[Cite as *State v. Davis*, 2017-Ohio-9445.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Patricia A. Delaney, P.J.
Plaintiff - Appellee	:	Hon. John W. Wise, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
BENJAMIN A. DAVIS	:	Case No. 17-CA-55
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of Common Pleas, Case No. 17-CR-00051

JUDGMENT: Affirmed

DATE OF JUDGMENT: December 20, 2017

APPEARANCES:

For Plaintiff-Appellee

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Baldwin, J.

{¶1} Appellant Benjamin Davis appeals from the May 17, 2017 and June 30, 2017 Judgment Entries of the Licking County Court of Common Pleas. Appellant was found guilty of one count of Assault on a Peace Officer, R.C. 2903.13(A), (C)(5) and sentenced to a term of 14 months for that offense and a 156 day term for a post release control violation, running consecutively. Appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant, Drew Doherty and Fallon Doherty were at the Kroger Grocery Store in Newark, Licking County, Ohio on January 24, 2017 at approximately 9:30 p.m. when they were noticed by Newark Police Officer Christy Litzinger. The Officer recognized Appellant and saw Mr. Doherty conceal merchandise in his clothing while Appellant acted as a lookout. She contacted Kroger Loss Prevention Officer, John Shaneyfelt, and reported her observations. A second loss prevention officer at Kroger was processing another shoplifter, so Mr. Shaneyfelt would have no assistance in any encounter with the Appellant and the Dohertys. Upon learning this, Officer Litzinger agreed to assist Mr. Shaneyfelt by stationing herself at the exit to provide assistance if needed.

{¶3} The trio came to the self-check-out center, scanned and purchased several items, but did not scan the item Mr. Doherty had concealed in his clothing. Mr. Shaneyfelt stopped Mr. Doherty and Fallon Doherty stopped with him. Appellant proceeded to the exit and encountered Officer Litzinger. Officer Litzinger identified herself as a Newark Police Officer three times and asked Appellant for identification. Appellant responded with an expletive and struck Officer Litzinger in the throat and the chest, then left the store.

{¶4} On February 1, 2017 Appellant was indicted for assault on a peace officer while in the performance of her official duties, (R.C. 2903.13(A), (C)(5)), a fourth degree felony. He presented his defense to a jury on May 17, 2017. The jury found that Officer Litzinger was a peace officer performing her official duties during the assault and that Appellant was guilty of assault on a peace officer. The Appellant was sentenced to fourteen months incarceration to run consecutively with a 156 day post release control prison term.

{¶5} Appellant filed a timely appeal and submitted three assignments of error:

{¶6} "I. DAVIS' CONVICTION FOR ASSAULT ON A PEACE OFFICER IS BASED ON INSUFFICIENT EVIDENCE, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 1 & 16, ARTICLE I OF THE OHIO CONSTITUTION."

{¶7} "II. DAVIS' CONVICTION FOR ASSAULT ON A PEACE OFFICER IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 1 & 16, ARTICLE I OF THE OHIO CONSTITUTION."

{¶8} "III. DAVIS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION."

{¶9} In his first two assignments of error, Appellant argues that the conviction of assault on a peace officer is against the manifest weight and sufficiency of the evidence.

{¶10} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in 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. Thompkins*, 78 Ohio St. 3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App. 3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶11} An appellate court's function when reviewing the sufficiency of the evidence is to determine 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*, 61 Ohio St. 3d 259, 574 N.E.2d 492, (1991) paragraph two of the syllabus.

{¶12} Appellant was convicted of assault under R.C. 2903.13 (A) when the victim of the offense was a peace officer acting in the course of her official duty, raising the level of the offense to a felony of the fourth degree. (R.C. 2903.13 (C)(5)) Those sections state in relevant part that "[n]o person shall knowingly cause or attempt to cause physical harm to another***" and that "[i]f the victim of the offense is a peace officer*** while in the performance of their official duties, assault is a felony of the fourth degree." In the context of the first two assignments of error, Appellant argues that the evidence does not support a conclusion that he acted knowingly, that the victim was engaged in the performance of her official duties or that she was harmed and, therefore, the decisions of the trial court should be reversed.

