[Cite as *Steubenville v. Whittaker*, 2018-Ohio-4014.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

CITY OF STEUBENVILLE,

Plaintiff-Appellee,

v.

TINA M. WHITTAKER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 JE 0025

Criminal Appeal from the
Steubenville Municipal Court of Jefferson County, Ohio
Case No. 17-CRB-814

BEFORE:
Gene Donofrio, Cheryl L. Waite, Kathleen Bartlett, Judges.

JUDGMENT:
Affirmed.

Atty. Stephen B. Lamatrice, 123 North 4th Street, Steubenville, Ohio 43952, for Plaintiff-Appellee, No Brief Filed, and

Atty. John Falgiani Jr., P.O. Box 8533, Warren, Ohio 44484, for Defendant-Appellant.

Dated:
September 27, 2018

Donofrio, J.

{¶1} Defendant-appellant, Tina Whittaker, appeals from a Steubenville Municipal Court judgment convicting her of one count of assault following a bench trial.

{¶2} On June 21, 2017, L.B., then age 10, was playing video games with his cousin when he heard a loud banging on the door. According to L.B., he answered the door to find appellant, his next-door neighbor, on his porch yelling about her car being towed. Appellant pushed her way into the house. According to L.B. and his cousin, appellant then grabbed him, shook him, and shoved him against the stove. L.B.'s father came downstairs after hearing the commotion. He confronted appellant and told her to leave. L.B.'s father then lifted up L.B.'s shirt and noticed a small bruise. The family took L.B. to a doctor, who gave him medicine to help with back pain.

{¶3} As a result of the incident, appellant was charged with one count of assault, a first-degree misdemeanor in violation of Steubenville Ordinance 537.03(a). The matter proceeded to a bench trial where the court found appellant guilty. The court subsequently sentenced appellant to 180 days jail, 177 of which were suspended upon the condition of 180 days of unsupervised probation.

{¶4} Appellant filed a timely notice of appeal on September 28, 2017. She now raises three assignments of error.

{¶5} Appellant's first assignment of error states:

> THE JUDGMENT OF CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶6} Appellant argues her conviction was against the manifest weight of the evidence. Appellant claims that while the alleged assault occurred around noon, she did not arrive home that day until 5:00 p.m. She also points to the testimony of her neighbors, who stated appellant was not at home during the time of the incident. Appellant asserts the court showed favoritism toward L.B. when he testified. And she contends L.B.'s testimony was questionable as to the details of what occurred.

{¶7} In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all

reasonable inferences and determine whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other'." *Id*. (Emphasis sic.) In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence produced at trial. *Id*. at 390.

{¶8} Yet granting a new trial is only appropriate in extraordinary cases where the evidence weighs heavily against the conviction. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). This is because determinations of witness credibility, conflicting testimony, and evidence weight are primarily for the trier of the facts who sits in the best position to judge the weight of the evidence and the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *State v. Rouse*, 7th Dist. No. 04-BE-53, 2005-Ohio-6328, ¶ 49, citing *State v. Hill*, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. Thus, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. No. 99-CA-149, 2002-Ohio-1152.

{¶9} Appellant was convicted of assault in violation of Steubenville Ordinance 537.03(a), which provides: "No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn."

{¶10} We must examine all of the evidence presented at trial in conducting a manifest weight review.

{¶11} L.B. was the first witness. He testified that he heard a knock at the door. (Tr. 10). It was appellant, his next-door neighbor. (Tr. 10-11). He stated that appellant forced her way into his house when he opened the door a crack. (Tr. 12). L.B. stated that appellant was yelling "You had my car towed." (Tr. 11). L.B. testified that appellant grabbed him by the shoulders, shook him, and pushed him against the stove, all the while yelling about her car. (Tr. 12-13). L.B. stated he went to get his dad, who yelled

at appellant, and then she left. (Tr. 13). Afterwards, L.B. went to the doctor who gave him medicine for back pain. (Tr. 14).

{¶12} L.B.'s cousin testified next. She corroborated L.B.'s testimony. She explained that she and L.B. were playing a video game, when they heard banging on the door. (Tr. 22). She witnessed appellant push through the door while "screaming and cussing" about her towed car. (Tr. 22-23). She further witnessed appellant grab and shake L.B. (Tr. 23). And she witnessed L.B.'s father come downstairs and confront appellant. (Tr. 24).

{¶13} L.B.'s father was the prosecution's final witness. While he was in the bathroom upstairs between 11:30 a.m. and noon, L.B.'s father heard loud knocking at the door, as well as what he knew to be appellant's voice. (Tr. 30-31). He went downstairs and found appellant in his kitchen. (Tr. 31-32). He stated that appellant left. (Tr. 32). After appellant left and L.B. told him what had happened, he lifted up L.B.'s shirt and noticed a small bruise on his back. (Tr. 32). His wife then made an appointment to take L.B. to the doctor, who sent L.B. for x-rays and prescribed him a muscle relaxer. (Tr. 32, 35).

{¶14} Appellant's first witness was her neighbor, Jacqueline. Jacqueline testified that appellant's father was "life-flighted" to Pittsburgh the night before the incident. (Tr. 38). She explained that appellant had called her the night before, asking her to take the dogs out. (Tr. 38). On the date in question, she claimed to have not heard anything out of the ordinary. (Tr. 39). According to her, appellant was not home all day. (Tr. 40). She stated that the first time she saw appellant was when appellant walked over, inquiring about her car, which she stated was around 5:00 pm. (Tr. 39-40). She then saw the police arrest appellant. (Tr. 39-40).

{¶15} Jacqueline's boyfriend testified next. He stated he saw appellant on the day in question around 5:00 p.m. (Tr. 42). He had gone to appellant's house earlier in the day to let her dogs out. (Tr. 42). He had no further knowledge about the incident other than stating that appellant was arrested on the porch when she came to inquire about the location of her car. (Tr. 43).

{¶16} Appellant was the last to testify. She testified that the night before the incident her father was "life-flighted" to Pittsburgh. (Tr. 47-48). Appellant was unaware

of the exact time she had come home from the hospital, but identified it as the afternoon. (Tr. 48). Appellant informed the court that she then went to sleep. (Tr. 49). She stated she woke up and found out that her father's condition had worsened. (Tr. 49). Appellant stated she went out to get her car and it was gone. (Tr. 49). She then called the police who informed her that it had been towed. (Tr. 49). Appellant stated that next she went to Jacqueline's house for help and while she was there the police came over and arrested her. (Tr. 50).

{¶17} Appellant testified that L.B. and his family fabricated the assault. (Tr. 51). She denied going to L.B.'s house on the day in question, denied hurting anyone, and denied putting her hands on anyone. (Tr. 51-52).

{¶18} Witness testimony was the only evidence presented at trial. Reliability of witness testimony is an issue left to the trier of fact, whose opportunity to assess the witnesses is superior to that of the reviewing court. *DeHass*, 10 Ohio St.2d at 231. Here, the trial court clearly found L.B.'s and his family's testimony more credible than appellant's testimony. L.B.'s testimony was corroborated by both his cousin's and his father's testimony. The court simply did not find appellant to be credible in her denial of committing this offense.

{¶19} Appellant points out that L.B.'s father testified that the assault occurred between 11:30 a.m. and noon. But her testimony, as corroborated by her neighbors, was that she did not arrive at home until later that day. This was a credibility question for the court as the trier of fact. The court indicated that it simply did not believe appellant's testimony that she was not home and did not assault L.B.

{¶20} Moreover, what appellant characterizes as favoritism towards witnesses was simply the trier of fact weighing the credibility of the witnesses. When there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not for the court of appeals to choose which version to believe. *State v. Anderson*, 7th Dist. No. 14-BE-0036, 2016-Ohio-4800, ¶ 19, quoting *State v. Dyke*, 7th Dist. No. 99 CA 149, 2002-Ohio-1152.

{¶21} Based on the above, appellant's conviction was not against the manifest weight of the evidence.

{¶22} Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶23} Appellant's second assignment of error states:

> APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION; SECTION 10, ARTICLE I, OHIO CONSTITUTION.

{¶24} Appellant argues she was denied effective assistance of counsel.

{¶25} To prove an allegation of ineffective assistance of counsel, the appellant must satisfy a two-prong test. First, appellant must establish that counsel's performance has fallen below an objective standard of reasonable representation. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus. Second, appellant must demonstrate that he was prejudiced by counsel's performance. *Id*. To show that he has been prejudiced by counsel's deficient performance, appellant must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley*, at paragraph three of the syllabus.

{¶26} Appellant bears the burden of proof on the issue of counsel's ineffectiveness. *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999). In Ohio, a licensed attorney is presumed competent. *Id*.

{¶27} Appellant gives two reasons for asserting ineffective assistance of counsel.

{¶28} First, appellant argues her counsel was ineffective for failing to request a bill of particulars. She claims that if she had a bill of particulars she would have known what time the state alleged she committed the assault and, therefore, would have been able to present more accurate information as to where she was at that time.

{¶29} Appellant's trial counsel made discovery requests upon the state. The state responded, answering counsel's discovery requests. The discovery included the names and addresses of the state's witnesses and informed appellant that a copy of the police report was available at her request. The time the assault was said to have

occurred would have been available from the police report and the witnesses. Thus, counsel had access to that information.

{¶30} Although the Ohio Supreme Court has held that the state should provide a bill of particulars if requested, "the court has also stressed that the real question is whether the defendant's 'lack of knowledge concerning the specific facts a bill of particulars would have provided him actually prejudiced him in his ability to fairly defend himself.'" *State v. Sewell*, 2nd Dist. No. 27562, 2018-Ohio-2027, ¶ 68, quoting *State v. Chinn*, 85 Ohio St.3d 548, 569, 709 N.E.2d 1166 (1999).

{¶31} In this case, there is no indication that the lack of a bill of particulars actually prejudiced appellant. Her counsel had the means to find out the time the assault occurred. Counsel used this information deciding to call appellant's neighbors to testify that appellant was not home at the time L.B.'s father stated the assault occurred. Thus, appellant can show no prejudice regarding the lack of the bill of particulars.

{¶32} Second, appellant argues her counsel was ineffective for failing to subpoena an alibi witness in her defense. She points out that she testified she was with "Reverend Montgomery" at the hospital in Pittsburgh at the time this incident occurred. Had her counsel called this reverend to testify, appellant contends, he could have corroborated her alibi that she was with her father in a Pittsburgh hospital.

{¶33} Appellant's counsel did call appellant's two neighbors to corroborate her testimony that she was visiting her father in a Pittsburgh hospital at the time the assault was alleged to have occurred. There could be a myriad of reasons why counsel did not subpoena the reverend who appellant references. Whether to call a particular witness falls within the realm of trial strategy. *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, 25 N.E.3d 1023, ¶ 203, citing *State v. Treesh*, 90 Ohio St.3d 460, 490, 739 N.E.2d 749. This court will not second guess an attorney's trial tactics as they are generally not subject to question by a reviewing court. *State v. Armstrong*, 7th Dist. Mahoning No. 09-MA-204, 2011-Ohio-661, ¶ 47.

{¶34} In sum, appellant has failed to meet her burden to demonstrate that she was prejudiced by her counsel's alleged ineffectiveness.

{¶35} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶36} Appellant's third assignment of error states:

> APPELLANT WAS DENIED A FAIR TRIAL UNDER THE DOCTRINES OF "CUMULATIVE ERROR" OR "PLAIN ERROR".

{¶37} Appellant raises two issues in this assignment of error. First, she argues the cumulative effect of the errors cited in her previous two assignments denied her a fair trial. Second, she makes a claim of prosecutorial misconduct. We will address each in turn.

{¶38} An appellate court may reverse a defendant's conviction based on the doctrine of cumulative error. Cumulative error occurs when errors deemed separately harmless deny the defendant a fair trial. *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus.

{¶39} We have not found any harmless errors in this case. Thus, the doctrine of cumulative error does not apply.

{¶40} Appellant also makes a claim of prosecutorial misconduct. She points to comments by the prosecutor describing her defense as "laughable" and calling her a "nut." (Tr. 61, 62).

{¶41} The test for prosecutorial misconduct is whether the conduct complained of deprived the defendant of a fair trial. *State v. Fears*, 86 Ohio St.3d 329, 332, 715 N.E.2d 136 (1999). In reviewing a prosecutor's alleged misconduct, a court should look at whether the prosecutor's remarks were improper and whether the prosecutor's remarks affected the appellant's substantial rights. *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). "[T]he touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, ¶ 61, quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). An appellate court should not deem a trial unfair if, in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 121.

{¶42} Calling appellant a "nut" and her defense "laughable" although unprofessional, does not rise to the level of prosecutorial misconduct. This was a bench trial, not a jury trial. The impact of remarks is lessened when they are heard by a court, since the court is presumed to only consider relevant evidence. *State v. Wiles*, 59 Ohio St. 3d 71, 87, 571 N.E.2d 97 (1991). Nothing in the record indicates that the trial court relied upon these statements in any way. Moreover, the trial court reprimanded the prosecutor by instructing him to treat appellant with some respect. (Tr. 63).

{¶43} Although the prosecutor's comments were improper, there is no indication that they affected appellant's substantial rights or denied her a fair trial.

{¶44} Accordingly, appellant's third assignment of error is without merit and is overruled.

{¶45} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs
Bartlett, J., concurs

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Steubenville Municipal Court of Jefferson County, Ohio, is affirmed. Costs to be waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.