

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-140352
	:	TRIAL NO. 13CRB-21732
Plaintiff-Appellee,	:	
vs.	:	
	:	<i>OPINION.</i>
OSWALD NELSON,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: February 25, 2015

Heidi Rosales, City Prosecutor, and *Christopher Liu*, Assistant City Prosecutor, for
Plaintiff-Appellee,

Josh Thompson, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

FISCHER, Judge.

{¶1} Defendant-appellant Oswald Nelson challenges his conviction for misdemeanor assault against a security guard in the John Weld Peck Federal Building (the “federal building”). Because we determine that Nelson’s assignments of error challenging the sufficiency and weight of the evidence, and the actions of his counsel, are without merit, we affirm his conviction.

{¶2} On August 1, 2013, Nelson entered the federal building on Main Street in downtown Cincinnati. Nelson refused to comply with the security requirements, such as removing items from his pockets and removing his belt, and instead Nelson tried to “bolt” past the security guards. One security guard had been walking around the perimeter of the building when he received a call that Nelson was causing a disturbance. The roving guard confronted Nelson and attempted to detain him, and Nelson hit him. At that point, the other guards physically held Nelson, and Nelson was arrested by Cincinnati police.

{¶3} Nelson was charged with misdemeanor assault under R.C. 2903.13, and the matter proceeded to a bench trial. The roving security guard testified that he had placed his hands up in attempt to stop Nelson from leaving when Nelson then walked into the guard’s hands, “bladed his body” into the guard, and used his hand to “karate-chop” the guard’s arm. Nelson testified in his defense that one of the security guards had told him to leave the building, and that when he attempted to leave, the security guard put his hands into Nelson’s abdomen. Nelson then reacted to this physical contact by hitting the guard’s arm. The security guard testified in rebuttal that he had never laid a hand on Nelson prior to Nelson walking into him.

{¶4} The trial court found Nelson guilty. At sentencing, the trial court considered Nelson's prior military service and sentenced him to 17 days in prison with credit for the 17 days he had already served in prison awaiting trial. This appeal ensued.

{¶5} We first address an issue regarding mootness, an issue of first impression in this appellate district. The Supreme Court has held that an appeal by a criminal defendant convicted of a misdemeanor is moot where the defendant voluntarily completes his sentence, and where no evidence exists to show that the defendant will suffer "some collateral disability or loss of civil rights" from the conviction. *See State v. Wilson*, 41 Ohio St.2d 236, 325 N.E.2d 236 (1975), syllabus. Several Ohio appellate courts have distinguished the mootness principle articulated in *Wilson* from cases where a defendant has been sentenced to prison "time served," reasoning that a defendant imprisoned involuntarily pending the outcome of a criminal proceeding would be prevented from exercising his appellate rights through no choice of his own. *See State v. Benson*, 29 Ohio App.3d 109, 110, 504 N.E.2d 77 (10th Dist.1986); *State v. Byrd*, 185 Ohio App.3d 30, 2009-Ohio-5606, 923 N.E.2d 161 (2d Dist.); *State v. Lewis*, 8th Dist. Cuyahoga No. 98621, 2013-Ohio-1187, ¶ 3-4; *State v. Campbell*, 9th Dist. Summit No. 24668, 2010-Ohio-2573.

{¶6} We agree with the reasoning of *Benson* and the cases that follow and hold that a criminal defendant's misdemeanor appeal is not moot where the record demonstrates that the defendant was imprisoned pending the outcome of the proceedings on the charges for which he was held, the trial court sentenced the defendant to time served, and the defendant did not otherwise voluntarily complete any other part of his sentence. Therefore, because Nelson did not voluntarily serve

his prison sentence, and no fines or costs were imposed on him, his appeal is not moot.

{¶7} In his first assignment of error, Nelson argues that his assault conviction was not supported by sufficient evidence because the state failed to prove that he had acted “knowingly” as required for an assault conviction. A person acts knowingly when “regardless of his purpose, * * * he is aware that his conduct will probably cause a certain result or will probably be of a certain nature.” R.C. 2901.22(B).

{¶8} Nelson specifically contends that he did not have the requisite mens rea because he had acted “reflexively” to the “continued contact” by the security guard. Nelson relies on a case from the Eighth Appellate District, *State v. Miller*, 8th Dist. Cuyahoga No. 96781, 2012-Ohio-1191. In *Miller*, police officers responded to a residence for a male, possibly on drugs or mentally ill, threatening his mother. When the officers arrived at the residence, the defendant charged at the officers while mumbling incoherently, and the officers grabbed the defendant’s arms to prevent him from hurting himself or others. The defendant then began flailing his arms, and the officers took the defendant to the ground. During this struggle, the defendant kicked one of the officers in the leg, and kneed the officer in the stomach. *Id.* at ¶ 3-4. The *Miller* court reversed the defendant’s conviction for assault, finding that the defendant’s actions “did not rise to the level of ‘knowingly’ ” where the defendant “at some point” during the struggle with the officers struck one of them. *Id.* at ¶ 14.

{¶9} In contrast to *Miller*, the evidence presented by the security guard showed that no physical struggle occurred until after Nelson struck the guard, and neither party submitted evidence showing that Nelson had been incoherent at the

time. The security guard testified that Nelson walked into the guard's body and struck the guard's arm. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have determined that Nelson knowingly caused or attempted to cause physical harm to the security guard as required by R.C. 2903.13. *See State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. Therefore, we overrule Nelson's first assignment of error.

{¶10} In his second assignment of error, Nelson argues that his conviction was against the manifest weight of the evidence because the security guard was not a credible witness. Nelson specifically contends that the guard's testimony varied as to whether Nelson or the guard initiated physical contact.

{¶11} In reviewing a weight-of-the-evidence challenge, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice such that the conviction must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). Although this court considers witness credibility in a challenge to the weight of the evidence, matters of witness credibility are primarily for the trier of fact. *See State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus.

{¶12} The record belies Nelson's argument that the security guard's testimony varied as to who initiated physical contact. The guard maintained throughout trial that Nelson walked into the guard's person first. Thus, we cannot say that the trial court lost its way and created such a manifest miscarriage of justice

that Nelson's conviction must be reversed and a new trial ordered. *See Thompkins* at 387. We overrule Nelson's second assignment of error.

{¶13} In his third assignment of error, Nelson argues that he was denied a fair trial because he received ineffective assistance of counsel. Nelson asserts that his counsel failed to demand discovery or to collect or present evidence, argue Nelson's self-defense theory, and make any opening statement or closing argument.

{¶14} In order to succeed on a claim for ineffective assistance of counsel, an accused must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that but for counsel's alleged errors, the outcome of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶15} Nelson argues that counsel could have obtained security footage from the federal building and photographs of the injuries that Nelson sustained. The record does not indicate that either the footage or the photographs existed, and even if they did, nothing in the record indicates that counsel made an unreasonable trial-strategy decision in not presenting them. *See State v. Reinhardt*, 1st Dist. Hamilton No. C-130560, 2014-Ohio-4071, ¶ 16 (this court will not second-guess matters of trial strategy). As to Nelson's self-defense theory, the record indicates that Nelson testified as to his version of events, and that even under his version, self-defense did not apply. *See State v. Henderson*, 1st Dist. Hamilton No. C-130541, 2014-Ohio-3829, ¶ 30 (noting the elements of self-defense, including that the defendant must prove that he was not at fault for causing the situation that led to the affray). Therefore, Nelson has not shown that counsel's conduct in this regard fell below an objective standard of reasonableness. *See Strickland*.

{¶16} Finally, Nelson makes no argument as to how counsel's failure to provide an opening statement or closing argument would have changed the outcome of his trial, and we will not second guess counsel's choice in this instance to refrain from giving an opening statement or closing argument in a misdemeanor-assault case tried to the bench. *See Strickland; State v. Issa*, 1st Dist. Hamilton No. C-970270, 1998 Ohio App. LEXIS 686 (Feb. 27, 1998) (counsel's failure to give an opening statement was nothing more than a trial tactic). Therefore, we overrule Nelson's third assignment of error.

{¶17} In conclusion, having overruled Nelson's assignments of error, we affirm the judgment of the trial court convicting Nelson of misdemeanor assault.

Judgment affirmed.

HENDON, P.J., and CUNNINGHAM, J., concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.