[Cite as *State v. Casiano*, 2010-Ohio-3528.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Appellee

v.

Teofilo Casiano

Appellant

Court of Appeals Nos. WD-09-009
WD-09-010

Trial Court Nos. 2008CR0243
2008CR0102

DECISION AND JUDGMENT

Decided: July 30, 2010

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Aram Ohanian, Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} In this appeal from a judgment of the Wood County Court of Common Pleas, appellant, Teofilo Casiano, was found guilty on three counts of felonious assault in violation of R.C. 2903.11(A)(2), all felonies of the second degree, and one count of aggravated menacing in violation of R.C. 2903.21, a misdemeanor of the first degree.

Appellant was sentenced to seven years in prison on each count of felonious assault and six months in prison on the count of aggravated menacing. The court further ordered that each seven year term of imprisonment run concurrent to each other and concurrent to the six month term imposed for the first degree misdemeanor. Appellant appeals this judgment and sets forth the following assignments of error:

{¶ 2} "I. Appellant received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10, of the Ohio Constitution.

{¶ 3} "II. The Trial Court erred to the prejudice of Appellant by not accepting the presentence investigation report.

{¶ 4} "III. Appellant's conviction was against the manifest weight of the evidence."

{¶ 5} At appellant's trial, the facts were adduced from the witnesses and from appellant. The following pertinent testimony of Casiano, Megan Jensen, Shalene Shellabarger, Mark Lane, Chris Toth, and Alex Tijerina set forth the facts from their respective viewpoints.

{¶ 6} According to Megan, she had a "physical relationship" with Casiano in the spring of 2007. At some point during this relationship, Megan was arrested and jailed for her failure to pay a fine. Appellant posted $325 for her bail. Megan claimed that appellant told her that the $325 was a birthday present. Shortly thereafter, appellant would not answer Megan's telephone calls, and she stopped trying to speak with him.

{¶ 7} On the evening of July 1, 2007, Megan and her roommate, Shalene, were "hanging out" with Mark, Chris, and Alex in Megan's trailer, which is located on Lot 111, Southview Estates Trailer Park, Perrysburg, Wood County, Ohio. They then decided to "play some cards" and after purchasing these cards at a gas station, returned to the trailer. Later that night, Megan received "like 15" calls in a row from appellant on her cell phone. Megan never answered any of these calls.

{¶ 8} Around one o'clock in the morning, there was a knock on the door of the trailer. When Megan opened the door, appellant was standing on her porch. His motor vehicle was at the front of her driveway. Appellant gave Megan a makeup bag that she left in his car. He then asked Megan to accompany him to his vehicle, and she agreed. Casiano opened the trunk of the automobile and began "digging in it." Shalene came out of the trailer and stood on the stairs to the porch.

{¶ 9} Appellant pulled a tire iron out of his trunk. According to Megan and Shalene, Casiano began pacing back and forth, repeatedly placing the tire iron against his chest and then pointing it at Megan, and continuously yelling that Megan owed him the money that he had posted for her bail[1]. When Shalene attempted to go back into the trailer, appellant said, "You are not going in there."

{¶ 10} Mark and Chris subsequently came out of the trailer and stood near a large tree at the end of the driveway. Casiano began yelling and tried to hit Mark with the tire

[1]The tire iron was later retrieved by Officer Charles Moffit of the Perrysburg Police Department at the scene of the incident.

iron, but Mark "bearhugged" him, and they fell to the ground. At some point Alex came out of the trailer, saw the two men wrestling on the ground, and separated them. Alex then grabbed appellant, walked him to his car, and said "get out of here." Appellant started his automobile, but did not leave. Instead, he drove directly toward Chris, Mark, and Alex and then backed up. He did this three times[2], getting closer to the three each time. The second time the car came so close to Mark that he jumped up on the hood of the vehicle to avoid being struck. His "side" and/or forearm hit the windshield. He then jumped off the car. Appellant drove his car at them one more time, backed up, and left.

{¶ 11} At that point, Mark, Chris, and Alex decided that they better leave. When they reached the county road that led to their homes, appellant was waiting. He started chasing them at a high speed and tried to hit Chris's automobile. Although Chris, Mark, and Alex all agree that after what seemed to be a long period of time, appellant stopped chasing them, they each related a slightly different version of that occurrence. In any event, the chase ended.

{¶ 12} Appellant testified at trial on his own behalf and provided the following version of the events that happened on July 1, 2007. Appellant called Megan six times on the evening of June 30, 2007, because he (1) wanted to return her makeup bag; and (2) expected repayment of the "$350" he used to post her bail. When Megan failed to

[2]Twelve year old Kennedy Frisby also testified at trial. Kennedy was spending the night at her aunt and uncle's trailer which is located "right across" from Megan's trailer. Kennedy averred that they heard people screaming, looked out the window, and saw a car backing up and then going forward "trying to hit people."

return his calls, and after admittedly having "too much to drink," appellant decided to go to Megan's residence.

{¶ 13} Casiano took an iron bar, which he described as a "nutcracker," not a tire iron, out of his car and held it against his chest while he was talking to Megan outside her trailer. When Chris and Mark came out of the trailer, Mark "picked up something off the ground" and came at appellant. Then both men grabbed him, and Mark bit appellant's finger and continued biting it as all three men scuffled on the ground. Mark still had Casiano's finger in his mouth when all three men finally stood up.

{¶ 14} At this point, Casiano was told to "get the fuck out of here." He replied: "I will. Tell him to let go of my finger." Mark then dragged appellant to his car, punching him in the face the entire time. One of these punches missed appellant's face, and Mark's fist hit the hood of the car. Mark then kicked the door of appellant's vehicle, and, when he was attempting to back out of the driveway, jumped on the hood of the car and punched the windshield, which shattered. While admitting that he is "much bigger" than Mark, Chris, or Alex, Casiano claimed that he did not fight with them because he simply wanted to "get out of there."

{¶ 15} Appellant further testified that he did move his automobile back and forth in the driveway in attempting to "back out," but added that this was necessary because of the cars "on this side and all around." He denied ever trying to hit anyone with his vehicle. After he pulled out of the driveway, appellant decided to wait and call 911. While he was speaking with someone from emergency services in Wood County, Ohio,

Chris's car passed by. Casiano made the decision to follow the car for the purpose of learning the license plate number for the police. He continued talking to someone at 911 throughout the ensuing chase. When Chris's car stopped by the side of the road, appellant parked behind it. Alex got out of the car and yelled at appellant. When he got back into the car, it pulled away. Appellant did not follow because the 911 operator told him to stay where he was until the police arrived at that location.

{¶ 16} In his testimony, Officer Ward Belair of the Village of Whitehouse Police Department substantiated the fact that appellant had some blood and a bump on his head and a lacerated finger. Officer Brad Baker, also an employee of the Village of Whitehouse Police Department, also stated that appellant had injuries to his face and his hand. Both officers testified that appellant appeared to be intoxicated. Officer Belair determined that appellant was in no condition to drive due to intoxication and/or his vehicle was unsafe to drive due to the "spider web" pattern of cracked glass on his windshield.

{¶ 17} In his Assignment of Error No. I, appellant contends that he received ineffective assistance of trial counsel in violation of the Sixth Amendment to the United States Constitution and Section 10, Article I, Ohio Constitution.

{¶ 18} To succeed on a claim of ineffectiveness, a defendant must satisfy a two part test. First, the defendant must show that his trial counsel failed in a duty that he owes his client. *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142. 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.'" *Strickland v. Washington* (1984), 466 U.S. 668, 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101. The question is whether counsel acted "outside the wide range of professionally competent assistance." Id. at 690. If a defendant demonstrates that his counsel was incompetent, the defendant must then satisfy the second part of the *Strickland* test by showing that but for his trial counsel's errors, there is a reasonable probability the result of the proceeding would have been different. Id. at 694.

{¶ 19} First, appellant urges that trial counsel was ineffective because he did not conduct an investigation of the "facts, circumstances, or evidence" that could have been presented at trial on appellant's behalf. He asserts that counsel failed to attempt to locate and interview any possible witnesses to support appellant's version of the events that occurred on July 1, 2007. Generally, any decision to call or not call witnesses falls within the province of defense counsel's trial strategy and is not considered a deficient performance absent a showing of prejudice. *State v. Hunt* (1984), 20 Ohio App.3d 310, 312. Thus, appellant is required to establish that the testimony of the witnesses would have significantly assisted his defense thereby affecting the outcome of this case. *State v. Reese* (1982), 8 Ohio App.3d 202, 203. He failed to do so.

{¶ 20} Appellant also argues that his trial counsel failed to engage in a proper investigation because (1) counsel had ample time to investigate the "serious charges"

against appellant and did not do so; and (2) failed to enter more than one aerial photograph of the scene of the alleged offenses into evidence. Casiano's first allegation is simply speculation. Our review of the transcript of the proceedings below shows that trial counsel engaged in a vigorous cross-examination of the defense witnesses and allowed appellant, who chose to testify, to present his version of the events that occurred on June 30, and July 1, 2007. As to the aerial photographs, the state offered 12 photographs, including aerial photographs, of the scene where the offense occurred. Appellant again fails to show how he was prejudiced by his trial counsel's decision not to offer additional photographs of that scene.

{¶ 21} Casiano further contends that his trial counsel was ineffective because he did not obtain an expert witness to analyze blood droplets found at the scene of the offense. Appellant hypothesizes that if it this blood was determined to be his blood, it would have demonstrated that he was the victim of an assault by Chris, Mark, and Alex. He further argues that the testimony of this expert could have been used to impeach the credibility of these witnesses. Here, evidence was offered at appellant's trial to establish that appellant did have blood and a bump on his head and a laceration on his finger. Appellant claimed that these injuries were caused by the three young men. Thus, the jury had evidence before it that, if believed, tended to substantiate appellant's assault claim. Therefore, appellant was not prejudiced by any alleged omission on the part of his counsel with regard to analysis of the "blood droplets."

{¶ 22} Next appellant claims that trial counsel was ineffective because he did not play the tape of the 911 call made by Casiano during his pursuit of Chris, Mark, and Alex at trial. Appellant fails to set forth any reason as to why this omission violated any duty to his client and thereby prejudiced his defense. Moreover, appellant's own testimony, the testimony of Officer Belair, the testimony of Officer Baker, and the three young men revealed the facts pertinent to this issue.

{¶ 23} Finally, appellant urges that his trial counsel was ineffective because, at Casiano's sentencing hearing, he failed to object when the trial judge stated that, due to an incomplete presentence investigation report, appellant's "sentence would not be able to be reduced by any judicial release." In order to dispose of this argument, we must first determine appellant's Assignment of Error No. II, which contends that the trial court erred by not accepting the presentence investigation report.

{¶ 24} Upon entering a judgment finding appellant guilty, the trial court ordered a presentence investigation and allowed appellant's release on bond. The judge also set August 1, 2008, as the date for sentencing. Appellant, however, did not appear on that date and was later apprehended in another state. The court then set a new date for a hearing on sentencing. At that hearing, the trial court found that appellant did not participate in the presentence investigation and further failed to appear for sentencing. The judge then held that he considered the presentence investigation report incomplete. Appellant's trial counsel subsequently stated that he reviewed that report and had no

objection to the same. Thereafter, the trial court made, inter alia, the statement set forth above.

{¶ 25} On appeal, appellant argues that under Crim.R. 32.2, the trial court was required to have a presentence investigation "in order to have even the possibility of sentence modification or judicial release at some future time."

{¶ 26} Crim.R. 32.2 provides that "[i]n felony cases the court shall, and in misdemeanor cases the court may, order a presentence investigation and report before imposing *community control sanctions or granting probation*. (Emphasis added.) On its face, the rule does not require the court to order a presentence investigation report in felony cases unless some type of community control or probation is granted as an initial sentence. See *State v. Barnett* (May 31, 1998), 6th Dist. No. H-97-020, citing *State v. Cyrus* (1992), 63 Ohio St.3d 164, syllabus. See, also, *State v. Myrick*, 8th Dist. No. 91492, 2009-Ohio-2030, ¶ 22-27. Thus, Crim.R. 32.2 is not applicable to this cause. Id.

{¶ 27} The germane statute in this instance is R.C. 2929.20(B)(3), which sets forth the requisites necessary for judicial release. This statute states that an "eligible offender," that is, an offender who is not serving a mandatory term of years in prison or has completed that mandatory term, and whose stated prison term is more than five years, but less than ten years "shall file the motion [for judicial release] after the eligible offender has served five years of the stated prison term." Clearly, these requisites do not include a "complete" presentence investigation report. Therefore, the trial court did err in making

this statement at appellant's sentencing hearing. Nevertheless, we conclude that this error is harmless error.

{¶ 28} Crim.R. 52 states that "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Because the trial court's misstatement concerning judicial release did not prejudice or affect the outcome of this case, it is harmless error. That is, is does not affect appellant's eligibility for judicial release. See *State v. Woody*, 6th Dist. No. OT-05-012, 2006-Ohio-1624, ¶ 11, following *State v. Barnett* (Mar. 31, 1998), 6th Dist. No. H-97-020. Accordingly, appellant's Assignment of Error No. II is found not well-taken. It follows that the fourth argument under appellant's Assignment of Error No. I is also without merit. Consequently, appellant's Assignment of Error No. I is found not well-taken.

{¶ 29} Appellant's Assignment of Error No. III contends that the trial court's judgment is against the manifest weight of the evidence due to the fact that the prosecution failed to offer "credible evidence."

{¶ 30} In determining whether a verdict is against the manifest weight of the evidence, this court sits as a "thirteenth juror." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. Id. This court, however, must keep in mind that it is the trier of fact's duty to determine the credibility of a witness; accordingly, our ability to consider credibility is limited. *State v. Reynolds*, 10th Dist. No. 3692, 2004-Ohio-3692, ¶13. (Citation omitted.) In resolving conflicts in the

evidence, we must determine whether the finder 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.'" Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 31} Under R.C. 2903.11(A)(2), the state had to present sufficient evidence that appellant knowingly caused or attempted to cause physical harm to another by means of a deadly weapon or dangerous ordnance. An individual acts knowingly when he is aware that his conduct will probably cause a certain result. R.C. 2901.22(B). An automobile can be a "deadly weapon" when it is used in a manner likely to produce great harm or death. *State v. Tate*, 8th Dist. No. 87008, 2006-Ohio-3722, ¶ 23. Here, there was evidence offered by six witnesses that appellant drove his automobile at Chris, Mark, and Alex at least three times, in attempts that were likely to cause them great physical harm. In fact, at one point Mark had to jump up on the hood of appellant's vehicle to avoid being injured.

{¶ 32} As to the first degree misdemeanor, R.C. 2903.21(A) provides that "[n]o person shall knowingly cause another to believe the offender will cause serious physical harm to the person or property of the other person." In addition to the testimony of Mark, Chris, and Alex, who believed that appellant was trying to cause them serious physical harm, there was also testimony offered at trial to the effect that Casiano took a tire iron out of the trunk of his automobile and kept pointing it at Megan while demanding the repayment of the money he used for her bond. Megan testified that at one point, appellant placed the tire iron against her chest, told her how lucky she was that he did not

bring his gun, and demanded that she give him the money she owed him within two weeks. When asked what she was thinking when appellant was pointing the tire iron at her, Megan replied: "How much it would hurt when [Casiano] hit me with it." She also testified that she was afraid. Based upon the foregoing, we find that the state did prove appellant's guilt beyond a reasonable doubt; therefore, Assignment of Error No. III is found not well-taken.

{¶ 33} The judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE