

[Cite as *State v. Mathis*, 2009-Ohio-4626.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MICHAEL MATHIS

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P. J.

Hon. John W. Wise, J.

Hon. Julie A. Edwards, J.

Case No. 08 CA 143

OPINION

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 239

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 4, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Wise, J.

{¶1} Appellant Michael Mathis appeals his conviction and sentence entered in the Licking County Common Pleas Court following a trial by jury.

{¶2} Appellee is State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} The uncontested facts are as follows:

{¶4} On the night of April 10, 2008, Appellant Michael Mathis, his girlfriend Wendy Lemay and Mr. Mathis' mother, Pamela Messer, were drinking at "Scooters", a local bar in Licking County. Appellant and Ms. Lemay got into an argument, and Appellant was thrown out of the bar. The two women stayed at the bar. During their drive home, they were stopped by the Buckeye Lake police. Pamela Messer was charged with OMVI, and their car was impounded. The Buckeye Lake Police then drove the two women home. (T. at 80-81). Ms. Lemay testified that she was intoxicated, having consumed at least five beers and three shots of tequila

{¶5} Ms. Lemay testified that when she arrived at the house with the police, Appellant was mad "because he had warrants." (T. at 82).

{¶6} At some point, Appellant picked up a kitchen knife and showed it to Ms. Lemay. Appellant then slapped Ms. Lemay. Ms. Lemay ran out the back door, and Appellant followed her. Appellant caught Ms. Lemay by grabbing her sweatshirt, and punched her. Ms. Lemay fell to the ground and lost consciousness. She awoke in the kitchen, to find Appellant leaning over her.

{¶7} The next day, Ms. Lemay went to the hospital and discovered that she had a broken ankle. She also had bruises and a black eye. She told the medical personnel that her boyfriend had slapped her, and that she had hurt her ankle when she fell.

{¶8} As a result of Ms. Lemay's injuries, Appellant was charged with felonious assault.

{¶9} A trial was held on August 26, 2008, and Appellant was found guilty of felonious assault.

{¶10} On October 8, 2008, the trial court sentenced Appellant to four years incarceration.

{¶11} Appellant now appeals, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶12} "I. THE STATE PRODUCED INSUFFICIENT EVIDENCE TO PROVE THAT APPELLANT KNOWINGLY CAUSED SERIOUS PHYSICAL HARM, DENYING HIS FOURTEENTH AMENDMENT RIGHT TO HAVE EVERY ELEMENT OF THE OFFENSE OF CONVICTION PROVEN BEYOND A REASONABLE DOUBT.

{¶13} "II. PROSECUTOR COMMITTED MISCONDUCT WHEN HE REPEATEDLY MISSTATED EVIDENCE TO THE JURY WHICH WAS NOT INCLUDED IN TESTIMONY, WHICH STATEMENTS SERVED AS THE BASIS FOR THE MENS REA OF FELONIOUS ASSAULT VIOLATING THE DEFENDANT'S RIGHT TO A FAIR TRIAL AND A VERDICT BASED UPON EVIDENCE, NOT IMPROPER PROSECUTOR STATEMENTS.

{¶14} "III. THE PROSECUTOR COMMITTED MISCONDUCT WHEN HE ELICITED TESTIMONY CONCERNING THE APPELLANT'S MENS REA, RESULTING IN PREJUDICIAL TESTIMONY OF "OTHER ACTS" THEREBY DENYING APPELLANT MATHIS HIS RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION [sic] OF THE OHIO CONSTITUTION.

{¶15} "IV. THE COURT ERRED TO THE PREJUDICE OF THE DEFENDANT/APPELLANT WHEN EVIDENCE UNRELATED TO THE CHARGES

WERE INTRODUCED AND PRESENTED TO THE JURY AS EVIDENCE OF THE CRIME.

{¶16} “V. INEFFECTIVE ASSISTANCE OF COUNSEL OCCURRED WHEN DEFENSE COUNSEL FAILED [sic] DEFEND APPELLANT DURING CRUCIAL TESTIMONY AND FAILED TO OBJECT TO PREJUDICIAL EVIDENCE, RESULTING IN A DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL”

I.

{¶17} In his first assignment of error Appellant argues that his conviction was based upon insufficient evidence. We disagree.

{¶18} In *State v. Jenks* (1981), 61 Ohio St.3d 259, superseded by constitutional amendment on other grounds in *State v. Smith*, 80 Ohio St.3d 89, 1997-Ohio-355, the Ohio Supreme Court set forth the standard of review when a claim of insufficiency of the evidence is made. The Ohio Supreme Court held: “An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *Id.* at paragraph two of the syllabus.

{¶19} In the instant case, Appellant was charged and convicted of felonious assault, in violation of R.C. §2903.11(A)(1), which provides:

{¶20} “(A) No person shall knowingly do either of the following:

{¶21} “(1) Cause serious physical harm to another or to another's unborn;”

{¶22} “Serious physical harm” is defined as follows:

{¶23} “(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶24} “(b) Any physical harm that carries a substantial risk of death;

{¶25} “(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶26} “(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶27} “(e) Any physical harm that involves acute pain of such duration to result in substantial suffering or that involves any degree of prolonged or intractable pain.”
R.C. §2901.01(A)(5).

{¶28} Appellant argues that the State failed to prove that he knowingly caused the serious physical harm that resulted from the victim’s broken ankle.

{¶29} A person acts “knowingly”, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.”

{¶30} In the case at bar, we find that the evidence presented showed that appellant knowingly caused serious physical harm to the victim that proximately resulted in her injuries, which included, among other things, a broken ankle, and thus supported Appellant's conviction for felonious assault.

{¶31} The victim testified that she and Appellant were arguing, that he slapped her in the face, and then picked up a knife in a threatening manner and showed it to her,

and that when she ran outside in an attempt to get away from him, he chased her, caught her, punched her and knocked her out. (T. at 86-92). When she regained consciousness she had a broken ankle, a black eye and other bruises on her face and arms. (T. at 98-99). She further testified that she did not know how long she was unconscious but did know that when she regained consciousness, she was in the kitchen. (T. at 105). Additionally, she testified that she had to wear a cast on her ankle for four (4) weeks which affected her ability to do things and that on a scale of 1 to 10, her pain was 10. (T. at 105-106). She stated that she needed to take the painkiller medication Vicodin for a couple of weeks for the pain. (T. at 106).

{¶32} Additionally, the jury heard testimony from the police officer who responded to the call. The officer testified that he took the victim's statement and also took pictures of the victim which showed the bruising to her left eye, her arm and her leg with a cast on it. (T. at 67-68). The jury also had before it the victim's medical records.

{¶33} While Appellant argues that there was no evidence that he broke the victim's ankle, the testimony was that she did not have a broken ankle prior to being assaulted and knocked unconscious by Appellant, but that her ankle was broken when regained consciousness.

{¶34} "Cause" is defined as "an act or failure to act which in a natural and continuous sequence directly produces the physical harm to persons, and without which it would not have occurred.

{¶35} "A defendant's responsibility is not limited to the immediate or most obvious result of the defendant's act. The defendant is also responsible for the natural

and foreseeable consequences or results that follow, in the ordinary course of events, from the act.” Ohio Jury Instructions, Section 409.55.

{¶36} Based on the foregoing, we find that the jury had before it sufficient evidence to find that Appellant’s actions caused serious physical harm to the victim in this case.

{¶37} Accordingly, Appellant’s first assignment of error is overruled.

II., III.

{¶38} In his second and third assignments of error, Appellant argues that he was denied a fair trial based upon prosecutorial misconduct. We disagree.

{¶39} Appellant argues that the statements made by the prosecutor during closing arguments that Appellant chased the victim with a knife amounted to misconduct. Appellant further argues that the prosecutor should not have been allowed to introduce evidence that Appellant had outstanding warrants.

{¶40} Appellant did not object to the comments to which he now claims error. Therefore, we must find plain error in order to reverse.

{¶41} The defendant bears the burden of demonstrating that a plain error affected his substantial rights. *United States v. Olano* (1993), 507 U.S. at 725,734, 113 S.Ct. 1770; *State v. Perry* (2004), 101 Ohio St.3d 118, 120. Even if the defendant satisfies this burden, an appellate court has discretion to disregard the error and should correct it only to ‘prevent a manifest miscarriage of justice.’ " *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. *Perry*, supra, at 118.

{¶42} Determining whether improper remarks constitute prosecutorial misconduct requires analysis as to (1) whether the remarks were improper and (2), if so, whether the remarks prejudicially affected the accused's substantial rights. *State v. Tenace* (2006), 109 Ohio St.3d 255, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 14 OBR 317. The touchstone of analysis “is the fairness of the trial, not the culpability of the prosecutor.” *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78. We will not deem a trial unfair if, in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments. *State v. Treesh* (2001), 90 Ohio St.3d 460, 464.

{¶43} A prosecutor may comment upon the evidence supporting the conclusion a defendant is lying, not telling the truth, scheming, or has ulterior motives for not telling the truth. *State v. Strobel* (1988), 51 Ohio App.3d 31.

{¶44} In the case sub judice, the victim testified as follows:

{¶45} Prosecutor: “And so what happens when they take you home?”

{¶46} Victim: “I get in and Michael Mathis is mad because the cops brought us home and –

{¶47} Prosecutor: “Why is he mad?”

{¶48} Victim: “Because he had warrants

{¶49} Prosecutor: “Okay. And I don’t want to talk anything further about that, but you mentioned that. Okay. So what happens next?”

{¶50} Victim: “He just – he really started at his mother and I jumped in her defense and so – .” (T. at 81-82)

{¶51} With regard to the knife, the victim testified:

{¶52} Prosecutor: “Any doubt about who it was that threatened you with a knife?”

{¶53} Victim: “No.”

{¶54} Prosecutor: “For the sake of argument, let’s assume that you were running because you’re being chased by somebody with a knife, you fall. Why were you running?”

{¶55} Victim: “Because I was being chased.”

{¶56} Prosecutor: “Would you have been running, if you weren’t being chased by somebody with a knife?”

{¶57} Victim: “No.”

{¶58} Prosecutor: “I don’t care if you’re wearing tennis shoes or heels, if you fall, why did you fall?”

{¶59} Victim: “Because I was being chased and I was running.” (T. at 127-128).

{¶60} Based on the totality of the evidence presented at trial, including the above exchanges, we do not find the comments made by the prosecutor to be improper.

{¶61} Upon review, we conclude the prosecutor’s statements were not improper, and, in context of the entire trial, it is clear beyond a reasonable doubt the jury would have found Appellant guilty of the charges even without the comments.

{¶62} Accordingly, Appellant’s second and third assignments of error are overruled.

IV.

{¶63} In his fourth assignment of error Appellant argues that the trial court erred in allowing certain evidence to be presented at trial. We disagree.

{¶64} Specifically, Appellant challenges the admission of the two exhibits, both photographs: one of a second knife located on a dresser in the bedroom, and the other of a broken black light in the bedroom.

{¶65} Trial courts are granted broad discretion with respect to the admission or exclusion of evidence at trial. *State v. Sage* (1987), 31 Ohio St.3d 173, 180. Thus, an appellate court will not reverse a trial court's ruling absent an abuse of discretion. *State v. Myers*, 97 Ohio St.3d 335, 348, 2002-Ohio-6658, ¶ 75. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Absent an abuse of discretion resulting in material prejudice to the defendant, a reviewing court should be reluctant to interfere with a trial court's decision in this regard. *State v. Hymore* (1967), 9 Ohio St.2d 122.

{¶66} As Appellant failed to object the introduction of the photographs, this Court must find plain error in order to reverse.

{¶67} Officer Edwards testified that he took the pictures of the two knives and the broken light fixture because he was investigating a felonious assault and that these things could be a sign of domestic violence. (T. at 69, 74).

{¶68} Based on such, we find that the trial court abused its discretion in allowing in such evidence.

{¶69} Assuming arguendo, we find that Appellant has failed to show how this alleged error affected the outcome or changed the verdict in this case.

{¶70} Accordingly, Appellant's fourth assignment of error is overruled

V.

{¶71} In his fifth assignment of error Appellant argues that he was denied the effective assistance of counsel.

{¶1} Our standard of review is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and whether counsel violated any of his or her essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.* at 141-142. Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie*, 81 Ohio St.3d 673, 675, 1998-Ohio-343, 693 N.E.2d 267.

{¶72} Appellant specifically cites trial counsel's failure to object to the prosecution's statements that Appellant chased the victim with a knife.

{¶73} Appellant further argues that his defense counsel should have called the medical personnel to whom the victim made statements concerning her fall and further should have put forth evidence concerning the type of fracture sustained by the victim.

{¶74} Additionally, Appellant argues that his counsel should have objected to the questions posed to the victim by the prosecutor as to why he was mad, which elicited her statement that Appellant had outstanding warrants.

{¶75} In analyzing the first prong of *Strickland*, there is a strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Id.* at 689. Appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.*, citing *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83. Tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 651 N.E.2d 965.

{¶76} With regard to the failure to call a medical professional to testify as to the victim's injuries, such could have been sound tactical or defense strategy. Appellant has not overcome such presumption.

{¶77} Having previously concluded that Appellant was not prejudiced by the prosecutor's statements or questions posed to the victim about Appellant's warrants, he has likewise failed to make a showing of the second prong of the *Strickland* test.

{¶78} Accordingly, Appellant's fifth assignment of error is overruled.

{¶79} For the foregoing reasons, the judgment of the Court of Common Pleas, Licking County, Ohio, is affirmed.

By: Wise, J.

Farmer, P. J., and

Edwards, J., concur.

JUDGES