

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 10AP-526
Plaintiff-Appellee,	:	(C.P.C. No. 08CR-11-8390)
v.	:	
	:	(REGULAR CALENDAR)
Donald H. Stewart, II,	:	
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on February 3, 2011

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*,
for appellee.

Stephen Dehnart, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Donald H. Stewart, II, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas in which the court found him guilty, pursuant to a jury trial, of felonious assault in violation of R.C. 2903.11, a second-degree felony.

{¶2} On September 25, 2008, appellant borrowed a car belonging to Tonya Bozeman, his girlfriend. Appellant returned the car to Bozeman between 3:30 and 4:00 p.m. Bozeman was upset that appellant returned the car late and with little gasoline. Bozeman's daughter, Tiffany Smith, drove Bozeman to work at about 4:35 p.m. Before

leaving, Bozeman asked her neighbor, Shannon Bailey, to watch her car while she was gone in case appellant came back to get anything from it. Bailey lived with his girlfriend, Nataya Reeder, and her teenage son, Joseph Reeder.

{¶3} At about 8:30 p.m., Bailey saw appellant inside Bozeman's vehicle, so he approached appellant and told him to get out of the car. An argument ensued, and Bailey said he was going to call the police. Bailey used a cell phone to call 911, and, while he was talking to the operator, appellant struck Bailey in the face with a ceramic coffee mug causing significant injuries. Appellant left the scene but was eventually arrested.

{¶4} On November 25, 2008, appellant was indicted on one count of felonious assault. On April 12, 2010, a jury trial commenced. On April 19, 2010, the jury found appellant guilty of felonious assault as alleged in the indictment. On May 4, 2010, the trial court issued a judgment entry finding appellant guilty and sentencing him to a five-year prison term. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

[I.] The trial court erred by failing to instruct the jury on the lesser included offense of Aggravated Assault where the evidence warranted such an instruction.

[II.] The evidence was legally insufficient to support appellant's conviction for Felonious Assault.

[III.] The Court erroneously overruled appellant's motions for acquittal pursuant to Criminal Rule 29.

[IV.] Appellant's conviction was against the manifest weight of the evidence.

{¶5} Appellant argues in his first assignment of error that the trial court erred when it failed to instruct the jury on the lesser-included offense of aggravated assault.

Felonious assault is defined 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.

{¶6} Aggravated assault is defined in R.C. 2903.12, which provides, in pertinent part:

(A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly:

(1) Cause serious physical harm to another.

{¶7} We first note that, although appellant claims the offense of aggravated assault is a lesser-included offense of the offense of felonious assault, the offense of aggravated assault is an inferior degree of felonious assault because its elements are identical to or contained within the offense of felonious assault, coupled with the additional presence of one or both mitigating circumstances of sudden passion or a sudden fit of rage brought on by serious provocation occasioned by the victim. See *State v. Logan*, 10th Dist. No. 08AP-881, 2009-Ohio-2899, fn. 1, citing *State v. Deem* (1988), 40 Ohio St.3d 205. In other words, aggravated assault is the same conduct as felonious assault but its nature and penalty are mitigated by provocation. See, e.g., *State v. Scott* (Mar. 27, 2001), 10th Dist. No. 00AP-868.

{¶8} Although aggravated assault is an inferior offense of felonious assault, rather than a lesser-included offense, the Supreme Court of Ohio held in *Deem* that, in a trial for felonious assault, where the defendant presents sufficient evidence of serious provocation, an instruction on aggravated assault must be given. *Deem* at 211. The test for whether the trial court should instruct the jury on aggravated assault when the defendant is charged with felonious assault is the same test applied when an instruction on a lesser-included offense is sought. *State v. McClendon*, 2d Dist. No. 23558, 2010-Ohio-4757, ¶18, citing *State v. Shane* (1992), 63 Ohio St.3d 630. The instruction must be given when the evidence presented at trial would reasonably support both an acquittal on the charged crime of felonious assault and a conviction for aggravated assault. *Id.*, citing *State v. Young*, 2d Dist. No. 19328, 2003-Ohio-1254. Thus, a jury instruction should be given for an inferior offense, if under any reasonable view of the evidence, and when all of the evidence is construed in a light most favorable to the defendant, a reasonable jury could find that the defendant had established by a preponderance of the evidence the existence of one or both of the mitigating circumstances. *State v. Rhodes* (1992), 63 Ohio St.3d 613, 617-18.

{¶9} When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Clark*, 71 Ohio St.3d 466, 470, 1994-Ohio-43. When a defendant requests an instruction on an inferior degree offense, the

burden is on the defendant to persuade the fact finder of the mitigating elements of the offense. See *State v. Hill* (1996), 108 Ohio App.3d 279, 284; *Rhodes* at syllabus.

{¶10} There are two prongs to an analysis of whether the provocation was reasonably sufficient to prompt sudden passion or a sudden fit of rage: an objective prong and a subjective prong. *Shane* at 634. For the objective standard, the alleged provocation must be reasonably sufficient to bring on a sudden fit of rage. *Shane* at 634. The subjective standard concerns whether the defendant in the particular case actually was under the influence of sudden passion or in a sudden fit of rage. *State v. Mack* (1998), 82 Ohio St.3d 198, 201, citing *Shane* at 634-35. The emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time are only considered during this subjective stage of the analysis. *Shane* citing *Deem*.

{¶11} In examining whether provocation is reasonably sufficient to bring on a sudden fit of passion or fit of rage, it must be sufficient to arouse the passions of an ordinary person beyond the power of his or her control. *Shane* at 635. Words alone will not constitute reasonably sufficient provocation in most situations and fear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage. *Id.* at 634-35; *Mack* at 198.

{¶12} Upon review, we find no evidence showing provocation that was reasonably sufficient to bring on a sudden fit of rage or that appellant actually acted with passion or rage. Appellant testified that, when Bailey was approaching him, Bailey said "[W]hat the fuck you doing?" and then yelled at him to "Get out the damn car." Bailey testified he slightly tapped appellant's shoulder at some point, but it is not clear when he touched him, and appellant never testified that Bailey touched him. Bailey denied he threatened

appellant and said he did not run at the car or scream at appellant. Bailey then retrieved a cell phone and told appellant he was calling the police. Appellant testified that, while Bailey and he were arguing, he continued gathering his belongings from the back seat, and he saw a shadow on the other side of the car. Appellant said the shadow was Bailey's "cousin" (apparently referring to Joseph Reeder), who was walking around the other side of the car. He then felt "pressure" and "sharp pain" and saw "blind spots." He felt like the car door was pressing across his shoulder and chin. Bailey denied he slammed the car door against appellant. Appellant repeatedly testified that he never felt Bailey was a threat until he felt the car door pressed against his body, but he felt like the "cousin" on the other side of the car was the threat. The pain level on his shoulder was a five out of ten and the pain on his chin was a seven out of ten. Appellant testified he went blind and basically "blacked out," and then he "reacted" to the car door being slammed against him and what he "perceived" to be someone circling around the vehicle. He said he reacted but did not know what he was reacting to at the time. He had a mug in his hand because he was going to place it in the front of the car. To protect himself, he turned with the mug in his hand and swung it.

{¶13} Although appellant testified that he was pinned between the door and the car when Bailey confronted him, even if believed, there was no further indication that this circumstance would have aroused the passions of an ordinary person beyond the power of his or her control. What appellant basically describes in his testimony is he acted out of pain and fear. As indicated above, fear is different than passion and rage. In addition, appellant testified he acted in self-defense to protect himself when he swung the mug at Bailey. Evidence supporting the privilege of self-defense, i.e., that the defendant feared

for his own personal safety, does not constitute sudden passion or fit of rage. See *State v. Tantarelli* (May 23, 1995), 10th Dist. No. 94APA11-1618 (testimony that defendant was dazed, confused, and scared was insufficient to show sudden passion or fit of rage). As for the pain appellant felt, appellant's testimony regarding the level of pain does not support a finding that the pain was so extreme or excruciating so as to arouse the passions of an ordinary person beyond the power of his or her control. See, e.g., *State v. McGranahan*, 1st Dist. No. C-940374 (sufficient evidence of provocation creating a sudden fit of passion or rage to entitle defendant to a jury instruction on aggravated assault when defendant testified the victim grabbed him by the testicles and was inflicting excruciating pain on him). Thus, we find the alleged provocation was not reasonably sufficient to bring on a sudden fit of rage.

