

IN THE SUPREME COURT OF OHIO

ORIGINAL  
ON COMPUTER - JJ

Wilburn F. Martin,

Appellant,

v.

State of Ohio,

Appellee.

09-0634

On Appeal from the  
Stark County Court  
of Appeals, Fifth  
Appellate District

Court of Appeals  
No. 2007 CA 00230

---

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT WILBURN F. MARTIN

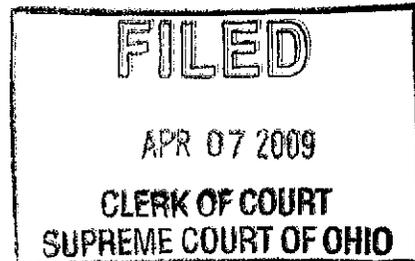
---

Wilburn F. Martin  
Inst. No. #531-629  
Belmont Correctional Inst.  
Post Office Box 540  
St. Clairsville, Ohio 43950

APPELLANT IN PRO PERSONA

John D. Ferrero, Prosecutor  
Kathleen O. Tatarsky, Assistant Prosecutor  
Stark County Prosecutor's Office  
110 Central Plaza South – Suite 510  
Canton, OH 44702-1413  
(330) 451-7965

COUNSEL FOR APPELLEE, STATE OF OHIO



**TABLE OF CONTENTS**

**Page**

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....	1
STATEMENT OF THE CASE AND FACTS.....	3
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	4
<b><u>Proposition of Law No. I:</u></b> Whether the jury verdict finding Appellant guilty of felonious assault, attempted aggravated arson and attempted arson was against the manifest weight of the evidence in violation of the Due Process clause of the Fourteenth Amendment to the United States Constitution.....	4
<b><u>Proposition of Law No. II:</u></b> The Appellant was denied his right to due process and the effective assistance of appellate counsel.....	6
CONCLUSION.....	10
CERTIFICATE OF SERVICE.....	11

**APPENDIX**

**Appx. Page**

Journal Entry of the Stark County Court of Appeals (Released and Journalized March 2, 2009).....	A1
Opinion of the Stark County Court of Appeals (Released and Journalized March 2, 2009).....	A2

**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC  
OR GREAT GENERAL INTEREST AND INVOLVES A  
SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case should be considered by the Ohio Supreme Court because Appellant was convicted without sufficient evidence to support his conviction and where the manifest weight of evidence is clearly against a finding of guilty against the Defendant.

Enough is enough! Juries should not be able to get away with finding a defendant guilty when the evidence is so scant, uncorroborated, and clearly exaggerated – especially when even the evidence presented does not meet all of the elements of the crimes being charged. Such is the case here.

This case is a simple matter of the Appellant panhandling a fuel-truck driver who was in the process of filling a fuel tank at a gas station. Appellant asked him for a cigarette in the early hours and was rebuffed. Appellant testified that after he was rebuffed, he continued walking on to McDonald's – which is consistent with where the police found him after they were called. The fuel-truck driver, Laney, tired at the end of his long shift and in a less-than-friendly part of town was clearly on edge when he was solicited for a cigarette from the nearly fifty-year-old Appellant. The Appellant testified that when he was rebuffed by Laney, he moved on heading towards McDonald's; however, Laney called the police claiming that the Appellant had threatened to blow him up – but never at any time established any motive for the threat. From his testimony, it even appears that Laney claimed Appellant made threatening gestures before asking for a cigarette – claiming the Appellant had ignited his lighter, presumably wanting to blow himself and Laney up together before asking whether or not he could have a cigarette and go to McDonald's for breakfast.

The lunacy alleged by Laney has no independent corroboration and is clearly, to the average person, an exaggeration by Laney of a common incident of panhandling, which for whatever reason caused Laney to overreact. Whether there was a threat or a general fear exhibited by Laney to having been panhandled by a black man in the wee hours of the morning where he was alone and uncertain of true motives of the Appellant, it still cannot change the fact that the Appellant posed no serious threat to Laney and could not, even if he wanted to, have caused damage because the equipment that was being used, as testified to by two different witnesses, was safe and being safely employed by Laney during the course of his job. There was no evidence that even if the Appellant ignited his lighter that it would have caused any damage; and if the Appellant did in fact ignite his lighter, there was no negative consequence – no explosion, no damage, no nothing – except the tank-filler who was tired and

perturbed and clearly more scared of the unknown people he would find lurking in the dark shadows in the early morning than of the potential for being blown up.

When the evidence is so scant and the foundation for the charges are rested upon mere nonsense, there can not be any substantial guilty verdict to such severe charges such as those brought against the Defendant. This is becoming an overwhelming problem in the inner-city, rubber-stamped by fearful white suburban juries that clearly want to be left alone from the inner-city denizens. The Appellant, a disabled man who lived in the neighborhood, tried to bum a cigarette off of a guy he sees working in the parking lot of the local gas station. He is told "no" and continues on his way, but is demonized because he is simply a scary character and the tank-filler desired to be left alone. The police are called to remove the Appellant like rubbish or a irritant, and told he was trying to blow up the place to somehow make the situation seem more threatening than it really was and give cause for police intervention, since the tank-filler felt unprotected from vagabonds and anyone wanting to take advantage of him – even the Appellant, simply wanting to bum a cigarette from him. The predominately white jury feels empathy for the tank-filler, left all alone out there near the inner-city street at the wee hours of the morning, and in doing so, buys the nonsense meant to make the Appellant look like a crazy man and in finding him guilty they feel a sense of accomplishment that they have cleaned up the city streets from the likes of the Appellant or any other form of low-life lurking in the morning shadows because they themselves would not want to be panhandled or approached by a black man if they were all alone and stopped to get gas at an inner-city gas station early in the morning. That prejudice allows them to except, without corroboration, any fabrication that will allow them to convince themselves that justice is being served by a guilty verdict – and the appellate courts have a duty to reverse these verdicts in situations when the evidence is so skewed and the jury clearly loses its way. Otherwise, a continual miscarriage of justice occurs and the invidious discrimination that creeps up in so many areas of society finds its way into the jury room where the natural bias is to believe the person who is afraid and disbelieve the person who is supposed to have caused fear – overriding the Defendant's natural and Constitutionally protected presumptions, especially when he's a black man walking down an inner-city street early in the morning.

Justice in this case can hardly be considered to be blind – yet when it is not, its color distinctions can be masked with so many other justifications as to allow the discrimination to run

rampant. The only corrective mechanism are the appellate courts and while the Court of Appeals tends to be a rubber stamp for these types of cases, the Supreme Court can use this case as an opportunity to show the public, who demands a more perfect and fairer judicial system, that a man railroaded with scant evidence and with evidence that is contrary to science can be set free when the appropriate checks and balances are employed by the last stop on the train – the Supreme Court.

For these reasons, it is asserted by the Appellant that a miscarriage of justice will occur if the Court does not address these issues and vacate the verdict.

### **STATEMENT OF THE CASE AND FACTS**

The case commenced with opening arguments by both sides. The first witness to testify was Sherman Laney (“Laney”). Laney was employed at North Canton Transfer as a gasoline delivery driver. On April 12, 2007 he was delivering gasoline at the BP Station at the corner of 38<sup>th</sup> Street and Cleveland Avenue in Canton, Stark County, Ohio. He indicated that he had hooked up his tanker to deliver the gasoline to the gas compartments. During the process of unloading the gas he indicated that he saw Appellant running towards him. He stated that the appellant ran over to the fittings inside the well and stuck his hand in acting like he was trying to do something. The Appellant then said he wanted a smoke and Laney told him to get out of there. He stated that he had to push the Appellant several times to leave and said he would blow us up. He indicated that he came at him one more time and then smirked and walked away. He indicated that the Sheriff then caught the Appellant walking away from the gas station and identified him and then filled out a statement.

On cross examination, Laney indicated that all the gas fumes that are intended to be recovered by the safety system are not always recovered, but that he is still willing to do the job even though he knows that there are fumes around. He further indicated that he would not do a job that he thought was inherently dangerous where there was a risk to his life. He indicated that he did not see anything in the Appellant's hands at the time the Appellant went near to the fill tank. It was not until later when the witness claimed that he shoved the Appellant away that he claimed to see a lighter.

The next witness to testify was Deputy Robert First. Deputy First testified that on April 12, 2007 he was working as a patrolman when he received a call regarding a black male threatening to blow something up. He then drove Laney down to where the suspect had been caught walking on Cleveland Avenue and Laney advised that the suspect was the same individual who threatened to blow

him up. First indicated that when he arrested the Appellant, the Appellant claimed that all he wanted was a cigarette and did not threaten anyone.

The next witness to testify was Dan Wright. He indicated that he worked for Kenan Advantage, which is also known as North Canton Transfer. He described the dangers associated with delivering gasoline. He indicated the actual value of the truck Laney was driving that night was worth between \$120,000 to \$130,000. On cross examination he indicated that there's no extra vapors which are vented to the atmosphere during the fueling process. He further indicated on cross examination that where the hose is removed from the fill tank that it is not inherently dangerous to have the gasoline exposed to the air and is very unlikely that there would be an explosion. [It should be noted as an undisputed matter of physics consistent with the lay testimony provided by Wright that gasoline is merely flammable and not combustible.]

The Appellant testified on his own behalf. The Appellant indicated that he was walking down the street on the way to McDonald's and walked over to the driver (Laney) and asked him for a cigarette. He indicated that the driver told him if he did not leave he was going to call the police, so he left right away. Appellant further indicated that walked down Cleveland Avenue towards McDonald's and the next thing he knew, the police had stopped and detained him. The Appellant testified that he did not have any cigarettes on him and never threatened to kill Laney.

The Appellant was charged with Felonious Assault, a felony of the second degree, Attempt to Commit an Offense (Aggravated Arson), a felony of the fifth degree. The case proceeded to trial and the jury convicted the Defendant of all counts. The Defendant took appeal to the Fifth District Court of Appeals for Stark County and the Appeals Court rendered its opinion on March 2, 2009, affirming the conviction. The Defendant now appeals to the Ohio Supreme Court.

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law No. 1:** Whether the jury verdict finding Appellant guilty of felonious assault, attempted aggravated arson and attempted arson was against the manifest weight of the evidence in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

A guilty verdict “may nevertheless be overturned as against the sufficient weight of the evidence.” An appellate court has the power to “pass on upon the weight of the evidence.” *State v.*

*Cooley* (1989), 46 Ohio St.3d 20, 25-26, Cert. denied, (1990), 111 S. Ct. 1431; *State v. Abi-Sarkis* (1988), 41 Ohio App. 3d 333, 337.

In determining whether a verdict is against 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 the witnesses and determine whether, in resolving the conflicts, 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.” *State v. Dapice* (1989), 57 Ohio App. 3d 99, 107; *City of Akron v. Cook* (1990), 67 Ohio App. 3d 640; *State v. Simmons* (1989), 61 Ohio App. 3d 514, 518. An appellate court should reverse a verdict when the evidence weights heavily against the Defendant's conviction. *Abi-Sarkis*, 41 Ohio App. 3d, at 337-338.

The law states that before a defendant can be found guilty of Felonious Assault, the jury must find beyond a reasonable doubt that the defendant did knowingly cause or intend to cause physical harm to an individual by means of a dangerous ordinance. A person acts knowingly regardless of his purpose when he is aware that his conduct will probably cause a certain result or is aware that his conduct will probably be of a certain nature. A person has knowledge of circumstances probably exist. (See: Ohio Jury Instructions given to the jury before deliberations.)

The Appellant was also charged with attempt to commit the offense of Aggravated Arson. To be convicted, the jury must find beyond a reasonable doubt that a defendant knowingly engaged in conduct, which if successful, would have resulted in the commission of the offense of Aggravated Arson. Aggravated Arson is defined as follows: No person by means of fire or explosion shall knowingly create a substantial risk of serious physical harm to another. (See: Ohio Jury Instructions given to the jury before deliberations.)

The Appellant was also charged with an attempt to commit the offense of Arson. Arson is defined as a defendant knowingly engaged in conduct, which if successful, would have resulted in the commission of the offense of Arson. Arson is defined as follows: No person by means of fire or explosion shall knowingly create a substantial risk of physical harm to the property of another and the value of said property or the amount of the physical harm involved is more than \$500.00. (See: Ohio Jury Instructions given to the jury before deliberations.)

