[Cite as *Akron v. McGuire*, 2009-Ohio-4661.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

CITY OF AKRON	C.A. No. 24638
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE AKRON MUNICIPAL COURT COUNTY OF SUMMIT, OHIO
PRINCESS N. MCGUIRE	
Appellant	CASE No. 08CRB13726

DECISION AND JOURNAL ENTRY

Dated: September 9, 2009

WHITMORE, Judge.

{¶1} Defendant-Appellant, Princess McGuire, appeals from her conviction in the Akron Municipal Court. This Court affirms.

I

{¶2} On the morning of October 20, 2008, Tessa Johnson arrived at Princess and Recardo McGuire's (collectively "the McGuires") home to drop off her child with the child's father, Recardo. Johnson's fiancé took the child to the door while Johnson remained in the car. Shortly thereafter, the child returned to the car crying, stating that Princess had told the child that she was going to physically harm her mother, Johnson. Johnson exited the car and began to take her child to the McGuires' door to retrieve her belongings. As Johnson approached the door, Princess exited the house and began yelling at her, which lead to an argument between the two women. Johnson started to return to her car at her fiancé's request. Though the parties dispute what happened next, Johnson testified that Princess hit her as she was attempting to return to her

car. At some point, Recardo exited the house with a cane or stick-like object which was used to smash the driver's side, front, and rear windows of Johnson's car.

{¶3} The police were called to the McGuires' residence and, upon questioning the witnesses present at the scene, arrested Princess and charged her with criminal damaging in violation of Akron City Code 131.06. Princess pleaded not guilty to the charges and the matter proceeded to trial. The jury found Princess guilty and she was sentenced to thirty days in jail, twenty seven of which were suspended. She was also ordered to have no contact with Johnson for one year. McGuire timely appeals from her conviction, asserting three assignments of error for our review.

II

Assignment of Error Number One

> "THE TRIAL COURT ERRED WHEN IT FAILED TO HOLD AN *IN CAMERA* HEARING WITH JUROR 12 TO DETERMINE IF JUROR 12 WAS PREJUDICED IN ANY MANNER AGAINST APPELLANT MCGUIRE. THE TRIAL COURT'S ERROR RESULTED IN DENYING APPELLANT MCGUIRE THE RIGHT TO A NEUTRAL JURY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE 1 OF THE OHIO CONSTITUTION."

{¶4} In her first assignment of error, Princess argues that the trial court should have further questioned Juror 12 as to whether he could remain impartial after he informed the court that he recognized Princess and was "concerned about his welfare after the trial[.]" She argues that, based on Juror 12's concerns, the trial court erred by not holding a hearing to determine whether he was biased or prejudiced against her. We disagree.

{¶5} A reviewing court affords a trial court considerable deference with respect to its handling of alleged juror misconduct. *State v. Hessler* (2000), 90 Ohio St.3d 108, 115-16. "Therefore, we employ an abuse-of-discretion standard and will not reverse the trial court unless

it has handled the alleged juror misconduct or ruled upon the post-trial motion in an unreasonable, arbitrary, or unconscionable manner." (Internal quotations and citations omitted.) Id. at 116.

{¶6} Initially, we note that Princess does not argue that the trial court erred in denying her motion for a mistrial; rather, she asserts that the trial court was obligated to hold a hearing and further question Juror 12 as to his ability to be fair and impartial based on the court's awareness that Juror 12 and Princess had personal knowledge of one another. Though neither party disputes on appeal that the jury wrote a note to the judge asserting the same, and a copy of such a note is contained in the file we received from the trial court, the jury's note was never introduced into evidence or made a part of the record. Likewise, there is no evidence in the record as to any discussion that might (or might not) have taken place about the note between the trial judge, counsel for both parties, and Juror 12. The note in the file is dated "1-20-09" and contains the following exchange:

> "[JURY]: Need to talk concerning the lady.
>
> "[COURT]: What is your question?
>
> "[JURY]: Juror 12,
>
> He is concerned about his welfare after the trial because he grew-up three streets over from the defendant and his mother still lives at the house. During mid-trial, Juror 12 recognized the defendant['s] face.
>
> "[COURT]: Juror, your duty is to follow the law I gave you."

