[Cite as *State v. Stewart*, 2012-Ohio-4640.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-09-173
	:	O P I N I O N
- vs -		10/8/2012
	:	
COREY STEWART,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2011-05-0628

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

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YOUNG, J.

{¶ 1} Defendant-appellant, Corey Stewart, appeals his convictions in the Butler County Court of Common Pleas for assault and attempted felonious assault.

{¶ 2} Appellant was indicted in May 2011 on one count of assault in violation of R.C. 2903.13(A) and one count of attempted felonious assault in violation of R.C. 2903.11(A)(1). The state alleged that on April 21, 2011, appellant, an inmate at the Butler County Jail, pushed Corrections Officer David Schueller out of his cell and into a metal railing, put his arm

around the officer's neck, tried to choke him, and tried to throw him over the railing. The incident took place on the second floor of the E-pod, a pod for isolation, medical, psychological, and sex offender inmates. On the ground floor of the pod, below the railing, are metal tables and metal seats bolted to a concrete floor. The distance between the top of the railing to the concrete floor below is just over 12 feet; the distance between the top of the railing and the metal table directly below the railing is 9 feet 7 inches. As a result of the altercation, Officer Schueller suffered several injuries.

{¶ 3} A jury trial was held in July 2011. Officer Schueller and two inmates who had witnessed part of the altercation and who had come to the officer's help testified on behalf of the state. Appellant testified on his own behalf. On July 12, 2011, appellant was found guilty as charged. Following the merger of his convictions, appellant was sentenced to five years in prison.

{¶ 4} Appellant appeals, raising two assignments of error.

{¶ 5} Assignment of Error No. 1:

{¶ 6} APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL.

{¶ 7} Appellant argues that his trial counsel was ineffective because he did not effectively cross-examine the two inmates regarding their bias and motive and whether they were induced or forced to testify.

{¶ 8} To prevail on an ineffective assistance claim, an appellant must show that his trial counsel's performance fell below an objective standard of reasonableness and that appellant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687-688, 693, 104 S.Ct. 2052 (1984); *State v. Layne*, 12th Dist. No. CA2009-07-043, 2010-Ohio-2308, ¶ 42.

{¶ 9} Regarding the first prong, there is "a strong presumption that counsel's conduct

falls within the wide range of reasonable professional assistance." *Strickland* at 689. There is also a presumption that the challenged action may be "sound trial strategy" that the defendant must overcome. *State v. Gilbert*, 12th Dist. No. CA2010-09-240, 2011-Ohio-4340, ¶ 72. It is well-established that the scope of cross-examination falls within the realm of trial strategy. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 101; *State v. Davis*, 10th Dist. No. 09AP-869, 2011-Ohio-1023, ¶ 18. Debatable trial tactics and strategies do not constitute ineffective assistance of counsel. *State v. Curtis*, 12th Dist. No. CA2009-01-004, 2009-Ohio-6740, ¶ 49.

{¶ 10} Regarding the second prong, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694. "A defendant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other." *State v. Madrigal*, 87 Ohio St.3d 378, 389 (2000); *Gilbert* at ¶ 73.

{¶ 11} Inmate Joshua Mullins and inmate Jerry Birt both witnessed part of the altercation between Officer Schueller and appellant. Both inmates testified that appellant was trying to push the officer over the railing. Both disclosed their criminal record at the beginning of their direct examination: Mullins was incarcerated for failure to provide a notice of a change of address, had a similar conviction in 2010, and was convicted in 2004 on two counts of gross sexual imposition. All were felony offenses. Birt was convicted of rape in 1999 and escape in 2004.

{¶ 12} Defense counsel never asked either inmate if they were induced or forced to testify, and did not inquire about their bias or motive. However, on cross-examination, defense counsel asked Mullins why a statement he had written ten minutes after the altercation did not mention appellant trying to push the officer over the railing. Mullins explained that he omitted facts in his written statement because he did not want to be

involved in the incident. On redirect examination, Mullins testified he did not want to be a snitch or to testify for the state.

{¶ 13} On direct examination, both inmates explained why they came to the officer's help. Mullins testified he helped the officer because he "was being pushed over the rail. * * * [J]ust because I'm an inmate doesn't mean that I don't have feelings towards staff or people." Birt testified he helped the officer because the latter was "in trouble, he need[ed] help. * * * That's just the right thing to do. The man is just doing his job, that's it. Not only that, my kids think I'm a hero[.]"

{¶ 14} Given the inmates' testimony and the high standard for finding ineffective assistance of counsel under *Strickland*, we find that appellant did not receive ineffective assistance of counsel. Defense counsel's failure to adequately cross-examine both inmates regarding bias, motive, inducement, or coercion amounts to nothing more than defense strategy and trial tactic. Debatable trial tactics and strategies do not constitute ineffective assistance of counsel. *Curtis*, 2009-Ohio-6740 at ¶ 49.

{¶ 15} Appellant's first assignment of error is overruled.

{¶ 16} Assignment of Error No. 2:

{¶ 17} THE JURY'S VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND NOT SUPPORTED BY SUFFICIENT EVIDENCE.

{¶ 18} Appellant argues that given his testimony he was acting in self-defense and the inmates' testimony that appellant "interlocked with Officer Schueller while the officer was attempting to hit [appellant]," his convictions for assault and attempted felonious assault were supported by insufficient evidence and were against the manifest weight of the evidence.

{¶ 19} An appellate court, in reviewing the sufficiency of the evidence supporting a criminal conviction, examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *Layne*, 2010-Ohio-2308 at ¶ 23. After examining the

evidence in a light most favorable to the prosecution, the appellate court must then determine if "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.

{¶ 20} In determining whether a conviction is contrary to the manifest weight of the evidence, an appellate court must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses to decide whether the jury clearly lost its way in resolving evidentiary conflicts and created such a manifest miscarriage of justice that the conviction must be reversed. *Layne* at ¶ 24. This discretionary power is to be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. *Id.* A determination that a conviction is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency. *State v. Church*, 12th Dist. No. CA2011-04-070, 2012-Ohio-3877, ¶ 10.

{¶ 21} Appellant was convicted of assault in violation of R.C. 2903.13(A) and attempted felonious assault in violation of R.C. 2903.11(A)(1). The former prohibits a person from knowingly causing or attempting to cause another physical harm; the latter prohibits a person from knowingly causing another serious physical harm. The jury trial revealed the following facts.

{¶ 22} Officer Schueller testified that in December 2010, appellant, who was an isolation inmate in the E-pod at the time, asked to use the phone. When the officer told him he was not allowed to use the phone, appellant became very upset and threatened to beat the officer to death. Appellant admitted that words were exchanged but denied he threatened to harm or kill the officer.

{¶ 23} On April 21, 2011, appellant was again an inmate in the E-pod; his cell was on the second floor. Officer Schueller testified that appellant asked for an inmate request form;

in addition, a new cellmate was placed in appellant's cell. Officer Schueller went to the cell to give a mat to the new inmate and the form to appellant. Once inside the cell, the officer gave the mat to the inmate and tried to give the form to appellant. However, appellant stood back with his arms crossed, staring at the officer. Officer Schueller put the form on a bed. As the officer was backing out of the cell, appellant came across the cell and forcefully pushed the officer backwards into the metal railing. The impact "knocked the wind out of" the officer.

{¶ 24} Thereafter, while pinning the officer against the railing, appellant put his right arm around the officer's neck and tried to choke him and push him over the top of the railing. The officer testified that during the struggle, (1) his prescription glasses were knocked off, (2) part of his upper body was over the top of the railing, (3) one of his feet was off the ground, and (4) he started feeling light headed from being choked and panicked. In an attempt to free himself, the officer started to swing wildly and struck appellant in the face a couple of times. Appellant briefly released his choking grip a little bit but "was right back on top of [the officer] again trying to choke [him]."

{¶ 25} Eventually, the officer was able to reach his shoulder radio and call for help. He then heard an inmate ask if he needed help. After the officer replied "yes," that inmate (Birt) and another inmate came to help him; the four individuals then went down into a big pile. The struggle ended with the arrival of other corrections officers. As a result of the struggle, Officer Schueller suffered strained tendons in both wrists, a partial tear in his left shoulder rotator cuff, nerve damage to his neck from being choked, bruises on his back, and a small cut on a knuckle which became infected and required hospitalization.

{¶ 26} Mullins testified he was on the phone on the first floor when he heard a commotion upstairs. Mullins observed appellant punch Officer Schueller and heard two inmates ask the officer if he needed help. After the officer replied "yes," Mullins ran upstairs. As Mullins reached the second floor, appellant was on top of Officer Schueller. The officer

was against the railing, one of his legs was "in between the railing and hanging underneath it," and his head, right shoulder, and right arm were hanging over the railing. Mullins believed the officer "was being pushed over the railing." With the help of another inmate, Mullins pulled appellant away from the officer.

{¶ 27} Birt's cell was across the floor from appellant's cell. Birt testified that as he was going to his cell, he heard a commotion and observed appellant swing at the officer, punch him in the face, and "shove" him into the railing. Birt started walking toward them. Birt then saw appellant grab the officer by the shoulder and his pants and try to throw him over the railing. The officer's feet were off the floor, his upper body was hanging over the top of the railing, and the officer looked scared to death. Birt started running toward them and asked the officer if he needed help. Birt then grabbed appellant and, with the help of another inmate, tried to restrain appellant. At that point, other officers came to assist.

{¶ 28} Appellant testified that he acted in self-defense and that Officer Schueller, Mullins, and Birt all lied during their testimony. According to appellant, he used the intercom twice that morning, the first time to inquire about his release, and the second time to get a mat for his new cellmate and to ask to speak to a sergeant. Officer Schueller told him he needed to fill out an inmate request form to speak to a sergeant. Appellant became upset; words were exchanged.

{¶ 29} Officer Schueller subsequently came to appellant's cell, opened it, gave the mat to the new inmate, and stood in the doorway of the cell with the form in his hand. Appellant initially stood there but then took a couple of steps toward the officer to get the form. At that point, the officer threw the form in appellant's face. Appellant continued to walk toward the officer. As he was asking him why he had thrown the form in his face, the officer punched appellant in the mouth. Appellant grabbed the officer's wrist and told him he hit like a "bitch." The officer freed his hand and punched appellant's face. Thereafter, appellant grabbed the

officer's wrists and the two struggled until two inmates came to the officer's rescue.

{¶ 30} Appellant denied trying to throw Officer Schueller over the top of the railing, throwing retaliatory punches, or having his arm around the officer's neck. Appellant also denied raising his fists at the officer or threatening him. Appellant testified he grabbed the officer's wrists solely to prevent him from striking appellant again. Appellant further testified that Officer Schueller had absolutely no reason to strike him.

{¶ 31} After thoroughly reviewing the record, we find that the jury neither lost its way nor created a manifest miscarriage of justice in finding appellant guilty of assault and attempted felonious assault. It is well-established that when conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the trier of fact believed the prosecution testimony. *State v. Davis*, 12th Dist. No. CA2010-06-143, 2011-Ohio-2207, ¶ 43. Further, the decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the trier of fact, who has seen and heard the witness. *State v. Rhines*, 2nd Dist. No. 23486, 2010-Ohio-3117, ¶ 39. The jury did not lose its way simply because it chose to believe the state's witnesses, including Mullins and Birt, and rejected appellant's self-defense claim.

{¶ 32} We therefore find that appellant's convictions for assault and attempted felonious assault are not against the manifest weight of the evidence. Our determination that appellant's convictions are supported by the weight of the evidence is also dispositive of the issue of sufficiency. *Church*, 2012-Ohio-3877 at ¶ 10. Appellant's second assignment of error is overruled.

{¶ 33} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.