The State failed to meet its burden of proof beyond a reasonable doubt with respect to the three

counts. It is very clear that Laney had been working a very long shift and was at the end of a twelve-hour shift. He does clearly indicate that Appellant was asking for a cigarette, which is consistent with the Appellant's own testimony. However, the description given by Laney makes no sense whatsoever and flies in the face of common sense. Laney's viewpoint seems completely uncorroborated and at odds with other witnesses. There was no behavior of the Appellant observed by the police or any other individual which would indicate that the Appellant was attempting to harm himself or anyone else. Appellant testified that after being rebuffed in his attempt to get a cigarette, he continued on his way towards McDonald's in clear view of anyone driving by and with no attempt to conceal or hide himself. When weighing the testimony, the description of the Appellant's actions provided by Laney seems exaggerated and does not make any sense whatsoever.

Laney testified that merely using a mobile phone within twenty-five feet of a pump could cause an explosion. He testified that Appellant had actually lit his lighter within twelve inches from the pump. Yet there was no physical evidence that doing so was the cause of or could have caused any serious injury whatsoever. In fact, testimony was presented that clearly showed that there was no risk with the present setup that vapors would escape and cause any fuel to feed a fire. Even assuming that the Appellant did in fact light his lighter, which seems a bit preposterous considering the circumstances, it appears that Laney clearly exaggerated the threat posed by the Appellant since there was clearly no explosion at the time that Laney said the Appellant had ignited the lighter. Without an explosion or a substantial risk of an explosion, there would be no felonious assault to Laney, as there was no substantial risk of damage to an individual per the Arson statute, nor was there any risk to any property in excess of \$500.00 or more, as is also required by the statute.

Without more, Appellant asserts that the manifest weight of the evidence is insufficient to convict the Defendant of the charges alleged against him and the matter should be dismissed.

**Proposition of Law No. II:** The State prosecutor committed misconduct when she commented on the Defendant's failure to testify in closing argument.

If there is a genuine issue as to whether there is a claim of ineffective assistance of counsel on appeal, the two-prong test developed in *Strickland v. Washington* (1984), 466 U.S. 668, and *State v. Bradley* (1989), 42 Ohio St.3d 136, for determining whether counsel rendered ineffective assistance of counsel, is also the standard for determining whether an appellant has presented a genuine issue of a

colorable claim of ineffective assistance of appellate counsel that would mandate reopening his appeal. *State v. Smith*, 95 Ohio St.3d 127. Therefore, it must first be determined whether appellate counsel's performance was deficient and then determined whether that deficiency prejudiced the outcome of the appeal. *State v. Reed* (1996), 74 Ohio St.3d 534, 535. An appellant can demonstrate prejudice by demonstrating that had his claims been properly presented, there was a reasonable probability that they would have been successful. *State v. Goff*, 98 Ohio St.3d 327, 328.

Appellate counsel's failure to raise the issue that the conviction was not supported by the sufficiency of the evidence was deficient on the part of the appellant counsel and had the claim been presented, it is reasonably likely that it would have been successful.

The state failed to establish that Appellant was guilty of the crimes of which he was convicted. Their evidence is lacking in sufficiency.

A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the state has met its burden of production at trial. *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 390. On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed the evidence against the defendant would support a conviction. *Id.* The relevant inquiry is whether, after viewing all 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two the syllabus.

The state must provide sufficient proof necessary to convince the trier of fact beyond a reasonable doubt of the existence of every element of the offense. *In re Winship* (1970), 397 U.S. 358; *State v. Haynes* (1971), 25 Ohio St. 2d 264, 270. The inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have convicted. *State v. Jenks*, (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. See also *Tibbs*, 457 U.S. at 37.

"The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *Thompkins*, Ohio St.3d at paragraph two of the syllabus. Unlike sufficiency, "manifest weight" does not involve looking at the evidence in the light most favorable to the state or deferring to the trier of fact. "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence. *Id.*, at 387. citing *Robinson*, at 487.

