

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 15AP-704
Plaintiff-Appellee,	:	(C.P.C. No. 14CR-0661)
v.	:	
	:	(REGULAR CALENDAR)
Kyle J. Fort,	:	
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 24, 2016

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Valerie B. Swanson*, for appellee. **Argued:** *Valerie B. Swanson*

On brief: *Carpenter Lipps & Leland, LLP*, *Kort Gatterdam*, and *Erik P. Henry*, for appellant. **Argued:** *Erik P. Henry*

APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Defendant-appellant, Kyle J. Fort, appeals from a judgment of the Franklin County Court of Common Pleas convicting him of assault. For the following reasons, we affirm.

I. Facts and Procedural History

{¶ 2} In February 2014, the Franklin County Grand Jury indicted Fort on two counts of assault, in violation of R.C. 2903.13, both fourth-degree felonies. Count One alleged Fort assaulted Officer Michael Robison of the Columbus Division of Police. Count Two alleged Fort assaulted Officer Joshua Jarrell of the Columbus Division of Police. The matter proceeded to a jury trial in May 2015. The following evidence was adduced at trial.

{¶ 3} Officer Jarrell testified as follows: Over a defense objection, Officer Jarrell described the Columbus Division of Police's use of force policy as a "gradual" policy, progressing from mere presence, to placing a hand on someone, to closed-hand strikes, to kicks, to use of pepper spray, to lethal force. (Tr. 52.) When an officer is confronted with a certain level of force, the officer is authorized to respond with the next higher level of force in order to "maintain the upper hand of any situation." (Tr. 53.) For example, if an assailant shoves an officer, the officer is authorized to grab the assailant.

{¶ 4} At approximately 5:50 a.m. on January 31, 2014, Officer Jarrell was dispatched to 3926 Southpoint Boulevard, Columbus, Ohio, on a report of a domestic dispute. Officer Jarrell was the first police officer at the scene. When he arrived, Officer Jarrell spoke with Katrina Sandifer, who had reported the dispute and was in the parking lot near the apartment. Based on Officer Jarrell's conversation with Sandifer, he determined he needed to speak to the other party involved in the dispute. Sandifer gave Officer Jarrell permission to enter the apartment.

{¶ 5} Officer Jarrell approached the apartment and knocked on the door. Fort opened the door but only "enough that his head was just sticking out." (Tr. 63.) Officer Jarrell tried to speak with Fort to investigate the situation, but Fort was confrontational toward him. Fort attempted to close the door, and Officer Jarrell then forcibly pushed the door open and entered the apartment. Fort began to yell at Officer Jarrell, telling him he had no right to be there and to leave. At that time, Officer Robison arrived at the scene and entered the apartment. Fort yelled for someone, and he attempted to evade the officers by moving towards the stairs.

{¶ 6} Officer Jarrell positioned himself to block Fort from ascending the stairs. Fort then pushed Officer Jarrell aside and began to climb the stairs. Both officers grabbed Fort to stop him. After the officers grabbed Fort, Fort turned around in a "threatening manner" and attempted to "swing like he's going to swing or punch at" Officer Jarrell. (Tr. 67, 68.) This caused both officers and Fort to stumble down a few steps to the floor at the bottom of the stairs.

{¶ 7} The officers maintained their hold on Fort and attempted to handcuff him. Officer Jarrell was "up at [Fort's] torso * * * holding his hands" and Officer Robison was toward Fort's feet while Fort was "flailing" and "kicking." (Tr. 69.) Fort kicked Officer

Robison "in the face or in the head," causing Officer Robison to lose some control of Fort. (Tr. 69.) At that time, Officer Jarrell struck Fort in the face with a close-handed fist, which stunned Fort. Fort attempted to swing his foot up to kick Officer Jarrell in the head, but he did not strike him. Officer Jarrell struck Fort again, and the officers were able to place handcuffs on Fort to gain full control of him.

{¶ 8} Officer Jarrell testified that if Fort had filed a complaint about the incident with the Columbus Division of Police, it would have interviewed Officer Jarrell. However, the department did not interview Officer Jarrell regarding his conduct during the incident involving Fort.

{¶ 9} Officer Robison testified as follows: At approximately 5:50 a.m. on January 31, 2014, Officer Robison was dispatched to 3926 Southpoint Boulevard as a result of a domestic violence call. The caller reported that she would be at the Turkey Hill gas station at the intersection of South High Street and Obetz Road. Because the caller was not at the gas station upon Officer Robison's arrival, the officer proceeded to the 3926 Southpoint Boulevard address. When he arrived at the scene, he saw Officer Jarrell with a female, later identified as Sandifer, near the front door of the apartment.

