[Cite as *State v. Jennings*, 2009-Ohio-2579.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91231

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HERMAN JENNINGS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-497449

BEFORE: Celebrezze, J., Dyke, P.J., and Jones, J.

RELEASED: June 4, 2009

JOURNALIZED:

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant Herman Jennings brings this appeal challenging his conviction for felonious assault. After a thorough review of the record, and for the reasons set forth below, we affirm.

{¶ 2} On June 18, 2007, a Cuyahoga County Grand Jury indicted appellant on three counts: Count 1 charged felonious assault in violation of R.C. 2903.11(A)(2), with a peace officer specification and a firearm specification; Count 2 charged carrying a concealed weapon in violation of R.C. 2923.12 (A)(2); Count 3 charged having a weapon while under a disability in violation of R.C. 2923.13(A)(2).

{¶ 3} On February 26, 2008, a jury trial commenced. The state presented several witnesses, including three police officers who participated in appellant's arrest on June 7, 2007.[1]

{¶ 4} Lt. Timothy Gaertner testified that on June 7, 2007, he was part of the arrest team, comprised of police officers and SWAT team members, executing an arrest warrant for appellant. Lt. Gaertner testified that he and the other arrest team members met prior to executing the arrest warrant to review appellant's case file, which included appellant's photograph. He testified he was in the first car to arrive at the East 123rd Street address in Cleveland, Ohio.

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[1]A fourth witness, James Ealey, testified with regard to the firearm specifications and Counts 2 and 3. Since appellant was acquitted of those charges, this court does not address Mr. Ealey's testimony.

When he arrived, Lt. Gaertner spotted appellant entering the driver's-side door of a van that was backed into the driveway.

{¶ 5} Lt. Gaertner testified that appellant started the van and revved the engine. Lt. Gaertner then testified that he ran alongside the van as appellant drove it slowly in reverse, up the driveway, and that he maintained eye contact with appellant during this time. Lt. Gaertner testified that after driving a short distance on the driveway, appellant gunned the engine again and cut the wheel to the right so that the front of the van swerved toward Gaertner. He testified he was forced to jump out of the way to avoid being hit by the van. He also testified that he was not hit by the van, nor did he suffer any injuries as a result of jumping out of the way.

{¶ 6} Cleveland Police Officer Patrick Livingston testified that he was part of the arrest team on June 7, 2007 that executed the warrant on appellant. Officer Livingston testified that he witnessed appellant enter the van, gun the engine, drive it in reverse, and subsequently cut the wheel to the right so that the front driver's end of the van swerved toward Lt. Gaertner. He also testified that from his point of view, he saw Lt. Gaertner dive out of the way, but he was not sure if Gaertner had been hit or not.

{¶ 7} Lt. Gaertner, Officer Livingston, and state's witness Officer Robert Taylor identified appellant as the person driving the van that day and as the same person who was arrested in connection with the alleged crimes.

{¶ 8} Appellant made a Crim.R. 29 motion, which the trial court denied. Appellant did not present a case-in-chief; he instead made another Crim.R. 29 motion, which the court denied.

{¶ 9} On March 4, 2008, the jury returned verdicts of guilty on the charge of felonious assault with the peace officer specification, but not guilty on the firearm specification. It returned verdicts of not guilty on the charges of carrying a concealed weapon and having a weapon while under a disability. The court proceeded directly to sentencing. Appellant was sentenced to three years incarceration with five years postrelease control.[2]

Review and Analysis

{¶ 10} Appellant filed a timely notice of appeal, raising three assignments of error for our review.

Sufficiency of the Evidence

{¶ 11} "I. The trial court committed error when it denied Defendant-appellant's motion for acquittal made pursuant to Crim.R. 29."

{¶ 12} In his first assignment of error, appellant argues there was insufficient evidence to convict him of felonious assault. He specifically argues there was no evidence that he knowingly caused or attempted to cause physical harm to Lt. Gaertner. We disagree.

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[2]The court ran this sentence consecutive to appellant's three-year sentence in CR-493416 on convictions for abduction and domestic violence.

{¶ 13} Under Crim.R. 29, a trial court "shall not order an entry of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus. "A motion for judgment of acquittal under Crim.R. 29(A) should only be granted where reasonable minds could not fail to find reasonable doubt." *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394.

{¶ 14} Thus, the test an appellate court must apply in reviewing a challenge based on a denial of a motion for acquittal is the same as a challenge based on the sufficiency of the evidence to support a conviction. See *State v. Bell* (May 26, 1994), Cuyahoga App. No. 65356.

{¶ 15} The Ohio Supreme Court set forth the test an appellate court should apply when reviewing the sufficiency of the evidence to support a conviction in *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492: "[T]he relevant inquiry on appeal is whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. In other words, an appellate court's function when reviewing the sufficiency of the evidence is to examine the evidence admitted at trial and determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Eley* (1978), 56 Ohio St.2d 169." See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 16} R.C. 2903.11(A) states: "No person shall knowingly do either of the following: *** (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶ 17} The testimony of both Lt. Gaertner and Officer Livingston was that appellant gunned the engine of the van, then cut the wheel in such a manner that Lt. Gaertner was forced to jump out of the way to avoid being hit. In fact, Officer Livingston's testimony suggested he thought Lt. Gaertner had been hit by the van. Lt. Gaertner testified that he maintained eye contact with appellant the entire time appellant was driving in reverse and Gaertner was running alongside the van.

{¶ 18} We find that the state presented sufficient evidence that appellant knowingly attempted to cause Lt. Gaertner physical harm.[3] The evidence showed that appellant was looking directly at Lt. Gaertner when he was driving the van, gunning the engine, and turning the front end of his vehicle toward Lt. Gaertner. This evidence directly contradicts appellant's argument that he was not aware of Lt. Gaertner's presence beside the van. We are also persuaded that appellant knew, by the act of turning his vehicle toward Lt. Gaertner, that he was attempting to cause him physical harm. Given Lt. Gaertner's testimony

[3]Appellant argues that he did not "cause" anyone physical harm as a result of his actions. We dismiss this argument out of hand because the statute also proscribes "attempting to cause physical harm" to another person. Likewise, the statute does not require the state to prove that anyone suffered physical injury.

that he was almost close enough to reach the van's door handle indicates that even a slight turn in the direction of the van could result in Lt. Gaertner being hit. Lt. Gaertner's uncontroverted testimony was that he was forced to jump out of the way in order to avoid being hit, even though he testified that he was not forced to dive onto his face or knees.

{¶ 19} We find that the trial court properly denied appellant's Crim.R. 29 motion on the felonious assault charge. Appellant's first assignment of error is overruled.

Manifest Weight of the Evidence

{¶ 20} "II. Appellant's conviction is against the manifest weight of the evidence."

{¶ 21} In his second assignment of error, appellant argues that the jury's finding of guilt on the felonious assault charge was against the manifest weight of the evidence. In fact, his entire argument is contained in one sentence: "Again, there was no testimony that Appellant caused or attempted to cause any harm to the alleged victim." Appellant then cites to a 72-page section of the transcript.

{¶ 22} Essentially, appellant is making the same argument he made in his first assignment of error. He has not demonstrated how the jury lost its way in reaching a guilty verdict. This court, having already determined that the

evidence was sufficient to sustain the felonious assault conviction, will not make appellant's argument for him.

{¶ 23} Appellant's second assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 24} "III. Appellant was denied effective assistance of counsel in violation of his rights guaranteed to him by the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution."

{¶ 25} In his third assignment of error, appellant argues that his trial counsel was ineffective for failing to present a case-in-chief. He specifically argues that, although trial counsel had listed witnesses on his witness list, counsel decided not to subpoena any of them to testify.

{¶ 26} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that: 1) the performance of defense counsel was seriously flawed and deficient, and 2) the result of the appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 27} In reviewing a claim of ineffective assistance of counsel, it *must* be presumed that a properly licensed attorney executes his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

{¶ 28} The Ohio Supreme Court held in *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373: "'When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.' *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, [***], 358 N.E.2d 623, 627, vacated in part on other grounds (1978), 438 U.S. 910. This standard is essentially the same as the one enunciated by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668. ***

{¶ 29} "Even assuming that counsel's performance was ineffective, this is not sufficient to warrant reversal of a conviction. '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. Cf. *United States* v. *Morrison,* 449 U.S. 361, 364-365 (1981).' *Strickland,* supra, at 691. To warrant reversal, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' *Strickland,* supra, at 694. In

adopting this standard, it is important to note that the court specifically rejected lesser standards for demonstrating prejudice.

{¶ 30} "Accordingly, to show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

{¶ 31} Appellant offers nothing more than a general assertion that his counsel was ineffective for failing to put on a defense. We are not persuaded.

{¶ 32} In *State v. Ballinger*, Cuyahoga App. No. 79974, 2002-Ohio-2146, this court held that the decision to call or not call particular witnesses fell within the realm of trial strategy and tactics, and failure to call witnesses generally will not support a claim of ineffective assistance of counsel. In the case before us now, there was no indication that there were any eyewitnesses to the events at issue other than the law enforcement officials executing the arrest warrant, three of whom testified for the state.

{¶ 33} In light of the evidence presented against appellant, as well as his failure to demonstrate prejudice as required by the second prong of *Strickland*, appellant's claim of ineffective assistance of counsel has no merit. Appellant's third assignment of error is 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.

FRANK D. CELEBREZZE, JR., JUDGE

ANN DYKE, P.J., and
LARRY A. JONES, J., CONCUR