

[Cite as *State v. Jaime*, 2010-Ohio-5783.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94401

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MAJOR D. JAIME

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-523700

BEFORE: Gallagher, A.J., McMonagle, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: November 24, 2010
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SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant Major Jaime brings this appeal challenging his conviction by the Cuyahoga County Common Pleas Court for aggravated burglary. For the reasons set forth herein, we affirm.

{¶ 2} On May 1, 2009, a Cuyahoga County grand jury indicted Jaime on one count of aggravated burglary and one count of kidnapping. On November 12, 2009, a jury trial commenced. The state called three

witnesses, including the victim, Jacqueline Stacey, Jaimie's former girlfriend, who testified to the events that occurred in the early morning hours of April 24, 2009.

{¶ 3} Stacey testified she lived in an apartment overseen by the Cuyahoga Metropolitan Housing Authority ("CMHA") near the intersection of Division and W. 28th Street, in Cleveland, Ohio. Stacey met Jaime in the winter of 2009, and they dated for a short time before becoming engaged in March 2009. The couple broke off their engagement shortly thereafter, when, as Stacey testified, Jaime reported to the "workhouse." During the time Stacey and Jaime dated, Jaime kept some of his personal belongings at Stacey's apartment. He spent some nights with her there, although his name was not on the lease agreement. After the couple broke up, Stacey testified that she and Jaime would get together occasionally and have sex at her apartment.

{¶ 4} On April 23, Stacey and Jaime had been together in the early evening, drinking at a friend's house, but Jaime left before Stacey did. When Stacey returned home shortly after midnight, Jaime was, as she understood it, in her apartment to retrieve some of his personal belongings. Stacey thought Jaime had somehow gotten hold of her spare key and let himself into the apartment. She stated she had not given him her key. Stacey told

Jaime he was not allowed to be in her home without her permission. She then told him to leave, but when he refused, Stacey called the police.

{¶ 5} Jaime left Stacey's apartment before the police arrived. CMHA Patrol Officer Manuel Leon and another officer responded to a 911 call of a "male refusing to leave." The officers spoke with Stacey; she described Jaime and told the officers Jaime did not live in the apartment with her. When the officers were exiting the complex, they saw Jaime returning to the apartment.

Officer Leon informed Jaime that he would be a named suspect in a burglary report, and that if Jaime returned to Stacey's apartment, he would be arrested for criminal trespass. Jaime told the officers he lived there, but Officer Leon confirmed that Jaime's name did not appear on the lease agreement for the unit Stacey occupied. Furthermore, there was no mail or independent corroboration that Jaime resided there. The officers escorted Jaime off the property and instructed him several times that he was not to return.

{¶ 6} Around 3:00 a.m., Stacey awoke to the sound of kicking and banging on her front door, and she could hear Jaime outside her apartment screaming, "Bitch, give me my shit." Stacey did not let him inside her apartment. While Stacey tried to call out for help, she saw Jaime coming toward her inside the apartment from the direction of the porch. Jaime continued to yell at her to give him his belongings. Stacey testified that

Jaime grabbed her and hit her in the face. She also stated that he pulled her hair and choked her, causing her to black out for a short time. Stacey testified that Jaime threatened to throw her from the balcony if she continued to call for help.

{¶ 7} Officer Leon arrived at Stacey's apartment in response to a 911 call of "a male beating a female." At first, the officers were unable to enter the apartment through the front door because the lock was bent. Jaime was still in the apartment when the police arrived, and in fact, he opened the front door from the inside, allowing the police to enter. He was arrested at that time.

{¶ 8} According to Stacey and Officer Leon, Jaime had a gash on his arm that was bleeding profusely. Officer Leon, who investigated the scene, testified there were blood spatters throughout the apartment and that a large window near the porch door was broken. Officer Leon also testified that the broken glass and blood he saw had not been there when he was at the apartment earlier that evening. Broken glass with blood on it was found on the floor in the apartment and in the hallway outside the apartment.

