[Cite as *State v. Patrick*, 2004-Ohio-6688.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NOS. 2003-T-0166 and 2003-T-0167**
LORETTA E. PATRICK,	:	
Defendant-Appellant.	:	

Criminal Appeals from the Girard Municipal Court, Case No. 03 CRA 00319 and Case No. 03 CRB 000148

Judgment: Affirmed.

Gary M. Gilmartin, 100 North Market Street, Girard, OH 44420 (For Plaintiff-Appellee).

Debora K. Witten, 465 Robbins Avenue, Niles, OH 44446, and *Anthony G. Rossi*, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Defendant-Appellant).

DONALD R. FORD, P.J.

{¶1} Appellant, Loretta E. Patrick, appeals the October 23, 2003 judgment entry of the Girard Municipal Court, in which she was found guilty of domestic violence and violating a protection order. She was sentenced to one hundred eighty days in jail on each offense, and she was fined $1,000 for each offense.

{¶2} On March 13, 2003, appellant was charged with domestic violence, in violation of R.C. 2919.25(A). On March 18, 2003, the state filed a motion for a

temporary protection order on behalf of Michael Patrick ("Michael"). On that same date, the temporary protection order was granted. Thereafter, on May 28, 2003, appellant was charged with violating a protection order, in violation of R.C. 2919.27(A)(1). Both offenses were misdemeanors of the first degree. On May 28, 2003, appellant entered a plea of not guilty to both charges. A bench trial was held on October 23, 2003.

{¶3} Michael took the stand and related that on December 6, 2001, he and appellant were married. They resided in a home located on a cul-de-sac in the city of Hubbard, Ohio. On March 4, 2003, when appellant arrived home, he saw an officer leaving his house.[1] He stated that there had been a burglary at his home. Although Michael believed that appellant burglarized his home, there is no evidence that she did.

{¶4} About an hour later, appellant came down the street in a white convertible BMW. Michael stated that he and his girlfriend, Christina Kwiecinski ("Christina"), ran out to the driveway. Appellant then "came at the house [in her car] and came at [Christina,] and [he] pushed her out of the way ***." Appellant hit Michael, struck a garbage can and proceeded up the street. Michael suffered injuries on his side, leg, shoulder and back. He also had bruises and contusions. He received physical therapy and incurred thousands of dollars in medical bills. On cross-examination, appellant's attorney questioned Michael as to his felony conviction for illegal gambling. Further, Michael acknowledged that after his separation from appellant, Christina became his girlfriend. Michael's mother, Josephine Patrick ("Josephine"), witnessed the foregoing incident.

1. On that date, Michael and appellant had been separated. After their separation, appellant sought an annulment of the marriage, which was granted in September 2003.

{¶5} Christina related that she was looking out the window on March 4, 2003, when she saw appellant in her BMW come down the street. She and Michael went to the end of the driveway. Appellant proceeded to speed up toward Michael and her. According to Christina, Michael pushed her out of the way, and appellant hit Michael with the car. She then hit the garbage can and a "For Sale" sign in the next yard over.

{¶6} Jim Taafe, ("Taafe"), a supervisor for the Hubbard Police Department, testified that he prepared a report for aggravated vehicular assault against appellant after he arrived at the scene on March 4, 2003. As a result of the incident, Michael obtained a temporary protection order. However, on May 27, 2003, it was claimed that appellant violated the order.

{¶7} Patricia and Patrick Ard ("the Ards"), Michael's neighbors, took the stand and related that on May 27, 2003, they witnessed appellant taking pictures in Michael's driveway. The Ards then noticed that appellant and a man with a pony tail, Joseph Swistok ("Swistok"), got in a truck and pulled away. A bit later, they heard another car and overheard Michael yelling that appellant was not allowed to be anywhere near his house. According to the Ards, Michael indicated that he was going to call the police because appellant had violated the protection order.

{¶8} Officer Louis Carsone ("Officer Carsone") of the Hubbard Police Department arrived at the scene on May 27, 2003. Michael told him that there was a protection order in existence against appellant and that she was not allowed near the property. Officer Carsone asked Michael for a copy of the order, which Michael produced. It stated that appellant was not allowed within five hundred yards of Michael

or Josephine or any place where appellant knew or should have known they would be. As a result, Officer Carson placed appellant under arrest.

{¶9} At the close of the state's case, appellant moved for a Crim.R. 29 acquittal, which was denied. Appellant then took the stand in her own defense.

{¶10} Appellant testified that in January 2003, she filed for an annulment after months of marital trouble with Michael. She indicated that on March 4, 2003, she received a notice that Michael was contesting the annulment. She went to his home in Hubbard to ask him why he was contesting the annulment proceeding, which was scheduled for March 5. When she discovered that Michael was not home, she related that she left a note for him. She explained that she returned to his home later that night because she wanted to speak to him about the proceedings on the next day. Appellant stated that Michael and Christina ran down the driveway screaming at her and that Michael threw a small garbage can at her car. Appellant denied that she hit the garbage can or Michael with her vehicle. She indicated that if she had hit Michael, there would have been some damage to her car since he is a "big size man."

{¶11} Appellant then testified as to the events that transpired on May 27, 2003, after the temporary protection order was issued. She indicated that she had gone past Michael's home that day to take pictures of it and the roadway for purposes of her criminal hearing on the domestic violence charge. She drove past the bar where Michael worked to avoid problems. She claimed that she did not go onto Michael's property, but stopped in a neighbor's driveway, took the photographs, and attempted to leave. According to appellant, Michael and Christina showed up and blocked her from leaving because they parked their vehicle in front of her car.

{¶12} Swistok took the stand and related that he and appellant are partners in real estate. He stated that he drove appellant to Michael's house in his truck on May 27, 2003, to obtain pictures.

{¶13} In a judgment entry dated October 23, 2003, the trial court found appellant guilty of both charges and sentenced her to a term of one hundred eighty days in jail on each charge and fined her $1,000 on each charge, of which $500 was suspended. The sentences were to run consecutively. Appellant timely filed the instant appeal and raises the following assignments of error for our consideration:

{¶14} "[1.] The trial court erred in denying [appellant's] Crim.R. 29 motion and in entering a finding of guilt on the charge of violation of a protection order where the evidence was insufficient, as a matter of law, to support a determination of guilt.

{¶15} "[2.] Appellant's conviction for violating a protection order is against the manifest weight of the evidence and should be reversed.

{¶16} "[3.] Appellant was denied the effective assistance of counsel guaranteed to her by the Sixth and Fourteenth Amendments to the United States Constitution and is therefore entitled to a new trial."

{¶17} As appellant's first and second assignments of error raise questions regarding the adequacy of the evidence, they will be addressed in a consolidated fashion. In her first assignment of error, appellant alleges that the trial court erred in denying her Crim.R. 29 motion for acquittal with respect to the charge of violating the protection order. In her second assignment of error, appellant claims that her conviction for violating the protection order was against the manifest weight of the evidence.

{¶18} In *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus, the Supreme Court of Ohio established the test for determining whether a motion for acquittal is properly denied, and the Court stated that "[p]ursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." Thus, when an appellant makes a Crim.R. 29 motion, he or she is challenging the sufficiency of the evidence introduced by the state. As this court stated in *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 WL 738452, at 4-5:

{¶19} "'"(***)(T)he test (for sufficiency of the evidence) is whether after viewing the probative evidence and the inference[s] drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence*. ***"'

{¶20} "In other words, the standard to be applied on a question concerning sufficiency is: when viewing the evidence 'in a light most favorable to the prosecution,' *** '(a) reviewing court (should) not reverse a jury verdict where there is substantial evidence upon which the jury could reasonably conclude that all of the elements of an offense have been proven beyond a reasonable doubt.' ***." (Emphasis sic.) (Citations omitted.)

{¶21} An appellate court must look to the evidence presented to decide if the state offered evidence on each statutory element of the offense, so that a rational trier

of fact may infer that the offense was committed beyond a reasonable doubt. *State v. March* (July 16, 1999), 11th Dist. No. 98-L-065, 1999 WL 535675, at 3. The evidence is to be viewed in a light most favorable to the prosecution when conducting this inquiry. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Furthermore, the verdict will not be disturbed on appeal unless the reviewing court finds that reasonable minds could not have arrived at the conclusion reached by the trier of fact. *State v. Dennis* (1997), 79 Ohio St.3d 421, 430.