{¶ 10} As Officer Robison approached the apartment, he could hear a male yelling from inside the apartment at Officer Jarrell, who was still outside. The male, later identified as Fort, attempted to shut the door, but Officer Jarrell put his foot and hand on the door to keep it from closing. It was clear to Officer Robison that Fort did not want the officers to enter the apartment. However, the officers obtained verbal consent from Sandifer. Officers Jarrell and Robison entered the apartment to investigate the domestic violence call.

{¶ 11} Once they entered the apartment, Fort was "belligerent and yelling" and told the officers to leave. (Tr. 104.) Based on the call to the police, Officer Robison was looking for a baseball bat in the apartment, but he did not see one. Fort yelled to someone on the second floor of the apartment and began to ascend the stairs. The officers ordered Fort to stop going up the stairs, and they grabbed his arms to escort him out to a police cruiser.

{¶ 12} Fort "violently pulled his arms from" the officers' grasps and "attempted to strike Officer Jarrell with a punch." (Tr. 110.) Officer Robison saw Fort "connect with

Officer Jarrell on his right shoulder and neck." (Tr. 110.) Officer Robison attempted to grab Fort's arm and then they all "fell to the floor." (Tr. 110.) The officers attempted to handcuff Fort, but Fort "continued to be combative." (Tr. 111.) Fort "started to kick his legs in the air and -- at which time he connected with a kick to the left side of [Officer Robison's] face." (Tr. 111.) Fort's "hard-soled combat" boots "connected solid" with Officer Robison's head. (Tr. 112.) Fort's strike to Officer Robison's head knocked his glasses off and caused him to fall back into a wall. Officer Robison was "caught by a woman who had appeared in the apartment." (Tr. 111.) Officer Jarrell punched Fort in the face, and the officers were able to handcuff Fort. They held Fort at the scene until additional backup arrived because Fort continued to kick his legs and flail his body "back and forth." (Tr. 113.)

{¶ 13} After the incident was over, Officer Robison went to Grant Medical Center for treatment. He had a "severe headache" and bruising to his ear and the side of his face. (Tr. 113.) Officer Robison also had nausea and "was seeing spots in front" of his eyes due to the concussion he sustained. (Tr. 114.) Over a defense objection, Officer Robison testified that, if he was the subject of an "Internal Affairs" complaint, an internal affairs sergeant would interview him. (Tr. 121.) However, an internal affairs sergeant did not interview Officer Robison regarding this incident.

{¶ 14} Tariq Fort, Fort's 14-year-old son, testified for the defense. On the day of the incident, Tariq lived at 3926 Southpoint Boulevard with Fort and Tariq's mother, Sandifer. During the early morning hours of that day, Fort and Sandifer were arguing and "it got pretty loud." (Tr. 149.) Tariq and his sister woke up and went downstairs to see what was happening. Tariq was in the living room of the apartment when the police arrived, but he immediately ran up the stairs to retrieve his phone to record the incident. He did not find his phone. Tariq saw the police "beating up" his father, even after they had handcuffed him. (Tr. 146.) Tariq could see blood on his father's face.

{¶ 15} Katrina Sandifer Hayes, Sandifer's mother and Tariq's grandmother, testified for the defense. On the day of the incident, Tariq called Hayes to tell her that there was a disturbance at his residence. After receiving this call, Hayes drove to 3926 Southpoint Boulevard "to find out what was going on." (Tr. 154.) Upon her arrival, she saw police officers' arms punching "downward." (Tr. 157.) She tried to enter the

apartment during the incident, but an officer pushed her out of the doorway. Hayes did not see any officer get kicked in the head, and she did not "catch" any officer who was falling down. (Tr. 159.) When the police took Fort out of the apartment in handcuffs, Hayes noticed blood dripping from Fort. Hayes entered the apartment and saw blood on the floor, but she did not see any broken furniture in the apartment.

{¶ 16} Fort testified on his own behalf. Fort resided at 3926 Southpoint Boulevard from approximately 2009 or 2010 until the incident on January 31, 2014. On the day of the incident, Fort and Sandifer had an argument. Fort kicked a hole in the wall near the front door of the apartment. The argument ended, and Sandifer left the apartment. The police arrived approximately five to eight minutes after Sandifer left.

{¶ 17} Officer Jarrell knocked on the door to the apartment, and Fort "cracked the door open." (Tr. 173.) Officer Jarrell ordered Fort to back up, and Fort responded by saying, "No, you're not coming in my house." (Tr. 174.) Officer Jarrell "kicked the door in from the bottom" and entered the apartment. (Tr. 174.) Fort told the officers that the police cannot enter his home without reason, and the officers did not explain why they had entered the apartment. Because the officers did not explain what they wanted, Fort told the officers he was going to bed. Fort called up the stairs to his son and said, "Look, the police think they can just do what they want anytime they want." (Tr. 176.)

{¶ 18} The officers looked at each other and said, "We're going to take this one outside." (Tr. 176.) The officers "snatched [Fort]" and "roughed [him] up." (Tr. 176.) Fort placed his hands behind his back to prevent any further problems. The officers "beat up" Fort like a "rag doll," including "smash[ing]" his head into the floor. (Tr. 176.) It was "chaos." (Tr. 176.) Officer Jarrell also choked Fort until he could not breathe. Officer Robison pulled Officer Jarrell away from Fort before he choked to death. Fort denied kicking or otherwise assaulting either officer.

{¶ 19} After the incident, Fort wore a neck brace due to pain in his neck. He also had a broken rib, bruised ribs, and a bloody nose. Fort attempted to obtain the assistance of the National Association for the Advancement of Colored People and the Federal Bureau of Investigation regarding the incident, but he did not report it to the Columbus Division of Police Internal Affairs Bureau because a sergeant "made it clear that [Fort]

was guilty" and because Fort did not want to make any statements to the Columbus Division of Police. (Tr. 186.)

{¶ 20} The jury found Fort guilty of Count One of the indictment (assault of Officer Robison) and not guilty of Count Two of the indictment (assault of Officer Jarrell). The trial court sentenced Fort to three years of community control.

{¶ 21} Fort timely appeals his conviction.

II. Assignments of Error

{¶ 22} Fort assigns the following errors for our review:

[1.] Appellant was deprived of the effective assistance of trial counsel in violation of appellant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Section 10 and 16, Article I of the Ohio Constitution.

[2.] Appellant was deprived of his right to a fair trial and due process contrary to the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution because the state introduced irrelevant and prejudicial evidence regarding the Columbus Police Department's use of force policy.

[3.] Appellant was deprived of his right to a fair trial and due process contrary to the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution because the state introduced evidence regarding the lack of a complaint lodged against the officers for their conduct.

[4.] The trial court erred by admitting Officer Michael Robison's medical record containing diagnostic information into evidence, depriving appellant of his right to a fair trial and due process contrary to the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution.

[5.] The trial court violated appellant's rights to due process and a fair trial when it entered a judgment of conviction based on insufficient evidence and against the manifest weight of the evidence in violation of appellant's rights under the United States and Ohio Constitutions.

III. Discussion

A. Fifth Assignment of Error – Sufficiency and Manifest Weight of the Evidence

{¶ 23} For ease of discussion, we address Fort's assignments of error out of order. We first address Fort's fifth assignment of error, which asserts his conviction was not supported by sufficient evidence and was against the manifest weight of the evidence.

1. Sufficiency of the Evidence

{¶ 24} Whether there is legally sufficient evidence to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Sufficiency is a test of adequacy. *Id.* The relevant inquiry for an appellate court is whether the evidence presented, when viewed in a light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime proven beyond a reasonable doubt. *State v. Mahone*, 10th Dist. No. 12AP-545, 2014-Ohio-1251, ¶ 38, citing *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶ 37. "[I]n a sufficiency of the evidence review, an appellate court does not engage in a determination of witness credibility; rather, it essentially assumes the state's witnesses testified truthfully and determines if that testimony satisfies each element of the crime." *State v. Bankston*, 10th Dist. No. 08AP-668, 2009-Ohio-754, ¶ 4.

{¶ 25} Fort was convicted of assault, a violation of R.C. 2903.13 and a felony of the fourth degree. R.C. 2903.13(A) provides that "[n]o person shall knowingly cause or attempt to cause physical harm to another." Assault is a felony of the fourth degree, "[i]f the victim of the offense is a peace officer * * * while in the performance of their official duties." R.C. 2903.13(C)(5). Thus, to prove Fort committed the offense of assault as charged, the state was required to show that Fort knowingly caused or attempted to cause physical harm to Officer Robison while he was in the performance of his official duties. "Physical harm to persons" means any injury, illness, or other physiological impairment, regardless of its gravity or duration." R.C. 2901.01(A)(3). "A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). When determining whether a defendant acted knowingly, his state of mind must be determined from the totality of the circumstances surrounding the alleged crime. *State v. Ingram*,

10th Dist. No. 11AP-1124, 2012-Ohio-4075, ¶ 22. Culpable mental states are frequently demonstrated through circumstantial evidence. *Id.*

{¶ 26} Fort argues that, even if the evidence showed he kicked Officer Robison, the evidence did not demonstrate he knowingly caused harm to Officer Robison. Fort asserts the officers first began to grab and assault him, causing him to avoid getting harmed by flailing and kicking his legs in the air. According to Fort, the police officers' conduct escalated the situation, and he was simply protecting himself. Fort suggests that he was kicking his legs uncontrollably out of fear.

{¶ 27} Contrary to Fort's arguments, evidence presented at trial supported a finding that Fort knowingly caused harm to Officer Robison. Officer Jarrell testified that Fort was verbally confrontational upon the officer's arrival at the apartment. Officer Robison testified that Fort's foot "connected solid" with his head. (Tr. 112.) Officer Robison reported that he sustained a concussion from the impact of Fort's combat boot hitting his head, and his symptoms included a severe headache, nausea, seeing spots, and bruising to his face. Officer Jarrell testified that he saw Fort kick Officer Robison "in the face or in the head." (Tr. 69.) Viewed in a light most favorable to the prosecution, the evidence at trial sufficiently demonstrated that Fort knowingly caused physical harm to Officer Robison.

2. Manifest Weight of the Evidence

{¶ 28} When presented with a manifest weight argument, an appellate court engages in a limited weighing of the evidence to determine whether sufficient competent, credible evidence supports the jury's verdict. *State v. Salinas*, 10th Dist. No. 09AP-1201, 2010-Ohio-4738, ¶ 32, citing *Thompkins* at 387. "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." *Thompkins* at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). Determinations of credibility and weight of the testimony are primarily for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The jury, or the trial court in a bench trial, "is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *State v. Cattledge*,

10th Dist. No. 10AP-105, 2010-Ohio-4953, ¶ 6, quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). Thus, the finder of fact may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part, or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67 (1964).

{¶ 29} An appellate court considering a manifest weight challenge "may not merely substitute its view for that of the trier of fact, but must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Harris*, 10th Dist. No. 13AP-770, 2014-Ohio-2501, ¶ 22, citing *Thompkins* at 387. Appellate courts should reverse a conviction as being against the manifest weight of the evidence in only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶ 30} To support his argument that his conviction was against the manifest weight of the evidence, Fort cites several inconsistencies in the evidence. In particular, Fort cites Officer Jarrell's testimony that Fort did not strike him, which was contrary to Officer Robison's testimony that Fort struck Officer Jarrell on the right shoulder and neck. Fort asserts that Officer Robison testified that, when Fort kicked him, he fell backward and was caught by a woman. According to Fort, the only woman in the area, Katrina Sandifer Hayes, testified that she did not catch the officer. Lastly, Fort notes that Officer Robison testified that furniture had been overturned in the residence, which was contrary to Hayes' testimony that she did not see any broken or overturned furniture. Fort argues that these inconsistencies demonstrate the jury clearly lost its way.

{¶ 31} "A conviction is not against the manifest weight of the evidence solely because the trier of fact heard conflicting testimony." *State v. Anderson*, 10th Dist. No. 14AP-1047, 2015-Ohio-4458, ¶ 27. To reverse on manifest weight grounds in this case, we would need to find that a reasonable trier of fact could not find as credible the testimony of Officers Robison and Jarrell regarding Fort's strike to Officer Robison's head and the circumstances surrounding that event. *See State v. Brown*, 10th Dist. No. 02AP-11, 2002-

Ohio-5345, ¶ 10 ("[I]t is inappropriate for a reviewing court to interfere with factual findings of the trier of fact which accepted the testimony of such witness unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible."). As to Count One of the indictment, the factual dispute for the jury to resolve centered on whether Fort assaulted Officer Robison. Fort denied kicking Officer Robison, and Officers Robison and Jarrell testified that Fort kicked Officer Robison in the head. Further testimony demonstrated the circumstances surrounding the incident and its effect on Officer Robison's body. As Fort correctly notes, some of the testimony regarding the circumstances surrounding the incident was inconsistent. But those inconsistencies did not render the officers' testimony so unbelievable to render the verdict against the manifest weight. It was within the province of the jury to resolve the inconsistencies in the evidence and to reach a determination on the ultimate issue of fact. This case does not present exceptional circumstances requiring this court to invoke its power to reverse the jury's verdict on manifest weight grounds.

{¶ 32} Because Fort's conviction was supported by sufficient evidence and was not against the manifest weight of the evidence, his fifth assignment of error is overruled.

B. First Assignment of Error – Ineffective Assistance of Trial Counsel

{¶ 33} Fort's first assignment of error alleges he was deprived of his constitutional right to effective assistance of trial counsel.

{¶ 34} In order to prevail on a claim of ineffective assistance of counsel, Fort must satisfy a two-prong test. First, he must demonstrate that his counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This prong requires Fort to show that his counsel committed errors which were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* In considering claims of ineffective assistance of counsel, courts indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 101. If Fort can satisfy the first prong, he must then establish that he was prejudiced by the deficient performance. *Strickland* at 687. To show prejudice, Fort must establish there is a reasonable probability that, but for his counsel's errors, the result of the trial would have

been different. A "reasonable probability" is one sufficient to undermine confidence in the outcome of the trial. *Id.* at 694.

{¶ 35} Fort contends his trial counsel was ineffective in not filing a motion to suppress evidence stemming from the officers' entry into the apartment at 3926 Southpoint Boulevard. The failure to file a motion to suppress constitutes ineffective assistance of counsel only if, based on the record, the motion would have been granted. *State v. Randall*, 10th Dist. No. 03AP-352, 2003-Ohio-6111, ¶ 15; see *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, ¶ 65 (to establish ineffective assistance for failure to file a suppression motion, a defendant must prove that there was a basis to suppress the evidence in question). The Supreme Court of Ohio has rejected claims of ineffective counsel when counsel failed to file or withdrew a suppression motion when doing so was a tactical decision, there was no reasonable probability of success, or there was no prejudice to the defendant. See *State v. Nields*, 93 Ohio St.3d 6, 34 (2001), citing various cases. However, when counsel does not file a suppression motion, "the record developed at trial is generally inadequate to determine the validity of the suppression motion." *State v. Shepherd*, 5th Dist. No. 14CA63, 2015-Ohio-4215, ¶ 41, citing *State v. Parkinson*, 5th Dist. No. 1995CA00208 (May 20, 1996). Thus, "[w]here the record is not clear or lacks sufficient evidence to determine whether a suppression motion would have been successful, a claim for ineffective assistance of counsel cannot be established." *Parkinson*.

{¶ 36} Fort argues the evidence relating to his altercation with the police should have been suppressed because the officers' entry into the apartment was unlawful. The Fourth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment, as well as Article I, Section 14, of the Ohio Constitution, prohibit the government from conducting warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *State v. Mendoza*, 10th Dist. No. 08AP-645, 2009-Ohio-1182, ¶ 11, citing *Katz v. United States*, 389 U.S. 347, 357 (1967), *superseded by statute on other grounds*. Judicially recognized exceptions to the search warrant requirement include consent and the presence of exigent circumstances. *State v. Akron Airport Post No. 8975*, 19 Ohio St.3d 49, 51 (1985). Courts must exclude evidence obtained by searches and seizures that violate the Fourth Amendment. *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, ¶ 181.

{¶ 37} The state argues Fort cannot demonstrate that a motion to suppress would have been successful because the police were given consent to enter the residence and because exigent circumstances existed justifying the officers' entry into the apartment. Conversely, Fort argues that he was occupying the apartment and refused consent, and that any alleged threat to Katrina Sandifer no longer existed when the police arrived because she was outside the apartment. Because Fort's trial counsel did not file a motion to suppress, the facts relating to the issue of the lawfulness of the officers' entry into the apartment were not fully developed at trial. Nonetheless, even if we determined that the record before this court demonstrates that the officers did not have consent to enter the residence and that exigent circumstances did not exist, the exclusionary rule would not operate to exclude evidence regarding Fort's assault on Officer Robison.

{¶ 38} The "exclusionary rule is a judicially created sanction designed to protect Fourth Amendment rights through its deterrent effect." *State v. Brown*, 142 Ohio St.3d 92, 2015-Ohio-486, ¶ 12. This rule operates to exclude evidence obtained by the government in violation of the United States Constitution. *State v. Helton*, 160 Ohio App.3d 291, 2005-Ohio-1789, ¶ 14 (11th Dist.). But this rule does not operate to exclude evidence of "independent and distinct criminal conduct." *State v. Freeman*, 2d Dist. No. 18798 (Feb. 15, 2002). As explained in *Freeman*: "Application of the exclusionary rule is generally restricted to those areas where its remedial objectives are most efficaciously served." *Id.*, citing *United States v. Leon*, 468 U.S. 897 (1984).

{¶ 39} The objective to discourage illegal searches and seizures by police is not furthered by the suppression of criminal misconduct occurring "separate and apart from the illegal police conduct." *Id.* Ohio courts have held that "evidence of a fresh crime committed during or after an unlawful search and seizure is not properly regarded as deriving from the unlawful search and seizure; that evidence instead derives from the defendant's intervening voluntary criminal act." *State v. Hammer*, 2d Dist. No. 2012-CA- 2, 2012-Ohio-3497, ¶ 19, citing *State v. Ali*, 154 Ohio App.3d 493, 2003-Ohio-5150, ¶ 18 (7th Dist.); *State v. Cammon*, 8th Dist. No. 91574, 2009-Ohio-4706, ¶ 27-28; and *Freeman*. Further, "a citizen, in the absence of excessive force, is not privileged to use force in order to repel an arrest by a police officer, even an illegal one." *Id.*, citing *Columbus v. Fraley*, 41 Ohio St.2d 173 (1975). Thus, the "exclusionary rule does not apply

to evidence of an assault upon a police officer during the officer's unlawful entry." *Hammer* at ¶ 23. However, "if the police officer intentionally provokes the illegal conduct on the part of the citizen, then a different result may obtain." *Id.*

{¶ 40} Here, the evidence demonstrated that the police entered the apartment at 3926 Southpoint Boulevard to investigate a report of domestic violence. Immediately upon Officer Jarrell's arrival at the scene, Fort was confrontational. Officers Jarrell and Robison attempted to obtain information from Fort, but he attempted to leave the apartment's living room and proceed upstairs. The officers obstructed his ability to go up the stairs, and Fort then pushed Officer Jarrell aside to go around him. The encounter escalated into a melee in which Fort ultimately kicked Officer Robison in the head. Fort testified that the officers were the instigators and that they beat him. The jury rejected Fort's testimony and believed the officers' testimony.

{¶ 41} Because Fort cannot demonstrate that the trial court would have granted a motion to suppress, we reject his claim that he received ineffective assistance of trial counsel. Accordingly, Fort's first assignment of error is overruled.

C. Second, Third, and Fourth Assignments of Error – Admission of Evidence

{¶ 42} We address Fort's second, third, and fourth assignments of error together as they all involve evidentiary determinations. In his second assignment of error, Fort asserts the trial court erred in admitting testimony regarding the Columbus Division of Police's use of force policy. In his third assignment of error, Fort asserts the trial court erred in admitting testimony regarding Fort's non-filing of a complaint against Officers Jarrell and Robison. In his fourth assignment of error, Fort asserts the trial court erred in admitting a hospital discharge document regarding Officer Robison's treatment.

{¶ 43} The admission or exclusion of relevant evidence rests within the trial court's sound discretion. *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus. Thus, a reviewing court will not reverse a trial court's evidentiary ruling absent an abuse of discretion that materially prejudices the affected party. *State v. Issa*, 93 Ohio St.3d 49, 64 (2001). A trial court abuses its discretion when it acts "unreasonably, arbitrarily, or unconscionably." *Barnes* at 23.

1. Use of Force Policy

{¶ 44} Fort asserts that evidence of the Columbus Division of Police's use of force policy was irrelevant to the issue of whether Fort knowingly assaulted the officers. Fort further contends that, even if relevant, this evidence should have been excluded pursuant to Evid.R. 403(A) because it was unfairly prejudicial.

{¶ 45} Evid.R. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Generally, relevant evidence is admissible and irrelevant evidence is inadmissible. Evid.R. 402. "[T]he question of whether evidence is relevant is ordinarily not one of law but rather one which the trial court can resolve based on common experience and logic." *State v. Lyles*, 42 Ohio St.3d 98, 99 (1989). Evid.R. 403(A) provides that "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

{¶ 46} In *State v. Totty*, 2d Dist. No. 23372, 2010-Ohio-1234, the court addressed an admissibility of evidence issue similar to the one presented here. In *Totty*, the court addressed the issue of whether the defendant's trial counsel was deficient for not objecting to testimony by a police officer regarding his department's use of force policy. In *Totty*, Adrien Totty was convicted of assault on a peace officer in violation of R.C. 2903.13(A) and (C)(3). *Id.* at ¶ 1. Totty claimed that he was defending himself against the police officer's aggressive conduct. *Id.* at ¶ 52. The Second District Court of Appeals found that "explication of the policy for the use of force under which Watkins was operating explained his use of force, and was especially relevant in light of Totty's later testimony that [the police officer] was the sole aggressor, who attacked without reasonable provocation." *Id.* at ¶ 53.

{¶ 47} We agree with the *Totty* court's analysis and find it applicable here. Officer Jarrell's testimony regarding the Columbus Division of Police's use of force policy constituted relevant evidence. Fort testified that the police officers beat him even though he took no physical action against them. Officer Jarrell's testimony disputed Fort's claim. Officer Jarrell explained his police department's use of force policy, which provided a backdrop for the officers' testimony regarding their responses to Fort's actions. He

described the policy as a "gradual" policy, progressing from mere presence, to placing a hand on someone, to closed-hand strikes, to kicks, to use of pepper spray, to lethal force. The policy authorizes an officer to use a level of force one level above the level of force he faces in order to maintain control of a situation. Officer Jarrell testified that his use of force escalated in response to Fort's escalating physical resistance to the officers in accordance with police department policy. For example, when Fort pushed Officer Jarrell aside, Officer Jarrell grabbed at Fort's arm, and when Fort kicked Officer Robison in the head, Officer Jarrell punched Fort in the face as a means to regain control of the situation. Thus, as in *Totty*, Officer Jarrell's testimony regarding the department's policy explained the officers' responses to Fort's actions.

{¶ 48} Fort argues that any relevance of the use of force policy was substantially outweighed by unfair prejudice because the testimony indicated the police department's policy sanctioned the officers' mistreatment of him. According to Fort, the policy effectively directed the jury to find him guilty. We disagree. This argument incorrectly assumes the police officers' conduct was unreasonable and that the policy sanctioned such unreasonableness. Officer Jarrell's testimony regarding the use of force policy explained the officers' response to Fort as they confronted him and his actions. Further, contrary to Fort's contention, the admission of this testimony did not unfairly prejudice him by directing the jury to reach a certain finding as to his or the officers' conduct. Therefore, Evid.R. 403(A) did not require the exclusion of Officer Jarrell's testimony regarding the use of force policy.

{¶ 49} Because the trial court did not abuse its discretion in permitting the admission of testimony regarding the Columbus Division of Police's use of force policy, we overrule Fort's second assignment of error.

2. Internal Affairs Complaint

{¶ 50} Fort argues the trial court committed reversible error in permitting the state to introduce evidence indicating that he did not file a complaint with the Columbus Division of Police's Internal Affairs Bureau against Officers Jarrell and Robison. We disagree.

{¶ 51} Officer Jarrell testified that when a complaint is submitted to the Columbus Division of Police alleging an officer engaged in misconduct, the officer is investigated and

interviewed. He further testified that he was not interviewed as part of an investigation regarding the incident at issue here. Thus, the evidence demonstrated that Fort did not submit a complaint with the Columbus Division of Police alleging Officer Jarrell engaged in misconduct. Fort's counsel did not object to Officer Jarrell's testimony on the issue of the complaint. Officer Robison also testified that when a complaint is filed against officers with the Columbus Division of Police Internal Affairs Bureau, an internal affairs sergeant will interview the officer. Officer Robison testified that he was not interviewed regarding the incident at issue here. Fort's counsel timely objected to Officer Robison's testimony on this issue. The trial court overruled the objection and permitted the testimony, declining to exclude it under Evid.R. 403.

{¶ 52} Even assuming the testimony regarding the non-filing of a citizen complaint was irrelevant, Fort cannot show that its admission constituted reversible error. Fort's counsel did not object to Officer Jarrell's testimony on the issue of the non-filing of a complaint, and, thus, Fort must demonstrate the admission of that testimony constituted plain error under Crim.R. 52(B) for this court to reverse on this issue. *State v. Scott*, 10th Dist. No. 05AP-1144, 2006-Ohio-4981, ¶ 19, 21. An appellate court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a miscarriage of justice. *State v. Pilgrim*, 184 Ohio App.3d 675, 2009-Ohio-5357, ¶ 58 (10th Dist.). For an error to be a "plain error" under Crim.R. 52(B), it must satisfy three prongs: (1) there must be an error, meaning a deviation from a legal rule, (2) the error must be "plain," meaning an "obvious" defect in the trial proceedings, and (3) the error must have affected "substantial rights," meaning the error must have affected the outcome of the trial. *Barnes* at 27.

{¶ 53} Because Fort's counsel objected to Officer Robison's testimony regarding the non-filing of a complaint, the admission of this testimony is reviewed under the harmless-error standard, rather than the plain-error standard. Where there is no reasonable possibility the challenged testimony contributed to a conviction, the error is harmless and thus does not constitute grounds for reversal. *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, ¶ 62. Additionally, error in the admission of testimony may be considered harmless where such testimony is cumulative of other, properly admitted testimony. *State v. Arnold*, 10th Dist. No. 07AP-789, 2010-Ohio-5622, ¶ 8, citing

Conway at ¶ 59; *see State v. Webb*, 70 Ohio St.3d 325, 335 (1994) ("Nonconstitutional error is harmless if there is substantial other evidence to support the guilty verdict.").

{¶ 54} Under either the harmless-error standard or the plain-error standard, the admission of the testimony regarding the non-filing of the complaint was not reversible error because it did not materially prejudice Fort. The state elicited the testimony in an attempt to impeach Fort's testimony regarding the officers' conduct. According to the state, the non-filing of a citizen complaint demonstrated that Officers Jarrell and Robison did not mistreat Fort. But, as noted above, Fort explained at trial that he did not file a citizen complaint against the officers because he did not want to make any statements to the Columbus Division of Police regarding the incident and because he viewed such action as futile based on a Columbus police sergeant's statement. Thus, Fort was afforded the opportunity to rebut the inference the state wanted the jury to draw from the evidence that Fort did not file a citizen complaint with the Columbus Division of Police.

{¶ 55} Because Fort fails to demonstrate reversible error as to the admission of testimony regarding the non-filing of a complaint against the police officers, we overrule his third assignment of error.

3. Hospital Discharge Document

{¶ 56} In his fourth assignment of error, Fort argues the trial court erred in admitting into evidence Officer Robison's medical record containing diagnostic information. In particular, Fort challenges the admission of "State's Exhibit D," a one-page Grant Medical Center document briefly summarizing Officer Robison's visit to the hospital's emergency department on January 31, 2014.

{¶ 57} State's exhibit D contains basic identifying information regarding Officer Robison, and it indicates that his discharge diagnosis was "Contusion face; Concussion no LOC." The testimony at trial regarding state's exhibit D was limited to Officer Robison testifying that the document was a fair and accurate copy of a report he received from Grant Medical Center regarding his visit to the hospital's emergency department on January 31, 2014. At the conclusion of the state's case, the state offered "State's Exhibit D" into evidence. Fort's counsel objected to the document's admission into evidence "because it does contain diagnostic information on it that was not testified to." (Tr. 135.) The trial court overruled the objection and admitted the document into evidence.

{¶ 58} The state does not challenge Fort's contention that state's exhibit D was improperly admitted into evidence because it was not properly authenticated. The state argues that, insofar as the trial court erred in admitting state's exhibit D into evidence, the error was harmless. We agree. At trial, although Fort denied kicking Officer Robison, there was no dispute that Officer Robison was injured during the altercation with Fort. Officers Robison and Jarrell testified that Fort kicked Officer Robison in the head. Officer Robison testified that Fort struck him "solid" with "hard-soled combat" boots, causing him to fall back into a wall. (Tr. 112.) Moreover, Officer Robison testified extensively regarding his injuries. He testified that, as a result of Fort kicking him, he had a "severe headache" and bruising to his ear and the side of his face. He further testified that he had nausea and "was seeing spots in front" of his eyes. (Tr. 113, 114.) Officer Robison testified that he suffered a concussion. In view of this evidence, the concussion diagnosis contained in state's exhibit D was cumulative of other properly admitted evidence demonstrating Officer Robison sustained injury to his head and brain. Therefore, the admission of state's exhibit D was harmless error.

{¶ 59} Accordingly, we overrule Fort's fourth assignment of error.

IV. Disposition

{¶ 60} Having overruled Fort's five assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

DORRIAN, P.J., and BROWN, J., concur.
