**[Cite as *State v. Rohm*, 2010-Ohio-1240.]**

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

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| STATE OF OHIO | : | |
| Plaintiff-Appellee | : | C.A. CASE NO. 2009 CA 19 |
| v. | : | T.C. NO. 2008 CRB 00786 |
| HARRY A. ROHM | : | (Criminal appeal from Municipal Court) |
| Defendant-Appellant | : | |
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**O P I N I O N**

Rendered on the 26th day of March, 2010.

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FROELICH, J.

**{¶ 1}** This case is before on us on the direct appeal of Defendant-appellant Harry Rohm from his conviction and sentence for assault and unlawful restraint. For the following reasons, the judgment of the trial court will be affirmed.

I

**{¶ 2}** Late on the evening of April 11, 2008, Carrie Loges went to a bar where she met her sister and some of her sister's friends. Loges also saw Rohm, whom she had briefly dated in the past. Loges arranged for a ride home from Richard Menke. When Menke called to tell her that he had arrived, Loges went outside. Rohm followed Loges from the bar and tried to convince her to leave with him. When Loges refused, Rohm grabbed her by the hair, twisted her arm behind her back, and dragged her across the parking lot to his Jeep.

**{¶ 3}** Menke could see two people struggling, and he could hear yelling, but he could not identify either party. James Green, who had ridden with Menke, got out of the car. Green saw Rohm dragging Loges by her hair and arm, and he told Menke to call the police. Fairborn Police Officers Roman and Foreman were dispatched to the bar. When the officers arrived, they found Loges sitting in the front, passenger seat of the Jeep, with Rohm leaning against the frame of the door.

**{¶ 4}** Loges was very upset and crying. She told the officers that Rohm had assaulted her and dragged her to his Jeep by her hair. The officers observed that Loges's hair was in disarray, and when she ran her hands through her hair, clumps of her hair fell out. Officer Roman also observed "a good bit of hair" on the center console and in the driver's seat area. Although Loges had been drinking, the officers stated that she was lucid and walking normally, not stumbling or falling down.

**{¶ 5}** Rohm told Officer Roman that he and Loges had dated briefly and that they had an argument in the parking lot after she tried to leave with two other men. At trial, however, Rohm said that the argument had occurred the previous

weekend. On the night in question, Rohm claimed that Loges was very intoxicated. He saw her stagger out the door, and he followed her. He put his right arm around her waist and took her left hand in his left hand because he thought she was going to fall. He told her to get into his Jeep, and he would get her some food and coffee to help her to sober up. She yelled that she was not drunk. He denied touching her hair and stated that he never forced her to go with him. He testified that she was not struggling with him and that she was staggering due to her intoxication. He further claimed that Loges pulled her own hair out, while sitting in his Jeep.

**{¶ 6}** Rohm was indicted on one count each of assault and unlawful restraint. Following a bench trial, Rohm was found guilty of both charges, and the trial court ordered a 45-day suspended sentence. Rohm appeals.

II

**{¶ 7}** Rohm's First Assignment of Error:

**{¶ 8}** "APPELLANT'S CONVICTION OF ASSAULT AND UNLAWFUL RESTRAINT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

**{¶ 9}** Although Rohm characterizes his first assignment of error as a manifest weight argument, the law and argument that he presents attack the sufficiency of the State's evidence. As manifest weight and sufficiency of the evidence arguments apply two different standards, we will address both.

**{¶ 10}** A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or to sustain the verdict as a matter of law. *State v. Thompkins,* 78

Ohio St.3d 380, 386, 1997-Ohio-52. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259: "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."

**{¶ 11}** In contrast, when reviewing a judgment under a manifest weight standard of review "[t]he court reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [factfinder] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which evidence weighs heavily against the conviction." *Thompkins,* supra, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

**{¶ 12}** Rohm was convicted of assault in violation of R.C. 2903.13(A), which states: "No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn." He was also convicted of unlawful restraint in violation of R.C. 2905.03, which states: "No person, without privilege to do so, shall knowingly restrain another of the other person's liberty."

**{¶ 13}** The State's evidence shows that Rohm forced Loges to get into his Jeep against her will, rather than allowing her to leave with Menke, as she had planned, and thus depriving her of her liberty. Moreover, Rohm forced Loges to the Jeep by twisting her arm behind her back and dragging her to the Jeep by her hair, causing clumps of her hair to fall out, which she described as "uncomfortable." The act of pulling another person's hair may support a conviction for assault, as it may either cause physical harm or evidence a knowing attempt to cause physical harm. See, e.g., *State v. Sloan,* Lake App. No. 2007-L-053, 2007-Ohio-6558 (victim pulled out of bed by her hair); *State v. Singh* (Jan. 31, 1997), Miami App. No. 96-CA-24 (victim's hair pulled and fingers bent back, either of which "is capable of producing excruciating pain, as well as injury").

**{¶ 14}** Viewing the State's evidence, as we must, in a light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crimes of assault and unlawful restraint to have been proven beyond a reasonable doubt. Therefore, Rohm's convictions are supported by sufficient evidence.

**{¶ 15}** The thrust of Rohm's argument is that his testimony was more credible than that of the victim, who he says was intoxicated. Rohm claims that he never pulled Loges's hair, but that she pulled it out herself. He also insisted that he never forced Loges to get into his Jeep. Instead, he was merely helping her walk because she was so intoxicated. The trial court's verdict reflects that the court rejected Rohm's version of events and found the testimony of the State's witnesses to be more credible.

**{¶ 16}** The credibility of witnesses and the weight to be given to their testimony are primarily matters for the trier of fact to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231. The factfinder heard the testimony of all of the witnesses and saw their demeanor on the stand. The factfinder "is particularly competent to decide 'whether, and to what extent, to credit the testimony of particular witnesses,' we must afford substantial deference to its determinations of credibility." *State v. Spears,* 178 Ohio App.3d 580, 2008-Ohio-5181, ¶12, quoting *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288. Based on the record before us, Rohm's convictions are not against the manifest weight of the evidence, nor are they based on insufficient evidence.

**{¶ 17}** Accordingly, Rohm's first assignment of error is overruled.

III

**{¶ 18}** Rohm's Second Assignment of Error:

**{¶ 19}** "APPELLANT WAS PROVIDED WITH INEFFECTIVE ASSISTANCE OF COUNSEL."

**{¶ 20}** In his second assignment of error, Rohm argues that he was denied his constitutional right to the effective assistance of trial counsel. In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. Trial counsel is entitled to a strong presumption that his conduct falls within the wide range of effective assistance, and to show deficiency the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. Id.

**{¶ 21}** First, Rohm contends that his trial counsel was ineffective because counsel failed to object to hearsay evidence from Officer Roman that the person who called 911 told the dispatcher that someone was being dragged across the parking lot by her hair. Generally, an out-of-court statement that is offered to explain a police officer's conduct while investigating a crime, rather than for the truth of the statement, is not hearsay. *State v. Thomas* (1980), 61 Ohio St.2d 223, 232. The question is whether this testimony was offered for the truth of the matter, or simply to explain the presence of Officers Roman and Foreman at the bar.

**{¶ 22}** We conclude that there is no evidence that the statement was offered for the truth of the matter, but rather to explain why the officers were at the bar. The information was admissible for its truth through Green, who saw Rohm dragging Loges by her hair across the parking lot, Menke, who saw someone being dragged by their hair and who made the 911 call, and Loges herself. Counsel was not deficient for electing not to object to the statement by Officer Roman.

**{¶ 23}** Rohm also insists that counsel was ineffective because during his direct examination of Rohm, counsel caused him to reveal a prior arrest when counsel asked: "do you have any criminal record of any kind?" Rohm responded, "Traffic violations. I have been arrested for other things that I had nothing to do with that was nearly 40 years ago." When the State asked Rohm about the arrest on cross-examination, he was able to explain that the charges had been dismissed. Nevertheless, Rohm maintains that this evidence of his prior arrest should not have been offered and that the evidence damaged his credibility with the trial court. There was no objection by the prosecutor to the question about the defendant's

lack of a "criminal record." The relevance of the question is questionable, unless it was an attempt to introduce testimony of the defendant's good character. Evid.R. 404(A)(1), 404(B).

**{¶ 24}** The problem may lie in differing understandings of "criminal record" held by Rohm and his attorney. By counsel's use of the phrase, it seems that counsel was asking if Rohm had any prior convictions. By his response, Rohm understood the phrase to include any prior citations or arrests. After Rohm revealed his arrest, counsel stressed that the arrest had occurred a very long time ago and that Rohm had since been able to obtain a CCW permit because he had no "criminal record." Although counsel's initial question could have been more specific, we cannot fault counsel for Rohm's volunteered broad, although understandable, interpretation of the phrase "criminal record."

**{¶ 25}** Even assuming, arguendo, that counsel's performance had been deficient in either instance, Rohm can show no prejudice, particularly because this was a bench trial, rather than a jury trial. This court "indulges '* * * in the usual presumption that in a bench trial in a criminal case the court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary.'" *State v. Post* (1987), 32 Ohio St.3d 380, 384, quoting *State v. White* (1968), 15 Ohio St.2d 146, 151. For example, in *State v. Chandler,* Cuyahoga App. No. 81817, 2003-Ohio-6037, the court found that the questioning, by the trial judge in a trial to the bench, of the defendant about facts underlying the defendant's prior convictions was improper, but that it did not constitute reversible error given this presumption. Id. at ¶17, citing *Post,* supra.

**{¶ 26}** Rohm's second assignment of error is overruled.

IV

**{¶ 27}** Having overruled both of Rohm's assignments of error, the judgment of the trial court will be Affirmed.

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DONOVAN, P.J. and BROGAN, J., concur.

Copies mailed to:

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