[Cite as *State v. Bidlack*, 2009-Ohio-4589.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Appellee

v.

Rick E. Bidlack

Appellant

Court of Appeals Nos. WD-08-023
WD-08-024

Trial Court Nos. 07CRB02227
08CRB00012

DECISION AND JUDGMENT

Decided: September 4, 2009

* * * * *

Matthew L. Reger, Bowling Green City Prosecutor, for appellee.

Wendell R. Jones, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is a consolidated appeal from two judgments issued by the Bowling Green Municipal Court following a jury verdict finding appellant guilty of violating a protection order. Because we conclude that appellant's constitutional right to effective

assistance of counsel was not violated and that the verdicts were based on sufficient evidence and were not against the manifest weight of the evidence, we affirm.

{¶ 2} Appellant, Rick E. Bidlack, was charged in two separate cases, on two separate dates, with two counts of violating the terms of an August 2007 protection order which ordered him to stay more than 500 feet from the protected person, his former girlfriend ("the victim"). The cases were consolidated for trial. Appellant filed a "Notice of Alibi" listing witnesses negating his presence in Grand Rapids for each incident, along with motions in limine which sought to prevent the state from introducing "information or evidence of any other acts" of appellant other than the actions which formed the basis for the current offenses.

{¶ 3} At trial, the state presented testimony by the victim, her minor son, her ex-husband, two neighbors, and two sheriff's deputies. The victim first testified that, on September 8, 2007, she and her 13 year old son allegedly saw appellant in a gold truck at a restaurant located down the street from her residence in Grand Rapids, Ohio. Appellant allegedly spoke to the victim's son, who was riding his bicycle to a nearby cousin's home. The son became frightened and immediately turned around to go back home. The son testified that when the chain came off, he left his bicycle and ran to alert the victim that appellant was nearby.

{¶ 4} The victim said she returned with her son to retrieve the bicycle, which now appeared to be working. The son went on his way and the victim followed him back to

the corner near the restaurant. The victim said she saw that the truck was still there and appellant was standing next to it. The victim spoke to appellant, saying, "Do you think that's such a good idea?" She said appellant allegedly started to approach her and she turned and walked quickly back to her house. She called 911 and gave a statement to police about the incident.

{¶ 5} The victim then testified that, on December 31, 2007, around 6:00 p.m., she and her ex-husband were standing outside her home talking with neighbors. The victim said she saw appellant slowly drive by several times in a white Suburban vehicle, in the alleyway in front of her house. The ex-husband also positively identified appellant as the driver of the truck that drove by the victim's house. The victim again called police to make a report.

{¶ 6} The victim's neighbors, Charles S. and Jennifer S., both testified that, on December 31, 2007, they were standing with the victim and her ex-husband and talking outside of their houses. Charles said the victim's ex-husband had said appellant had been allegedly driving around in Grand Rapids that day in a white SUV truck. Just minutes later, Charles stated that he saw a white SUV truck fitting the ex-husband's description drive by the victim's home while they were all standing outside. Charles stated, however, that he did not see the person driving the truck that night and could not positively identify appellant as the driver. Jennifer also testified that she saw the white SUV "creeping by" the victim's house and positively identified appellant as the driver.

{¶ 7} Two Wood County Sheriff's deputies were called to testify about reports made after each incident. Deputy Michael Meternick testified that he responded to the victim's call on September 8, 2007. The victim reported that appellant had approached her and her son, in violation of the protection order. Deputy Meternick said he took her statement and made his report.

{¶ 8} Deputy Brian A. Ruckstuhl then testified that he responded to a 911 call and arrived at the victim's home at approximately 6:11 p.m. on December 31, 2007. The victim and three other persons at the house all reported that appellant had allegedly driven by the victim's house. The victim reported that appellant drove by while she, her ex-husband, and two neighbors were standing and talking in the yard outside the house. After Deputy Ruckstuhl made his report, he contacted the Henry County Sheriff's Office to have a deputy meet him at appellant's home which is located in Henry County, just two miles from Grand Rapids. The deputies knocked on the door, but even though the lights were on, all the windows were covered with blinds or blankets. There were two vehicles at appellant's residence, one of which was a white vehicle like the one described by the victim. No one answered the deputies' knocks on the door and windows, and they did not see appellant at his residence. The state then rested.

