[Cite as *State v. Totty*, 2010-Ohio-1234.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23372
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-4380
v.	:	
	:	(Criminal Appeal from
ADRIEN K. TOTTY	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 26th day of March, 2010.

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MATHIAS H. HECK, JR., by KIRSTEN A. BRANDT, Atty. Reg. #0070162, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

LAWRENCE J. GREGER, Suite 1100 Liberty Tower, 120 West Second Street, Dayton, Ohio 45402
Attorney for Defendant-Appellant

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FAIN, J.

{¶ 1} Defendant-appellant Adrien Totty appeals from his conviction and sentence for Assault on a Peace Officer. Totty contends that the conviction is not supported by sufficient evidence and that it is against the weight of the evidence. He further contends that he was denied the effective assistance of trial counsel.

{¶ 2} We conclude that the State presented evidence sufficient to support the conviction and that the jury did not lose its way in reaching a guilty verdict. We further conclude that Totty has not demonstrated that counsel's performance was deficient. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} One day in November 2008, Dayton Police Officer Jeffrey Watkins was on patrol in a marked police cruiser when he stopped at a red light at the intersection of Abbey Road and State Route 35. While stopped, Watkins observed a tan truck and a white car traveling on State Route 35 at an estimated speed of one hundred miles per hour. Watkins pursued the vehicles. Over the next two miles, Watkins's cruiser reached speeds of one hundred to one hundred twenty-five miles per hour. The truck was weaving between the lanes of travel.

{¶ 4} Watkins was ready to quit the chase, as too dangerous at the high speeds they were traveling, when he noticed the truck turn off State Route 35 onto Liscum Road. After turning, Watkins observed the truck traveling in the lane of oncoming traffic. Watkins activated his cruiser lights, notified dispatch, and caught up to the truck. The truck traveled another two blocks before stopping.

{¶ 5} Totty got out of his truck and took off running. Watkins caught up to Totty as he was attempting to climb a six-foot tall fence. As Watkins pulled Totty off the fence, Totty turned and struck Watkins in the face with his fist. Watkins then managed to wrestle Totty to the ground. Another officer arrived on the scene to help subdue and handcuff Totty.

{¶ 6} Totty was indicted on one count of Assault on a Peace Officer in violation of R.C. 2903.13(A) and (C)(3) as well as one count of Theft of a Motor Vehicle in violation of R.C. 2913.01(A)(1). The State withdrew the count for Theft. Following a jury trial, Totty was convicted of Assault on a Peace Officer and was sentenced to a prison term of one year. From his conviction and sentence, Totty appeals.

II

{¶ 7} Totty's First and Second assignments of error state as follows:

{¶ 8} "THE APPELLANT'S CONVICTION FOR ASSAULT ON A PEACE OFFICER IN VIOLATION OF R.C. 2903.13(A) AND 2903.13(C)(3) IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND MUST BE REVERSED.

{¶ 9} "THE APPELLANT'S CONVICTION FOR ASSAULT ON A PEACE OFFICER IN VIOLATION OF R.C. 2903.13(A) AND 2901.13(C)(3) IS BASED ON INSUFFICIENT EVIDENCE AND MUST BE REVERSED."

{¶ 10} In these two assignments of error, Totty contends that his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence. In support he argues that the State failed to submit any evidence – either eye-witness testimony or physical evidence – corroborating the testimony of Officer Watkins. He further claims that Watkins was not able to see, because the scene was very dark.

{¶ 11} Sufficiency and manifest weight challenges are separate and legally distinct issues. *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52. "While

the test for sufficiency requires a determination of whether the State has met its burden of production at trial, a manifest weight challenge questions whether the State has met its burden of persuasion." Id. at 390.

{¶ 12} A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or to sustain the verdict as a matter of law. Id. at 386. "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* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 13} In contrast, when reviewing a judgment under a manifest weight standard of review "'[t]he court 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 [factfinder] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which evidence weighs heavily against the conviction.' " *Thompkins,* supra, at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 14} Assaulting a police is proscribed by R.C. 2903.13 which provides in

pertinent part:

{¶ 15} "(A) No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn.

{¶ 16} "(C) Whoever violates this section is guilty of assault, and the court shall sentence the offender as provided in this division and divisions (C)(1), (2), (3), (4), (5), and (6) of this section. Except as otherwise provided in division (C)(1), (2), (3), (4), or (5) of this section, assault is a misdemeanor of the first degree.

{¶ 17} "(3) If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, a firefighter, or a person performing emergency medical service, while in the performance of their official duties, assault is a felony of the fourth degree."

{¶ 18} "Physical harm" means any injury, illness, or other physiological impairment, regardless of its gravity or duration. R.C. 2901.01((A)(3).

{¶ 19} "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." R.C. 2901.22(B).

{¶ 20} At trial, Totty admitted that he was driving erratically and that he was stopped by Watkins. He also admitted that he ran away from Watkins. However, he denied hitting Watkins. Instead, he attributed his movements to his attempt to avoid being assaulted by Watkins. Conversely, Watkins testified that Totty made a fist, and that Watkins then felt an impact with his face. Watkins testified that the punch to his face resulted in damage to his prescription eyeglasses and a scratch to his nose. According to Watkins, no other people were involved in the altercation.

{¶ 21} Although physical evidence may be helpful to prove a case, it is not necessary. Watkins's testimony was adequate direct evidence upon which a rational juror could rely in finding Totty guilty beyond a reasonable doubt. The lack of physical evidence does not undermine an eyewitness's testimony that, if found credible, is sufficient to sustain a conviction. *State v. Gilfillan*, Franklin App. No. 08-AP-317, 2009-Ohio-1104, ¶ 54. This court has stated that eyewitness testimony used as the primary means of identifying a defendant is sufficient to sustain a conviction. *State v. Dewitt*, Montgomery App. No. 21620, 2007-Ohio-3437, ¶ 32. We have further held that punching someone is sufficient to satisfy the culpability requirement of knowingly as set forth in the assault statute. *State v. Hill*, Montgomery App. No. 20678, 2005-Ohio-3701.

{¶ 22} There is evidence in this record upon which the jury could reasonably conclude that Totty assaulted Watkins. Specifically, there is evidence that Totty punched Watkins in the face, resulting in damage to Watkins's eyeglasses and a scratch to his nose. Furthermore, it can be inferred that by punching Watkins in the face, Totty knew that harm to the officer was a reasonably foreseeable result. We therefore conclude that the claims of insufficient evidence and manifest weight are without merit. The First and Second assignments of error are overruled.

III

{¶ 23} Totty's Third Assignment of Error states:

{¶ 24} "APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT THE TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH

AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES AS WELL AS ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

{¶ 25} Totty contends that his trial counsel was not effective, because he failed to object to Watkins's testimony regarding the police department investigation of his use of force against Totty, and because counsel failed to request a jury instruction regarding the offense of Resisting Arrest.

{¶ 26} In order to reverse a conviction based on ineffective assistance of counsel, it must be demonstrated both that trial counsel's conduct fell below an objective standard of reasonableness and that the errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 688; *State v. Bradley* (1989), 42 Ohio St.3d 136. Trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland,* 466 U.S. at 688. Deficient performance means that claimed errors were so serious that the defense attorney was not functioning as the "counsel" that the Sixth Amendment guarantees. *State v. Cook* (1992), 65 Ohio St.3d 516, 524.

{¶ 27} We begin with Totty's claim that counsel's performance was deficient due to his failure to request a jury instruction on the misdemeanor offense of Resisting Arrest, as proscribed in R.C. 2921.33(B). Totty claims that the facts in this case could support such a charge.

{¶ 28} An offense may be a lesser-included offense of another if: (i) one offense carries a greater penalty than the other; (ii) some element of the greater offense is not required to prove commission of the lesser offense; and (iii) the greater

offense as statutorily defined cannot be committed without the lesser offense, as statutorily defined, also being committed. *State v. Evans,* 122 Ohio St.3d 381, 2009-Ohio-2974, ¶ 26, clarifying *State v. Deem* (1988), 40 Ohio St.3d 205.

{¶ 29} The offense of Assault on a Peace Officer may be committed without committing the offense of Resisting Arrest. Resisting Arrest, as proscribed in R.C. 2921.33(B), provides that "no person, recklessly or by force, shall resist or interfere with a lawful arrest of the person or another person and, during the course of or as a result of the resistance or interference, cause physical harm to a law enforcement officer."

{¶ 30} Resisting Arrest requires the element of interference with, or resistance of, a lawful arrest. Assault on a Peace Officer does not require this element (a person who is not even under arrest, lawful or unlawful, may assault a policeman), and therefore may be committed without the commission of Resisting Arrest.

{¶ 31} Resisting Arrest is therefore not a lesser-included offense of Assault Upon a Peace Officer, and Totty would not have been entitled to an instruction on Resisting Arrest. Therefore, his counsel was not ineffective for having failed to request an instruction.

{¶ 32} We next address Totty's claim that counsel was ineffective for failing to object to the following testimony elicited by the State during its direct examination of Watkins:

{¶ 33} "Q: Officer, are you familiar with the term use of force?

{¶ 34} "A: Yes I am.

{¶ 35} "Q: Can you generally tell the court your understanding what the use of

force is and what (unintelligible)?

{¶ 36} "A: The use of force (unintelligible). We have different tools from anywhere from verbal commands, use of strikes, wrestling, pepper spray, taser, asp which is the tactical baton, to our hand gun. Where our use of force works, we are allowed to go one level above with the suspect or individual is using. (Unintelligible). If he is not listening to my commands, I can go hands on and use the taser. If he starts wrestling me, I can go to strikes. If he starts striking me, I can go to baton. If he has a baton or weapon, then I can use deadly force with my firearm.

{¶ 37} "***

{¶ 38} "A: [Afterward] I notified my supervisor about the use of force because we also investigate all of our uses of force. So he came out to do the investigation on the use of force.

{¶ 39} "***

{¶ 40} "Q: You mentioned that you have to make a use of force report any time there is a struggle or something like that, correct?

{¶ 41} "A: That is correct.

{¶ 42} "Q: You did that?

{¶ 43} "A: Yes I did.

{¶ 44} "Q: With who again?

{¶ 45} "A: My supervisor comes out, I go back to the office and type out a form stating what kind of force was used, why I used it and an analysis of what occurred to cause me to use it.

{¶ 46} "***

{¶ 47} "Q: What would happen if your sergeant ever makes the decision to determine you were out of line to use force, what would happen?

{¶ 48} "A: When my sergeant makes his determination, he forwards it to internal affairs and they also investigate it and if they believe that I have done anything in violation to policy or anything that is wrong, I would receive discipline or expect some charges.

{¶ 49} "Q: As you sit here today, have you received any notification of a violation on this use of force?

{¶ 50} "A: No."

{¶ 51} Totty contends that this line of questioning constituted "improper bolstering of [Watkins's] actions, by the statements that he has not been disciplined or charged as a result of this use of force which raised at least an inference that the Dayton Police department approved Officer Watkins' actions on the night in question."

{¶ 52} We agree with Totty that testimony that Watkins was not disciplined for his use of force was not properly admissible. It was for the jury, in assessing the evidence in this case, and specifically in assessing Totty's contention that he was merely defending himself, passively, against Watkins's aggression, to determine whether Watkins used force appropriately against Totty. Nevertheless, we are not prepared to say that the last two questions and answers, quoted above, to which no objection was made, were so prejudicial as to have been reasonably likely to have affected the outcome of the trial.

{¶ 53} The previous questions and answers in this line of testimony were not

objectionable. The explication of the policy for the use of force under which Watkins was operating explained his use of force, and was especially relevant in light of Totty's later testimony that Watkins was the sole aggressor, who attacked without reasonable provocation.

{¶ 54} The Third Assignment of Error is overruled.

IV

{¶ 55} All of Totty's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN and FROELICH, JJ., concur.

Copies mailed to:

Mathias H. Heck, Jr.
Kirsten A. Brandt
Lawrence J. Greger
Hon. Frances E. McGee