[Cite as *State v. Kurek*, 2012-Ohio-1993.]

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

State of Ohio	Court of Appeals No. WD-10-074
Appellee	Trial Court No. 2010CR0230
v.	
Christopher Kurek	**DECISION AND JUDGMENT**
Appellant	Decided: May 4, 2012

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Aram Ohanian and David E. Romaker, Jr., Assistant Prosecuting Attorneys, for appellee.

William F. Hayes, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Wood County Court of Common Pleas, following a jury trial, convicting appellant Christopher Kurek of assault on a peace

officer in violation of R.C. 2903.13(A) and (C)(3), a felony of the fourth degree, and sentencing him to 17 months in prison. We affirm.

A. Facts and Procedural Background

{¶ 2} On May 20, 2010, the Wood County Grand Jury indicted appellant on one count of assault on a peace officer in violation of R.C. 2903.13(A) and (C)(3). Appellant pleaded not guilty, and the case proceeded to a jury trial on September 1, 2010.

{¶ 3} The testimony at trial revealed that around midnight on May 6, 2010, appellant was riding his motorcycle at high rates of speed up and down the road through his trailer park. Appellant admitted that he had several beers earlier, but contended that he was not intoxicated because he was able to ride that night on wet ground at speeds of 105 m.p.h. without losing control.

{¶ 4} Several of his neighbors were roused by the loud noise of the motorcycle and came out to confront appellant. An argument ensued during which appellant threatened to get a sword and cut off his neighbor's head. Appellant, for his part, testified that he does not remember saying such a thing, but admitted it was possible that he said it. No physical harm came about from this argument, but one of his neighbors did call the police. Officer Robbie Barrett of the Northwood Police Department responded to the call. The testimony at trial conflicted over what happened next.

{¶ 5} Officer Barrett testified that as he was driving up to appellant's residence, appellant was putting his motorcycle away. Upon noticing the officer, appellant started yelling, "throwing F bombs" at him. Barrett talked to appellant through the passenger

window of his patrol car and told him "Don't take off [on me]." Barrett then turned the car around. When he pulled back up in front of appellant's residence, appellant had just finished putting the motorcycle away and was coming out. Barrett testified that he got out of his patrol car and, in what seemed like a split second, he was face-to-face with appellant. Barrett elaborated:

> Just got out of my car. I saw - - it was still black out. I approached him. He charged me. Was still - - I mean, it was constant like. I couldn't get a word in edgewise. It was constant F-M, F-M-U [sic] this and that. It was, it was like I was on a treadmill being pulled forward in slow motion, but it happened so fast.

{¶ 6} Barrett testified that he did not see any punch, but knew he was hit in the face. A scuffle broke out. Barrett testified that appellant is much bigger than he is, and basically he was fighting for survival. After a few seconds, appellant broke away and was heading towards his trailer. Fearing that appellant was going inside to get his sword, Barrett drew his taser and fired, striking appellant in the back of his left arm, incapacitating him. Shortly thereafter, Officer Fred Genzman arrived on the scene and secured appellant. Barrett testified that the scuffle resulted in a scrape on his chin and some scratches on his face. Genzman confirmed that Barrett did not have any scrapes or scratches on his face before the altercation. A picture of Barrett's face, taken at the scene shortly after the incident, was admitted into evidence.

{¶ 7} The state also called several of appellant's neighbors as witnesses. Russell Herrick testified, "I saw the police officer step out of his vehicle and go around the front of the vehicle, and as soon as he got around the front of the vehicle I saw the defendant sort of charge towards him. I saw the officer step kind of stumbled backwards a little bit and then he shot him with the taser." Herrick described the charge as aggressive, but not "like a dead sprint towards him." On cross-examination, Herrick admitted that he "didn't actually see any physical contact."

{¶ 8} Vicki Smith testified that she observed Barrett get out of his vehicle and say something to appellant. Appellant then yelled at Barrett and "went off and hauled off and swang [sic] at him." Smith, however, did not see appellant hit Barrett because at that moment she was turning around to go back into her house to use the restroom.

{¶ 9} Finally, Beverly Montie testified that she saw Barrett get out and go around the front of his car, and then she saw the officer "fly back." She explained that Barrett was "kind of stumbling back * * * he definitely wasn't stepping. I knew he had been struck somehow. You could tell by the way he went back." However, Montie admitted she could not see appellant, nor did she see him strike Barrett.

{¶ 10} Appellant testified on his own behalf. He recounted,

> This car pulls up, the door swings open, [Barrett] jumps out. The car is jerking from being thrown in park. He's running at me, step back and put my hands up. I'm right next to him. * * * I raised my hands up and looked at him. He just charged me. Woo woo boom. I'm wait a minute. I

got my hands in the air. I got my hands in the air soaking wet hair. In my imagination he grabbed my hands and twisted around. I don't remember exactly what we did. I pushed him off me. I'm like, hey, wait a minute. No sound, no nothing. Had he said you're under arrest, keep your hands up against the car, turn around, turn around with your hands up in the air, fine, I'll do whatever you want. Officer Barrett been to my house before. Other officers been to my house. I'm 53 years old. I've had all the fun I can stand. I've never assaulted a police officer. I'm not going to start now.

{¶ 11} In addition to the testimony regarding the incident itself, two witnesses testified to appellant's nature as a non-violent person. First, Beverly Montie testified on cross-examination that she has never known appellant to be a violent person. However, on redirect and over objection, she was asked if she knew that appellant had been convicted of domestic violence in 2001. She testified that based on the domestic violence conviction her opinion would be different. On re-cross, defense counsel elicited that she has never seen appellant be violent in the trailer park. Second, Norma DeVerna testified on appellant's behalf, and stated that he was not a violent person. On cross-examination, the state again raised appellant's 2001 domestic violence conviction. DeVerna testified that she did not know about the conviction, but that it did not change her opinion of him.

{¶ 12} Following deliberations, the jury returned a verdict of guilty. On October 22, 2010, the court sentenced appellant to a 17-month prison term.

B. Assignments of Error

{¶ 13} Appellant has timely appealed, and now raises two assignments of error.

1. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, §10 OF THE CONSTITUTION OF THE STATE OF OHIO.

2. THE TRIAL COURT VIOLATED THE APPELLANT'S RIGHT TO DUE PROCESS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION WHEN IT UPHELD THE JURY VERDICT AS IT WAS NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

II. Analysis

A. Ineffective Assistance of Counsel

{¶ 14} Appellant argues in his first assignment of error that his trial counsel was ineffective for indicating in his opening statement that appellant was a peaceful, non-violent person, and for questioning two witnesses about appellant's character for non-violence, when he knew that appellant had a 2001 domestic violence conviction which the state could then introduce. Appellant further argues that counsel's errors were

compounded by his failure to seek a limiting instruction as to the effect and meaning of the domestic violence conviction. Appellant contends that these errors caused his counsel to lose credibility with the jury. In addition, appellant contends that the domestic violence conviction could have been, and probably was, construed by the jury as evidence that appellant is a violent individual prone to committing violence against a law officer. He concludes that because this was a "thin" case, a conviction was unlikely without this additional evidence.

{¶ 15} In order to prove ineffective assistance, appellant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, he must show that his counsel's performance fell below an objective standard of reasonableness. *Id.* at 687-688. Second, appellant must demonstrate a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. Here, even assuming that counsel's performance was deficient, appellant has failed to satisfy the second prong of *Strickland*. Thus, his claim of ineffective assistance of counsel must fail. *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989) ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.")

{¶ 16} Appellant has not demonstrated a reasonable probability that, but for the alleged errors of counsel, the result of the trial would have been different. Appellant argues that the only evidence of the assault came from Officer Barrett's testimony. He

concludes that because of the lack of evidence, the impact on the jury of hearing about his domestic violence conviction was likely what tipped the scales towards conviction. However, we do not find this case to be as "thin" as appellant makes it out to be. In addition to the officer's testimony, three other eyewitnesses testified and provided circumstantial evidence that Barrett had been struck by appellant. Herrick testified that he saw appellant charge towards Barrett and saw Barrett stumble backwards. Smith testified that she saw appellant swing at Barrett. Montie saw Barrett "fly back" as if he had been hit. Further, a photograph showing minor scrapes and scratches on Barrett's face was admitted into evidence. Genzman testified that those scrapes and scratches were not present shortly before Barrett's encounter with appellant. Thus, although Barrett provided the only direct evidence of the assault, there was abundant circumstantial evidence that confirmed his version of the incident. As such, we do not find it is reasonably probable that counsel's alleged errors in inviting introduction of the domestic violence conviction altered the trial's outcome.

{¶ 17} Accordingly, appellant's first assignment of error is not well-taken.

B. Insufficiency and Manifest Weight

{¶ 18} In his second assignment of error, appellant argues that the conviction was based on insufficient evidence and was against the manifest weight of the evidence because the only evidence of the assault was the officer's testimony. We disagree.

{¶ 19} Insufficiency and manifest weight are distinct legal theories. "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a

verdict is a question of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "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*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 20} In contrast, when reviewing a manifest weight claim,

> 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. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, quoting *Thompkins* at 387.

"Weight is not a question of mathematics, but depends on its effect in inducing belief." (Emphasis deleted.) *Thompkins* at 387. We must keep in mind, however, that "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact may believe all, some, or none of what a witness says. *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964).

{¶ 21} Addressing his insufficiency claim first, we hold that appellant's conviction is not based on insufficient evidence. Appellant was charged with assault on a peace officer in violation of R.C. 2903.13(A) and (C)(3), which provides:

> (A) No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn.
>
> * * *
>
> (C) Whoever violates this section is guilty of assault, and the court shall sentence the offender as provided in this division and divisions (C)(1), (2), (3), (4), (5), and (6) of this section. * * *
>
> * * *
>
> (3) If 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."

{¶ 22} Here, when viewed in a light most favorable to the prosecution, testimony from the trial indicated that on the night in question, Barrett was acting in his official police duties, in uniform, when appellant charged at and struck Barrett, causing physical injury to his face. Thus, evidence on each of the essential elements having been submitted, appellant's claim of insufficiency is without merit.

{¶ 23} Neither is appellant's conviction against the manifest weight of the evidence. As discussed in the analysis of appellant's ineffective assistance of counsel claim, Barrett testified that appellant charged at him and he was struck in the face. Three

other eyewitnesses testified to the incident, and although they did not see appellant make contact with Barrett, their testimony provided circumstantial evidence that appellant assaulted Barrett. Further, evidence of the resulting physical harm was presented in the form of a photograph of Barrett's face and Genzman's testimony regarding the timing of the injuries. The only contradictory evidence was appellant's own testimony in which he stated that Barrett was the aggressor, and he only pushed Barrett away. From this evidence, we cannot conclude that the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. Thus, appellant's manifest weight claim is without merit.

{¶ 24} Accordingly, appellant's second assignment of error is not well-taken.

III. Conclusion

{¶ 25} For the foregoing reasons, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal 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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE