[Cite as *State v. Fisher*, 2020-Ohio-670.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 108494
v.	:	
DAVID FISHER, IV,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: February 27, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-18-630739-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Janna R. Steinruck, Assistant Prosecuting Attorney, *for appellee*.

Ariel E. Burr, *for appellant*.

MARY J. BOYLE, P.J.:

{¶ 1} Defendant-appellant, David Fisher IV, appeals his convictions. He raises three assignments of error for our review:

> 1. David Fisher, IV was denied his constitutional right to effective assistance of counsel where counsel failed to call witnesses to testify on his behalf and make specific requests regarding body camera footage.

2. David Fisher, IV was denied his constitutional right to effective assistance of counsel where counsel failed to raise the affirmative defense of self defense.

3. Prosecutor's objection to reveal whether the state is in possession of potentially exculpatory evidence violates appellant's constitutional due process rights.

{¶ 2} Finding no merit to his assignments of error, we affirm.

I. Procedural History and Factual Background

{¶ 3} On August 14, 2018, a Cuyahoga County Grand Jury indicted Fisher for one count of assault in violation of R.C. 2903.13(A), a felony of the fourth degree; one count of resisting arrest in violation of R.C. 2921.33(B), a misdemeanor of the first degree; and one count of obstructing official business in violation of R.C. 2921.31(A), a felony of the fifth degree.

{¶ 4} Fisher pleaded not guilty and waived his right to a jury trial. The following evidence was presented to the bench.

{¶ 5} On July 13, 2018, Euclid police officers responded to Mitchell's Lounge on Euclid Avenue for a report of a stabbing around 11:45 p.m. Officer David Maslyk arrived first on scene and was wearing a body camera that recorded his interactions with the witnesses. He identified what was occurring as the state played the video in court.

{¶ 6} There was a very large crowd standing outside the bar, and most of the crowd appeared to be members of a wedding party. Officer Maslyk said a woman approached him immediately and informed him that a security guard for the bar stabbed one of her relatives. Officer Maslyk said he learned that the alleged suspect

was standing right inside the front glass doors, which were locked, and the crowd was forming in front of the doors, presumably "trying to get in there to him." Officer Maslyk testified that the crowd, whom he learned were mostly family members of the stabbing victim, was upset and that he could smell alcohol emanating from the crowd.

{¶ 7} Officer Maslyk went to the bar's front door and "was getting a little stressed out * * * [that the crowd was] getting animated because" of his presence and because they wanted the security guard to be arrested. Officer Maslyk tried "to get the crowd back" for his safety and testified he was unable to immediately locate the stabbing victim because he was trying to handle the crowd. While trying to disperse the crowd, Officer Maslyk "noticed [a] gentleman in the white shirt who was later identified as Jerome Fisher[1] that immediately came around to [him and] was very postured, [his] fists were clenched at times and he was yelling and screaming, wanted to know what happened to his cousin, wanted to know who did it, wanted to get inside[.]" Officer Maslyk told Jerome to walk away "several times." He said after warning Jerome a third time to walk away, Fisher assisted in removing Jerome from near the front door. Officer Maslyk testified that at that point, Fisher was "not on [his] radar" and that he was more concerned with Jerome. Officer Maslyk stated that as Jerome was being guided away from the front door after a third

[1] While Jerome's last name is also Fisher, throughout the rest of the opinion, "Fisher" refers to David Fisher.

warning, Jerome began yelling obscenities at him, taunting him, and telling Officer Maslyk to "come get some." At that point, other officers arrived on scene.