{¶13} Appellant submits that the State failed to prove he knowingly caused physical harm to Officer Litzinger because the contact was only incidental to his attempt to leave the store. "A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature." (R.C. 2901.22). "Whether a person acts knowingly can only be determined, absent a defendant's admission, from all the surrounding facts and circumstances, including the doing of the act itself." *State v. Huff* (2001), 145 Ohio App.3d
555, 563, 763 N.E.2d 695. (Footnote omitted). Thus, "[t]he test for whether a defendant acted knowingly is a subjective one, but it is decided on objective criteria." *State v. McDaniel,* 2nd Dist. Montgomery App. No. 16221,*7 (May 1, 1998), citing *State v. Elliott*, 104 Ohio App.3d 812, 663 N.E.2d 412, (10 Dist.1995).

{¶14} Appellant cites to *State v. Curlee-Janes*, 8th Dist. Cuyahoga, No. 98233, 2013-0hio-1175 and *State v. Kemper*, 12th Dist. No. CA2012-04-079, 2012-0hio-5958 in support of his argument that his contact with the police officer was "part and parcel" of his attempt to flee from the building and that he did not knowingly cause physical harm to Officer Litzinger. We find those cases distinguishable. First, in both cases the courts found that the record did not contain any evidence of physical harm. *State v. Curlee, supra* at ¶ 13; *State v. Kemper, supra* at ¶ 20. In the case sub judice, Officer Litzinger testified that she did experience pain and a twisted knee when Appellant assaulted her.

{¶15} *Kemper* and *Curlee* are further distinguished from the case at bar by their facts. In *Kemper* the Appellant shoved the victim to gain access to his property when the victim was attempting to prevent him from doing so, but the court could not find that "Kemper was aware that placing his hands on Winters' shoulder to move her aside would

probably cause a certain result, mainly physical harm." *Kemper* at ¶ 17. In *Curlee* the Appellant was charged with and convicted of resisting arrest and two counts of assault on a police officer, but the assault convictions were reversed because the court found there was insufficient evidence to support a conclusion that the Appellant had knowingly caused harm when the contact occurred as she thrashed about and resisted arrest.

{¶16} In this case, the testimony of the Officer Litzinger and the Loss Prevention Officer Shaneyfelt, in conjunction with the video of the incident, provided sufficient evidence for the jury to conclude the Appellant acted knowingly to cause physical harm. The officer testified that Appellant struck her twice. She confirmed that the actions of the Appellant did cause her pain. Loss Prevention Officer Shaneyfelt testified that Appellant struck the Officer with his fist and forearm. The incident was recorded on a security camera and the video was played for the jury. A rationale juror could find that the testimony, in conjunction with the video of the incident, provided sufficient evidence to conclude, beyond a reasonable doubt, that the Appellant was aware that his conduct would probably cause physical harm to Officer Litzinger.

{¶17} Appellant further suggests the record contains insufficient evidence of harm to Officer Litzinger, claiming that the testimony of the Officer and Mr. Shaneyfelt contradicts their written statements and undermines their credibility such that they cannot be believed.

{¶18} The jurors not only had the opportunity to evaluate the demeanor of the witnesses and assess their credibility, they also had the advantage of a video of the event against which they could judge the witnesses' testimony. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight

of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. We cannot find that the jury lost its way so as to create a manifest miscarriage of justice in this context.

{¶19} With regard to the status of the Officer at the time of the assault, Appellant contends that because Officer Litzinger was out of uniform, off-duty, and not retained as a security officer for the Kroger in which the event occurred, the state failed to fulfill subsection (C)(5) of R.C. 2903.13. Appellant has adopted the unsuccessful arguments of appellants in *State v. Duvall*, 11th Dist. Portage No. 95-P-0140, 1997 WL 360695, *3 and *State v. Underwood,* 132 Ohio Misc.2d 1, 2005-Ohio-2996, 830 N.E.2d 1266, (M.C.) ¶ 13 who asserted that an officer is performing official duties only if she is officially "on duty" or "on the clock." The courts in *Duvall* and *Underwood* rejected that theory and instead held that "A duly commissioned police officer holds a public office upon a continuing basis" *Underwood*, *supra at* ¶ 10 and that:

> "[t]he official duty of a police officer is to enforce obedience to the law by others. This is what is meant by his 'official duty' * * *. To construe this to mean officially on duty or during hours assigned is to restrict the purpose of the statute by amendment by substituting official hours for official duty."

Duvall, supra at *5.

{¶20} The Court in *Duvall* explained that:

> Accordingly, to determine what comprises a peace officer's "official duties," the court must look at the activities in which the peace officer was engaged when he was assaulted. If the peace officer was engaging in a

> duty imposed upon him by statute, rule, regulation, ordinance or usage, regardless of his duty status, that officer is "in the performance of [his] official duties" for purposes of R.C. 2903.13(C)(3).

Id at *5

{¶21} The general duties of a police officer are set forth in R.C. 737.11:

> The police force of a municipal corporation shall preserve the peace, protect persons and property, and obey and enforce all ordinances of the legislative authority of the municipal corporation, all criminal laws of the state and the United States ***"

{¶22} We agree with the aforementioned analysis and find that, in the case sub judice, there was sufficient evidence for a rational fact finder to find, beyond a reasonable doubt, that Officer Litzinger was a peace officer engaged in assisting Loss Prevention Officer Shaneyfelt in the apprehension of a shoplifter and enforcement of the laws of the state of Ohio and that, consequently, she was engaged in the performance of her official duties.

{¶23} After reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of witnesses, we do not find that 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. Also, after viewing the evidence in the light most favorable to the prosecution, we do find that any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. Appellant's first two assignments of error are overruled.

{¶24} In Appellant's third assignment of error he claims that he received ineffective assistance of counsel because his trial attorney failed to object to a jury instruction regarding consciousness of guilt/flight and failed to request that court costs be waived.

{¶25} The test for ineffective assistance claims is set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See also *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). There is essentially a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, the trial court must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his or her essential duties to the client. If the court finds ineffective assistance of counsel, it 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 there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different.

{¶26} In order to warrant a finding trial counsel was ineffective, the petitioner must meet both the deficient performance and prejudice prongs of *Strickland* and *Bradley*.

{¶27} We find no merit in Appellant's allegation that he received ineffective assistance of counsel as a result of his attorney failing to request that the trial court waive court costs. Because R.C. 2947.23(C) grants appellant the ability to seek waiver of costs at any time, including after sentencing, Appellant has not been prejudiced by the failure of his counsel to request a waiver at sentencing.

{¶28} The case cited by Appellant, *State v. Parsley,* 10th Dist. Franklin No. 09AP-612, 2010-Ohio-1689, is inapposite because that court addressed the imposition of a mandatory fine which could be avoided by proof of indigency. In that case, the court held that the outcome would have been affected had counsel filed an affidavit of indigency. Upon a finding of indigency, the trial court would have been obligated to waive the fine. In this case, the court was not required to waive costs but had the discretion to do so, either at or after sentencing (R.C. 2947.23 (C)), so the likelihood of any change in the outcome of the trial is purely speculative and Appellant still has the opportunity request a waiver of costs.

{¶29} In a supplemental filing, Appellant brings our attention to a holding of the Eighth Appellate District in a case decided December 7, 2017 captioned *State Of Ohio Plaintiff-Appellee v. Carlton B. Springer Defendant-Appellant,* Cuyahoga No. 104649, 2017-Ohio-8861. The court in that case relied upon its decision in *State v. Gibson*, 8th Dist. Cuyahoga No. 104363, 2017-Ohio-102 to hold that "*** a prior finding by the trial court that the defendant was indigent demonstrated a reasonable probability that the trial court would have waived costs had counsel made a timely motion." *Springer* at ¶46. The court concluded that "under such circumstances counsel's failure to move for waiver of costs was deficient and prejudiced the defendant." *Springer* at ¶46. However, we decline to adopt that court's holding in this case.

{¶30} The holding in *Gibson* was based upon the rationale set forth in a decision rendered by the Supreme Court of Ohio, but that holding has been abrogated by an amendment to the Revised Code. In *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, 871 N.E.2d 589, ¶ 5 (2007), the court held that if the defendant fails to make a

motion to waive court costs at the time of sentencing, the issue is waived and the matter of costs is res judicata. The court in *Gibson* relied upon *Clevenger* to hold that because the failure to file a timely motion to waive costs created irreversible prejudice to the appellant, failure to request a waiver of costs was violative of an essential duty of counsel to his client resulting in ineffective assistance of counsel. *Gibson* ¶¶ 14-15.

