

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
**No. 91574**

---

**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**SHANAE CAMMON**

DEFENDANT-APPELLANT

---

**JUDGMENT:**  
**AFFIRMED**

---

Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-502373

**BEFORE:** Boyle, J., Dyke, P.J., and Sweeney, J.

**RELEASED:** September 10, 2009

**JOURNALIZED:  
ATTORNEY FOR APPELLANT**

Susan J. Moran  
55 Public Square  
Suite 1616  
Cleveland, Ohio 44113-1901

**ATTORNEYS FOR APPELLEE**

William D. Mason  
Cuyahoga County Prosecutor  
Brian P. Murphy  
Assistant County Prosecutor  
The Justice Center, 9<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Shanae Cammon, appeals her conviction of assault on a peace officer. Finding no merit, we affirm.

Procedural History and Facts

{¶ 2} The grand jury indicted Cammon for a single count of assault, a violation of R.C. 2903.13(A), carrying a peace officer specification. Cammon pled not guilty to the charge and the matter proceeded to a jury trial. We glean the following relevant facts from the evidence presented at trial.

{¶ 3} On September 19, 2007, around 8:30 p.m., Cleveland Metropolitan Housing Authority officers David DeJesus and Marc Ortiz responded to a call regarding a male carrying a slingshot and “making a disturbance” in Unwin Estates, a CMHA property on Quincy Avenue. The officers pulled up to the property in a marked vehicle, and several males fled the area. The officers exited their vehicle to investigate further and encountered approximately 35 teenagers congregated outside in a common area. The officers did not find an individual matching the initial description giving rise to the radio call but received complaints from residents regarding the teenagers. The officers subsequently asked the teenagers to “move along,” which was not well received by the crowd.

{¶ 4} As for the events that then transpired between the officers and Cammon giving rise to the indictment, the state and the defense presented conflicting evidence.

{¶ 5} According to the state's two witnesses, officers Ortiz and DeJesus, some members of the crowd started to throw rocks while they were escorting a pregnant woman to their patrol car who was refusing to cooperate. They called for additional backup, and Officer Ortiz returned to the common area to address another crowd that had started to form. Officer Ortiz testified that, after he asked the crowd to disperse, Cammon, who was one of the individuals in the area hanging out, responded by saying: "Fuck that shit. I ain't going to go nowhere." Officer Ortiz asked her to calm down and told her again that she had to leave, along with everyone else. She responded: "You all ain't got to leave. They ain't even the real police." Officer Ortiz further advised Cammon that it was not a request but an order and ultimately placed her under arrest for failure to disperse after he warned her three times.

{¶ 6} Officer Ortiz further testified that Cammon initially resisted his placing handcuffs on her, flailing her arms above her head, but that he ultimately handcuffed her and proceeded to escort her back to his vehicle. Prior to reaching the patrol car, Cammon "suddenly reared back with her right leg," kicking him in his right knee. Officer Ortiz consequently lost his balance and fell on the ground, taking Cammon with him. As soon as they hit the ground, Cammon stated: "That's what you get, bitch." Ortiz then placed Cammon under arrest for assaulting a police officer.

{¶ 7} Officer DeJesus corroborated this testimony, stating that Cammon refused to leave despite being asked and ultimately kicked Officer Ortiz in the right knee.

{¶ 8} The defense presented five witnesses. Cammon and three of the witnesses, who were present when the officers asked the crowd to disperse, testified that the crowd was going “wild” and calling the officers names, but that they did not participate and were merely laughing at the officers. According to Cammon, while the other kids were yelling, Officer Ortiz confronted her sister with his “billy club” saying: “You think I’m playing? And I was standing right on the side of him. And I was, like: Dang, now you got my sister. And he turned to me, like: You think I’m playing? And he just threw me on the fence and instantly handcuffed me.” Cammon further testified that she never kicked Officer Ortiz nor stated any profanities against him. The other witnesses corroborated this testimony, stating that they never saw Cammon kick Officer Ortiz nor heard any profanities, but witnessed Officer Ortiz throw Cammon against the police car.

