[Cite as *State v. Kronenberg*, 2018-Ohio-4331.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106118

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHELLE KRONENBERG

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-17-614825-A
Application for Reopening
Motion No. 519228

RELEASE DATE: October 23, 2018

FOR APPELLANT

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LARRY A. JONES, SR., J.:

{¶1} Michelle Kronenberg has filed a timely application for reopening pursuant to App.R. 26(B). Kronenberg is attempting to reopen the appellate judgment, rendered in *State v. Kronenberg*, 8th Dist. Cuyahoga No. 106118, 2018-Ohio-1962, that affirmed her conviction and sentence for multiple offenses of menacing by stalking. We decline to reopen Kronenberg's original appeal.

{¶2} In order to establish a claim of ineffective assistance of appellate counsel, Kronenberg is required to establish that the performance of her appellate counsel was deficient and the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct.

2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 767 (1990).

{¶3} In *Strickland*, the United States Supreme Court held that a court's scrutiny of an attorney's work must be highly deferential. The court further stated that it is all too tempting for a defendant to second-guess his or her attorney after conviction and that it would be too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Thus, a court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*.

{¶4} Kronenberg has raised two proposed assignments of error in support of her application for reopening. Kronenberg's first proposed assignment of error is that:

> The appellant's conviction for menacing by stalking is against the manifest weight of the evidence as all elements of the offense were not proven beyond a reasonable doubt for each count of the indictment.

{¶5} Kronenberg, through her first assignment of error, argues that appellate counsel was ineffective for failing to argue that her convictions for menacing by stalking were against the manifest weight of the evidence.

{¶6} A manifest weight argument on appeal challenges the credibility of the evidence presented at trial and questions whether the state met its burden of persuasion at trial. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541; *State v. Whitsett*, 8th Dist. Cuyahoga No. 101182, 2014-Ohio-4933; *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598. Because it is a broader review, a reviewing court may determine that a

judgment of conviction is sustained by sufficient evidence, but nevertheless conclude that the judgment is against the weight of the evidence.

{¶7} When considering the claim that a conviction is against the manifest weight of the evidence, this court sits as a "thirteenth juror" and may disagree with the factfinder's resolution of conflicting testimony. *Thompkins* at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). This court must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of all witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact 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. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983). In conducting such a review, this court remains mindful that the credibility of witnesses and the weight of the evidence are matters primarily for the trier of fact to assess. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). The reversal of a conviction, based upon a manifest weight argument, is reserved for the "exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387.

{¶8} After reviewing the entire record, weighing the evidence and all reasonable inferences, considering the credibility of all witnesses, and resolving any conflicts in the evidence, we find that the trial court, as the trier of fact, did not lose its way.

{¶9} The evidence adduced at trial clearly showed that Kronenberg harassed the victims over a period of 15 years. In addition, the evidence adduced at trial demonstrated that: 1) the victims lived in fear of Kronenberg; 2) the victims were fearful of Kronenberg pounding and banging on the victims' home door; 3) the victims lost sleep because of Kronenberg's actions and

conduct; and 4) the victims suffered emotional distress because of Kronenberg's actions and conduct.

{¶10} We find that the evidence presented during the course of trial demonstrates that the trial court carefully assessed the credibility of the witnesses and properly weighed and considered all of the testimony and evidence before rendering its verdict. Therefore, we cannot find that the trial court lost its way and cannot find that the verdict was against the manifest weight of the evidence. Kronenberg has failed to demonstrate that she was prejudiced through her first proposed assignment of error.

{¶11} Kronenberg's second proposed assignment of error is that:

> Appellate counsel's representation was deficient as he failed to raise the issue of necessity which the appellant presented as an affirmative defense at trial.

{¶12} Kronenberg, through her second proposed assignment of error, argues that the trial court erred by rejecting her affirmative defense of necessity. In order to establish the affirmative defense of necessity, Kronenberg was required to establish that: (1) the harm she inflicted was committed under pressure of physical or natural force, rather than human force; (2) the harm she sought to avoid was greater than, or at least equal to the harm that was sought to be prevented by the law defining the offense charged; (3) that she reasonably believed at that moment that her act was necessary and was designed to avoid greater harm; (4) she was without fault in bringing about the situation; and (5) the harm threatened was imminent, leaving no alternative by which to avoid the greater harm. *State v. Prince*, 71 Ohio App.3d 694, 595 N.E.2d 376 (4th Dist.1991); *State v. Solivan*, 8th Dist. Cuyahoga No. 89172, 2007-Ohio-5957.

{¶13} In Ohio, a party seeking to utilize the affirmative defense of necessity must establish that his or her actions were the result of a physical or natural force, rather than a human

force. *State v. Spingola*, 144 Ohio App.3d 76, 83, 759 N.E.2d 473 (10th Dist.2001). The affirmative defense of necessity requires the criminal conduct to be committed as a consequence of physical or natural forces. Such forces are expressly distinguished from human forces. The necessity defense is inapplicable when the alleged reason for the necessity arises from a human source.

{¶14} Herein, the record demonstrates that Kronenberg voluntarily visited the victims' residence under the pressure of a human source, her own conscious choice. Thus, we find that Kronenberg failed to establish the first element of the affirmative defense of necessity, and the trial court did not err by rejecting the affirmative defense of necessity. *State v. Brown*, 11th Dist. Ashtabula No. 2006-A-0045, 2007-Ohio-4380. Kronenberg has failed to demonstrate that she was prejudiced through her second proposed assignment of error.

{¶15} Accordingly, the application for reopening is denied.

LARRY A. JONES, SR., JUDGE

EILEEN T. GALLAGHER, P.J., and
SEAN C. GALLAGHER, J., CONCUR