"Weight of the evidence concerns the inclination of the greater amount of credible evidence, offered at trial, to support one side of the issue rather than the other." *Thompkins*, 78 Ohio St.3d at 387 (emphasis in *Thompkins*). "A reversal based in the weight of the evidence . . . draws the appellate court into questions of credibility." *Tibbs*, at 3. "The 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." *Thompkins*, at 387 (emphasis added).

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. See *State v. Martin* (1983), 20 Ohio App. 3d 172, paragraph three of the syllabus. This present case is the poster-child for just such a case.

The issues of whether there is sufficient evidence and whether the verdict is against the manifest weight of the evidence are separate and distinct. In the present case, the Appellate Counsel only brought forth the argument that the verdict was against the manifest weight of the evidence, but failed to address the sufficiency claim. The question of sufficiency involves whether the case may go to the fact finder or, if it has, whether the evidence was sufficient to support the verdict. *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 386, citing *State v. Robinson* (1995), 162 Ohio St. 486, 487, and *Crim. R. 29*. See also *Tibbs v. Florida* (1982), 457 U.S. 31, 41 (if insufficient evidence, then should not have been submitted to jury); *State v. Watson* (1971), 28 Ohio St. 2d 15, 20 (sufficient evidence is required to prevent directed verdict).

The state must provide sufficient proof necessary to convince the trier of fact beyond a reasonable doubt of the existence of every element of the offense. *In re Winship* (1970), 397 U.S. 358; *State v. Haynes* (1971), 25 Ohio St. 2d 264, 270. The inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have convicted. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. See also *Tibbs*, 457 U.S. at 37.

Here, the jury simply lost its way as to the conviction. The evidence is lacking that the State failed to provide testimony that supports each element of the crimes charged against Appellant Martin herein. Certainly Laney felt intimidated when a black man approached him and asked him for a cigarette, a common reaction when a white man is alone in a "bad" part of town as Laney was. He

viewed the Appellant as a nuisance for pestering him for a cigarette and clearly exaggerated the incident to make this nearly fifty-year-old man seem menacing and threatening in order to justify his response. The predominantly white jury empathized with Laney, believing that he should have been undisturbed in the performance of his duties and not pestered by the Appellant for a cigarette. Further, the Prosecutor offered no apparent testimony that would explain any motive of the Appellant for allegedly threatening to blow up Laney. It was never testified that the Defendant threatened to blow up Laney if he did not give him a cigarette, but just that he apparently acted erratically and threatened to blow him up for no good reason. If that were in fact accurate and not a mere smokescreen to cover for Laney's fear, the Appellant would have been also threatening to blow himself up, since presumably a point-blank ignition of a tank of gas would have killed them both – despite the fact that testimony showed that was not physically possible or likely. Any evidence that the Appellant was going to blow himself up would be evidence of serious derangement of the Appellant; yet, there was no evidence whatsoever that the Appellant exhibited any mental derangement before or after the alleged threat and no evidence was put forth showing any history of the same. And furthermore, the physical evidence and technical evidence indicates that there is no danger of a person blowing anything up if he did in fact light a lighter in the presence of the fill tank. The elements, therefore, even with the testimony provided, are insufficient to find the Defendant guilty of felonious assault.

In finding the Defendant guilty of the charges when there was no direct evidence and inconsistent testimony, the jury clearly sought to punish the Appellant for scaring Laney – and their own personal desire to be free from panhandlers when alone in a minority neighborhood. Failure to argue these issues on appeal are tantamount to ineffective assistance of appellate counsel.

Furthermore, the second issue that the Appellate Counsel failed to allege was ineffective assistance of trial counsel for failing to call any expert witnesses as to the scientific lack of danger of any ignition of a lighter in the proximity of a refueling truck during the time of its refueling. It is a well-known scientific fact that gasoline, while flammable, is not combustible. The fundamental basis behind the charge of felonious assault was that the Appellant was attempting to ignite fuel vapors in the vicinity of Laney – something that both Laney and his fellow worker testified were not a real threat, but were enough of a threat to be considered by Laney to have called the police to have the Appellant removed. However, the trial counsel never brought forward any witness to testify that even if the

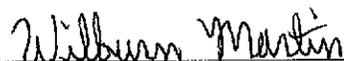
Appellant had ignited his lighter, that there was no cause for any concern because of the nature of the gasoline and the mechanical devices used to store and fill the pump wells. Had there been evidence presented to refute the basic assumption of a threat, the jury would have never been able to reach the conclusion that the Appellant had intended to blow up or even could have blown up the fuel pump and thus could not have found the Defendant guilty.

Failure to argue the ineffective assistance of trial counsel on appeal is then in itself ineffective assistance of appellate counsel and proof that the Appellant was denied a fair trial.

**CONCLUSION**

For the foregoing reasons, the Appellant respectfully requests this Court to reverse his convictions and/or remand this case for a new trial.

Respectfully submitted,



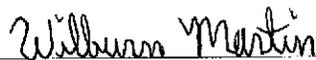
\_\_\_\_\_  
Wilburn F. Martin, *in pro persona*  
Inmate No. 531-629  
Belmont Correctional Institution  
P.O. Box 540  
St. Clairsville, OH 43950

**Certificate of Service**

I certify that a copy of this **Memorandum in Support of Jurisdiction** was sent by ordinary U.S. mail to:

John D. Ferrero  
Kathleen O. Tatarsky  
Stark County Prosecutor's Office  
110 Central Plaza South - Suite 510  
Canton, OH 44702-1413

on this 24<sup>th</sup> day of March, 2009.



\_\_\_\_\_  
Wilburn F. Martin, *in pro persona*  
APPELLANT

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

WILBURN F. MARTIN

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2007 CA 00230

09 MAR -2 PM 2:45  
CLERK OF COURT OF APPEALS  
STARK COUNTY, OHIO

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to appellant.

*Julie A. Edwards*  
\_\_\_\_\_  
*W. Scott A. ...*  
\_\_\_\_\_  
*[Signature]*  
\_\_\_\_\_

JUDGES

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

RECEIVED  
STARK COUNTY, OHIO  
COURT OF APPEALS  
MARCH 2 2 14 5

STATE OF OHIO	:	JUDGES:
	:	W. Scott Gwin, P.J.
Plaintiff-Appellee	:	John W. Wise, J.
	:	Julie A. Edwards, J.
-vs-	:	
	:	Case No. 2007 CA 00230
WILBURN F. MARTIN	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal Appeal From Stark County Court  
Of Common Pleas Case No. 2007-CR-0655

JUDGMENT: Affirmed

R.

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee For Defendant-Appellant

JOHN D. FERRERO Prosecuting Attorney Stark County, Ohio	HERBERT J. MORELLO 808 Courtyard Centre 116 Cleveland Avenue, N.W. Canton, Ohio 44702
---	--

BY: KATHLEEN O. TATARSKY  
Assistant Prosecuting Attorney  
Appellate Section  
110 Central Plaza South – Suite 510  
Canton, Ohio 44702-1413

A TRUE COPY TESTE:  
NANCY S. REINBOLD, CLERK  
By *T. Flickinger* Deputy  
Date *3/3/09*

*Edwards, J.*

{¶1} Defendant-appellant, Wilburn Martin, appeals his conviction and sentence from the Stark County Court of Common Pleas on one count each of felonious assault, attempted aggravated arson and attempted arson. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On May 21, 2007, the Stark County Grand Jury indicted appellant on one count of felonious assault in violation of R.C. 2903.11(A)(2), a felony of the second degree, one count of attempted aggravated arson in violation of R.C. 2923.02(A) and 2909.02(A)(1), a felony of the second degree, and one count of attempted arson in violation of R.C. 2923.02(A) and 2909.03(A)(1), a felony of the fifth degree. At his arraignment on May 25, 2007, appellant entered a plea of not guilty to the charges.

{¶3} Subsequently, a jury trial commenced on July 5, 2007. The following testimony was adduced at trial.

{¶4} On April 12, 2007, Sherman Laney, who is employed by North Canton Transfer as a truck driver, was delivering gasoline to the BP Station at 38<sup>th</sup> Street and Cleveland Avenue a little before 3:00 a.m. Laney had just hooked up the hoses from his tanker truck and inserted one end of the hoses into holes leading to the underground gasoline storage tanks. After hooking up the hoses to the no lead gasoline tanks, Laney was walking over to the mid grade gasoline tanks when he noticed appellant running around the front of the truck towards him. According to Laney, appellant "went right to the no lead, went to his knees, and stuck his hand right in between the fittings and inside the well and acted like he was trying to do something there." Transcript Volume 2 at 11.

{¶5} Laney testified that he then charged appellant and told him to get out of there, and that appellant then said that he wanted a smoke. The following is an excerpt from Laney's testimony at trial:

{¶6} "Then he lit a lighter and went for the no lead. Uh, he got real close, too close. Uh, you're not even allowed to smoke within 25 feet of us cause the danger of a fire from the fumes. He got too close. I got - - I pushed him out of the way again. Then he just wouldn't go away; he just kept coming. I pushed him, worked him to the end of the truck, and uh, I realized I got enough space between him and I realized I had my phone in my pocket so I brought out my phone and dialed 911. I had it on the green button; I told him you better leave now. He didn't want to leave, and he told me he would blow us up, blow - - he'd blow me up and him too cause he didn't care, he was crazy.

{¶7} "Uh, and then I just said, Well, that's it, I pressed - - dialed 911. I pressed the green button on my phone. Then he said, Ah, you'll be dead before they answer it." Transcript Volume 2 at 12.

{¶8} Laney testified that appellant came at him one more time and that he backed off. Appellant then "just smirked" at Laney and walked away. Transcript Volume 2 at 13.

{¶9} Laney called 911, provided a description of appellant and advised the dispatcher of the direction that appellant was walking. The Stark County Sheriff was dispatched and found appellant, who appeared to be intoxicated and whose speech was slurred, walking down Cleveland Avenue. Laney identified appellant as the person who had threatened him and filled out a statement.

{¶10} On cross-examination, Laney testified that he was unable to say whether appellant had anything in his hand when appellant went to the fill tank.

{¶11} Deputy Robert First of the Stark County Sheriff's Office testified that he received a call regarding the BP at 38<sup>th</sup> and Cleveland Avenue N.W. Deputy First testified that after another deputy located appellant walking down Cleveland Avenue, Deputy First put Laney in his cruiser and drove him to where appellant was located. Laney then identified appellant. Deputy First testified that when appellant was patted down, three lighters were found in his right front pocket, but no cigarettes were found. According to Deputy First, "as we were placing [appellant] back in the car, the only statement he made to us was that alls he wanted was a cigarette, he didn't threaten anybody." Transcript Volume 2 at 52.

{¶12} The next witness to testify was Dan Wright, the safety director for North Canton Transfer, who outlined the dangers associated with delivering gasoline. Wright testified that if there was an explosion at the BP station, the people in the general vicinity would be burned to death and a half mile would have to be evacuated. According to Wright, the truck that Laney was driving that night was worth approximately \$120,000.00 and the truck would be destroyed in an explosion. Wright further testified that anything within 500 feet of the BP station would be damaged.

{¶13} Appellant then took the stand in his own defense. He testified that he was on his way to McDonald's on April 12, 2007 and that he walked over to Laney and asked him for a cigarette. He further testified that he left after Laney told him to do so. Appellant denied that he ever struck a lighter and denied ever threatening to kill Laney or to kill himself. He further stated that he did not have cigarettes on him.

{¶14} At the conclusion of the evidence and the end of deliberations, the jury, on July 6, 2007, found appellant guilty of all of the charges. The jury further found that the value of the property involved was more than \$100,000.00. Pursuant to a Judgment Entry filed on July 13, 2007, appellant was sentenced to an aggregate prison sentence of five (5) years.

{¶15} Appellant now raises the following assignment of error on appeal:

{¶16} "WHETHER THE JURY VERDICT FINDING APPELLANT GUILTY OF FELONIOUS ASSAULT, ATTEMPTED AGGRAVATED ARSON AND ATTEMPTED ARSON WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

I

{¶17} Appellant, in his sole assignment of error, argues that his convictions for felonious assault, attempted aggravated arson and attempted arson are against the manifest weight of the evidence. We disagree.

{¶18} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the 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 judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. Because the

trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, syllabus 1.

{¶19} As is stated above, appellant was convicted of one count each of felonious assault, attempted aggravated arson and attempted arson. R.C. 2903.11, the felonious assault statute, states, in relevant part, as follows: "(A) No person shall knowingly do either of the following:... (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶20} R.C. 2909.02 defines the crime of aggravated arson. Under R.C.2909.02(A)(1) "No person, by means of fire or explosion, shall knowingly do any of the following(1) Create a substantial risk of serious physical harm to any person other than the offender \* \* \* "

{¶21} R.C. 2909.03, the arson statute, states, in relevant part, as follows:

{¶22} "(A) No person, by means of fire or explosion, shall knowingly do any of the following: (1) Cause, or create a substantial risk of, physical harm to any property of another without the other person's consent...."

{¶23} Pursuant to R.C. 2901.22(A) "[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."

{¶24} Finally, R.C. 2923.02(A) provides a definition of attempt: "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the

commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.”

{¶25} Appellant, in his brief, contends that Laney's version of events is not credible. Appellant argues that the officers who apprehended appellant did not observe any behavior that would indicate that appellant was attempting to harm himself or others. Appellant also points out that Laney testified that using a cell phone within twenty five feet of a gas pump could cause an explosion and notes that there was no explosion even though appellant allegedly lit his lighter within twelve inches from the pump. Appellant, in his brief, further argues, in relevant part, as follows:

{¶26} “Further, Mr. Wright testified with respect to the inherent dangers that it was very unlikely that there would be an explosion at the point in time that Laney described what Appellant was alleged to have done. As such, without an explosion, or the substantial risk of one, there would be no felonious assault to Laney, no substantial risk of damage to an individual per the arson statute, nor risk to any property in excess of \$500.00 or more.”

{¶27} However, upon our review of the record, we cannot say that the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. As is set forth above, Laney testified that appellant lit a lighter and got close to the no lead gasoline tank and hose and that appellant threatened to blow him up. Laney further testified that appellant stated that Laney would be dead before his 911 call was answered. The jury, as trier of fact, was in the best position to assess Laney's credibility and clearly found him to be more credible than appellant. Moreover, there was testimony adduced at trial that if appellant had been

successful and an explosion had occurred, the results would be catastrophic to both people living nearby and to property. As is stated above, Wright testified that anyone in close vicinity would be burned to death and also testified that the heat from an explosion would burn anything within 500 feet. While appellant did not cause physical harm to anyone, it is the attempt to cause physical harm that is relevant. See *State v. Johnson*, Cuyahoga App. No. 81814, 2003-Ohio-4180, reversed on other grounds (finding that merely because ineptly made firebomb did not result in fire or explosion or damage did not bar conviction for arson to property). From the evidence adduced at trial, we cannot say that the jury lost its way in finding that appellant attempted to cause physical harm.

{¶28} In short, upon our review of the entire record, we cannot say that the trier of fact clearly lost its way and created a manifest miscarriage of justice in convicting appellant of felonious assault, attempted aggravated arson and attempted arson. Based on the foregoing, we find that appellant's convictions for felonious assault, attempted aggravated arson and attempted arson were not against the manifest weight of the evidence.

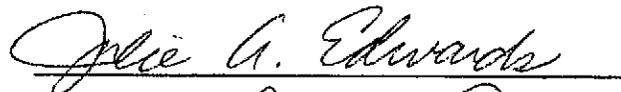
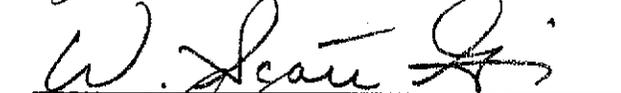
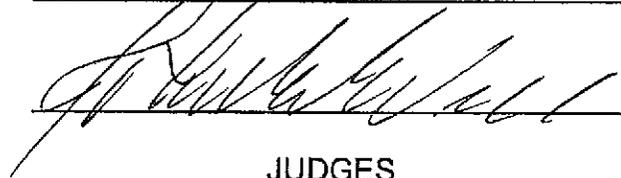
{¶29} Appellant's sole assignment of error is, therefore, overruled.

{¶30} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Edwards, J.

Gwin, P.J. and

Wise, J. concur

  
\_\_\_\_\_  
  
\_\_\_\_\_  
  
\_\_\_\_\_

JUDGES

JAE/d1020