

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
ALLEN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 1-14-41

v.

BRANDON LYLE,

OPINION

DEFENDANT-APPELLANT.

Appeal from Allen County Common Pleas Court
Trial Court No. CR20140233

Judgment Affirmed

Date of Decision: March 30, 2015

APPEARANCES:

Joseph A. Benavidez for Appellant

Terri L. Kohlrieser for Appellee

SHAW, J.

{¶1} Defendant-appellant Brandon M. Lyle (“Lyle”) appeals the August 15, 2014, judgment of the Allen County Common Pleas Court sentencing Lyle to an aggregate prison term of 19 years and 6 months after Lyle was convicted in a jury trial of two counts of Felonious Assault in violation of R.C. 2903.11(A)(2), both felonies of the second degree and both containing Firearm Specifications in violation of R.C. 2941.145(A), and one count of Having a Weapon While Under Disability in violation of R.C. 2923.13(A)(3), a felony of the third degree.

{¶2} On July 17, 2014, Lyle was indicted for two counts of Felonious Assault in violation of R.C. 2903.11(A)(2), both felonies of the second degree and both containing specifications that Lyle had a firearm on or about his person or under his control while committing the offense, and that he displayed the firearm, brandished it, or used it to facilitate the offense in violation of R.C. 2941.145(A), and one count of Having Weapons While Under Disability in violation of R.C. 2923.13(A)(3), a felony of the third degree. (Doc. 4). On July 28, 2014, Lyle pled not guilty to the charges.

{¶3} On August 5, 2014, the State filed a Bill of Particulars further defining the charges against Lyle. According to the Bill of Particulars, on May 17, 2014, at approximately 1:30 a.m., Lyle entered Hilary Lanker’s residence, woke Hilary up, “and began verbally and physically accosting Ms. Lanker.” (Doc. No. 35). Lyle

then allegedly “used a revolver to threaten and hit Ms. Lanker in the head causing her to visit the St. Rita’s emergency Room.” (*Id.*) With regard to Count 2, it was alleged that on May 17, 2014, at approximately 1:30 a.m. Lyle also woke up James Lanker, Hilary’s father, and that Lyle “physically accosted Mr. Lanker, held a revolver to Mr. Lanker[’]s head while threatening to kill Mr. Lanker, and fired the revolver at Mr. Lanker.” (*Id.*) With regard to Count 3, it was alleged that Lyle was previously convicted of a fifth degree felony, was under a disability, and that he carried and used a revolver on May 17, 2014. (*Id.*)

{¶4} On August 12-14, 2014, the case proceeded to a jury trial. At trial, the State presented the testimony of ten witnesses. Lyle presented the testimony of Hilary Lanker, and Lyle testified on his own behalf. Ultimately the jury returned guilty verdicts on all three counts against Lyle, including the firearm specifications accompanying Count 1 and Count 2.

{¶5} The trial court proceeded immediately to sentencing. The State recommended that Lyle be sentenced to maximum consecutive sentences for an aggregate prison term of 29 years. Lyle’s attorney contended that maximum sentences were not appropriate here, and argued for a more lenient prison sentence. The trial court ordered that Lyle serve 7 years in prison on each Felonious Assault conviction, and 3 years in prison on each firearm specification. Lyle was ordered to serve 30 months in prison on the Having Weapons Under

Disability conviction. The prison terms were all ordered to be served consecutively, with the sole exception that the trial court ordered that the firearm specifications merged with each other.¹ Thus Lyle was ordered to serve 19 years and 6 months in prison. A judgment entry memorializing this sentence was filed August 15, 2014.

{¶6} It is from this judgment that Lyle appeals, asserting the following assignments of error for our review.

ASSIGNMENT OF ERROR 1
THE JURY ERRED IN FINDING APPELLANT GUILTY AS THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF [THE] EVIDENCE AND THERE WAS INSUFFICIENT EVIDENCE TO HAVE FOUND ALL ESSENTIAL ELEMENTS OF THE OFFENSE BEYOND A REASONABLE DOUBT.

ASSIGNMENT OF ERROR 2
APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

First Assignment of Error

{¶7} In his first assignment of error, Lyle argues that there was insufficient evidence to convict him and that his convictions were against the manifest weight of the evidence. Specifically, Lyle challenges his Felonious Assault convictions,

¹ In its brief to this Court, the State indicates that it does not feel the firearm specifications should have merged in this case. At the sentencing hearing, both the State and defense counsel indicated that they believed the firearm specifications should not merge in this instance. (Tr. at 453). However, the State indicates that it did not wish to file a cross-appeal on this matter, and we will not address it further in this opinion.

arguing that there was not sufficient evidence presented that he knowingly caused or attempted to cause harm to another by means of a deadly weapon.

{¶8} 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.* When an appellate court reviews a record upon a sufficiency challenge, “ ‘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. Leonard*, 104 Ohio St.3d 54, 2004–Ohio–6235, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶9} The Ohio Supreme Court has “carefully distinguished the terms ‘sufficiency’ and ‘weight’ in criminal cases, declaring that ‘manifest weight’ and ‘legal sufficiency’ are ‘both quantitatively and qualitatively different.’ ” *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012–Ohio–2179, ¶ 10, quoting *State v. Thompkins*, 78 Ohio St.3d 380 (1997), paragraph two of the syllabus.

{¶10} Unlike our review of the sufficiency of the evidence, an appellate court’s function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *Thompkins, supra*, at 387. In reviewing whether the trial court's judgment was against the

weight of the evidence, the appellate court sits as a “thirteenth juror” and examines the conflicting testimony. *Id.* In doing so, this Court must review the entire record, weigh the evidence and all of the reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts in the evidence, the factfinder “ ‘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. Andrews*, 3d Dist. Allen No. 1-05-70, 2006-Ohio-3764, ¶ 30, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶11} In this case Lyle was convicted of two counts of Felonious Assault in violation of R.C. 2903.11(A)(2), which reads,

(A) No person shall knowingly do either of the following:

* * *

(2) Cause or attempt to cause physical harm to another or to another’s unborn by means of a deadly weapon or dangerous ordnance.

Both Felonious Assault counts against Lyle contained “Firearm Specifications” pursuant to R.C. 2941.145(A), which reads,

(A) Imposition of a three-year mandatory prison term upon an offender * * * is precluded unless the indictment * * * specifies that the offender had a firearm on or about the offender’s person or under the offender’s control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense.

Lyle was also convicted of Having Weapons While Under Disability in violation of R.C. 2929.13. However, Lyle does not challenge this conviction on appeal and makes no argument at all as to how this conviction was improper, therefore we will not further address it.

{¶12} At trial the State called ten witnesses to convict Lyle of the Felonious Assault of Hilary Lanker and the Felonious Assault of James Lanker. The first witness the State called was James Lanker. James testified that he is Hilary's father and that at the time of the incident with Lyle, James regularly stayed at Hilary's house on her couch. (Tr. at 42). James testified that on May 16, 2014, he went to work, then went back to Hilary's and went to sleep on the couch around 9:30 p.m. (*Id.*)

{¶13} James testified that he was awakened when Lyle entered Hilary's home through the front window, which was next to the couch where James slept. (Tr. at 45-46). James testified that Lyle and Hilary had four children together, but they were not living together at the time of the incident.² (*Id.* at 38). According to James, Lyle was upset and demanded to know where Hilary was. (*Id.* 45). James testified that Lyle then went upstairs, and that he could hear yelling, cussing and a commotion. (*Id.* at 46). James testified that he then heard Hilary yell for help, so he went upstairs. (*Id.* at 47).

² James actually testified that he thought there was "a restraining order or something of the sort" against Lyle so Lyle was not supposed to be in Hilary's residence. (Tr. at 86-87). Hilary testified that pursuant to an open children services case Lyle "wasn't allowed to" live with her or be in her home. (Tr. at 324).

{¶14} James testified that while upstairs, he saw a physical altercation where Lyle was pushing Hilary on her bed, but at that time James did not recall seeing a weapon. (Tr. at 47-48, 74-75). James testified that he then attempted to intervene but he was ultimately slammed down to the floor by Lyle. (*Id.* at 47). James testified that he then went downstairs to look for his phone to call the police. (*Id.* at 48).