Both responses to the jury's inquiries were handwritten and signed by the trial court judge. Given the context of the exchange and the judge's response, it appears that the inquiry was made at some point during jury deliberations, as the judge responds by instructing Juror 12 to follow the law he was given, which presumably refers to the jury instructions. We note again, however,

that the record does not contain any reference as to when the court received this information or what it did with the information once received. The only reference in the record as to any alleged juror misconduct appears at the start of the sentencing hearing, after the jury had returned a guilty verdict and had been dismissed. The sentencing hearing began with the following exchange:

> "[COURT]: We're on the record. The jury has found the defendant guilty. The jury has been polled. The court accepts the verdict and we're now here for sentencing on a second degree misdemeanor of criminal damaging. [Defense counsel.]
>
> "[COUNSEL]: Yes, Your Honor, before we – before we go forward with sentencing, I would move the Court to set aside a verdict – the motion for mistrial. It's come to the court's notice and all of our attention the defendant actually had personal knowledge – or one of the jurors had personal knowledge of the defendant and –
>
> "[COURT]: So the defendant had personal knowledge of the juror and they both failed to say anything?
>
> "[COUNSEL]: Yes. Yes, Your Honor. However, it stands to reason that the juror would have shared information with the jury that was not given at trial and they would have considered evidence that was not presented before the Court.
>
> "[COURT]: You have any proof of that?
>
> "[COUNSEL]: No, Your Honor, I don't.
>
> "[COURT]: Okay. Motion is overruled and we will proceed with sentencing. ***."

Based on the foregoing exchange it is apparent that Princess, too, realized before the trial was complete that she had personal knowledge of Juror 12.

{¶7} The Supreme Court has stated that "[t]here is no *per se* rule requiring an inquiry in every instance of alleged [juror] misconduct." (Emphasis and alteration in original.) *State v. Sanders* (2001), 92 Ohio St.3d 245, 253, quoting *U.S. v. Hernandez* (C.A. 11, 1991), 921 F.2d 1569. Furthermore, we have previously held that it is the burden of the party alleging the

misconduct to request the court hold a hearing and inquire further into the alleged misconduct. *State v. Mills*, 9th Dist. No. 21751, 2004-Ohio-1750, at ¶6; *State v. Mundy*, 9th Dist. No. 05CA0025-M, 2005-Ohio-6608, at ¶11-16. Additionally, this Court and others have rejected the argument that a trial court should hold a hearing sua sponte to investigate allegations of juror misconduct. *Mills* at ¶6. See, also, *State v. Curtis*, 7th Dist. No. 01-JE-16, 2002-Ohio-3054, at ¶26-27 (holding that juror misconduct must be affirmatively proven with evidence and placing the burden on the defendant to bring the alleged misconduct to the trial court's attention and request relief); *State v. Sapp* (Aug 15, 1995), 10th Dist. No. 94APA10-1524, at *8 (rejecting the argument that the court was required to hold a hearing to determine if the defendant was prejudiced by the alleged misconduct when the defendant had failed to put any of the alleged misconduct on the record).

{¶8} We have also cautioned that "a defendant must bring an alleged error to the attention of the trial court at a time when the error can be corrected" and "may not sit idly while hoping for a favorable jury verdict and only assert an issue, capable of being remedied at the time of its occurrence, upon receiving an unfavorable jury verdict." *Mills* at ¶4. While the record does not reveal precisely when defense counsel became aware of Juror 12's concern, it does reveal that Princess was likewise cognizant of the fact that she knew Juror 12 at a point when the jury was still present. Thus, she could have brought this to the court's attention during her trial, when it could have been addressed, irrespective of when the court addressed Juror 12's concern. Instead, Princess first raised the fact that she knew Juror 12 at her sentencing, once the jury had been dismissed. Furthermore, despite Princess' assertions that it was "unreasonable for the trial court not to investigate the[] allegations" (emphasis in original) contained in the jury's note, the record reveals that she failed to request such an inquiry of Juror 12, nor did she object

at sentencing as to how the court had handled the matter. Id. at ¶4-6. Thus, Princess waived any objection to the alleged misconduct and has not argued plain error on appeal. *Sanders*, 92 Ohio St.3d at 253 (concluding that, because the defendant "did not request [a] remedy [for the alleged juror misconduct] at trial, nor did he express dissatisfaction with the trial judge's handling of the matter" the party had waived all but plain error on appeal); *Mills* at ¶4-5. Accordingly, Princess' first assignment of error is not well taken.

Assignment of Error Number Two

> "THE PROSECUTING ATTORNEY MADE IMPORPER (sic) STATEMENTS DURING CLOSING ARGUMENTS. THE PROSECUTOR'S CLOSING ARGUMENT CONTAINED STATEMENTS REGARDING HER OPINION OF THE TRUTHFULNESS OF A WITNESS IN VIOLATION OF APPELLANT MCGUIRE'S RIGHT TO DUE PROCESS. THESE STATEMENTS WERE IMPROPER AS IT IS THE DUTY OF THE FACT FINDER TO DETERMINE THE VERACITY OF THE WITNESS."

