[Cite as *State v. Pena*, 2014-Ohio-423.]

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

State of Ohio

Appellee

v.

Ernesto Pena, Jr.

Appellant

Court of Appeals No. L-12-1309

Trial Court No. CR0201201965

DECISION AND JUDGMENT

Decided: February 7, 2014

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Appellant, Ernesto Pena, Jr., appeals his conviction, following a jury trial in the Lucas County Court of Common Pleas, for felonious assault in violation of R.C. 2903.11(A)(1), a felony of the second degree. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} The first trial ended on Thursday, September 6, 2012, in a hung jury. A second trial was rescheduled for the following Monday. After the second jury was empaneled, the state presented the following evidence.

{¶ 3} On June 2, 2012, while in the home they shared, Dawn Boes and appellant got into a heated argument. Ms. Boes explained, "[t]here was a lot of screaming going on. And he just started hitting me. Back of his hands, fist, his open hand. All over my whole head, my face, my eyes, my jaw." The hitting was not constant but occurred over the course of a few hours. She did not hit back. When Ms. Boes realized an opportunity to flee, she ran to a neighbor's house and called 9-1-1. It was midnight.

{¶ 4} The 9-1-1 tape was played. The jury could hear the victim report the altercation, ask for medical help, and state that she could not see out of her left eye.

{¶ 5} She testified that when the fire department arrived, a medic "flashed a flashlight at me in my eye, basically, and handed me an ice pack." She indicated that she had difficulty communicating with the responding police officer because she was in shock and in pain. The victim admitted she had been drinking and that she had taken a prescription anxiety medication earlier in the day. She testified that the officer suggested she file a report in the morning.

{¶ 6} Ms. Boes went to her mother's home to spend the night. There, Ms. Boes blew her nose and felt her eye "pop[] out of the socket." Her mother drove her to the emergency room around 3:00 a.m. By then, her eye had "swollen shut." After a medical

exam, x-ray, and CT scan, Ms. Boes was informed that her left eye socket was fractured in two places and that she suffered nerve damage on the left side of her face.

{¶ 7} Photographs and medical reports were introduced into evidence. The photographs were taken at the hospital and depicted swelling and bruising on Ms. Boes' face around her left eye. The final diagnosis on the medical report indicates: "(1) Left orbital floor and posterior and medial wall fractures. (2) Multiple contusions. (3) Acute alcohol intoxication."

{¶ 8} Ms. Boes indicated that since the altercation, the left side of her face has been "numb" and "tingling" and that she has been having trouble with her vision in her left eye. She asserted that the doctors had indicated that "the nerve damage will probably always be there."

{¶ 9} Carl Schwirzinski, the patrol officer who responded to the 9-1-1 call, testified that when he arrived at the scene, Ms. Boes had already been treated by paramedics and had a bag of ice on her face. The officer stated that Ms. Boes was "a little hysterical. She was intoxicated. She had, um, a little bit of a bruise above her – I can't remember if it's her left or her right eye, but she had a little bit of a knot that was on this side, if I remember right." Ms. Boes identified appellant as her attacker. The patrol officer testified that he made a report and recommended Ms. Boes talk to the prosecutor once she "sobered up." At the time, he did not realize the severity of her injuries.

{¶ 10} When shown the photographs taken of Ms. Boes at the hospital, Officer Schwirzinski indicated that the swelling and extent of bruising apparent in the photographs was not present when he questioned Ms. Boes at the scene.

{¶ 11} Ms. Boes' mother testified that she received a phone call from her daughter just after midnight on June 3, 2012. When she arrived at the scene, the mother was "devastated" when she saw her daughter's face. The mother explained, "It was – it was pretty bloody and bruised and she was bruised everywhere." The mother took Ms. Boes back to the mother's apartment. A short time later, the mother took her daughter to the hospital after Ms. Boes blew her nose and her eye "protruded out."

{¶ 12} Police Officer Mary Seng testified that she was called to the hospital in the early morning hours of June 3, 2012, to speak to a victim of an assault. Officer Seng testified that when she arrived, "[Ms. Boes] was very upset. Her eye was swollen almost shut. Very bruised, very swollen. Black and Blue." Ms. Boes indicated to Officer Seng that "her live-in boyfriend had punched her in the eye, had beat her up * * *."

