

[Cite as *State v. Kessler*, 2010-Ohio-2094.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93340

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ERIN KESSLER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-516078-B

BEFORE: Kilbane, P.J., McMonagle, J., and Jones, J.

RELEASED: May 13, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Michael J. Cheselka
Michael J. Cheselka, Jr., LLC
75 Public Square - Suite 920
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Jennifer W. Kaczka
Daniel T. Van
Assistant County Prosecutor
Justice Center - 8th Floor
1200 Ontario street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Erin Kessler (“Kessler”), appeals the trial court’s finding of guilt on two counts of felonious assault. Kessler argues essentially that the trial court’s judgment was against the manifest weight of the evidence because the State did not prove beyond a reasonable doubt that she acted knowingly. Kessler also argues that the State failed to prove that she caused the victim, Matthew Gurewicz (“Gurewicz”), serious physical harm. After reviewing the facts of the case and the applicable law, we disagree and affirm.

Factual and Procedural History

{¶ 2} On October 1, 2008, Kessler was indicted on two counts of felonious assault, in violation of R.C. 2903.11(A)(1) and 2903.11(A)(2), felonies of the second degree.

{¶ 3} On February 24, 2009, Kessler executed a written jury waiver in open court and proceeded to a bench trial, at the conclusion of which she was found guilty as charged.

{¶ 4} On April 16, 2009, the trial court sentenced Kessler to two years of incarceration on both counts, which merged for sentencing purposes.

{¶ 5} On May 20, 2009, Kessler filed the instant appeal.

{¶ 6} The following evidence was adduced at trial.

{¶ 7} Matthew Gurewicz testified that on September 4, 2008, at approximately 3:00 p.m., he was standing in his front yard at 4141 East 59th Street in Cleveland, Ohio. According to Gurewicz, four cars pulled up and a group of six or seven people emerged from the cars. The group surrounded him, and at least one member of the group accused him of setting their home on fire. The crowd began beating and kicking him, and someone struck him on the head with a skateboard. Gurewicz attempted to escape from the group by running away. Two members of the group chased Gurewicz up the street.

{¶ 8} Gurewicz testified that Kessler was driving one of the cars that day, and that she followed Gurewicz up the street in a gray or light blue car.¹

Gurewicz further testified that Kessler struck him in the leg as he ran up a neighbor's driveway at 4122 East 59th Street, knocking him against a parked car and causing him to roll off of it. Gurewicz made it onto a neighbor's porch and sought help while the group gathered in the neighbor's front yard and began throwing objects at him. As Gurewicz screamed for help, imploring his neighbor to call 911, the group disbursed.

¹Officer Steven Kinan from the Cleveland Police Department also testified that upon speaking with the victim and witnesses at the scene, he determined that Kessler could have been driving a silver or light blue, late model Ford Tempo. It was later determined that Kessler drove a late model, silver Pontiac.

{¶ 9} Gurewicz, who suffers from epilepsy, was transported to Metro Hospital, where he was kept under observation for eight hours and treated for a closed head injury, a cervical spine strain, a right wrist sprain, and multiple abrasions to his body.

{¶ 10} Detective Kevin Martin from the Cleveland Police Department testified that he interviewed Kessler and codefendant Brianna Dorcsak (“Dorcsak”) at Kessler’s home, and that Kessler admitted driving one of the cars to East 59th Street that day to confront Gurewicz about a fire that had started that morning. Kessler also admitted to Detective Martin that she struck Gurewicz with her car when she pulled into the driveway at 4122 East 59th Street. During the interview, Dorcsak told Detective Martin that Kessler drove a late model, silver Pontiac. Detective Martin testified that he observed a late model, silver Pontiac parked outside Kessler’s home.

Assignments of Error

{¶ 11} Kessler appeals, arguing that her conviction is against the manifest weight of the evidence. In support of this argument, she asserts two assignments of error:

“I. The circumstantial evidence on which the State relies does not prove beyond a reasonable doubt that Kessler knowingly injured Gurewicz.

