[Cite as *State v. Dixon*, 2010-Ohio-5541.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

JEFFREY ALAN DIXON

Defendant-Appellant

JUDGES:
Hon. Julie A. Edwards, P. J.
Hon. W. Scott Gwin, J.
Hon. John W. Wise, J.

Case No. 2010 CA 00056

O P I N I O N

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. 2009 CR 01665

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: November 15, 2010

APPEARANCES:

For Plaintiff-Appellee

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PROSECUTING ATTORNEY
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Wise, J.

{¶1} Appellant Jeffrey A. Dixon appeals from his conviction, in the Stark County Court of Common Pleas, on two counts of assault. The appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2} In the early morning hours of October 10, 2009, Canton police officers were dispatched to a "shots fired" disturbance call at or near 821 Richard Place NW. The 911 call had been placed by Thomas Platts, who lived at that location with his roommate Adam Grimm. Officer Gary Premier arrived first. Platts directed him to a neighboring residence to the north, where a man who had just fled the scene lived. Premier waited for backup, then went to the neighboring residence. The neighbor's girlfriend answered the door and gave police consent to search the residence. The neighbor was handcuffed and placed in one of the police cruisers, but told the officers the man with the gun was somebody back in the first house.

{¶3} Officer Premier returned to 821 Richard Place at about 5 AM to speak with Platts and Grimm. Premier noticed numerous unfired 7.62 rifle rounds and .25 caliber pistol casings all around the outside of the residence. Officers Richard Hart and David Grant then accompanied Premier inside.

{¶4} When the officers went inside to speak with appellant, he appeared to be sound asleep on a couch. The officers shook him and stated several times that they were Canton police officers. Officer Hart finally grabbed one of appellant's legs and tried to move it off the couch. Appellant quickly opened his eyes, alertly sat up, and kicked Hart in the upper leg, near his groin. Appellant also threw a punch at Officer Grant, striking him in the chest and shoulder area. A scuffle ensued, with Hart and

Grant receiving additional punches from appellant. Appellant received a gash on his forehead during the struggle. The officers were ultimately able to overcome appellant's resisting actions and get him handcuffed. No firearms were apparently found at that time, although the officers had found a number of .25 rounds in a bag next door.

{¶5} On November 30, 2009, the Stark County Grand Jury indicted appellant on two counts of assault (R.C. 2903.13(A)), specifically upon police officers, thus elevating the charges to felonies of the fourth degree. See R.C. 2903.13(C)(3).

{¶6} Appellant pled not guilty to both charges, and the matter proceeded to a jury trial on January 26, 2010. The jury ultimately found appellant guilty as charged.

{¶7} Via a judgment entry filed February 9, 2010, the court sentenced appellant to eighteen months in prison on each count, to be served concurrently, plus three years of community control.

{¶8} On March 9, 2010, appellant filed a notice of appeal, and herein raises the following three Assignments of Error:

{¶9} "I. THE TRIAL COURT ERRED BY PROVIDING WRITTEN JURY INSTRUCTIONS TO THE JURY WHICH INCLUDED A PARAGRAPH REGARDING THE PRIOR CRIMINAL RECORD OF THE ACCUSED WHEN NO SUCH RECORD WAS IN EVIDENCE.

{¶10} "II. THE APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

{¶11} "III. THE TRIAL COURT'S FINDING OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

I.

{¶12} In his First Assignment of Error, appellant argues that the trial court erred in its rendition of the instructions to the jury regarding prior criminal offenses on the part of appellant. We disagree.

{¶13} In the case sub judice, the trial court provided the jury with written instructions and read same to the jurors. The trial court asked counsel if they had any concerns with the written instructions; appellant's trial counsel had no objections thereto. Tr. at 384, 437. The trial court duly read the instructions to the jury; when the judge reached a paragraph that discussed prior criminal offenses, which had not been demonstrated by the prosecution, she stated as follows: "Ladies and Gentlemen, the next instruction with regard to prior criminal offenses doesn't apply to this case, so it will be redacted from the instructions, and I won't be reading that to you." Tr. at 392. Appellant's trial counsel also did not object at this point.

{¶14} The record is thus clear that defense counsel did not object to the pertinent jury instructions as required by Crim.R. 30(A). However, under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." In *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 448 N.E.2d 452, the Ohio Supreme Court discussed the application of the plain error doctrine in the context of an allegedly erroneous jury instruction. The Court stated: " * * * [A]n erroneous jury instruction 'does not constitute a plain error or defect under Crim.R. 52(B) unless, but for the error, the outcome of the trial clearly would have been otherwise.' *State v. Long* (1978), 53 Ohio St.2d 91, 97, 372 N.E.2d 804. Additionally, the plain error rule is to be applied with utmost caution and invoked only

under exceptional circumstances, in order to prevent a manifest miscarriage of justice." *Id.* at 227, 372 N.E.2d 804.

{¶15} We note the record does not contain a copy of the actual written instructions provided to the jury, although it would appear the copy from which the judge was reading contained the incorrect "other offenses" language, based on her sua sponte redaction. However, upon review, we find that appellant has failed to demonstrate that the outcome of the trial clearly would have been otherwise, but for the alleged jury instruction error. As such, appellant's plain error argument must fail.

{¶16} Accordingly, appellant's First Assignment of Error is overruled.

II.

{¶17} In his Second Assignment of Error, appellant contends he was denied the effective assistance of trial counsel. We disagree.

{¶18} Our standard of review is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. Id.

Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675, 693 N.E.2d 267.

{¶19} Appellant raises the following two areas of alleged ineffective assistance: (1) the failure of trial counsel to file a motion in limine and to object to the hearsay statement made by Officer Premier concerning the neighbor's allegation that the people living at 821 Richard Place (thus including appellant) were conducting a marijuana growing operation; and (2) failure to object to the written jury instructions, as outlined in Assignment of Error I.

{¶20} In regard to the failure to object to the grow operation statement, appellant essentially presents both a hearsay challenge and an argument that the statement was inadmissible as evidence of prior bad acts. See Evid.R. 404(B). Nonetheless, we agree with the State that it is unlikely the trial court would have sustained the proposed objection, given that the single statement was offered for the purpose of establishing additional foundation for the purpose of the officers' investigation of the suspect's house. Cf. *State v. Lynn* (2000), 137 Ohio App.3d 402, 406. Furthermore, "[c]ompetent counsel may reasonably hesitate to object [to errors] in the jury's presence because objections may be considered bothersome by the jury and may tend to interrupt the flow of a trial." *State v. Rogers* (April 14, 1999), Summit App.No. 19176, 1999 WL 239100, citing *State v. Campbell* (1994), 69 Ohio St.3d 38, 53, 630 N.E.2d 339 (internal quotations omitted).

{¶21} Appellant secondly contends his trial counsel was ineffective for not objecting to the written jury instructions concerning prior criminal offenses. However, as

per our previous analysis, and in light of the officers' testimony, we are unpersuaded that the outcome of the trial would have been different had the proposed objections been raised by trial counsel. We therefore find appellant was not prejudiced thereby.

{¶22} Accordingly, we hold trial counsel's performance did not fall below an objective standard of reasonable representation, and appellant was not deprived of the effective assistance of trial counsel. Appellant's Second Assignment of Error is overruled.

III.

{¶23} In his Third Assignment of Error, appellant contends his conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. We disagree.

{¶24} In reviewing a claim of insufficient evidence, "[t]he 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.

{¶25} Our standard of review on a manifest weight challenge to a criminal conviction is stated as follows: "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." *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. See also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. The

granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175, 485 N.E.2d 717.

{¶26} R.C. 2903.13(A) states: "No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn."

{¶27} Furthermore, R.C. 2903.13(C)(3) states: "If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, a firefighter, or a person performing emergency medical service, while in the performance of their official duties, assault is a felony of the fourth degree."

{¶28} In the case sub judice, appellant does not dispute that Officers Grant and Hart were in uniform and were in performance of their official duties at the time of the incident in question, but he maintains that the two officers admitted to shining their flashlight beams at his face in attempting to awaken him.[1] Defense witnesses testified that appellant is a heavy sleeper and has awakened aggressively in the past. Appellant also took the stand in his defense and indicated that he had been drinking heavily the night before the incident, and was still groggy and confused when he reacted to the officers. He also testified that he later apologized to the officers at the hospital. Nonetheless, Officers Grant and Hart clearly described how appellant resisted arrest, reacted combatively to the uniformed officers' presence, and proceeded to strike and attempt to strike the officers with his kicks and punches. Ultimately, the jurors were in the best position to accept or reject the testimony of the various witnesses.

{¶29} Upon review, we find reasonable jurors could have found the essential elements of the crime of felonious assault upon a police officer proven beyond a

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[1] Officer Premier did not recall the presence of lit flashlights. Tr. at 207.

reasonable doubt on both counts, and we further conclude the jury did not clearly lose its way and create a manifest miscarriage of justice requiring that appellant's convictions be reversed and a new trial ordered.

{¶30} Appellant's Third Assignment of Error is overruled.

{¶31} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby affirmed.

By: Wise, J.

Edwards, P. J., and

Gwin, J., concur.

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JUDGES

JWW/d 1007

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JEFFREY ALAN DIXON	:	
Defendant-Appellant	:	Case No. 2010 CA 00056

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to appellant.

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JUDGES