[Cite as *State v. Watson*, 2017-Ohio-7856.]

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

STATE OF OHIO Appellee v. LADAN WATSON Appellant	C.A. No. 28218 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 2015 09 2990

DECISION AND JOURNAL ENTRY

Dated: September 27, 2017

HENSAL, Presiding Judge.

{¶1} Ladan Watson appeals his convictions and sentence in the Summit County Court of Common Pleas. For the following reasons, this Court affirms.

I.

{¶2} Mr. Watson told a detective that a female acquaintance stole $100 worth of cocaine from him, so he punched her, causing bruises to her legs, stomach, and face. He also said that they had consensual sex later that night. Based on the woman's version of the events, however, the Grand Jury indicted Mr. Watson for rape, felonious assault, abduction, and aggravated menacing. At trial, the court rejected Mr. Watson's request for an instruction on the inferior degree offense of aggravated assault. After the jury found him guilty of felonious assault, abduction, and aggravated menacing, the trial court sentenced him to eight years imprisonment. Mr. Watson has appealed his convictions and sentence, assigning five errors.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR IN NOT INSTRUCTING THE JURY ON THE INFERIOR DEGREE OFFENSE OF AGGRAVATED ASSAULT.

{¶3} Mr. Watson argues that the trial court incorrectly denied his request for an instruction on the inferior degree offense of aggravated assault. "This Court reviews a trial court's decision to give or decline to give a particular jury instruction for an abuse of discretion under the facts and circumstances of the case." *State v. Sanders*, 9th Dist. Summit No. 24654, 2009-Ohio-5537, ¶ 45.

{¶4} The Grand Jury indicted Mr. Watson for committing felonious assault, which prohibits a person from "knowingly * * * [c]aus[ing] serious physical harm to another * * *." R.C. 2903.11(A)(1). The Revised Code's aggravated assault provision, Section 2903.12(A)(1), provides that "[n]o person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly * * * [c]ause serious physical harm to another * * *." Comparing the provisions, the Ohio Supreme Court has determined that aggravated assault is an inferior degree offense of felonious assault. *State v. Deem*, 40 Ohio St.3d 205, 210-211 (1988).

{¶5} In a trial for felonious assault, an instruction on aggravated assault must be given to the jury if the defendant presents sufficient evidence of serious provocation. *Id*. at paragraph four of the syllabus. "Provocation, to be serious, must be reasonably sufficient to bring on extreme stress and the provocation must be reasonably sufficient to incite or to arouse the defendant into using deadly force." *Id*. at paragraph five of the syllabus. "In determining

whether the provocation was reasonably sufficient to incite the defendant into using deadly force, the court must consider the emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time." *Id.* We construe the evidence in a light most favorable to the defendant. *State v. Bostick*, 9th Dist. Summit No. 25853, 2012-Ohio-5048, ¶ 6.

{¶6} In *State v. Mack*, 82 Ohio St.3d 198 (1998), the Ohio Supreme Court clarified what it means by "reasonably sufficient" provocation. *Id*. at 201. It explained:

> [A]n objective standard must be applied to determine whether the alleged provocation is reasonably sufficient to bring on a sudden passion or fit of rage. That is, the provocation must be "sufficient to arouse the passions of an ordinary person beyond the power of his or her control." If this objective standard is met, the inquiry shifts to a subjective standard, to determine whether the defendant in the particular case "actually was under the influence of sudden passion or in a sudden fit of rage.

Id., quoting *State v. Shane*, 63 Ohio St.3d 630, 634-635 (1992).

{¶7} Mr. Watson argues that his companion's cocaine theft was sufficient to constitute serious provocation, pointing to his conversation with the detective. According to that interview, the woman came to Mr. Watson's home to do drugs with him. They sat across the table from each other and there was a pile of cocaine on a piece of paper on the table. Mr. Watson invited her to take some and watched her "do a little bit." He then turned around to make himself something to eat, and when he turned back, noticed that all of the powder was gone. He got "pissed[,]" thinking that she had taken the rest of the cocaine and hidden it somewhere, so he "beat her ass."

{¶8} Upon review of the record, we conclude that, although the theft of $100 of cocaine could be very upsetting to some people, it is not the sort of conduct that would arouse the passions of an ordinary person so much that he or she would be incited to use deadly force. *See State v. West*, 8th Dist. Cuyahoga No. 101133, 2014-Ohio-5143, ¶ 19 (concluding that

victim's attempt to steal money did not constitute serious provocation); *State v. Marcum*, 7th Dist. Columbiana No. 04 CO 66, 2006-Ohio-7068, ¶ 49 (concluding that theft of personal property does not satisfy the provocation element in aggravated assault). We, therefore, conclude that the trial court exercised proper discretion when it declined to give the jury an aggravated assault instruction. Mr. Watson's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR WHEN IT SENTENCED THE DEFENDANT WITHOUT PROPERLY GIVING HIM ALL THE REQUIRED NOTIFICATIONS CONCERNING POST-RELEASE CONTROL.

{¶9} Mr. Watson argues that the trial court failed to provide him all of the post-release control notifications that were required at his sentencing hearing. Specifically, he argues that the court did not inform him about all of the possible sanctions for violating post-release control under Revised Code Section 2929.141(A)(1).

{¶10} Recently, in *State v. Grimes*, __ Ohio St.3d __, 2017-Ohio-2927, the Ohio Supreme Court recited all of "the statutory requirements for [post-release control] notice at the sentencing hearing." *Id.* at ¶ 9. It explained that "the court at a sentencing hearing must notify the offender that he or she 'will' or 'may' be supervised" after leaving prison, depending on the nature of the offense. *Id.*, quoting R.C. 2929.19(B)(2)(c) and (d). It also explained that "[a]dditionally, the court, at the sentencing hearing, must notify the offender that if he or she 'violates that supervision * * *, the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender.'" *Id.*, quoting R.C. 2929.19(B)(2)(e).

{¶11} At his sentencing hearing, the trial court provided Mr. Watson with both of the notifications identified by the Ohio Supreme Court in *Grimes*. We, therefore, conclude that his

sentence is not void because it did not provide any additional notifications. Mr. Watson's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR BY SENTENCING MR. WATSON WITHOUT COMPLYING WITH R.C. 2929.19(B)(2)(G).

ASSIGNMENT OF ERROR IV

> MR. WATSON WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL WHEN HIS TRIAL COUNSEL FAILED TO OBJECT TO THE TRIAL COURT'S FAILURE TO SENTENCE MR. WATSON IN ACCORDANCE WITH R.C. 2929.19(B)(2)(G).

{¶12} Mr. Watson has argued his next two assignments of error together. He argues that the trial court failed to tell him at the sentencing hearing the specific amount of jail-time credit that he would be awarded, in violation of Section 2929.19(B)(2)(g). He also argues that the failure constitutes plain error. He further argues that his trial counsel was ineffective for not ensuring that the court provided him with the proper notification.

{¶13} Section 2929.19(B)(2)(g) provides that, if the court determines at a sentencing hearing that a prison term is necessary or required, it must determine the number of days by which the department of rehabilitation and correction must reduce the stated prison term because of the defendant's confinement awaiting trial, notify the offender of the amount, and include it in the sentencing entry. Although the trial court included Mr. Watson's jail time credit in its sentencing entry, it did not notify him of the credit at his sentencing hearing. This Court has held that a sentencing court violates Section 2929.19(B)(2)(g) if it does not address the issue of jail-time credit at the sentencing hearing. *State v. Clark*, 9th Dist. Summit No. 27511, 2016-Ohio-91, ¶ 25; *State v. Clark*, 9th Dist. Summit No. 26673, 2013-Ohio-2984, ¶ 17.

{¶14} Unlike in the *Clark* cases, the trial court addressed the issue of jail-time credit at the sentencing hearing, telling Mr. Watson that it was "going to give [him] credit for time [he'd] already served in jail waiting for this case to be resolved." Mr. Watson did not object to the court's statement as insufficient under Section 2929.19(B)(2)(g). *See State v. Gordon*, 9th Dist. Summit No. 28331, 2017-Ohio-7147, ¶ 38. Although Mr. Watson has not forfeited review for plain error, "[n]otice of plain error * * * is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus. "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *State v. Wickline*, 50 Ohio St.3d 114, 120 (1990).

{¶15} Mr. Watson argues that, because the trial court did not calculate the amount of time he had served on the record, he could not contest the amount of the credit. We note that Mr. Watson's presentence investigation report indicated that he was entitled to a credit of 194 days, which is what the trial court ordered in its sentencing entry. Mr. Watson has not pointed to any evidence in the record suggesting that the 194-day calculation was incorrect. We, therefore, conclude that he has failed to establish plain error.

{¶16} Regarding whether his counsel was ineffective for not objecting to the trial court's jail-time credit statement during the sentencing hearing, we note that, to prevail on a claim of ineffective assistance of counsel, Mr. Watson must show: (1) that 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 there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (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, 100 (1955). In addition, to establish prejudice, Mr. Watson 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.

{¶17} Upon review of the appellate record, there is no evidence that suggests that the trial court did not properly calculate Mr. Watson's jail-time credit. Accordingly, we cannot say that there is a reasonable probability that Mr. Watson was prejudiced by his counsel's failure to object at the sentencing hearing. Mr. Watson's third and fourth assignments of error are overruled.

ASSIGNMENT OF ERROR V

> THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR AT THE SENTENCING HEARING BY FAILING TO COMPLY WITH R.C. 2929.19(B)(2)(F).

{¶18} Mr. Watson also argues that the trial court failed to comply with Section 2929.19(B)(2)(f) at the sentencing hearing. That section provides that, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, it shall "[r]equire that the offender not ingest or be injected with a drug of abuse and submit to random drug testing * * * and require that the results of the drug test administered under any of those sections indicate that the offender did not ingest or was not injected with a drug of abuse." R.C. 2929.19(B)(2)(f).

{¶19} Although the trial court did not comply with Section 2929.19(B)(2)(f) at the sentencing hearing, this Court has repeatedly concluded that an error under that section is harmless because the requirement is only intended to facilitate drug testing of prisoners in state institutions and creates no substantive rights for defendants. *State v. Mavrakis*, 9th Dist. Summit. No. 27457, 2015-Ohio-4902, ¶ 50; *State v. Taylor*, 9th Dist. Summit No. 27867, 2016-Ohio-3439, ¶ 19; *State v. Cain*, 9th Dist. Summit No. 27785, 2016-Ohio-7460, ¶ 47; Crim.R. 52(A). Mr. Watson's fifth assignment of error is overruled.

III.

{¶20} Mr. Watson's five assignments of error are overruled. The judgment of the Summit 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 Summit, 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

TEODOSIO, J.
CALLAHAN, J.
CONCUR.

APPEARANCES:

NEIL P. AGARWAL, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.