{¶14} Likewise, as to whether appellant subjectively acted with sudden passion and rage, we also find there was no evidence of such. Appellant never testified that he swung the mug at Bailey because of passion or rage. Even if appellant's version of the incident was to be believed, he was acting in self-defense based upon pain and fear. Appellant also stated that, at the time he struck Bailey, he "blacked out" and "reacted." Neither "blacking out" due to pain or "reacting" to pain or fear necessarily imply sudden rage or passion. Without any further indications in the record, we cannot find a reasonable jury could find that appellant established by a preponderance of the evidence the existence of sudden rage or passion. Therefore, we find the trial court did not abuse its discretion when it failed to instruct the jury on aggravated assault as a lesser inferior offense of felonious assault. Appellant's first assignment of error is overruled.

{¶15} We will address appellant's second, third, and fourth assignments of error together. In these assignments of error, appellant argues that his judgment was based upon insufficient evidence and was against the manifest weight of the evidence. In reviewing a sufficiency of the evidence claim, the relevant inquiry is whether any rational fact finder, viewing the evidence in a light most favorable to the state, could have found all of the essential elements of the crime proven beyond a reasonable doubt. *State v. Jones*, 90 Ohio St.3d 403, 417, 2000-Ohio-187, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, and *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. On review for sufficiency, courts do not assess whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Id.* at 390. In determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789. Consequently, a verdict will not be disturbed based upon insufficient evidence unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484; *Jenks* at 273. Appellant here also contends that the trial court erred in denying his Crim.R. 29(A) motion for an acquittal, which is the same as a claim that the evidence was insufficient to support the conviction. *State v. Ritze*, 154 Ohio App.3d 133, 2003-Ohio-4580, ¶12.

{¶16} This court's function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *Thompkins* at 387. In order to undertake this review, we must sit as a "thirteenth juror" and review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. *Id.*, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. If we find that the fact finder clearly lost its way, we must reverse the conviction and order a new trial. *Id.* On the other hand, we will not reverse a conviction so long as the State of Ohio, plaintiff-appellee, presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense were established beyond a reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193-94, 1998-Ohio-533.

{¶17} In addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. See *Martin* at 175. However, in conducting our review, we are guided by the presumption that the jury, or the trial court in a bench trial, "is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Thus, a reviewing court must defer to the factual findings of the jury or judge in a bench trial regarding the credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Concerning the issue of assessing witness credibility, the general rule of law is that "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its

own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. Indeed, the fact finder is free to believe all, part or none of the testimony of each witness appearing before it. *Hill v. Briggs* (1996), 111 Ohio App.3d 405, 412. If evidence is susceptible to more than one construction, reviewing courts must give it the interpretation that is consistent with the verdict and judgment. *White v. Euclid Square Mall* (1995), 107 Ohio App.3d 536, 539. Mere disagreement over the credibility of witnesses is not sufficient reason to reverse a judgment. *State v. Wilson*, 113 Ohio St.3d 382, 387, 2007-Ohio-2202.

