

[Cite as *State v. Ward*, 2011-Ohio-608.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 10AP-430
Plaintiff-Appellee,	:	(C.P.C. No. 09CR-11-6850)
v.	:	
	:	(REGULAR CALENDAR)
Eric D. Ward,	:	
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on February 10, 2011

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

David H. Thomas, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Eric D. Ward, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas in which the court found him guilty, pursuant to a bench trial, of felonious assault in violation of R.C. 2903.11, a second-degree felony; domestic violence, in violation of R.C. 2919.25, a third-degree felony; abduction, in violation of R.C. 2905.02, a third-degree felony; and receiving stolen property, in violation of R.C. 2913.51, a fourth-degree felony.

{¶2} Appellant and the victim, Ebony Gaiters, had lived together and had a child together. The parties then ended their relationship, and appellant moved into his

grandmother's home. On October 31, 2009, appellant's grandmother told him to leave her house, and Gaiters agreed to allow appellant to stay at her house temporarily.

{¶3} Although appellant wished to revive a romantic relationship with Gaiters, Gaiters was not in agreement, and the two argued about the issue on October 31, 2009. Appellant also accused Gaiters of dating another man. During the argument, appellant hit Gaiters many times in the face, resulting in a broken nose. At appellant's request, Gaiters then went to the kitchen to prepare food for their child. While she was preparing food, appellant found a photograph of Gaiters and another man, and confronted her. Appellant then began to hit Gaiters, at which point Gaiters grabbed a pot of boiling water to distract appellant. Appellant grabbed Gaiters' arm, and the boiling water splashed on Gaiters' face and body, causing burns. The arguing continued, with appellant hitting and choking Gaiters. Gaiters eventually fell asleep. When Gaiters awoke, she noticed appellant was gone and her car was missing.

{¶4} Several days later, a Columbus police officer, Claud Rousch, found Gaiters' vehicle in an apartment parking lot. When the officer saw appellant approaching the vehicle, the officer stopped appellant and found keys on him after a pat-down search. The keys were apparently put in the ignition of the vehicle by an unidentified officer, and the vehicle started.

{¶5} Appellant was charged with receiving stolen property, abduction, felonious assault, and domestic violence. A bench trial commenced April 6, 2010. After the State of Ohio, plaintiff-appellee, rested its case, appellant moved the court for a motion pursuant to Crim.R. 29, which the trial court denied. The trial court also denied appellant's motion pursuant to Crim.R. 29 after the defense rested its case. The trial court found appellant

guilty on all counts. The trial court sentenced appellant to a total term of incarceration of six years. Appellant appeals the judgment of the trial court, asserting the following two assignments of error:

[I.] The trial court erred in denying Appellant's Crim.R. 29 motion because (1) the State failed to prove Appellant's conduct was "knowingly" as to the Felonious Assault count, and (2) the State failed to prove that the keys taken from Appellant were the same keys used to start Ms. Gaiter[s'] vehicle thereby violating Appellant's right to a fair trial under the Due Process clause of the Fourteenth Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution.

[II.] The Trial Court violated Appellant's right to Due Process as Guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution by entering verdicts of Guilty, as the jury's verdict [sic] was against the manifest weight of the evidence.

{¶6} We will address appellant's assignments of error together, as they are related. Appellant argues in these assignments of error that there was insufficient evidence and it was against the manifest weight of the evidence to find appellant's conduct as to the felonious assault charge was knowing, and the state failed to demonstrate that the keys taken from appellant were the same keys used to start Gaiters' vehicle. A motion for acquittal under Crim.R. 29(A) is governed by the same standard used for determining whether a verdict is supported by sufficient evidence. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417. 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*, 78 Ohio St.3d 380, 390, 1997-Ohio-52. 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 a defendant would support a

conviction. *Id.* 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. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶7} 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 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.

{¶8} In addressing a manifest weight of the evidence argument, 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., Inc. 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, 2007-Ohio-2202, ¶24.

{¶9} Appellant first attacks his conviction for felonious assault. R.C. 2903.11 provides:

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

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

Appellant first contends the state failed to prove the "knowingly" element. R.C. 2901.22(B) defines "knowingly" as follows:

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.

{¶10} The trial court here found appellant guilty of felonious assault based upon the burns to Gaiters' body resulting from the boiling water splashing on her. Appellant contends he was not aware that his actions would cause Gaiters to be splashed and burned by the boiling water. He argues he grabbed Gaiters' arm to stop the water from

splashing out of the pot, and the testimony was unclear as to whether he even knew the water was boiling. Appellant also points out that there was no evidence of a struggle and no evidence he intentionally directed the pot toward Gaiters.

{¶11} The testimony at trial provided sufficient evidence that appellant acted knowingly when he burned Gaiters. Gaiters testified that appellant repeatedly struck her in the face with his fist and then told her to fix their child something to eat. While they were in the kitchen, Gaiters began to boil some water in a pot and appellant found some photographs of her ex-boyfriend with their son on top of the refrigerator. Appellant then started punching her. She "attempted" to throw the pot of boiling water "toward" appellant to "distract" him so she could run away. As she grabbed the pot, appellant grabbed her arm. She was able to grab the pot by the handles, but she "didn't really get to lift it." She said she "went to grab it" and that was when appellant grabbed her at the same time. Once appellant grabbed her, she still tried to lift the pot, but there was a "struggle." The water splashed onto her body when appellant grabbed her arm.