{¶ 9} Photographs of Stacey's injuries showed bruising and minor cuts on her face; she also had a bald spot on her head where she claimed Jaime had pulled her hair out. Stacey denied medical treatment when EMS arrived on the scene. Jaime required medical attention from EMS.

Although Jaime told the officers Stacey had cut him with a knife, Officer Leon found no evidence that Jaime's laceration came from anything other than the broken glass from the window.

{¶ 10} According to Officer Leon, Jaime told him he was trying to locate a particular piece of paper with a number on it that he had left at Stacey's apartment. No paper meeting that description was found there.

{¶ 11} CMHA Detective Larry Jones conducted the investigation into the incident involving Stacey and Jaime. He stated that Jaime refused to make a statement to Officer Leon and then refused to talk to him when Det. Jones contacted him in jail. Det. Jones testified regarding the 911 calls that were received at 12:30 a.m. and 3:17 a.m. for the location of Stacey's apartment. The state introduced the call logs into evidence as business records, over the defense's objection. The person who made the call at 3:17 a.m. was never identified nor called as a witness at trial. Det. Jones also testified there was no mail in the apartment bearing Jaime's name to indicate he lived there.

{¶ 12} At the close of the state's case, Jaime made a Crim.R. 29 motion, which the court denied. The defense rested. The jury acquitted Jaime of kidnapping, but convicted him of aggravated burglary. The trial court sentenced Jaime to three years in prison and five years of postrelease control.

Jaime filed this timely appeal, raising four assignments of error for our review.

{¶ 13} “I. The defendant was denied a fair trial when the government introduced evidence of the defendant’s post arrest silence.”

{¶ 14} In his first assignment of error, Jaime argues that there were several occasions during trial when Det. Jones commented improperly on his post-arrest silence. Specifically, Jaime points to Det. Jones’s testimony that during the course of his investigation, Jaime refused to talk to him. Later, when the prosecutor asked Det. Jones whether the arresting officers found mail or other evidence at the apartment that indicated Jaime lived there, Det. Jones responded, “[The arresting officers] told me that [Jaime] did not want to talk to them and he only wanted to talk to real police and when I attempted to talk to him, I was told that he did not want to talk to me. So I could not get his side of the story.”

{¶ 15} In *State v. Tolliver*, Cuyahoga App. No. 86121, 2006-Ohio-2312, this court recognized that “the *Miranda* decision precludes the substantive use of a defendant’s silence during police interrogation to prove his guilt.” The Ohio Supreme Court has recognized, however, that “where evidence has been improperly admitted in derogation of a criminal defendant’s constitutional rights, the admission is harmless ‘beyond a reasonable doubt’ if the remaining evidence alone comprises ‘overwhelming’ proof of defendant’s

guilt.” *State v. Williams* (1983), 6 Ohio St.3d 281, 452 N.E.2d 1323, citing *Harrington v. California* (1969), 395 U.S. 250, 254, 89 S.Ct. 1726, 23 L.Ed.2d 284.

{¶ 16} Jaime did not object to the testimony about his post-arrest silence at trial; therefore, we review the admission of that evidence under a plain error standard. See *State v. Gooden*, Cuyahoga App. No. 82621, 2004-Ohio-2699. “Plain error does not exist unless it can be said that, but for the error, the outcome of the trial would clearly have been otherwise.” *Id.*, citing *State v. Moreland* (1990), 50 Ohio St.3d 58, 552 N.E.2d 894.

{¶ 17} Jaime argues that there were several references to his post-arrest silence, but we note that there were only two occasions. First, Det. Jones commented on Jaime’s post-arrest silence in response to the state’s question regarding the course of his investigation. Where the evidence that was introduced reveals it was an inquiry only into the course of the police investigation of the incident and police procedure, rather than an insinuation of the defendant’s guilt, there is no error. See *Gooden*, *supra*.

