[Cite as *State v. Hilliard*, 2007-Ohio-6193.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 88485

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WAYNE HILLIARD

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-451697

BEFORE: Boyle, J., Rocco, P.J., and Dyke, J.

RELEASED: November 21, 2007

JOURNALIZED:

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BOYLE, M.J., J.:

{¶ 1} Appellant-defendant, Wayne Hilliard, appeals the judgment of the Cuyahoga County Court of Common Pleas, finding him guilty of two counts of assault on a corrections officer. For the following reasons, we affirm.

{¶ 2} On May 14, 2004, Hilliard was indicted by a Cuyahoga County Grand Jury on two counts of assault on a corrections officer, felonies of the fifth degree, in violation of R.C. 2903.13. At his arraignment, he entered a plea of not guilty.

{¶ 3} A jury trial began on March 2, 2006. The state presented four witnesses, to wit: three corrections officers and a detective from the Cuyahoga County Sheriff's Department. Hilliard testified in his defense.

{¶ 4} James Toney, Robert Scott, and Mark Thevenin each testified that they are employed as corrections officers for the Cuyahoga County Jail and members of a

special unit called the "response team." The "response team" is corrections officers who receive extra training in the areas of cell extractions of unruly inmates, use of pepper foam spray, use of interpersonal communications, and use of a personal offense device (which is a police-officer-type night stick). Additionally, members of the response team wear black, military style uniforms, leather boots, and are equipped with handcuffs, pepper foam spray, rubber gloves, and a two-way radio. This uniform is different from the other corrections officers working in the jail, who wear a standard uniform consisting of a gray shirt and blue pants. Further, whenever the response team is called, an issue already exists, such as an unruly inmate.

{¶ 5} Toney was the first to testify for the state. He testified that around 9 p.m. to 9:30 p.m., on November 3, 2003, he was called to assist in the booking of Hilliard, whom Toney considered to be an unruly inmate because he had removed his wristband. During booking, each entering inmate is tagged with a wristband. It contains a picture of the person being booked, his date of birth, booking number, the sheriff department's number and vital information pertaining to the individual being processed or "booked." It is a violation for an inmate to remove the wristband. Reagan, also a corrections officer, summoned the response team.

{¶ 6} That day, Toney and Scott were assigned to the response team, while Thevenin was not. Arriving first, Toney, who is six feet two inches tall and weighs approximately two hundred and fifty pounds, found Hilliard in the "bullpen." Hilliard is

approximately six feet three inches tall, and weighs over two hundred and fifty-five pounds.

{¶ 7} Following standard procedure, Toney and Scott instructed Hilliard "to turn around, place [his] hands on the wall," so that they could handcuff and transport him to "10 bravo pod cell eight," the lockup pod. Toney also said that Hilliard appeared agitated and angry saying "it was bullshit. "[1]

{¶ 8} Next, Toney and Scott escorted Hilliard to cell 8, where Thevenin was the supervising officer of the pod. Again, following standard procedure, Toney and Scott prepared to remove Hilliard's handcuffs to conduct a strip search. Toney explained that a strip search is required to intercept and prevent contraband from entering the jail.

{¶ 9} Before entering the bullpen, Toney and Scott, instructed Hilliard to face the cell wall, away from the officers, and keep his hands on the wall. They told Hilliard to remove his clothes and hand them back to Toney, the corrections officer directly behind him. When Hilliard got to his underwear, Toney stated, "Like I say, he didn't really want to at first, kind of saying something about fags, something like that. And he did take them off though." According to Toney, Hilliard, not following directions, turned toward his right and tossed his boxers back into Toney's face.

[1]Hilliard had just been sentenced to thirty days in the county jail for violating his probation and had just been taken from the courtroom to the jail to be booked and begin serving his sentence.

{¶ 10} As a result of Hilliard's actions, Scott grabbed Hilliard's left arm, trying to turn him toward the wall, as Thevenin attempted to secure Hilliard's legs to keep him facing the wall. However, when Thevenin grabbed Hilliard's legs, Hilliard kicked back, and got Thevenin in the right side of his face with his foot. Scott, who was on Hilliard's left side, went to get the boxers and grab Hilliard's right arm, which he did briefly, but Hilliard pulled away, striking Toney in the groin, "dropping him." Toney immediately fell to the ground.

