

[Cite as *State v. Nunez*, 2018-Ohio-83.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104623

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EMILIO NUNEZ, JR.

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-16-603121-A
Application for Reopening
Motion No. 510351

RELEASE DATE: January 8, 2018

FOR APPELLANT

Emilio Nunez, Jr.
Inmate No. 683623
Belmont Correctional Institution
P.O. Box 540
St. Clairsville, Ohio 43950

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
By: Gregory Ochocki
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

SEAN C. GALLAGHER, J.:

{¶1} Emilio Nunez, Jr. has filed a timely application for reopening pursuant to App.R. 26(B). Nunez is attempting to reopen the appellate judgment rendered in *State v. Nunez*, 8th Dist. Cuyahoga No. 104623, 2017-Ohio-4295, that affirmed his conviction for the offense of felonious assault. We decline to reopen Nunez's original appeal.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Nunez is required to establish that the performance of his appellate counsel was deficient and the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 767 (1990).

{¶3} In *Strickland*, the United States Supreme Court held that a court's scrutiny of an attorney's work must be highly deferential. The court further stated that it is all too tempting for a defendant to second-guess his attorney after conviction and that it would be too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Thus, a court must indulge in 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*.

{¶4} Herein, Nunez has raised two proposed assignments of error in support of his application for reopening. Nunez's initial proposed assignment of error is that:

Appellant's convictions are based upon insufficient evidence as a matter of law. In violation of the due process clause of the Fourteenth Amendment U.S. Const., Article 1 Sec. 16 Ohio Const.

{¶5} Nunez, through his first proposed assignment of error, argues that insufficient evidence was adduced at trial to support his conviction for the offense of felonious assault.

{¶6} Although sufficiency of the evidence and manifest weight of the evidence comprise different legal concepts, manifest weight must subsume sufficiency in conducting the required analysis; that is, a finding that a conviction is not against the manifest weight of the evidence necessarily includes a finding of sufficiency. *State v. Robinson*, 8th Dist Cuyahoga No. 96463, 2011-Ohio-6077; *Cleveland v. Kirkpatrick*, 8th Dist. Cuyahoga No. 94950, 2011-Ohio-2257; *State v. Parks*, 10th Dist. Franklin No. 09AP-810, 2010-Ohio-2105. “[T]hus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency.” *State v. Braxton*, 10th Dist. Franklin No. 04AP-725, 2005-Ohio-2198, ¶ 26.

{¶7} On direct appeal, this court has already determined that Nunez's conviction for the offense of felonious assault was supported by the manifest weight of the evidence.

Finally, when reviewing a claim challenging the manifest weight of the evidence, the court, reviewing the entire record, must 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. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. Reversing a conviction as being against the manifest weight of the evidence should be reserved for only the exceptional case in which the evidence weighs heavily against the conviction. *Id.*

We cannot conclude that a manifest miscarriage of justice occurred in this instance. Nunez largely relies on the evidentiary issues as the basis to demonstrate the jury lost its way. Having overruled the evidentiary arguments, we need not reconsider them. Further, Nunez's only argument is that he is more credible than K.K. because the only identification of Nunez as the attacker came from prior statements that K.K. had conveniently "forgotten" by the time of trial. Nunez, by his own admission, violated the no-contact order and enticed K.K. into "forgetting" about the incident, thereby causing the credibility issue he now relies on. Nevertheless, the jury was free to assess K.K.'s trial credibility from all the evidence presented, and in this case, we cannot conclude from the arguments presented that the jury lost its way. Importantly, K.K. did not recant her prior statements; she merely stated a lack of memory. Nunez's second assignment of error is overruled.

State v. Nunez, 8th Dist. Cuyahoga No. 104623, 2017-Ohio-4295, ¶ 22 - 23.

{¶8} The finding that Nunez's conviction for the offense of felonious assault was not against the manifest weight of the evidence is dispositive of the claim that his conviction was not supported by sufficient evidence. Contrary to Nunez's argument, his conviction for the offense of felonious assault was supported by sufficient evidence. Nunez has failed to establish that he was prejudiced through his initial proposed assignment of error in support of his claim of ineffective assistance of appellate counsel.

{¶9} Nunez's second proposed assignment of error is that:

Trial court's denial of appellant's motion for acquittal constituted error and/or an arbitrary abuse of power causing the remainder of the trial proceedings to be fundamentally unfair in violation of the due process clause reasonable doubt standard, Fourteenth Amendment U.S. Const.

{¶10} Nunez, through his second proposed assignment of error, argues that the trial court erred by failing to grant a Crim.R. 29 motion for acquittal with regard to the charged offense of felonious assault. Specifically, Nunez argues that sufficient evidence was not adduced at trial to support each element of the offense of felonious assault, which required the trial court to grant a Crim.R. 29 motion for acquittal.

{¶11} When examining a challenge to the denial of a Crim.R. 29 motion for acquittal, this court must determine whether the evidence adduced at trial, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). "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." *Id.* A reviewing court is not to determine whether the prosecution's evidence is to be believed, but whether, if believed, the evidence adduced at trial could support a conviction. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

{¶12} The evidence adduced at trial demonstrated that Nunez caused serious physical harm to the victim, a violation of R.C. 2903.11(A)(1). The evidence included: 1) the victim's statement to the police dispatcher that she had been assaulted twice, by Nunez, in a period of 24 hours; 2) the victim's written statement to the police that Nunez had beaten her and caused her injuries; 3) the victim's statement to a nurse that Nunez had beaten her; 4) the statement to the physician's assistant that Nunez had beaten her;

and 5) the victim, after being transported to Lakewood Hospital, was diagnosed with a broken nose, multiple rib fractures, and a contused sacrum.

{¶13} Viewing this evidence in a light most favorable to the prosecution, we find that a rational trier of fact could have found the essential elements of felonious assault were proven beyond a reasonable doubt. Thus, the trial court did not err by denying Nunez's Crim.R. 29 motion for acquittal. Nunez has failed to establish that he was prejudiced through his second proposed assignment of error in support of his claim of ineffective assistance of appellate counsel.

{¶14} Accordingly, the application for reopening is denied.

SEAN C. GALLAGHER, JUDGE

TIM McCORMACK, P.J., and
EILEEN T. GALLAGHER, J., CONCUR