{¶ 18} Det. Jones’s subsequent reference to Jaime’s decision not to speak to him was in response to the state’s question about whether there was mail or other evidence in the apartment to indicate Jaime resided there. Nothing in the prosecutor’s question indicates that it was designed to elicit a comment that Jaime was in jail. The prosecutor could not have predicted that Det.

Jones would have responded that Jaime refused to talk to him or Officer Leon in answer to his question.

{¶ 19} Furthermore, we find that if there were any error, it was harmless beyond a reasonable doubt. See *State v. Vrona* (1988), 47 Ohio App.3d 145, 547 N.E.2d 1189. The evidence presented at trial through the victim's testimony was enough to establish Jaime's guilt. Jaime's first assignment of error is overruled.

{¶ 20} "II. The trial court erred in admitting the police dispatch call logs as business records."

{¶ 21} In his second assignment of error, Jaime argues that the police call dispatch logs were improperly admitted at trial since they fall under the exclusion provided for in Evid.R. 803(8). Conversely, the state argues that the call logs were properly admitted as a business record under Evid.R. 803(6).

{¶ 22} The admission of evidence lies within the broad discretion of the trial court. *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 239, 2005-Ohio-4787, 834 N.E.2d 323. A reviewing court will uphold an evidentiary decision absent an abuse of discretion that has affected the substantial rights of the adverse party or is inconsistent with substantial justice. *Id.*

{¶ 23} Evid.R. 803 states in relevant part: “The following are not excluded by the hearsay rule, even though the declarant is available as a witness: * * * (6) A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.”

{¶ 24} In *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621, the Ohio Supreme Court, relying on *Crawford v. Washington* (2004), 541 U.S. 36, 24 S.Ct. 1354, 158 L.Ed.2d 177, distinguished between testimonial and nontestimonial statements and “indicated that business records are, by their nature, not testimonial.” (Internal quotations omitted.)

“The essence of the business record hearsay exception contemplated in *Crawford* is that such records or statements are not testimonial in nature because they are prepared in the ordinary course of regularly conducted business and are * * * not prepared for litigation.” *State v. Sims*, Cuyahoga App. No. 89261, 2007-Ohio-6821 (ballistic test was found nontestimonial because the conclusions stated in the report were fact, not opinion).

{¶ 25} Likewise, we find that the 911 dispatch logs introduced by the state were admissible under the “business record” exception to the hearsay rule. A log showing that calls were made to 911 was factual evidence, not opinion. The state laid a proper foundation with Det. Jones, who testified that the call logs were generated simultaneously with emergency calls coming into police dispatch. He identified the printout as being a true and accurate report of dispatch calls, their originating phone number, and time they were received, with brief descriptions of the reason for the calls. Furthermore, we find that Det. Jones is a qualified witness for purposes of Evid.R. 803(6) and these call logs.

{¶ 26} Jaime argues that the call logs fall under Evid.R. 803(8),¹ which would exclude them, as matters in a criminal case that were observed by police personnel. We disagree. The call logs were not offered to prove that a “male [was] beating a female,” which may constitute properly excluded hearsay. Instead, the state introduced the call logs to corroborate Det. Jones’s course of investigation.

¹ Evid.R. 803(8) allows admission of the following as exceptions to the hearsay rule: “Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, *excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel*, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.” (Emphasis added.)

{¶ 27} Even if there had been some error in the admission of the call logs, we find the error would have been harmless beyond a reasonable doubt because the state offered independent evidence to verify that Jaime had beaten Stacey while in her apartment after breaking in. Jaime's second assignment of error is overruled.

{¶ 28} "III. The trial court committed plain error in allowing without a limiting instruction testimony that the appellant was previously incarcerated."

{¶ 29} In his third assignment of error, Jaime argues that his due process rights were violated when the trial court allowed witnesses to testify that he had previously been incarcerated. Specifically, he argues that it was improper to allow testimony that left the jury with the impression he was a convict who is more likely than not to have committed the crime he was charged with. Since Jaime failed to object to testimony regarding his prior incarcerations, we review his claim under a plain error standard.

{¶ 30} Ohio law prohibits "the introduction of evidence tending to show that a defendant has committed another crime wholly independent of the offense for which he is on trial * * *." *State v. Hector* (1969), 19 Ohio St.2d 167, 249 N.E.2d 912, paragraph one of the syllabus; see, also, *State v. Breedlove* (1971), 26 Ohio St.2d 178, 271 N.E.2d 238. "This rule is necessary because the average person is likely to more readily believe that a person is

guilty of the crime charged if the person has previously been convicted of a crime.” *State v. Pritchard* (Oct. 1, 1981), Cuyahoga App. No. 43216.

{¶ 31} Jaime identifies two occasions on which Stacey commented that he had been in the “workhouse.” Stacey’s reference to his prior incarceration was not an explicit statement that Jaime had a criminal record. She testified about his time in the “workhouse” only to show that he did not live at her apartment after they called off their engagement. Det. Jones’s reference to having contacted Jaime in jail did not violate the general rule in *Hector* because Det. Jones was referring to Jaime’s incarceration in connection with the charges in this case.

{¶ 32} We do not find these references in the context in which they were made violated Jaime’s due process rights, in light of the overwhelming evidence that Jaime committed aggravated burglary. Stacey testified that Jaime broke into her apartment, uninvited, and assaulted her. Jaime has not demonstrated how the outcome of the trial would clearly have been different had the jury not heard from the victim that he had been in a workhouse.

{¶ 33} Even if it was error for the evidence of Jaime’s prior incarceration to be heard by the jury, we find that the error was harmless beyond a reasonable doubt. Jaime’s third assignment of error is overruled.

{¶ 34} “IV. Trial counsel was ineffective for failing to object to inadmissible evidence that prejudiced the appellant’s defense.”

{¶ 35} In his fourth assignment of error, Jaime argues that he was given ineffective assistance of counsel because his attorney failed to object to inadmissible evidence. Specifically, Jaime argues that his attorney’s failure to object to evidence of his post-arrest silence and prior incarceration rendered his counsel ineffective. We disagree.

{¶ 36} In order to substantiate a claim of ineffective assistance of counsel, the appellant must show that (1) counsel’s performance was deficient and (2) the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *State v. Trimble*, 122 Ohio St.3d 297, 310, 2009-Ohio-2961, 911 N.E.2d 242, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Judicial scrutiny of defense counsel’s performance must be highly deferential. *Strickland*, 104 S.Ct. at 2065. In Ohio, there is a presumption that a properly licensed attorney is competent. *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905.

{¶ 37} The Ohio Supreme Court has held that a reviewing court should not “second-guess trial strategy decisions, and ‘a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’” *State v. Mason* (1998), 82 Ohio St.3d 144, 694

N.E.2d 932, quoting *Strickland*; see, also, *State v. Bey* (1999), 85 Ohio St.3d 487, 709 N.E.2d 484. “Debatable trial tactics and strategies do not constitute a denial of effective assistance of counsel.” *State v. Clayton* (1980), 62 Ohio St.2d 45, 402 N.E.2d 1189.

{¶ 38} Although Jaime’s attorney failed to object to mention of his post-arrest silence, we note that the blame for that evidence reaching the jury falls squarely on the prosecutor’s shoulders. Choosing not to highlight the evidence, as defense counsel did, falls within the ambit of trial strategy. Defense counsel could easily have wanted to avoid drawing further attention to Jaime’s workhouse detention and therefore did not object. See *State v. Day*, Cuyahoga App. No. 79368, 2005-Ohio-281.

{¶ 39} Jaime has not demonstrated that but for his attorney’s decision not to object to any inadmissible evidence, the outcome of the trial would have been different. Having overruled Jaime’s first and third assignments of error, we likewise find he was not denied effective assistance of counsel. Jaime’s fourth assignment of error is overruled.

Judgment 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.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

CHRISTINE T. McMONAGLE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR