[Cite as *Westlake v. Filiaggi*, 2010-Ohio-4481.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93599

CITY OF WESTLAKE

PLAINTIFF-APPELLEE

vs.

KATHLEEN FILIAGGI

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Rocky River Municipal Court
Case No. 09 CRB 0481

BEFORE: Rocco, P.J., McMonagle, J., and Stewart, J.

RELEASED AND JOURNALIZED: September 23, 2010

ATTORNEY FOR APPELLANT

Paul A. Griffin
Paul A. Griffin Co., L.P.A.
600 Broadway, Second Floor
Lorain, Ohio 44052

ATTORNEY FOR APPELLEE

Andrea F. Rocco
Prosecutor
City of Westlake
27700 Hilliard Boulevard
Westlake, Ohio 44145

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant, Kathleen Filiaggi, appeals from her conviction for assault following a jury trial in the Rocky River Municipal Court. She complains that she received ineffective assistance of counsel, that the city prosecutor made improper closing arguments, that the evidence against her was insufficient, and that the manifest weight of the evidence did not support the verdict. Although we find sufficient evidence in the record to support the verdict, we hold that the cumulative effect of numerous errors

deprived appellant of a fair trial. Therefore, we reverse and remand for a new trial.

Procedural History

{¶ 2} Appellant was charged with assault in violation of R.C. 2901.13(A) [sic][1] in a complaint filed in the municipal court on March 12, 2009. She entered a not guilty plea on March 19, 2009. A jury trial was scheduled for May 20, 2009.

{¶ 3} At the trial, the jury heard the testimony of the victim, Cheryl Loving, nurses John Staunton and Kurt Kless, and Westlake Police Officer Andrew Fleck. The appellant also testified on her own behalf. At the conclusion of the trial, the jury found appellant guilty of assault. On June 8, 2009, the court sentenced appellant to a $250 fine plus costs and placed her on two years of community control sanctions with conditions. The court stayed execution of the sentence pending this appeal.

Facts

{¶ 4} At the trial, the victim, Cheryl Loving, testified that she was admitted to the intensive care unit of St. John West Shore Hospital in Westlake, Ohio on March 4, 2009 because she had tried to commit suicide.

[1]This is obviously a typographical error. R.C. 2901.13(A) sets forth the statute of limitations for criminal prosecutions. Subsequent documents after the complaint in this case, including the warrant issued for appellant's arrest, refer to the offense as a violation of R.C. 2903.13(A).

Appellant acted as her nurse beginning at 3:00 p.m. on March 5. Loving said that at approximately 8:00 p.m., she asked appellant for her medications for COPD and stomach problems but appellant ignored her. A "couple hours" later, Loving felt "jittery" and asked for her medications again but was told that she had to wait until the doctors came in. Although "both doctors come [sic] in," Loving still did not receive her medication. At about 12:00, she "needed to get up and walk," so she put on the pajamas she had come to the hospital in, removed monitors from her arms and chest and cuffs from her legs, and got up to walk.

{¶ 5} Appellant came out of another patient's room. Loving told her, "I need to walk," but appellant "was very angry about it." She told Loving to go back to her room and threatened to "call security and have you tied down" if she did not comply. Loving asked for appellant's name so that she could report appellant for being rude. Appellant gave Loving her first name, but not her last name.

{¶ 6} Loving returned to her room, but went back out to the nurse's station and asked appellant for a pencil to write her name down. Appellant gave her a pencil without any lead. Loving put the pencil down on the desk and asked for something else she could write with. Appellant came around the desk and "started to strangle" Loving. Two other nurses pulled appellant away from Loving and told Loving to return to her room and call security.

Loving called the Westlake Police Department from her room. The altercation left a "dime-sized" mark on Loving's neck.

{¶ 7} John Staunton, a registered nurse in the intensive care unit at St. John West Shore, testified that he was working the 7:00 p.m. to 7:00 a.m. shift. He was assigned to a patient in the room adjacent to Loving's room. He heard Loving become upset because she had not gotten her medications. Later, he saw Loving at the nurse's station. Appellant moved very close to Loving; Loving touched appellant. Appellant then put her hand on Loving's neck. When Loving complained that appellant was choking her, appellant told Loving, "If you touch me again, I'll choke you again." Staunton and another nurse, "Kurt," pulled appellant away from Loving. The charge nurse called security. Staunton took over Loving's care after this incident. In assessing Loving, he noted a dime-sized red mark on the right side of Loving's neck.

