[Cite as *State v. Gray*, 2009-Ohio-4821.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-12-294
	:	O P I N I O N
- vs -		9/14/2009
	:	
WANDA CAROL GRAY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-02-0204

Robin N. Piper, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

Fred Miller, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

BRESSLER, P.J.

{¶1} Defendant-appellant, Wanda Gray, appeals the decision by the Butler County Court of Common Pleas denying her motion for a new trial on her claim of ineffective assistance of trial counsel.

{¶2} Appellant was charged with burglary, a second-degree felony, after police contend she forced open a sliding glass door and entered the victim's residence with the purpose of committing a criminal offense therein.

{¶3} Appellant's case was tried to a jury which returned a guilty verdict as charged. New counsel for appellant then filed a motion for a new trial, arguing that appellant was prejudiced by her trial counsel's representation. A hearing was held before a different trial judge, who denied the motion for a new trial. After sentencing, appellant instituted this appeal, setting forth a single assignment of error.

{¶4} Assignment of Error:

{¶5} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT OVERRULED HER MOTION FOR NEW TRIAL ON THE BASIS OF INEFFECTIVE ASSISTANCE OF COUNSEL [SIC]."

{¶6} Crim.R. 33 states, in pertinent part, that a new trial may be granted on a motion of the defendant for any of the following causes affecting materially his substantial rights: irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial.

{¶7} A motion for a new trial pursuant to Crim.R. 33 is addressed to the sound discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion. *State v. Schiebel* (1990), 55 Ohio St.3d 71, paragraph one of the syllabus.

{¶8} To establish ineffective assistance of counsel, appellant must show that counsel's actions fell below an objective standard of reasonableness and that appellant was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 687-88, 693-95, 104 S.Ct. 2052.

{¶9} To demonstrate an error in counsel's actions, appellant must overcome the strong presumption that licensed attorneys are competent, and that the challenged action is the product of sound trial strategy and falls within the wide range of reasonable professional assistance. Id. at 689-90. Appellant must demonstrate that, due to her attorney's ineffectiveness, her trial was so demonstrably unfair that there is a reasonable probability the

result would have been different absent her attorney's deficient performance. Id. at 687-88, 693-95; *State v. Ghee*, Madison App. No. CA2008-08-017, 2009-Ohio-2630, ¶21-22.

{¶10} Appellant argues that she should receive a new trial because she was prejudiced when her trial counsel failed to file a notice of alibi, and object to inadmissible hearsay evidence regarding the alleged offense, including whether appellant had permission to be in the victim's home and any alleged theft from the home.

{¶11} The record indicates that the victim of the alleged burglary did not testify at trial. This court has not been informed of the reason for the victim's absence. Two witnesses testified for the state. Without objection from appellant's trial counsel, both witnesses testified to statements made by the victim to establish elements of the charge.

{¶12} According to the record, the state presented the testimony of the victim's neighbor, who provided the description of a car and the person he saw exit the car and walk around to the back of the victim's house on the afternoon at issue. The neighbor testified that after he notified the victim about his observations, the victim later called him and told him someone had broken into his sliding door in the back of the house.

{¶13} The state's second witness, Det. Rebecca Ervin, was the police officer responsible for obtaining and processing evidence at the scene. She indicated that she received information about the alleged burglary scene from the victim or from the first responding officer who had already talked with the victim.

{¶14} The detective testified that the victim or the first responding officer told her the victim's pry bar was found outside the back sliding glass door and that $2,400 in cash was missing from the victim's kitchen.

{¶15} The detective testified that the victim said he had a photograph on his cell phone of the person he thought was responsible and the detective and the victim met with the neighbor who stated that the cell phone image depicted the "dude" he saw at the victim's

house. Det. Ervin also testified that the victim identified the individual in the cell phone photograph as "Wanda Gray." The detective told the jury that the victim told her appellant did not have permission to be at his house that day. Det. Ervin eventually met with appellant at her home, where the detective observed a car in appellant's driveway matching the description given by the victim's neighbor.

{¶16} Appellant testified in her own defense that she was not at the victim's house that day and that she left her house only briefly to take someone to work. Appellant indicated that the victim approached her on the afternoon in question, accused her of stealing "weed" from him, and took her photo with his cell phone camera.

{¶17} Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted, and is generally not admissible unless it falls within one of the recognized exceptions. Evid.R. 801(C); Evid.R. 802; *State v. Steffen* (1987), 31 Ohio St.3d 111, 119.

{¶18} The victim's out-of-court statements, which included statements that appellant did not have permission to be at his home and that something was stolen from his home, were clearly hearsay. The hearsay statements of the victim directly pertained to the issue of appellant's guilt.

{¶19} In the motion for a new trial, the arguments and discussion centered on whether the hearsay statements could have been properly admitted as the hearsay exceptions of present sense impression or excited utterance.

{¶20} The "present sense impression" exception involves a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness. See Evid.R. 803(1). *State v. Graves*, Lorain App. No. 08CA009397, 2009-Ohio-1133, ¶4 (when the statement is the product of reflective thinking rather than spontaneous perception,

the exception does not apply).

{¶21} "Excited utterance" is a statement relating to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition. See Evid.R. 803(2); see, also, *State v. Leide*, Butler App. No. CA2005-08-363, 2006-Ohio-2716, ¶13, citing *State v. Taylor* (1993), 66 Ohio St.3d 295 (multiple-part test to qualify under excited utterance exception).

{¶22} In the case at bar, the victim spoke with the neighbor and later with police some time after the alleged break-in had allegedly transpired. The statements made to police and the identification of the defendant came after the victim had some time to reflect on the events, and had engaged in some investigation of the person he suspected of the offense.

{¶23} The facts presented in this case cannot substantiate the admission of the victim's statements as a spontaneous statement made while perceiving the event or immediately thereafter under the present sense impression exception or as statements delivered under the nervous excitement of the startling occurrence for the excited utterance exception.

{¶24} We note that the state did not attempt to lay the foundation for any hearsay exception during its presentation of evidence at the trial; it simply offered the out-of-court statements of the victim unchallenged by appellant's counsel. The statements of the victim were crucial to show the elements of the second-degree felony offense. See R.C. 2911.12(A)(2) (by force, stealth, or deception did trespass in an occupied structure…that is the permanent habitation of any person when that person is present or likely to be present, with purpose to commit in the habitation any criminal offense).

{¶25} Regardless of whether the state could have properly introduced the hearsay statements of the victim at trial under some sort of exception, the failure of appellant's attorney to object to the admission of the victim's out-of-court statements deprived appellant

of her right to confront her accuser.

{¶26} The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." *Davis v. Washington* (2006), 547 U.S. 813, 821, 126 S.Ct. 2266; *Pointer v. Texas* (1965), 380 U.S. 400, 403-406, 85 S.Ct. 1065 (Sixth Amendment is made applicable to the states through the Fourteenth Amendment to the United States Constitution); see, also, Section 10, Article I, Ohio Constitution (in any trial, in any court, party accused shall be allowed to meet the witnesses face to face).

{¶27} The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford v. Washington* (2004), 541 U.S. 36, 61-62, 124 S.Ct. 1354 (Thomas, J., concurring in part and concurring in judgment).

{¶28} A witness' testimonial, out-of-court statement offered against an accused to establish the truth of the matter asserted is barred under the Confrontation Clause unless the witness is unavailable and the accused had a prior opportunity to cross-examine the witness. *Crawford* at 53-54; *Davis* at 821 (a critical portion of this holding is the phrase "testimonial statements;" only statements of this sort cause the declarant to be a "witness" within the meaning of the Confrontation Clause; it is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause); *Greene v. McElroy* (1959), 360 U.S. 474, 496, 79 S.Ct. 1400 (primary reason for protecting an accused's right to confrontation is to provide the accused the opportunity to show that evidence against the accused is untrue); *State v. Peeples*, Mahoning App. No. 07 MA 212, 2009-Ohio-1198, ¶19 (if the statement is nontestimonial, it is merely subject to the regular admissibility requirements of the hearsay rules).

