

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff/Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2010 AP 01 0002
FRANCISCO S. PORTILLO	:	
	:	
	:	
Defendant/Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Tuscarawas County Court of Common Pleas Case No. 2009 CR 04 0118

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: January 4, 2011

APPEARANCES:

For Defendant-Appellant:

RODNEY A. BACA
Schnars, Baca & Infantino, LLC
610 Market Avenue North
Canton, Ohio 44702

For Plaintiff-Appellee:

RYAN STYER
Tuscarawas County Prosecutor's Office
125 East High Street
New Philadelphia, Ohio 44663

Delaney, J.

{¶1} Defendant-Appellant, Francisco Portillo, appeals from the judgment of the Tuscarawas County Court of Common Pleas, finding him guilty of felonious assault. The State of Ohio is Plaintiff-Appellee.

{¶2} On March 17, 2010, Appellant was at a bar named “The Red Onion” in New Philadelphia, Ohio. Appellant was 18 years of age at the time of the incident.

{¶3} That same day, Charles Warren, age 51, was working with a friend, Josh Moss. After the two men finished working for the day, they went to Warren’s house briefly and then decided to go to the Red Onion to get some food and have a couple of beers since it was St. Patrick’s Day. According to Warren, the two men arrived at the Red Onion at 10:00 p.m. He stated that neither he nor Moss were drunk that night.

{¶4} Warren recalled having a brief exchange with Appellant when Appellant approached the bar about how old Appellant was, because Warren did not think he looked old enough to drink. Otherwise, Warren stated that he never challenged Appellant to a fight and that he sat at the bar talking to people who came by while he was eating and drinking.

{¶5} Warren stated that at approximately 1:00 a.m., he went outside to call his girlfriend to come and pick him up, because he did not want to drive after having a few drinks. He went back into the bar and sat in the same seat he was in before.

{¶6} Shortly thereafter, Josh began verbally arguing with one of Appellant’s friends, and then Josh, Appellant, and his two friends, Eric Flickinger and Nate Gianfrancisco, went out the back door of the bar to fight. Warren followed the group outside, as he was concerned that the three men might attack Moss at once.

{¶7} Things quickly settled down outside and then as Mr. Warren was turning around to go back into the bar, Appellant ran up and punched him in the face. Mr. Warren stated that it felt like Appellant had something hard in his hand when Appellant hit him and that he was going to pass out, so he put his arms around Appellant and that is the last thing that he remembered of the fight. When he woke up, he thought that he was seriously hurt. Mr. Warren had a broken nose, multiple facial fractures, bruises, possible brain hemorrhaging, and had to be transferred to a different hospital with more advanced facilities.

{¶8} There was no hemorrhaging of the brain, but his eye socket had been crushed, his face had been pushed in, his nose was bent from being broken, and he had multiple plastic surgeries, wherein a plastic piece was placed in his face. He also stated that he has ongoing numbness in his face, that his teeth are numb, and that his vision is not correct.

{¶9} Moss testified that Warren has been his best friend as well as a father figure for the past fifteen years.

{¶10} He stated that while he and Warren were at the bar, Appellant referred to them as “narcs”. Later in the evening, Moss testified that a man named Eric Flickinger began groping a girl and acting inappropriate with her. Moss stated that he told Flickinger to stop, and Flickinger challenged him to go fight outside. Moss stated that the two of them went outside to fight, and then Gianfrancisco came out and Warren came out as well. Appellant was also outside during the confrontation.

{¶11} Moss recalled that Warren stated, “don’t you think it should be one on one?” and Appellant stated, “do you want to fight?” At that time, everyone decided to

just go back into the bar; however, Moss saw Appellant punch Warren and start “beating the tar out of him.” Moss stated that he then ran up to Appellant and kicked him in the backside to get him off of Warren. He observed Warren put his arms around Appellant and then fall to the ground. Appellant then sat on top of Warren and began punching him.

{¶12} Moss was also attacked during this time. He suffered a broken tooth, broken nose, had black eyes, and bruised ribs.

{¶13} Ashley Johnson, a bartender at the Red Onion on March 17, 2009, was serving Moss and Warren that evening. She stated that they were nice and funny and that they sat at the bar most of the night. She stated that neither of the men appeared intoxicated. She recognized Appellant, who she referred to as “Frankie”, and stated he was at the bar with a group of people that night. Ashley stated that Appellant and his friends were very rude to her and that Appellant kept asking her for alcohol, but she refused to give it to him because she knew he was underage. She noted, though, that Appellant appeared to be pretty drunk.

