[Cite as *State v. Fussell*, 2006-Ohio-6438.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87739

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CARMILLA FUSSELL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-470891

BEFORE: McMonagle, J., Gallagher, P.J., and Corrigan, J.

RELEASED: December 7, 2006

JOURNALIZED:

[Cite as *State v. Fussell*, 2006-Ohio-6438.]

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[Cite as *State v. Fussell*, 2006-Ohio-6438.]

CHRISTINE T. MCMONAGLE, J.:

{¶ 1} Defendant-appellant, Carmilla Fussell, appeals from the judgment of the Common Pleas Court, rendered after a jury verdict, finding her guilty of assault on a police officer and sentencing her to 12 months incarceration. For the reasons that follow, we affirm.

{¶ 2} The events leading to Fussell's conviction occurred in the early morning hours of July 28, 2005. Middleburg Heights police officer James Duff testified at trial that he stopped Fussell at approximately 3:20 a.m. that morning for speeding. When asked for identification, Fussell gave Duff a false name and told him that she did not have her temporary driver's license with her. Smelling the odor of alcohol, Duff asked Fussell to exit the vehicle and take a field sobriety test, which she failed. Fussell then admitted to Duff that she had lied about her name because there was an outstanding warrant for her arrest on an earlier traffic violation. Duff then arrested Fussell for driving under the influence of alcohol.

{¶ 3} Duff testified that he transported Fussell to the Middleburg Heights police station. He took her into the booking room for processing, but Fussell put her head down on the table and would not answer any of his questions. Duff gave Fussell a blanket, because she appeared to be cold, and then completed the booking forms. He offered Fussell an opportunity to make a telephone call to arrange for a bond, but she refused to do so. Duff testified that he then had no choice but to put Fussell in a jail cell.

{¶ 4} Duff testified that standard operating procedures of the Middleburg Heights Police Department require the police, when putting a prisoner in a jail cell, to search the prisoner for contraband and then confiscate and inventory the prisoner's personal items, so the prisoner cannot hurt himself or later accuse the department of stealing or losing his property. Duff testified that he asked the female dispatcher at the station to assist Fussell with removing her jewelry and then left the room. Shortly thereafter, the dispatcher advised him that Fussell would not cooperate.

{¶ 5} According to Duff, he returned to the booking room and explained to Fussell that she needed to cooperate with the police because she could not remain in the booking room. Duff testified that he told Fussell that she could keep her street clothes on and "sleep it off" in a jail cell, but she needed to relinquish her jewelry. He told her that if she did not comply, the police would have to hold her down and take the jewelry off.

{¶ 6} Duff testified that when Fussell still refused to cooperate, he told the female dispatcher that he would hold Fussell's arm down, so she could take off the bracelets. When he put his hand on Fussell, she became "extremely agitated" and sprang to her feet. Duff ordered her to sit down. When she did not comply, Duff moved in closer and put his arm on her shoulder to get her to sit down on the bench. According to Duff, Fussell then "swung wildly" at him. She managed to get his arm off her shoulder, and then swung at his face, scratching the right side of his face with her fingernail.

{¶ 7} Duff was stunned for a moment, but then he grabbed Fussell's arm, pushed her up against the wall and forced her to the ground. With the assistance of the female dispatcher and Officer Paul Meyerholtz, who had come into the booking room after being alerted to the disturbance, the officers handcuffed Fussell, got her jewelry off, and put her in a jail cell.

{¶ 8} Officer Meyerholtz testified that when he came in the booking room, he observed Duff and Fussell struggling. When Meyerholtz intervened, Fussell began kicking at both him and Duff.

{¶ 9} Fussell's version of what occurred in the booking room differed from that of the officers. She testified that when Duff told her to remove her jewelry, she did not say anything. She assumed that Duff would leave the room, and when he did not, she just sat there. According to Fussell, Duff then said, "since you're not moving, I'll move for you," and yanked on her ponytail and tried to snatch her jewelry off. When Fussell brushed Duff's arm away, he took her arm and forced it behind her back. She then "put her weight down" to make it difficult for him to force her to the ground, so "he kind of was like slinging me around." Fussell admitted that she probably scratched Duff, but testified that she did not intend to do so and that Duff was likely scratched when he was "tossing and slinging [her] around."

{¶ 10} On cross-examination, Fussell testified that she had only one glass of champagne before Duff stopped her, but admitted that she pled guilty to the charge of driving under the influence of alcohol. She also admitted that during the field

sobriety tests, she had held herself and hopped around in an attempt to convince Duff not to issue a citation because she had to use the bathroom. Fussell further admitted that she was convicted in 2005 of a felony drug charge and passing a phony check.

PROSECUTORIAL MISCONDUCT

{¶ 11} In her first and second assignments of error, Fussell claims that she was denied her constitutional right to a fair trial because, during cross-examination, the prosecutor improperly asked her to comment on the truthfulness of Officer Duff's testimony. She objects to the following colloquy:

{¶ 12} "QUESTION: And it's your testimony that he [Duff] never left the room, like he told us he left you with a dispatcher, a female dispatcher?

{¶ 13} "ANSWER: He never left the room.

{¶ 14} "QUESTION: And that's your recollection?

{¶ 15} "ANSWER: Yes.

{¶ 16} "QUESTION: So Officer Duff then lied to this jury?

{¶ 17} "ANSWER: Yes."

{¶ 18} Fussell argues that it is improper for a prosecutor to ask a defendant to comment on the veracity of another witness, because such a determination is reserved exclusively to the jury. This court has held, however, that it is within the trial court's discretion to allow the prosecution, on cross-examination, to inquire whether another witness was lying. *State v. McCuller*, Cuyahoga App. No. 86592,

2006-Ohio-302, at ¶s 29-30; *State v. Carter*, Cuyahoga App. No. 84816, 2005-Ohio-2179, at ¶23; *State v. Curry* (Dec. 17, 1992), Cuyahoga App. No. 63438. Accordingly, we find no error.

{¶ 19} Moreover, even if we were to conclude that this single question was misconduct, we would not find the error reversible. A prosecuting attorney's conduct during trial does not constitute grounds for error unless the conduct deprives the defendant of a fair trial. *State v. Keenan* (1993), 66 Ohio St.3d 402, 402-405; *State v. Gest* (1995), 108 Ohio App.3d 248. The touchstone of a due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips* (1982), 455 U.S. 209, 71 L.Ed.2d 78, 102 S.Ct. 940. The effect of the prosecutor's misconduct must be considered in light of the whole trial. *State v. Durr* (1991), 58 Ohio St.3d 86, 94.

{¶ 20} Here, the prosecutor asked Fussell once whether Officer Duff had lied during his testimony. There is nothing in the record to indicate that this single question deprived Fussell of a fair trial. Rather, as discussed below, it is clear from the testimony presented at trial that there was sufficient evidence to convict Fussell, irrespective of the prosecutor's question.

{¶ 21} Appellant's first and second assignments of error are overruled.

RIGHT TO REMAIN SILENT

{¶ 22} In her third assignment of error, Fussell argues that the prosecutor's questions during trial about her failure to answer questions at the police station

during booking violated her Fifth Amendment right to remain silent after her arrest. We disagree.

{¶ 23} In the seminal case of *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, the United States Supreme Court held that the Fifth Amendment prohibits the admission into evidence of statements made by a defendant during custodial interrogation when the defendant has not been advised of certain rights. Subsequently, in *Pennsylvania v. Muniz* (1990), 496 U.S. 582, 110 L.Ed.2d 528, 110 S.Ct. 2638, the Supreme Court adopted the "routine booking question" exception to the requirements of *Miranda.* Under this exception, the police are allowed to ask questions pertaining to biographical matters, even if the accused has already invoked his right to remain silent. In order to fall within this exception, the questions must be part of the routine process normally attendant to arrest, custody, and record keeping and must not be intended to elicit incriminating statements. 496 U.S. at 601-602.

{¶ 24} Here, Officer Duff testified that after he brought Fussell to the police station, he brought her into the booking room "to initiate the booking process and the procedures for the processing of a DUI." The prosecutor's questions about Fussell's refusal to answer these booking questions were proper and Duff's testimony about Fussell's behavior (e.g., putting her head down on the table, ignoring him, refusing to take off her jewelry) was admissible into evidence. Accordingly, we find no violation of Fussell's right to remain silent.

