

[Cite as *State v. Swisher*, 2009-Ohio-3484.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio, :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. : No. 08AP-1056  
 : (C.P.C. No. 07CR01-1585)  
 James R. Swisher, : (REGULAR CALENDAR)  
 :  
 Defendant-Appellant. :

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D E C I S I O N

Rendered on July 16, 2009

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*Ron O'Brien*, Prosecuting Attorney, and *Laura R. Swisher*,  
for appellee.

*Clark Law Office*, and *Toki M. Clark*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, James R. Swisher, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas pursuant to a jury verdict finding him guilty of one count of felonious assault.

{¶2} The charge against appellant arose out of an altercation with Michelle Bowyer, his girlfriend at the time. Appellant's sister, Amy Swisher, was also involved and admittedly struck Bowyer, but Bowyer asserted that it was appellant who inflicted the most serious damage when he kned her in the face and inflicted a broken nose and two orbital fractures.

{¶3} Appellant brings the following assignments of error on appeal:

ASSIGNMENT OF ERROR NO. 1:

THE CONVICTION OF APPELLANT FOR FELONIOUS ASSAULT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 2:

THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE DEFENDANT'S MOTIONS FOR ACQUITTAL AND FOR RULE 29 DISMISSAL.

ASSIGNMENT OF ERROR NO. 3:

THE PROSECUTION ENGAGES IN MISCONDUCT WHERE 1) THEY ARE PERSONAL FRIENDS OF THE ALLEGED VICTIM IN A FELONIOUS ASSAULT CASE AND 2) WHERE THEY REPEATEDLY REFERENCE PRIOR CRIMINAL CHARGES OF A DEFENSE WITNESS, EVEN SUBSEQUENT TO A COURT ADMONISHMENT.

{¶4} Appellant's first assignment of error asserts that his conviction is against the manifest weight of the evidence. Appellant also raises a sufficiency of the evidence argument in support of this assignment of error.

{¶5} The legal concepts of sufficiency of the evidence and weight of the evidence involve different determinations. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. As to sufficiency of the evidence, "sufficiency" is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." *Id.*, citing *Black's Law Dictionary* (6th ed. 1990) 1433. A determination as to whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id.* at 386. The relevant inquiry on review of the sufficiency of the evidence is whether, "after viewing

the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis sic.) *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. A reversal based on insufficient evidence has the same effect as a not-guilty verdict because such a determination "means that no rational factfinder could have voted to convict the defendant." *Tibbs v. Florida* (1982), 457 U.S. 31, 41, 102 S.Ct. 2211, 2218.

{¶6} As opposed to the concept of sufficiency of the evidence, the court in *Thompkins* noted that "[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.' It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief." *Thompkins* at 388, quoting Black's at 1594.

{¶7} When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. *Id.* at 387. An appellate court should reverse a conviction as against the manifest weight of the evidence in only the most "exceptional case in which the evidence weighs heavily against conviction," *State v. Martin* (1983), 20 Ohio App.3d 172, 175, instances in which 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." *Id.*

{¶8} Michelle Bowyer testified at trial that, on the day in question, she, appellant, and another friend had gone to a restaurant and then a bar to celebrate her birthday. Bowyer and appellant had been in a relationship for several years by that time, for one period living together, and had a two-year-old child together. Their relationship was often volatile.

{¶9} Bowyer testified that in order to go out they had left their daughter with appellant's sister Amy and her boyfriend Sean Estep, even though Bowyer had misgivings about their ability to reliably watch the child. As the evening progressed, all three persons in the party drank, and she and appellant began to bicker. At one point appellant went out to Bowyer's car, where she joined him, and they argued some more. They then left together with appellant at the wheel. While driving, appellant grabbed her head and banged it against the passenger window, whereupon, Bowyer stated, she turned toward him and began kicking him in the head, neck and chest to defend herself.

{¶10} After this violent flare-up, the two rode without speaking until they reached appellant's sister's house, where they had planned to spend the night. When they entered the home, appellant physically prevented her from leaving when she decided to do so, and they shoved each other, whereupon appellant fell into a CD rack and knocked it over.

{¶11} At this point appellant's sister Amy became involved. Bowyer testified that Amy was very tall and strong and began punching her so that Bowyer was forced to fall to the couch, where she assumed the fetal position to protect herself. Amy kept punching Bowyer, after which appellant pushed Amy out of the way and violently struck Bowyer on the left side of her face with his knee, causing her to pass out.

{¶12} Bowyer testified that she later awoke in the bathroom and attempted to ice her face. Looking in the mirror she saw that her nose was crooked, and she had a large pocket of blood beneath her eye. Both appellant and Amy came to the bathroom and told her that it did not look that bad. Amy also asked, "Michelle, why did you make me do this? I didn't want to do this to you. Why did you make me do it?" (Tr. 51.) Bowyer testified that she did not leave the home at that time because she was concerned that she was not sober enough to drive, especially with her child.