{¶ 8} Kurt Kless was also a registered nurse in the intensive care unit at St. John West Shore and also worked the 7:00 p.m. to 7:00 a.m. shift. He was assigned to care for a patient in another room adjoining Loving's room. At approximately midnight, he heard appellant tell Loving that she could not get up, and if she tried to go any where, appellant would tie her down. A little later, he saw appellant approach Loving and a patient care assistant who was walking with Loving in the hallway. Appellant told Loving to get

back in her room because she was not allowed to walk around. At approximately 1:00 a.m., Loving came to the nurse's station and asked for appellant's last name. Appellant came out of another patient's room and told Loving that she was not going to tell her her last name and told Loving to get back to her room. Appellant went back into the other patient's room. When she came back out, Loving was still at the nurse's desk. Appellant walked up to Loving, bumping into her and causing her to back into the nurse's station. Appellant told Loving, "[g]et back in your room, I'm not gonna tell you again." Appellant also "grab[bed] [Loving] by her throat." Loving told appellant, "[y]ou're choking me," and appellant replied "Grab me again, I'm gonna choke you again." Kless and Staunton then separated appellant and Loving. Staunton took Loving back to her room.

{¶ 9} Westlake police officer Andrew Fleck testified that he took statements from Loving, Staunton, Kless, and appellant.

{¶ 10} Appellant testified that when she came on duty at 7:00 p.m., she was briefed by the day shift nurse about problems she had had with Loving. Appellant then assessed Loving, reconnected her to her monitors, and "firmly told her, 'You are gonna keep your monitor on.' " She also told Loving to press the call bell if she needed to get up for any reason.

{¶ 11} Loving asked for her medications. Appellant checked her chart, but all she saw listed there was a breathing medication that Loving was not

due to take until 10:00 p.m. Appellant then left to work with another patient.

{¶ 12} A nursing assistant told appellant that Loving asked for her medications again. Appellant told her she would be there as soon as she could. When she came out of the other patient's room 15 or 20 minutes later, Loving was walking in the hallway with a nursing tech. Appellant told Loving that she could not take a walk and needed to return to her room. Appellant escorted Loving back to her room, where Loving asked for her medications again. Appellant then went back to the nurse's station to check Loving's chart, which still did not show any doctor's orders for medication. Loving called for appellant using the call bell, and when appellant entered her room, she asked appellant her last name and the names of the doctors Loving had seen. Appellant told Loving that "I'm not gonna deal with this anymore" and left the room.

{¶ 13} Appellant went to work with her other patient. When she left the other patient's room, she saw Loving at the nursing station. Appellant told Loving she needed to go back to her room. Loving responded that she would not, and asked for a pen. Appellant gave her a pencil. Appellant came around the desk to escort Loving back to her room. Loving raised her arm, so appellant grabbed Loving's arm with her left hand. Appellant then grabbed Loving's jaw to push her back away from her.

Law and Analysis

{¶ 14} Appellant's fourth assignment of error argues that her conviction is not supported by sufficient evidence and contravenes the manifest weight of the evidence. We disagree. Appellant admitted that she put her hand on Loving's jaw and pushed her backward. Witnesses observed a mark on Loving's neck as a result. Witnesses also heard Loving complain that appellant was choking her. While appellant argues that she did not intend to injure Loving, intent is not required. The statute only requires the state to show appellant knowingly caused or attempted to cause physical harm. The use of sufficient force to leave a mark, as well as Loving's complaint that she was choking, were sufficient for the jury to conclude that appellant was "aware that [her] conduct [would] probably cause" physical harm, that is, an "injury * * * or other physiological impairment, regardless of its gravity or duration." R.C. 2901.22(B) and 2901.01(A)(3). Therefore, we overrule the fourth assignment of error.

{¶ 15} Appellant's third assignment of error contends that the cumulative effect of numerous errors deprived her of a fair trial. Under the cumulative error doctrine, "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Garner*, 74

Ohio St.3d 49, 64, 1995-Ohio-168, 656 N.E.2d 623; *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256, paragraph two of the syllabus.

{¶ 16} In this case, the prosecutor introduced irrelevant and prejudicial evidence and repeatedly encouraged the jury to accept her evaluation of the facts of the case as demonstrating guilt. While these errors might not be considered reversible error in themselves, taken together, we believe that they deprived appellant of a fair trial.

{¶ 17} First, the prosecutor cross-examined appellant extensively regarding the fact that she was discharged from her employment at St. John West Shore Hospital, and the fact that St. John reported her to the Ohio Nursing Board:

{¶ 18} "Q. St. John's fired you, didn't they?

{¶ 19} "A. Correct.

{¶ 20} "Q. And the head of St. John's actually reported you to Ohio Nursing Board?

{¶ 21} "A. Correct. He said that's policy.

{¶ 22} "* * *

{¶ 23} "Q. Is it policy to fire somebody —

{¶ 24} "A. I have no idea.

{¶ 25} "Q. — just because a patient complains?

{¶ 26} "A. I have no idea.

{¶ 27} "* * *

{¶ 28} "Q. Are you telling me you aren't aware that — that 11 and a half years you've been a nurse in all of these very volatile units, that patients, as you pointed out, come in psychotic, that they don't make allegations that are completely baseless?

{¶ 29} "A. I've never had one on me, no.

{¶ 30} "* * *

{¶ 31} "Q. Are you aware that there were statements taken by Mr. Kless and Mr. Staunton?

{¶ 32} "A. Correct.

{¶ 33} * *

{¶ 34} "Q. As well as another fella that was on unit?

{¶ 35} "A. Bob, the charge nurse, (unintelligible).

{¶ 36} "Q. And you aware [sic] that those — all those documents were forwarded to the head of St. John's?

{¶ 37} "A. I believe they were, yeah, (unintelligible).

{¶ 38} "Q. So how are you telling me there was not an investigation done?"

{¶ 39} Thereafter, counsel stipulated that the hospital conducted an investigation, that the defendant may or may not have been aware of the investigation, but that the jury would not be told the conclusion of the

investigation. The prosecutor referred to this testimony in closing argument when she suggested that "[o]bviously the hospital didn't think it was a good thing to — to accept or condone and she's no longer working there."

{¶ 40} Appellant's discharge from her employment and the report to the state nursing board about this incident had no relevance to appellant's prosecution for assault. The sole purpose of this testimony was to buttress the state's case by showing that appellant's employer had taken adverse action against appellant based on the same behavior. Appellant was substantially prejudiced by this line of questioning.

{¶ 41} In addition to buttressing its case with evidence that plaintiff lost her employment as a result of this incident, the state also mischaracterized the evidence about the assault. During closing argument, the prosecutor repeatedly stated that appellant "aggressively moved toward" the victim, "charged" her, and "aggressively charged" her. These arguments imply that appellant approached the victim with the purpose of attacking her. There is no evidence in the record to support this characterization of appellant's actions.

{¶ 42} Further, the prosecutor improperly encouraged the jury to give weight to the very fact of this prosecution by informing the jury that "I get reports all the time from hospitals where patients like to say, oh, my nurse was — manhandled me * * * and you know what, Ladies and Gentlemen, and

officers go out there and they talk to everybody that was in the room or on the unit that night, and never has there been a charge filed by me. Because when you get the full story, Ladies and Gentlemen, you find that there was a — that whatever it was, there was no manhandling." There was no evidence in the record to support this argument. Even if there was, it is improper for a prosecutor to argue that the jury should find the defendant guilty because the prosecutor never previously believed a complaint that a nurse had assaulted a patient.

{¶ 43} Taken together, appellant's right to a fair trial was prejudiced by the prosecutor's mischaracterization of the evidence, her attempt to use appellant's discharge from employment as evidence that she assaulted the victim, and her efforts to convince the jury that it should rely upon her judgment in bringing the prosecution to find appellant guilty. Therefore, we reverse and remand for a new trial.

Reversed and remanded for further proceedings consistent with this opinion.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

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KENNETH A. ROCCO, PRESIDING JUDGE

CHRISTINE T. McMONAGLE, J., and
MELODY J. STEWART, J., CONCUR