[Cite as *State v. Bedford*, 2010-Ohio-3577.]

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

STATE OF OHIO	C.A. Nos. 25048 & 25066
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
JOSEPH R. BEDFORD	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 05 1623

DECISION AND JOURNAL ENTRY

Dated: August 4, 2010

MOORE, Judge.

{¶1} Appellant, Joseph R. Bedford, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms in part and vacates in part.

I.

{¶2} On the night of May 13, 2008, Mr. Bedford appeared at his mother, Carol Bedford's, apartment and engaged in an altercation. Mr. Bedford's brother-in-law, Danny Frazier, was not present at the apartment but contacted the police after receiving a phone call from Ms. Bedford. Officers from the Akron Police Department responded to the apartment, eventually arresting Mr. Bedford.

{¶3} On May 29, 2008, the Summit County Grand Jury indicted Mr. Bedford on one count of domestic violence, in violation of R.C. 2919.25(A), a felony of the fourth degree, and one count of disrupting public services in violation of R.C. 2909.04(A)(1), also a felony of the fourth degree.

{¶4} The charges were tried to a jury beginning July 31, 2008 and concluding August 1, 2008. On August 1, 2008, the jury found Mr. Bedford guilty of each charge. The trial court sentenced Mr. Bedford to one year of incarceration on each charge and further ordered that the sentences run consecutively, rather than concurrently, for a total of two years of incarceration.

{¶5} Mr. Bedford timely filed a notice of appeal, and has raised four assignments of error for our review. We have rearranged his assignments of error in order to facilitate our discussion.

II.

ASSIGNMENT OF ERROR IV

"[] BEDFORD'S CONVICTION FOR DISRUPTION OF PUBLIC SERVICES IS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

{¶6} In his fourth assignment of error, Mr. Bedford contends that the evidence at trial was insufficient to support his conviction for disruption of public services. We agree.

{¶7} In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 279. Furthermore:

> "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 the 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." *Jenks*, 61 Ohio St.3d paragraph two of the syllabus; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

{¶8} Bedford was convicted under R.C. 2909.04, which provides as follows:

> "(A) No person, purposely by any means or knowingly by damaging or tampering with any property, shall do any of the following:
>
> "(1) Interrupt or impair television, radio, telephone, telegraph, or other mass communications service; police, fire, or other public service communications;

> radar, loran, radio, or other electronic aids to air or marine navigation or communications; or amateur or citizens band radio communications being used for public service or emergency communications[.]"

{¶9} For the purposes of R.C. 2909.04, "property" includes telecommunication devices. *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, at ¶25, citing R.C. 2901.01(A)(10)(a). Black's Law Dictionary defines "tampering" to mean "[t]he act of altering a thing; esp., the act of illegally altering *** a consumer good." Black's Law Dictionary (8 Ed.Rev.2004) 1494.

{¶10} Mr. Bedford cites *State v. Tayse*, 9th Dist. No. 23978, 2009-Ohio-1209, and *Robinson*, supra, for the proposition that proof of some damage to a phone is necessary to support a conviction for disruption of public services. In *Tayse*, this Court held that merely turning off a cell phone did not constitute damage or tampering for the purposes of R.C. 2909.04. *Tayes* at ¶23. In *Robinson*, the Supreme Court of Ohio held that damaging a single private phone can support a conviction under R.C. 2909.04. *Robinson* at ¶32.

{¶11} We believe this matter most closely resembles *Tayse*. In this case, Ms. Bedford had a cordless telephone as well as at least one standard corded phone, both of which were served by the same landline telephone connection. Evidence indicated that Mr. Bedford took the cordless phone from Ms. Bedford and did not allow her to use it for a period of time. The State introduced no evidence, however, that Mr. Bedford damaged or tampered with the phone. For the purposes of R.C. 2909.04, physically withholding the use of a cordless phone is indistinguishable from turning off a cell phone. The State failed to establish that Mr. Bedford damaged or tampered with a telephone. While this Court in *Tayse* discussed damaging or tampering with a phone, it did so in the context of distinguishing the facts of *Tayse* from those in *Robinson*. The gravamen, however, of the analysis is whether the services were interrupted or

impaired in any significant way. In this case, they were not. Accordingly, Mr. Bedford's conviction for disruption of public services is not supported by sufficient evidence. *Jenks*, 61 Ohio St.3d at paragraph two of the syllabus.

{¶12} Mr. Bedford's fourth assignment of error is sustained and his conviction for a violation of R.C. 2909.04(A)(1) is vacated.

ASSIGNMENT OF ERROR III

"[] BEDFORD'S CONVICTIONS FOR DOMESTIC VIOLENCE AND DISRUPTION OF PUBLIC SERVICES ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶13} In his third assignment of error, Mr. Bedford contends that his convictions for domestic violence and disruption of public services are against the manifest weight of the evidence. Initially, we note that our resolution of Mr. Bedford's fourth assignment of error renders moot his argument with regard to his conviction for disruption of public services. App.R. 12(A)(1)(c).

{¶14} With regard to his conviction for domestic violence, Mr. Bedford primarily asserts that the weight of the evidence is against the jury's finding that Mr. Bedford caused physical harm to his mother. We disagree.

{¶15} It is well established that a review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct determinations. *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, at *1. "While the test for sufficiency requires a determination 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 *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring).

{¶16} A determination of whether a conviction is against the manifest weight of the evidence 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} This discretionary power should be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. Id.

{¶18} Domestic violence is prohibited under R.C. 2919.25(A), which provides that "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." "Physical harm to persons" is defined as "injury, illness, or other physiological impairment, *regardless of its gravity or duration*." (Emphasis added.) R.C. 2901.01(A)(3).

{¶19} In support of his argument, Mr. Bedford contends that his mother testified she was not afraid of him, but rather afraid that he would not go to sleep. Mr. Bedford further contends that even though he is three times his mother's size, it is not clear that she sustained any injuries. She did not seek or accept medical treatment on the night of the incident and she denied that her eye was puffy, red or swollen. Additionally, the officers did not collect any photographic evidence despite their possession of a Polaroid camera.

{¶20} Ms. Bedford testified that Mr. Bedford grabbed her breast, pushed her, poked her in the eye and slapped her in the face, all of which hurt. She later read her statement describing the incident, which was given to the investigating police officers the night of the incident. In her statement that night she reported only that Mr. Bedford punched her in her left eye and face. She

did, however, admit that despite her pain, she did not have any injuries or require medical attention.

{¶21} Officer Christopher Lepa of the Akron Police Department responded to a call regarding a domestic dispute at Ms. Bedford's apartment. Officer Lepa testified that he observed a minor mark on Ms. Bedford's left eye. He stated that the mark appeared to have been inflicted shortly before his arrival. He also testified that victims sometimes leave out events when filling out their statement forms. After having his memory refreshed, Officer Lepa further testified that Ms. Bedford reported that Mr. Bedford pushed her in the chest area, which she said caused pain.

{¶22} Officer James Hadbavny arrived at the scene with Officer Lepa and the two investigated the incident together. Officer Hadbavny separately interviewed Mr. Bedford. While interviewing Mr. Bedford, Officer Hadbavny had to ask him to have a seat for his own safety because he was so intoxicated that Officer Hadbavny feared for Mr. Bedford's safety. Officer Hadbavny did not interview Ms. Bedford, but observed that her face was red on the left side. He testified that he had his Polaroid camera with him but elected not to document Ms. Bedford's injuries because the pictures rarely show anything and are typically vague.

{¶23} Mr. Bedford testified on his own behalf. He admitted that he has had a lifelong problem with alcohol. He denied, however, pushing, slapping, punching, grabbing or otherwise harming his mother.

{¶24} Mr. Bedford's testimony focused on Ms. Bedford's lack of a visible injury. The officers offered somewhat conflicting testimony about the location of redness on Ms. Bedford's face. Yet each officer did testify to redness on the left side of her face, which was consistent with her written statement the night of the incident. Mr. Bedford offered only a blanket denial of touching or harming his mother. Although the evidence suggests that Ms. Bedford did not suffer

serious injury, the statute requires only some injury, "regardless of its gravity[.]" R.C. 2901.01(A)(3); R.C. 2919.25(A). After reviewing the entire record, weighing the inferences and considering the credibility of the witnesses, we cannot say that the trier of fact created a manifest miscarriage of justice in finding Mr. Bedford guilty of domestic violence. *Otten*, 33 Ohio App.3d at 340.

{¶25} Mr. Bedford's third assignment of error is overruled.

ASSIGNMENT OF ERROR II

"[] BEDFORD WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO PERFORM AS THE KIND OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT."

{¶26} In his second assignment of error, Mr. Bedford contends that he was denied the effective assistance of trial counsel because his trial counsel did not personally appear for three of the four pretrials in this case. Mr. Bedford further contends that his trial counsel was ineffective because counsel failed to object to inadmissible hearsay evidence, as well as inadmissible other acts evidence. We do not agree.

{¶27} To show ineffective assistance of counsel, Mr. Bedford must satisfy a two prong test. *Strickland v. Washington* (1984), 466 U.S. 668, 669. First, he must show that his trial counsel engaged in a "'substantial violation of any *** essential duties to his client.'" *State v. Bradley* (1989), 42 Ohio St.3d 136, 141, quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396. Second, he must show that his trial counsel's ineffectiveness resulted in prejudice. *Bradley*, 42 Ohio St.3d at 141-142, quoting *Lytle*, 48 Ohio St.2d at 396-397. "Prejudice exists where there is a reasonable probability that the trial result would have been different but for the alleged deficiencies of counsel." *State v. Velez*, 9th Dist. No. 06CA008997, 2007-Ohio-5122, at ¶37, citing *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus. This Court need not address

both *Strickland* prongs if Mr. Bedford fails to prove either one. *State v. Ray*, 9th Dist. No. 22459, 2005-Ohio-4941, at ¶10.

{¶28} Mr. Bedford notes that trial counsel did not object to inadmissible hearsay when Ms. Bedford read her statement made to the police, when Officer Lepa testified as to what Ms. Bedford told him, when Officer Lepa read a "danger assessment" from his incident investigative report, when Officer Lepa read Ms. Bedford's statement that Mr. Bedford was "intoxicated and that he does drink a lot[,]" or when Officer Lepa read his narrative and description of Ms. Bedford's injuries. Similarly, Mr. Bedford contends that trial counsel failed to object to inadmissible other acts evidence including Mr. Frazier's testimony that Mr. Bedford threatened and cursed at him, Ms. Bedford's testimony that she was reprimanded by the management of her apartment complex due to noise caused by Mr. Bedford, Ms. Bedford's comments about Mr. Bedford's drinking problem, her statement that Mr. Bedford was first handcuffed due to a warrant for his arrest, her statement that Mr. Bedford had no driver's license, her statement that "you can say the wrong words and it will set him off[,]" or Officer Lepa's statement that Mr. Bedford was arrested on a warrant for disorderly conduct by intoxication.

{¶29} Assuming without deciding that the hearsay evidence was otherwise inadmissible, it appears from the record that trial counsel made a tactical decision not to object to its admission. We have 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. Windham*, 9th Dist. No. 05CA0033, 2006-Ohio-1544, at ¶24, quoting, *State v. Taylor*, 9th Dist. No. 01CA007945, 2002-Ohio-6992, at ¶76. On cross-examination, trial counsel chose to highlight the inconsistencies between Ms. Bedford's testimony at trial about the events in question and the statement she gave to police the night of the incident. Counsel also pointed out

the portion of Officer Lepa's investigative report, and Officer Lepa's narrative and description of Ms. Bedford's injuries. Allowing the documents to be read into the record was crucial to trial counsel's strategy. In fact, during closing arguments trial counsel directed the jurors specifically to Ms. Bedford's statement to the police, saying, "That's two inconsistent statements *** and you'll get to view that statement, or she read it into the record." Additionally, trial counsel highlighted inconsistencies between the descriptions of Ms. Bedford's facial injury as described by the officers.

{¶30} We also conclude that trial counsel's decision not to object to other acts evidence constituted a trial tactic. Again, assuming without deciding that the evidence was inadmissible, trial counsel allowed the introduction, without objection, of numerous statements that tended to reflect poorly on Mr. Bedford, several of which occurred well prior to the incident in question. In the defense case-in-chief, however, Mr. Bedford testified that he has had an alcohol problem all of his life, he and Ms. Bedford had been dealing with his alcohol problems for some time, that she has previously threatened to seek a restraining order to have him leave her alone, and that she had threatened to "use the courts and judicial system *** because she just couldn't tell me face to face or something like that because it was hurting too bad[.]" On cross-examination, the following exchange occurred between the prosecutor and Mr. Bedford:

> "Q. She's told you you have an alcohol problem, right?
>
> "A. Correct.
>
> "Q. And you said today that she used the judicial system, and it was a little muddled, but she used the judicial system because you don't think she could tell you face to face because it hurt too bad; is that correct?
>
> "A. I don't understand.
>
> "Q. Well, you said she used the judicial system to basically punish you for drinking?

> "A. She used the judicial system to get rid of me, not to punish me for drinking, just to get rid of me.
>
> "Q. Okay. And you said earlier that she used the judicial system because she couldn't tell you face to face because it hurt her too bad?
>
> "A. That's correct."

{¶31} Mr. Bedford's approach, including his testimony on direct and cross-examination, was to portray himself as a troubled son with an alcohol problem to support his contention that Ms. Bedford invented the domestic violence claim to "get rid of [him]." Using this approach, trial counsel's strategy during the State's case-in-chief was to allow the State to admit some evidence that reflected poorly on Mr. Bedford's behavior during the preceding years. "'[D]ebatable trial tactics do not give rise to a claim for ineffective assistance of counsel.'" *State v. Williams*, 9th Dist. No. 24169, 2009-Ohio-3162, at ¶37, quoting *State v. Hoehn*, 9th Dist. No. 03CA0076-M, 2004-Ohio-1419 at ¶45. Moreover, "the end result of tactical trial decisions need not be positive in order for counsel to be considered 'effective.'" *State v. Awkal* (1996), 76 Ohio St.3d 324, 337. Mr. Bedford failed to satisfy the first prong of *Strickland*. *Bradley*, 42 Ohio St.3d at 141.

{¶32} At oral argument, Mr. Bedford's appellate counsel conceded that if Mr. Bedford's counsel was not deficient during trial then he cannot establish prejudice flowing from trial counsel's failure to personally appear at several pretrial hearings. We agree that because trial counsel was not ineffective, Mr. Bedford is unable to establish prejudice flowing from trial counsel's pre-trial absences. We have already determined that counsel's performance was not deficient at trial. Further, Mr. Bedford's appellate brief argues only that the absences demonstrated a "lack of preparedness" and then states the bare legal conclusion that it is likely the outcome would have been different "if [Mr.] Bedford had effective representation." This

argument is entirely speculative. Therefore, Mr. Bedford cannot establish prejudice in relation to his claims of pretrial ineffective assistance of counsel.

{¶33} Accordingly, Mr. Bedford's second assignment of error is overruled.

ASSIGNMENT OF ERROR I

> "[] BEDFORD WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS FORCED TO CHOOSE TO EITHER WAIVE HIS CONSTITUTIONAL AND STATUTORY SPEEDY TRIAL RIGHTS, OR TO WITHDRAW HIS REQUEST FOR SUBSTITUTE COUNSEL."

{¶34} In his first assignment of error, Mr. Bedford contends that he was denied his right to effective assistance of counsel when the trial court forced him to waive his constitutional and statutory speedy trial rights or to withdraw his request for the appointment of substitute counsel. We do not agree.

{¶35} At the July 21, 2008 final pretrial hearing, Mr. Bedford requested that the trial court appoint him a new attorney. Another attorney stood in for his appointed counsel at the hearing. At that time, his trial was scheduled for July 24, 2008, and his attorney had already filed a motion to continue the trial due to the need to review evidence that had recently become available. According to the prosecutor, Mr. Bedford's speedy trial deadline was approximately August 10, 2008.

{¶36} The trial court explained to Mr. Bedford that it would appoint new counsel, but doing so would require Mr. Bedford to sign a waiver of his right to a speedy trial. Mr. Bedford indicated that he did not want his trial continued further because he was being held in the Summit County Jail while awaiting trial. The trial court further explained that it could not appoint new counsel and expect him or her to conduct a trial in three days. Mr. Bedford remained adamant that he did not wish to waive his speedy trial rights. The trial judge indicated, "Well, since [your lawyer's] not available on Thursday, I'll continue the case. I'm going to do it

within your speedy trial deadline." Mr. Bedford then thanked the trial judge. The court continued the trial until July 31, 2008, and all parties agree that the trial was held within Mr. Bedford's speedy trial deadline.

{¶37} This matter is very similar to *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164. In that case, a death-penalty matter, Williams requested the appointment of new counsel approximately three weeks prior to trial. Id. at ¶54. The trial court stated that it would only appoint new counsel if Williams were to sign a waiver of his right to speedy trial. Id. Williams refused to sign the waiver and opted instead to continue with his present counsel. Id. The Supreme Court of Ohio noted that Williams never demonstrated that the court was required to appoint new counsel. Id. It held that the trial court acted within its discretion in requiring that Williams either continue with the same counsel or sign a time waiver. Id. at ¶55.

{¶38} In this case, trial was scheduled to begin three days after the final pretrial during which Mr. Bedford requested new counsel. The trial court reasonably felt that it could not force newly appointed counsel to try a case on three days' notice. At the hearing, the prosecutor indicated that Mr. Bedford's speedy trial deadline would pass in approximately 20 days. The trial court had little choice but to allow Mr. Bedford to decide between a speedy trial waiver and the appointment of new counsel. Mr. Bedford remained adamant that he did not want to further delay his case. Accordingly, maintaining his previously appointed attorney and briefly continuing the trial best suited Mr. Bedford's desires to delay the matter as little as possible. The trial court, in allowing Mr. Bedford to choose a course of action "simply acted out of that respect for the individual which is the lifeblood of the law." (Citations omitted.) Id. at ¶57.

{¶39} Mr. Bedford's first assignment of error is overruled.

III.

{¶40} Mr. Bedford's fourth assignment of error is sustained, and his conviction for disrupting public services is vacated pursuant to that determination. His first, second and third assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed in part and vacated in part, and the cause remanded for further proceedings consistent with this opinion.

Judgment affirmed in part,
vacated in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, 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 both parties equally.

CARLA MOORE
FOR THE COURT

CARR, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

JACQUENETTE S. CORGAN, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.