{¶31} The Revised Code has been amended since the decision in *Clevenger* and that amendment mandates a different result in this case. Effective March 22, 2013, R.C. 2947.23 was amended to add the following language in a new subsection (C): "The court retains jurisdiction to waive, suspend, or modify the payment of the costs of prosecution, including any costs under R.C. 2947.231, at the time of sentencing or at any time thereafter." The Eighth District acknowledged this addition in *State v. Nelson,* 8th Dist. Cuyahoga, No. 104795, 2017-Ohio-6883, ¶ 89, where it cited the amendment and held that "[a]ccording to this provision, a defendant is no longer required to move to waive costs at the time of sentencing." Consequently, Appellant is not prejudiced by trial counsel's failure to request waiver of costs at sentencing because he is not foreclosed from filing a request at a later time. Therefore, we find the basis for a finding of ineffective assistance of counsel for failure to request that waiver no longer exists. For that reason, we are unwilling to adopt the rationale of the court in *Springer*, and we find that the failure to request a waiver of costs at sentencing is not ineffective assistance of counsel.

{¶32} Appellant also claims he received ineffective assistance of counsel because his trial counsel failed to object to a jury instruction regarding flight from the scene and consciousness of guilt. The relevant instruction is as follows:

> Testimony has been admitted indicating that the defendant fled the scene. You are instructed that fleeing the scene alone does not raise a presumption of guilt, but may tend to indicate defendant's consciousness or awareness of guilt. If you find that the facts do not support that the defendant fled the scene, or if you find that there was some other motive that prompted the defendant's conduct, or if you are unable to decide what the defendant's motivation was, then you should not consider this evidence for any purpose.
>
> However, if you find that the facts support that the defendant engaged in such conduct and if you decide that the defendant was motivated by consciousness or an awareness of guilt, you may but are not required to consider that evidence in deciding whether the defendant is guilty of the crime charged. You alone will determine what weight if any to give to this evidence." (Transcript, p. 164, lines12-25 - p. 165, lines 1-8)

{¶33} The Appellant contends that the act of flight was actually related to the shoplifting offense committed by one of his companions and, because Appellant was not charged with shoplifting, this jury instruction was inappropriate and misleading, and trial counsel should have objected to its use.

{¶34} Appellant's trial counsel made a strategic decision to emphasize his client's desire to leave the store quickly and we cannot find that decision, and the failure to object to the jury instruction, violative of any essential duty to Appellant. Trial counsel emphasized Appellant's flight from the store and sought to use the instruction to his client's advantage. He argued Appellant's motivation for leaving the store in a rush and "shoving" Officer Litzinger was his concern that he not be involved with the shoplifting

investigation. Appellant's trial counsel made a rational decision to argue that his client came into contact with the officer only as part of his effort to quickly leave the scene of the theft offense committed by Mr. Doherty, without any attempt to knowingly cause her harm. He tied this argument to the jury instruction and wove it into his closing argument in a bid to persuade the jury. Appellant's strategy was unsuccessful, but we cannot agree that it fell below an objective standard of reasonable representation and was violative of any of his essential duties to the Appellant. On the contrary, considering the evidence against the Appellant, this strategy shows that trial counsel invested a great deal of time and ingenuity to defend the actions of Appellant. The argument failed to persuade the jury, but "[w]e will not second-guess the strategic decisions counsel made at trial even though appellate counsel now argue that they would have defended differently." *State v. Post* (1987), 32 Ohio St.3d 380, 388, 513 N.E.2d 754, 762 as cited in *State v. Mason*, 82 Ohio St.3d 144, 169, 1998-Ohio-370, 694 N.E.2d 932 (1998).

{¶35} Appellant's third assignment of error is overruled.

{¶36} For the forgoing reasons, the judgment of the Licking County Court of Common Pleas is affirmed.

{¶37} Costs assessed to Appellant.

By: Baldwin, J.

Delaney, P.J. and

John Wise, J. concur.

CRB/dw