

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO,	:	Case No. 16CA7
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
JUSTIN MATTHEW BURRIS,	:	
	:	RELEASED: 1/24/17
Defendant-Appellant.	:	

APPEARANCES:

Timothy Young, Ohio Public Defender, and Allen M. Vender, Ohio Assistant Public Defender, Columbus, Ohio, for appellant.

Keller J. Blackburn, Athens County Prosecuting Attorney, and Merry M. Saunders, Athens County Assistant Prosecuting Attorney, Athens, Ohio, for appellee.

Harsha, J.

{¶1} A jury convicted Justin M. Burris of aggravated burglary for breaking into the apartment of Amy Wright and attacking her. The Athens County Court of Common Pleas sentenced him to prison, and this appeal ensued.

{¶2} Initially, Burris asserts that his trial counsel provided ineffective assistance by failing to object to a portion of a taped telephone conversation between Burris and a police officer. Burris claims that in this part of the taped conversation, he referenced the time he spent in prison for other crimes, which was irrelevant, unduly prejudicial, and indicative of other bad acts. We reject this assertion because the contested statements are vague and not necessarily indicative of prison time for other crimes. Moreover, Burris concedes on appeal that he trespassed with force by kicking down the door to gain entry to Wright's apartment, the weight of the evidence establishes that he injured Wright, and he admitted to the police that he committed a crime after it occurred.

Therefore, he has established neither deficient performance by his trial counsel nor prejudice.

{¶3} Next, Burris contends that his conviction for aggravated burglary is against the manifest weight of the evidence because the evidence did not credibly establish that he inflicted, attempted, or threatened to inflict physical harm on Wright. But the state presented evidence that a police officer responding to the crime scene took a photograph of Wright's head because it was bleeding. Another officer at the scene also observed that Wright had a cut to the top of her head that was bleeding. Wright testified that after a struggle, she and her former boyfriend Darren Leister got Burris out the door of the apartment. However, Burris picked up a piece of door trim, tried to stab them, hit Leister, and then hit Wright on the top of her head. Wright further testified that while Leister tried to keep Wright's children away, Burris then punched Wright in the left jaw, causing her to think she had been knocked out. Leister testified that although he did not see Burris strike Wright in her face, he did see Wright holding her left jaw and saw swelling on her left cheek. When one of the officers received a telephone call later from Burris, he admitted to kicking the door in and committing a crime. One of the police officers testified that he believed that the information provided by Wright and Leister as well as the evidence he observed at the scene matched up with what Burris admitted in his telephone call to the police. Although some of the statements Wright and Leister made to the police might be inconsistent with their trial testimony, the jury neither clearly lost its way nor created a manifest miscarriage of justice by crediting the state's evidence and determining that Burris was guilty of aggravated burglary. Consequently, his conviction is not against the manifest weight of the evidence.

{¶4} Therefore, we overrule Burris's assignments of error and affirm his conviction and sentence.

I. FACTS

{¶5} The Athens County Grand Jury returned an indictment charging Justin M. Burris with one count of aggravated burglary and two counts of felonious assault. For the aggravated-burglary charge, the state alleged that Burris trespassed by force in the separately occupied structure of Amy Wright with purpose to commit an assault and recklessly inflicted, attempted, or threatened to inflict physical harm on her. Burris pleaded not guilty to the charges, and the case proceeded to a jury trial.

{¶6} Amy Wright testified that she had met Burris through Craigslist. Burris had been to her apartment on three brief occasions and he had gone trick or treating with her and her three sons for Halloween. According to Wright on October 30, 2016, she was at her apartment with her ex-boyfriend, Darren Leister, and her three sons. She had hoped to get back together with Leister, and she told Burris she would be at a friend's house that night. Burris sent her many text messages and when she failed to respond, he showed up at her apartment unannounced.

{¶7} Wright and Leister testified that after they denied him entry into the apartment, Burris kicked the door in and entered. According to Wright after Burris entered, he started to fight with Leister, hitting him on the side of his face and then choking him, until she and Leister were able to get Burris off him and out of the apartment. Wright testified that Burris then picked up a piece of broken door trim and started to try to stab her and Leister, eventually hitting Leister and then Wright on the top of her head with the piece of wood before Burris ran away from the scene. Leister

confirmed that Burriss hit him and choked him and after he and Wright threw Burriss out of the apartment, Burriss picked up a piece of the door frame and began to swing it at them. Leister testified that Burriss hit him on the arm with the piece of wood trim, causing some cuts. According to Leister, he tried to get the children back into a room and when he turned around after Wright screamed his name, he saw Wright holding her jaw.

{¶8} Wright called 911 after Burriss ran away. She lied to the dispatcher that Burriss was a member of her estranged husband's motorcycle gang, the Villains, because she was trying to get back together with Leister and did not want him to know that she had been seeing a man she met on the internet.

{¶9} Athens Police Officer Neal Dicken arrived at the apartment and took pictures of the visible injuries on Wright and Leister. He photographed the top of Wright's head, which appeared to be bleeding, but did not photograph her face because he did not observe any swelling, bruising, or other injury. He also photographed Leister's left ear, which was a little red.

{¶10} Athens Police Lt. Adam Claar arrived next and also observed that Wright had a laceration on the top of her head that was bleeding and that Leister's left ear was red.

{¶11} Both Wright and Leister gave written statements to the police about the incident. In her written statement Wright stated that Burriss had punched her cheek hard, that she was bleeding from her right ear, and that her cheek was swollen. She also reiterated her misrepresentation that Burriss was in the motorcycle gang. In his written statement Leister stated that Burriss had punched him in the jaw and hit Wright several times in the head and face, including one last time as hard as he could in her

jaw. He testified that although he did not see Burris hit Wright, he assumed Burris had hit her because he saw Wright holding her jaw.

{¶12} Burris called Wright while the police were present, and she put him on speaker phone. Lt. Claar testified that Burris threatened Wright, stated he would get her before the cops got him, and that the police would not take him alive.

{¶13} Several hours later Burris called the police department and spoke with Lt. Claar. In his call Burris admitted kicking the apartment door open and fighting with Leister; he also stated that Wright should leave the apartment because he would harm her and Leister if he returned to the apartment. Although Burris did not specifically state that he struck Wright, he repeatedly admitted to Lt. Claar that he “did it.” According to Lt. Claar, the information that the victims had provided to the police matched what Burris had admitted to during his call to him.

{¶14} Wright testified that she was taken to the hospital, where the staff washed the blood off the top of her head to make sure that she did not need stitches and scanned her head because of the swelling and bruising to make sure that her jaw was not broken.

{¶15} The jury returned verdicts finding Burris guilty of aggravated burglary and not guilty of felonious assault. The trial court sentenced him to seven years in prison.

II. ASSIGNMENTS OF ERROR

{¶16} Burris assigns the following errors for our review:

I. JUSTIN BURRIS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO OBJECT TO COMMENTS ALLUDING TO BURRIS'S PRIOR CRIMINAL HISTORY.

II. THE TRIAL COURT VIOLATED JUSTIN BURRIS'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT ENTERED A JUDGMENT OF

CONVICTION FOR AGGRAVATED BURGLARY AGAINST THE
MANIFEST WEIGHT OF THE EVIDENCE.

III. LAW AND ANALYSIS

A. Ineffective Assistance of Counsel

{¶17} In his first assignment of error Burris asserts that he received ineffective assistance of counsel when his trial attorney failed to object to comments alluding to Burris's prior criminal history.

{¶18} To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Failure to satisfy either part of the test is fatal to the claim. *Strickland* at 697; *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989). Because this issue cannot be presented at trial, we conduct the initial review. *State v. Plymale*, 4th Dist. Gallia No. 15CA1, 2016-Ohio-3340, ¶ 34.

{¶19} The defendant has the burden of proof because in Ohio, a properly licensed attorney is presumed competent. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62. In reviewing the claim of ineffective assistance of counsel, we 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* at 697; *Plymale* at ¶ 35.

{¶20} On the first day of the trial the state provided Burris’s trial counsel with a redacted copy of the recorded telephone conversation between Burris and Lt. Claar. Burris’s counsel stipulated to the accuracy of the call with redactions and that Burris made it. Counsel had an opportunity to review the recording and agreed that it would be presumed admissible unless he objected. The jury heard the recording without objection, including the following statements:

I know how the system works. I’ve been in the system, I just did [redacted].

* * *

You know my face by now, pull my picture up * * * you know my face so, I’m sure you already did that, so you know what I look like.

I been home for 16 months, I’m in the union * * * I got my life back together.

{¶21} “ ‘[T]he failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel.’ ” *State v. Fears*, 86 Ohio St.3d 329, 347, 715 N.E.2d 136 (1999), quoting *State v. Holloway*, 38 Ohio St.3d 239, 244, 527 N.E.2d 831 (1988). A defendant must also show that he was materially prejudiced by the failure to object. *Holloway*, 38 Ohio St.3d at 244; *State v. Hale*, 119 Ohio St.3d 118, 2008–Ohio–3426, 892 N.E.2d 864, ¶ 233. Additionally, tactical decisions, such as whether and when to object, ordinarily do not give rise to a claim for ineffective assistance. *State v. Johnson*, 112 Ohio St.3d 210, 2006–Ohio–6404, 858 N.E.2d 1144, ¶ 139–140.

{¶22} Even if we assume counsel’s failure to object amounted to deficient performance, Burris cannot establish the prejudice prong of *Strickland*. He admitted to the police that he trespassed with force by kicking in the door to Wright’s apartment and he further confessed that he had committed a crime after breaking into the apartment.

The testimony of Wright, Leister, and the police established that Burriss inflicted harm on Wright after breaking into the apartment.

{¶23} Thus, there is no reasonable probability that but for counsel's failure to object, the jury would have found Burriss not guilty. Because Burriss has not met his burden of proof under the prejudice requirements of ineffective assistance of counsel, we overrule his first assignment of error.

B. Manifest Weight of the Evidence

{¶24} In his second assignment of error Burriss contends that his conviction for aggravated burglary is against the manifest weight of the evidence.

{¶25} In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of 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. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6254, 960 N.E.2d 955, ¶ 119.

{¶26} In making this determination we are reminded that generally, the weight and credibility of evidence are to be determined by the trier of fact. *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 132. "A jury, sitting as the trier of fact, is free to believe all, part or none of the testimony of any witness who appears before it." *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23. We defer to the trier of fact on these evidentiary weight and credibility issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and

to use these observations to weigh their credibility. *Id.*; *State v. Koon*, 4th Dist. Hocking No. 15CA17, 2016-Ohio-416, ¶ 18.

{¶27} The jury convicted Burris of aggravated burglary in violation of R.C. 2911.11(A)(1)(a), which provides that “[n]o person by force, stealth, or deception, shall trespass in an occupied structure or in a separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply: (1) The offender inflicts, or attempts or threatens to inflict harm on another.”

{¶28} Burris concedes that “the element of aggravated burglary requiring trespass by force is not disputed.” Instead, Burris contends only that his conviction for aggravated burglary is against the manifest weight of the evidence because “[t]here is no credible evidence that Burris harmed Wright.” He contends that “Wright and Leister’s accounts of the incident were inconsistent, not supported by physical evidence, and often based on known falsehoods.”

{¶29} It is true that Wright admitted initially misrepresenting to the police that Burris was a member of her estranged husband’s motorcycle gang. But she presented the credible explanation that she wanted to get back together with Leister and did not want him knowing that she was dating a man she had met on the internet.

{¶30} Despite any discrepancies, real or perceived, between the statements made to police, the physical evidence, and the testimony, Wright and Leister provided statements to the police and the police observed physical evidence consistent with Burris injuring them after breaking into the apartment. For example, the police observed

that Wright was bleeding from the top of her head when they arrived. In addition, Wright and Leister testified that Burris harmed both of them by hitting them with the piece of wood trim and his fist. Finally, Lt. Claar testified that everything that Wright and Leister told him “matched up” with what Burris had confessed to him in his phone call to the police.

{¶31} It is not our job to second-guess the jury where there is evidence from which it could reach a guilty verdict; we must defer to the jury’s credibility and weight determinations. The jury neither clearly lost its way nor created a manifest miscarriage of justice by crediting the state’s evidence that Burris inflicted harm on Wright and Leister after he trespassed by kicking in the door to Wright’s apartment. Thus the jury verdict convicting him of aggravated burglary is not against the manifest weight of the evidence. See *State v. Reyes-Rosales*, 4th Dist. Adams No. 15CA1010, 2016-Ohio-3338, ¶ 28, quoting *State v. Moses*, 10th Dist. Franklin No. 13AP-816, 2014-Ohio-1748, ¶ 34 (“ ‘where the basis for a manifest weight argument lies in witnesses’ conflicting testimony or the credibility of the witnesses, the court will decline to substitute its own judgment for that of the trier of fact’ ”). We overrule Burris’s second assignment of error.

IV. CONCLUSION

{¶32} Burris has not established that his conviction for aggravated burglary should be reversed. Having overruled his assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.