

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

State of Ohio

Court of Appeals No. L-10-1003

Appellee

Trial Court No. CR0200902907

v.

John B. Stevens

DECISION AND JUDGMENT

Appellant

Decided: September 30, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
James Vail, Assistant Prosecuting Attorney, for appellee.

Nicole I. Khoury, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, John B. Stevens, appeals from a judgment issued by the Lucas County Court of Common Pleas following a jury verdict finding him guilty of felonious assault. For the reasons that follow, we affirm.

{¶ 2} Appellant sets forth the following assignments of error:

{¶ 3} "I. The conviction not sufficiently supported by credible evidence was against the manifest weight of the evidence.

{¶ 4} "II. Trial counsel was ineffective which prejudiced defendant/appellant's right to a fair trial as guaranteed by the U.S. and Ohio Constitutions."

{¶ 5} Following appellant's indictment for felonious assault, a jury trial commenced on December 14, 2009. Jennifer McFate-Rogers testified that on September 21, 2009, she and her boyfriend, Jason Dent, went to Papa's Tavern in Toledo, Ohio to celebrate Dent's birthday. When she arrived home from work at a little after 11 p.m., Dent was already intoxicated, and they shared a bottle of wine before leaving for the tavern. McFate-Rogers testified that she and Dent sat on the back patio at Papa's to avoid other people, and that at some point appellant came outside and joined them. McFate-Rogers testified that she recalled appellant mentioning smoking some marijuana, but she told him she didn't want to. When Dent went inside for a moment, appellant spoke to McFate-Rogers and she believed he was "hitting on her." McFate-Rogers testified that she told Dent that appellant had hit on her, and that Dent told her that he had words with appellant, although she could not recall seeing them speak. She also testified that she convinced Dent to leave afterward because she believed both men to be intoxicated, and she did not want any trouble.

{¶ 6} McFate-Rogers testified that when she and Dent left, they decided to cut through an alley behind the tavern to get home more quickly. Before entering the alley, they met up with a childhood friend who began to walk with them. McFate-Rogers testified that she could not recall whether there was lighting in the alley or not. The three walked down the center of the alley with McFate-Rogers between the two men. McFate-Rogers testified that she then saw a van pass the alley, back up, then cut through a yard and come right at them in the alley. She heard the two men tell her to "watch out, there's a van coming right at us." She couldn't move quickly enough and was struck by the van, sustaining multiple injuries. McFate-Rogers testified that the next thing that she remembered was waking up in the hospital.

{¶ 7} Jason Dent testified that he and McFate-Rogers went to Papa's Tavern on the night of September 21, 2009 to celebrate his birthday after she had returned home from work at around 11:15 p.m. He testified that he had been drinking since around 5 p.m. that day, that he shared a bottle of wine with McFate-Rogers before heading to Papa's, and that he was highly intoxicated by the time they arrived there. Dent testified that he and McFate-Rogers were on the patio at Papa's with appellant, and that appellant was smoking marijuana and had offered him some. Dent testified that he did not believe he had smoked with appellant, but that he had been intoxicated and could not be sure. McFate-Rogers told him that appellant had hit on her while Dent was inside the tavern.

Dent testified that he yelled at appellant a little bit before McFate-Rogers convinced him to leave.

{¶ 8} Dent testified that they left out the back gate and started walking down the alley behind the tavern, where they met up with a childhood friend. Dent was telling his friend of the incident with appellant, when he saw a white van back up past the alley, drive through a yard and strike McFate-Rogers. Dent indicated that there was a streetlight at the end of the alley when asked if the alley was dark. Dent testified that the van stopped when it hit a tree, and after he ran around to the van to check on McFate-Rogers, appellant ran out of the back of the van. Dent testified that he held McFate-Rogers' head until an ambulance showed up, at which point he rode with her to the hospital, where he was arrested for disorderly conduct.

{¶ 9} Officer Thomas LaForge testified that when he arrived upon the scene where McFate-Rogers had been, he found the van against a light pole with no driver, and a female lying in the alley who appeared to have been struck by the vehicle. However, LaForge's investigation report indicated there was no light pole struck at the scene, but rather the vehicle had come to rest against a tree. LaForge testified that there were streetlights in the alley and that the victim was visible in the alley from the light. LaForge also testified that there was no driver present at the scene, and the back door of the van was ajar. LaForge then received a call that the driver was found in front of the building behind which the van was left.

{¶ 10} Upon investigating the scene, LaForge determined that the van had started from a parked position, accelerated rapidly in reverse, then turned towards the alley and cut through a yard before striking the victim and coming to rest against a light pole. After the van was moved, he observed skid marks that appeared as though the driver attempted to stop rapidly. LaForge testified that he believed that Stevens struck McFate-Rogers as he was slamming on his brakes.

{¶ 11} LaForge's partner, Officer John Noonan, also testified at trial. Noonan testified that when he and LaForge arrived on the scene, appellant was injured and being detained in the front yard of the building that the van had crashed into. Noonan testified that Dent was detaining appellant. Noonan also testified that the alley was not well-lit, but that there were streetlights along the street and there was enough lighting from them that you could see in the alley. He did not recall that the van had crashed into any light pole.

{¶ 12} Detective Gene Kutz testified that he spoke with appellant at the hospital where appellant was being treated for his injuries. Appellant told Kutz that he had met up with Dent and McFate-Rogers at Papa's and that things were going fine at first, and indicated that either he was going to sell them some marijuana or they were going to sell him some. Appellant also told Kutz that he had left the tavern with McFate-Rogers and Dent, and walked to his van to leave. As he opened the van to go inside, there were two males with McFate-Rogers, one of whom hit him and the other who took his wallet. One

of the men also stated that they should make appellant sign over the title to his van. Appellant told Kutz that he started the van and threw it in reverse as the two men ran alongside pounding on the vehicle. Appellant claimed that he put the van in forward and somehow McFate-Rogers got in front of him and he hit her with the van.

{¶ 13} The defense presented a witness, Keith Watson, who stated that he found appellant's wallet behind Papa's Tavern on December 8, 2009. Watson claimed that he did not know how the wallet got there, but that he picked it up and turned it in at the bar.

{¶ 14} Sufficiency of the evidence and manifest weight of the evidence are quantitatively and qualitatively different legal concepts. *State v Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency of the evidence is purely a question of law. *Id.* Under this standard of adequacy, a court must consider whether the evidence was sufficient to support the conviction as a matter of law. *Id.* The proper analysis 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, Williams* (1996) 74 Ohio St.3d 569, 576, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 15} "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, the court may nevertheless conclude that the judgment is against the weight of the evidence." *Thompkins*, 78 Ohio St.3d at 387, citing *State v. Robinson* (1955), 162 Ohio St. 486, 55 O.O. 388, 124 N.E.2d 148. A manifest

weight challenge questions whether the state has met its burden of persuasion. *Id.* at 386. In making this determination, the court of appeals sits as a "thirteenth juror" and, after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 16} Appellant was convicted of felonious assault in violation of R.C. 2903.11(A)(2), which states:

{¶ 17} " (A) No person shall knowingly do either of the following:

{¶ 18} "* * *

{¶ 19} "(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶ 20} According to R.C. 2901.22(B), "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."

{¶ 21} Appellant contends that there was not proof beyond a reasonable doubt that he knowingly committed the offense of which he was convicted. He argues that McFate-Roger's testimony is "hearsay at best" and that she did not see the van coming at her or hit her. While McFate-Rogers did testify that she heard the men with her telling her to watch out, and that the next thing she remembered was waking up in the hospital, she did testify that she saw the van back up, cut through the yard and come right at them in the alley. She also testified that she was struck by the van after she could not move out of the way quickly enough.

{¶ 22} Appellant also maintains that the burden was not met because the only other eyewitness was Dent, who was intoxicated at the time of the events in question. Appellant mentions that Dent has a criminal record and was arrested for disorderly conduct on the night in question, apparently in an attempt to indicate that the witness's testimony should not be credible.

{¶ 23} However, "weight of evidence and credibility of witnesses are matters for the trier of fact. The factfinder can observe the body language, evaluate voice inflections, observe hand gestures, perceive the interplay between the witness and examiner, and watch the witness's reaction to exhibits and the like. Determining credibility from a sterile transcript is far more difficult. A reviewing court must, therefore, accord due deference to the credibility determination made by the factfinder." *State v. York*, 6th

Dist. No. WD-03-017, 2003-Ohio-7249, ¶ 10, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of syllabus.

{¶ 24} Appellant refers to Officer LaForge's testimony that he believed appellant had struck his brakes at the beginning of a skid, as he was slamming on his brakes, as evidence that he had not intentionally hit McFate-Rogers. However, LaForge's testimony does not conclusively indicate appellant's intent or exactly when he hit his brakes- whether it was before or after the impact with McFate-Rogers -and it was up to the jury to decide whether or not they believed LaForge's testimony to be true. Appellant also cites Officer Noonan's testimony that he did not believe there were streetlights in the alleyway itself as evidence that he did not intentionally hit McFate-Rogers, but appellant ignores the fact that Officer LaForge's and Dent's testimony both indicate that there was adequate lighting in the alleyway, and that Noonan also testified that "you could see", as there was light in the alley from the streetlights. Again, the issue of credibility is one for the trier of fact, and in such an instance where there is conflicting testimony, it is up to the jury to determine which witness's testimony is most credible.

{¶ 25} In this case, the jury found that appellant used the vehicle in a manner that was likely to produce great bodily harm or death, as is within their province as the trier of fact. Appellant would have the court find that his van could only be a deadly weapon if he had used it intentionally to cause the specific harm caused to the victim. But it has been rejected that "the determination of an instrumentality as being a deadly weapon

must be premised upon a finding that the instrument or device was knowingly or intentionally employed to harm the victim." *State v. Hutchins* (August 9, 1991), Lucas App. No. L-90-182. Rather, whether or not an instrument is a deadly weapon is determined by its capability to inflict death or bodily harm. *State v. Orlett* (1975), 44 Ohio Misc. 7, 9. This is determined both by the nature of the instrument and the manner in which it is used. *State v. Devoe* (1977), 62 Ohio App.2d 192, paragraph one of the syllabus. A vehicle can be a deadly weapon when it is used in such a manner that it is likely to produce great harm or death. *State v. Tate*, 8th Dist. No. 87008, 2006-Ohio-3722, ¶ 23. The determination of whether an automobile was used as a deadly weapon is a question for the trier of fact. *Hutchins*, citing *Orlett* at 9. In this case, the jury, as trier of fact, found that appellant did use the vehicle as a deadly weapon by using it in a manner that was likely to produce great bodily harm or death.

{¶ 26} The jury heard testimony that appellant struck the victim with his van and that she consequently suffered severe injuries. While appellant's counsel and his statement to Officer Kutz indicated that appellant hit her accidentally, the jury chose to believe other testimony which led them to the conclusion that this was not the case. Based on their determination of the credibility of witness testimony and that appellant's van was in fact a deadly weapon, the jury found appellant guilty of felonious assault. On review, we cannot say that the jury clearly lost its way or perpetrated a manifest miscarriage of justice. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 27} In his second assignment of error, appellant contends that his right to a fair trial was prejudiced as his trial counsel was ineffective. There is a two-part test under which a claim of ineffective counsel must be reviewed: first, that counsel was deficient and fell below an objective standard of reasonableness, and second, that the deficiency of performance prejudiced the trial. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2520, 80 L.Ed.2d 674. In showing such prejudice, the appellant must show that there is a reasonable probability that without counsel's mistakes, the outcome of the trial would have been different. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 524 N.E.2d 476.

{¶ 28} In reviewing a claim of inefficient counsel, the court must "be highly deferential" and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington* at 689. In the state of Ohio, a licensed attorney is presumed competent. *State v. Hamblin* at 155.

{¶ 29} Appellant asserts that his defense counsel at trial was ineffective in that he did not object to the "flight" instruction given to the jury. Appellant claims that this instruction was inappropriate as the only mention of flight at trial was from Dent, who was intoxicated at the time, and that appellant was being detained in the front yard and thus did not flee. However, along with Dent's testimony that appellant "came flying out the back of the van and took off running", Officer LaForge testified that when he arrived on the scene there was no driver present with the vehicle. Officer Noonan did testify that appellant was being detained when he arrived, but this does not constitute proof that

appellant had not made an attempt to flee, and in fact, it was never speculated why appellant had to be detained. Appellant suggests that Kutz's testimony that appellant made a statement regarding being attacked by the two men should indicate that he feared for his safety, perhaps as an explanation for why he did not remain at the van after he had crashed.

{¶ 30} The jury instruction that was given stated:

{¶ 31} "In this case there is evidence tending to indicate that the defendant fled or attempted to flee from the vicinity of the alleged crime. In this connection, you are instructed that flight in and of itself does not raise a presumption of guilt. But unless satisfactorily explained, it tends to show consciousness of guilt or a guilty connection with the crime. If, therefore, you find that the defendant did flee or attempt to flee from the scene of the alleged crime and has not satisfactorily explained his conduct in doing so, you may consider this circumstance in the case in determining the guilt or innocence of the defendant."

{¶ 32} As the instruction stated, there was evidence presented that indicated the defendant attempted to flee: Dent's testimony that appellant ran out of the back of the van, LaForge's testimony that there was no driver present at the vehicle when he arrived on the scene, and Noonan's testimony that appellant was being detained in the front yard of the building behind where he had crashed. This evidence was sufficient to support the

contention that appellant may have been attempting to flee, and thus the instruction to the jury was not improper.

{¶ 33} Appellant claims that the instruction that the jury may consider flight if the defendant "has not satisfactorily explained his conduct" would infringe on his constitutional right to remain silent. A similar instruction to the one given in this case was given in *State v. Fields* (1973), 35 Ohio App.2d 140, stating:

{¶ 34} "Now, in this case, there is evidence tending to indicate that both of the defendants fled from the vicinity of the alleged crime. In this connection, you are instructed that flight in and of itself does not raise a presumption of guilt, but unless satisfactorily explained, it tends to show consciousness of guilt or a guilty connection with the crime. If, therefore, you find that one or both of the defendants did flee from the scene of the alleged crime, and one or both have not satisfactorily explained their conduct in so doing, you may consider this circumstance together with all other facts and circumstances in the case in determining the guilt or innocence of one or both of the defendants."

{¶ 35} "No burden can be placed upon the defendant to explain his actions, and therefore any instruction by the trial court which has the net effect of requiring a defendant to make an explanation is improper." *Id.* at 146. The court in *Fields* held that "it is apparent from an examination of the above instruction that it may, and almost certainly will, be understood to require a defendant, himself, to 'satisfactorily explain' his

conduct in fleeing the scene of a crime, and a conscientious juror, intent upon following the law as the court gives it to him, will consequently construe the continuing silence of a defendant as a failure to so satisfactorily explain his conduct in fleeing the scene and, therefore, is to be considered by him as a 'circumstance together with all the other facts and circumstances in the case in determining the guilt or innocence' of the defendant." *Id.* at 145. The plain meaning of the instruction is that the defendant must be the one to explain his conduct, not anyone else. *Id.*

{¶ 36} Several cases have been distinguished from *Fields* on the basis that the flight instruction given to the jury did not require the defendant to personally explain his conduct and an additional instruction was given to the jury that the defendant's silence was not be used against him in any way. *State v. Taylor* (1997), 78 Ohio St.3d 15, 676 N.E.2d 82 (instruction stating "flight, in and of itself, does not raise a presumption of guilt, but unless satisfactorily explained, it tends to show consciousness of guilt or a guilty connection with the crime" did not implicate the defendant's 5th Amendment right not to testify); *State v. Brady*, 9th Dist. No. 22034, 2005-Ohio-593, (instruction stating "and this conduct has not been satisfactorily explained" did not require defendant to personally explain his conduct); *State v. Morris*, 10th Dist. No. 05AP-1032, 2007-Ohio-2382, (instruction stated "and this conduct has not been satisfactorily explained" and thus did not put the burden on the defendant to personally explain); *State v. Pitts* (Sept. 30, 1997), 6th Dist. No. L-96-259, (instruction stated "that no satisfactory explanation has

been offered for his conduct" and thus did not require the defendant to personally explain his conduct.)

{¶ 37} The trial court did give an instruction that appellant had a constitutional right not to testify, and that his lack of testimony could not be considered for any purpose. However, the jury instruction on flight stated "if, therefore, you find that the defendant did flee or attempt to flee from the scene of the alleged crime and has not satisfactorily explained his conduct in doing so, you may consider this circumstance in the case in determining the guilt or innocence of the defendant." This instruction appears to impermissibly place the burden upon the defendant to explain his conduct, and thus would be unconstitutional under *Fields*.

{¶ 38} While the court must presume that the defense counsel's conduct falls within the range of reasonable assistance, it may find that counsel was ineffective where counsel fell below an objective standard of reasonableness and this deficiency prejudiced the trial. In the instant case, counsel's failure to object to a flight instruction which unconstitutionally implicated appellant's Fifth and Fourteenth Amendment right not to testify fell below an objective standard of reasonableness.

{¶ 39} However, in order for appellant to prevail on a claim of ineffective counsel, he must also show that the deficiency of counsel's performance prejudiced the trial in that without counsel's mistakes, the outcome of the trial would have been different. The holding in *Fields* presumes that the statement "have not satisfactorily explained their

conduct in so doing" places an undue burden on the defendant, but several courts have found that using a passive statement such as "and this conduct has not been satisfactorily explained" is permissible, where an instruction regarding defendant's right not to testify is also made. When looking at the instructions as a whole, the jury was instructed that they could not use appellant's failure to testify in any way. Assuming that the wording of the flight instruction would cause the jury to completely ignore the instruction regarding appellant's right not to testify would have the effect of placing the entire verdict contingent on one phrase. It would be hard to say that the jury made their determination based on this one fragment of an instruction, and that with a slightly different wording, the entire outcome of the trial would be different.

{¶ 40} Furthermore, it is clear that appellant was actually able to explain his conduct without testifying. Detective Kutz testified as to the statements appellant made to him while at the hospital that Dent and his friend had assaulted him and he was in fear for his safety. In both his opening and closing statements, counsel addressed the evidence of flight with the explanation that appellant was trying to escape Dent and his friend, who had just assaulted appellant and were trying to drag him from his van, and that he crawled out of the van after it had crashed in order to get away from the men. Counsel also called a witness who testified that he had found appellant's wallet behind Papa's Tavern. In his closing statement, counsel claimed that this discovery of the wallet two and a half months after the events in question might lend credence to appellant's

statements to Detective Kutz. Thus appellant's conduct was explained by testimony and by counsel, without his right not to testify being violated, as it would have if the proper instruction had been made to the jury. It cannot be said that if the instruction had been made in the passive voice rather than active that the jury would have somehow found this explanation to be more satisfactory, at least to the extent where it would have changed the outcome of the trial entirely. Although appellant's counsel did err in his failure to object to the wrongful flight instruction, there is no evidence that the outcome of the trial would have been different. For this reason, we find appellant's second assignment of error not well-taken.

{¶ 41} Accordingly, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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