{¶ 11} Toney then got up and grabbed Hilliard's right arm. The three corrections officers were able to pull Hilliard down, to try to handcuff him, while Hilliard resisted. The officers then sprayed Hilliard with one or two second bursts of pepper foam, finally handcuffing him, and calling a "10 20 5" emergency on the radio. The officers' supervisor arrived. After putting Hilliard in a transport chair, he was wheeled to the medical unit. Here, he was cleaned of the pepper spray and examined.

{¶ 12} Toney explained that the hit to his testicles caused him nauseating pain, and he had difficulty walking. Toney further testified that forty-five minutes after the incident, the pain increased, so he went to Metro Hospital. At the hospital, Toney learned that he suffered a contusion to his right testicle and that it was bruised. Additionally, Toney received an injury to his right knee and wrist.

{¶ 13} Scott testified next. His testimony echoed that of Toney and Thevenin. Scott said that they instructed Hilliard before performing the strip search, emphasizing, "that he was not allowed to turn off the wall because that's a sign of aggression."

Giving specific orders, Scott explained, ensures an inmate's compliance, "so they know what to expect before a CO goes into the cell" and "[Hilliard] wasn't complying." Scott also testified that he did not see Hilliard hit Toney in the groin or kick Thevenin in the face, but he did see Toney go down to his knee, and heard Thevenin say "ah my face." Defense counsel declined to cross-examine Scott.

{¶ 14} Thevenin testified next. Although a member of the response team, that shift, Thevenin was supervising the "ten bravo pod," where Hilliard was in cell 8. It was Thevenin's job to oversee a strip search of an inmate entering his pod. Thevenin explained that "when you take your clothes off, the policy is, remain facing the wall, hand your clothing back to us. The inmate [Hilliard] turned off the wall, threw them back like this (indicating). Once he did that, that's a threatening gesture to us. That was a strike to Officer Toney's face with the underwear. Per our policy, one object coming in contact with another, during academy, is a strike. Him throwing them in his face instead of handing them to him was, actually, he was trying to assault him. *** As far as we know, he's blinding him for a reason: now, he's turning around, he's already angry. I don't know where he's going now *** at that time I think he may want to fight."

{¶ 15} Hilliard heard Toney "giving orders [to Hilliard] to remove his shirt and everything. He was complying, for the most part. He was still basically, this is bullshit, you know, you guys need to kiss my ass for slavery, some other things. Officer Toney said, you need to remain quiet, just follow the procedures. Officer Scott reiterated, you

need to calm down, just follow procedures. He got down to his boxer shorts, at which time he pulled them off, turned around, threw them back in Officer's Toney's face. At that time Officer Scott tried to put him into the wall to control him. I was going to move in to push him back to the wall, at which time I took a shot to the side of my head, Officer Toney came in to go for his arm, at which time I saw him go to the floor." Thevenin further testified he received an injury to his left temple that caused a "red contusion, a little knot" when he "donkey kicked [me]." Thevenin sought medical treatment in the jail.

{¶ 16} Brian Smith, a deputy sheriff assigned to the detective bureau, testified last. He conducts follow-up investigations of felonies that occur in the county or jail. The morning after the incident, on November 4, 2003, he began his investigation by collecting all reports that had been generated, including all computerized criminal histories and photos. First, he interviewed Hilliard, on November 6. Hilliard gave Smith a written statement. Smith further got a copy of Hilliard's sentencing journal entry.

{¶ 17} Hilliard admitted many things to Smith: his removal of the wristband, Toney and Scott escorting him, and the strip search. Hilliard admitted that he more or less complied with the initial part of the strip search, that he was pepper sprayed, and taken to the medical unit to be decontaminated. Smith testified that Hilliard was calm during the interview and that he did not observe physical injuries on Hilliard, "none whatsoever," nor did Hilliard complain of any injuries to Smith.

{¶ 18} Hilliard told Smith, "that he was basically pummeled by six officers." They knocked his false teeth out, they beat him to the ground. "Pretty much it." Smith did not obtain Hilliard's medical records from the medical unit of the jail. In rebuttal, Smith testified that Hilliard did not inform him that he received medical treatment as a result of this incident, other than the decontamination for the pepper spray.

{¶ 19} Smith also interviewed Toney, Thevenin, and Scott, and reviewed Toney's Metro hospital medical record. After gathering all the information, he sent it to his supervisor for review. Then, they went to the prosecutor's office.

{¶ 20} At the conclusion of the state's case, the defense moved for a Crim.R. 29 acquittal, arguing that the state had failed to show Hilliard "knowingly caused them — the assault." The trial court denied the motion.

{¶ 21} Hilliard testified in his own defense. He admitted that he took off the wristband, but that he "didn't snatch it off like they said I did. I took it off because, you know, I was sitting there, I was nervous, and so over what, five-six hour period of time, I had worked it off." He testified that he was escorted by "the men in black" to another part of the jail, to another cell, where he went to sleep. Hilliard then testified "that about a few hours later, while I was laying there asleep, the cell door opened, and when I looked up, it was maybe like seven, ten corrections officers standing there looking at me, you know. And so they said – one of them hollered out, he said, Hilliard, get up, strip."

{¶ 22} Hilliard stated that he complied with everything they said, but "by the time I had stripped, they had all surrounded me, and I was standing there with my hands against the wall, and you know, it had got real quiet, wasn't nobody saying nothing. And so I was just standing there with my hands against the wall. So I turned my head. I didn't take my hands off the wall. I didn't. I just turned my head to see what else the COs were gonna tell me to do. When I turned my head, he sprayed mace in my face. Then when he did that, they all just started beating me with those black leather gloves that they got on. When they started beating me, I just covered my head up like this (indicating), and just dropped to the floor. And when I dropped to the floor, they was kicking me, stomping me. And when I woke up, I was in the hospital somewhere."

{¶ 23} He further testified that he "got the worst beating of his life." Hilliard described that his head hurt, his eyes burned, his head swelled up, he thought his ribs were broken, and he had pain everywhere. He stated that he recognized two of the three officers who testified, but the record is silent as to whom he specifically identified. He reiterated that "ten of them actually beat me up." Hilliard denied kicking anyone and he denied punching anyone.

{¶ 24} During the state's cross-examination, Hilliard admitted that much of what he had just testified to orally, was not in his written statement, including his testimony that there were ten men in his cell, that he went to sleep and was awoken by officers, that he did not throw boxers in Toney's face, and that he received physical injuries.

However, Hilliard did state that the jail hospital gave him motrin, and x-rayed his head and whole body.

{¶ 25} At the conclusion of Hilliard's testimony, the defense rested. On March 3, 2006, the jury returned with its verdicts. The jury found Hilliard guilty of counts one and two, assaults on Thevenin and Toney.

{¶ 26} Hilliard appeared for sentencing. At the sentencing hearing, the trial court sentenced Hilliard to a six-month prison term.

{¶ 27} It is from this judgment that appellant now appeals, raising the following two assignments of error:

{¶ 28} "[1.] The trial court erred in denying Appellant's motion for acquittal as to the charges when the state failed to present sufficient evidence to sustain a conviction.

{¶ 29} "[2.] Appellant's conviction is against the manifest weight of the evidence."

{¶ 30} Hilliard argues in both assignments of error that he committed no crimes, and that it was he who had been beaten up. He contends that the state failed to present any evidence to support his conviction for assaults on two corrections officers. For the reasons that follow, we disagree.

{¶ 31} In *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, the Supreme Court of Ohio explained that sufficiency of the evidence and weight of the evidence are not synonymous legal concepts. They are "both quantitatively and qualitatively different." Id.

{¶ 32} The high court further explained:

{¶ 33} "[w]ith respect to sufficiency of the evidence, '"sufficiency" is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.' Black's Law Dictionary (6 Ed.1990) 1433. See, also, Crim.R. 29(A) (motion for judgment of acquittal can be granted by the trial court if the evidence is insufficient to sustain a conviction). 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. Robinson* (1955), 162 Ohio St. 486 ***. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 45 ***, citing *Jackson v. Virginia* (1979), 443 U.S. 307 ***." (Parallel citations omitted.) Id. at 386-387.

{¶ 34} When determining sufficiency of the evidence, we must consider whether, after viewing the probative evidence in a light most favorable to the prosecution, any rational trier of fact could have found all of the elements of the offense proven beyond a reasonable doubt. *State v. Shaffer*, 11th Dist. No. 2002-P-0133, 2004-Ohio-336, at ¶17. Further, we note that the verdict will not be disturbed on appeal unless the reviewing court finds that reasonable minds could not have arrived at the conclusion reached by the trier of fact. *State v. Dennis* (1997), 79 Ohio St.3d 421, 430.

{¶ 35} Hilliard was convicted of two counts of assault on a corrections officer. R.C. 2903.13(A), assault, provides in part, "[n]o person shall knowingly cause or attempt to cause physical harm to another ***." The assault is an assault on a

corrections officer when, according to R.C. 2903.13(C)(2)(b), "[t]he offense occurs in or on the grounds of a local correctional facility, the victim of the offense is an employee of the local correctional facility ***, and the offense is committed by a person who is under custody in the facility *** subsequent to the person's being *** convicted of any crime[.]"

{¶ 36} R.C. 2901.22 provides in part: "(A) a person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

{¶ 37} "(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶ 38} Finally, R.C. 2923.02 defines "attempt" as: "(A) No person, purposely or knowingly, when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

{¶ 39} Both Thevenin and Toney described in great detail how Hilliard kicked Thevenin in the face and struck Toney in the groin after Hilliard came off the wall during the strip search. Scott, although he stated that he did not see Hilliard kick Thevenin or strike Toney, did testify that he heard Thevenin exclaim, "ah my face," and saw Toney

go down to his knee. Further, it has not been refuted that Hilliard was an inmate in a local correctional facility and that Thevenin and Toney were corrections officers of that facility performing their official duties.

{¶ 40} In addition, all three officers testified that Hilliard became noncompliant during the strip search when he came off the cell wall, threw his boxers in Toney's face, and then began resisting them by "donkey kicking" Thevenin in the face and striking Toney in the groin. Thus, viewing the evidence in a light most favorable to the state, it presented evidence legally sufficient to go to the jury and to support a jury verdict as a matter of law.

{¶ 41} With respect to manifest weight of the evidence, the Supreme Court has stated:

{¶ 42} "[a]lthough a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence. [*Robinson*, supra, at 487]. Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.' (Emphasis added.) Black's, supra, at 1594.

{¶ 43} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony. [*Tibbs,* supra, at 42]. See, also, *State v. Martin* (1983), 20 Ohio App.3d 172, 175 *** ('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.')." *Thompkins*, supra, at 387.

{¶ 44} In addition, when assessing witness credibility, "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. The factfinder is free to believe all, part, or none of the testimony of each witness appearing before it. *Warren v. Simpson* (Mar. 17, 2000), 11th Dist. No. 98-T-0183, 2000 Ohio App. LEXIS 1073, at 3. Finally, we note that a judgment of the trial court should only be reversed as being against the manifest weight of the evidence in the exceptional case where the evidence weighs heavily against the conviction. *Thompkins*, supra, at 387.

{¶ 45} Hilliard argues that the evidence did not show that he committed a crime, and that if any crime was committed, it was by the corrections officers against him. He denies hitting or kicking anyone, and claims that he was the one who got "beat up" and that he acted "in an effort to attempt to protect himself."

{¶ 46} However, after reviewing the record, the evidence overwhelmingly shows that Hilliard committed acts of assault on two corrections officers. Three officers testified to essentially the same scenario of events that took place during Hilliard's booking. Again, all three testified that during the strip search, Hilliard became noncompliant, kicked Thevenin in the face, and hit Toney in the groin. Detective Smith also testified that Hilliard did not have any physical injuries after the incident, nor did he complain of any.

{¶ 47} The factfinder is free to believe or disbelieve, all, none, or any part of each witnesses' testimony. The inconsistencies between Hilliard's oral testimony at trial and his written statement is remarkable. We can only conclude that the trier of fact chose to believe the overwhelming and consistent testimony presented by the state.

{¶ 48} Upon review, we do not find this to be "the exceptional case in which the evidence weighs heavily against the conviction," and in which the trier of fact "clearly lost its way and created such a manifest injustice that the conviction must be reversed and a new trial ordered." Accordingly, the weight of the evidence supports the conviction and appellant's two assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY JANE BOYLE, JUDGE

KENNETH A. ROCCO, P.J., CONCURS;
ANN DYKE, J., CONCURS IN JUDGMENT ONLY