{¶ 8} Officers Christian Studly and Alexander Schwedt arrived thirty seconds to a minute after Officer Maslyk, who directed them to arrest Jerome. Officer Maslyk testified that he then left the bar's front-door area to help with Jerome's arrest because he was worried for Officer Studly's safety. As Officer Maslyk walked toward Officer Studly, David Fisher "c[a]me up posturing * * * [with] his fists down." Officer Maslyk said Fisher "came out of nowhere" and grabbed him. Officer Maslyk testified that, to defend himself, he "wrap[ped Fisher] up" and "took him to the ground." Officer Maslyk testified that in the process, Fisher punched him in the face and "busted" his lip. Officer Maslyk also suffered a cut to his elbow and later discovered that he tore his biceps tendon. He testified that after they were on the ground, Fisher was "still resisting, still flailing, [and] not listening to verbal commands."

{¶ 9} Officer Studly testified that when he went to arrest Jerome, he saw an "altercation [break] out between Officer Maslyk and another individual." Officer Studly stated that he did not see what led to the altercation, but that he assisted Officer Maslyk by taking out his taser and telling Fisher to comply. Officer Studly said he took out his taser because Officers Maslyk and Schwedt were "struggling" and "fighting" with Fisher, who was on the ground.

{¶ 10} Officer Schwedt testified that as he approached the crowd, he heard Officer Maslyk yelling and saw "a man in a maroon dress shirt later identified as

David Fisher step in front of Officer Maslyk, grab both his arms, and then a fight ensue[d]." Officer Schwedt said he observed Officers Maslyk and Studly approaching Jerome when Fisher stepped in front of Officer Maslyk and grabbed him. Officer Schwedt testified that he saw Officer Maslyk then take Fisher to the ground. Officer Schwedt fired a few rounds from his pepper ball gun and then helped Officer Maslyk "restrain David Fisher because his legs were flailing and kicking all over the place while he was still actively resisting on the ground."

{¶ 11} Officer Schwedt also testified to footage recorded from his police cruiser's dash camera, which showed that after Fisher was placed in the police car, Fisher stated, "That's why he got punched." The dash-camera footage shows Fisher stating, "I had to get him off me. That's why he got punched." The footage also shows that Fisher stated, "I didn't even swing on him until he slammed me."

{¶ 12} When asked if his interaction with Fisher interrupted his investigation into the stabbing, Officer Maslyk testified that it did because he was unable to type up his report for a number of hours, it added extra police work, and it resulted in injuries to an officer. He also stated:

> [T]he victim could have been laying around the corner of the building in serious need of help and we could not get him help, not to mention I could be losing potential witnesses. There could be witnesses standing by say I want to tell this police [officer] everything I saw. And then they see everything that is transpiring, they see the arguing, the yelling, not listening to the police verbal commands and get nervous and say, I'm not staying here anymore. I don't want to be involved in this. I'm leaving. So yeah, it could play havoc on an investigation for sure.

{¶ 13} The state admitted as evidence footage from Officer Schwedt's dash camera and Officer Maslyk's body camera as well as a picture of Officer Maslyk's elbow. The state then rested.

{¶ 14} Fisher moved for an acquittal under Crim.R. 29, which the trial court denied. He then rested without presenting witnesses on his behalf. Fisher renewed his Crim.R. 29 motion, which the trial court again denied.

{¶ 15} The court found Fisher guilty of all charges and sentenced him to one-and-a-half years of community control for each offense. The trial court informed Fisher that a violation of his community-control conditions could result in more restrictive sanctions or 18 months in prison for assault, 180 days for resisting arrest, and 1 year for obstructing official business. The trial court ordered Fisher to pay costs or perform community control work service in lieu of payment.

{¶ 16} It is from this judgment that Fisher now appeals.

II. Law and Analysis

A. Ineffective Assistance of Counsel

{¶ 17} In his first and second assignments of error, Fisher argues that his trial counsel was ineffective for failing to (1) call witnesses to testify on his behalf, (2) request the body-camera footage of other officers on the scene, and (3) raise the affirmative defense of self-defense.

{¶ 18} The defendant carries the burden of establishing a claim of ineffective assistance of counsel on appeal. *State v. Corrothers*, 8th Dist. Cuyahoga No. 72064, 1998 Ohio App. LEXIS 491, 19 (Feb. 12, 1998), citing *State v. Smith*, 3 Ohio App.3d

115, 444 N.E.2d 85 (8th Dist.1981). To gain reversal on a claim of ineffective assistance of counsel, a defendant must show that (1) his "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The first prong of *Strickland*'s test requires the defendant to show "that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. *Strickland*'s second prong requires the defendant to show "a reasonable probability that but for counsel's errors, the proceeding's result would have been different." *State v. Winters*, 8th Dist. Cuyahoga No. 102871, 2016-Ohio-928, ¶ 25, citing *Strickland*.

{¶ 19} While "[t]he right to counsel is the right to the effective assistance of counsel," "trial strategy or tactical decisions cannot form the basis for a claim of ineffective counsel." *Id.* at 686, citing *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). "Judicial scrutiny of defense counsel's performance must be highly deferential." *State v. Sanchez*, 8th Dist. Cuyahoga No. 103078, 2016-Ohio-3167, ¶ 8, citing *Strickland*.

{¶ 20} First, as to his trial counsel's failure to call witnesses on his behalf, "'counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court.'" *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, 25 N.E.3d 1023, ¶ 203, quoting *State v. Treesh*, 90 Ohio St.3d 460, 739 N.E.2d 749 (2001).

{¶ 21} Further, while Fisher argues that someone can be heard yelling during his arrest that "he didn't do anything," there is no evidence in the record that the witness (or any other witness, for that matter) was available, would have actually testified that Fisher "did not do anything," or that any such testimony would have benefitted Fisher or been something more than merely cumulative of evidence already elicited. The state admitted testimony from three officers at the scene as well as footage of two different angles showing what transpired and led to Fisher's arrest. An unidentified person's testimony about whether he or she believed Fisher did or did not "do anything" does not establish a reasonable probability of a different outcome. *See State v. Delawder*, 4th Dist. Lawrence No. 14CA12, 2015-Ohio-1857, ¶ 35 ("[W]e cannot speculate about testimony that was not presented or proffered at trial"); *State v. White*, 8th Dist. Cuyahoga No. 101576, 2017-Ohio-7169, ¶ 14 ("[T]he mere failure to call [alibi] witnesses does not render counsel's assistance ineffective absent a showing of prejudice"); *State v. Pimental*, 8th Dist. Cuyahoga No. 84034, 2005-Ohio-384, ¶ 17 ("Although Pimental lists the names of the purported witnesses he claims his trial counsel should have called to testify, he fails to reveal what testimony the witnesses would have offered. His mere conclusion that the witnesses' testimony would have affected the outcome of the trial is insufficient to satisfy his burden of proving that his trial counsel was ineffective.").

{¶ 22} Moreover, Fisher is basing his ineffective-assistance claim on speculation that evidence outside the record would establish a reasonable probability of a not-guilty verdict on all of the charges; but when a defendant bases

a claim of ineffective assistance of counsel on evidence outside of the record, postconviction relief rather than direct appeal is the proper vehicle to raise such a claim. *State v. Kennard*, 10th Dist. Franklin No. 15AP-766, 2016-Ohio-2811, ¶ 24; *State v. Mankins*, 8th Dist. Cuyahoga No. 99356, 2013-Ohio-4039, ¶ 23; *see also State v. Irwin*, 7th Dist. Columbiana No. 11CO6, 2012-Ohio-2704, ¶ 97 ("While evidence may exist outside the record to support an appellant's contention of ineffective assistance, a direct appeal is not the proper place to present this evidence.").

{¶ 23} We do not find that Fisher's trial counsel was ineffective in the presentation of evidence on his behalf. Fisher's trial counsel cross-examined the three police officers presented as witnesses for the state. His counsel extensively questioned Officer Maslyk about his and Fisher's actions, who started the altercation, and whether Officer Maslyk was overly aggressive or acted improperly. Fisher argues that "the body camera footage from the other officers on scene would have shown different angles of the tussle between [Fisher] and Officer Maslyk[.]" Assuming that Fisher means the footage from Officers Schwedt's and Studly's body cameras, since they appear to be the only officers on scene at the time the pertinent events transpired, it is unclear what those other angles would offer. Fisher does not actually allege that the other angles would show something different or exculpatory; he merely speculates that they would. Further, Officer Studly testified that he did not see what led to the tussle between Officer Maslyk and Fisher, so it is hard to imagine that his body camera would actually have captured any of the incident.

Finally, the footage from both Officer Schwedt's dash camera and Officer Maslyk's body camera provided a clear view of what transpired. Therefore, we find that any additional camera footage would not establish a reasonable probability of a different outcome and that Fisher's trial counsel was thus not ineffective for failing to request or obtain such footage, assuming that it exists.

{¶ 24} Finally, we turn to Fisher's claim that his counsel was ineffective for failing to raise self-defense. In Ohio, self-defense is an affirmative defense that a defendant must prove by a preponderance of the evidence.[2] R.C. 2901.05(A); *State v. Williford*, 49 Ohio St.3d 247, 249, 551 N.E.2d 1279 (1990).

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[2] The General Assembly amended R.C. 2901.05 through Am.Sub.H.B. 228, which became effective on March 28, 2019. The amended statute now places the burden of proof on the state to prove that the defendant did not act in self-defense. The statute states:

> (A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense other than self-defense, defense of another, or defense of the accused's residence as described in division (B)(1) of this section, is upon the accused.
>
> (B)(1) A person is allowed to act in self-defense, defense of another, or defense of that person's residence. If, at the trial of a person who is accused of an offense that involved the person's use of force against another, there is evidence presented that tends to support that the accused person used the force in self-defense, defense of another, or defense of that person's residence, the prosecution must prove beyond a reasonable doubt that the accused person did not use the force in self-defense, defense of another, or defense of that person's residence, as the case may be.

Nevertheless, the statute's changes were not effective at the time of Fisher's trial. Fisher's trial occurred on February 21, 2019, before the effective date of the amendment. Therefore, the amendments do not apply. *See State v. Koch*, 2d Dist. Montgomery No. 28000, 2019-Ohio-4099, ¶ 103 (finding the defendant "[was] not entitled to retroactive application of the burden-shifting changes made by the legislature to Ohio's self-defense statute, R.C. 2901.05, as a result of H.B. 228."). Therefore, contrary to Fisher's assertion

{¶ 25} To succeed on a claim of self-defense, a defendant must establish the following three elements: (1) no fault in creating the situation giving rise to the affray; (2) a bona fide belief that he or she was in imminent danger of death or great bodily harm and that the only means of escape from such danger was in the use of force; and (3) no violation of any duty to retreat or avoid the danger. *State v. Barnes*, 94 Ohio St.3d 21, 24, 759 N.E.2d 1240 (2002).

{¶ 26} In *State v. Radecki*, 8th Dist. Cuyahoga No. 93260, 2010-Ohio-4108, the defendant raised the same argument, alleging that his trial counsel was ineffective for failing to raise self-defense as an affirmative defense to the charge for assaulting a police officer. We found that the defendant's argument failed for two reasons: "(1) defendant's attorney in his opening and closing statements and through examination (both cross and direct) raised this issue at trial and (2) 'in a bench trial it is presumed that the trial court considered the appropriate inferior and lesser-included offenses and defenses.'" *Id.* at ¶ 6, quoting *State v. Perez*, 8th Dist. Cuyahoga No. 91227, 2009-Ohio-959. We went on to say:

> It is clear from the trial court's comments that it did consider the issue of self-defense; specifically, the trial court had "especially concentrated on the video" and took into account "the totality of the circumstances." Since there is no dispute that defendant inflicted wounds on the officer, the only thing the trial court could have possibly been contemplating before rendering the verdict was whether defendant had a defense to justify his conduct, i.e. whether he was acting in self-defense.

Id.

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that his trial counsel "removed the state's burden to prove beyond a reasonable doubt that [Fisher] was not acting in self-defense[,]" it was actually Fisher's burden to raise and prove the affirmative defense of self-defense.

{¶ 27} We reach the same conclusion in this case. First, Fisher argues that his "counsel's logic in his closing and the theory of his case rested clearly on the assertion that it was indeed the victim who was the aggressor and [Fisher] was merely responding. The fact that he failed to take the next step and raise an affirmative defense is beyond unreasonable." But it was abundantly clear that Fisher's attorney was raising the issue of self-defense. This was a bench trial, and as we said in *Radecki*, the trial court is presumed to have considered the appropriate defenses in rendering its verdict. It is clear from the transcript that the trial court considered this defense, stating, "I know there is the defense here that, well, the defendant didn't know what Officer Maslyk was trying to do and he was just trying to protect himself."

{¶ 28} Furthermore, "'[i]n the absence of excessive or unnecessary force by an arresting officer, a private citizen may not use force to resist arrest by one he knows, or has good reason to believe, is an authorized police officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances.'" *State v. Scimemi*, 2d Dist. Montgomery No. 94-CA-58, 1995 Ohio App. LEXIS 2244, 17 (Jun. 2, 1995), quoting *Columbus v. Fraley*, 41 Ohio St.2d 173, 324 N.E.2d 735 (1975). A review of the record shows that the level of force that Officer Maslyk used against Fisher was neither unnecessary nor excessive, and as a result, Fisher was not entitled to use force against Officer Maslyk. *See State v. Pitts*, 2d Dist. Greene No. 2005 CA 93, 2006-Ohio-4517, ¶ 29 ("Only after Pitts became violent did the officers resort to physical force against Pitts. The force with which

the officers attempted to subdue Pitts was neither unnecessary [n]or excessive, and Pitts was not entitled to use force against them.").

{¶ 29} Accordingly, we overrule Fisher's first and second assignments of error.

B. Exculpatory Evidence

{¶ 30} In his third assignment of error, Fisher argues that the state's refusal to reveal whether it had potentially exculpatory or useful evidence violated his due process rights. Fisher specifically argues that the state violated his due process rights when it rejected his appellate counsel's requests concerning alleged body-camera footage that the state did not turn over to defense counsel prior to trial. In support of his argument, Fisher relies on email communications between his appellate counsel and the Cuyahoga County Prosecutor's Office that occurred after trial, which constitutes evidence that is outside the record.

{¶ 31} "[A] bedrock principle of appellate practice in Ohio is that an appeals court is limited to the record of the proceedings at trial." *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, ¶ 13. "[A] claim requiring such proof that exists outside of the trial record cannot appropriately be considered on a direct appeal." *State v. Croom*, 7th Dist. Mahoning No. 12 MA 54, 2014-Ohio-1945, ¶ 11. Instead, matters relating to evidence outside the record should be raised in postconviction relief proceedings. *State v. McNeal*, 8th Dist. Cuyahoga No. 77977, 2002-Ohio-4764, ¶ 12. Therefore, because Fisher's third assignment of error

regarding the possible existence of exculpatory material relies on evidence outside of the record, it is not properly before us on direct appeal.

{¶ 32} Accordingly, we overrule Fisher's third assignment of error.

{¶ 33} 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 is terminated. Case remanded to the trial court for execution of sentence.

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

MARY J. BOYLE, PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
MICHELLE J. SHEEHAN, J., CONCUR

Keywords: ineffective assistance of counsel, self-defense, exculpatory evidence

Summary: Fisher's trial counsel was not ineffective for failing to call witnesses on his behalf, secure additional body-camera footage, or raise the affirmative defense of self-defense. Fisher's argument with respect to exculpatory evidence relies on evidence outside the record, which is not properly before the court.