

[Cite as *State v. Mustaine*, 2010-Ohio-4922.]

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

STATE OF OHIO	:	
	:	Appellate Case No. 23703
Plaintiff-Appellee	:	
	:	Trial Court Case No.
	:	09-CRB-2077
v.	:	
	:	(Criminal Appeal from Dayton
MITCHELL A. MUSTAINE	:	Municipal Court)
	:	
Defendant-Appellant	:	

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OPINION

Rendered on the 8th day of October, 2010.

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by EBONY WREH, Atty. Reg. 30080629, City of Dayton Prosecutor’s Office, 335 West
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FAIN, J.

{¶ 1} Defendant-appellant Mitchell Mustaine appeals from his conviction on one count of Assault in violation of R.C. 2903.13(A). Mustaine contends that the State failed to present evidence sufficient to sustain the conviction. He further claims that the conviction is against the manifest weight of the evidence. Finally, Mustaine

contends that the trial court erred by failing to grant his request for a stay of execution of his sentence, pending appeal.

{¶ 2} We conclude that there is sufficient evidence in the record to warrant a reasonable finder of fact in finding Mustaine guilty of Assault. We further conclude that the conviction is not against the manifest weight of the evidence. Finally, the issue regarding Mustaine's request for stay of sentence is rendered moot by our resolution of the sufficiency and weight of the evidence issues, and by the fact that Mustaine has completed serving his sentence. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} On February 28, 2009, Mitchell Mustaine went to his barber. He then attempted to withdraw money from an automated teller machine in order to pay the barber. Mustaine's ATM card was rejected, and he was not able to withdraw any money. Mustaine then called his brother for a ride home. Upon arriving home, Mustaine went upstairs. Katie Cummings, his girlfriend and the mother of his child, was dressing following a shower. Katie told Mustaine that she had deactivated the card. Mustaine grew upset and began to yell at Katie.

{¶ 4} While Mustaine and Katie were arguing, Katie's sister, Sarah Cummings, arrived at the residence, along with her friend Whitney McMahon. The three women had planned to go out shopping. Noticing that the door was open, Sarah leaned in and called out to Katie. Sarah and Whitney heard Mustaine yelling, so they went upstairs to see what was happening. Once upstairs, Sarah and Whitney observed

Katie “pinned” into a corner by Mustaine who was yelling at her about “money.” Katie was crying.

{¶ 5} Upon observing Sarah and Whitney, Mustaine yelled “get these bitches out of my house.” When Sarah refused to leave, Mustaine said that he would make her leave. He then put his hands on Sarah’s shoulders and slammed her against a wall. He did not let go of her until Whitney tried to push him away. Whitney then used her cellular telephone to call the police. Mustaine threatened to kill Sarah and to “kick [her] teeth in” if she caused him to go to jail.

{¶ 6} Mustaine and Katie then went into one of the bedrooms, at which point Sarah heard Mustaine and Katie’s toddler begin crying in another bedroom. Sarah entered and got the child out of bed to comfort him. Mustaine entered and began to wrestle with Sarah for control of the child. Whitney also became involved. At that point, Mustaine punched Sarah several times in the face and torso.

{¶ 7} Mustaine, Sarah and Whitney continued to wrestle over the child until they reached the front door of the residence. Sarah said that she would leave if Mustaine would give the child to Katie. At that point, Mustaine took the child and attempted to leave with his brother who was still parked outside. However, Katie threw herself on the hood of the car and pleaded with Mustaine not to take the child. Mustaine then ran to his mother’s van, which had pulled up to the residence during the altercation in the house. For some reason Mustaine abandoned that attempt and returned to the house with the child. Mustaine’s mother and brother both left before the police arrived.

{¶ 8} Dayton Police officers arrived at the residence while Whitney and Sarah were outside. Officer Jason Rhodes observed Mustaine peer out of the door. When

Rhodes knocked on the door, no one answered. Rhodes could hear Katie crying, and then he heard a loud crash, which he later determined was merely a vacuum cleaner falling from the stairway. Rhodes knocked again and announced that he would “kick in” the door, at which point Katie answered. Rhodes proceeded upstairs where he located Mustaine and ultimately arrested him.

{¶ 9} Mustaine was charged with two counts of Assault, in violation of R.C. 2903.13(A), one count of Aggravated Menacing, in violation of R.C. 2903.21(A), and one count of Domestic Violence, in violation of R.C. 2919.25(C). Following the withdrawal of his request for a jury trial, the matter was tried to the Dayton Municipal Court. The court found Mustaine guilty of one count of Assault against Sarah Cummings. The court acquitted Mustaine of the remaining charges. Mustaine was sentenced to one hundred and eighty days in jail, with ninety days suspended, and credit for six days served. He was also placed on two years of supervised probation, and ordered to complete an alcohol and drug evaluation, as well as an anger management class. Finally, Mustaine was fined two hundred dollars, all of which was suspended. Mustaine filed a motion to stay execution of his sentence, which was denied by the trial court.

{¶ 10} From his conviction and sentence, Mustaine appeals.

II

{¶ 11} Mustaine’s First Assignment of Error states as follows:

{¶ 12} “THE TRIAL COURT ERRED IN FINDING MITCHELL MUSTAINE GUILTY BEYOND A REASONABLE DOUBT AS TO THE ASSAULT CHARGE AGAINST SARAH CUMMINGS.”

{¶ 13} Mustaine contends that the State failed to present evidence sufficient to support his conviction for Assault. He further contends that the conviction is against the manifest weight of the evidence.

{¶ 14} The standards of review for appeals involving weight and sufficiency of the evidence are well established. When an appellant challenges the sufficiency of the evidence, we must determine whether the state presented adequate evidence on each element of the offense. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. When reviewing whether a judgment is against the manifest weight of the evidence, we must determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. *Id.* at 387.

{¶ 15} The offense of Assault is proscribed by R.C. 2903.13(A), which provides that “[n]o person shall knowingly cause or attempt to cause physical harm to another ***.” Thus in order to establish the offense, the State was required to prove, beyond a reasonable doubt, that Mustaine either knowingly caused or attempted to cause physical harm to Sarah Cummings. A person is deemed to act knowingly when “regardless of purpose, 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(B). Physical harm is defined as “any injury, illness, or other physiological impairment, regardless of its gravity or duration.” R.C. 2901.01(A)(3).

{¶ 16} In this case, there is evidence, in the form of testimony provided by Sarah Cummings and Whitney McMahon, that Mustaine grabbed Sarah by the shoulders, “slammed” her into the wall, and held her there until Whitney intervened. Mustaine even

admitted that he “stuck [his] hand on her shoulder [and] gave her a little nudge” toward the stairs because he was angry that she was in his home.

{¶ 17} Both women further testified that Mustaine hit Sarah repeatedly while she was trying to keep Mustaine from leaving with the child. Mustaine and Katie Cummings both corroborated that there was a “scuffle” between Mustaine and Sarah. Furthermore, as testified to by the responding officer, Sarah suffered a cut to her nose and had swelling under her left eye.

{¶ 18} We conclude that the State presented evidence sufficient to establish the offense of Assault. There is competent, credible evidence to indicate that Mustaine, who weighs two hundred and fifty pounds, forcefully slammed Sarah, who was described as being of slight build, into a wall and held her there until someone else intervened. There is also competent and credible evidence to show that he hit Sarah during the “scuffle” with the child. A reasonable finder of fact could infer from the evidence regarding Mustaine’s behavior during the course of this incident that he acted knowingly – that is, that he knew that his conduct would probably cause Sarah injury or physiological impairment, regardless of its gravity or duration . Finally, the element of physical harm was also established

{¶ 19} Mustaine next argues that Katie’s testimony must be considered as the more credible, since she has emotional ties to him as well as to her sister. Specifically he cites Katie’s testimony that, although she saw Mustaine trying to push Sarah to the stairs, she did not see him force her against the wall.

{¶ 20} The credibility of witnesses and the weight to be assigned to their testimony are generally left to the finder of fact – in this case, the trial court – to resolve. *State v.*

DeHass (1967), 10 Ohio St.2d 231, 231. The trial court is entitled to believe all, some or none of the testimony provided by the witnesses. Obviously, the trial court chose to credit the testimony of Whitney and Sarah over that of Mustaine and Katie. We cannot say that this was error. From our review of the evidence in the record, we conclude that there is sufficient evidence to support the Assault conviction and that the conviction is not against the manifest weight of the evidence.

{¶ 21} Mustaine's First Assignment of Error is overruled.

III

{¶ 22} Mustaine's Second Assignment of Error is as follows;

{¶ 23} "THE TRIAL COURT ERRED IN DENYING A STAY OF SENTENCE IMPOSITION PENDING APPEAL."

{¶ 24} Mustaine contends that the trial court should have stayed the execution of his jail sentence during the pendency of this appeal. Mustaine has, at this point, served the jail sentence. The State appropriately concedes that the fact that Mustaine sought a stay of execution of his sentence, as well as the fact that Mustaine is still subject to probation, prevents his appeal from becoming moot in its entirety. Nevertheless, the fact that Mustaine has completed his jail sentence does prevent this court from affording him meaningful relief in the event that we were to hold that the trial court erred in denying his motion for a stay. This assignment of error has therefore been rendered moot by the completion of Mustaine's jail sentence. For that reason, as well as for the reason that we are affirming Mustaine's conviction and sentence, this assignment of error has been rendered moot, and we need not address it.

{¶ 25} Accordingly, Mustaine’s Second Assignment of Error is overruled, as moot.

IV

{¶ 26} Mustaine’s First Assignment of Error having been overruled, and his Second Assignment of Error having been overruled as moot, the judgment of the trial court is Affirmed.

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BROGAN and GRADY, JJ., concur.

Copies mailed to:

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Hon. Carl Sims Henderson

Case Name: State of Ohio v. Mitchell A. Mustaine
Case No: Montgomery App. No. 23703
Panel: Brogan, Fain, Grady
Author: Mike Fain
Summary: