[Cite as *State v. Ellington*, 2010-Ohio-5280.]

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

STATE OF OHIO	:	
	:	Appellate Case No. 23828
Plaintiff-Appellee	:	
	:	Trial Court Case No. 09-CR-3023
v.	:	
	:	(Criminal Appeal from
WILLARD ELLINGTON	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 29th day of October, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant Willard Ellington appeals from his conviction and sentence for Felonious Assault, in violation of R.C. 2903.11(A)(2), and Aggravated Menacing, in violation of R.C. 2903.21(A). Ellington contends that the evidence is not sufficient to support his conviction, that his conviction is against the manifest weight of the evidence, and that his trial counsel was ineffective for having failed to

make a motion for a judgment of acquittal at the close of the State's case and at the end of the trial.

{¶ 2} We conclude that the evidence in the record is sufficient to support the conviction; that the conviction is not against the manifest weight of the evidence; and that trial counsel was not ineffective for having failed to make a motion for a judgment of acquittal at the close of the State's case and at the end of the trial. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} Early one morning in September 2009, one of the maintenance technicians of the Eagle Ridge Apartments, Lonnie Hicks, heard a radio broadcast on his walkie-talkie that a man who had been "trespassed" from the property (i.e., notified that he was not allowed on the property) had been spotted by the property manager. The property manager further broadcast to all of the employees that one of them should inform the police, who were on the property for an unrelated call, so they could hold the man until the paperwork could be produced to trespass him from the property. Hicks responded to this message, due to his proximity to the police officers. Once the police officers were informed of the situation, Hicks stayed near the police cruiser until the property manager came with the trespass paperwork. The man on the property was identified as Willard Ellington, who had been trespassed from the property several times before. As a result, Ellington was arrested for criminal trespass by Police Officer Chris Fogle.

{¶ 4} At that time, Hicks had no knowledge of Ellington apart from having seen him sitting in his car around the complex, and other than an occasional exchange of

pleasantries, had never had any interaction with Ellington.

{¶ 5} The next morning, Hicks was going about his job picking up the trash around the Needmore Road portion of the apartment complex, while parents and children waited for the school bus. At around 8:10 to 8:15 a.m., Ellington pulled up on Needmore Road, stopped, and began to yell out to Hicks. Hicks testified that Ellington screamed at him, "Motherfucker, I'm going to kill you; motherfucker, that radio you've got on your side ain't going to save you; I'm going to pop a cap in your ass; I know who you are and I'm going to get you; and – this just went on and on." Ellington further screamed at Hicks, "I've got a gun and I can shoot you from here and I'm going to put a cap in your ass." At this time, Hicks had yet to see a handgun. Hicks informed Ellington that if he did not leave the property, then he would be trespassed again. Ellington drove off.

{¶ 6} Hicks went back to picking up the trash around the complex until Ellington came, "flying at a high rate of speed," back to face Hicks approximately two minutes after Ellington had left. Ellington spun his jeep around and sat there facing Hicks down for about twelve seconds. At this time, Hicks made no attempt to get away. Ellington again started to yell at Hicks, shouting, "I'm going to kill you; I'm going to put you on the evening news." At this point, Ellington reached toward the passenger floorboard, came up with what looked to Hicks like a handgun, made what Hicks described as a cocking motion, and pointed the gun out the window directly at Hicks, who was standing only feet way.

{¶ 7} Hicks testified that upon seeing a, "dark gun, four to six inches, barrel * * *," he turned and ran, believing that Ellington was about to kill him. Ellington got out of his silver Jeep and chased Hicks through the apartment complex, still pointing the gun

at Hicks. Ellington eventually gave up the foot-chase and returned to his Jeep.

{¶ 8} This chase was witnessed by Jeffery Williams, who was standing at the bus stop waiting for his nephew to get on the school bus. Williams, a resident at the apartment complex, testified that he saw Ellington, "messing with the maintenance man. And he was telling the maintenance man that you're the one that I'm going to get." Williams also testified that he witnessed Ellington move his truck forward a little bit. Later, Williams testified that he witnessed Ellington leave, only to come back and, "[t]hen the next thing I know, he was chasing the maintenance man." Williams also testified that, "it looked like he had a gun in his hand, chasing the maintenance man around the complex."

