ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	CASE NO. 10-0153
Appellee,	:	On Appeal from the Montgomery County Court of Appeals, Second Appellate District
-Vs-	:	
	:	Court of Appeals Case No. 23036
JESSE E. PERKINS,	:	
Appellant,	:	
	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JESSE PERKINS

JESSE PERKINS
Inmate Number 588-767
London Correctional Institution
P.O. Box 69
London, Ohio 43140

Appellant, Pro Se

MATHIAS H. HECK, JR.
Prosecuting Attorney's

R. LYNN NOTHSTINE
(Atty. No. 0061560)
Assistant Prosecuting Attorney
Montgomery County Prosecutor's Office
301 West Third Street
Montgomery County Courts Building
P.O. Box 972
Dayton, Ohio 45422

Counsel for Appellee

FILED
JAN 26 2010
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page No.

STATEMENT OF THE SUBSTANTIAL CONTITUTIONAL QUESTION 1-2

STATEMENT OF THE CASE AND FACTS PROCEDURAL POSTTURE 2-8

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW 8

FIRST PROPOSITION OF LAW: THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT'S COMMITTED THE CHARGED OFFENSES, AND THE JURY'S GUILTY VERDICT AMOUNT TO A MANIFEST MISCARRIAGE OF JUSTICE 8-11

CONCLUSION 11

CERTIFICATE OF SERVICE 11

APPENDIX

State of Ohio v. Jesse E. Perkins, Montgomery County Court of Appeals Case No. 23036, Decision and Journal Entry (December 18, 2009) A-1

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

Jesse E. Perkins (hereinafter "Appellant") ask this Court to accept jurisdiction regarding the propositions of law addressing a violation of his due process and equal protection rights under XIV Amendment to the United States Constitution and Article I, Sections 2 & 16 of the Ohio Constitution, when Montgomery County Common Pleas Court allowed his convictions on multiple counts of felonious assault at stand when: (1) the State failed to provide sufficient evidence to prove beyond a reasonable doubt at trial that he committed the offenses; and (2) the jury's guilty verdict amounts to a manifest miscarriage of justice.

This case is of public or great general interest and raises the substantial constitutional question on whether the evidence presented at trial was insufficient to sustain convictions on multiple counts of felonious assault and against the manifest weight of the evidence; whether the Montgomery Common Pleas Court should have entered judgment of acquittal pursuant to Crim.R. 29 in Appellant's favor based on insufficient evidence presented in the State's case-in-chief that failed to prove Appellant's guilt beyond a reasonable doubt.

The decision by the Second District Court of Appeals in State of Ohio v. Jesse E. Perkins, 2009 WL 4893290 (Ohio App. 2nd Dist.), 2009-Ohio-6696, should be accepted for review due to the violation of Appellant's constitutional rights under due process and equal protection of the law. A cursory review of the evidence presented in this shows there was no proof of evidence to support a finding that Appellant struck one victim named (Volkerding) in the head with a pool stick, that he broke a beer bottle over the head of another victim named (Darding), and that he then used the broken bottle to cut the face of another victim named (Wiley), all while being committed under one continuing course of criminal conduct during bar fight.

The implication of the decision by Second District Court of Appeals affect every defendant's constitutional rights to have the State present sufficient evidence to the jury that raise to a level of guilty beyond a reasonable doubt at trial. This Court needs to accept jurisdiction over this criminal case, and adjudicate the legal issues on the merits to resolve and clarify the questions presented in this case for clarification in all appellate courts in Ohio.

STATEMENT OF THE CASE AND FACTS PROCEDURAL POSTURE

I. Procedural History:

On May 14, 2008, in Case No. 2008-CR-1411, Appellant Jesse E. Perkins (hereinafter "Appellant") was indicted by a Montgomery County Grand Jury on: Count 1, Felonious Assault-resulting in serious physical harm (toward victim Adam Volkerding), a felony of the second degree; Count II, Felonious Assault, with a deadly weapon (toward victim Adam Volkerding), a felony of the second degree; Count III, Felonious Assault, resulting in serious physical harm (toward Timothy Wiley), a felony of the second degree; and Count V, Felonious Assault, with a deadly weapon (toward Kurt Darding), a felony of the second degree, all in violation of Sections 2903.11(A)(1) or Sections 2903.11(A)(2) of the Ohio Revised Code. Furthermore, all of the above charges had Specifications attached to them stating that the Appellant in question was considered a 'Repeat Violent Offender' pursuant to Section 2941.149 and 2929.14 of the Ohio Revised Code, as the Appellant was previously convicted of or pleaded guilty to Felonious Assault on January 14, 1997. The Appellant's counsel of record for the above mentioned charges was H. Charles Wagner.

