[Cite as *State v. White*, 2010-Ohio-4537.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23816
v.	:	T.C. NO. 09CRB6087
ARTHUR W. WHITE, JR.	:	(Criminal appeal from Municipal Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 24th day of September, 2010.

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EBONY N. WREH, Atty. Reg. No. 0080629, Assistant City Prosecutor, 335 W. Third Street, Room 372, Dayton, Ohio 45402
Attorney for Plaintiff-Appellee

CHRIS BECK, Atty. Reg. No. 0081844, 188 W. Hebble Avenue, Fairborn, Ohio 45324
Attorney for Defendant-Appellant

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FROELICH, J.

{¶ 1} Arthur W. White, Jr. was convicted of assault after a bench trial in the Dayton Municipal Court. He was sentenced to a suspended 180-day jail sentence, one year of intensive supervised probation, restitution of $10.70, a fine, and court costs.

{¶ 2} White appeals from his conviction, claiming that his conviction was based on insufficient evidence and was against the manifest weight of the evidence and that his trial counsel rendered ineffective assistance. For the following reasons, the trial court's judgment will be affirmed.

I

{¶ 3} The State presented the testimony of Robin C.[1] and Dayton Police Officer Eric Brown at trial. Their testimony, if believed, established the following facts:

{¶ 4} On May 13, 2009, White invited Robin to his apartment on Pointview Avenue to spend the night. The two had had an on-and-off romantic relationship during the past two years, and Robin had been to White's apartment on prior occasions. Robin accepted White's invitation, and she arrived at White's apartment between 6:30 p.m. and 7:30 p.m. Robin went through the unlocked front entrance to the apartment building, climbed the stairs, and knocked on White's apartment door. White asked her how she got inside, kissed her, and let her inside the apartment.

{¶ 5} Initially, White and Robin had a peaceful evening. They watched television, talked, and ate. Robin used White's computer in his bedroom. Robin heard the door open and close and assumed that White had walked his dog and cat.

{¶ 6} After a few hours, however, White's demeanor changed – he "kept getting nasty" with Robin and rolled his eyes at her. Robin began to call friends and relatives for a ride home; she was unable to reach anyone and left messages indicating where she was. At

[1]Because the testimony reflects that Robin has been diagnosed with HIV, we decline to include her last name and will identify her by her first name only.

approximately 11:30 p.m., White told Robin to "get the f out of [his] house." Robin asked him why he didn't say that before it had begun to storm outside and there were no longer buses, and she began to gather her belongings. As White cursed at Robin and played his telephone loudly, Robin asked if she could use his phone to call a cab. White said no. Robin used her cell phone to call a cab.

{¶ 7} As Robin continued to gather her belongings, White told her that he was going to "throw [her] down the steps." Approximately twenty minutes later, while Robin was still in White's apartment, Robin's cell phone rang. White "snapped" her cell phone with his hands and hit her three or four times on her chest and arm with a closed fist . Robin then saw the cab through the window. She said, "You don't have to worry about me; I'm gone," ran down the steps, and left in the cab. Robin contacted the police.

{¶ 8} Officer Brown responded to Robin's apartment and learned from Robin that her phone had been broken and that she had been assaulted. Robin reported that she was grabbed on her arm and that a struggle occurred. The officer observed a light scratch and a red mark on Robin's right forearm and two light scratches of an inch or less on her back. The officer did not recall being told that Robin had been punched repeatedly with a closed fist. As for the cell phone, Officer Brown observed an orange flip cell phone that was broken into two pieces.

{¶ 9} White testified on his own behalf. He stated that he met Robin in downtown Dayton during his bus commute, and they began having a sexual relationship about six or seven months prior to May 2009. Three or four days prior to May 13, 2009, Robin and White were talking at White's home when Robin "inadvertently" told him that she was HIV

positive. Robin had previously told White that she was going to a support group with a friend with HIV, but White had believed that only the friend was HIV positive.

{¶ 10} White was very upset when he learned of Robin's HIV status. He told her that she should have told him before then and that he would not have had sex with her if he had known. White also told Robin that he did not want to see her anymore and that she should not come to the house again. White repeated this to Robin over the telephone, in an e-mail, and in a text message.

{¶ 11} During the evening of May 13, 2009, Robin went to White's apartment and knocked on his apartment door. When White opened the door, he asked her how she had gotten into the building. Robin responded that a neighbor had let her in. Robin asked White if she could use his restroom. White let her in and watched television in the living room while Robin went to the restroom.

{¶ 12} After approximately thirty minutes, White went to look for Robin. He went into his bedroom and found her lying naked on the bed with two condoms beside her. White picked up the condoms, put them on the backpack that Robin had brought with her, and got into bed to sleep. Robin said that she was calling a cab and leaving. Robin got up, started putting on her clothes, and called a cab. White told her to go to the living room, while he stayed in his bedroom.

{¶ 13} From the living room, Robin started yelling at White and calling him "all kind of names." White returned to the living room and told Robin that if she continued to call him names she would have to wait for the cab in the hallway. Robin responded that she was not going to leave until her cab got there. White told her to leave again. When Robin

again refused, White walked up to her and Robin hit him twice in the face with her cell phone. White grabbed Robin by the arm and told her that she had to go. He also grabbed her cell phone, "tore it up," opened up the apartment door, and threw the cell phone down in the hallway. White told her, "If you want your cell phone there it is." Robin threatened to call the police for breaking her phone and for assault. Robin eventually went into the hall. White closed the door and locked it.

{¶ 14} On June 3, 2009, White was charged with assault, menacing, and criminal damaging. The case was tried to the court on September 2, 2009. During the trial, the court granted White's Crim.R. 29 motion to dismiss the criminal damaging charge. At the conclusion of the trial, White was found guilty of assault, but was acquitted of menacing. With respect to the assault charge, the court orally found that White had caused physical harm to Robin "by grabbing her forearm causing a bruise, a scratch and hitting her in the chest and shoulder."

{¶ 15} After a presentence investigation, the court sentenced White to 180 days in jail, all of which were suspended, and to one year of intensive supervised probation. White was required to complete the Stop the Violence program. White was further ordered to pay restitution of $10.70; a $200 fine, $175 of which was suspended; and court costs.

{¶ 16} White raises three assignments of error on appeal. We will address them in a manner that facilitates our analysis.

II

{¶ 17} White's second and third assignments of error state:

{¶ 18} "THE STATE PRESENTED INSUFFICIENT EVIDENCE TO ESTABLISH

EVERY ESSENTIAL ELEMENT OF ASSAULT BEYOND A REASONABLE DOUBT.

{¶ 19} "APPELLANT'S CONVICTION FOR ASSAULT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 20} "A sufficiency of the evidence argument disputes whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law." *State v. Wilson*, Montgomery App. No. 22581, 2009-Ohio-525, ¶10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. When reviewing whether the State has presented sufficient evidence to support a conviction, the relevant inquiry is whether any rational finder of fact, after viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 430, 1997-Ohio-372, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d. 560. A guilty verdict will not be disturbed on appeal unless "reasonable minds could not reach the conclusion reached by the trier-of-fact." Id.

{¶ 21} In contrast to the sufficiency of the evidence standard, "a weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive." *Wilson* at ¶12. When evaluating whether a conviction is contrary to the manifest weight of the evidence, the 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."

Thompkins, 78 Ohio St.3d at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 22} Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288. However, we may determine which of several competing inferences suggested by the evidence should be preferred. Id.

{¶ 23} The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence. *Wilson* at ¶14. A judgment of conviction should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *Martin,* 20 Ohio App.3d at 175.

{¶ 24} White was convicted of violating R.C. 2903.13(A), which reads: "No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn." "Physical harm" means any injury, illness, or other physiological impairment, regardless of its gravity or duration. R.C. 2901.01(A)(3); *State v. Totty*, Montgomery App. No. 23372, 2010-Ohio-1234, ¶18. "A person acts knowingly, regardless of his purpose, when 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).