THE STATE'S FAILURE TO CALL THE DISPATCHER TO TESTIFY

{¶ 25} During his closing argument, defense counsel argued that if the female dispatcher had been called to testify, she would have corroborated either Fussell's or Duff's testimony regarding what had happened. Defense counsel told the jury that the State could have subpoenaed the dispatcher and then argued:

{¶ 26} "Well, if it had been my responsibility to prove this young lady was not guilty, I certainly would have brought her back, but I wouldn't have brought her back before I talked to her, but they obviously talked to her because I don't know when she left this area but the only thing we know for sure is she's not here–"

{¶ 27} The trial judge then interrupted defense counsel, stating:

{¶ 28} "THE COURT: Wait a minute. Don't testify.

{¶ 29} "MR. WILLIS: I'm not testifying.

{¶ 30} "THE COURT: There is no evidence that they talked to her. Don't testify, Mr. Willis. Please stick to the evidence in the case."

{¶ 31} In her fourth and fifth assignments of error, Fussell asserts that the trial court erred in prohibiting defense counsel from arguing, during summation, that the jury could draw an inference adverse to the State in light of its failure to call the female dispatcher to testify at trial. She further contends that the trial court denied her a fair trial by reprimanding defense counsel when he attempted to make this argument. We disagree.

{¶ 32} Counsel may comment during closing argument upon the evidence adduced at trial. *Drake v. Caterpillar Tractor Co.* (1984), 15 Ohio St.3d 346, 347-348. Counsel is given wide latitude in making oral arguments to the jury, but may not make statements in argument which are obviously erroneous, misleading, or not supported by any evidence. Id.

{¶ 33} Here, the only testimony regarding the dispatcher's whereabouts came from Officer Duff, who testified that she had remarried and left the department. There is no evidence whatsoever in the record that the prosecutor or anyone else had ever spoken with the dispatcher, much less determined that her version of what happened differed from that of Officer Duff. Accordingly, defense counsel's argument to the jury that the State did not call the dispatcher because "obviously they talked to her" and she would have testified differently than Officer Duff was completely unsupported by the record. Therefore, the trial court did not err in admonishing defense counsel that he could not make such an argument to the jury.

{¶ 34} Appellant's fourth and fifth assignments of error are overruled.

CUMULATIVE EFFECT OF THE ALLEGED ERRORS

{¶ 35} In her sixth assignment of error, Fussell argues that the cumulative effect of the errors identified in assignments of error one through five so prejudiced her that she was denied due process of law. In light of our resolution of assignments of error one through five, this assignment of error is likewise without merit.

{¶ 36} Appellant's sixth assignment of error is overruled.

SUFFICIENCY AND WEIGHT OF THE EVIDENCE

{¶ 37} In Fussell's seventh assignment of error, she challenges the sufficiency and manifest weight of the evidence to support her conviction.

{¶ 38} A challenge to the sufficiency of evidence supporting a conviction requires the appellate court to determine whether the State met its burden of production at trial. *State v. Thompkins* (1997), 78 Ohio St.3d 380. An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. Id. The relevant inquiry 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. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 39} We note that although Fussell moved for acquittal at the close of the State's case, she failed to renew her motion for acquittal at the close of all the evidence. "'A defendant who is tried before a jury and brings a Crim.R. 29(A) motion for acquittal at the close of the State's case waives any error in the denial of the motion if the defendant puts on a defense and fails to renew the motion for acquittal at the close of all the evidence.'" *State v. Brooks*, Cuyahoga App. No. 82174, 2003-Ohio-4813, at ¶15, quoting *State v. Miley* (1996), 114 Ohio App.3d 738,

742; *State v. Fisher*, 148 Ohio App.3d 126, 129-130, 2002-Ohio-3026. Fussell, therefore, waived any challenge to the sufficiency of the evidence.

{¶ 40} Nonetheless, we believe the State presented sufficient evidence in this case from which a jury could conclude, beyond a reasonable doubt, that Fussell assaulted Officer Duff. R.C. 2903.13(A), regarding assault, provides that "no person shall knowingly cause or attempt to cause physical harm to another ***." R.C. 2903.13(C)(3) provides that if the victim of the offense is a peace officer, assault is a felony of the fourth degree.

{¶ 41} Fussell contends that the State failed to produce evidence that she acted knowingly in assaulting Officer Duff. According to Fussell, although she admitted swinging at Officer Duff, she did not know that he would be injured as a result of her swing, and, therefore, she did not have the requisite culpable mental state to sustain a conviction for assault. We disagree.

{¶ 42} A person acts knowingly, regardless of purpose, when she is aware that her conduct will probably cause a certain result or will probably be of a certain nature. *State v. Miller*, 96 Ohio St.3d 384, 2002-Ohio-4931, at ¶31. "'Probably' is defined as 'more likely than not' or a greater than fifty percent chance." *Miller v. Paulson* (1994), 97 Ohio App.3d 217, 222.

{¶ 43} Here, Officer Duff testified that Fussell "swung wildly" at him. He testified further that after she had successfully dislodged his arm from her shoulder, she attacked him. According to Duff, "[i]t was no longer an attempt on her part to

simply free herself of me, she was now coming at me." Officer Meyerholtz testified that when he entered the booking room, he saw Fussell standing in front of Officer Duff, with her arms up "in an aggressive posture" and then he saw her swing at Officer Duff. Meyerholtz testified further that when he intervened, Fussell began kicking at both him and Officer Duff.

{¶ 44} We find the officers' testimony, if believed, sufficient to demonstrate that Fussell knowingly attempted to cause physical harm to Officer Duff. She attacked him, even after she had dislodged his arm from her shoulder, and she kicked at both him and Officer Meyerholtz. Such actions indicate knowledge, or even desire, that injury will occur.

{¶ 45} While the test for sufficiency requires a determination of whether the State has met its burden of production at trial, a manifest weight challenge questions whether the State has met its burden of persuasion. *Thompkins*, supra at 390. When considering an appellant's claim that the conviction is against the weight of the evidence, the reviewing court sits essentially as a "'thirteenth juror' and [may] disagree with the fact finder's resolution of the conflicting testimony.'" *Thompkins*, supra at 387, quoting *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 72 L.Ed.2d 652, 102 S.Ct. 2211. The reviewing court must examine the entire record, weighing the evidence and considering the credibility of witnesses, while being mindful that credibility generally is an issue for the trier of fact to resolve. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. The court may reverse the judgment of conviction if it

appears that the fact finder, in resolving conflicts in the evidence, "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins*, supra at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. 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.

{¶ 46} Fussell argues that her conviction was against the manifest weight of the evidence because she did not knowingly attempt to injure Officer Duff. She argues that Officer Duff put his hands on her first and, therefore, she merely acted "reflexively," rather than knowingly. As set forth in the testimony, however, Fussell attacked Officer Duff even after she had managed to dislodge his arm from her shoulder. This testimony adequately supported a reasonable inference that Fussell acted knowingly.

{¶ 47} Moreover, Fussell's own testimony damaged her credibility. She admitted that she had given Duff a false name when he stopped her, because she had an outstanding warrant for her arrest. She also admitted that during the field sobriety tests, she held herself and hopped around in an attempt to get Officer Duff to think she had to use the bathroom, but then declined an opportunity to use the restroom at the police station because "they made me wait so long *** I guess I forgot about it." Further, she testified that she only had one glass of champagne before the traffic stop, but admitted that she pled guilty to the charge of driving under

the influence of alcohol. In light of these contradictions in Fussell's testimony, the jury did not lose its way in rejecting Fussell's version of what happened in the booking room and finding her guilty of assault on a peace officer.

{¶ 48} Appellant's seventh assignment of error is overruled.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. MCMONAGLE, JUDGE

SEAN C. GALLAGHER, P.J., and
MICHAEL J. CORRIGAN, J.*, CONCUR

(*Sitting by Assignment: Judge Michael J. Corrigan, Retired, of the Eighth District Court of Appeals.)