Appellant plea not guilty to all counts, and the court scheduled the matter for a jury trial. A jury heard the case between August 14, 2008. The Defense counsel stipulated that the victims in case suffered "serious physical harm." The jury returned guilty verdicts on all counts and the court made finding that the Appellant is a Repeat Violent Offender pursuant to Section 2941.149 of the Ohio

Revised Code in the specifications attached to all of the counts in the indictment.

The court sentenced the Appellant to eight years in prison on each count with each count running concurrent; no additional time was given to the Appellant for the repeat violent offender specifications, for a combined total of eight years in prison. Furthermore, the court ordered that the Appellant pay complete restitution in the amount of $14,000 to one of the victims in the case. On March 3, 2009, the Appellant filed a pro se Motion for Reconsideration which was overruled om March 23, 2009. The Appellant filed a timely appeal, and this matter is now before this Court.

II. Statement of the Facts:

On March 29, 2008, at a little after midnight, officer Morgan Rodriguezs and officer Leal of the City of Dayton Police Department received a call from dispatch stating that there was a fight at Belmont Billiards located at 820 Watervillet Ave., Dayton, Ohio. *See Trial Transcript pp. 259-261.* When the officers arrived, it was alleged "Chaos" at the bar; there were injuries that were sustained by bar patrons and the remnants of pepper spray were in the air throughout the bar. *Id at 261-262.* Some of the witness later described the events that transpired as being a brawl that involved at least fifteen different people and further stated that random individuals were throwing bottles and pool balls for no apparent reason. *Id. at 108, 119, 141, 154, 162, 199.*

The officers attempted to obtain statements from a few witnesses and some of the victims of the assault. *Trial Transcript p. 262.* One of the injured patrons who suffered a cut on the stomach, Kevin Stang, spoke to one of the officers and stated that he was OK and that he did not want to press charges; Mr. Stang then subsequently left. *Id, at 262.* Other patrons that were injured included Timothy Wiley, Adam Volkerding, and Kurt Darding. Medics were called due to the seriousness of one of the injuries: namely, an intoxicated victim by the name of Timothy Wiley who suffered a cut on his face. *Id at 262, 272.* The officers continued to talk to victims and witnesses of the fight, but no one had any description or suspect information. *Id at 264-265.* Most of the patrons that were spoken to

appeared to be intoxicated and were freely leaving the scene of the assault. *Id. At 271-273.* Furthermore, no evidence was collected. *Id at 269.* One of the officers who was at the scene even stated that part of the investigation was "messed up" and that a better and more through investigation should have taken place. *Id. at 272, 273.*

One of the officers at the scene received a call from dispatch stating that a reported victim from the brawl at Belmont Billiards, Adam Volkerding, was being treated at the local VA Center, so the officers subsequently went to the VA Center to speak to said victim. *Trial Transcript pp. 263-266.* The victim, Adam Volkerding, was reportedly "highly intoxicated" upon arrival of the officers. *Id . At 266.* He reported that someone had hit in the face with a pool cue but was unsure as to who it was. *Id at 265.*

Adam Volkerding later testified at trial that earlier in the evening of March 29, 2009, he was drinking at Belmont Billiards with friends Brittany Morris, Nathen Wiley, victim Timothy Wiley and possibly a few other individuals, and that they were celebrating Timothy Wiley's birthday. *Trial Transcript pp. 85-86.* Adam Volkerding stated that he ran into an old friend by the name of Travis Spicer and began conversing with him. *Id at 86.* The conversation with Mr. Spicer began to get a little heated and they began to argue which led to some shoving. *Id. At 88, 95, 98-99.* Mr. Volkerding stated that he does not remember what occurred after that other than him having a few more drinks. *Id. At 88.* Mr. Volkerding testified that he suffered a fractured skull, a broken nose and that he had lacerations to the face. *Id at 90.* Adam Volkerding stated that he was highly intoxicated throughout the evening and incident. *Id. at 94.*

A friend of the victims in the above captioned case, Matt Ficklin, who was also drinking with them at Belmont Billiards on March 29, 2008, stated that he was able to see who hit Adam Volkerding one of the times that Mr. Volkerding was hit. *Trial Transcript pp. 112-114.* Mr. Ficklin also admitted to drinking at least five beer and a shot within two hours the night the incident occurred. *Id. at 105.*