{¶ 9} The jury found Cammon guilty, and the court sentenced her to one year of community control sanctions. Cammon appeals, raising the following four assignments of error:

{¶ 10} “I. The state failed to present evidence sufficient to sustain appellant’s conviction for assault on a peace officer.

{¶ 11} “II. Appellant was denied effective assistance of counsel.

{¶ 12} “III. The trial court erred by denying appellant’s requested jury instruction for a lesser included offense.

{¶ 13} “IV. Appellant’s convictions are against the manifest weight of the evidence.”

#### Sufficiency and Manifest Weight of the Evidence

{¶ 14} In her first and fourth assignments of error, Cammon attacks the conviction as being not supported by sufficient evidence and against the manifest weight because the state failed to prove that the assault occurred against a “peace officer.” She claims that the state failed to present any evidence as to Officer Ortiz’s status as a peace officer as defined by the court. She further claims that the jury “lost its way” by finding that Cammon acted “knowingly.” We find her arguments unpersuasive.

{¶ 15} A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the state has met its burden of production at trial. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. On review for sufficiency, courts are to assess not whether the state’s evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Id.* 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.

{¶ 16} A challenge to the manifest weight of the evidence, however, attacks the credibility of the evidence presented. *Thompkins*, supra, at 387. Because it is a broader review, a reviewing court may determine that a judgment of a trial court is sustained by sufficient evidence, but nevertheless conclude that the judgment is against the weight of the evidence. *Id.*, citing *State v. Robinson* (1955), 162 Ohio St. 486, 487.

{¶ 17} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions 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, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the “exceptional case in which the evidence weighs heavily against the conviction.” *Id.*

{¶ 18} Cammon was convicted of one count of assault on a peace officer, a violation of R.C. 2903.13(A), and a fourth degree felony as provided in R.C.

2903.13(C)(3). To overcome a Crim.R. 29 motion for acquittal, the state was required to prove that Cammon “knowingly \*\*\* [c]ause[ed] or attempt[ed] to cause physical harm” to a peace officer while in the performance of his official duties. *State v. Young*, 8th Dist. No. 79779, 2002-Ohio-1274; R.C. 2903.13(A) and (C)(3). Peace officer is defined under R.C. 2935.01(B) and includes member of a police force employed by a metropolitan housing authority, such as CMHA. See, also, *State v. Allen*, 8th Dist. No. 89380, 2008-Ohio-229; *State v. Antonio*, 8th Dist. No. 86896, 2006-Ohio-4107.

{¶ 19} Contrary to Cammon’s assertion, we find that the state presented sufficient evidence that Officer Ortiz was a “peace officer” and that he was acting in his official capacity at the time of the assault. Officer Ortiz testified that he was employed by the CMHA police department for 16 years and was on duty at the time of the incident. He was dressed in full uniform and responded to the scene in a black and white marked police car. Ortiz also specifically testified that he is a “duly commissioned officer with the State of Ohio.” Indeed, the defense did not dispute Ortiz’s status as a peace officer at trial and repeatedly referred to him as a “police officer” in questioning the witnesses.

{¶ 20} Although conceding that a member of a metropolitan housing authority meets the definition of a “peace officer,” Cammon further argues that the jury could not have found her guilty on the peace officer specification because the trial court omitted such reference when charging the jury. We find her argument misplaced. First, the trial court’s failure to give the jury a complete



instruction on the definition of a peace officer does not negate the evidence presented by the state or give rise to a sufficiency challenge. See *Thompkins*, 78 Ohio St.3d 380 (sufficiency challenge deals with the state's production of evidence). Indeed, the state presented sufficient evidence that Ortiz was a "duly commissioned officer" and that he was acting in his capacity as a CMHA police officer at the time of the incident. Accordingly, Cammon's attack of the verdict on sufficiency grounds fails.

