

[Cite as *Stow v. Braden* , 2005-Ohio-6455.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

CITY OF STOW

C. A. No. 22703

Appellee

APPEAL FROM JUDGMENT
ENTERED IN THE
CUYAHOGA FALLS MUNICIPAL
COURT
COUNTY OF SUMMIT, OHIO
CASE No. 2004CRB04393

v.

NATASHA C. BRADEN

Appellant

DECISION AND JOURNAL ENTRY

Dated: December 7, 2005

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Judge.

{¶1} Appellant, Natasha Braden, appeals her conviction out of the Cuyahoga Falls Municipal Court. This Court affirms.

I.

{¶2} Appellant was charged with one count of domestic violence in violation of Stow Codified Ordinance 537.14, a misdemeanor of the first degree. Appellant was represented by Attorney J. Anthony Terilla, who filed various motions, requests and other documents in appellant's defense. Attorney Terilla moved to withdraw, citing a breakdown in the attorney-client relationship.

Attorney Larry Smith assumed the representation of appellant, and the matter proceeded to a bench trial. At the conclusion of the bench trial, the trial court found appellant guilty and sentenced appellant accordingly. Appellant timely appealed, setting forth three assignments of error for review.

II.

ASSIGNMENT OF ERROR I

“APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HER FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.”

{¶3} Appellant argues that trial counsel was ineffective for his failures to file a notice of appearance, to inform the prosecuting attorney of his representation of appellant, to file discovery motions, and to object to hearsay testimony. This Court disagrees.

{¶4} This Court uses a two-step process as set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 687, 80 L.Ed.2d 674, to determine whether a defendant’s right to the effective assistance of counsel has been violated.

“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.” *Id.*

{¶5} To demonstrate prejudice, “the defendant 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.” *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland*, 466 U.S. at 691.

{¶6} This Court must analyze the “reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Strickland*, 466 U.S. at 690. The defendant must first identify the acts or omissions of his attorney that he claims were not the result of reasonable professional judgment. This Court must then decide whether counsel’s conduct fell outside the range of professional competence. *Id.* There is a strong presumption that licensed attorneys in Ohio are competent. *State v. Smith* (1985), 17 Ohio St.3d 98, 100.

{¶7} Appellant first alleges that trial counsel was ineffective for his failure to file a notice of appearance. Mr. Terilla filed a notice of appearance on appellant’s behalf on December 28, 2004. Accordingly, this Court presumes that appellant does not challenge Mr. Terilla’s effectiveness in this regard. After the trial court allowed Mr. Terilla to withdraw from further representation of appellant, Mr. Smith assumed her representation. Mr. Smith filed subpoenas in

the case, but made no other filings. The city prosecutor asserted that she did not know who was representing appellant until Mr. Smith appeared at trial.

{¶8} Although Mr. Smith did not properly file a notice of appearance, the trial court permitted him to represent appellant at trial. See *State v. Rogan*, 2d Dist. No. 2002CA18, 2003-Ohio-3780, at ¶14. In addition, appellant did not object to Mr. Smith's representation. This Court finds that the better practice is for an attorney to file a notice of appearance to ensure the receipt of documents filed by the opposing party and appropriate case management by the court. Appellant, however, has demonstrated no prejudice by Mr. Smith's failure to file his notice of appearance. Mr. Smith was knowledgeable about the issues in the case, and he prepared for appellant's defense by issuing subpoenas for witnesses in appellant's defense. This Court finds that appellant has not overcome the presumption of Mr. Smith's competence only by alleging his failure to file a notice of appearance.

{¶9} Appellant further alleges that trial counsel was ineffective for his failure to file discovery motions. Mr. Terilla filed a request of notice of the prosecutor's intent to use evidence in chief at the trial, so that appellant might raise objections to such evidence, if necessary, pursuant to Crim.R. 12(C)(3). Mr. Terilla further filed a request for discovery on December 28, 2004. After Mr. Terilla's withdrawal from representation of appellant, Mr. Smith assumed her representation. Although Mr. Smith filed nothing more than subpoenas in this

case, this Court finds no reason why Mr. Smith should have duplicated the work that Mr. Terilla did during his representation of appellant. Appellant has failed to demonstrate how she was prejudiced by Mr. Smith's failure to file redundant discovery motions on appellant's behalf. Accordingly, appellant's argument that she was prejudiced by Mr. Smith's failure to file discovery motions is not well taken.

{¶10} Appellant further argues that trial counsel was ineffective for failing to object to the admission of certain hearsay evidence. Specifically, appellant argues that counsel should have objected to the testimony of police officers, who testified as to statements made by appellant's minor son, an alleged witness to the altercation between appellant and her husband. Appellant argues that she was thereby effectively denied the opportunity to cross-examine the minor child.¹

{¶11} "This Court has consistently held that 'trial counsel's failure to make objections is within the realm of trial tactics and does not establish ineffective assistance of counsel.'" *State v. Bradford*, 9th Dist. No. 22441, 2005-Ohio-5804, at ¶27, quoting *State v. Taylor*, 9th Dist. No. 01CA007945, 2002-Ohio-6992, at ¶76. In this case, this Court considers Mr. Smith's failure to object as a tactical decision. Further, appellant has not demonstrated that such failure to object was not sound trial strategy.

¹ Appellant earlier filed a motion in limine requesting that the trial court prohibit the minor child's testimony at trial.

{¶12} The hearsay statements at issue were statements by appellant’s eleven-year-old son that appellant “was out of control.” Officer Brian Snavelly of the Stow Police Department testified that the child told him that he and his father were trying to evade appellant after an altercation at home and that appellant chased them to the laundry room and attacked Mr. Braden, injuring his face. The trial court did not reference the hearsay statements of the child as it pronounced judgment, or indicate that the statements were fundamental to its decision. When a matter is tried before the trial court without a jury, there is a presumption that the trial court has “considered only the relevant, material and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary.” *Akron v. Fowler*, 9th Dist. No. 21327, 2003-Ohio-2844, at ¶7, citing *State v. Post* (1987), 32 Ohio St.3d 380, 384. In addition, as discussed in regard to the second assignment of error, there was sufficient evidence to support the trial court’s decision. Accordingly, appellant has failed to demonstrate that the outcome of the trial would have been different without the introduction of the hearsay statements. Appellant’s first assignment of error is overruled.

ASSIGNMENT OF ERROR II

“APPELLANT’S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND BASED ON INSUFFICIENT EVIDENCE.”

{¶13} Appellant argues that her conviction for domestic violence was not supported by sufficient evidence and was against the manifest weight of the

evidence. Specifically, appellant argues that the evidence established that appellant was physically incapable of injuring the victim. In addition, she argues that the trial court's finding that appellant did not intend to harm the victim indicates that there was insufficient evidence to establish that appellant acted knowingly. This Court disagrees.

{¶14} Appellant was charged with one count of domestic violence in violation of Stow Codified Ordinance 537.14(a), which states that “[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member.” This section mirrors the charge of domestic violence as set forth in R.C. 2919.25(A).

{¶15} A review of the sufficiency of the State's evidence and the manifest weight of the evidence adduced at trial are separate and legally distinct determinations. *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600. “While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion.” *Id.*, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook J., concurring). When reviewing the sufficiency of the evidence, this Court must review the evidence in a light most favorable to the prosecution to determine whether the evidence before the trial court was sufficient to sustain a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259, 279.

“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.

{¶16} A determination of whether a conviction is against the manifest weight of the evidence, however, does not permit this Court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

“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 and a new trial ordered.” *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶17} A new trial should be granted, however, only in the exceptional case, where the evidence weighs heavily against the conviction. *Id.* In fact, while this Court must weigh the evidence and consider the credibility of witnesses, it is well settled that “the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.” *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶18} This Court has stated that “[s]ufficiency is required to take a case to the jury [.] *** Thus, a determination that [a] conviction is supported by the

weight of the evidence will also be dispositive of the issue of sufficiency.” (Emphasis omitted.) *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96CA006462.

{¶19} There is no dispute that the victim, as appellant’s husband, is a family member. There is further no dispute that the bloody gouge on the victim’s face constitutes physical harm.

{¶20} Appellant argues first that, because there was some evidence that she suffered from arthritis at the time of the incident, the trial court erred in finding that she was physically able to inflict the injury to the victim’s face. Appellant further argues that the evidence established that she had no fingernails at the time and could, therefore, not have gouged her husband’s face. This Court disagrees.

{¶21} Appellant testified that she had arthritis at the time of the incident. Mr. Braden testified that appellant had mentioned to him that she was getting arthritis like her father. Appellant further testified that she picked the lock to the basement laundry room with a bobby pin or safety pin to gain access to her husband and son. The trial court found that, because appellant had the agility in her hands to manipulate a small pin in a lock, her arthritis did not preclude her from inflicting the gouge to the victim’s face.

{¶22} In addition, a photograph admitted into evidence and taken on the evening of the incident shows that appellant in fact has a nail on her left thumb. There was testimony that appellant opened the laundry room door with her right

hand and attacked the victim with her left hand, leaving a gouge on his right cheek.

{¶23} Based on the evidence, this Court finds that a trier of fact could reasonably find that appellant was physically capable of inflicting the injury sustained by the victim. There was evidence of her manual dexterity and of the existence of a thumbnail, which reasonably might cause the type of injury sustained by the victim.

{¶24} Appellant next argues that there was insufficient evidence to establish that she acted with the requisite culpable mental state. This Court disagrees.

{¶25} R.C. 2901.22(B) states:

“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.”

{¶26} There was evidence to show that appellant chased her husband and son throughout their house, yelling at them. There was evidence to show that Mr. Braden and his son locked themselves in the laundry room to avoid appellant. There was evidence that appellant picked the lock and eventually opened the door and attacked the victim with her hands against the victim’s face. The victim sustained a gouge to his cheek. Based on the evidence, this Court finds that a trier

of fact could reasonably find that appellant knew that her attack on the victim would probably cause an injury to the victim's face.

{¶27} The trial court recited that it did not believe that appellant “intended to cause that injury [.]” A specific intention to cause a certain result, however, is necessary to find that a person has acted purposely. Pursuant to Stow Codified Ordinance 537.14(A), however, appellant need only to have acted knowingly, and not purposely, in order to be convicted of domestic violence.

{¶28} For the foregoing reasons, this Court finds that the trial court did not lose its way and create a manifest miscarriage of justice when it convicted appellant of domestic violence in violation of Stow Codified Ordinance 537.14(A).

{¶29} This Court finds that this is not the exceptional case, where the evidence weighs heavily in favor of appellant. Having found that appellant's conviction is not against the manifest weight of the evidence, this Court further necessarily finds that there was sufficient evidence to support the trial court's verdict. Appellant's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

“THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY EXCLUDING TESTIMONY REGARDING THE MARITAL HISTORY OF APPELLANT AND COMPLAINANT AS THAT HISTORY WAS RELEVANT WITH REGARD TO THE COMPLAINANT'S MOTIVE TO LIE.”

{¶30} Appellant argues that the trial court erred by excluding testimony regarding the marital history of appellant and the victim, as such evidence was relevant to issues of the victim’s credibility. This Court disagrees.

{¶31} The decision to admit or exclude evidence lies in the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 180. This Court, therefore, reviews the trial court’s decision regarding evidentiary matters under an abuse of discretion standard of review. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates “perversity of will, passion, prejudice, partiality, or moral delinquency.” *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Id.*

{¶32} In this case, the trial court excluded testimony regarding the marital history of appellant and the victim as not relevant to the issue of whether appellant knowingly caused or attempted to cause physical harm to her husband on the evening of December 21, 2004. Evid.R. 402 states that “[e]vidence which is not relevant is not admissible.” Evid.R. 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

{¶33} Appellant argues that evidence of appellant's and the victim's discordant marital history was relevant to the issue of the victim's credibility. Specifically, appellant argues that evidence of marital discord was relevant to show the victim's motive to lie and should have been admitted pursuant to Evid.R. 404(B) as evidence of other acts. Evid.R. 404(B) provides:

“Evidence of the other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

{¶34} Evidence may properly be admitted under Evid.R. 404(B) to establish motive. However, where the purpose of the prior acts evidence is to establish “the motive of a state's witness to lie, rather than the motive of the criminal defendant to commit the alleged act, it appears that the defendant is attempting to specifically impeach the witness' character for truthfulness and which is more appropriately accomplished through Evid.R. 607, 608, or 609.” *State v. Lumpkin* (Feb. 25, 1992), 10th Dist. No. 91AP-567. Consequently, Evid.R. 404(B) is inapplicable. Therefore, we cannot say that the trial court erred in determining the evidence should not be admitted under Evid.R. 404(B) and/or as irrelevant.

{¶35} Appellant's third assignment of error is overruled.

III.

{¶36} Appellant's assignments of error are overruled. Appellant's conviction out of the Cuyahoga Falls Municipal Court for one count of domestic violence is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Cuyahoga Falls Municipal Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

Exceptions.

DONNA J. CARR
FOR THE COURT

SLABY, P. J.
MOORE, J.
CONCUR

APPEARANCES:

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