[Cite as *State v. Clemmons*, 2010-Ohio-3109.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO Plaintiff-Appellee	:	C.A. CASE NO. 23237
vs.	:	T.C. CASE NO. 08-CR-3000
TERRY L. CLEMMONS Defendant-Appellant	:	(Criminal Appeal from Common Pleas Court)

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O P I N I O N

Rendered on the 2nd day of July, 2010.

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GRADY, J.:

{¶ 1} Defendant, Terry Clemmons, appeals from his conviction and sentence for felonious assault.

{¶ 2} On July 23, 2008, Laura Hazlett returned home late to the residence at 41 Bond Street in Dayton she shared with Defendant

Clemmons, who was her boyfriend, and their roommate, Charles Reeves. Defendant became angry at Hazlett and they argued. The argument escalated, and Defendant struck Hazlett's face. Charles Reeves intervened and prevented Defendant from further assaulting Hazlett. Defendant fled when police were called.

{¶ 3} Dayton Police Officer Paul Price was dispatched to the Bond Street residence at around 2:00 a.m., and he drove Hazlett to Grandview Hospital. Hazlett made a statement to Officer Price identifying Defendant Clemmons as her assailant. Hazlett was later transferred to Miami Valley Hospital where she was placed in intensive care. Hazlett's jaw was wired shut for two months, requiring her to ingest only liquids, and she wore a neck brace to hold her jaw in place.

{¶ 4} Defendant was interviewed on July 30, 2008 by Detective Via. Following a waiver of his *Miranda* rights, Defendant admitted hitting Hazlett several times in the face. Defendant was indicted on one count of felonious assault in violation of R.C. 2903.11(A)(1). Defendant filed a motion to suppress his statement to police. Following a hearing, the trial court overruled Defendant's motion. Defendant was found guilty following a jury trial of felonious assault and the trial court sentenced him to eight years in prison.

{¶ 5} Defendant timely appealed to this court from his

conviction and sentence.

FIRST ASSIGNMENT OF ERROR

{¶ 6} "COUNSEL FOR APPELLANT WAS INEFFECTIVE IN HIS EFFORTS TO SUPPRESS THE STATEMENT GIVEN TO DETECTIVE VIA BY APPELLANT."

{¶ 7} Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must affirmatively demonstrate to a reasonable probability that were it not for counsel's errors, the result of the trial would have been different. Id.; *State v. Bradley* (1989), 42 Ohio St.3d 136. Further, the threshold inquiry should be whether a defendant was prejudiced, not whether counsel's performance was deficient. *Strickland*.

{¶ 8} Defendant was indicted on August 21, 2008, (Dkt. 2), and on that same date Attorney Richard Lipowicz was appointed to represent him. (Dkt. 6). On September 26, 2008, Attorney Lipowicz moved to withdraw from his appointment, stating "that Defendant has forbidden counsel from taking steps essential to his defense, including the filing of certain pretrial motions." (Dkt. 12).

{¶ 9} The court held a hearing on the motion to withdraw on September 30, 2008. Attorney Lipowicz explained that Defendant refused to cooperate in filing a motion to suppress the statement he made to Officer Via, and in permitting Attorney Lipowicz to file a plea of not guilty by reason of insanity. He explained:

{¶ 10} "I don't feel like I'm going to be violating any attorney/client privilege by doing so but there's been indication that [Defendant] suffers from a mental illness. And I have learned from an independent source that he is bipolar and suffers from major depression and may have been treated for these conditions in the past but is currently not being treated either theraputically [sic] or with medication. And my concern is whether or not his mental condition is affecting his ability to fully understand things that I feel as his attorney are necessary to provide him with a full and complete defense in this case.

{¶ 11} "Furthermore, and I don't think I'm speaking out of school, but I think the victim in this case has also expressed to me a desire to see Mr. Clemmons receive - - again, she has indicated to me she believes he's suffering from certain mental illnesses that require theraputic [sic] and medicinal treatment. Your Honor, those are reasons why I filed my motion for leave to withdraw not so much that he's made the decision though he wants to go to trial. Think that's his decision to go to trial but think

that, you know, his refusal to allow me to do things that I think are central to his defense is what's got me concerned." (Tr. 4-5).

{¶ 12} After hearing counsel's representations, the trial court concluded that Defendant's competence was in issue. The court continued the trial date and ordered a competency evaluation pursuant to R.C. 2945.371(G)(3). (Dkt. 13).

{¶ 13} On October 22, 2008, Attorney Lipowicz filed a motion to suppress Defendant's statement to police. The motion alleged that "Defendant was not properly advised of his right to remain silent; nor did he knowingly and effectively waive his constitutional rights." (Dkt. 17). No more particular basis for those claims was specified.

{¶ 14} On October 30, 2008, following a stipulation by the parties concerning the contents of a psychiatric report, the trial court found Defendant competent to stand trial. (Dkt. 21). On the following day, October 31, 2008, the court appointed Attorney Marshall G. Lachman to represent Defendant. (Dkt. 22). On November 4, 2008, the court granted Attorney Lipowicz leave to withdraw as counsel for Defendant. (Dkt. 23).

{¶ 15} Defendant's motion to suppress his statement to police was heard on November 25, 2008. Following the hearing, the court found that Detective Via had properly administered the Miranda warnings, and that Defendant himself read the "Waiver of Rights"

paragraph out loud, after which he signed the waiver form, submitted to an oral interview, and signed a written statement admitting culpability. The court concluded that "Clemmons' oral and written statements to Det. Via were voluntarily given and that they were given after Clemmons knowingly, intelligently and voluntarily waived his *Miranda* rights." (Dkt. 27).

{¶ 16} Defendant argues that Attorney Lachman's representation fell below an objective standard of reasonable representation because he failed to offer evidence showing that Defendant lacked the mental capacity to knowingly and intelligently waive his *Miranda* rights, grounds that were alleged in the motion to suppress that Attorney Lipowicz had filed.

{¶ 17} Proof that a defendant not only waived his *Miranda* rights but that the waiver was knowing, intelligent, and voluntary is a burden imposed on the prosecution when a defendant files a motion to suppress his statement to police. The court found that the State bore that burden. Defendant's contention, in essence, is that his counsel was ineffective for failing to offer evidence that could rebut the State's proof.

{¶ 18} Defendant fails to identify what evidence, if any, concerning his lack of mental capacity his attorney could or should have offered in order to create a reasonable probability that the court would then have granted Defendant's motion to suppress

evidence. *Strickland*. The fact that Defendant's prior counsel alleged a lack of mental capacity in the motion to suppress he filed does not itself demonstrate that claim. Lacking that affirmative demonstration, the record does not support a finding that Defendant was prejudiced by his counsel's alleged failure. Absent resulting prejudice, ineffective assistance of counsel is not shown. *Id*.

{¶ 19} Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 20} "THE TRIAL COURT ERRED IN ALLOWING OFFICER PRICE TO GIVE HEARSAY TESTIMONY REGARDING A STATEMENT MADE TO HIM BY THE VICTIM."

{¶ 21} Officer Price testified that when he arrived on the scene, Hazlett told him that Defendant had broken her jaw. That testimony was admitted under the excited utterance exception to the rule against hearsay. Defendant claims that the trial court abused its discretion in so holding because Hazlett's statement was too remote in time, ten minutes after the assault occurred, to be considered an excited utterance. We disagree.

{¶ 22} A trial court has broad discretion in the admission or exclusion of evidence and in the absence of an abuse of that discretion, an appellate court will not reverse a trial court's evidentiary rulings. *Klischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 66. An abuse of discretion implies an arbitrary, unreasonable,

unconscionable attitude on the part of the court. *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶ 23} An excited utterance, Evid.R. 803(2), is an exception to the general rule barring hearsay. Evid.R. 802. Evid.R. 803(2) defines excited utterance as: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

{¶ 24} The excited utterance exception derives its guarantee of trustworthiness from the fact that the declarant is still under the stress of excitement caused by the startling event at the time the statement is made, while reflective processes have been stilled and before the witness has had an opportunity to reflect on the statement and fabricate it. *State v. Wallace* (1988), 37 Ohio St.3d 87; *State v. Taylor* (1993), 66 Ohio St.3d 295, 300; *State v. Humphries* (1992), 79 Ohio App.3d 589. Admission of an excited utterance has four prerequisites: (1) there must be an occurrence startling enough to produce a nervous excitement in the declarant, (2) the statement, even if not made contemporaneous with or immediately after its exciting cause, must be made before there was time for the nervous excitement to diminish, (3) the statement must relate to the exciting event, and (4) the declarant must personally observe the startling event. *Taylor*, at 300-01.

{¶ 25} Approximately ten minutes had elapsed between the

assault on Hazlett and her statement to Officer Price when he arrived on the scene. However, there is no per se amount of time after which a statement can no longer qualify as an excited utterance. The critical requirements are that the statement be made while the declarant is still under the stress of the event, and the statement cannot be a result of reflective thought. *Taylor* at 303; *State v. Rockwell*, Montgomery App. No. 19454, 2002-Ohio-6789.

{¶ 26} The defendant in *State v. Rockwell* argued that the victim's statements were not excited utterances because she had time to reflect before making them. Rockwell claimed the victim's statements were made one and one-half hours after the incident. The victim claimed her statements were made one-half hour after the incident. This court concluded that because the evidence showed the victim was crying, upset, and shaking while making her statements, those statements were made while the victim was still under the influence of the stress of the incident, and therefore they were admissible as excited utterances. Id. at ¶23-26.

{¶ 27} Officer Price's testimony demonstrates that Hazlett was still under the stress of the incident, the assault on her by Defendant, at the time Officer Price arrived on the scene and Hazlett told him that Defendant had broken her jaw. Officer Price testified that when he arrived, Hazlett was visibly injured and

"crying hysterically." Under those circumstances, the trial court did not abuse its discretion in concluding that Hazlett was still under the influence of the stress of Defendant's assault on her at the time she made her statement to Officer Price, and admitting that hearsay statement in evidence as an excited utterance. *Rockwell; State v. Cornell* (1998), 129 Ohio App.3d 106, 110-114.

{¶ 28} Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 29} "APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF EVIDENCE."

{¶ 30} A weight-of-the-evidence argument challenges the believability of the evidence in relation to the reasonable doubt standard, and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 31} "The 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 jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *State v. Thompkins* (1997), 78 Ohio St.3d 380.

{¶ 32} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230. In *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288, we observed:

{¶ 33} "Because the factfinder . . . has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness."

{¶ 34} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 35} Defendant was convicted of felonious assault in violation of R.C. 2903.11(A)(1), which provides: "No person shall knowingly . . . [c]ause serious physical harm to another or to another's unborn[.]"

{¶ 36} Defendant argues that his conviction is against the manifest weight of the evidence because he did not cause serious physical harm to Hazlett. Defendant claims that there is evidence

demonstrating that several of Hazlett's injuries, including the discoloration to her eye and the protective cup she wore to protect her jaw, were after-effects of her surgery. Defendant conveniently ignores the fact that Hazlett would not have undergone the surgery had Defendant not physically attacked her.

{¶ 37} The evidence presented by the State shows that Defendant's conduct caused serious physical harm to Hazlett. Hazlett testified that after Defendant hit her, she felt a snap and knew something was broken. Hazlett required reconstructive surgery to put her jaw back together. She wore a neck brace to hold her jaw in place and a protective cup on her jaw. Her jaw was wired shut for two months.

{¶ 38} When officers responded to the scene, Hazlett's face was swelling. When Detective Via spoke to Hazlett at Miami Valley Hospital the day after the assault, she was in a lot of pain, she had severe bruising to the left side of her face, was wearing a neck brace and had a metal screen taped to her cheek bone, and her mouth was wired shut. The evidence was clearly sufficient for the jury to find that Hazlett suffered serious physical harm.

{¶ 39} Regarding whether he acted "knowingly" in causing serious physical harm to Hazlett, Defendant argues that because Hazlett's jaw was very susceptible to injury as a result of previous injuries, and because he did not have specific knowledge of how

little force was required to cause serious physical harm to Hazlett's jaw, he did not act knowingly. We are not persuaded by this argument.

{¶ 40} Knowingly is defined in R.C. 2901.22(B):

{¶ 41} "A person acts knowingly, regardless of his purpose, when he is aware that this 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."

{¶ 42} Hazlett testified that Defendant was aware of the preexisting injuries to her face, and that as a result her jaw was weak and easily susceptible to serious injury. She added that Defendant was protective of her on other occasions, and made sure no one placed their hands on Hazlett's face when she was out in public. Being on notice that Hazlett's jaw was susceptible to serious physical injury, Defendant was aware that his conduct would probably cause injuries that proved to be serious. Hazlett told Officer Price immediately after the assault occurred that Defendant had hit her repeatedly and also hit her with a telephone. That testimony was corroborated by Charles Reeves. Defendant admitted to Detective Via that he slapped Hazlett several times until Reeves intervened and stopped the assault. This evidence supports a finding that Defendant acted knowingly.

{¶ 43} Finally, Defendant argues that even if he did knowingly cause serious physical harm to Hazlett, they were engaged in mutual physical combat when she was injured. He points out that Hazlett kicked Defendant during their confrontation. The testimony of Hazlett and Charles Reeves indicates that Hazlett kicked Defendant after he struck her, in an attempt to protect herself from Defendant's assault. The trial court instructed the jury on self-defense, but the jury obviously did not believe that Defendant acted in self-defense. Even if they were mutually engaged in a physical fight, Defendant was not justified in causing serious physical harm to Hazlett.

{¶ 44} The credibility of the witnesses and the weight to be given to their testimony were matters for the trier of facts, the jury here, to decide. *State v. DeHass* (1967), 10 Ohio St.2d 230. The jury did not lose its way in this case simply because it chose to believe the State's version of the events, which it had a right to do.

{¶ 45} Reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the trier of facts lost its way in choosing to believe the state's witnesses, or that a manifest miscarriage of justice occurred. Defendant's conviction is therefore not against the manifest weight of the evidence.

{¶ 46} Defendant's third assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, J. and FROELICH, J. concur.

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