{¶ 9} Hicks continued to run away from Ellington and ran in front of two or three apartments before he concluded that he was out of the line of fire. Hicks kept running, making turns to avoid getting shot, and finally ran through a hole in the fence behind the apartments that led to a vacant, open parking lot. In the parking lot he found a dumpster with a lone car parked by it and hid. From this vantage point, Hicks could see Needmore Road and witnessed Ellington in his Jeep go down Needmore and pull into the Kroger Grocery Store parking lot near the apartment complex, looping down and around each of the parking aisles. Hicks witnessed Ellington stop for 20-30 seconds, and then make a final loop around the parking aisles, after which Hicks lost sight of Ellington.

{¶ 10} Hicks then sought shelter in a nearby automotive store and told the workers to call 9-1-1 because someone was trying to kill him. Observing that the workers did not know how to respond, Hicks called 9-1-1, himself, from his phone. Hicks remained in the automotive store for about ten more minutes, until he saw two police

cruisers come down Needmore Road. Hicks then called on the walkie-talkie, and one of the other maintenance technicians informed him that the police had arrived at the apartment complex. Hicks returned, feeling it was safe to come back. Hicks remained with the police until he was informed that Ellington had been apprehended.

{¶ 11} Ellington was arrested, and his vehicle was searched. No firearm was found.

{¶ 12} Ellington was charged by indictment with Felonious Assault and Aggravated Menacing. Following a bench trial, he was convicted of both offenses, and sentenced to 180 days in the Montgomery County Jail for Aggravated Menacing, and community control not to exceed five years for Felonious Assault. Ellington appeals from his conviction and sentence for Felonious Assault, only.

II

{¶ 13} Ellington's First Assignment of Error is as follows:

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

{¶ 15} "A. THE TRIAL COURT ERRED IN FINDING APPELLANT 'KNOWINGLY' COMMITTED FELONIOUS ASSAULT, WHEN APPELLEE DID NOT SHOW PROOF OF APPELLANT'S CULPABLE MENTAL STATE.

{¶ 16} "B. APPELLEE DID NOT SHOW THAT WHAT APPELLANT HELD OUT THE WINDOW WAS A HANDGUN."

{¶ 17} Ellington argues that the State failed to show what Ellington's state of mind was at the time of the incident and failed to produce evidence of a handgun.

{¶ 18} The Supreme Court of Ohio has held that a sufficiency-of-the-evidence

argument raises the issue of whether each element of an offense has been adequately proven to allow the case to go to the jury or to sustain the verdict as a matter of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 1997-Ohio-52. The Supreme Court of Ohio set forth the test in *State v. Jenks* (1991), 61 Ohio St.3d 259, stating that: "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."

{¶ 19} Ellington was charged with Felonious Assault, in violation of R. C. 2903.11(A)(2), which provides: "No person shall knowingly* * * [c]ause serious physical harm to another * * * [or] [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance." "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. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R. C. 2901.22. The Ohio Revised Code defines "attempt" as, "[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct which if successful, would constitute or result in the offense." R.C. 2923.02(A).

{¶ 20} The Ohio Supreme Court has held that the act of pointing a deadly weapon at another, coupled with a threat, is sufficient evidence to support a conviction for Felonious Assault. *State v. Green* (1991), 58 Ohio St.3d 239. In *Green*, the

defendant aimed a rifle at the police and told them that they should not come further into his house without a warrant. Id. No shot was fired, but it was later determined that the rifle was loaded and could have been easily made functional. Id.

{¶ 21} Much like in *Green,* Ellington's actions and threats meet all of the elements of Felonious Assault. In fact, the facts in the case before us are stronger concerning the threat; the threat in *Green* was conditional (leave, or I will shoot you), but the threat in this case was unconditional (I am going to shoot you). Ellington argues that there was no evidence presented that a reasonable jury could have found that Ellington "knowingly" caused or attempted to cause physical harm to Hicks. We disagree.

{¶ 22} Ellington's actions were consistent with the defendant in *Green*. Hicks testified that when Ellington came into the apartment complex he shouted, "Motherfucker, I'm going to kill you; motherfucker, that radio you've got on your side ain't going to save you; I'm going to pop a cap in your ass; I know who you are and I'm going to get you," and, "I've got a gun and I can shoot you from here and I'm going to put a cap in your ass." Although Hicks had yet to see a gun, a reasonable trier of fact could find that he was clearly informed as to Ellington's murderous intentions. A reasonable jury would also be hard pressed not to conclude that Ellington knew what the result of his conduct would be.

{¶ 23} When Ellington left the apartment complex only to return later, after Hicks had informed him that he would be trespassing again, Ellington continued his verbal threats. Ellington threatened, "I'm going to kill you; I'm going to put you on the evening news." At this point Ellington reached to the passenger seat and produced a black-barreled handgun 4 to 6 inches in length. Hicks began to run away at this time,

afraid that he was about to be shot by Ellington. Williams, a resident at the apartment complex, testified that he saw Ellington get out of his car and chase Hicks, holding a gun. The circumstantial evidence in this case could easily lead a reasonable jury to find that Ellington "knowingly" caused or attempted to cause harm to Hicks by the use of a deadly weapon, and was prevented from doing so by Hicks's evasive actions.

{¶ 24} The Supreme Court of Ohio has held that, "[w]hen 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. * * * *Tibbs,* 457 U.S. at 42, 102 S.Ct. at 2218, 72 L.Ed.2d at 661. See, also, *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 20 OBR 215, 219, 485 N.E.2d 717, 720-721 ('The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.')." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. The witnesses in this case are consistent. A reasonable jury could have come to the conclusion that Ellington knowingly attempted to cause Hicks harm by means of a deadly weapon. This is not the exceptional case where the finder of fact – here, the trial court – lost its way, resulting in a miscarriage of justice.

{¶ 25} Ellington's First Assignment of Error is overruled.

III

{¶ 26} Ellington's Second Assignment of Error is as fallows:

{¶ 27} "APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO MAKE CRIM.R.29 MOTION FOR ACQUITTAL AT THE CLOSE OF APPELLEE'S CASE, AND AT THE END OF THE TRIAL."

{¶ 28} Ellington argues that failing to make a Crim. R. 29 motion for a judgment of acquittal, based on the State's failure to show "sufficient credible evidence" to prove Felonious Assault under R.C. 2903.11(A)(2), is a violation of Ellington's Sixth Amendment right to the effective assistance of trial counsel. Ellington argues that trial counsel was ineffective for having failed to make the motion to preserve the right in the record, and was denied the opportunity to challenge the sufficiency of the evidence on appeal.

{¶ 29} "We review the alleged instances of ineffective assistance of trial counsel under the two prong analysis set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, and adopted by the Supreme Court of Ohio in *State v. Bradley* (1989), 42 Ohio St.3d 136, * * *. Pursuant to those cases, 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. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel's conduct fell below an objective standard of reasonableness and that his errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Id.* Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel." (Internal citation omitted). *State v. Mitchell,* Montgomery App.

No. 21957, 2008-Ohio-493, ¶ 31. “Criminal Rule 29(A) requires a trial court to enter a judgment of acquittal ‘if the evidence is insufficient to sustain a conviction of such an offense ....’ A sufficiency of the evidence argument challenges whether the State has presented enough evidence on each element of the offense to allow the case to go to the jury or to sustain a guilty verdict as a matter of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 1997-Ohio-52. The proper test to apply to the inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492: ‘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. Frezgi*, Montgomery App. No. 22439, 2008-Ohio-4732.

{¶ 30} In the case before us, Ellington rested without presenting any evidence. Therefore, there would have been but one opportunity for his counsel to have moved for a judgment of acquittal – at the end of all of the evidence. Ellington would only have been entitled to a judgment of acquittal if all of the evidence, viewed in a light most favorable to the State, would not have supported a conviction. But this is exactly the test for whether there is sufficient evidence in the record to have supported Ellington’s conviction. We have already determined, in considering Ellington’s First Assignment of Error, that there is sufficient evidence in this record to support his conviction for Felonious Assault. It necessarily follows, therefore, that there was no basis upon which

to have filed a meritorious motion for a judgment of acquittal.

{¶ 31} Ellington can satisfy neither prong of the *Strickland* test. Because a motion for a judgment of acquittal, had it been made, would have been without merit, his trial counsel was not ineffective for having failed to make the motion. And for the same reason, Ellington suffered no prejudice as a result of the motion not having been made.

{¶ 32} Parenthetically, the failure to move for a judgment of acquittal at the close of all of the evidence is not fatal to a claim that a conviction is not supported by the evidence. Convicting a defendant of an offense without sufficient evidence in the record to support the conviction would be a classic example of plain error.

{¶ 33} Ellington's Second Assignment of Error is overruled.

IV

{¶ 34} Both of Ellington's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, P.J., and BROGAN, J., concur.

Copies mailed to:

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