[Cite as *State v. Miller*, 2010-Ohio-2097.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93371

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DARTRELL MILLER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-514224

BEFORE: Stewart, J., Kilbane, P.J., and Dyke, J.

RELEASED: May 13, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Gayl M. Berger
614 West Superior Avenue, Suite 1425
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Katherine Mullin
Assistant County Prosecutor
The Justice Center
1200 Ontario Street, 9th Floor
Cleveland, OH 44113

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Dartrell Miller, appeals his conviction for assault on a police officer and resisting arrest. Upon review of the record and for the reasons stated below, we affirm.

{¶ 2} In July 2008, appellant was estranged from his wife, Jaime Copeland. Copeland was living in CMHA housing on East 55th Street with her three children, the youngest of whom is appellant's child. Although they lived apart, appellant occasionally spent the night at Copeland's house. On July 29, 2008, appellant was upset because Copeland had allowed a woman whom she had once been in an intimate relationship with, and her children, to move into the house. Appellant confronted Copeland and a shouting match ensued. As appellant was leaving, there was pushing and shoving at the front door. Copeland, who was holding their one-year-old daughter in her arms at the time, was shoved back against the stairs and their daughter hit her head against the wall. Copeland's friend called 911.

{¶ 3} Detective James Neal and Officer John Smiddy of the CMHA Police Department responded to the call. They handcuffed appellant and placed him in the back of the police cruiser while they investigated the incident. While he was interviewing witnesses, Det. Neal observed appellant banging his head against the glass partition separating the front seat of the

cruiser from the passenger compartment. Detective Neal leaned into the cruiser and placed his hand on appellant's forearm to restrain appellant from hurting himself. Appellant banged his head into the partition again, smashing Detective Neal's hand against the glass. Appellant then leaned back on the seat and kicked both legs out, striking Det. Neal in the chest and knocking him out of the door. Appellant was wearing steel-toed work boots. Detective Neal testified that he had the wind knocked out of him.

{¶ 4} Appellant pushed himself out of the cruiser and onto the sidewalk. Detective Neal had to taser appellant twice and get assistance from another officer to restrain him. Appellant was then transported to the hospital for examination according to CMHA Police Department policy. Appellant continued to struggle with the police and EMS technicians on the way to and while at the hospital. He was subsequently released from the hospital with no injuries and transported to jail.

{¶ 5} Appellant was indicted on charges of domestic violence, endangering children, assault on a peace officer, and resisting arrest following the incident. He entered a plea of not guilty to the charges, and the matter proceeded to a jury trial. The jury found appellant not guilty of the domestic violence and child endangering charges and guilty of assaulting a peace officer and resisting arrest. The trial court sentenced appellant to six months imprisonment and three years of postrelease control.

{¶ 6} Appellant timely appeals raising three assignments of error for our review. Appellant claims that he was denied effective assistance of counsel for failing to request a psychiatric evaluation for sanity. He also claims that the trial court erred in not considering his competency to stand trial, and that the conviction for assault on a police officer is against the manifest weight of the evidence.

{¶ 7} In his first assignment of error, appellant claims that his defense counsel's performance was deficient for failing to have a psychiatric evaluation for sanity prior to trial. He argues that his behavior with police was bizarre and inexplicable and an evaluation was necessary to determine whether he was sane at the time of the incident. He contends that without a psychiatric evaluation it was impossible to determine whether he acted "knowingly" during the incident, which is an element of the offense of assaulting a police officer.

{¶ 8} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether appellant was prejudiced by counsel's ineffectiveness. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶ 9} In *Strickland*, the United States Supreme Court stated that a court's scrutiny of an attorney's work must be highly deferential. The court further stated that it is tempting for a defendant to second-guess his attorney after conviction and that it would be all too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Accordingly, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 104 S.Ct. at 2065.

{¶ 10} Pursuant to R.C. 2901.01(A)(14):

{¶ 11} "A person is 'not guilty by reason of insanity' relative to a charge of an offense only if the person proves, in the manner specified in section 2901.05 of the Revised Code, that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts."

{¶ 12} The issue of appellant's sanity was not raised until sentencing. At that time, appellant claimed he had a history of mental illness. He claimed he had psychiatric problems dating back to 1984. He admitted he did not mention any psychiatric problems to defense counsel or to the court.

He told the court, "Its embarrassing and humiliating. I don't usually bring it up. I try to put it in the past."

{¶ 13} Clearly, up until sentencing, defense counsel was unaware of any alleged ongoing mental health issues. In the months prior to trial, appellant maintained gainful employment, assisted in preparing his defense, attended pretrial hearings, and responded to the trial court's questions during those hearings.

{¶ 14} Appellant's argument that counsel should have known to seek a psychiatric evaluation for insanity based solely upon his erratic behavior on the day of the incident is speculative at best. The evidence indicates that appellant was angry on the day of the incident. He was "mad," he was "yelling and screaming," "his arms were flailing up and down." Appellant's subsequent outburst in the police cruiser after being told he was being arrested, indicates that he was out of control, but does not reasonably suggest that he was legally insane. Accordingly, defense counsel was not ineffective for failing to request that the court inquire into appellant's sanity or for failing to pursue an insanity defense.