{¶18} Appellant's arguments regarding both insufficiency of the evidence and manifest weight of the evidence are based upon the same argument; that is, the state's witnesses presented conflicting testimony on several details surrounding the incident. For example, appellant points out Bozeman's other daughter, Toyia Bozeman, never mentioned in her testimony that Nataya Reeder was beside Bailey when he was struck; Nataya testified she was beside Bailey at the time he was struck; Joseph Reeder testified that Nataya was on the porch during the incident; and Bailey testified that Nataya was in the house changing clothes during the incident. As another example, appellant points out that Toyia also said Bailey went back to the door of his house to get a towel and then used the phone to call 911 after he was struck, and he never had a phone before he went to his doorway; Nataya testified she handed Bailey her cell phone to call 911 before Bailey was struck; and Bailey testified that he used a phone already in his possession to call 911 before he was struck. As a further example of inconsistencies, appellant points out that Bailey admitted he "tapped" appellant, while the other witnesses for the state said Bailey never touched appellant.

{¶19} The inconsistencies pointed out by appellant are minor inconsistencies that do not impact the essential elements of felonious assault. Despite these inconsistencies in the testimonies, all of the eyewitnesses to the incident saw appellant strike Bailey with a coffee mug without warning or provocation. Their consistent testimonies, in this respect, were supported by the 911 recording, which suggested that appellant struck Bailey suddenly. There is no indication in the 911 call that appellant was in any pain or that he was being crushed by a car door. In the 911 recording, Bailey is alternating between conversing with the operator and appellant. Appellant's voice is heard moments before Bailey grunts and the call ends, as the phone drops to the ground. Therefore, the 911 recording supports the version of the incident set forth by the state's witnesses; that is, appellant turned and struck Bailey abruptly without physical or verbal incitement. Thus, these testimonial inconsistencies on minor, extraneous details that occurred prior to the crime do not diminish or negate the consistent testimonies of the witnesses as they related to the actual criminal act itself.

{¶20} Although we do agree that there are some discrepancies between the testimonies of the witnesses, "the mere existence of conflicting evidence cannot make the evidence insufficient as a matter of law." *State v. Murphy*, 91 Ohio St.3d 516, 543, 2001-Ohio-112. " [W]hile the [fact finder] may take note of the inconsistencies and resolve or discount them accordingly, * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence.' " *State v. Samatar*, 152 Ohio App.3d 311, 2003-Ohio-1639, ¶113, quoting *State v. Craig* (Mar. 23, 2000), 10th Dist. No. 99AP-739, quoting *State v. Nivens* (May 28, 1996), 10th Dist. No. 95APA09-1236. A jury

may believe or disbelieve all, part or none of a witness's testimony. *State v. Antill* (1964), 176 Ohio St. 61, 67; *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21.

{¶21} As we mentioned above, it is the trier of fact that must resolve conflicts in the testimony. See *Jackson*, 443 U.S. at 319, 99 S.Ct. 2789. Viewing the evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that appellant had committed the crime of felonious assault. We hold that the state met its burden regarding each element of that crime, and, accordingly, there was sufficient evidence to support appellant's conviction.

{¶22} With regard to the manifest weight of the evidence, appellant does not contest that he struck Bailey in the face and inflicted serious physical harm upon him. Photographs submitted as evidence also show Bailey sustained very large, deep wounds on his cheek and temple, which Bailey testified required 200 stitches. Although appellant testified that he swung the mug at Bailey because Bailey was pinning him between the door and car, as explained above, there is no evidence to support his claim, and the jury was free to disbelieve him and believe the state's witnesses. Regardless, appellant admitted he knowingly swung the ceramic coffee mug at Bailey, with serious physical harm being the probable result of smashing a heavy mug against a person's face. See R.C. 2901.22(B) (a person acts "knowingly" when he is aware his conduct will probably cause a certain result or will probably be of a certain nature, regardless of purpose). After reviewing the evidence, we cannot say that this is one of the exceptional cases where the evidence weighs heavily against the conviction. The jury did not create a manifest injustice by concluding that appellant was guilty of the crime charged in the indictment. The jury heard the witnesses, evaluated and weighed the evidence, and was convinced

of appellant's guilt. Therefore, appellant's second, third, and fourth assignments of error are overruled.

{¶23} Accordingly, appellant's four assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and TYACK, JJ., concur.