{¶15} James testified that Lyle then dragged Hilary down the stairs by her hair. (Tr. at 49, 60). James testified that he saw Lyle pushing Hilary in the head with a gun, saying, “I ought to fucking kill you, bitch.” (*Id.* at 49). James testified that he knew Lyle owned a gun, a revolver, specifically, as Lyle had showed it to him previously. (*Id.* at 62).

{¶16} James testified that he “interjected,” telling Lyle to “stop” and asking what Lyle was doing “this” for. (Tr. at 49). James testified that Lyle then approached James on the couch, held the gun to his head and stated, “Shut up. I ought to kill you, mother fucker.” (*Id.* at 50). James testified that Lyle repeated that statement, and when James asked what he did, Lyle said, “I’ll kill you mother fucker; stay out of it.” (*Id.* at 51).

{¶17} James testified that Lyle put the gun to his head and began to pull the trigger back. (Tr. at 51). James testified that he “heard the mechanism when you pull the trigger.” (*Id.* at 51). James testified that he then put his hand up and the

gun discharged to his right, just past his leg and torso. (*Id.* at 51-52). As a result, James testified that his arm received a scrape or abrasion 4-5 inches long. (*Id.* at 88). James testified that he thought he was going to be killed. (*Id.* at 87).

{¶18} According to James, after Lyle shot at him, Lyle went back to Hilary. (Tr. at 52). James testified that he stayed back so as to not further escalate the situation. (*Id.* at 52). James testified that Hilary then left with Lyle. (*Id.* at 53).

{¶19} James testified that he learned the bullet entered the couch near the spot where he was sitting at the time Lyle fired the weapon. (Tr. at 58). Five days after the incident, Detective Kent Miller was informed by James that Hilary had found where the bullet had entered the couch. (*Id.* at 235-236). Hilary allowed Detective Miller into the house to examine the couch and look for the bullet. (*Id.*) Detective Miller testified that he went to the home and saw where the bullet entered and exited the couch, but no bullet was recovered. (*Id.* at 235-239). Detective Miller testified that at that time Hilary suggested to him that possibly one of the children had stabbed the couch with a pencil, creating the hole. (*Id.* at 238). However, Detective Miller testified the hole in the couch was not consistent with a pencil going all the way through it. (*Id.* at 239).

{¶20} James Lanker's son, James Lanker, Jr. ("Jimmy"), also testified in this case. He testified that in the early morning hours of May 17, 2014, he was awakened by his father knocking on his door. (Tr. at 106). Jimmy testified that

James was “shook” like something had happened to him. (*Id.*) Jimmy testified that James relayed what had happened and that Hilary was with Lyle, so Jimmy began calling Lyle. (*Id.* at 107). Jimmy testified that he called several times and kept getting hung up on. (*Id.* at 107). Jimmy testified that at least once Hilary hung up on him, which she never did. (*Id.*) Jimmy testified that he eventually got Lyle on the phone and Lyle said Hilary did not want to talk to him, so Jimmy threatened to “GPS” the phone. (*Id.* at 107). Jimmy testified that Hilary pulled up to the house crying a few minutes later with dried blood in her hair, saying something about Lyle hitting her. (*Id.* at 108). Jimmy testified that roughly ten minutes after Hilary’s arrival, they went to the emergency room. (*Id.* at 108).

{¶21} The physician’s assistant who treated Hilary at St. Rita’s Hospital, Shane Trotter, testified at trial. Trotter testified that Hilary was treated in the emergency room for contusions on her arm and head and a laceration on her scalp. (Tr. at 264). Trotter testified that when he asked Hilary how she sustained the laceration on her scalp in order to know how to treat it, Hilary told him that she had been hit in the head with a pistol. (*Id.* at 264-266). This explanation was contained in Hilary’s medical records, which were introduced into evidence. (State’s Ex. 36).

{¶22} Patrolman Matthew Douglass testified that he met with Hilary at St. Rita’s Hospital. Patrolman Douglass testified that Hilary had large marks around

the back of her neck, blood in her hair, and a contusion on her head. (Tr. at 119). Patrolman Douglass testified that the wound on her head looked like it came from a gun or an object. (*Id.* at 120).

{¶23} Patrolman Douglass testified that Hilary informed him that Lyle threatened her and her father with a gun and that Lyle had fired a round inside her home. (Tr. at 124). Hilary gave Patrolman Douglass permission to search the home. (*Id.*) A gun was located on top of Hilary's bedroom dresser when the house was searched. Patrolman Douglass contacted Hilary to have her describe the gun she had told him Lyle had been using and Hilary accurately described the same weapon that was found on top of the bedroom dresser. (*Id.* at 129). The gun was collected and later tested for DNA, which revealed that DNA profiles consistent with Hilary and Lyle were on the handled areas of the gun. (*Id.* at 201-202).

{¶24} The State also introduced evidence of a recorded phone call between Lyle and Hilary when Lyle was in jail. (State's Ex. 39). In the call, Lyle tells Hilary that the State does not have a case if there are no witnesses. (*Id.*) Hilary tells Lyle that he had better accept a plea offer, but Lyle reiterates, "there ain't no witnesses, there ain't no case." (*Id.*)

{¶25} In addition, the State presented photographs of the various areas where the incidents allegedly took place, including photographs of blood that was

tested and found to be consistent with Hilary's, located on her mattress and on the floor of her bedroom. Photographs of Hilary's injuries, along with her scalp laceration, and the purported bullet hole in the couch were introduced into evidence. There was also testimony that the revolver that was found on the bedroom dresser had been discharged once. (Tr. at 140).

{¶26} On appeal, Lyle argues that the foregoing evidence presented by the State was insufficient to convict him of the Felonious Assault of Hilary and James Lanker.

{¶27} Looking first to the Felonious Assault of James, there was clear testimony that, when looked at in the light most favorable to the prosecution, could have constituted Felonious Assault of James. James testified that Lyle put a gun to his head and actually fired the weapon. Corroborative evidence was introduced through DNA consistent with Lyle's on the gun, a round missing from the revolver, and a possible bullet hole on the couch where James stated he was sitting. Therefore we cannot find that the State produced insufficient evidence to convict Lyle of the Felonious Assault of James.

{¶28} As to Hilary, James testified that Lyle was pushing Hilary's head with the gun. There was testimony that Hilary had a contusion and a laceration on her head that looked like it may have come from a gun, and there was testimony

indicating that Hilary had told the medical professionals treating her that she had been hit in head with the gun.

{¶29} Alternatively, there was also testimony that Lyle aimed his gun at Hilary and said that he “ought to kill her.” In *State v. Green*, 58 Ohio St.3d 239, the Ohio Supreme Court held, “[t]he act of pointing a deadly weapon at another coupled with a threat, which indicates an intention to use such weapon, is sufficient evidence to convict a defendant of the offense of ‘felonious assault’ as defined by R.C. 2903.11(A)(2).” *Green* at syllabus. Thus there was evidence that, when looked at in the light most favorable to the prosecution, could be considered sufficient to convict Lyle of Felonious Assault against Hilary. Lyle’s arguments regarding sufficiency are thus not well-taken.

{¶30} Lyle next argues that his convictions were against the manifest weight of the evidence. In his case-in-chief, James first called Hilary to testify on his behalf. Hilary testified that Lyle assaulted her, but that he only did it with his fists. (Tr. at 292). Hilary acknowledged having made multiple statements in the past to multiple people, that Lyle may have hit her with the gun, but Hilary testified that she stated that Lyle *may* have hit her with the gun only as a *possibility*. (*Id.* at 308-315). At trial, Hilary testified that she did not think Lyle had hit her with a gun because she was struck 30-40 times and she thought she

would have been injured more seriously. (*Id.* at 310). Hilary also testified that she did not see Lyle with a gun when he was hitting her. (*Id.* at 292).

{¶31} Hilary did testify that she heard what she thought was a gun discharging when she was going upstairs, but when she asked Lyle if he had a gun Lyle said that he did not. (*Id.* at 294).

{¶32} Lyle then testified on his own behalf. Lyle admitted to assaulting Hilary with closed fists and to slamming James to the ground. (Tr. at 364-365). However, he testified that James was the one that had actually pulled the gun out, and that it only discharged as Lyle and James struggled with it. (*Id.* at 368-370). Lyle denied firing the gun at James and he denied hitting Hilary with the pistol or pointing it at her. (*Id.* at 379).