{¶ 25} White claims that the State's evidence was insufficient to prove that he assaulted Robin. He asserts that Robin's report to Officer Brown and the injuries that Officer Brown observed supported only that White grabbed Robin's arm. White argues that grabbing Robin's arm in an attempt to escort her out of his residence "would not be considered offensive by a reasonable person who was not welcome at the residence." White

notes that there is no evidence that he caused "serious physical harm" as required by R.C. 2903.13(B).

{¶ 26} Robin testified that White punched her on her arm and chest with his fist, without provocation. We have held that punching someone is sufficient to satisfy the culpability requirement of "knowingly" as set forth in the assault statute. *Totty* at ¶21, citing *State v. Hill*, Montgomery App. No. 20678, 2005-Ohio-3701. Robin reported the assault to the police, who observed a light scratch and a red mark on her right forearm and two light scratches of an inch or less on her back. Robin's injuries were sufficient to establish physical harm under R.C. 2903.13(A); the State was not required to prove that White caused serious physical harm, as required by R.C. 2903.13(B). In short, White's conviction for assault was based on legally sufficient evidence.

{¶ 27} White further argues that the court "lost its way" when it convicted him of assault. He emphasizes that, according to Officer Brown, Robin did not report that she had been punched by White and that her injuries are consistent with only being grabbed by the arm so that she could be escorted from the apartment.

{¶ 28} The trial court could have reasonably accepted White's version of events. Nevertheless, we cannot say that the trial court lost its way when it elected to believe that, regardless of how Robin came to be in White's apartment, there was a confrontation between Robin and White during which White assaulted Robin.

{¶ 29} The second and third assignments of error are overruled.

III

{¶ 30} White's first assignment of error states:

{¶ 31} "APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

{¶ 32} White claims that his counsel rendered ineffective assistance by failing to raise two defenses: self-defense and defense of property. At oral argument, White's counsel withdrew his argument regarding self-defense.

{¶ 33} To establish ineffective assistance of counsel, it must be demonstrated both that trial counsel's conduct fell below an objective standard of reasonableness and that the errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136. Trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688. Deficient performance means that claimed errors were so serious that the defense attorney was not functioning as the "counsel" that the Sixth Amendment guarantees. *State v. Cook* (1992), 65 Ohio St.3d 516, 524.

{¶ 34} Under Ohio law, self-defense is an affirmative defense for which the defendant bears the burden of proof. Because it functions as an admission and avoidance, as affirmative defenses do, a claim of self-defense presupposes that the alleged crime took place. *State v. Kucharski*, Montgomery App. No. 20815, 2005-Ohio-6541, ¶16. In order for White to have established self-defense involving the use of nondeadly force, he would have been required to show, by a preponderance of the evidence: "(1) that the defendant was

not at fault in creating the situation giving rise to the altercation and (2) that he had reasonable grounds to believe and honest belief, even though mistaken, that he was in imminent danger of bodily harm and his only means to protect himself from such danger was by the use of force not likely to cause death or great bodily harm." *State v. Fritz*, Montgomery App. No. 20796, 2005-Ohio-4736, ¶20. "There is no duty to retreat when nondeadly force is employed." *State v. Fritz*, 163 Ohio App.3d 276, 2005-Ohio-4736, ¶20.

{¶ 35} Defense of property, or defense of ejectment, is akin to self-defense. *State v. Perez*, Mahoning App. No. 09 MA 30, 2010-Ohio-3168, ¶14. A property owner may eject a trespasser by the use of reasonable force after the trespasser has received notice to depart and fails to do so within a reasonable time.[2] *State v. Childers* (1938), 133 Ohio St. 508, 516; *Dayton v. Sexton* (Sept. 22, 2000), Montgomery App. No. 18143; *State v. Fonce* (Dec. 2, 1994), Trumbull App. No. 94-T-5041. A person lawfully in his or her own residence has no duty to retreat before using reasonable force in defense of that person's residence. R.C. 2901.09.

{¶ 36} Beginning with self-defense, White asserted in his brief that he was justified in breaking and throwing Robin's cell phone to prevent further injury to him and, therefore, his criminal damaging of Robin's cell phone was justified. The trial court dismissed the criminal damaging charge at trial. Accordingly, White's argument concerning self-defense

[2]White cites to R.C. 2305.40, which is a civil statute providing immunity from liability for damages when an owner of real property (among others) injures a trespasser, provided that (1) the owner is inside a building on the property that is maintained as a dwelling, (2) the trespasser has made, is making, or is attempting to make an unlawful entry into the dwelling, and (3) the owner uses "reasonably necessary force to repel the trespasser from the building ***." R.C. 2305.40 concerns tort liability, not criminal liability.

is moot. In addition, as stated above, White withdrew his self-defense claim at oral argument.

{¶ 37} As for the defense of property defense, White's evidence, if believed, supported a finding that he acted in defense of his property. White was in his own apartment, and both he and Robin testified that he had asked Robin to leave. Robin's own testimony revealed that she stayed in the apartment for twenty minutes after White told her to get out and, thus, she had a reasonable opportunity to leave prior to the use of force.

{¶ 38} The State argues that White never testified that he grabbed Robin's arm in order to physically remove her from his property. However, White testified:

{¶ 39} "Q: Tell the judge what happened after you told her, leave, go out in the hallway, she says no and you tell her to leave again; tell the judge what happens after that.

{¶ 40} "A: OK I walked up to her telling her come on. She hit me in the face with her cell phone twice –

{¶ 41} "Q: Twice.

{¶ 42} "A: And she was still like motioning like she was fighting and I stepped back and I said look you got to get out of here.

{¶ 43} "Q: All right[.] Then what happened?

{¶ 44} "A: And she was still telling me I'm not leaving until my cab comes so I grabbed her by the arm, I was like come on, you got to go.

{¶ 45} "Q: All right[.] Tell the judge what happened.

{¶ 46} "A: OK. When she did hit me in the face with the cell phone and she kept on you know just swinging I took the cell phone out of her hand, tore it up, opened up the

door and threw it down in the hallway and I told you, you know, if you want your cell phone there it is. And she was saying Oh Lord, I'm gonna call nine-one-one, you done tore up my phone and I'm gonna press assault charges on you. I said you have to go out in the hall and do all that then. Eventually she went out in the hall."

{¶ 47} White later testified that Robin "took herself outside [his] apartment" after he broke her phone and threw it into the hallway. White indicated that "really she was going to get her phone."

{¶ 48} Based on the evidence, the trial court could have reasonably found that White grabbed Robin in order to eject her from his apartment. Although the testimony suggests that he let go of Robin to order to grab her cell phone and that Robin left on her own accord after White threw the cell phone into the hallway, the trial court could have found that the force used by White was reasonable and done in an effort to force Robin to leave. Accordingly, White's counsel acted unreasonably when he failed to raise defense of property as an affirmative defense.

{¶ 49} Nevertheless, we conclude that there was no reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S at 694; *Bradley*, 42 Ohio St.3d at 142. The trial court found that White had caused physical harm to Robin "by grabbing her forearm causing a bruise, a scratch and hitting her in the chest and shoulder." Stated differently, the trial court rejected White's argument that he had only grabbed Robin's arm (which, by itself, could have constituted assault) and, instead, found that White had also punched Robin's chest and shoulder, as she had testified. Although simply grabbing Robin's arm and leading her toward the door might have

constituted reasonable force to remove Robin from White's apartment, we conclude, as a matter of law, that punching Robin under these circumstances was unreasonable. Accordingly, in light of the trial court's findings, we find no reasonable probability that the outcome of White's trial would have been different even if White's counsel had raised defense of property as an affirmative defense.

{¶ 50} The first assignment of error is overruled.

III

{¶ 51} The trial court's judgment will be affirmed.

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FAIN, J. and GRADY, J., concur.

Copies mailed to:

Ebony N. Wreh
Chris Beck
Hon. Carl Sims Henderson