“II. The State has failed to prove beyond a reasonable doubt that Kessler caused Gurewicz to suffer serious physical harm.”

{¶ 12} Since they are substantially interrelated, we address Kessler’s assignments of error together. This court recently reiterated the standard of review for manifest weight challenges from criminal bench trials in *State v. Strickland*, 183 Ohio App.3d 602, 2009-Ohio-3906, 918 N.E.2d 170, stating that:

“In evaluating a challenge to the verdict based on the manifest weight of the evidence in a bench trial, ‘the trial court assumes the fact-finding function of the jury. Accordingly, to warrant reversal from a bench trial under a manifest weight of the evidence claim, this court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered.’” (Internal citations omitted.)

{¶ 13} In conducting our review, we are mindful that the weight of the evidence and the credibility of witnesses are matters primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. Moreover, in reviewing a claim that a conviction is against the manifest weight of the evidence, the conviction cannot be reversed unless it is obvious that the trier of fact 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. McShane*, 8th Dist. No. 91367, 2009-Ohio-3455. (Internal citations omitted.)

{¶ 14} R.C. 2903.11(A)(1) and (2) state:

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

“(1) Cause serious physical harm to another * * *;

“(2) Cause or attempt to cause physical harm to another

*** * * by means of a deadly weapon or dangerous
ordnance.”**

{¶ 15} Kessler argues, as she did at trial, that this incident was merely an accident. She argues that she did not knowingly cause serious physical harm to Gurewicz because the evidence presented at trial showed that she was merely turning her car slowly into a driveway and Gurewicz merely happened to run in front of her car.

{¶ 16} She argues that the State was required to present evidence that she knew or should have known that Gurewicz was about to cross in front of her vehicle. Finally, Kessler argues that Gurewicz did not suffer serious physical harm after being struck by Kessler’s vehicle. These arguments lack merit.

{¶ 17} At trial, Gurewicz specifically testified that Kessler pulled the vehicle into the driveway only after she saw him running across it in his attempt to escape. Nothing in the record contravenes this testimony. “The culpable mental state required for felonious assault is knowledge, not purpose or intent. A person acts knowingly when he is aware that his conduct will

probably cause a certain result.” *State v. Reed*, 8th Dist. No. 89137, 2008-Ohio-312, citing R.C. 2901.22(B).² “When a defendant voluntarily acts in a manner that is likely to cause serious physical injury, the factfinder can infer that the defendant was aware that [her] actions would cause whatever injury results from [her] actions, or in other words, that [she] acted knowingly.” *Id.* at ¶10. Given the uncontroverted testimony in this case that Kessler followed Gurewicz in her vehicle and pulled into the driveway only after Gurewicz entered it, the weight of the evidence supports the trial court’s finding that Kessler was acting knowingly when she struck him.

{¶ 18} The State presented direct evidence that Kessler followed Gurewicz up the street in her vehicle as he fled from his assailants, and she knowingly pulled into the driveway Gurewicz was crossing while attempting to escape, nearly pinning him between her car and a parked car.

{¶ 19} We further find that the State proved that Kessler’s actions were likely to cause serious physical harm to Gurewicz. If a person operates a vehicle in such a manner as to hit the victim as he attempts to escape, such an act is one that causes a significant risk of serious physical harm. See *Reed*, *supra*.

²R.C. 2901.22(B) states: “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.”

{¶ 20} In this case, Kessler’s actions support the inference that she was aware that her actions would probably cause serious physical injury, even if she did not intend the specific injuries that resulted from striking Gurewicz. Contrary to Kessler’s argument, the State was only required to prove that Kessler knew the likely result of her conduct — not the exact consequences of it.

{¶ 21} The record also supports the fact that the State proved that Kessler caused or attempted to cause serious physical harm to Gurewicz. As mentioned above, Gurewicz suffered multiple injuries.

{¶ 22} Kessler’s assignments of error are overruled; the manifest weight of the evidence supports the felonious assault convictions.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant’s conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

CHRISTINE T. McMONAGLE, J., and
LARRY A. JONES, J., CONCUR