. Finally, although Wiley did not identify Perkins prior to trial, he did testify at trial that he recognized Perkins as the assailant.

{¶ 31} Although Perkins notes that he presented ten witnesses who indicated that he was not the assailant, we note that some of those witnesses admitted that they were not sure of Perkins's location during the fight. The jury was free to give more weight to the testimony of Ficklin, Darding and Wiley than to the testimony of these other witnesses. Our review of the transcript does not lead us to conclude that the jury was clearly wrong to do so.

{¶ 32} Finally, although the investigating officer indicated that he had been relatively new at his job, and that, in hindsight, he would have performed a more complete investigation at the scene, there is nothing in this record to support a finding that the initial investigation resulted in a wrongful conviction. The outcome of this case depended on the jury's evaluation of eyewitness testimony, including the jury's assessments of the credibility of the various witnesses.

{¶ 33} The record does not indicate that this is the rare case where a jury lost its way, resulting in a manifest miscarriage of justice. We conclude that there is

sufficient evidence to support the judgment, and that the judgment is not against the manifest weight of the evidence. Accordingly, the sole assignment of error is overruled.

III

{¶ 34} Perkins's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

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