{¶29} In situations involving statements made to police, the statements are nontestimonial if made during the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable the police to meet an ongoing emergency. *Davis* at 822. Statements are testimonial if they are made under circumstances objectively indicating that there is no ongoing emergency and the primary purpose of the police interrogation is to establish past events relevant to a later criminal case. Id.; *Peeples* at ¶21.

{¶30} Whether the victim's statements made to either the neighbor or the police fell under any recognizable hearsay exception, the out-of-court statements made to the police officers under the circumstances of this case were clearly testimonial and subject to the protections of the Confrontation Clause. Contrary to the assertions otherwise, the state's case against appellant was based upon the victim's out-of-court statements, which were not subject to cross-examination.[1] See *Melendez-Diaz v. Massachusetts* (2009), ___ U.S. ____, 129 S.Ct. 2527 (the framers of the Constitution were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation; court was unaware of any authority that held that a person who volunteers his testimony is any less a "witness against" the defendant, than one who is responding to interrogation).

{¶31} Appellant demonstrated that, due to her attorney's ineffectiveness, her trial was so demonstrably unfair that there is a reasonable probability the result would have been different absent her attorney's deficient performance. See *Williamson v. United States* (1994), 512 U.S. 594, 598,114 S.Ct. 2431 (the hazards of out-of-court statements are that

1. The trial judge who heard the motion for a new trial acknowledged that there may be *Crawford v. Washington* confrontation issues. The trial judge did not rule on the issue, apparently because it was not raised by counsel filing the motion for a new trial. We find that the failure to object to the denial of the right of cross-examination would constitute plain error and is an essential part of the ineffectiveness claim. See *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68 (definition of plain error).

the declarant might be lying, have faulty memory, might have misperceived events, or his words misunderstood or taken out of context; these hazards might be minimized for statements made in court due to a witness' awareness of the gravity of the proceedings, the fact-finder's ability to observe a witness' demeanor, and, most importantly, the opponent's right to cross-examine).

{¶32} The judge hearing the motion for a new trial found that appellant's trial counsel did not object to the victim's out-of-court statements because he believed they were admissible as some hearsay exception, "so, he made a conscious decision not to object." The trial court stated that appellant's trial counsel had "a strategy here." Counsel pursued the specific defense that appellant was not at the house that day and that the victim had an ulterior motive in reporting a theft. According to the trial court, "The fact that the [strategy] didn't work out, that is a separate matter, but that doesn't give rise to a *Strickland v. Washington* ineffective assistance of claim." [sic]

{¶33} Appellant's trial counsel testified at the hearing that he now believed there were instances where he should have objected based on hearsay and that he made mistakes. Trial counsel testified that due to his inexperience, his representation was deficient, it affected the outcome of the trial, and appellant received the ineffective assistance of counsel as established under *Strickland*. Trial counsel indicated that he thought at the time that the victim's statements might be admissible under some exception. According to trial counsel, "It was not a trial strategy."

{¶34} The trial court abused its discretion when it determined that the conduct of trial counsel constituted trial strategy and that appellant was afforded effective counsel in reference to the admission, without objection, of the out-of-court statements of the victim. Trial counsel's inexperience resulted in an accuser testifying against his client without having to appear in court to do so. Trial counsel was mistaken as to the admissibility of the

testimony; he did not employ a strategy to permit the evidence to be used against his client because he thought it would serve his client's best interest.

{¶35} Appellant also argues that her trial counsel was ineffective when he failed to file a notice of alibi, which prompted the trial court to prohibit her from presenting the alibi testimony of her mother. See Crim.R. 12.1. While appellant was not able to present her alibi witness, we cannot say from the record that the result of the trial would have been different, absent the deficient performance with regard to the alibi issues.

{¶36} In conclusion, appellant was denied the effective assistance of trial counsel to her prejudice. The trial court abused its discretion when it found no ineffective assistance of trial counsel by the failure to object to the admission, without cross-examination, of the out-of-court statements of appellant's accuser.

{¶37} The trial court's decision to deny appellant's motion for a new trial is reversed. Appellant's conviction is vacated and this matter is remanded to the trial court for a new trial consistent with this opinion and in accordance with the law.

POWELL and YOUNG, JJ., concur.

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