[Cite as *State v. Velez*, 2015-Ohio-642.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellee v. ROGELIO VELEZ, III Appellant	C.A. No. 13CA010518 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 13CR087192

DECISION AND JOURNAL ENTRY

Dated: February 23, 2015

HENSAL, Presiding Judge.

{¶1} Rogelio Velez appeals his conviction for assault on a corrections officer in the Lorain County Court of Common Pleas. For the following reasons, this Court affirms.

I.

{¶2} The Lorain city jail is divided into seven blocks. Each block contains multiple holding cells, which open into a central common area with tables and chairs. In April 2013, Timothy Bunting worked as a detention officer at the jail. His duties included booking inmates, providing food and medication to them, and doing rounds each hour to assure their safety and well-being.

{¶3} According to Officer Bunting, on April 15, he began his shift around 6:00 a.m. For most of the day he worked with another officer, who left around 5:00 p.m. Mr. Velez was an inmate at the time. When Officer Bunting was doing rounds around 2:00 p.m., Mr. Velez asked if he was going to test him. Officer Bunting asked Mr. Velez what he meant, and Mr. Velez

responded by calling him a derogatory name and telling him that he would take care of him on the street. Officer Bunting construed the statement as an act of aggression, so he recorded it in the jail's activity log.

{¶4} Shortly after the other officer left, Officer Bunting had to deliver dinner to the inmates. Around the same time, a new inmate arrived for booking. The telephone also began to ring repeatedly. As Officer Bunting dealt with everything, he heard screaming coming from one of the jail blocks. When he responded, he discovered that it was Mr. Velez yelling. According to Officer Bunting, Mr. Velez was angry about not getting his food yet and wanted to know when he would be served. Officer Bunting told him that he had a great deal to do. According to Officer Bunting, this appeared to upset Mr. Velez more, as Mr. Velez again told the officer that he would take care of him when he saw him on the street.

{¶5} Officer Bunting testified that Mr. Velez was in the block with the highest risk inmates and that he grew concerned that the other inmates would act out unfavorably in reaction to Mr. Velez's aggression. He, therefore, decided to move Mr. Velez to a different cell block where he would not have an audience for his behavior. Under jail regulations, he was not allowed to move an inmate unless another officer was present. Although he was the only corrections officer on duty, police officer Shawn Petty had arrived to transport some inmates back to the county jail. Officer Bunting, therefore, asked Officer Petty to help him move Mr. Velez.

{¶6} Officer Bunting testified that, before entering the cell block, he told the four inmates in the block to return to their holding cells, and they complied. He explained that he did not lock their holding cells, however, because he would have had to crank each door closed individually. He testified that, as he entered the block's common area, he noticed Mr. Velez take

off his glasses and kick off his shoes, which he interpreted as a sign that Mr. Velez anticipated a fight. He ordered Mr. Velez out of his cell, and Mr. Velez complied. As Mr. Velez stood in the common area, he hitched up his pants, which Officer Bunting interpreted as another indication that he might start a physical confrontation. The officer, therefore, ordered Mr. Velez to turn around and place his hands on the bars of his holding cell.

{¶7} Around the time that Mr. Velez was complying with Officer Bunting's turn-around instruction, Officer Petty entered the cell block. Both officers approached Mr. Velez and took hold of his arms. According to Officer Bunting, Officer Petty told Mr. Velez to give him his hands so he could handcuff him for transporting. Officer Bunting did not know exactly what happened next between Mr. Velez and Officer Petty, but he testified that, shortly after Officer Petty told Mr. Velez to give him his hands, Officer Petty snapped Mr. Velez's hands off the holding cell bars and took him to the floor. Officer Bunting explained that officers sometimes act quickly in those situations so that they can use the element of surprise to get someone handcuffed quickly before they have time to react. Officer Petty, on the other hand, testified that he took Mr. Velez to the floor because Mr. Velez did not comply with Officer Bunting's instruction to give them his hands.

{¶8} As Mr. Velez fell to the floor, he turned and curled up on his side. Officer Bunting testified that, although Mr. Velez resisted, they turned him on his stomach so that they would have an easier time handcuffing him. Officer Bunting also explained that he moved around to the top of Mr. Velez's head so he would not interfere with Officer Petty, who was securing Mr. Velez's torso. Officer Bunting said that, after getting in place, he grabbed Mr. Velez's arms and attempted to bring them behind Mr. Velez's back. Mr. Velez bared his teeth, however, and tried to pull Officer Bunting's hands toward his mouth. Officer Bunting claimed

that Mr. Velez sucked part of one of his gloves into his mouth, but was unable to bite his hand or fingers. During this time, Officer Petty was on top of Mr. Velez, with his knee in Mr. Velez's back. He was also punching Mr. Velez in the side and directing him to give them his arms. Once Officer Bunting was able to get his hands away from Mr. Velez's mouth, he began punching Mr. Velez in the side of the head, until he relented enough that they could secure him. Mr. Bunting testified that, after they finished handcuffing Mr. Velez, they dragged him out of the room when he refused to stand up.

{¶9} The Grand Jury indicted Mr. Velez for assault and obstructing official business. A jury convicted him of assault, and the trial court sentenced him to seven months in jail. Mr. Velez has appealed, assigning three errors.

II.

ASSIGNMENT OF ERROR I

THE VERDICT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

{¶10} Mr. Velez argues that there was insufficient evidence to convict him of assault because the only evidence of an attempted assault came from Officer Bunting. He notes that Officer Petty did not see the alleged assault and that there is no assault that is visible on the video of the incident.

{¶11} Whether a conviction is supported by sufficient evidence is a question of law, which this Court reviews de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In making this determination, we must view the evidence in the light most favorable to the prosecution:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction 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. 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, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶12} The Grand Jury indicted Mr. Velez for assault under Revised Code Section 2903.13(A). That section provides that "[n]o person shall knowingly cause or attempt to cause physical harm to another[.]" R.C. 2903.13(A). "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." R.C. 2901.22(B). Physical harm in this context means "any injury, illness, or other physiological impairment, regardless of its gravity or duration." R.C. 2901.01(A)(3).

{¶13} Officer Bunting testified that Mr. Velez bared his teeth at him and pulled his gloved hands toward his open mouth. He testified that, from Mr. Velez's facial expressions, it looked like Mr. Velez wanted to bite him. He also testified that Mr. Velez sucked part of his glove into his mouth and bit the glove. Viewing his testimony in a light most favorable to the prosecution, it was sufficient to establish that Mr. Velez knowingly attempted to cause Officer Bunting harm. Mr. Velez's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶14} Mr. Velez next argues that his conviction was against the manifest weight of the evidence. To determine whether a conviction is against the manifest weight of the evidence, this Court

> must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts

> in 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, 33 Ohio App.3d 339, 340 (9th Dist.1986). Weight of the evidence pertains to the greater amount of credible evidence produced in a trial to support one side over the other side. *Thompkins*, 78 Ohio St.3d at 387. An appellate court should only exercise its power to reverse a judgment as against the manifest weight of the evidence in exceptional cases. *State v. Carson*, 9th Dist. Summit No. 26900, 2013-Ohio-5785, ¶ 32, citing *Otten* at 340.

{¶15} Mr. Velez argues that, since the alleged assault was not visible on the video recording of the incident and Officer Bunting was the only one who provided evidence of it, his conviction is against the manifest weight of the evidence. According to Mr. Velez, the only assault that appears on the video is of the officers tackling him to the ground and beating him up.

{¶16} The weight to be given to evidence is primarily within the province of the jury. *State v. DeHass*, 10 Ohio St.2d 230, 231 (1967). "A jury is free to believe or reject the testimony of each witness, and issues of credibility are primarily reserved for the trier of fact." *State v. Wilson*, 9th Dist. Summit No. 26683, 2014-Ohio-376, ¶ 31, quoting *State v. Rice*, 9th Dist. No. 26116, 2012-Ohio-2174, ¶ 35. "A conviction is not against the manifest weight because the jury chose to credit the State's version of the events." *Id*., quoting *State v. Minor*, 9th Dist. Summit No. 26362, 2013-Ohio-558, ¶ 28.

{¶17} As Mr. Velez has noted, it is impossible to see on the video whether Mr. Velez bared his teeth at Officer Bunting or whether Mr. Velez pulled Officer's Bunting's glove into his mouth. After careful review of the record, however, we conclude that, although all of the evidence that Mr. Velez assaulted Officer Bunting came from Officer Bunting, we cannot say

that the jury clearly lost its way when it credited Officer Bunting's testimony and found Mr. Velez guilty of assault. Mr. Velez's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

{¶18} Mr. Velez also argues that his trial lawyer was ineffective. To prevail on a claim of ineffective assistance of counsel, Mr. Velez must establish (1) that his counsel's performance was deficient to the extent that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) that but for his counsel's deficient performance the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A deficient performance is one that falls below an objective standard of reasonable representation. *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus. A court, however, "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* at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955). In addition, to establish prejudice, Mr. Velez must show that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Id*. at 694.

{¶19} Mr. Velez argues that his lawyer's performance was deficient because he did not object to leading questions that the prosecutor asked Officer Bunting on direct examination. During a break in the testimony after the prosecutor finished examining the officer, Mr. Velez alleged that his lawyer had been ineffective for allowing the prosecutor to ask leading questions. Mr. Velez's lawyer explained on the record, however, his reasons for not objecting. He said that he had learned that, "while you can object early and often to every single question * * *, that's

not always the best way to curry favor with the jury." He also explained that, in light of the interjections that Mr. Velez had made during opening statements, he did not want to anger the jury more by making objections that he thought the court would overrule. The trial court also confirmed to Mr. Velez that, even if his lawyer had objected to the questions, it would have overruled them, noting that it had discretion to allow leading questions on direct examination. *See* Evid.R. 611(C); *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶ 149.

{¶20} "This Court has consistently held that trial counsel's failure to make objections is within the realm of trial tactics and does not establish ineffective assistance of counsel." *State v. Smith*, 9th Dist. Wayne No. 12CA0060, 2013-Ohio-3868, ¶ 24, quoting *State v. Guenther*, 9th Dist. Lorain No. 05CA008663, 2006-Ohio-767, ¶ 74. That holds true in this case. The trial court's statements also make clear that the result of the trial would not have been different even if Mr. Velez's lawyer had objected to the questions, as it would have overruled his objections. Accordingly, we conclude that Mr. Velez has not established that he received ineffective assistance of counsel because his lawyer did not object to the prosecutor's alleged leading questions.

{¶21} Mr. Velez next argues that his lawyer was ineffective for allowing the State to admit the jail's activity log, which contained damaging information against him. He argues that, because the log is a public record, it was not admissible under Evidence Rule 803(8). That rule provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: * * * Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

Evid.R 803(8). Mr. Velez argues that there was damaging information in the activity log that bolstered Officer Bunting's testimony.

{¶22} Although the trial court allowed the State to introduce the jail's activity log, Officer Bunting testified that he was the one who entered the information in the log about Mr. Velez's conduct. The Ohio Supreme Court has explained that, if a law enforcement officer is allowed to testify about the matters contained in his investigative reports, any error from the admission of those reports is harmless. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶ 111-113; *see also State v. Walker*, 9th Dist. Summit No. 11357, 1984 WL 4783, *2 (Feb. 29, 1984) (explaining that admission of report containing officer's observations at the time of arrest was harmless because officer testified about his observations at trial). For the same reasons, we conclude that, because Officer Bunting testified about the conduct that he recorded on the activity log and was subject to cross-examination about what occurred, any violation of Evidence Rule 803(8) was harmless. *See* Crim.R. 52(A) ("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."). The outcome of Mr. Velez's trial, therefore, would not have been different if his lawyer had objected to the admission of the activity log.

{¶23} Mr. Velez further argues that his lawyer was ineffective because he did not request an instruction for self-defense. According to Mr. Velez, the video establishes that Officers Bunting and Petty were the aggressors, tearing his arms off the bars of his holding cell and taking him to the ground without provocation. It also shows Officer Petty kneeling on his back and repeatedly punching him in the kidneys while Officer Bunting punched his head. Mr. Velez argues that, because the officers used excessive force, his lawyer should have requested an instruction that he was privileged to defend himself from their unlawful conduct.

{¶24} This Court has recognized that, in claiming self-defense, a defendant "concedes [that] he had the purpose to commit the act, but asserts that he was justified in his actions." *State v. Griffin*, 9th Dist. Summit No. 23459, 2007-Ohio-1944, ¶ 7, quoting *State v. Howe*, 9th Dist. Lorain No. 00CA007732, 2001 WL 833355 *2 (July 25, 2001). "Self-defense presumes intentional, willful use of force to repel force or escape force. Accidental force * * * is exactly the contrary, wholly unintentional and unwillful." *State v. Champion*, 109 Ohio St. 281, 286–287 (1924).

{¶25} "Generally, the failure to request jury instructions is purely a matter of trial tactics and will not be disturbed upon review." *State v. Herrington*, 9th Dist. Summit No. 25150, 2010-Ohio-6455, ¶ 11. In this case, Mr. Velez's theory of the case was inconsistent with a self-defense instruction. Instead of arguing that he purposely attempted to cause harm to Officer Bunting, he argued that Officer Bunting singled Mr. Velez out for punishment because Mr. Velez had been acting like a jerk. Mr. Velez's lawyer portrayed Mr. Velez as someone who complied with every order that Officer Bunting gave him and argued that Mr. Velez passively attempted to protect himself after Officer Petty tackled him. Mr. Velez's lawyer disputed Officer Bunting's testimony that Mr. Velez snarled at him, arguing that, if Mr. Velez opened his mouth after landing on the floor, he was merely crying out in pain from having a 260-pound man drive his knee into his back. Mr. Velez's lawyer also argued that, if Officer Bunting's glove got pulled at all, it likely just caught in Mr. Velez's mouth as Officer Bunting repeatedly punched him in the face.

{¶26} Because Mr. Velez denied that he purposely attempted to bite Officer Bunting, we conclude that his counsel's failure to request a self-defense instruction was "purely a matter of

trial tactics." *Id.* Accordingly, Mr. Velez has failed to establish that his trial lawyer was ineffective. Mr. Velez's third assignment of error is overruled.

III.

{¶27} Mr. Velez's conviction was supported by sufficient evidence and is not against the manifest weight of the evidence. He has also failed to establish that his trial lawyer was ineffective. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JENNIFER HENSAL
FOR THE COURT

CARR, J.
MOORE, J.
CONCUR.

APPEARANCES:

KENNETH N. ORTNER, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and NATASHA RUIZ GUERRIERI, Assistant Prosecuting Attorney, for Appellee.