{¶9} In her second assignment of error, Princess asserts that the prosecutor made improper statements during her closing argument by questioning the truthfulness of Recardo's testimony. Specifically, the prosecutor questioned the veracity of Recardo's testimony that he was the only one who struck Johnson's car and that his wife did not cause any of the damage or ever take the cane from him to use it to hit Johnson's car. Princess argues that the prosecutor's characterization of Recardo's testimony as untruthful was an expression of the prosecutor's personal opinion, which was both improper and prejudicial. We disagree.

{¶10} We have previously stated that:

> "[When] deciding whether a prosecutor's conduct rises to the level of prosecutorial misconduct, a reviewing court must determine if the remarks were improper, and, if so, whether they actually prejudiced the substantial rights of the defendant. [An] [a]ppellant must demonstrate that there is a reasonable probability, that, but for the prosecutor's misconduct, the result of the proceeding would have been different." *State v. Wharton*, 9th Dist. No. 23300, 2007-Ohio-1817, at ¶16, quoting *State v. Overholt*, 9th Dist. No. 02CA0108-M, 2003-Ohio-3500, at ¶47.

"[W]ide latitude is given to counsel during closing argument to present their most convincing positions." *State v. Phillips* (1995), 74 Ohio St.3d 72, 90. Moreover, "[c]omments made in closing argument are not viewed in isolation, rather the closing argument is reviewed in its entirety to determine whether remarks by the prosecutor were prejudicial." *State v. Henry*, 9th Dist. No. 02CA008170, 2003-Ohio-3151, at ¶28, quoting *State v. Smith* (Jan. 17, 2001), 9th Dist. No. 99CA007451, at *1.

{¶11} Princess concedes that her counsel failed to object to the statements during closing arguments. Thus, she argues that the statements constituted plain error under Crim.R. 52(B). The Supreme Court has remarked that "[n]otice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. In order for this Court to apply Crim.R. 52(B), it must be clear that the outcome of the trial would have been different but for the alleged error. *Wharton* at ¶16.

{¶12} Here, Princess alleges that the prosecutor's comments during closing arguments were improper because they challenged the truthfulness of Recardo's testimony. Specifically, Princess alleges that the following statements made by the prosecutor during closing argument constitute plain error:

> "Imagine if your husband, your wife, your girlfriend, imagine if one of them was charged and you were there and you have the ability to save them. You have the ability to get up on the stand and say whatever it was that would save them. Would you not get up on the stand and say whatever you needed to save them? Would you not get up on the stand and possibly even say it was you to save that person? Possibly even making it where you put yourself on the line, just to save your husband, your wife, maybe even your sister or your brother. Wouldn't you do that?
>
> "That's what happened today. Someone is trying to save someone else ***."

{¶13} Princess asserts that the prosecutor improperly expressed her personal opinion as to the truthfulness of Recardo's testimony and that these statements, taken in conjunction with the "limited information put before the jury" prejudiced her right to a fair trial. We have previously stated that:

> "[I]t is not prosecutorial misconduct to characterize a witness as a liar or a claim as a lie if the evidence reasonably supports the characterization. However, prosecutors may not invade the realm of the jury by, for example, stating their personal beliefs regarding guilt and credibility, or alluding to matters outside the record." (Internal citations omitted.) *State v. Johnson*, 9th Dist. No. 06CA0074, 2007-Ohio-5604, at ¶10, quoting *State v. Baker*, 2d. Dist. No. 2004 CA 29, 2005-Ohio-45, at ¶19.

Upon reviewing the record, we do not consider the prosecutor's comments as those representing her personal beliefs. Instead, we consider the statements she made in closing arguments as an attempt to characterize Recardo as being untruthful based on the evidence adduced at trial. At trial, both Johnson and Officer William Price testified that Princess had caused the damage to Johnson's car windows. Johnson testified that Recardo hit her front windshield first, then handed the cane to Princess who struck her front windshield again, then hit the driver's side window and rear window, too.

{¶14} Officer Price testified that he arrived on the scene and interviewed the McGuires as to what had transpired. The McGuires informed him that "the windows had gotten busted out of the car because [the McGuires] were defending themselves" from Johnson's attempts to run them over with her car. There is no indication that Recardo informed Officer Price at the time when the parties were interviewed, or later when his wife was arrested, that he, in fact, had committed the offense. Office Price testified that upon further consultation with the second officer at the scene and after interviewing witnesses, the officers determined that Princess had been responsible for striking Johnson's car windows. The record reveals that even Princess'

counsel remarked during his closing argument that he was surprised by Recardo's testimony that he was solely responsible for the damage to Johnson's car. Defense counsel characterized Recardo's testimony in his closing argument as "surprising to [the jury]. It was surprising to me. I didn't tell you about that in opening [argument]. I didn't think he would come up and say he did it. I didn't think that." Thus, it is evident from the testimony of Officer Price and Johnson that the evidence reasonably supported the prosecutor's characterization of Recardo's testimony – testimony which even surprised defense counsel who called Recardo as a witness. Accordingly, we do not consider the prosecutor's statements improper or prejudicial when viewed in the totality of the evidence adduced at trial. *Wharton* at ¶16; *Henry* at ¶28.

{¶15} Based on the foregoing, we do not consider Princess' conviction as representing the rare circumstance where a manifest miscarriage of justice occurred. *Long*, 53 Ohio St.2d at paragraph three of the syllabus. Princess' second assignment of error is without merit.

Assignment of Error Number Three

> "THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF SECTION 3(B)(3), ARTICLE IV OF THE OHIO CONSTITUTION, AS THE EVIDENCE DEMONSTRATED THAT APPELLANT MCGUIRE DID NOT COMMIT THE OFFENSE."

{¶16} In her third assignment of error, Princess argues that her convictions are against the manifest weight of the evidence because: (1) there was contradictory evidence presented at trial as to who caused the damage to Johnson's windows; (2) Johnson's testimony was self-serving; (3) the testimony of Johnson and Officer Price was neither certain or reliable; and (4) Johnson's testimony was vague, uncertain, and conflicted with the Recardo's testimony. We disagree.

{¶17} When considering a manifest weight argument, an appellate court:

> "[M]ust 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.

{¶18} A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Id. Therefore, this Court's "discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶19} Akron City Code 131.06 provides, in relevant part, that "[n]o person shall cause, or create a substantial risk of physical harm to any property of another without his consent *** knowingly, by any means[.]"

{¶20} At trial, the prosecutor called Johnson, her mother, and Officer Price to testify. Johnson testified that she and her fiancé arrived at the McGuires' house to leave her daughter with her father, Recardo. Shortly after Johnson's fiancé left the child at the door, the child returned to the car crying and told Johnson that Princess said she was going to "physically *** harm [Johnson]." Johnson asked her daughter if she wanted to leave, which she did, so Johnson exited the car to go with her daughter to retrieve her bag from the house. Recardo and Johnson's fiancé were still talking at the front door when Johnson's daughter went back into the house. Johnson testified that Princess then exited the house from the side door and began walking toward Johnson, telling Johnson "she's gonna whoop [her]." Johnson's fiancé stepped between

the women and told Johnson to get back in the car, but before she could do so, Princess hit her. According to Johnson, she started to get back in the car and was trying to start it to leave the house when she saw Recardo exit the house and approach the car with a cane or stick-like object. Johnson testified that Recardo hit the front windshield, then handed the cane to Princess, who hit the front windshield again. As Johnson tried to put the car in reverse to leave, Princess hit the driver's side window and the rear window, too, resulting in all three windows being shattered. Princess' sister-in-law then approached the car and "punche[d] [Johnson] under the eye, and then [] [Johnson] just black[ed] out."

{¶21} On cross examination, Johnson admitted that things had happened very fast and that the scene was very confusing, but re-iterated her strong belief that Princess damaged her car, stating "I know that for a fact. I know who damaged that vehicle without a doubt."

{¶22} Johnson's mother testified that she owned the car that was damaged and that she had not given consent to anyone other than her daughter's fiancé to touch or drive her car that day.

{¶23} Officer Price testified that he arrived at the scene shortly after Officer Barker. Upon arriving, he observed Johnson's car straddling the curb and the street with two flat tires and three shattered windows. In trying to diffuse the situation and determine what had occurred, the officers separated the parties; Officer Price interviewed the McGuires and the woman with them, and Officer Barker interviewed Johnson and her fiancé. The officers received different versions of what had taken place from each party, but Officer Barker[1] also interviewed an independent witness who came forward with information on what had transpired between the parties. Based on the information gathered at the scene, Officers Barker and Price determined

that Princess was the party who had struck Johnson's car, so they subsequently arrested her for criminal damaging. Officer Price admitted on cross examination that he did not personally observe the fight and confirmed that the officers did not know the name of the independent witness who spoke to Officer Barker that day, but noted that the witness requested not to be involved any further in the matter at the time of the interview.

{¶24} Recardo testified for the defense, stating that he was responsible for all the damage done to Johnson's car and that his wife was not involved in any way, nor did she smash any windows.

{¶25} To the extent that Princess argues that Johnson's testimony was not credible because she admitted that she "black[ed] out"; that there was conflicting testimony presented from Johnson, Office Price, and Recardo; and that Johnson's testimony was self-serving and unreliable, we note that where conflicting evidence is presented, we "will not disturb the jury's factual determinations because the jury is in the best position to determine the credibility of the witnesses during trial." *State v. Danko*, 9th Dist. No. 07CA0070-M, 2008-Ohio-2903, at ¶36. Furthermore, "this Court will not overturn the trial court's verdict on a manifest weight of the evidence challenge only because the jury chose to believe certain witnesses' testimony over the testimony of the others." *Id*. at ¶36.

{¶26} Princess further asserts that "the evidence in this case was neither certain nor reliable" and points to the fact that the officers largely relied on the report of an unidentified witness, who did not testify at trial, to determine that she was responsible for the damage to Johnson's car. While Princess argues that the officers relied on the report from the unidentified witness in making their decision to arrest Princess, we note that the issue on appeal is not what

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[1] Officer Barker was not available to testify because he was serving in the military in Iraq at the

the arresting officers believed; rather it is what the jury believed after assessing the credibility of the testifying witnesses.

{¶27} The record reveals that the trial court sustained counsel's objections to any testimony about what the independent witness told the officers, but that counsel later failed to object or request a limiting instruction when Officer Price testified that "after speaking *** with this *** independent witness, that's how we determined that [Princess] busted out the window in the car[.]" By failing to object to this testimony at trial, Princess has forfeited any objection related to this testimony. Moreover, she has not argued plain error with respect to this issue on appeal. *Akron v. Concannon*, 9th Dist. No. 24512, 2009-Ohio-4162, at ¶12.

{¶28} After a thorough review of the record, this Court cannot say that the jury clearly lost its way and created a manifest miscarriage of justice by convicting Princess of criminal damaging. Here, Johnson testified that Princess was responsible for damaging her car by repeatedly hitting it with a cane while Johnson attempted to leave the McGuires' property. The unidentified witness corroborated Johnson's testimony. Johnson's mother testified that she did not consent to anyone other than Johnson's fiancé touching her car that day. While Recardo attempted to accept responsibility for the damage to Johnson's car, the jury presumably discredited his testimony and found Johnson's testimony to be more credible. Despite the conflicting testimony, we do not consider the evidence to weigh heavily against Princess' conviction. Accordingly, Princess' third assignment of error is overruled.

III

{¶29} Princess' assignments of error are overruled. The judgment of the Akron Municipal Court is affirmed.

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time of trial.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Akron 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.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
CONCURS

BELFANCE, J.
CONCURS, SAYING:

{¶30} I concur. With respect to the first assignment of error, it is troubling that the juror was not questioned by the court and counsel in light of the information conveyed to the trial judge in the note. It is axiomatic that a fair and impartial jury is the cornerstone of the defendant's right to a trial by jury. However, the ability to review the trial court's conduct is

frustrated by the lack of a record. While the trial court is afforded discretion in determinations of jury misconduct, that discretion is not limitless. However, in this matter, it is impossible to determine whether the trial court abused its discretion given that it is unclear at what point counsel was apprised of the jury's note, what discussions ensued, and whether a request to interview the juror was made but rejected by the trial court. Although the Appellant suggests that the trial court improperly failed to investigate, there is no record from which this Court can make that assessment, and Appellant did not avail herself of App.R. 9(C) to provide a record. While it is possible that trial counsel was unaware of the exchange that occurred between the trial court and the jury, it is equally possible that trial counsel was apprised of the note and acquiesced to the trial court's decision to send the note back to the jury in lieu of bringing the juror before the court for further inquiry.

APPEARANCES:

J. DEAN CARRO, Appellate Review Office, School of Law, The University of Akron, for Appellant.

MAX ROTHAL, Director of Law, DOUGLAS J. POWLEY, Chief City Prosecutor, and CARA C. KENNERLY-FORD, Assistant City Prosecutor, for Appellee.