{¶12} Although appellant claims the evidence was unclear whether he knew the water in the pot was boiling because he was searching for photographs while the pot was on the stove, Gaiters' testimony was that appellant was searching for photographs above the refrigerator in the kitchen immediately prior to her attempt to throw the pot of water. Appellant's presence in the kitchen strongly suggests he was aware that the water in the pot, which was sitting on a stove, would be hot. Also, appellant was clearly aware of what Gaiters was doing, as appellant had directed Gaiters to fix their child something to eat. Furthermore, despite appellant's argument that there was no evidence he struggled with Gaiters, Gaiters specifically testified there was a "struggle" between them while she was

holding the pot of water. Although we agree that there is no evidence that appellant intentionally directed the pot toward Gaiters so she would get splashed with the water, "knowingly" does not require that appellant acted with specific purpose. It is enough that appellant was aware his act of grabbing Gaiters' arm and struggling with her while she was holding a pot of hot water would probably cause her to spill the hot water and cause her injury. Given Gaiters' testimony, we find there was sufficient evidence that appellant knowingly caused serious physical harm to Gaiters.

{¶13} Appellant also asserts it was against the manifest weight of the evidence to find the burn injury suffered by Gaiters rose to the level of serious physical harm. He presents no argument in support of this assertion, and we find it without merit. R.C. 2901.01 provides, in pertinent part:

(5) "Serious physical harm to persons" means any of the following:

* * *

(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.

{¶14} Gaiters testified that, after the hot water splashed on her, she felt a "horrible" tingling sensation on her face, arms, side, and thigh due to the burns. She described the tingling sensation as "very painful." She thought her body was going through "shock." She was shaking and hurting "really" badly. She asked appellant to call an ambulance, but he told her to "take" the pain. Appellant kept telling her that her face

was really "messed up." An hour later, she was in "so much pain" she was shaking and could not move. There was liquid oozing from blisters on her face. Gaiters stated that when appellant continued to punch her face after she was burned, the blistered skin began to peel off. Gaiters had to be admitted to the hospital and stayed overnight. Doctors believed she may have had third-degree burns on her thigh. She still has scars from the burns on her face, side, and thigh. Gaiters also testified the treatments for the burns were painful. Columbus Police Officer Ronald Lemmon described Gaiters' appearance as looking as if half of the skin on her face had melted off. Columbus Police Officer Anthony Monturo testified Gaiters appeared to be in a great deal of pain.

{¶15} We find this testimony supports the element of "serious physical harm" necessary for a conviction for felonious assault. According to Gaiters, the burns caused permanent scars. Lemmon testified, and this court's review of the photographs in evidence confirms, that it looked as if half of Gaiters' face had melted off, which constitutes temporary, serious disfigurement. The burns also involved acute pain that resulted in substantial suffering and prolonged pain. Gaiters said she felt a "horrible" tingling sensation that was "very painful" on her face, arms, side, and thigh. She said the pain rendered her unable to move. She also said the later treatments for the burns were painful. Therefore, the finding that Gaiters suffered serious physical harm was not against the manifest weight of the evidence or based upon insufficient evidence.

{¶16} Appellant also attacks the trial court's finding regarding his conviction for receiving stolen property. R.C. 2913.51(A) provides:

No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that

the property has been obtained through commission of a theft offense.

{¶17} Specifically, appellant here contends the state failed to establish that the keys Rousch took from him were the same keys later used to start Gaiters' vehicle. Appellant argues that Rousch testified he recovered a key from appellant, but he did not know who verified that the same key was the one that started Gaiters' vehicle. Thus, appellant asserts there was no evidence linking him to the vehicle, and his mere proximity to the vehicle was insufficient to satisfy the elements of receiving stolen property. We disagree with appellant's contentions.

{¶18} On this issue, Rousch testified he located Gaiters' missing vehicle in the parking lot of an apartment complex where appellant's aunt lived. He and other officers sat in their vehicles waiting for appellant, for whom they had a physical description. Rousch saw appellant walking toward Gaiters' car. Appellant then walked by the officer's vehicle, looked inside, and continued walking. The officers subsequently detained appellant. During a pat-down search, the officers found a car key. Rousch said another officer who he did not know verified that the key belonged to Gaiters' vehicle while at the scene. He said another officer verified the key belonged to Gaiters' vehicle by starting the car, although he did not see who started the car. He said he personally witnessed that the same key that had been in appellant's possession was the key that started Gaiters' vehicle.

{¶19} Appellant's claim that there was no evidence linking him to the vehicle apart from his mere proximity to the vehicle is incorrect. Rousch clearly testified that he saw the same key he removed from appellant's person during the pat-down search in the ignition

of Gaiters' idling car. Persuasive circumstantial evidence also supported a finding that appellant possessed or retained the stolen vehicle. After the assaults, appellant and Gaiters' car were both missing. Gaiters' car was located in the parking lot of the apartment complex where appellant's aunt lived. Also, the fact that appellant was seen walking toward the same vehicle that he had been suspected of stealing a few days earlier serves to further support an inference that appellant had retained the stolen vehicle. For these reasons, we find there was sufficient evidence to prove appellant received stolen property, and the court's determination, in this respect, was not against the manifest weight of the evidence or based upon insufficient evidence. For all the above reasons, appellant's first and second assignments of error are overruled.

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

Judgment affirmed.

CONNOR and RINGLAND, JJ., concur.

RINGLAND, J., of the Twelfth Appellate District, sitting by assignment in the Tenth Appellate District.
