[Cite as *State v. Williams*, 2007-Ohio-6612.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 21842
Plaintiff-Appellee	:	
	:	Trial Court Case No. 06-CR-2760
v.	:	
	:	(Criminal Appeal from
TYWONE L. WILLIAMS	:	Common Pleas Court)
	:	
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 7th day of December, 2007.

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BROGAN, J.

{¶ 1} Tywone L. Williams appeals from his conviction and sentence following a jury trial on two counts of felonious assault.

{¶ 2} Williams advances three assignments of error. First, he contends the trial court erred in permitting a police officer to provide speculative testimony about the cause of a cut on his finger. Second, he challenges the legal sufficiency and manifest

weight of the evidence to support his convictions. Third, he asserts that his attorney provided constitutionally ineffective assistance by failing to present exculpatory testimony.

{¶ 3} The present appeal stems from a fight involving Williams and an individual named Ian Brown. Trial testimony reveals that the incident occurred at a bar known as "The Nineteenth Hole" in the early morning hours of August 2, 2006. It started after Williams allegedly struck Anita Douglas, who had accompanied Brown and two other females to the bar. Brown and several unidentified patrons responded by punching Williams until bouncers separated them. A bar employee escorted Brown to a back office while a bouncer accompanied Williams to the parking lot. About fifteen minutes later, Brown left the office to go home. As he prepared to exit the bar, he saw Williams in the doorway. Williams, who had a shirt wrapped around one of his hands, told Brown to "knuckle up." Williams and Brown then began fighting outside. Williams placed Brown in a bear hug, and Brown responded by head-butting Williams. During the fight, Brown also threw Williams into a motorcycle. Although Williams took the brunt of the fall, Brown hit his knee and left forearm on the motorcycle. At that point, the fight was stopped by Brown's father, Richard Hummons, who worked as a bouncer at the bar. As Hummons escorted Brown to a car, he noticed blood on his son's shirt and cuts on his son's arms. During the fight, however, Brown never saw a knife or any other weapon and never felt himself being cut or stabbed. He did not notice his injuries until his father pointed them out. Hummons likewise did not see Williams using a knife or other weapon during the incident.

{¶ 4} Brown proceeded to a hospital where he spent more than six hours and

received stitches to close a small cut on his left arm, a two and one-half inch laceration on his right arm, and a puncture wound on his back. Brown also had other relatively small cuts and puncture wounds on his body. The wound to his right arm was deeper, requiring two sets of stitches to close and leaving a scar. The puncture wound to his back required the insertion of gauze for a week to help it heal.

{¶ 5} Dayton police sergeant Richard Blommel observed Brown's injuries and spoke to him at the hospital. Blommel then went to Williams' home and heard his version of events. According to Blommel, Williams reported that Brown had cut him with a knife during the fight outside the bar. Blommel observed a one and one-half inch cut along the top of Williams' index finger. Williams told Blommel that he must have sustained the injury while attempting to grab the knife from Brown. Blommel opined at trial, however, that the cut on top of Williams' finger was consistent with a folding knife blade having closed while he was holding it. Blommel demonstrated what he meant by using his own knife.

{¶ 6} After hearing testimony from Hummons, Brown, and Blommel, a jury convicted Williams on two counts of felonious assault under R.C. §2903.11(A), one for knowingly causing or attempting to cause physical harm with a deadly weapon, and one for knowingly causing serious physical harm. The trial court sentenced Williams to two concurrent five-year prison terms. This timely appeal followed.

{¶ 7} In his first assignment of error, Williams contends the trial court erred in permitting Blommel to speculate about the cause of the cut on his finger. Williams' argument, in its entirety, is as follows:

{¶ 8} "Blommel observed a cut on Appellant's finger when investigating his

assault claim. These were the only facts he possessed concerning Appellant's finger. The cause of Appellant's wound happened before this investigation. Nonetheless, the trial court permitted Blommel to testify that the collapse of a folding knife caused Appellant's injury. The state did not qualify Blommel as an expert, and Blommel was not competent to testify to the cause of Appellant's injuries. The trial court erred by allowing this speculative testimony, which prejudiced Appellant's right to a fair trial."

{¶ 9} Upon review, we find Williams' argument to be unpersuasive. As an initial matter, Blommel did not testify that the collapse of a folding knife caused Williams' injury. Instead, he testified that Williams' injury was consistent with a folding knife having collapsed on his finger. When the prosecutor first attempted to elicit this testimony, defense counsel objected due to the lack of a foundation. The trial court sustained the objection. The prosecutor then attempted to lay a foundation, establishing that Blommel, a fifteen-year veteran of the police department, had observed cut wounds and had experience with the use of knives.

{¶ 10} After laying the foregoing foundation, the prosecutor inquired again about the wound on Williams' finger. Blommel responded that the cut was consistent with a non-locking blade having folded on top of Williams' finger while he was holding a knife. Defense counsel did not object to this response or to the adequacy of the foundation for it. (Trial transcript at 77.) Instead, defense counsel next objected when the prosecutor asked Blommel for a better description of the type of knife he had in mind. The trial court overruled the objection and also allowed Blommel to display his own folding knife as an example. (Id. at 78.) Defense counsel objected on the basis that there was "[n]o indication a knife–-this knife or a similar knife was–-it was ever involved." (Id.) The trial

court overruled the objection. Blommel then demonstrated how the blade of his knife could fold over and cut his finger. (Id.) Without objection, Blommel also repeated his testimony that Williams' wound was consistent with such an injury. (Id.)

{¶ 11} Having reviewed the trial transcript, we find that defense counsel did not preserve for appeal the argument Williams now makes. As set forth above, defense counsel initially objected to Blommel testifying about the wound on Williams' finger due to the lack of a proper foundation. After the trial court sustained the objection, the prosecutor attempted to lay a foundation. Blommel then testified, without objection, that Williams' injury was consistent with a non-locking blade having folded on his finger. Defense counsel's failure to object to this testimony waived Williams' current argument that the prosecutor did not qualify Blommel as an expert and that his testimony was speculative, and we find no plain error.[1] Williams' first assignment of error is overruled.

{¶ 12} In his second assignment of error, Williams challenges the legal sufficiency and manifest weight of the evidence to support his convictions. In support of his weight and sufficiency arguments, which he addresses together, Williams contends the State failed to establish that Brown suffered serious physical harm as required for a felonious assault conviction under R.C. §2903.11(A)(1). According to Williams, none of Brown's injuries met the statutory definition of "serious physical harm." Williams additionally claims the State failed to prove that he caused or attempted to cause physical harm with a deadly weapon as required for a conviction under R.C.

[1]As noted above, defense counsel did object when Blommel attempted to describe a folding knife and displayed his own knife as an example, but Williams has not raised these issues in his assignment of error.

§2903.11(A)(2). Williams asserts that the record contains no credible evidence establishing that he used or possessed a deadly weapon such as a knife. Therefore, he argues that his felonious assault convictions are based on legally insufficient evidence and are against the manifest weight of the evidence.

{¶ 13} Upon review, we find Williams' argument to be unpersuasive. When a defendant challenges the sufficiency of the evidence, he is arguing that the State presented inadequate evidence on each element of the offense to sustain the verdict as a matter of law. *State v. Hawn* (2000), 138 Ohio App.3d 449, 471, 741 N.E.2d 594. "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 14} Our analysis is different when reviewing a manifest-weight argument. When a conviction is challenged on appeal as being against the weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, 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. Thompkins,* 78 Ohio St.3d 380, 387, 678 N.E.2d 541. A judgment should be reversed as being against the manifest weight of the evidence "only in the exceptional

case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 15} With the foregoing standards in mind, we conclude that Williams' convictions are based on legally sufficient evidence and are not against the manifest weight of the evidence. Viewing the evidence in a light most favorable to the prosecution, the jury reasonably could have found that Williams caused serious physical harm to Brown. "Serious physical harm" includes harm that involves "some permanent disfigurement or that involves some temporary, serious disfigurement." R.C. §2901.01(A)(5)(d). "Serious physical harm" also includes harm that involves "acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain." R.C. §2901.01(A)(5)(e).

{¶ 16} The record reflects that Brown received a two and one-half inch laceration on his forearm that left internal tissue hanging out of it. The cut required two sets of stitches to close and resulted in a scar. Brown also received a four-inch deep puncture wound on his back that needed to be packed with gauze for a week and stitched. In our view, the evidence concerning these wounds was legally sufficient to support a finding of serious physical harm under either of the definitions set forth above. Moreover, we cannot say that the jury created a manifest miscarriage of justice by finding serious physical harm in this case. Therefore, Williams' felonious assault conviction under R.C. §2903.11(A)(1) is based on legally sufficient evidence and is not against the manifest weight of the evidence.

{¶ 17} Viewing the evidence in a light most favorable to the prosecution, the jury likewise reasonably could have found that Williams caused physical harm with a deadly

weapon. Williams himself admitted to sergeant Blommel that a knife was involved in the fight outside the bar. The jury reasonably could have inferred that Brown and Hummons did not see the knife because Williams had concealed it in the shirt wrapped around his hand. Moreover, the fact that no one saw the knife did not preclude the jury from determining that it qualified as a deadly weapon. For purposes of a felonious assault conviction, a knife is a deadly weapon if it is capable of inflicting death and if it is used as a weapon. *State v. Berry*, Montgomery App. No. 21037, 2006-Ohio-833, ¶8-10. Here the jury reasonably could have determined, based on the nature of Brown's injuries, that Williams used the knife as a weapon and that it was capable of inflicting death. As set forth above, Brown's wounds included a two and one-half inch cut to his arm that left internal tissue hanging out and a four-inch deep stab wound to his back. It is reasonable to infer that a knife capable of inflicting these wounds is capable of causing death. Finally, although Williams informed Sergeant Blommel that Brown had attacked him with the knife, the jury fairly could have concluded otherwise based on the substantial cutting and stabbing wounds found on Brown's body.

{¶ 18} In short, Williams' admission that a knife was present, combined with the nature of Brown's injuries, provided the jury with legally sufficient evidence to find that Williams caused physical harm with a deadly weapon. Such a finding does not result in a miscarriage of justice. Therefore, Williams' felonious assault conviction under R.C. §2903.11(A)(2) is based on legally sufficient evidence and is not against the manifest weight of the evidence. The second assignment of error is overruled.

{¶ 19} In his third assignment of error, Williams asserts that his attorney provided constitutionally ineffective assistance by failing to present exculpatory testimony. This

argument concerns defense counsel's failure to call Anita Douglas, the woman Williams allegedly struck in the bar, as a witness at trial.

{¶ 20} Williams himself vaguely raised the foregoing issue at his sentencing hearing. Before the trial court imposed his sentence, he stated: "* * * I think I was misrepresented * * *. [M]y witnesses never got a chance to show up. * * * I had witness statements, they never had a chance to come out[.]" On appeal, Williams points to an August 3, 2006 affidavit in which Douglas states that Williams never hit her, that she did not see him with a knife, and that she saw him leave after the initial fight inside the bar. Williams claims he gave this affidavit to his attorney, who provided ineffective assistance by failing to call Douglas as a witness.

{¶ 21} The foregoing argument lacks merit for at least three reasons. First, the record itself is devoid of evidence that Williams ever gave the affidavit to his attorney. Second, the affidavit is not part of the trial record. Instead, it is attached to Williams' appellate brief as an exhibit. It is well settled, however, that a party cannot introduce new evidence on appeal. *State v. Ishmail* (1978), 54 Ohio St.2d 402, 405-406, 8 O.O.3d 405, 377 N.E.2d 500.

{¶ 22} Third, we would be disinclined to find ineffective assistance of counsel even if the record did reflect that defense counsel had the affidavit prior to trial. Douglas' averment that Williams did not hit her bears little relevance to the issues in this case. Although Williams' act of striking Douglas allegedly prompted the initial fight inside the bar, the felonious assault charges stemmed from the subsequent fight that occurred outside. The key issue is whether Williams cut and stabbed Brown with a knife, not whether he previously hit Douglas. On the other hand, the averment that Douglas did

not see Williams with a knife is potentially relevant. The significance of this averment is lessened, however, by Douglas' additional statement that she left after the first fight inside the bar. The prosecution did not argue that Williams displayed or used a knife inside the bar. Therefore, the fact that Douglas did not see one before she left is not particularly helpful. Finally, the averment that Douglas saw Williams leave after the fight inside the bar is of little significance. In her affidavit, Douglas states that she and Williams left in vehicles headed in opposite directions after the initial fight inside. Even if this assertion is true, Williams plainly returned shortly thereafter because he indisputably engaged in a second fight with Brown outside the bar. Douglas could not have any first-hand knowledge about this fight because she already had left. Therefore, we would find no ineffective assistance of counsel even if Williams' attorney did see Douglas' affidavit before trial. Williams has not shown that defense counsel's failure to call Douglas as a witness constituted deficient performance or that he was prejudiced by her absence at trial. See *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Williams' third assignment of error is overruled.

{¶ 23} Having overruled each of Williams' assignments of error, we hereby affirm the judgment of the Montgomery County Common Pleas Court.

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GRADY, J., and DONOVAN, J., concur.

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