[Cite as *State v. Blackson*, 2009-Ohio-5482.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-8
VINCE A. BLACKSON	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Tuscarawas County Court of Common Pleas Case No. 2008-CR-05-0161
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	October 14, 2009

APPEARANCES:

For Plaintiff-Appellee:

RYAN STYER
Tuscarawas County Prosecutor
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ROBERT C. URBAN, JR. 0017844
Assistant Prosecuting Attorney
(Counsel of Record)

For Defendant-Appellant:

RODNEY A. BACA 0070756
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Canton, Ohio 44702

Delaney, J.

{¶1} Defendant-Appellant, Vince Blackson, appeals from conviction in the Tuscarawas County Court of Common Pleas on two counts of domestic violence in violation of R.C. 2919.25, felonies of the third degree and fourth degree, respectively.

{¶2} Appellant married Shandria Kay Blackson on July 16, 2005. On May 15, 2008, they resided together at 2993 Grouse Drive, in Dennison, Ohio. On May 15, 2008, Appellant was at work, where Kay reported that he had drank at least four beers prior to coming home between 4:00 and 4:30 p.m. When he arrived home, Kay suggested that they go to a local bar, the Blue Goose, to play a game of pool.

{¶3} Appellant agreed and they went to the bar, where they both drank beer and spoke with friends who were at the bar. According to Kay, she had two beers while at the bar.

{¶4} Prior to leaving the bar and arriving back at their house, Kay testified that she and Appellant were getting along, but that once they returned to the house, Appellant started "bitching." He accused Kay of breaking his alarm clock, which was a deactivated cell phone. She stated that she told him to just "go to bed", but that he came out into the living room where she was sitting and stated, "That's it, bitch."

{¶5} At that time, according to Kay, Appellant picked up the coffee table that was in front of the couch where Kay was sitting, and threw it. They began "tussling" and Appellant grabbed one of Kay's arms and legs so that she could not fight back. According to Kay, who stated that she weighed 110 pounds, Appellant, who weighed over 200 pounds, began slapping her and punching her. She stated that blood began flying everywhere and that she could not see because of the blood on her face.

{¶6} Eventually, Appellant stopped punching and slapping her and went into his bedroom and closed the door. Kay stated that she went to the door of his bedroom and asked him to help her, but that he would not answer her.

{¶7} At that time, she grabbed her pocketbook and her glasses and left the house and went to her friend, Dennis Cross's house. Mr. Cross testified he had been friends with Kay for over twenty years and that when Kay arrived at his house, she was "crying, shook up" and that her face was covered in blood. He called 911.

{¶8} Tuscarawas Sheriff Deputy Rick Morrison responded to Mr. Cross's house, where he observed Kay's face covered in blood. He noted that she was still bleeding and was "fearful, scared, and crying." He stated that Kay admitted that she had been drinking and that she was in violation of her misdemeanor probation for doing so. She had been previously convicted of criminal damaging.

{¶9} Deputy Troy Beckley responded to Appellant's residence on Grouse Drive at the same time and noted that Appellant smelled of alcohol. He testified that when Appellant answered the door, Appellant told him that they had been at the Blue Goose and that everything was fine, but that once they got home, Kay started to "go crazy."

{¶10} According to Deputy Beckley, the furniture in the living room appeared to be in order, but that upon closer inspection, he found blood spatters on the couch, as well as on the wall behind the couch. Appellant claimed that Kay had fallen on the coffee table, but that he did not know how she had hurt herself. Appellant was arrested for domestic violence.

{¶11} Appellant testified on his own behalf at trial. He stated that he did not have anything to drink on May 15, 2008, until he got home from work. He also stated

that Kay threw his alarm clock into the wall and broke it. He testified that she attacked him, threw a glass at him, and ripped his shirt. He stated that he had never hit her before, though he admitted to having been convicted previously of domestic violence and assault, and that Kay was the victim in both of those cases.

{¶12} On June 13, 2008, the Tuscarawas County Grand Jury indicted Appellant on two counts of domestic violence in violation of R.C. 2919.25. Count one was a felony of the third degree and count two was a felony of the fourth degree.

{¶13} On November 19, 2008, Appellant filed a motion in limine, seeking to exclude mention at trial of his prior misdemeanor domestic violence conviction. He argued that the prior conviction was uncounseled and therefore inadmissible.

{¶14} After filing the motion in limine, Appellant's trial counsel realized that the prior domestic violence conviction followed a bench trial, wherein Appellant knowingly, voluntarily, and intelligently waived his right to counsel prior to proceeding to trial. In light of that valid waiver, counsel amended the motion in limine on the morning of trial, seeking to exclude the prior conviction based on a lack of evidence that Appellant had been advised that the conviction could be used against him as an enhancement predicate for future prosecutions on domestic violence charges. The trial court overruled the motion, finding that Appellant failed to provide any valid case law that would support his contention.

{¶15} After hearing the testimony of Dennis Cross, Kay Blackson, Deputies Morrison and Beckley, and Appellant, the jury convicted Appellant of both counts of domestic violence. The trial court sentenced Appellant to two years in prison.

{¶16} Appellant raises two Assignments of Error:

{¶17} "I. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION AND THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶18} "II. THE APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL."

I.

{¶19} In his first assignment of error, Appellant argues that there was insufficient evidence to support his conviction and that his conviction was against the manifest weight of the evidence.

{¶20} When reviewing a claim of sufficiency of the evidence, an appellate court's role 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. Contrary to a manifest weight argument, a sufficiency analysis raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. 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." *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶21} Conversely, when analyzing a manifest weight claim, this court sits as a "thirteenth juror" and in reviewing 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." *State v.*

Thompkins (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 548, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶22} In order to convict Appellant of domestic violence, a felony of the third degree, the State needed to prove that Appellant knowingly caused physical harm to his spouse and that he had two prior convictions for domestic violence and assault prior to committing the offense. In order to convict Appellant of domestic violence, a felony of the fourth degree, the State needed to prove that Appellant knowingly caused physical harm to his spouse and that he had one prior conviction for either domestic violence or assault prior to committing the offense.

{¶23} The evidence presented at trial was sufficient to support Appellant's convictions. Kay Blackson testified that Appellant punched her and slapped her in the face, causing her face to begin bleeding. She testified that she had to have seven stitches across her nose after the assault on May 15, 2008. Her friend, Dennis Cross, testified that she arrived at his house on the evening of May 15, 2008, with a bloody face and that she appeared scared and stated that she needed help. Deputy Morrison confirmed Kay's fearful state and the injuries that she sustained.

{¶24} Deputy Beckley found blood on the couch of in the residence, which is where Kay stated that she was when Appellant beat her up. Appellant testified that Kay went "crazy" that night, broke his alarm clock, and that she did get hurt that night, but that he did not know how she hurt herself. He stated that he did not punch her. He also admitted that he did not call 911 after she left, but instead, righted the furniture and went back to his room. Moreover, the state introduced certified copies of Appellant's prior convictions at trial.

{¶25} Viewing this evidence in the light most favorable to the prosecution, as we are required to do in a sufficiency analysis, we find that sufficient evidence existed to support Appellant's convictions. Moreover, we do not find that the jury lost its way in convicting Appellant of both counts of domestic violence, as it was within their province to weigh the credibility of the witnesses and determine that Kay Blackson was more credible than Appellant.

{¶26} Appellant's first assignment of error is overruled.

II.

{¶27} In Appellant's second assignment of error, he claims that he was denied the effective assistance of counsel.

{¶28} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that his trial counsel acted incompetently. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. In assessing such claims, "a court must indulge 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.'" Id. at 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164.

{¶29} "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." Id. at 690.

{¶30} Even if a defendant shows that his counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

{¶31} Appellant asserts that counsel was ineffective for failing to file a motion to suppress Appellant's prior convictions for domestic violence and assault because the prior convictions were uncounseled.

{¶32} The record shows that Appellant's counsel filed a motion in limine prior to trial, seeking to exclude mention of Appellant's prior conviction for domestic violence on the grounds that Appellant's conviction was the result of an uncounseled plea. Upon further review, it was discovered that Appellant in fact waived his right to counsel and proceeded to a bench trial, where he was found guilty of domestic violence involving his wife, the victim in the present case, Kay Blackson.

{¶33} Upon discovering that Appellant had in fact knowingly, intelligently, and voluntarily waived his right to counsel in his prior domestic violence trial, counsel amended his argument to state that the evidence should be excluded because Appellant had not been counseled that his prior conviction could be used for enhancement purposes in future prosecutions for domestic violence.

{¶34} The Sixth Amendment does not provide special protection to a defendant who waives his right to counsel. *State v. Gibson* (1976), 45 Ohio St.2d 366, 345 N.E.2d 399. A defendant who is afforded the right to counsel, but rejects that right does not suffer an uncounseled conviction and that conviction can be used to enhance a

sentence in a later conviction. *State v. Carrion* (1992), 84 Ohio App.3d 27, 616 N.E.2d 261.

{¶35} Appellant did not cite at the trial court level, nor at the appellate level, any authority which would support his argument that a trial court or attorney must inform him those domestic violence convictions can be used to enhance subsequent sentences for similar crimes.

{¶36} We find no evidence in the record that trial counsel's failure to file a motion to suppress Appellant's prior convictions was defective representation. The Sixth Amendment right to effective assistance of counsel does not require defense counsel to file a motion where any such motion would be frivolous. See *State v. Lott* (1990), 51 Ohio St.3d 160, 174, 555 N.E.2d 293.

{¶37} Moreover, Appellant has not proven that such a failure to file a motion would have resulted in a different outcome. As we have stated, the burden of showing ineffective assistance of counsel is on the defendant. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128. Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675, 693 N.E.2d 267. 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 ("[j]udicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel"); *State v. Carpenter* (1996), 116 Ohio App.3d 615, 626, 688 N.E.2d 1090 (court of appeals is to

"presume that a broad range of choices, perhaps even disastrous ones, are made on the basis of tactical decisions and do not constitute ineffective assistance").

{¶38} Appellant's second assignment of error is overruled.

{¶39} For the foregoing reasons, Appellant's assignments of error are overruled and the judgment of the Tuscarawas County Court of Common Pleas is affirmed.

By: Delaney, J.

Gwin, P.J. and

Edwards, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

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IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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-vs-	:	JUDGMENT ENTRY
	:	
VINCE A. BLACKSON	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-8
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Tuscarawas County Court of Common Pleas is affirmed. Costs assessed to Appellant.

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HON. PATRICIA A. DELANEY

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS