

[Cite as *State v. Vaughn*, 2015-Ohio-5595.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

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| STATE OF OHIO |) | |
| |) | |
| PLAINTIFF-APPELLEE |) | |
| |) | CASE NO. 13 MA 136 |
| VS. |) | |
| |) | OPINION |
| TERRELL M. VAUGHN |) | |
| |) | |
| DEFENDANT-APPELLANT |) | |

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| CHARACTER OF PROCEEDINGS: | Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 13 CR 632 |
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| JUDGMENT: | Affirmed |
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| APPEARANCES: | |
| For Plaintiff-Appellee | Attorney Ralph Rivera Assistant Mahoning County Prosecutor 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503-1426 |

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| For Defendant-Appellant | Attorney Rhys Cartwright-Jones 42 North Phelps Street Youngstown, Ohio 44503-1130 |
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JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: December 30, 2015

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DeGENARO, .J.

{¶1} Defendant-Appellant Terrell M. Vaughn appeals the judgment of the Mahoning County Court of Common Pleas convicting him of one count of felonious assault and sentencing him accordingly. On appeal, Vaughn asserts his conviction is not supported by sufficient evidence and alternatively against the manifest weight of the evidence. He also argues that the trial court's denial of his suppression motion based solely upon his absence at the hearing was plain error. For the following reasons, Vaughn's assignments of error are meritless. Accordingly, the judgment of the trial court is affirmed.

Facts and Procedural History

{¶2} Emil Smith was driving with his fiancée Robin Wheaton when he was badly beaten during a so-called road rage incident by several men, including Vaughn, causing him permanent injury. The Mahoning County Grand Jury charged Vaughn with one count of attempted murder, R.C. 2903.02(A) and R.C. 2923.02(A), a first-degree felony; and one count of felonious assault, R.C. 2903.11(A)(1), a second-degree felony. A warrant on the indictment issued and Vaughn was arrested. Vaughn was arraigned, pled not guilty, was appointed counsel, waived his speedy trial rights and posted bond.

{¶3} Vaughn filed a motion to suppress Wheaton's identification of him as the perpetrator. Vaughn asserted that the identification procedure was unnecessarily suggestive and that Wheaton's identification was unreliable. More specifically, Vaughn claimed the identification was problematic because he believed Wheaton had been shown a photograph of Vaughn in an array several days earlier, but failed to identify him. However, the man in the first photo array was a *different* Terrell Vaughn, not the defendant.

{¶4} The motion to suppress was called for hearing at 9:00 a.m., on August 12, 2013, but Vaughn failed to appear. The trial court's entry states: "Due to the Defendant's failure to appear for the hearing herein, Defendant's 'Motion to Suppress' is overruled and a Bench Warrant is hereby Ordered forthwith for Defendant's arrest." There is no transcript of this hearing, just the judgment entry. A second entry indicates that *later that*

same day, at 9:35 a.m., Vaughn appeared in court and was immediately taken into custody pursuant to the bench warrant, as Vaughn's oral motion to reinstate bond was denied. There is nothing in this entry indicating the suppression motion was renewed.

{¶15} A pretrial was held three days later and Vaughn, the prosecutor, and defense counsel were present; this was memorialized by a judgment entry which indicated, without detail, that pretrial discussions were held and that Vaughn's bond was reinstated. Pertinent to this appeal, there is no indication that the motion to suppress was renewed.

{¶16} The case proceeded to a jury trial on August 21, 2013. Prior to voir dire, the State moved to dismiss the attempted murder charge, which was sustained by the trial court. The following evidence was adduced at trial.

{¶17} Robin Wheaton testified that she and her fiancé Emil Smith left their house to go to dinner. Smith had been drinking beer all afternoon while he did yardwork. About two blocks away from their house, Smith stopped the vehicle and began fumbling with the radio. This caused a large sport utility vehicle to stop behind them and the driver of the SUV started blowing its horn. Smith responded by extending his middle finger at the SUV.

{¶18} Wheaton said the front passenger of the SUV got out of the vehicle and hit Smith, who had also gotten out of his vehicle. Wheaton then saw two other people getting out of the SUV; because she was afraid, she ran to a tree about 30 yards away. Wheaton said that she recognized the front passenger as Vaughn, and that she had seen him "about three times" in the past. Wheaton stated that at the time of the incident, she did not know Vaughn's name, but had seen him before in the neighborhood.

{¶19} Wheaton testified she had never seen the other two individuals before, and could not identify them. She witnessed all three men assaulting Smith: hitting, punching, and kicking him before leaving. Smith was rendered unconscious and bleeding and was later taken to St. Elizabeth's Hospital.

{¶10} Later that evening, Wheaton met with Youngstown Detective-Sergeant

David Sweeney, and gave him Vaughn's physical description, describing the front passenger as a black male with a goatee that came down to his chest. A video of this interview was later played for the jury.

{¶11} Smith testified that he only remembered part of what happened to him that evening. The defense stipulated that Smith suffered physical harm, but the prosecutor opted to provide evidence on this element regardless. Smith testified he was in a coma for over a month; required a breathing tube in his throat, feeding tubes; and stills suffer from memory loss. Smith is confined to a wheelchair, and as of the time of trial had remained in the hospital since the incident occurred. Smith could not identify the person who assaulted him.

{¶12} Det. Sweeney testified that on May 9, 2013 he administered the first of two photographic arrays to Wheaton. This first array did not contain a photograph of Vaughn; rather it contained the photograph of another man also named Terrell Vaughn. Wheaton did not identify anyone from this array. Sweeney followed-up on an address that Wheaton gave him where Vaughn could be found. Wheaton provided a house number but not a street name: "1496 in Rockford Village." When Sweeney knocked on the door of 1496 Rosewood in Rockford Village, Vaughn answered, and Sweeney observed Vaughn had a goatee that came down to his chest. Wheaton was then shown a second photographic array on May 14, 2013 from which she identified Vaughn.

{¶13} Vaughn took the stand in his own defense and testified that he had never seen Smith before, and denied assaulting Smith. Vaughn testified that he recognized Wheaton from around his neighborhood and that he had sold Wheaton marijuana in the past.

{¶14} After considering all the evidence, the jury convicted Vaughn of the felonious assault charge. Following a sentencing hearing, the trial court sentenced Vaughn to 8 years in prison and 3 years of mandatory post-release control.

Sufficiency and Manifest Weight

{¶15} In his first of two assignments of error, Vaughn asserts:

The evidence supporting the conviction is insufficient and it contradicts the manifest weight of the evidence.

{¶16} A challenge to the sufficiency of the evidence tests whether the state has properly discharged its burden to produce competent, probative, evidence on each element of the offense charged.” *State v. Petefish*, 7th Dist. No. 10 MA 78, 2011-Ohio-6367, ¶16. Thus, sufficiency is a test of adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id.* In reviewing the record for sufficiency, the relevant inquiry is whether, after viewing 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. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997).

{¶17} Conversely, “[w]eight of the evidence concerns the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other.” (Emphasis sic.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). A conviction will only be reversed as against the manifest weight of the evidence in exceptional circumstances. *Id.* This is so because the triers of fact are in a better position to determine credibility issues, since they personally viewed the demeanor, voice inflections and gestures of the witnesses. *State v. Hill*, 75 Ohio St.3d 195, 204, 661 N.E.2d 1068 (1996); *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967).

{¶18} Thus, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine 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. However, “[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province

to choose which one we believe.” *State v. Dyke*, 7th Dist. No. 99 CA 149, 2002–Ohio–1152, *2, citing *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999). Under these circumstances, the verdict is not against the manifest weight and should be affirmed.

{¶19} Vaughn was convicted of one count of felonious assault: "No person shall knowingly * * * [c]ause serious physical harm to another[.]" R.C. 2903.11(A)(1). Vaughn stipulated that Smith suffered serious physical harm; rather, he contends there was insufficient evidence that he was the perpetrator, or alternatively, that the jury's determination regarding that issue was against the manifest weight.

{¶20} First, with regard to sufficiency, Wheaton testified that she observed Vaughn, the front passenger, exit the vehicle and severely beat Smith. She said although she did not know Vaughn by name at the time of the assault, she recognized him from around her neighborhood, having seen him about 3 times before. When Wheaton met with Det. Sweeney on the day of the crime she gave him Vaughn's physical description as a black male with a long goatee that came down to his chest. She told Det. Sweeney that she recognized Vaughn.

{¶21} Subsequently, on May 9, 2013, Wheaton met with Sweeney and provided information about the assailants that she had acquired second-hand from an unnamed source in the neighborhood. She said that she learned the man with the goatee's name was possibly "Terdel Vone," who resided at house number 1496 in Rockford Village. That same day, Wheaton was shown a photographic array containing the picture of another Terrell Vaughn, and Wheaton failed to identify anyone from this array.

{¶22} Det. Sweeney then went to 1496 Rosewood, inside Rockford Village, and when he knocked on the door, Vaughn answered, and Sweeney observed Vaughn had a goatee that came down to his chest.

{¶23} On May 13, 2013, Wheaton was shown a second photographic array

and Wheaton identified Vaughn. In the picture of Vaughn he had a goatee, but it was not down to his chest. Wheaton also positively identified Vaughn in the courtroom during her testimony. At the time of trial he did not have a long goatee.

{¶24} Construing the evidence in favor of the State, this is sufficient evidence of the identity element and that Vaughn assaulted Smith.

{¶25} Turning to manifest weight, the jury had to weigh Wheaton's testimony with Vaughn's. Wheaton stated at trial that when the men got out of the SUV, she was scared and ran away from the scene and hid behind a tree; she conceded she was not in the best place to observe the assailants. In addition, on the day of the crime Wheaton described Vaughn to Det. Sweeney as a black male with a long goatee, in his mid-to-late 20s, 5'8" to 5'9" and approximately 150-160 pounds. In reality, however, Vaughn was 35 years old at the time of trial, 6'0" tall and 180 pounds.

{¶26} Further, Wheaton provided some slightly inconsistent information about the vehicle's description, when she testified she recalled telling the detective the SUV was silver in color; on the video of her April 21 interview she describes it as off-white or tan in color. She had also reported to police that she heard a gunshot, when there was no other evidence of this. Wheaton told Det. Sweeney during the first interview that she could only recall the first letter of the SUV's temporary tag, "X," while during the second interview she told the detective that the plate read "X4." Wheaton also admitted she purchased marijuana from Vaughn in the past and that Smith, the victim, was a cocaine user.

{¶27} Vaughn testified that he did not participate in the assault and that he did not know who did. He admitted he was familiar with Wheaton from selling her marijuana in the past, and said the two lived just blocks from one another.

{¶28} It appears the jury believed Wheaton's testimony over Vaughn's, which is within its province as the trier of fact. The minor inconsistencies in Wheaton's description of the events that evening were not material and do not render her

testimony unbelievable, especially considering that Wheaton's description of Vaughn's unusual goatee was corroborated by Det. Sweeney's observations of Vaughn when he went to Rockford Village. Thus, we cannot say the jury clearly lost its way in determining Vaughn participated in the assault.

{¶29} As Vaughn's assault conviction is supported by sufficient evidence and is not against the manifest weight of the evidence, his first assignment of error is meritless.

Denial of Suppression Motion

{¶30} In his second and final assignment of error, Vaughn asserts:

The defendant bearing a fundamental right to have a suppression hearing, denial of that motion strictly on his absence, without evidence of the cause of his absence, invites review under Crim.R 52.

{¶31} Vaughn contends the trial court committed plain error by denying his suppression motion solely because he failed to appear at the suppression hearing. Indeed, the trial court's entry indicates Vaughn's non-appearance was the reason for the denial. There was no transcript of the hearing provided and there is nothing in the record explaining why Vaughn, who was out on bond, failed to appear, although apparently he did eventually arrive at court about one-half hour after the hearing was scheduled to commence.

{¶32} Vaughn concedes he did not raise this issue at the trial court level and that counsel did not move for a continuance when Vaughn failed to appear. Further, Vaughn did not renew the suppression motion when he finally appeared at court later that morning or later in the proceedings. Thus, plain error review applies.

{¶33} Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. Plain error cannot be found unless it can be said that, but for the error, the outcome would clearly have been otherwise. *State v. Moreland*, 50 Ohio

St.3d 58, 62, 552 N.E.2d 894 (1990).

{¶34} Vaughn's suppression motion asserted that the identification procedure was unnecessarily suggestive and that Wheaton's identification was unreliable: specifically, the identification was problematic because he believed Wheaton had been shown a photograph of Vaughn in an array several days earlier, but failed to identify him. However, the man in the first photo array was a different Terrell Vaughn.

{¶35} During a sidebar at trial, while discussing defense counsel's request to play videos of Wheaton's police interviews, defense counsel essentially conceded that the suppression motion was filed based on his misunderstanding of the facts.

DEFENSE COUNSEL: I wish to play, Your Honor, her [Wheaton's] videotaped interview of April 21st, 2013 and her videotaped interview of May 9th, 2013.

THE COURT: May 9th when this other - - when this - - that's the lack of a photo identification that you filed a motion to suppress on?

DEFENSE COUNSEL: This is a separate interview that has nothing to do with that photo identification.

THE COURT: Well that's why she was there. She was there to do a photographic array that day, and you have mischaracterized to the Court that she failed to pick this Defendant out of - - Terrell Vaughn out of this photographic array and sought to suppress that information. And it wasn't even this guy.

DEFENSE COUNSEL: It was my mistake, Your Honor. I didn't understand she had been shown two photo arrays with two different Terrell Vaughns. It was my mistake.

THE COURT: Yeah, I understand you did that, but you filed a pleading in court representing to the Court that it was a misidentification or failure to identify this guy, and she was shown this photo array

before, and then mischaracterized the later photographic identification of this guy as being irreparably tainted because of the earlier exposure to his photograph.

{¶36} Thus, there was no error, let alone plain error in the trial court's decision to overrule the motion based upon Vaughn's absence. Even if the trial court had sua sponte continued the hearing and decision on the motion until a later date, which it was not required to do, the motion would have been denied. In fact, the trial court later stated during trial, but out of the presence of the jury: "I want the record to be clear that [the identification] wouldn't have been suppressible anyhow." Accordingly, Vaughn's second and final assignment of error is also meritless.

{¶37} In sum, Vaughn's felonious assault conviction is supported by sufficient evidence and is not against the manifest weight of the evidence. The trial court did not err by denying the suppression motion. Accordingly, the judgment of the trial court is affirmed.

Donofrio, P. J., concurs

Robb, J., concurs