{¶33} Lyle claims that based on his testimony and the testimony of Hilary, his convictions were against the weight of the evidence. Despite Lyle's arguments, the jury elected to believe the testimony of James Lanker and the physical evidence presented by the State. The jury was well within its discretion to elect not to believe Lyle's testimony, and to find Hilary's version of events that she stated at the trial were not credible, given that she had provided other versions in the past. Therefore, on the basis of the facts before us, we cannot find that the

jury clearly lost its way or the verdict created a manifest miscarriage of justice. Accordingly, Lyle's first assignment of error is overruled.³

Second Assignment of Error

{¶34} In Lyle's second assignment of error, he argues that his trial counsel was ineffective. Specifically, Lyle argues that his counsel was ineffective for calling one of the victims, Hilary Lanker, to testify at trial, and that trial counsel was ineffective for electing not to request a jury instruction on Assault, a lesser-included offense of Felonious Assault.

{¶35} To establish a claim of ineffective assistance of counsel, appellant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced him. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 133, citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to make either showing defeats a claim of ineffective assistance of counsel. *State v. Bradley*, 42 Ohio St.3d 136, 143 (1989), quoting *Strickland* at 697. (“[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.”).

{¶36} In order to show counsel's performance was deficient, Lyle must prove that counsel's performance fell below an objective standard of reasonable

³ We would also note that while Lyle makes no argument challenging the sufficiency/weight of the evidence of his Having Weapons While Under Disability conviction, there was sufficient evidence to convict him of this crime and the conviction was not against the weight of the evidence.

representation. *Jackson* at ¶ 133. Lyle must overcome the strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Strickland* at 689. To show prejudice, Lyle must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶ 204.

{¶37} Moreover, “ ‘counsel’s decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court.’ ” *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, ¶ 203, quoting *State v. Treesh*, 90 Ohio St.3d 460, 490, 2001-Ohio-4. In addition, “[f]ailure to request instructions on lesser-included offenses is a matter of trial strategy and does not establish ineffective assistance of counsel.” *State v. Griffie*, 74 Ohio St.3d 332, 333, 1996-Ohio-71, citing *State v. Clayton*, 62 Ohio St.2d 45 (1980), certiorari denied, 449 U.S. 879, 101 S.Ct. 227.

{¶38} On appeal, Lyle first argues that his counsel was ineffective for calling Hilary as a witness. As stated in *Pickens*, a trial counsel's decision on whether to call a witness falls within the ambit of trial strategy. Nevertheless, it seemed readily apparent from the record that Lyle called Hilary to dispute that Lyle ever used the gun to hit her or threaten her with it, which would have absolved him of Felonious Assault against her if believed. Hilary's story also did

not contradict Lyle's story, and thus tangentially aided Lyle in attempting to argue that perhaps it was James Lanker who pulled out the gun in the first place. Thus while it could have been somewhat damaging to call one of the victims to the stand to testify that Lyle did, in fact, beat her, Hilary testified that she did not believe Lyle used a gun to beat her, negating one of the elements of the crime charged against him. This argument is not well-taken.

{¶39} Lyle next argues that trial counsel should have requested a jury instruction on the lesser included offense of Assault. We would note the Ohio Supreme Court's holding in *Griffie*, cited previously, where the Court found that requests for lesser included offense instructions are soundly part of trial strategy. Nevertheless, trial counsel could have desired not to request the lesser included offense instruction because if the jury believed Lyle and Hilary's testimony, Lyle would not have been guilty of either of the indicted offenses, and thus would not have been convicted of anything *at all*. If the jury was instructed on the lesser included offense of assault, Lyle admitted to assaulting Hilary and to slamming James to the ground. Thus the jury still could have found Lyle guilty of crimes even if they acquitted him of the Felonious Assaults. Therefore, a clear trial strategy was present for an "all or nothing" verdict. Lyle's arguments are thus not well-taken, and his second assignment of error is overruled.

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{¶40} For the foregoing reasons Lyle's assignments of error are overruled and the judgment of the Allen County Common Pleas Court is affirmed.

Judgment Affirmed

ROGERS, P.J. and PRESTON, J., concur.

/jlr