{¶22} Applying this standard to the matter at hand, the state was required to present sufficient evidence to establish that appellant violated the temporary protection order. Violation of a temporary protection order is governed by R.C. 2919.27(A) which states that "[n]o person shall recklessly violate any terms of a protection order ***."

{¶23} Appellant also argues that the verdict was against the manifest weight of the evidence. Though the evidence may have been sufficient to sustain a guilty verdict, the issue of manifest weight requires a different type of analysis. *Schlee*, supra, at 5. When addressing whether a verdict is against the manifest weight of the evidence, a reviewing court examines "'the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury 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. Davis* (1988), 49 Ohio App.3d 109, 113. A judgment of the trial court should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶24} In this case, the state produced evidence that the trial court had issued a temporary protection order against appellant on March 18, 2003, for the protection of Michael and his mother, Josephine, after an incident that occurred on March 4, 2003. Taafe testified that he prepared a report on March 4, following an alleged incident of domestic violence involving appellant. As a result, the temporary protection order was issued.

{¶25} Appellant admitted she was near appellant's house on May 27, 2003. Furthermore, there was testimony from the Ards regarding appellant taking pictures in Michael's driveway on May 27, 2003. She was, therefore, within five hundred yards of appellant and/or Josephine or a place where she knew appellant or Josephine may be, which was in violation of the protection order. The Ards also overheard Michael yelling at appellant and telling her she was not allowed to be anywhere near his house. Although appellant claimed that her attorney advised her to take pictures of appellant's house and street for the domestic violence proceeding, which was to take place on May 28, she offered no explanation as to why she did not have someone else take the photographs. Furthermore, even if appellant believed Michael was not at home because she drove past the bar where he worked, she did not know whether Josephine was home as Josephine resided in Michael's home.

{¶26} The evaluation of the weight to be given to the evidence and evaluation of the credibility of the witnesses are functions primarily reserved for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. In the case at bar, the trial court must have found the state's witnesses to be more credible. Hence, we conclude, after reviewing the record and weighing the evidence and all reasonable

inferences, that the judgment of the trial court was supported by competent, credible evidence. Upon careful review of the testimony and evidence presented at trial, the trial court did not act contrary to the manifest weight of the evidence in convicting appellant of violating the protection order and, therefore, the conviction was sufficient as a matter of law. Appellant's first and second assignments of error are not well-founded.

{¶27} For the third assignment of error, appellant posits that she was denied the effective assistance of counsel because her trial counsel failed to timely request a jury trial and failed to object to inadmissible and prejudicial evidence.

{¶28} To warrant a reversal on the grounds that appellant was not provided with effective assistance of counsel, she bears the burden of meeting the two-prong test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 687, which states that: "[a] convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction *** has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction *** resulted from a breakdown in the adversary process that renders the result unreliable."

{¶29} In order to decide if an attorney's performance was deficient, the trial court must inquire whether the attorney provided "reasonably effective assistance, considering all the circumstances." *State v. Loza* (1994), 71 Ohio St.3d 61, 83, citing

Strickland, supra. "A Sixth Amendment violation does not occur 'unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance.' ***" *State v. Goodwin* (1999), 84 Ohio St.3d 331, 334, quoting *State v. Bradley* (1989), 42 Ohio St.3d 136, 142. In addition, a properly licensed attorney is presumed to be competent, and thus, judicial scrutiny of his or her performance must be highly deferential. *Strickland*, 466 U.S. at 689. An attorney's strategic decisions and trial tactics will not support a claim of ineffective assistance. *State v. Clayton* (1980), 62 Ohio St.2d 45, 48-49.

{¶30} Under the second prong of the *Strickland* test, appellant must show that she was prejudiced. To establish prejudice, appellant must prove that "there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus. See, also, *State v. Stojetz* (1999), 84 Ohio St.3d 452, 457. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Bays* (1999), 87 Ohio St.3d 15, 27. See, also, *State v. Brant* (Aug. 4, 2000), 11th Dist. No. 99-P-0037, 2000 WL 1114845.

{¶31} In the case at bar, the oral demand for a jury trial was made on the very day of the scheduled trial date, October 23, 2003. The offenses were committed on March 4, 2003, and May 27, 2003. Crim.R. 23(A) provides for the right to a jury trial in serious and petty offense cases and states:

{¶32} "In serious offense cases the defendant before commencement of the trial may knowingly, intelligently and voluntarily waive in writing his right to trial by jury. Such

waiver may also be made during trial with the approval of the court and the consent of the prosecuting attorney. *In petty offense cases, where there is a right of jury trial, the defendant shall be tried by the court unless he demands a jury trial. Such demand must be in writing and filed with the clerk of court not less than ten days prior to the date set for trial, or on or before the third day following receipt of notice of the date set for trial, whichever is later. Failure to demand a jury trial as provided in this subdivision is a complete waiver of the right thereto.*" (Emphasis added.)

{¶33} Here, the charges were petty, and thus, the right to a jury trial was not mandatory, but was available on demand. The demand did not conform with any of the provisions of Crim.R. 23(A) since it was an oral demand made for jury trial on the very day of the scheduled trial. We note this court must accord deference to defense counsel's strategic choices made during trial and "requires us to eliminate the distorting effect of hindsight." *State v. Post* (1987), 32 Ohio St.3d 380, 388. Apart from defense counsel's questionable trial strategy, we might presumably find a deficiency in not conforming the demand for a jury trial to Crim.R. 23. However, it is our position that the record does not demonstrate that the lack of a jury trial prejudiced the outcome or would have created any substantial difference in the outcome. Therefore, concerning trial counsel's failure to timely file a request for a jury trial, it is our position that this was a strategic decision which may not serve as evidence of counsel's deficient performance.

{¶34} Appellant also claims that her trial counsel was deficient for failing to object to a line of questioning by the prosecution regarding her prior criminal record. The prosecution had inquired about a felony conviction for aggravated vandalism, which occurred in 1992, against her boyfriend at the time.

{¶35} Generally speaking, Evid.R. 609(A)(1) allows a party to impeach a witness's credibility by cross-examining the witness about prior felony convictions. Yet, "[u]nder Evid.R. 609, a trial court has broad discretion to limit any questioning of a witness on cross-examination which asks more than the name of the crime, the time and place of conviction and the punishment imposed, when the conviction is admissible solely to impeach general credibility." *State v. Amburgey* (1987), 33 Ohio St.3d 115, syllabus.

{¶36} In the case at hand, the state introduced a significant amount of evidence against appellant during her trial. During the cross-examination of appellant, the state brought up what appeared to be an eleven-year old conviction, which appellant's attorney did not object to. Evid.R. 609(B) generally provides that "[e]vidence *** under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction *** or the termination of *** probation *** whichever is the later date, unless the court determines *** that the probative value of the conviction *** outweighs its prejudicial effect." The record does not reflect the exact date of her conviction in 1992, or when her probation was terminated. Obviously, the conclusion of her probation was subsequent to her conviction, which might have the result of it being within ten calendar years. However, we cannot indulge in such a conclusion.

{¶37} Thus, any error that may have occurred was harmless beyond a reasonable doubt in light of the evidence against appellant. *State v. Williams* (1983), 6 Ohio St.3d 281, 290. Even if we concluded that trial counsel should have made an objection, appellant has failed to show that she was prejudiced. Since appellant was not prejudiced by the testimony, and there is no reasonable probability that the outcome

of the trial would have been different without this testimony, we cannot conclude that trial counsel was ineffective for failing to object to such testimony. In light of the foregoing evidence, we cannot conclude that appellant has proven that there exists a reasonable probability that, were it not for counsel's alleged errors, the result of the trial would have been different. Thus, appellant's third assignment of error is without merit.

{¶38} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Girard Municipal Court is affirmed.

CYNTHIA WESTCOTT RICE, J.,

ROBERT A. NADER, J., Ret.,
Eleventh Appellate District,
sitting by assignment,

concur.