

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-08-1001

Appellee

Trial Court No. CR-2007-1909

v.

Michael Anthony Jones

DECISION AND JUDGMENT

Appellant

Decided: December 11, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Lawrence J. Kiroff, Assistant Prosecuting Attorney, for appellee.

Daniel H. Grna, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which found appellant guilty of one count of felonious assault and sentenced him to seven years imprisonment. For the reasons set forth below, the judgment of the trial court is affirmed.

{¶ 2} The following undisputed facts are relevant to the issues raised on appeal. During the early morning hours of January 13, 2007, the victim in this matter, an adult female, was assaulted while walking alone through a Toledo neighborhood. During the assault, the victim was cut along her jawline by a knife the assailant held to her neck. When the assailant fled, the victim called 9-1-1 for help. She was taken to the hospital where her injuries were treated. Approximately one month after the assault, the victim saw appellant at Toledo Municipal Court and recognized him as the man who had assaulted her. The victim contacted the investigating officer in her case, who then prepared a photo array from which she identified appellant as her assailant.

{¶ 3} On April 30, 2007, appellant was indicted for rape, kidnapping and felonious assault. Appellant entered pleas of not guilty and the matter was set for trial. For reasons unrelated to this appeal, this case came to trial two times and both times a mistrial was declared. A third trial commenced on October 24, 2007. At the conclusion of the trial, the jury found appellant not guilty of the charges of rape and kidnapping and guilty of felonious assault. Appellant was subsequently sentenced to seven years imprisonment.

{¶ 4} Appellant sets forth the following assignments of error:

{¶ 5} "Assignment of Error Number One

{¶ 6} "Insufficient evidence was presented at trial by the State of Ohio to convict the appellant of felonious assault.

{¶ 7} "Assignment of Error Number Two

{¶ 8} "The appellant's conviction of felonious assault was against the manifest weight of the evidence.

{¶ 9} "Argument Three

{¶ 10} "The trial court erred when it denied the appellant's motion for a directed verdict of acquittal.

{¶ 11} "Argument Four

{¶ 12} "The trial court committed plain error when it failed to instruct the jury on the lesser included offense of assault and also when it failed to provide the jury with a definition of the word disfigurement in its instructions.

{¶ 13} "Argument Five

{¶ 14} "The appellant received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution as well as under Section 10, Article I, of the Ohio Constitution."

{¶ 15} In his first assignment of error, appellant asserts that his conviction for felonious assault was not supported by sufficient evidence. As his second assignment of error, appellant asserts that his conviction was against the manifest weight of the evidence. These arguments will be considered together as both can be resolved by examining the evidence presented at trial.

{¶ 16} "Sufficiency" of the evidence is a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of the crime.

State v. Thompkins (1997), 78 Ohio St.3d 380, 386. When reviewing the sufficiency of

the evidence to support a criminal conviction, an appellate court must 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. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. A conviction that is based on legally insufficient evidence constitutes a denial of due process, and will bar a retrial. *Thompkins*, supra, at 386-387.

{¶ 17} In contrast, a manifest weight challenge questions whether the state has met its burden of persuasion. *Thompkins* at 387. In making this determination, the court of appeals sits as a "thirteenth juror" and, after "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." *Thompkins*, supra, at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172.

{¶ 18} Appellant was convicted of felonious assault in violation of R.C. 2903.11(A)(1), which provides that "[n]o person shall knowingly * * * [c]ause serious physical harm to another * * *."

{¶ 19} Pursuant to R.C. 2901.01(A)(5), "serious physical harm to persons" means any of the following:

{¶ 20} "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶ 21} "(b) Any physical harm that carries a substantial risk of death;

{¶ 22} "(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶ 23} "(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶ 24} "(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."

{¶ 25} In support of his first and second assignments of error, appellant cites a decision from this court in which the defendant's conviction for felonious assault was reversed. *In the Matter of Delayn K.* (Dec. 15, 2000), 6th Dist. No. H-00-029.

Appellant argues that in *Delayn K.*, we found as a matter of law that serious physical harm cannot be found if stitches are not needed to treat a victim's wound and no medical evidence is presented regarding the injury. However, contrary to appellant's argument herein, this court made no such finding in that case. Our decision in *Delayn K.* that there was no serious physical harm was based on the evidence in the record of that case and our conclusion that the wound on the victim's neck appeared to be "more of a scratch or scrape, than a 'slash'."

{¶ 26} More recently, in determining whether the state proved the "serious physical harm" element, Ohio appellate courts have held that "[w]here injuries are serious

enough to cause him or her to seek medical treatment, the finder of fact may reasonably infer that the force exerted on the victim caused serious physical harm as defined by R.C. 2901.01(A)(5)." *State v. Lee*, 6th Dist. No. L-06-1384, 2008-Ohio-253, citing *State v. Lee*, 8th Dist. No. 82326, 2003-Ohio-5640, ¶ 24. See, also, *State v. Wilson* (Sept. 21, 2000), 8th Dist. No. 77115; *State v. Euler*, 6th Dist. No. WD-03-060, 2004-Ohio-3800.

{¶ 27} At trial, the victim testified that she was taken to the hospital for treatment. The hospital records admitted into evidence indicate that the victim suffered "two parallel lacerations" on the left side of her neck. Photographs taken at the hospital and admitted into evidence show the victim's bleeding wound. One of the nurses who cared for the victim at the hospital testified that the treating physician cleaned the lacerations, pulled the edges of the wound together, applied Dermabond glue to pull the edges together, and then applied adhesive strips across the wound to close it so that it would heal without leaving too much of a scar. At trial, ten months after the attack, the victim indicated that the cut on her neck had left a scar.

{¶ 28} This court has thoroughly considered the entire record of proceedings in the trial court and the testimony as summarized above and finds that the state presented sufficient evidence from which, when viewed in a light most favorable to the state, a rational trier of fact could have found that the force exerted against the victim caused serious physical harm and that appellant was guilty beyond a reasonable doubt of felonious assault in violation of R.C. 2093.11(A)(1). See *State v. Jenks*, supra.

{¶ 29} As this court has consistently held, the trier of fact is vested with the discretion to weigh and evaluate the credibility of the evidence in reaching its determination. It is not within the proper scope of the appellate court's responsibility to judge witness credibility. *State v. Hill*, 6th Dist. No. OT-04-035, 2005-Ohio-5028, ¶ 42. Further, based on the testimony at trial and the law, this court cannot say that the jury clearly lost its way or created a manifest miscarriage of justice by finding appellant guilty of the charge of felonious assault. See *State v. Thompkins*, supra.

{¶ 30} Accordingly, we find that appellant's first and second assignments of error are not well-taken.

{¶ 31} In his third assignment of error, appellant asserts that the trial court erred when it denied his motion for a directed verdict of acquittal pursuant to Crim.R. 29(C). In support, appellant incorporates by reference the arguments set forth in his first assignment of error asserting that there was insufficient evidence presented to the jury on the element of serious physical harm.

{¶ 32} An appellate court reviews a trial court's decision on a Crim.R. 29(C) motion for acquittal using the same standard as that used to review a sufficiency of the evidence claim. *State v. Moore*, 3d Dist. No. 14-08-43, 2009-Ohio-2106, ¶ 20; *State v. Newson*, 6th Dist. No. H-02-036, 2003-Ohio-4729. In light of our finding as to appellant's first assignment of error, we find that the trial court did not err by denying appellant's Crim.R. 29 motion for acquittal. Accordingly, appellant's third assignment of error is found not well-taken.

{¶ 33} In his fourth assignment of error, appellant asserts that the trial court committed plain error when it failed to instruct the jury on the lesser included offense of assault and when it failed to provide the jury with a definition of "disfigurement" in its instructions.

{¶ 34} The record reflects that counsel did not request an instruction on the lesser included offense of assault and did not object to the instructions given to the jury.

{¶ 35} Crim.R. 30 provides, in relevant part:

{¶ 36} "On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury."

{¶ 37} It is well-settled that, absent plain error, failure to object to a jury instruction, as required by Crim.R. 30, constitutes a waiver of any claim of error as to the instruction. *State v. Long* (1978), 53 Ohio St.2d 91, 96-97; *State v. White*, 6th Dist. No. L-06-1363, 2008-Ohio-2990, ¶ 63. "In order to establish plain error, appellant must show that but for the error, the outcome of the trial clearly would have been otherwise." *State v. Herrera*, 6th Dist. No. OT-05-039, 2006-Ohio-3053. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long*, supra, at paragraph three of the syllabus; *White*, supra, at ¶ 49; *Herrera*, supra, at ¶ 88.

{¶ 38} Upon review of the record, we conclude that the decision not to seek an instruction on lesser included offenses was a deliberate, tactical decision of appellant's trial counsel. As in *State v. Clayton* (1980), 62 Ohio St.2d 45, trial counsel in this case elected to pursue acquittal rather than seek an instruction for a lesser included offense.

{¶ 39} In *State v. Clayton*, the Ohio Supreme Court considered the issue of whether the trial court committed plain error when it failed to instruct the jury on lesser included offenses to attempted murder. In that case, counsel specifically requested that there be no instructions on lesser included offenses. The court in *Clayton* considered the decision not to request instructions on lesser included offenses a matter of trial strategy, designed to secure a complete acquittal rather than invite conviction for a lesser included offense. *Id.* at 46.

{¶ 40} The Supreme Court concluded in *Clayton*: "Counsel's decision to limit the instruction to attempted murder and his client's subsequent conviction do not amount to a manifest miscarriage of justice and are not plain error." *Id.* at 47-48.

{¶ 41} As this court noted in *State v. White*, *supra*, at ¶ 55, "[d]ecisions following *Clayton* have precluded defendants from avoiding the consequences of unsuccessful tactical decisions at trial by arguing that failure to instruct on lesser included offenses constitutes plain error."

{¶ 42} We find that appellant made a tactical choice not to request a jury instruction on lesser included offenses in an effort to secure a total acquittal based upon his argument that he did not commit the offense. Under *State v. Clayton*, we conclude

that appellant cannot now assert plain error to avoid the result of his unsuccessful tactical decision at trial.

{¶ 43} Appellant also argues that the trial court's failure to provide the jury with a definition of "disfigurement" as used in R.C. 2901.01(A)(5)(d) constituted a manifest miscarriage of justice. Appellant states that "it is obvious that the jury did not understand the legal definition of the word * * *." Counsel did not request that such a definition be included in the instructions, nor did he object to the instructions as given. Based on the law as set forth above and the record, we find that the trial court did not commit plain error in this regard.

{¶ 44} Based on the foregoing, we find appellant's fourth assignment of error not well-taken.

{¶ 45} In his fifth assignment of error, appellant asserts that he was denied effective assistance of counsel. Appellant asserts that trial counsel was ineffective on two grounds: first, because he did not ask the court to instruct the jury on the definition of "disfigurement," and secondly, because he did not argue in closing that there was a lack of evidence that the victim suffered serious physical harm.

{¶ 46} To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. The standard requires appellant to satisfy a two-prong test. First, appellant must show that counsel's representation fell below an objective standard of reasonableness. Second,

appellant must show a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668. This test is applied in the context of Ohio law that states that a properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153.

{¶ 47} Appellant's sole argument in support of his claim that trial counsel should have requested an instruction on the definition of "disfigurement" is that the outcome of the case would have been different had the jury been given such an instruction. However, based on our findings under appellant's first and second assignments of error as to the sufficiency and weight of the evidence, we find this argument to be without merit.

{¶ 48} As to appellant's second argument, "opening and closing statements fall under the rubric of 'trial strategy.'" *State v. Robinson*, 6th Dist. No. L-06-1182, 2008-Ohio-3498, at ¶ 245, quoting *State v. Baker*, 7th Dist. No. 03 CO 24, 2003-Ohio-7008, ¶ 14, 18. Further, "[a] reviewing court must refrain from second-guessing trial strategy decisions." *Robinson*, supra, at ¶ 245.

{¶ 49} Accordingly, we find that appellant has not demonstrated ineffective assistance of counsel and, accordingly, his fifth assignment of error is not well-taken.

{¶ 50} On consideration whereof, we find that appellant was not prejudiced and the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J.

JUDGE

Arlene Singer, J.

Thomas J. Osowik, J.
CONCUR.

JUDGE

JUDGE

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