{¶13} The next morning Bowyer packed up her things and took her daughter away without significant opposition from appellant. Bowyer's parents and sister, upon seeing her appearance, urged her to go to the emergency room at Doctors Hospital West, where her injuries were diagnosed. She met with a sheriff's detective at the hospital and gave a statement.

{¶14} Bowyer testified that she has already undergone one surgery to repair her injuries and will undergo at least one more. Bowyer admitted that she had resumed her relationship with appellant after this violent incident, primarily out of a desire to ensure a paternal presence for their daughter. Bowyer also testified that she is diagnosed as bipolar and was taking medication for this, although she had not taken it for several days before the night in question. Bowyer denied taking any other drugs, such as painkillers, on the evening of the fight. Under cross-examination, she denied having frequent drinking-related blackouts, although she admitted that this had happened to her once or twice. She also denied that she had experienced "pill comas" from taking painkillers as recreational drugs.

{¶15} The prosecution next presented the testimony of Annie Sinnott, D.O., an attending physician at the Doctors West emergency room. Referring exclusively to her notes because she had no independent recollection of treating Bowyer for her injuries, Dr. Sinnott confirmed that, after testing and x-rays, she diagnosed Bowyer with bilateral nasal bone fractures and a fracture of the left maxillary sinus, and an inferior left orbital blowout fracture without entrapment. The doctor explained that this last diagnosis meant that violent pressure to the eye, transmitted through the eyeball, had ruptured the orbital bone, but that the eye muscles were not caught in the fracture. Dr. Sinnott also diagnosed a fracture of the left cheek bone and a severe contusion to the left elbow.

{¶16} Under cross-examination, Dr. Sinnott confirmed that her notes indicated that Bowyer had stated upon intake at the emergency room that injuries resulted from her boyfriend grabbing her hair and slamming her face against a bar table at a restaurant.

{¶17} The next witness for the prosecution was appellant's sister, Amy Swisher. Amy's testimony confirmed most of the aspects of Bowyer's account of events at Amy's apartment, although Amy minimized the extent to which she herself had struck Bowyer. Amy testified that Bowyer had, after falling to the couch, kicked out at her and appellant, stepping between them to break up the fight, had been kicked, at which time he lost control, punched Bowyer in the face twice, and then kneed her in the face.

{¶18} Amy confirmed that she was arrested for the assault the next day and was facing trial along with her brother when she reached a plea agreement allowing her to plead to simple assault, predicated on testifying against appellant. Amy testified that she was six feet one inch tall and weighed 232 pounds at the time of the incident. Upon

cross-examination, Amy admitted getting into physical fights on other occasions with other persons. She denied recreational painkiller and drug use or alcohol intake on the night in question. Amy denied at any time telling other family members that she had in fact inflicted Bowyer's injuries, not appellant, and gave various explanations for other family members' motives in attributing such statements to her.

{¶19} Sean Estep testified for the prosecution about the events leading to Bowyer's injuries. At that time he lived with Amy Swisher at the apartment where the assault took place. They did not have a land-line telephone.

{¶20} On the night in question, Estep and Amy were babysitting the two-year-old daughter of appellant and Bowyer, with the expectation that appellant and Bowyer would return from their evening out and spend the night. Appellant and Bowyer did return, but appellant had facial scratches and a swollen lip. Bowyer was intoxicated and wanted to use appellant's cell phone to call her parents to come get her. Appellant threatened to call the police if Bowyer left in her car, telling her that she was too drunk to drive.

{¶21} Estep gave very detailed testimony about the violent episode that ensued. He stated that appellant and Bowyer became more and more angry with each other, and Bowyer eventually spit in appellant's face. Appellant pushed Bowyer, and she got up and pushed him into a CD rack, knocking things to the floor. Amy then grabbed Bowyer and tried to throw her out of the apartment, but Bowyer turned and hit Amy in the eye. Amy hit Bowyer back, and Bowyer fell on the couch, where Amy proceeded to hit her again. When appellant attempted to separate the women, Bowyer kicked appellant in the stomach or crotch, making him extremely angry. He then

punched Bowyer twice and kneed her in the face so hard that Bowyer was thrown back and her elbow hit the wall with enough force to put a hole in the wall.

{¶22} After this, the parties calmed down. Esteppe gave Bowyer a towel to clean the blood from her face and chest, and she went to the bathroom for this purpose. Esteppe then gave her an ice pack, and the group discussed what could be done. Bowyer announced that she would stay at the apartment for a week or two until her face healed, so that her family would not become aware of the incident. At that point, however, Amy began making calls, apparently to preempt any accusations against appellant, and told her parents and perhaps others that she, Amy, rather than appellant, had injured Bowyer. There was some discussion of calling the police, but both appellant and Bowyer were afraid that the authorities would take their child after such an incident.

{¶23} Esteppe specifically testified that, while Amy punched Bowyer several times, these blows were to the side of the head above the ear, rather than the eye and nose area where Bowyer sustained her most serious injuries. On cross-examination, Esteppe agreed that Amy had a history of getting into fights, on one occasion engaging in three fights in a single day.

{¶24} Detective Lawrence Gauthney, of the Columbus Division of Police, Domestic Violence Unit, was called to testify about his initial investigation of the incident. Detective Gauthney testified that he went to Doctors West Hospital to interview Bowyer in the emergency room. She appeared frightened, nervous, and had very apparent physical injuries. In interviewing her, he noted her account of events that led to her injury. Detective Gauthney testified that Bowyer stated that driving home from

the bar appellant had smashed her head against the vehicle window several times and bit her on the hand and that Bowyer had kicked appellant repeatedly to defend herself. Bowyer's description to Detective Gauthney of subsequent events coincided with her testimony at trial; she specifically told Detective Gauthney that appellant had kned her in the eye and caused her most serious injuries. Based on this information, Detective Gauthney sought warrants at once for both appellant and Amy Swisher.

{¶25} The defense first presented the testimony of Mike Taylor, the friend who had accompanied appellant and Bowyer to celebrate her birthday. Taylor said that all three drank during the course of the evening, but, in his view, none were particularly intoxicated. He specifically denied observing any instance in which appellant grabbed Bowyer's head and banged it on the bar table. After appellant and Bowyer left the bar, Taylor caught up with them at Amy Swisher's apartment to retrieve his cell phone, which Bowyer had inadvertently taken with her. Taylor observed nothing out of the ordinary or any injuries to anyone present.

{¶26} With regard to Amy's subsequent statements taking responsibility for assaulting Bowyer, Taylor did recount a later conversation in which he was present in appellant's mother's home and observed Amy stating that she had "beat the crap out of [Bowyer]," and seemed proud of it. (Tr. 230.)

{¶27} The defense then presented the testimony of several family members in an attempt to establish that Amy, rather than appellant, had committed the worst of the assault on Bowyer.

{¶28} Dan Bulmer, stepfather of appellant and Amy Swisher, recounted one occasion on which, sometime after the assault, Amy had told another person that she

had severely beaten Bowyer. Bulmer also stated that Amy had on at least one occasion had too much to drink and had no recollection the next day of what she had done.

{¶29} Raven Hastler, appellant's cousin, testified that Amy had called her and specifically taken credit for beating Bowyer.

{¶30} Cathy Myers, appellant and Amy's aunt, also recounted a conversation with Amy in which Amy took responsibility for beating Bowyer and seemed very proud of herself for it. Myers specifically recollected that Amy had stated that she had grabbed Bowyer's hair and kneed Bowyer in the eye.

{¶31} Another aunt, Gina Rinehart, testified that she knew Bowyer well and that Bowyer was a heavy drinker with a history of blackouts. She further testified that Amy had stated on one occasion before trial that she would come to court and tell the truth, which was that Amy herself, rather than appellant, had beaten Bowyer.

{¶32} Lisa Bulmer, the mother of appellant and Amy, testified that on the night when Bowyer was beaten, Amy called and announced that Amy had beaten up Bowyer because Bowyer kept attacking appellant.

{¶33} Finally, appellant testified on his own behalf. His initial testimony generally corroborated that of Bowyer regarding the on-and-off nature of their relationship. Appellant testified that Bowyer often failed to take her medication for her bipolar condition, sometimes for months at a time. On the night in question, he stated, both he and Bowyer had smoked marijuana, and Bowyer had taken at least five Percocet painkiller tablets. During the course of the evening at the restaurant and later at a bar, Bowyer and appellant were getting along fine until she told him something about the paternity of their daughter that upset him. Appellant denied having grabbed Bowyer's

head and banged it on the table at the bar. After they began arguing, appellant decided to leave without Bowyer, but she eventually rode with him in the car to his sister's house.

{¶34} During the course of the drive, Bowyer became violent and without provocation attacked appellant as he drove, kicking him repeatedly and inflicting a wound behind his ear. At one point she hit him in the mouth and he bit her hand.

{¶35} Appellant testified that after they reached Amy's apartment, another altercation began, and Bowyer began pushing appellant. Amy intervened, and Bowyer grabbed Amy by the hair. At that time, Amy hit Bowyer several times and knocked her to the couch. Appellant did not see specifically Amy knee Bowyer in the face and could not say if she had actually done so. Appellant then was able to pull Amy off of Bowyer. On cross-examination, appellant denied preventing Bowyer from using the telephone after the incident.

