

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-160647
Plaintiff-Appellee,	:	TRIAL NO. 15CRB-32553
vs.	:	<i>JUDGMENT ENTRY.</i>
CHARLES DOVE,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Following a jury trial, defendant-appellant Charles Dove appeals from his conviction for resisting arrest in violation of R.C. 2921.33(A). Dove had burglarized the apartment of his erstwhile girlfriend Deanna Love. An arrest warrant was issued for Dove's arrest. The next day, Dove returned to attempt unsuccessfully to reconcile with Love. Dove and his friend Deon Brooks II consoled themselves with "beer, Fireball whiskey and Crown Royal." The visibly drunk and belligerent Dove then returned to Love's apartment that night. Police were summoned.

Dove was taken into custody by two Cincinnati police officers. He was placed in handcuffs and, with one officer on each side, was walked down the apartment driveway to a patrol car. Brooks employed his cellphone to make a dimly lit record of the events. During the walk, the verbally abusive Dove struggled with the officers. Dove violently swung himself backwards causing all three to fall to the ground. After the officers got

Dove to his feet, Dove spread his legs several feet apart and went limp. As the officers endeavored to carry Dove the remaining distance to the patrol car, Dove's legs tripped the officers. They again fell. Though Dove sustained a laceration and bruises to his face, he continued to struggle requiring the officers to forcibly push him into the back of the patrol car.

Officers filed a complaint against Dove for resisting arrest under R.C. 2921.33(A). The complaint stated that Dove had "by force" resisted arrest for an outstanding warrant when he had "pulled away from" and had "attempted to trip" the arresting officers. R.C. 2921.33(A) provides that "[n]o person, recklessly or by force, shall resist or interfere with a lawful arrest of the person or another."

Dove, the arresting officers, an investigating officer, Love, and Brooks each testified at trial. Dove claimed that he had not tried to pull away from or trip the officers but had merely tried to look over his shoulder to speak to Brooks. The jury returned a guilty verdict, the trial court entered judgment on the verdict, and imposed a fine, and a 90-day jail term with credit for time served and with the remainder of the term suspended. Dove appealed.

In his first assignment of error, Dove argues that the trial court erred in instructing the jury that it could return a guilty verdict on the resisting-arrest charge if it found that he had either "recklessly" or "by force" resisted his arrest.

Despite the wording of this assignment of error challenging the jury instructions, the gravamen of Dove's argument is that because "the complaint left out an element," it failed to give him adequate notice of the charge against him and thus deprived him of due process. To the extent that Dove advances the argument that the charging instrument was defective, he has forfeited all but plain error. Dove did not challenge the alleged defects in the complaint prior to trial. *See* Crim.R. 12(C)(2); *see also State v. Horner*, 126 Ohio St.3d

466, 2010-Ohio-3830, 935 N.E.2d 26, paragraph three of the syllabus. Plain error is an error so extreme that it affected the outcome of the proceedings and must be corrected to prevent a manifest miscarriage of justice. *See* Crim.R. 52(B); *see also State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22-23.

Since the complaint included a written statement of the essential facts constituting the offense and identified the offense by reference to the statute number, here R.C. 2921.33(A), it need not have also included each element of the offense. *See* Crim.R. 3; *see also State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162, ¶ 11. Since R.C. 2921.33(A) provides notice that an offender's resistance or interference may be committed either recklessly or by force, Dove has failed to demonstrate any defect in the notice provided by the complaint, much less plain error flowing from that defect. *See State v. Keegan*, 67 Ohio App.3d 824, 827, 588 N.E.2d 928 (1st Dist.1990).

To the extent that Dove challenges the instruction given to the jury, his argument also fails. At trial, both arresting officers testified that after Dove had violently swung himself backwards causing them to fall to the ground, Dove then spread his legs apart and let them go limp. As the officers endeavored to carry Dove the remaining distance to their patrol car, they again fell. The 1973 Committee Comment to R.C. 2921.33 explained that resisting arrest "may be committed \* \* \* recklessly by any means, such as 'going limp.'" *See Keegan* at 824.

We note that the trial court retains discretion on how to conform the jury instructions to the evidence presented at trial. *See State v. Condon*, 152 Ohio App.3d 629, 2003-Ohio-2335, 789 N.E.2d 696, ¶ 90 (1st Dist.). After a review of the instructions, we are convinced that the trial court gave the jury all relevant instructions on the elements of the resisting-arrest offense necessary for it to weigh the evidence and to discharge its duty as the fact-finder. *See* R.C. 2921.33(A); *see also State v. Comens*, 50 Ohio St.3d 206, 553

N.E.2d 640 (1990), paragraph two of the syllabus. The trial court did not err much less commit plain error. The first assignment of error is overruled.

In his second assignment of error, Dove contends that the trial court erred by employing “an unduly broad definition of recklessness” found in former R.C. 2901.22(C), in its jury charge. *See State v. Everett*, 1st Dist. Hamilton No. C-140275, 2015-Ohio-5273, ¶ 12. The trial court’s jury instruction defining recklessness employed the former language providing, in pertinent part, that “[a] person acts recklessly when, with heedless indifference to the consequences, he *perversely disregards a known risk* that his conduct is likely to cause a certain result or is likely to be of a certain nature.” (Emphasis added.) The current R.C. 2901.22(C), effective before Dove’s arrest, reflects that a person acts recklessly when he “disregards a substantial and unjustifiable risk.”

Because Dove failed to bring this alleged error to the trial court’s attention at a time when the error could have been corrected or avoided, and before the jury retired to consider its verdicts, we review only for plain error. *See* Crim.R. 30(A); *see also State v. Harris*, 2017-Ohio-5594, \_\_\_ N.E.3d \_\_\_, ¶ 25 (1st Dist.).

Because Dove’s theory of the case was that there had been no risk of interfering with the officers due to his conduct, Dove was not prejudiced by the use of the former definition. Moreover, the state presented ample evidence that Dove had acted with force to resist arrest. Since the outcome clearly would have not been different absent the alleged error, we overrule the second assignment of error. *See* Crim.R. 52(B).

Dove’s third assignment of error, in which he claims that his trial counsel was ineffective for failing to object to the admission of facts surrounding Dove’s actions in Love’s apartment, which had prompted his arrest, for eliciting those facts during her cross-examination of Love, and for failing to object to the jury hearing portions of Love’s 911 call, must also fail.

To establish that he was denied the ineffective assistance of counsel, Dove must show (1) that his counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for her unprofessional errors, the result of the proceeding would have been different. *See State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989), citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Judicial scrutiny of trial counsel's performance is highly deferential; this court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *See Strickland* at 689. And a reviewing court will not ordinarily second-guess strategic decisions made by trial counsel to pursue one course of defense over another. *See State v. Mason*, 82 Ohio St.3d 144, 157-158, 694 N.E.2d 932 (1998).

After reviewing the record, including his stipulation to the lawfulness of his arrest, we hold that there were no acts or omissions by trial counsel that were so prejudicial that they deprived Dove of a substantive or procedural right, or that rendered the trial fundamentally unfair. *See Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); *see also Strickland* at 687; *Bradley* at paragraphs two and three of the syllabus. The third assignment of error is overruled.

In his fourth assignment of error, Dove challenges the weight and the sufficiency of the evidence adduced to support his conviction. Our review of the record fails to persuade us that the jury, sitting as the trier of fact, and entitled to resolve any inconsistencies in the testimony, clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *see also State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. We can find no basis in this record to

conclude that this is “an exceptional case” in which the jury lost its way. *See State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

The state presented ample evidence that Dove had recklessly or by force resisted his lawful arrest, including the testimony of the arresting officers. Both Love and Brooks testified that Dove had placed his legs wider apart than normal before tripping the officers a second time. Video recordings from Brooks and from the patrol car’s camera system were played for the jury. *See Thompkins* at 387.

The record also reflects substantial, credible evidence from which the trier of fact could have reasonably concluded that the state had proved all elements of the charged crime beyond a reasonable doubt. *See* R.C. 2921.33(A); *see also State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 36. The final assignment of error is overruled.

Therefore, we affirm the trial court’s judgment.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**CUNNINGHAM, P.J., ZAYAS and MYERS, JJ.**

To the clerk:

Enter upon the journal of the court on December 20, 2017  
per order of the court \_\_\_\_\_.  
Presiding Judge