

[Cite as *State v. Madera*, 2010-Ohio-4884.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93764

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JONATHAN MADERA

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART,
REVERSED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-517823-B

BEFORE: Gallagher, A.J., McMonagle, J., and Cooney, J.

RELEASED AND JOURNALIZED: October 7, 2010

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SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant Jonathan Madera appeals his conviction by the Cuyahoga County Court of Common Pleas. For the reasons stated herein, we affirm in part, reverse in part, and remand.

{¶ 2} On December 2, 2008, a Cuyahoga County grand jury indicted Madera on two counts of aggravated robbery and two counts of felonious assault. A jury trial commenced on June 1, 2009. The state called five

witnesses, including the victim, Brandone Gould, and codefendant, Michael Soto.

{¶ 3} An unknown author once said, “The first thing in the human personality that dissolves in alcohol is dignity.” The facts in this case highlight that view. On November 9, 2008, Madera, his brother Jose (a.k.a. “Manny”), Gould, and Soto went together to a bar in Lakewood, Ohio, around midnight. They drank and socialized until closing at 2:00 a.m. Gould testified he drank approximately six to eight beers and six to eight mixed vodka drinks. He further testified that he had taken Vicodin and ecstasy earlier in the evening. The Maderas and Soto were also drinking.

{¶ 4} Outside the bar, there was a confrontation involving Gould, some other men, and Madera and his brother. The Maderas insisted Gould not have anything to do with these other men because the Maderas did not like them. Eventually the Maderas, Gould, and Soto got in Gould’s car and drove to the Maderas’ house on Bunts Road.¹ Gould and Soto both testified that an argument between Gould and the Maderas continued during the car ride.

{¶ 5} Gould testified that all four men went into the Maderas’ house. Gould entered the house behind the others, and the men continued arguing. Gould testified Madera told him that all Gould cared about was money. Gould stated, “I took my money out, I took some money out of my pocket and

¹ Madera and his brother lived on the second floor of a duplex.

threw it on the ground. I just dropped it on the ground.” Gould testified he later put some of the money back in his pocket and Madera also reached for some of the money from the floor.

{¶ 6} Afterwards, the men sat on the couch, and everything seemed fine for a short period of time. Ultimately the men began arguing again, and Gould testified Madera told him repeatedly to leave the house. Gould responded that he would not leave until all his money was returned to him, as he noticed he did not have all the money he came with.

{¶ 7} A physical brawl began between the men. Gould testified, “I can’t remember who hit who first but I know we [Gould and Manny] was [sic] grappling * * *.” The fight escalated with Gould knocking over a 55-gallon fish tank, and Madera responding by hitting Gould repeatedly with a decorative sword. Gould testified that after a few minutes of Madera hitting him with the sword, he made his way out of the house and drove to his brother’s house. Gould was transported via EMS to a local hospital, where he was treated for serious lacerations on his head and arms, as well as other cuts and bruises.

{¶ 8} Soto’s testimony corroborated most of Gould’s version of the facts. Soto testified that the Maderas told Gould from the outset not to come inside, but that Gould followed them upstairs and entered uninvited. Soto stated that Gould threw his money all over the floor, telling Madera “hey,

take the money * * * if the argument is over money, you know, you can have the money.” Soto testified Madera tried to get Gould to take the money back, but Gould refused, and the money lay on the dining room table until after Gould left. Soto was present in the same room when he heard Madera insist several times that Gould leave, but Soto was in the kitchen when fighting broke out between Gould and the Maderas.

{¶ 9} At the close of the state’s case, Madera made a Crim.R. 29 motion, which the court denied. The defense rested. The court denied Madera’s renewed Crim.R. 29 motion.

{¶ 10} The jury returned guilty verdicts on all four counts of the indictment. The court merged Counts 1 and 2 and sentenced Madera to three years for aggravated robbery; it merged Counts 3 and 4 and sentenced Madera to three years for felonious assault. The sentences were to run concurrent. Madera was advised of postrelease control and was ordered to pay restitution in the amount of \$1,100.

{¶ 11} Madera filed a timely notice of appeal, raising three assignments of error for our review.

{¶ 12} “I. The state produced insufficient evidence to sustain the defendant’s conviction for aggravated robbery.”

{¶ 13} In his first assignment of error, Madera argues the state failed to produce evidence on all elements of the charge of aggravated robbery. We agree.

{¶ 14} When an appellate court reviews a claim of insufficient evidence, “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. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 77, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37.

{¶ 15} Madera was convicted of aggravated robbery. R.C. 2911.01(A) states in part: “No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following: (1) Have a deadly weapon on or about the offender’s person or under the offender’s control and either display the weapon, brandish it, indicate that the offender possesses it, or use it; * * * (3) Inflict, or attempt to inflict, serious physical harm on another.”

{¶ 16} The challenge in this analysis is having to examine the testimony of individuals who are recounting events at a time when they were highly intoxicated. Examining their conduct and applying it to legal elements with conflicting and confusing facts is difficult.

{¶ 17} In order to prove aggravated robbery, the state must prove that a theft offense occurred. Gould's and Soto's conflicting testimony raise doubts on this particular question. Both witnesses agree that Gould voluntarily relinquished his money; no one threatened him into giving up his cash. We further question whether Gould relinquished all claim to his money once he gave it up and told Madera to "take the money." On the basis of the facts before us, the record is insufficient to support a finding that Madera committed a theft offense.

{¶ 18} Even if there had been sufficient evidence to establish Madera committed a theft offense, that fact coupled with felonious assault does not necessarily result in an aggravated robbery conviction. Madera argues that even if he kept some of Gould's money and he inflicted serious physical harm, the two acts were not done contemporaneously or in conjunction with each other, and therefore the elements of aggravated robbery have not been met.

{¶ 19} In *State v. Ballard* (1984), 14 Ohio App.3d 59, 469 N.E.2d 1334, this court held as follows: "Under R.C. 2911.02, the elements of robbery must occur simultaneously in order for the offense to occur. Therefore, the state

must prove that the accused's intent to deprive the owner of the property, as well as the actual taking (elements of the offense), coincided in point of time with the force or threat of force used in committing the theft offense, or in fleeing thereafter."

{¶ 20} There is no evidence that Madera used force or the threat of force when he picked up Gould's money from the floor and put it in his pocket. This leaves the question of whether Madera used force while attempting to flee immediately thereafter. This question poses its own difficulties in that Madera never fled the scene; instead, Gould left after several minutes of fighting. Nonetheless, we consider the Ohio Supreme Court's opinion in *State v. Thomas*, 106 Ohio St.3d 133, 2005-Ohio-4106, 832 N.E.2d 1190.

{¶ 21} In *Thomas*, the defendant struck an off-duty police officer ("Craska") shortly after the defendant committed a theft offense. *Id.* In reversing Thomas's conviction for robbery, the supreme court stated: "It is readily apparent to us that the evidence was insufficient to show that Thomas was 'fleeing immediately after' a theft when he inflicted harm on Craska. When Thomas and Craska neared the store, having walked together from the laundromat, Thomas was not 'fleeing immediately' after a theft. There was a delay or lapse of time between the theft offense and the attempt to flee, so that Thomas's actions upon his return with Craska to the store's front door were not 'immediately after' the theft offense within the meaning of R.C.

2911.02(A). Our conclusion in this case is fact-specific, as all determinations under this statute must be * * *. Based on the facts in the record, however, when the struggle that caused the harm occurred, Thomas was no longer ‘fleeing immediately after’ the theft.” Id. at ¶ 16.

{¶ 22} According to Gould’s testimony, after he threw his money on the ground and Madera put some of it in his pocket, Gould sat on the couch for a period of time, and then he and Madera began arguing again. The argument escalated into a physical altercation between Gould and Jose, but Gould testified he could not remember who threw the first punch. The mere fact that Gould fought with Jose and not Madera first, lends further support to the delay between the theft offense and Madera’s use of force.

{¶ 23} Under these specific facts, we find that the lapse in time between the theft and the use of force by Madera on Gould is sufficient to justify reversal of Madera’s convictions for aggravated robbery. There was enough delay between the two actions that they could not be considered contemporaneous nor part of “a single continuous transaction.” See *State v. McDonald* (Dec. 6, 2001), Cuyahoga App. No. 78939.

{¶ 24} We find there was insufficient evidence that Madera committed aggravated robbery. Madera’s first assignment of error is sustained, and his convictions for aggravated robbery are reversed.

{¶ 25} We find that Madera’s second and third assignments of error are related, and therefore, we address them together.

{¶ 26} “II. The defendant’s convictions were against the manifest weight of the evidence.”²

{¶ 27} “III. The trial court ought to have instructed the jury as to the law of criminal trespass in order for the jury to properly consider whether or not the victim was lawfully present in the home of the defendant and the failure to do so constituted plain error.”

{¶ 28} Madera argues that the jury lost its way in convicting him of felonious assault. Specifically, he argues that he was acting in self-defense and defense of his brother when he hit Gould with the sword. He also argues that Gould was trespassing on his property, which gave Madera the right to use force to remove him from the house.

{¶ 29} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether “there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether

² Having found the state failed to present sufficient evidence of aggravated robbery, we address his argument only as it relates to his felonious assault convictions.

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.” (Internal citations and quotations omitted.) *Leonard*, 104 Ohio St.3d 54, at ¶ 81.

{¶ 30} R.C. 2903.11 states: “(A) No person shall knowingly do either of the following: (1) Cause serious physical harm to another or to another’s unborn; (2) Cause or attempt to cause physical harm to another or to another’s unborn by means of a deadly weapon or dangerous ordnance * * *.”

{¶ 31} Madera does not specifically dispute that the state presented evidence on all elements of felonious assault. Gould’s testimony, in addition to Madera’s statement to the police, shows that Madera knowingly caused Gould serious physical harm when he hit Gould repeatedly with a sword, causing lacerations to his head and arms.

{¶ 32} Instead, Madera argues that he was acting in self-defense and defense of another when Gould attacked him and Jose. In support of this defense, he argues that under the Castle Doctrine, the state failed to rebut the presumption that Gould was unlawfully in the house. Madera also argues that it was plain error for the court not to give an instruction on criminal trespass. His theory is that once he asked Gould to leave his house and Gould refused, Gould is guilty of criminal trespass, thereby authorizing Madera to use force to remove him from the house under the Castle Doctrine.

{¶ 33} R.C. 2901.05(B)(1) states as follows: “Subject to division (B)(2) of this section, a person is presumed to have acted in self defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force.”

{¶ 34} This statute creates a rebuttable presumption, and the burden to prove the charged individual was not acting in self-defense falls on the state. See Senate Bill 184. “Under the Castle Doctrine [S.B. 184], a person is presumed to have acted in self-defense when attempting to expel or expelling another from their home who is unlawfully present. Further, under the Castle Doctrine, a person attempting to expel or expelling another is allowed to use deadly force or force great enough to cause serious bodily harm. There is also no duty to retreat inside one’s home anymore.” *State v. Johnson*, Cuyahoga App. No. 92310, 2010-Ohio-145, ¶ 18.

{¶ 35} It is Madera’s position that he asked and then demanded Gould leave the house, and when he refused, Madera was within his right to use force to expel him. The state argues that it met its burden to rebut the presumption Madera acted in self-defense by proving by a preponderance of the evidence that Gould was lawfully present in Madera’s home.

{¶ 36} In this case, the trial court gave the jury an instruction on self-defense, and then stated the following: “The presumption is a rebuttable one * * * This presumption does not apply if the state proves by the preponderance of the evidence that the person against whom the defensive force was used had a right to be in or was a lawful resident of the residence or vehicle.” Thus, the court did instruct the jury on the Castle Doctrine and gave the jury the opportunity to find that Gould was a criminal trespasser. We see no error in the trial court’s failure to specifically instruct the jury on either characterizing Gould as a trespasser or requiring the jury to determine by way of an interrogatory whether Gould was a criminal trespasser. We find it sufficient that the jury was allowed to consider the self-defense instruction that embraced the principles outlined in the Castle Doctrine.

{¶ 37} The jury found that Gould was lawfully present in the Maderas’ house. Thus, the jury rejected Madera’s Castle Doctrine claim. The evidence showed that Gould had been a frequent guest of the Maderas, and had on prior occasions spent the night there. The Maderas had known Gould for ten years. Gould entered the house shortly after the other three men when they came home from the bar; he was permitted to stay. Gould testified the Maderas never asked him not to come inside, and that he was only asked to leave immediately before the physical altercation began.

{¶ 38} The Castle Doctrine, on which Madera relies, is often applied to situations where an intruder enters a home, and the resident uses force to protect himself or his family. We have not seen it applied successfully in situations where a party of drunken friends dissolves into an all-out brawl, and subsequently the resident attacks a guest to forcibly remove him from the premises.

{¶ 39} We find the state successfully rebutted the presumption that Gould was not lawfully present in the Maderas' house. The jury did not lose its way in finding Madera's actions were not self-defense or defense of his brother.

{¶ 40} Similarly, the court did not commit plain error in failing to give an instruction on criminal trespass.³ Madera failed to request a jury instruction on criminal trespass, thus waiving all but plain error on appeal. *State v. Grant* (1993), 67 Ohio St.3d 465, 472, 620 N.E.2d 50. "Plain errors

³ R.C. 2911.21 states: "(A) No person, without privilege to do so, shall do any of the following: (1) Knowingly enter or remain on the land or premises of another; (2) Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows the offender is in violation of any such restriction or is reckless in that regard; (3) Recklessly enter or remain on the land or premises of another, as to which notice against unauthorized access or presence is given by actual communication to the offender, or in a manner prescribed by law, or by posting in a manner reasonably calculated to come to the attention of potential intruders, or by fencing or other enclosure manifestly designed to restrict access; (4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified by signage posted in a conspicuous place or otherwise being notified to do so by the owner or occupant, or the agent or servant of either."

are obvious defects in trial proceedings that affect ‘substantial rights,’ and ‘although they were not brought to the attention of the court,’ they may be raised on appeal. Crim.R. 52(B). To affect substantial rights, ‘the trial court’s error must have affected the outcome of the trial.’ Plain error is recognized ‘only in exceptional circumstances * * * to avoid a miscarriage of justice.’” *State v. Fortson*, Cuyahoga App. No. 92337, 2010-Ohio-2337 (internal citations omitted).

{¶ 41} The trial court properly instructed the jury on self-defense, even though the jury ultimately rejected it. We find the overlap in the language on self-defense and that contained in R.C. 2911.21, with respect to a person’s lawful right to be present on certain premises, confirms that the jury would have likewise rejected the defense of criminal trespass. Therefore, we do not find that the outcome would have been different had the jury been so instructed.

{¶ 42} Madera’s second and third assignments of error are overruled.

Judgment affirmed in part and reversed in part. Case remanded for the trial court to vacate the aggravated robbery convictions.

It is ordered that appellant and appellee share the 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.

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

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

CHRISTINE T. MCMONAGLE, J., and
COLLEEN CONWAY COONEY, J., CONCUR