{¶ 21} But even if Cammon raised a separate assignment of error challenging the jury instruction alone, her argument would still fail. Cammon never objected to the instruction and has waived all but plain error. *State v. Campbell* (1994), 69 Ohio St.3d 38, 49. A defective jury instruction does not rise to the level of plain error unless it can be shown the outcome of the trial would clearly have been different but for the alleged error. *Id.* Indeed, the Ohio Supreme Court has recognized that failure to instruct on each element of the offense is not necessarily reversible as plain error. *State v. Wamsley*, 117 Ohio St.3d 388, 391, 2008-Ohio-1195, ¶17; *State v. Adams* (1980), 62 Ohio St.2d 151, paragraph two of the syllabus. Here, had the trial court given the complete instruction, the outcome would have been the same.

{¶ 22} We likewise find no merit to Cammon's claim that the conviction is against the manifest weight of the evidence because she did not "knowingly" kick him. A person acts knowingly "when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B).

Both officers Ortiz and DeJesus testified that Cammon kicked Officer Ortiz while he was escorting her to the police vehicle. Officer Ortiz further testified that, immediately after Cammon kicked him and after they both hit the ground, she stated: “That’s what you get, bitch.” This testimony demonstrates that Cammon acted knowingly when she kicked Officer Ortiz. Although Cammon now suggests that the kick was “accidental” or “reckless,” she denied ever kicking him at trial. Here, the jury was free to believe Officer Ortiz’s testimony over Cammon’s, and we cannot say that the jury lost its way simply because it found Cammon’s testimony less credible.

{¶ 23} Accordingly, the first and fourth assignments of error are overruled.

#### Ineffective Assistance of Counsel

{¶ 24} In her second assignment of error, Cammon argues that she was denied effective assistance of counsel because her trial counsel (1) failed to file a motion to suppress “based upon the unlawful arrest that led to the altercation in the case” and (2) “failed to identify, object to, or argue accordingly the incorrect jury instruction given by the trial court regarding the definition of ‘peace officer.’”

{¶ 25} To succeed on a claim of ineffective assistance, a defendant must establish that counsel’s performance was deficient and that the defendant was prejudiced by the deficient performance. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136. Counsel will only be considered deficient if his or her conduct fell below an objective standard of reasonableness. *Strickland* at 688. When reviewing counsel’s performance, this

court must be highly deferential and “must indulge a strong presumption that counsel’s conduct [fell] within the wide range of reasonable professional assistance.” *Id.* at 689. To establish resulting prejudice, a defendant must show that the outcome of the proceedings would have been different but for counsel’s deficient performance. *Id.* at 694.

### *Motion to Suppress*

{¶ 26} Failure to file a motion to suppress is not per se ineffective assistance of counsel. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, quoting *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384. “Failure to file a motion to suppress constitutes ineffective assistance of counsel only if, based upon the record, the motion would have been granted.” *State v. Kuhn*, 9th Dist. No. 05CA008859, 2006-Ohio-4416, at ¶ 11, citing *State v. Robinson* (1996), 108 Ohio App.3d 428, 433.

{¶ 27} Cammon argues that her trial counsel should have filed a motion to suppress because the officers lacked probable cause to arrest her. But she fails to identify what evidence that the officers purportedly obtained illegally that would be grounds for suppression. To the extent that she implies that the officers’ testimony regarding her subsequent assault should have been suppressed, her argument is misplaced.

{¶ 28} Notably, a lawful arrest is not an element of assault on a peace officer. *State v. Newsome*, 11th Dist. No. 2003-A-0076, 2005-Ohio-3775, ¶12. Thus, even assuming that the officers lacked probable cause to arrest Cammon

for failure to disperse, the unlawful arrest does not justify an assault on a peace officer. *Id.* (“Where a citizen has forcibly resisted an unlawful arrest, they may be prosecuted for assault on a peace officer, although they would be immune from prosecution for resisting arrest”); see, also *State v. Christian*, 7th Dist. No. 02 CA 170, 2005-Ohio-1440, ¶ 26; *State v. Peer*, 2d Dist. No. 19104, 2002-Ohio-4198, ¶10. Here, because there was no reasonable basis to file a motion to suppress, we find that defense counsel was not defective in choosing not to file a futile motion.

#### *Jury Instruction*

{¶ 29} Under this assignment of error, Cammon raises two conflicting claims related to the trial court’s jury instruction defining “peace officer.” On the one hand, she argues that her trial counsel was deficient for not capitalizing on the incomplete instruction by arguing that the state failed to prove that Officer Ortiz satisfied the definition of a “peace officer” as instructed. But on the other hand, she argues that her counsel should have notified the court of the erroneous instruction. Under either theory, she fails to satisfy a claim for ineffective assistance of counsel. See *Strickland*, 466 U.S. at 694. As previously discussed, the record demonstrates that Officer Ortiz satisfies the meaning of “peace officer.” Trial counsel did not raise any argument to the contrary because the record did not support such a claim. Likewise, had her trial counsel informed the court of the incomplete instruction, the outcome would have been the same.

{¶ 30} The second assignment of error is overruled.

### Lesser Included Offense

{¶ 31} In her third assignment of error, Cammon argues that the trial court erred in failing to instruct the jury on the lesser included offense of disorderly conduct. We disagree.

{¶ 32} The mere fact that disorderly conduct is a lesser included offense of assault does not mean that the court must instruct on both offenses. See, e.g., *State v. Keith*, 10th Dist. Nos. 08AP-28, 08AP-29, 2008-Ohio-6122; *State v. Latessa*, 11th Dist. No. 2006-L-108, 2007-Ohio-3373. An instruction on a lesser included offense is required only where the evidence presented at trial would reasonably support *both* an acquittal on the crime charged and a conviction upon the lesser included offense. *State v. Robb* (2000), 88 Ohio St.3d 59, 74 (emphasis added). Thus, if the jury can reasonably find that the state failed to prove one element of the charged offense beyond a reasonable doubt but that the other elements of the lesser included offense were proven beyond a reasonable doubt, a charge on the lesser included offense is required. *Id.*

{¶ 33} Cammon argues that the trial court should have given an instruction of disorderly conduct under R.C. 2917.11(A)(1), which provides that “[n]o person shall recklessly cause inconvenience, annoyance, or alarm to another by doing any of the following: (1) Engaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior \*\*\*.”

{¶ 34} She contends that the jury could have found that she “recklessly” kicked Officer Ortiz and not “knowingly.” But Cammon, along with all the defense

witnesses, testified that she did not kick Officer Ortiz. She denied all culpability and presented no evidence that she acted “recklessly.” Conversely, both officers Ortiz and DeJesus testified that Cammon kicked Officer Ortiz while he was escorting her to the police car. The state further presented evidence that Cammon intentionally kicked Officer Ortiz by her remark immediately following the kick. Thus, based on the evidence presented at trial, the jury had two reasonable options: either find Cammon guilty of assaulting Officer Ortiz or not guilty of the charged offense. Under these circumstances, the trial court correctly refused an instruction on the lesser included offense. See *State v. Koreny* (Apr. 12, 2001), 8th Dist. No. 78074; *State v. Reider* (Aug. 3, 2000), 8th Dist. No. 79779 (both cases recognizing that a defendant is not entitled to an instruction on a lesser included offense if the defendant denies participation in any wrongdoing).

{¶ 35} Accordingly, because the evidence could not have reasonably supported both an acquittal on the assault charge and a conviction for disorderly conduct, we overrule the third assignment of error.

{¶ 36} Judgment affirmed.

It is ordered that appellee recover of 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 J. BOYLE, JUDGE

ANN DYKE, P.J., and  
JAMES J. SWEENEY, J., CONCUR