{¶14} Johnson also testified that the woman who sat down next to Moss at the bar was actually with Appellant’s friends that night.

{¶15} Deputy Martin of the Tuscarawas County Sheriff’s Department responded to Warren’s home after the incident and saw Warren and Moss there. He stated that both men were bloody and bruised, and were missing teeth. He stated that neither man appeared to be drunk.

{¶16} He discovered the name of Appellant and his friends through his investigation and prepared photo arrays of the three to show Warren. Warren identified

all three men (Flickinger, Gianfancisco, and Appellant), and identified Appellant as the man who hit him.

{¶17} Appellant called several witnesses on his behalf. Chris Kershbaumer, a bartender at the Red Onion, testified that Moss and Warren were “looking for trouble” all night. He stated that several regular customers at the bar approached him and asked him to ask the pair to settle down. Kershbaumer also testified that Moss picked up Appellant’s french fries off of the bar and threw them on the floor.

{¶18} Next, Robert Russell testified that he was helping someone change their tire outside when he saw two men fighting with an older man outside the Red Onion that evening. The two men had the older man on the ground kicking him in the head.

{¶19} Eric Flickinger, Nathaniel Gianfrancisco, and Beth McIntyre all testified on behalf of Appellant, and all of them confirmed that Moss and Warren were the aggressors that evening and not the other way around. Appellant testified on his own behalf and claimed that he was the designated driver for the group that evening and that after the fight, where he claimed that Warren hit him first, he fled the scene.

{¶20} While Beth McIntyre was on the stand, it was discovered that her real name was Laura Elizabeth McIntyre and she had a criminal record that included two convictions for falsification.

{¶21} As a result of the altercation, Warren suffered numerous injuries to his face and body. Warren had to go through numerous medical procedures, including reconstructive procedures on his face as a result of the serious, permanent injuries inflicted upon him during the fight. Specifically, Warren suffered damage to his face, nose, and eye and required him to be hospitalized for several days.

{¶22} On April 29, 2009, the Tuscarawas County Grand Jury indicted Appellant on one count of felonious assault, a violation of R.C. 2903.11(A)(1). A jury trial commenced on November 12, 2009, and Appellant was found guilty as charged. The trial court sentenced Appellant to six months in prison suspended in lieu of two years' community control sanctions.

{¶23} Appellant raises four Assignments of Error:

{¶24} "I. THE TRIAL COURT VIOLATED THE APPELLANT'S DUE PROCESS RIGHTS WHEN APPELLANT WAS NOT ALLOWED TO RECALL A WITNESS.

{¶25} "II. THE TRIAL COURT VIOLATED THE APPELLANT'S DUE PROCESS RIGHTS BY FAILING TO GIVE A LESSER INCLUDED INSTRUCTION OF ASSAULT.

{¶26} "III. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION THAT THE APPELLANT WAS GUILTY OF FELONIOUS ASSAULT AND HIS [SIC] AND THE CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶27} "IV. THE APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL."

I.

{¶28} In Appellant's first assignment of error, he argues that his rights were violated because he was not permitted to recall a witness to the stand. We disagree.

{¶29} Trial courts are granted broad discretion with respect to the admission or exclusion of relevant evidence at trial. *State v. Sage* (1987), 31 Ohio St.3d 173, 180, 510 N.E.2d 343, 348. Thus, an appellate court will not reverse a trial court's ruling absent an abuse of discretion. *State v. Myers*, 97 Ohio St.3d 335, 348, 2002-Ohio-6658, ¶75. "The term 'abuse of discretion' connotes more than an error of law or

judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Absent an abuse of discretion resulting in material prejudice to the defendant, a reviewing court should be reluctant to interfere with a trial court's decision in this regard. *State v. Hymore* (1967), 9 Ohio St.2d 122, 224 N.E.2d 126.

{¶30} Evid. R. 609 allows for the impeachment of a witness based on the witness's prior criminal record when that witness has been convicted of a crime involving dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance. Falsification is such a crime.

{¶31} In the present case, Appellant called Laura Elizabeth McIntyre to the stand as a witness during his case in chief. During the discovery process, the defense had provided the name "Beth McIntyre" to the prosecution as the witness they would be calling during trial. Counsel did not disclose the witness' full name because counsel was under the impression that her full name was Beth McIntyre. During cross-examination, the State established that Beth McIntyre's full name was in fact Laura Elizabeth McIntyre and that she had two prior convictions for falsification. The State brought out that McIntyre was convicted once in 2006 and once in 2009 of one count of falsification. No mention of the underlying facts of either of those cases was elicited during cross-examination.

{¶32} Defense counsel did not conduct a redirect examination. Defense counsel then called an additional witness, Nathaniel Gianfrancisco to the stand, and then a recess in the proceedings was called. After the recess, defense counsel asked to approach the bench. At the bench conference, counsel asked that he be allowed to

recall McIntyre to the stand to go into the facts of her convictions because he had a chance to talk to her during the recess. The State objected and the trial court sustained the objection. Defense counsel proffered that if McIntyre were allowed to testify, she would state that she lied to cover up for her husband out of fear of retribution from him. He stated that she lied about her husband's whereabouts when the police were looking for him.

{¶33} The trial judge must determine how far a litigant may be permitted to go in showing facts affecting credibility of a witness and such a decision is within his sound discretion. *State v. Agner* (1972), 30 Ohio App. 2d 96, 283 N.E.2d 443. See also, Evid.R. 611(A). We find that the trial court was within its' discretion to deny defense counsel's request to recall Ms. McIntyre.

{¶34} Appellant's first assignment of error is overruled.

II.

{¶35} In his second assignment of error, Appellant argues that the trial court erred in failing to give a lesser-included jury instruction on simple assault. Again, we disagree.

{¶36} First, we would note that Appellant did not object to the jury instructions given to the jury. Moreover, Appellant has failed to indicate at what point in the record that defense counsel asked for an instruction on a lesser included offense of assault as required by App. R. 16(A)(7).

{¶37} We will address Appellant's argument under a plain error standard of review. *State v. Hill* (2001), 92 Ohio St.3d 191, 196, 749 N.E.2d 274, 279; Crim. R. 52(B). "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution,

under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus, 372 N.E.2d 804. Plain error will not be found absent a showing by Appellant that “but for the error, the outcome of the trial clearly would have been otherwise.” *State v. Williams*, 99 Ohio St.3d 439, 458, 2003-Ohio-4164, at ¶ 40, quoting *Long*, supra, at paragraph two of the syllabus.

{¶38} We do not believe that the omission of a jury instruction on simple assault amounts to error. An instruction on a lesser included offense is warranted only when the evidence presented at trial supports such an instruction. “Even though an offense may be statutorily defined as a lesser included offense of another, a charge on such 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. Thomas* (1988), 40 Ohio St.213, 533 N.E.2d 286, paragraph two of the syllabus.

{¶39} Ohio’s simple assault statute, codified at R.C. 2903.13(A), provides, “No person shall knowingly cause or attempt to cause physical harm to another. . . .”

{¶40} Felonious assault, on the other hand, requires that the offender knowingly cause *serious* physical harm to another. R.C. 2903.11(A)(1) (emphasis added).

{¶41} The evidence in the case at bar simply does not support an instruction on the lesser included offense of simple assault, as the harm done to the victim was indeed serious. Warren suffered a crushed eye socket, a broken nose, and various other facial fractures and contusions and was transferred to a different hospital due to possible blood on the brain.

{¶42} Accordingly, the trial court did not commit error, plain or otherwise, in failing to give a jury instruction on the offense of simple assault.

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

III.

{¶44} In his third assignment of error, Appellant claims that his conviction was not supported by sufficient evidence and that his conviction was against the manifest weight of the evidence.

{¶45} When reviewing a claim of sufficiency of the evidence, an appellate court's role is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. Contrary to a manifest weight argument, a sufficiency analysis raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. 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. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶46} Conversely, when analyzing a manifest weight claim, this court sits as a "thirteenth juror" and in 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." *State v.*

Thompkins (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 548, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶47} In order to convict Appellant of felonious assault, a felony of the second degree, pursuant to R.C. 2903.11(A)(1), the State had to prove beyond a reasonable doubt that Appellant knowingly caused serious physical harm to another.

{¶48} The evidence adduced at trial, when viewed in the light most favorable to the prosecution, was sufficient to convict Appellant of felonious assault. Warren testified that Appellant struck him in the face and that he grabbed ahold of Appellant as he was falling to the ground. Witnesses stated that Appellant continued to punch Warren as he was unconscious on the ground. As a result of the altercation, Warren suffered multiple facial injuries, including a broken nose and a crushed eye socket and was required to go through several reconstructive surgeries as a result of these injuries. Warren testified that he still has pain and numbness as a result of the injuries.

{¶49} Moreover, we do not find that the conviction was against the manifest weight of the evidence. The jury does not appear to have lost its way in determining Appellant's guilt. The court even went so far as to allow a self-defense instruction to be added after closing arguments had been completed and after the jury had started deliberating. The jury still chose to convict Appellant of felonious assault, rejecting the contention that he acted in self defense. The jury was able to weigh the credibility of all of the witnesses and determined that Appellant was guilty.

{¶50} Appellant's third assignment of error is overruled.

IV.

{¶51} In his fourth assignment of error, Appellant argues that he received ineffective assistance of trial counsel.

{¶52} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that his trial counsel acted incompetently. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. In assessing such claims, “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.’” *Id.* at 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164.

{¶53} “There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland*, 466 U.S. at 689. The question is whether counsel acted “outside the wide range of professionally competent assistance.” *Id.* at 690.

{¶54} Even if a defendant shows that his counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this “actual prejudice” prong, the 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.” *Strickland*, 466 U.S. at 694.

{¶55} When counsel’s alleged ineffectiveness involves the failure to pursue a motion or legal defense, this actual prejudice prong of *Strickland* breaks down into two components. First, the defendant must show that the motion or defense “is

meritorious,” and, second, the defendant must show that there is a reasonable probability that the outcome would have been different if the motion had been granted or the defense pursued. See *Kimmelman v. Morrison* (1986), 477 U.S. 365, 375, 106 S.Ct. 2574, 2583; see, also, *State v. Santana* (2001), 90 Ohio St.3d 513, 739 N.E.2d 798 citing *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293.

{¶56} Appellant first argues that his counsel was ineffective for failing to adequately cross-examine two of the State’s witnesses, Ashley Johnson and Deputy Martin. In so doing, Appellant argues that trial counsel asked questions that brought into question Appellant’s character.

{¶57} Trial strategy and even debatable trial tactics do not establish ineffective assistance of counsel. *Id.* A reviewing court must be “highly deferential to counsel’s performance and will not second-guess trial strategy decisions.” *State v. Tibbetts*, 92 Ohio St.3d 146, 166-67, 749 N.E.2d 226, 2001-Ohio-132. Strategic choices made after substantial investigation “will seldom if ever” be found wanting. *Strickland v. Washington* (1984), 466 U.S. 686, 681, 104 S.Ct. 2052, 2061. “Because advocacy is an art and not a science, and because the adversary system requires deference to counsel’s informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment.” *State v. Conway*, 109 Ohio St.3d 412, 848 N.E.2d 810, 2006-Ohio-2815, ¶ 101.

{¶58} We do not find that counsel’s cross-examination of State’s witnesses was ineffective. Moreover, Appellant has not demonstrated what prejudice he suffered as a result of the specific questioning that took place. If counsel wishes to attack questions that were not asked, a direct appeal is not the appropriate forum to do so, as such

matters are outside the record, and therefore would be more appropriately challenged in a post-conviction proceeding.

{¶59} Regarding Appellant's argument that defense counsel was ineffective because he called certain witnesses to the stand who had criminal records, we cannot say that counsel was ineffective in this regard either. Counsel's decision on whether to call a particular witness generally falls within the purview of trial strategy and a reviewing court will not second guess that decision. *State v. Williams*, 99 Ohio St.3d 493, 794 N.E.2d 27, 2003-Ohio-4396. See also *State v. Jordan*, 10th Dist. No. 08AP-1074, 2009-Ohio-2161 (counsel's decision on the calling of witnesses is part of trial strategy).

{¶60} Finally, Appellant argues that it was error for trial counsel not to timely request instructions on simple assault and self-defense. We would note that the trial court actually did give a self-defense instruction, so therefore Appellant can show no prejudice. Regarding the instruction on simple assault, as we have already stated, such an instruction was not warranted given the facts of the case as set forth above. Because the injuries to Warren were severe, such an instruction was not warranted. Therefore, we do not find that trial counsel was ineffective for failing to pursue such an instruction.

{¶61} Appellant's fourth assignment of error is overruled.

{¶62} The judgment of the Tuscarawas County Court of Common Pleas is affirmed.

By: Delaney, J.

Hoffman, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

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STATE OF OHIO	:	
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	:	
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	:	
FRANCISCO S. PORTILLO	:	
	:	
Appellant	:	Case No. 2010 AP 01 0002
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Tuscarawas County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER