[Cite as *State v. Ortt*, 2015-Ohio-2981.]

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

STATE OF OHIO	C.A. No. 14AP0042
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
BRITTNEY ORTT	WAYNT COUNTY MUNICIPAL COURT COUNTY OF WAYNE, OHIO
Appellant	CASE No. 2014 CRB 000946

DECISION AND JOURNAL ENTRY

Dated: July 27, 2015

HENSAL, Presiding Judge.

{¶1} Brittney Ortt appeals her conviction for criminal damaging in the Wayne County Municipal Court. For the following reasons, this Court affirms.

I.

{¶2} Christina Kamp testified that she could not sleep during the early morning hours of May 10, 2014, because her neighbor Ms. Ortt was vacuuming. She eventually called the police. Later that day, Ms. Kamp heard Ms. Ortt yelling at her from outside. According to Ms. Kamp, when she looked outside, she saw Ms. Ortt standing near a Jeep that Ms. Kamp's aunt allows Ms. Kamp to drive. Ms. Ortt yelled and swore at Ms. Kamp for calling the police on her and began "doing something" to one of the Jeep's doors. After Ms. Ortt left, Ms. Kamp's friend Stacy Stitzlein told her that she should go downstairs to look at the Jeep. When Ms. Kamp did, she saw that someone had scratched letters in the paint at the same spot where Ms. Ortt was standing while yelling at her. Jim Murray testified that he was with Ms. Kamp during the yelling

incident and saw Ms. Ortt moving her arm up and down on the side of the Jeep as if she were scribbling on it. Ms. Stitzlein testified that she was at the apartment complex to take care of one of the residents when she heard shouting, so she went around the side of a building to tell the shouter to be quiet. When she turned the corner, she saw that the shouter was Ms. Ortt. According to Ms. Stitzlein, Ms. Ortt stomped away after she told her to be quiet.

{¶3} The Wayne County Prosecutor filed a complaint against Ms. Ortt, charging her with criminal damaging under Revised Code Section 2909.06(A)(1). At trial, Ms. Ortt denied damaging the Jeep. She testified that she did not even know that Ms. Kamp had use of a vehicle and that she is the person who usually drives Ms. Kamp. The municipal court, however, found her guilty of the offense and placed her on probation. Ms. Ortt has appealed, assigning two errors.

II.

ASSIGNMENT OF ERROR I

> MS. ORTT'S CONVICTION FOR CRIMINAL DAMAGING IS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND [IS] AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶4} Ms. Ortt argues that her conviction is not supported by sufficient evidence and is against the manifest weight of the evidence. Whether a conviction is supported by sufficient evidence is a question of law, which we review de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In making this determination, we must view the evidence in the light most favorable to the prosecution:

> 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.

State v. Jenks, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. If, on the other hand, a defendant asserts that her conviction is against the manifest weight of the evidence

> [a]n 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, 33 Ohio App.3d 339, 340 (9th Dist.1986). Weight of the evidence pertains to the greater amount of credible evidence produced in a trial to support one side over the other side. *Thompkins* at 387. An appellate court should only exercise its power to reverse a judgment as against the manifest weight of the evidence in exceptional cases. *State v. Carson*, 9th Dist. Summit No. 26900, 2013-Ohio-5785, ¶ 32, citing *Otten* at 340.

{¶5} Regarding the sufficiency of the evidence, Ms. Ortt argues that she cannot be guilty of criminal damaging because there was no evidence presented that she knew Ms. Kamp had a Jeep. Section 2909.06(A)(1) provides that no person shall knowingly "cause * * * physical harm to any property of another without the other person's consent[.]" Physical harm to property "means any tangible or intangible damage to property that, in any degree, results in loss to its value or interferes with its use or enjoyment[,]" but does not include "wear and tear occasioned by normal use." R.C. 2901.01(A)(4). "A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶6} According to Ms. Kamp, Ms. Ortt attracted her attention by yelling up at her window. When she looked outside, she saw Ms. Ortt standing by one of the rear doors of her

aunt's Jeep. Ms. Ortt was irate, was yelling profanities at her, and was doing something to the door of the Jeep. Upon review of the record, we conclude that, although there was no direct evidence that Ms. Ortt knew that Ms. Kamp had use of the Jeep, since Ms. Kamp and Ms. Ortt lived next door to each other, it was reasonable for the municipal court to infer that Ms. Ortt was familiar with the vehicle Ms. Kamp drove. *State v. Suggs*, 9th Dist. Summit No. 21782, 2004-Ohio-4191, ¶ 14 ("The trier of fact may rely on circumstantial evidence and all reasonable inferences arising therefrom in arriving at its verdict."), quoting *State v. Cloud*, 7th Dist. Columbiana No. 98 CO 51, 2001 WL 1155855, *3 (Sept. 26, 2001). Accordingly, there was sufficient evidence for the court to find that she knowingly damaged the Jeep.

{¶7} Regarding the weight of the evidence, Ms. Ortt argues that the witnesses gave very different accounts about the timing of the events. According to Ms. Kamp, after Ms. Ortt stopped yelling at her and walked away, she went downstairs a few minutes later to see the damage to the Jeep. Mr. Murray also testified that he observed the damage to the Jeep within three to five minutes after the incident. He also testified that a police officer arrived only a few minutes after they observed the damage. Ms. Stitzlein, however, testified that, after she drove Ms. Ortt off, she attended to a couple of the other residents of the apartment complex and then went to check on Ms. Kamp. By then it was about 1:45 p.m., approximately four hours after the yelling incident. Ms. Kamp asked her to check on the Jeep, so she did, and that is when she saw the scratch marks. They subsequently called the police. The officer, meanwhile, testified that he did not respond to the apartment complex until 5:45 p.m. that day.

{¶8} Ms. Ortt also argues that Ms. Kamp and Mr. Murray did not have a good view of what was happening in the parking lot, noting that they were on the third floor of the apartment building and several parking spots over from where she was allegedly standing. Ms. Ortt also

notes that, when the officer responded, Ms. Kamp told him that the Jeep had suffered other damage in the past. According to Ms. Ortt, the scratches that the officer observed on the Jeep could have been done on a previous day or in between the time when she left the vicinity and when the police were finally summoned.

{¶9} During closing argument, Ms. Ortt pointed out the discrepancies in the witnesses' statements about the timing of the events. The court found the inconsistency "somewhat troubl[ing]," but determined that it did not rise to the level of reasonable doubt. In light of the number of witnesses who observed Ms. Ortt doing something to the Jeep, it found her guilty of criminal damaging.

{¶10} Although the witnesses who corroborated Ms. Kamp's testimony were friends of Ms. Kamp and were inconsistent about the timing of the events, upon review of the record, we conclude that this is not the exceptional case where the evidence weighs heavily against the conviction. *See Otten*, 33 Ohio App.3d at 340. Accordingly, Ms. Ortt's conviction is not against the manifest weight of the evidence. Ms. Ortt's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> DEFENSE COUNSEL WAS INEFFECTIVE BY FAILING TO CALL ANY CORROBORATING AVAILABLE WITNESSES CONCERNING MS. ORTT'S WHEREABOUTS THE MORNING OF MAY 10, 2014, AND FOR FAILING TO ELUCIDATE ADDITIONAL INFORMATION ABOUT OTHER DAMAGE TO THE VEHICLE.

{¶11} Ms. Ortt argues that her trial counsel was ineffective because he did not call any witnesses to corroborate her testimony that she was not at the apartment complex after noon on May 10, 2014. She contends that such testimony would have demonstrated that she could not have been the person who caused damage to the Jeep. She also argues that her counsel should

have done more investigation about the amount of damage that existed to the Jeep before May 10.

{¶12} To prevail on a claim of ineffective assistance of counsel, Ms. Ortt must show (1) that counsel's performance was deficient to the extent that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) that there is a reasonable probability that, but for counsel's deficient performance the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). A deficient performance is one that falls below an objective standard of reasonable representation. *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus. A court, however, "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.'" *Strickland* at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 100 (1955). Further, to establish prejudice, Ms. Ortt must show that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Id*. at 694.

{¶13} On direct appeal, this Court is limited to considering the record of the trial court. Because Ms. Ortt's arguments rely on witnesses who were not called and on an investigation that was not completed, they are not appropriately considered on direct appeal. *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, ¶ 217, citing *State v. Madrigal*, 87 Ohio St.3d 378, 391 (2000). Ms. Ortt's second assignment of error is overruled.

III.

{¶14} Ms. Ortt's assignments of error are overruled. The judgment of the Wayne County Municipal Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Wayne County Municipal Court, County of Wayne, 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(C). 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.

JENNIFER HENSAL
FOR THE COURT

WHITMORE, J.
SCHAFER, J.
CONCUR.

APPEARANCES:

CHRISTINA I. REIHELD, Attorney at Law, for Appellant.

DANIEL R. LUTZ, Prosecuting Attorney, and NATHAN R. SHAKER, Assistant Prosecuting Attorney, for Appellee.