{¶36} Viewing this summarized evidence most favorable to the state, we find that there was both sufficient evidence to support appellant's conviction and that his conviction is not against the manifest weight of the evidence. Most significantly, the jury heard direct unequivocal testimony from three persons that appellant had kneed Bowyer in the face and caused her most severe injuries: Bowyer herself, Sean Estepp, and Amy Swisher. On appeal, appellant argues that Bowyer's testimony is tainted by her probable impairment by alcohol and drugs on the night in question, and her subsequent resumption of her contentious relationship with appellant. Appellant also argues that Amy Swisher was herself less than credible because of her pending charges in

connection with the incident and the impeaching testimony of those family members who testified that Amy took credit for Bowyer's beating.

{¶37} The jury in this case, as trier of fact, was charged with making determinations of credibility as to witnesses. The jury was thus free to give some, all or no weight to these factors affecting the credibility of those witnesses, and none of the impeaching factors presented in this case rise to the level of evidence that would cause us to revisit the jurors' assessment of credibility and reweigh the evidence in this case. More significantly, however, we must note that Sean Estep's testimony essentially corroborated that of Michelle Bowyer and Amy Swisher, and Estep's own credibility was never placed in question. As the only materially unimplicated witness in the case, Estep's own testimony would have sufficed by itself to convict appellant; the fact that it corroborates the testimony of the other witnesses present could reasonably have been taken by the jury to bolster the credibility of those witnesses as well.

{¶38} On the purely legal question of whether there was sufficient evidence to support conviction, the simple existence of direct evidence furnished by three witnesses supports conviction. On the question of manifest weight, no limited reweighing of the evidence would lead us to conclude that a manifest miscarriage of justice resulted from the jury losing its way, and the conviction must be affirmed as well. Appellant's first assignment of error is overruled.

{¶39} Appellant's second assignment of error asserts that the trial court erred in denying his trial motion at the close of the state's evidence to dismiss the case under Crim.R. 29. Again, a Crim.R. 29 motion examines the sufficiency of the evidence

presented in the state's case. *Thompkins*, supra. For the reasons given in discussing appellant's first assignment of error, appellant's second assignment of error is overruled.

{¶40} Appellant's third assignment of error asserts that prosecutorial misconduct occurred at trial because the prosecutor's personal relationship with Bowyer resulted in a personal vendetta on the part of the prosecutor to convict appellant. There is no testimonial evidence in the record supporting even the allegation that any personal friendship existed between the trial prosecutor and Bowyer. The sole support for this is appellant's statement at sentencing alleging that Bowyer and the prosecutor had a high school friendship, and that this caused the prosecutor to take an especially aggressive posture in the case.

{¶41} Our review on appeal is limited to matters in the record. Appellant's comments at sentencing occurred, obviously, after his conviction and are not properly part of the testified evidence in the case. This argument is not properly before this court in a direct appeal from a conviction.

{¶42} The second argument raised in the third assignment of error is that the prosecutor committed misconduct by improperly questioning a defense witness, Gina Rinehart, about prior convictions in an attempt to discredit her testimony. A review of the record does, in fact, disclose that the prosecution's questioning regarding a prior conviction for possession of cocaine mentioned a number of charges for which Rinehart was eventually not convicted. Some of this inquiry occurred after the court had clearly cut short the line of questioning. (Tr. 265.)

{¶43} The test for prosecutorial misconduct is whether a prosecutor's remarks were improper, and, if so, whether they prejudicially affected the substantial rights of the

accused and deprived him of a fair trial. *State v. Smith* (2000), 87 Ohio St.3d 424, 442; *State v. Kennan* (1993), 66 Ohio St.3d 402, 405. Assuming, arguendo, that the continued discussion and mischaracterization of the state of Rinehart's criminal record was improper, the record in the present case does not allow us to conclude that this questioning prejudicially affected any substantial right of the accused. Multiple witnesses were put forth to undermine, in particular, the credibility of Amy Swisher's testimony. The impact on the jury's assessment of Rinehart's testimony was unlikely to be substantially affected by introduction of a number of charges ancillary to the cocaine possession charge for which she was convicted. Rinehart was only one of a number of witnesses called to undermine Amy's testimony, and it is difficult to conclude that the jury disregarded or discounted all of this testimony on the sole basis of the scope of Rinehart's admitted criminal record. We find no evidence of prejudicial prosecutorial misconduct under the standard set forth by the Ohio Supreme Court in *Smith* and *Kennan* in this record, and appellant's third assignment of error is overruled.

{¶44} In summary, appellant's first, second, and third assignments of error are overruled, and the judgment of conviction and sentence entered by the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

BRYANT and TYACK, JJ., concur.

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