

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

STATE OF OHIO,	:	APPEAL NO. C-070758
	:	TRIAL NO. 07CRB-36439
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
JOSHUA NICHOLSON,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Joshua Nicholson appeals his conviction for assault. Neither of his assignments of error has merit, so we affirm the judgment of the trial court.

Nicholson was charged with the assault of Joseph Hager. During the trial to the bench, the state alleged that, around 2:00 a.m. on September 23, 2007, Hager and his friends Joseph Stein and Katy Hahn had been walking down a street in the Clifton area of Cincinnati. A group of men, including Nicholson, approached them and asked them if they wanted to fight. When Hager turned around, Nicholson pushed him down. Nicholson and the other men then beat and kicked Hager until he was unconscious. Stein ran to get a police officer, and Officer Dennis Zucker responded to the scene. When he arrived, he saw several people piled up in the middle of the street.

Stein and Hahn both identified Nicholson as the man who had knocked down and beaten Hager. Officer Zucker identified Nicholson as one of the people who had walked away from the pile in the middle of the street. Nicholson was arrested at the scene.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

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Nicholson's cousin Kevin Foster testified that he had been at the scene of the assault. According to Foster, another friend named Craig approached Hager, attempted to take a case of beer from him, and hit him. Foster admitted that he had also hit Hager. According to Foster, Nicholson was not involved in the assault. Nicholson testified that he had been walking with Foster, Craig, and another person in the early morning hours of September 23, and that somehow the group had become separated. According to Nicholson, he walked up to the scene of the assault after it had occurred.

The trial court found Nicholson guilty of assault, sentenced him to 80 days in jail and suspended 70 days. The court also ordered that Nicholson be placed on six months of probation, and that he pay a \$200 fine and restitution.

In his first assignment of error, Nicholson asserts that his conviction was based on insufficient evidence, and that it was against the manifest weight of the evidence. When reviewing whether a judgment is against the manifest weight of the evidence, we must determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice.²

After reviewing the record, we conclude that the trial court's finding of guilt was not against the manifest weight of the evidence. The court was in the best position to weigh the credibility of the witnesses. And we are unable to say the court lost its way in this case. The first assignment of error is without merit.

Nicholson asserts in his second assignment of error that he was deprived of the effective assistance of counsel. To prevail on this assignment of error, Nicholson must demonstrate that his counsel's performance was deficient, and that, in the absence of his counsel's errors, the result of the trial would have been different.³ Our review of counsel's performance must be "highly deferential."⁴

² See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

³ See *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373; *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052.

⁴ *Strickland*, supra, at 689.

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Nicholson claims that his trial counsel asked misleading questions during his direct examination of Foster and Nicholson. The questions, concerning what Nicholson was doing during the assault, were consistent with the defense's theory that Nicholson had been with Foster and Craig before the assault, but had not gotten involved. Nicholson himself admitted that he had arrived at the scene of the assault shortly after it had ended. We will not second-guess defense counsel's strategy in asking these questions. And even if we concluded that counsel's performance had been deficient, we could not conclude that the result of the trial would have been different, given the testimony of the eyewitnesses Stein and Hahn. The second assignment of error is overruled.

We therefore affirm the judgment of the trial court.

SUNDERMANN, P.J., PAINTER and HENDON, JJ.

To the Clerk:

Enter upon the Journal of the Court on October 8, 2008

per order of the Court _____.

Presiding Judge