{¶ 15} In his second assignment of error, appellant asserts that the trial court erred in failing to sua sponte order a competency evaluation.

{¶ 16} Under R.C. 2945.37, there is a presumption that a defendant is competent to stand trial. This presumption remains valid unless it is proven

by a preponderance of the evidence that the defendant is unable to understand the nature and objective of the proceedings against him or of assisting in his defense. *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, at ¶160.

{¶ 17} The issue of a defendant's competency to stand trial may be raised by the trial court, prosecutor, or the defendant. R.C. 2945.37(B). If a request is made prior to trial, the trial court is required to hold a competency hearing. Id. Once trial has commenced, however, "the court shall hold a hearing on the issue only for good cause shown or on the court's own motion." Id. The question of whether to hold a competency hearing once the trial has commenced is left to the trial court's discretion and will not be reversed absent an abuse of that discretion. *State v. Rahman* (1986), 23 Ohio St.3d 146, 156, 492 N.E.2d 401. An abuse of discretion is more than an error of law or judgment. Rather, it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218, 450 N.E.2d 1140.

{¶ 18} A defendant has a constitutional right to a competency hearing only when there is sufficient "indicia of incompetence" to alert the court that an inquiry is needed to ensure a fair trial. *State v. Berry* (1995), 72 Ohio St.3d 354, 359, 650 N.E.2d 433. Considerations in this regard might include supplemental medical reports, specific references by defense counsel to

irrational behavior, and the defendant's demeanor during trial. *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, at ¶15, citing *State v. Chapin* (1981), 67 Ohio St.2d 437, 424 N.E.2d 317, paragraph one of the syllabus.

{¶ 19} Appellant argues that, although neither he nor the state requested a competency hearing, the trial court should have recognized the necessity of a competency hearing based upon his "erratic behavior" at trial. The record does not support this argument. The record indicates the trial court only admonished appellant once, out of the hearing of the jury, for putting his head down on the table, moving around, and banging his keys on the table. The court found the behavior disrespectful, but gave appellant the benefit of the doubt on the belief that he might not be feeling well due to an injury he had suffered days earlier. The court advised appellant that he should be mindful that the jury was watching him. There are no indications of any issues with appellant's behavior after this point.

{¶ 20} This one instance of unusual behavior does not demonstrate that appellant did not understand the nature and objective of the proceedings against him or that he was unable to assist in his own defense. Appellant does not allege that he was unable to participate in his defense. He spoke rationally with the court during pretrial discussions and indicated that he understood the court's questions. Consequently, there is nothing in the

record that should have alerted either trial counsel or the trial court to question appellant's competency to stand trial. Therefore, the trial court did not abuse its discretion by failing to sua sponte order a competency hearing. The second assignment of error is overruled.

{¶ 21} In his third assignment of error, appellant claims that his conviction for assault against a peace officer is against the manifest weight of the evidence. Appellant maintains that there is no evidence that he knowingly attempted to cause physical harm to the officer.

{¶ 22} The manifest weight of the evidence standard of review requires us to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Otten* (1986), 33 Ohio App.3d 339, 515 N.E.2d 1009, paragraph one of the syllabus. "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. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 23} We are mindful that the weight to be given the evidence and the credibility of the witnesses are matters primarily for the trier of fact. *State*

v. DeHass (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The trier of fact has the authority to "believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.

{¶ 24} Appellant was convicted of assault of a peace officer, which requires the state to prove that appellant knowingly caused or attempted to cause physical harm to a peace officer while in the performance of his official duties. R.C. 2903.13.

{¶ 25} Appellant admits that he resisted arrest, but argues that it is unclear at which point he caused physical harm to Det. Neal. He argues that when Det. Neal placed his hand on the glass partition to soften the blows appellant was inflicting upon himself, there was no knowing attempt to cause the detective harm. Appellant also claims that after Det. Neal's continued attempts to restrain him in the police car, he became so enraged and upset that, without knowing what he was doing, he kicked the door and accidentally hit the detective in the chest. Appellant maintains that he was upset at the time because he did not do anything wrong. He notes that he was found not guilty of the domestic violence charges.

{¶ 26} We are not persuaded by these arguments. Pursuant to R.C. 2901.22(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."

{¶ 27} Detective Neal testified that while he was going through appellant's personal effects prior to transporting him to jail, appellant became upset and began banging his head against the partition in the police car. The detective said he opened the rear door and advised appellant to stop. When appellant continued, the detective leaned in and grabbed appellant's forearm to try and stop his momentum. Instead, the detective's hand was pinned against the partition, causing bruising and soreness. After calling for assistance, the detective again tried to restrain appellant at which point the detective testified that appellant, "spun, while seated in the rear of the car, he spun, laid back on his hands and on his back and with both feet kicked out the door, hitting me in the chest. The door was opened, I was in the doorway." Detective Neal testified that appellant kicked him wearing steel-toed work boots.

{¶ 28} Based upon the detective's testimony, we cannot conclude that the jury lost its way and created a manifest injustice when it found appellant guilty of assaulting a peace officer. The third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
ANN DYKE, J., CONCUR