{¶ 9} Appellant offered no evidence or witnesses on his own behalf. The jury found appellant guilty of both violations. As to the September 2007 incident, the trial court sentenced him to 90 days in the Wood County Justice Center along with a $250 fine

and court costs, with a credit of two presentence detention days. The court suspended 88 days of that sentence and $200 of the fine. As to the alleged December 2007 incident, the court imposed a sentence of 175 days in the Wood County Justice Center, a $500 fine and court costs, and a credit of 27 pre-sentence detention days. The court also suspended 158 of the days of the sentence for the second offense, and $450 of the fine.

{¶ 10} Appellant now appeals from those judgments, arguing the following four assignments of error:

{¶ 11} "I. Appellant received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendment to the United States Constitution and Article I, §10 of the Constitution of the State of Ohio.

{¶ 12} "II. The Trial Court erred to the prejudice of Appellant by denying his Motions for Acquittal, as the evidence presented by the State was insufficient to sustain his conviction for violation of a Protection Order.

{¶ 13} "III. The Jury erred by finding Appellant guilty of violation of a Protection Order when the evidence presented was insufficient to support said finding.

{¶ 14} "IV. The Jury erred by finding Appellant guilty of violation of a Protection Order when said finding was against the manifest weight of the evidence."

I.

{¶ 15} In his first assignment of error, appellant argues that his right to the effective assistance of counsel was violated.

{¶ 16} In order to prove ineffective assistance of counsel, a defendant must show (1) that defense counsel's representation fell below an objective standard of reasonableness and (2) that counsel's deficient representation was prejudicial to defendant's case. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. See also *Strickland v. Washington* (1984), 466 U.S. 668, 694.

{¶ 17} Ohio courts have held that the failure to call witnesses is not a substantial violation of counsel's duty to his or her client in the absence of a showing that such witnesses' testimony would have assisted the defense. *State v. Wallace*, 9th Dist. No. 06CA008889, 2006-Ohio-5819, ¶ 18, quoting *Middletown v. Allen* (1989), 63 Ohio App.3d 443, 448; *State. v. Reese* (1982), 8 Ohio App.3d 202. It is generally presumed that failing to call witnesses is tactical, trial strategy which does not necessarily constitute ineffective assistance of counsel. *State v. Coulter* (1992), 75 Ohio App.3d 219, 230; *State v. Williams* (1991), 74 Ohio App.3d 686, 695.

{¶ 18} In a similar case, *State v. Williams*, 8th Dist. No. 90845, 2009-Ohio-2026, the defendant was charged with aggravated murder. His counsel orally notified the state of the name and address of an alibi witness. Id., at ¶ 58. Further, during opening statements, defense counsel told they jury "'[w]e will hear evidence that [Williams] was not at East 35th Street. He was at 123rd and Philip which is near Superior which is about five and a half miles from there.'" Id. Thereafter, counsel presented no witnesses and

nothing in the record suggests that the witness did not appear at trial because he or she was not subpoenaed or could not be located. Id., at ¶ 59.

{¶ 19} Rejecting the ineffective assistance of counsel argument, the *Williams* court noted that the record did not demonstrate why defense counsel did not call the witness to the stand. Id., at ¶ 62. It hypothesized that maybe the witness' alibi was fabricated and the witness decided not to testify. Id. The court stated that "sound trial tactics" may have supported defense counsel's decision not to call the witness. Id.

{¶ 20} In this case, appellant's counsel filed notices of alibi which listed two witnesses and represented that they had indicated that appellant had been elsewhere during the times of the alleged violations. As in *Williams*, nothing in the record indicates that the alibi witnesses were, in fact, subpoenaed. During his opening statement and cross-examination of the victim, appellant's counsel mentioned that there were witnesses who would testify that appellant was not in Grand Rapids on the two dates and times of the alleged incidents.

{¶ 21} Upon the close of the state's case, however, appellant's counsel decided not to call any alibi witnesses and indicated appellant would rest. During a sidebar, the court asked appellant's counsel several times if he wanted to consult with appellant before resting. Defense counsel stated: "No, I want to rest now, but I just want to make sure one last time that he doesn't want to – Judge, we're ready to rest."

{¶ 22} Following a brief recess, in the judge's chambers counsel stated that the defense would rely solely on the conflicting testimony to prove to the jury reasonable doubt as to appellant's guilt. Counsel confirmed that his trial strategy remained the same throughout the trial, i.e., that appellant was not present during the alleged incidents and that he was not offering alternative or changed theories. Nothing in the record indicates that appellant himself disagreed with this strategy or counsel's failure to present the witnesses. Consequently, we conclude that the decision not to call the alibi witnesses may have been a strategic maneuver by appellant's counsel. *Williams*, supra. Therefore, we cannot say that trial counsel's acts fell below an objective standard of reasonableness.

{¶ 23} Accordingly, appellant's first assignment of error is not well-taken.

II.

{¶ 24} We will address appellant's second and third assignments of error together. In his second assignment of error, appellant argues that the trial court erred to the prejudice of appellant by denying his motions for acquittal because the evidence presented by the state was insufficient to sustain his conviction for violation of a protection order. In his third assignment of error, appellant contends that the evidence presented to the jury was insufficient to support a guilty verdict.

{¶ 25} The appellate standard of review of a Crim.R. 29 motion for acquittal and a jury's verdict based upon sufficiency of the evidence are the same. *State v. Messer-Tomack*, 10th Dist. No. 07AP-720, 2008-Ohio-2285, ¶ 7-8. In reviewing a sufficiency of

the evidence claim, the relevant inquiry is whether any rational factfinder, viewing the evidence in a light most favorable to the state, could have found all the essential elements of the crime proven beyond a reasonable doubt. *State v. Jones* (2000) 90 Ohio St.3d 403, 417, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, and *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 26} Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. On review for sufficiency, courts do not assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." Id., at 390. In determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319. Consequently, a verdict will not be disturbed based upon insufficient evidence unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484; *Jenks*, supra, at 273.

{¶ 27} In this case, the protection order issued in August 2007 states the following as one of the conditions applicable to appellant:

{¶ 28} "5. [Appellant] SHALL STAY AWAY from protected persons named in this order, and shall not be present within 500 feet * * * of any protected persons,

wherever protected persons may be found, or any place the [appellant] knows or should know the protected persons are likely to be, **<u>even with protected persons' permission</u>**. If [appellant] accidentally comes in contact with protected persons in any public or private place, [appellant] must depart immediately. This order includes encounters on public and private roads, highways, and thoroughfares.

{¶ 29} " * * *

{¶ 30} "7. [Appellant] SHALL NOT INITIATE OR HAVE ANY CONTACT with the protected persons named in this order at their residences * * *."

{¶ 31} At trial, four witnesses testified regarding the alleged appearance of appellant in locations that violated the protection order. The victim, appellant's former girlfriend and the person named in the protection order, testified that, regarding the first incident, she saw appellant at the restaurant in Grand Rapids where she lives, appellant did not immediately leave, but approached her. She also stated that, during the second incident, she saw appellant driving another vehicle very slowly past her home, located on a side street in Grand Rapids. The victim's son identified appellant and his vehicle as being at the restaurant located near his mother's residence in Grand Rapids. The son testified that appellant spoke to or gestured at him, and did not leave the area when his mother returned with him to retrieve his bicycle.

{¶ 32} The victim's former husband also testified as to the second incident, that he recognized appellant driving a white suburban vehicle within 15 to 20 feet from where

the victim was standing outside her home in Grand Rapids. Finally, a neighbor also identified that he saw a white SUV drive past which fit the description provided by the victim and her ex-husband. One of the sheriff's deputies also testified that a white SUV was in the driveway at appellant's residence, which was only minutes from the victim's house. Therefore, we conclude that, even when construing the facts in favor of appellant, sufficient evidence was presented from which the jury could have inferred or believed that appellant was, in fact, in violation of the protection order.

{¶ 33} Accordingly, appellant's second and third assignments of error are not well-taken.

III.

{¶ 34} In his fourth assignment of error, appellant argues that the jury's verdict was against the manifest weight of the evidence.

{¶ 35} When asked to overturn a conviction as against the manifest weight of the evidence, the appellate court must review the entire record, weighing the evidence and all reasonable inferences. Acting as a "thirteenth juror," the court may consider the credibility of witnesses, to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. A conviction on manifest weight grounds will be reversed only in the most "'exceptional case in which the

evidence weighs heavily against the conviction.'" Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 36} In this case, we have reviewed the entire record and, based upon the testimony of the witnesses and evidence presented, we cannot say that the jury clearly lost its way or that the evidence weighs heavily against the conviction. Although some slight conflicts may have existed in the testimony, such conflicts are not substantial enough to demonstrate that the witnesses were not credible. Therefore, we conclude that the jury's verdicts were not against the manifest weight of the evidence. Accordingly, appellant's fourth assignment of error is found not well-taken.

{¶ 37} The judgments of the Bowling Green Municipal Court are affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J.	_______________________________ JUDGE
Mark L. Pietrykowski, J.	
Thomas J. Osowik, J. CONCUR.	_______________________________ JUDGE
	_______________________________ JUDGE

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