Although he did not make a statement or speak with the officers at the time of the incident, he was interviewed by an officer three days later where he gave a description of the individual he saw hit Mr. Volkerding with the pool stick. *Id at 115-118.* Mr. Ficklin stated that the individual was around 5'9-5'10 in height and weighed about 170-190 pounds. Id. He also stated that the suspect had blond short hair and wore a long sleeved white shirt. Id. It should be noted that the Appellant is about 5'3, weighs 105 pounds and has brown hair. *Id. at 215.*

Mr. Ficklin participated in a photo spread on May 20, 2008, over a month and a half after the incident at Belmont Billiards took place in an attempt to identify the individual who he saw hit Mr. Volkerding with a pool strick on March 29, 2008. *Trial Transcript pp. 112-118, 121.* Mr. Ficklin picked the Appellant out of the photo spread despite that fact that the appearance of the Appellant significantly conflicts with Mr. Ficklin's prior description of the assailant who he saw hit Mr. Volkerding with a pool stick a few days after the incident occurred. *Id. At 112-118, 121.*

Another victim in the above captioned case, Kurt Darding, who was also drinking and celebrating with his friends and fellow victims at Belmont Billiards on March 29, 2008, also stated that he was able to see who hit Adam Volkerding one of the time, that Mr. Volkerding was hit. *Trial Transcript pp. 112-114.* Furthermore, he stated that the same individual who hit Mr. Volkerding in the face with a pool stick also hit him in the head with a beer bottle at one point during the night. *Id at 156-157, 159-160.*

Mr. Darding stated that after the Adam Volkerding initially got hit in the face with a pool stick, he noticed that an individual was throwing pool balls with his right hand toward Mr. Darding's general direction. *Trial Transcript pp. 156-157-160.* Mr. Darding stated that he charged the individual throwing the pools balls when said individual stopped throwing pool balls and suddenly hit Mr. Darding in the back of the head with a beer bottle causing a minor lump. *Id.* In addition to throwing pool balls with his right hand. Mr. Darding stated that the assailant also used his right hand to hit Mr.

Darding in the back of the head. *Id. At 160, 190.*

Mr. Darding's initial description of the suspect to the officer was that the assailant was 5'8 in height and weighed 150-160 pounds. Id at 164, 190. Mr. Darding also admitted to drinking around four to five drinks that night at two different bars. *Id at 149, 173-174.*

A few days later, someone informed Kurt Darding to look at the Appellant's myspace page as a possible suspect who may have been involved in the brawl at Belmont Billiards. *Trial Transcript pp. 165-166.* After viewing the myspace page. Kurt Darding phoned the police and was given a photo spread by a Detective Martinez. *Id. At 167-169.* Kurt Darding chose the photo that resembled the individual whose myspace page he had viewed earlier, Appellant Jess Perkins, despite that fact that the appearance of the Appellant significantly conflicts with Mr. Darding's prior description of the individual who he saw hit Mr. Volkerding with a pool stick a after the incident occurred. *Id. At 164. 167-169, 190.*

The victim that was the most seriously injured, Timothy Wiley, was also intoxicated and admitted to drinking several drinks that night at two different bars. *Trial Transcript pp. 216.* Mr. Wiley stated that he was celebrating his birthday with his friends and that he had arrived at Belmont Billiards after leaving another bar. *Id. at 197-199.* While at the bar, he stated that he heard some yelling and turned around to see his friend Adam Volkerding get hit in the face with a pool stick and then saw other people subsequently beat on his friend when Mr. Volkerding fell to the ground. *Id. At 201, 202, 217.* Mr. Wiley went over to the pile of people fighting and stated to assist his friend Adam Volkerding when he was maced in the face by the bartender on duty at Belmont Billiards. *Id. At 204.* Mr. Wiley stated that he became disoriented after he got maced. *Id. at 216.* Once the mace/pepper spray was discharged, Mr. Wiley stated that he retreated to a less hostile area of the bar. *Id. at 204, 205.*

Mr. Wiley stated that he heard another ruckus and turned around to see his friend Kurt Darding fighting with an unknown individual, when as assailant confronted Mr. Wiley and punched

him in the face with a broken beer bottle. *Trial Transcript pp. 204, 206-207.* Mr. Wiley stated that suspect who hit him in the face also used his right hand. *Id. at 207.* After hitting Mr. Wiley in the face with a beer bottle, Mr. Wiley stated that the suspect ran out of the bar. *Id. at 208-209.* Shortly thereafter, Mr. Wiley made an oral statement to one of the officers and then was taken to the hospital to treat his injuries. *Id. at 209-210.*

Mr. Wiley told the reporting officer that the assailant who hit him with the bottle was a white male, in the range twenty-three to twenty-five years old, 6'0 to 6'1 in height, weighed roughly 150 to 160 pounds and that the assailant did the attacking with his right hand. *Trial Transcript pp. 214-216.* According to the police report and subsequent testimony. Appellant is actually thirty years old, 5'3 to 5'4 in height, weighs 105-110 pounds, and left handed. Furthermore, a few days after the attack, Mr. Wiley was shown a picture of the Appellant in a photo spread and did not pick him as the assailant. Id at 214-215. At trial, Mr. Wiley identified the Appellant as the assailant, despite the fact that the appearance of the Appellant significantly conflicts with Mr. Wiley's prior description of the assailant and the photo spread lineup that Mr. Wiley previously participated in. *Id. at 213-216.*

Another injured patron who was at Elsa's and Belmont Billiards with Mr. Darding and Mr. Wiley, Kevin Stang, testified that the same assailant who hit Mr. Darding in the head with a beer bottle also took a swing at Mr. Stang and then subsequently assaulted Timothy Wiley. *Trial Transcript pp. 252-253, 262.* When asked at trial whether the assailant who assaulted Kurt Darding, Timothy Wiley and Mr. Stang was currently in the courtroom or if he had an idea as to who this assailant was, Mr. Stang stated that, "I honestly don't think I can remember the person's appearance enough to say whether I do or do not." *Id. At 254.*

In addition to the frequent and gross inconsistencies by the victims and witnesses for the State regarding the assailant's description, ten other witnesses who were at the bar that night and had witnessed the fights testified that the Appellant was not involved in the various fights that occurred in

the bar that evening and even stated that he was wearing clothing that did not match the assailants clothing. *Trial Transcript pp. 297 through 531.*

In support of its position on these issues, the appellant present the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

FIRST PROPOSITION OF LAW: THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT'S COMMITTED THE CHARGED OFFENSES, AND THE JURY'S GUILTY VERDICT AMOUNT TO A MANIFEST MISCARRIAGE OF JUSTICE.

Appellant argues that his due process rights and equal protections rights under XIV Amendment to the United State Constitution and Article I, Sections 2 & 16 of the Ohio Constitution was violated when the State did not present sufficient evidence at trial to convict him on two counts of felonious assault that resulted in serious physical harm and three counts of felonious assault with a deadly weapon. Also, Appellant argues the jury verdict of guilty is against the manifest weight of the evidence.

During trial the defense presented the testimony from ten different witnesses, all of the witness for the defense testified that they did not observe Appellant involved in the fighting at the bar. Appellant point out that the police officers responding to the scene of the fight indicated they performed a "shoddy investigation."

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 prove 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.*

When reviewing a claim that a judgment is against the manifest weight of the evidence, "[t]he

court, reviewing the entire record, weight the evidence and all reasonable inferences, considers the credibility of witness 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).*

The Appellant argues the State failed to prove that he committed the offenses with regard to either the sufficiency-of-the evidence or the manifest-weight claims. Appellant presents that all of the so-call eyewitnesses who identified him as the assailant admitted at trial that they had consume alcohol prior to the fight.

Appellant contends that none of the initial descriptions were correct because the witnesses described him as being taller and heavier then his actual weight and actual height at 105 pounds and 5 feet 3 inches, thus, making it basically impossible for just him alone to physical assault all three victims that are much heavier and taller then him.

The evidence insufficient and the jury lost their way when finding the Appellant guilty of five counts of felonious assault, felonies of the second degree. It should be very clearly from reviewing the records of the case that evidence was insufficient to prove Appellant guilt beyond a reasonable doubt mainly due to the police officers who arrived at the scene crime failure to adequately investigate the scene of the crime. The investigating officer indicated during trial that he had been relatively new at his job, and that, in hindsight could have performed a more complete investigation at the scene, there is ample evidence to support a finding that the initial investigation may have resulted in the wrongful conviction of Appellant as the culprit of the assault on all three victims.

The identifications made by the eyewitnesses are not creditable or believable. First, all the eyewitnesses who identified Appellant as the assailant admitted that they had been consuming alcohol prior to the fight. Second, none of the eyewitnesses initial descriptions of the Appellant as the assailant was correct because the witnesses described Appellant as much taller and much heavier than his actual weight of one hundred and five pounds ("105") and his actual height of about five feet three ("5'3") inches.

Matthew Ficklin a eyewitness stated to the police officer that the individual assailant who committed the assaults was around 5'9-5'10 in height and weighed about 170-190 pounds and had blond hair and was wearing a long-sleeved white shirt. *See, Trial Transcript pp. 112-215.*

Kurt Darding another eyewitness initially informed the police officer that the assailant was approximately 5'8 inches in height and weighed around 150-160 pounds. *See, Trial Transcript pp. 156-190.*

Timothy Wiley's who suffered a cut in his face initial statement to the reporting officer indicated that the attacker was about 6'0 in height and weighed approximately 150 pounds. *See, Trial Transcript pp. 214-216.*

According to the police report and testimony within the trial transcripts, the Appellant was wearing a black 'hoodie' and a hat the evening that the fight occurred, Appellant is actually thirty years old, 5'3 to 5'4 and weighed about 105-110 pounds and left handed. In addition to these conflicts regarding the assailant's initial description versus an actual description of the Appellant, all of the State's witnesses were unable to identify the Appellant in the initial photo spread, or in the alternative, were only able to identify him after looking at the Appellant's myspace page.

Additionally, even at trial some of the victims were still unable to testify as to whether the Appellant was the individual that had assaulted them or their friends at the bar. Finally, there were also ten defense witnesses who testified at trial that Appellant was not involved in the bar brawl

which occurred on March 29, 2008, at the Belmont Billiards.

Appellant argues the evidence presented by the State does not support a finding of guilt beyond a reasonable doubt of felonious assault. All testimony by the State's witnesses identified the Appellant as the assailant totally conflicts with their first statements made to the police office shortly after the fight took place at the Belmont Billiards. Clearly, findings of assault lacks reason. The manifest weight of the evidence does not support Appellant's assault conviction. There is no evidence in this case to support a finding that Appellant was the assailant who actual struck Volkerding in the head with a pool stick, that broke a beer bottle over Darding's head, and then used the broken bottle to cut Wiley's face.

Therefore, Appellant's conviction and sentence should be reversed and remand.

CONCLUSION

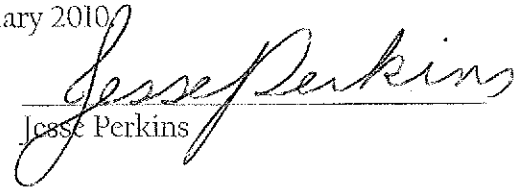
For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The Appellant requests that this court accept jurisdiction in this case so that the important issue presented will be review on the merits.

Respectfully submitted,

Jesse Perkins, Inmate #588-767
London Correctional Institution
P.O. Box 69
London, Ohio 43140
Appellant, Pro Se

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the forgoing **MEMORANDUM IN SUPPORT OF JURISDICTION** was sent by ordinary U.S. Mail service, postage prepaid, on R. Lynn Nothstine, Assistant Prosecuting Attorney, Montgomery County Prosecutor's Office, at 301 West Third Street, P.O. Box 972 on this 22 day of January 2010.



Jesse Perkins

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

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

. . . . . .

OPINION

Rendered on the 18th day of December, 2009.

. . . . . .

MATHIAS H. HECK, JR., by R. LYNN NOTHSTINE, Atty. Reg. #0061560, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

CHRISTOPHER A. DEAL, Atty. Reg. #0078510, 120 West Second Street, Suite 400, Dayton, Ohio 45402
Attorney for Defendant-Appellant

. . . . . .

FAIN, J.

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.

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.

Accordingly, the judgment of the trial court is Affirmed.

I

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.

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).

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.

From his conviction and sentence, Perkins appeals.

II

Perkins's sole assignment of error states as follows:

"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."

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.

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.

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).

Felonious Assault is proscribed in R.C. 2903.11, which provides in pertinent part:

"(A) No person shall knowingly do either of the following:

"(1) Cause serious physical harm to another or to another's unborn;

"(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

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.

"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).

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

"(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

"(b) Any physical harm that carries a substantial risk of death;

"(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

"(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

"(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."

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.

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.

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.

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.

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.[1]

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 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.

---

[1] 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.

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.

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.

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

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

. . . . . .

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

Copies mailed to:

Mathias H. Heck
R. Lynn Nothstine
Christopher A. Deal
Hon. Mary K. Huffman