{¶ 13} Upon discovering that Ms. Boes had already reported the incident to the police, Officer Seng reviewed the initial report. Officer Seng believed "the injury was more severe than it appeared initially on the scene." At that point, Officer Seng arranged to have Detective Steve Applin get involved in the investigation. When the detective arrived, Officer Seng supplied him with a copy of the original report.

{¶ 14} Upon the conclusion of Officer Seng's examination, the state rested. The first day of the second trial was over. On the record but outside the presence of the jury,

a discussion was held between the parties regarding Detective Applin. The state had listed Applin as a witness and issued a subpoena to ensure his appearance. However, Detective Applin did not appear. At that time, the state did not know why the detective had failed to appear. Appellant's trial counsel indicated that she had intended to cross-examine the detective but had not issued a subpoena to ensure his appearance. She felt that it was improper for the lead detective on a criminal case not to appear at trial when the detective was referred to during voir dire and during the testimony of Officer Seng. Trial counsel admitted, however, that she did not issue a subpoena to secure Detective Applin's appearance.

{¶ 15} The following morning, the state indicated:

> Judge, I can tell the court that after we broke yesterday I made some efforts to locate Detective Applin. I called over to Toledo Police Department and requested he be located. I also had them check his schedule. It turned out he was on vacation and he did not get my subpoena. He eventually called me at home yesterday evening and he and I discussed the matter. He was actually up in Michigan about 250 miles away from here and was unaware that we were back in trial on this case. I explained the situation to him and he indicated to me that the earliest he could be back in Toledo was two o'clock this afternoon. I e-mailed that information to [trial counsel] as soon as I found out about it and I believe at this point it's her decision to proceed without the detective.

{¶ 16} Appellant's trial counsel responded, "Judge, I did receive that email from [the state] last night and I responded and acknowledged the unavailability, advised [the state] that we would proceed to closing arguments today." Thereafter, appellant's counsel indicated that her client would not take the stand and moved for acquittal pursuant to Crim.R. 29. The trial court denied the motion.

{¶ 17} After closing argument, the jury returned a guilty verdict. The trial court sentenced appellant to serve six years in prison. Appellant timely brought the instant appeal.

First Assignment of Error

{¶ 18} Appellant sets forth two assignments of error, the first of which provides:

> Appellant's conviction fell against the manifest weight of the evidence.

{¶ 19} The Ohio Supreme Court has summarized the standard for reversal for manifest weight of the evidence as follows:

> 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 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. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 20} "In determining whether a conviction is against the manifest weight of the evidence, we do not view the evidence in a light most favorable to the state. Instead, we sit as a 'thirteenth juror' and scrutinize 'the factfinder's resolution of the conflicting testimony.'" *State v. Robinson*, 6th Dist. Lucas No. L-10-1369, 2012-Ohio-6068, ¶ 15, citing *Thompkins* at 388. Reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387, quoting *Martin* at 175.

{¶ 21} Here, Ms. Boes testified that her injuries were caused by appellant and that the injuries she sustained were extremely painful and likely permanent. There were no witnesses to the altercation between Ms. Boes and appellant. Therefore, the jury had to determine Ms. Boes' credibility. Appellant argues that Ms. Boes' testimony was unreliable because she informed the 9-1-1 operator that her eye was "swollen shut" but that the patrol officer responding to the scene only observed bruising around the eye. However, in our review of the 9-1-1 call we note that the victim did not report that her eye was "swollen shut," but that she could not see out of her left eye. We further note that the patrol officer interviewed the victim after the paramedics had treated her with ice.

{¶ 22} While a reviewing court considers the credibility of witnesses in a weight of the evidence review, "that review must nevertheless be tempered by the principle that weight and credibility are primarily for the trier of fact." *State v. Kash*, 1st Dist. Hamilton No. CA2002-10-247, 2004-Ohio-415, ¶ 25, citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). The trier of fact is in the best position to "view the

witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Kash* at ¶ 25, quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). "The jury may believe all that a witness has said, or part or none of it." *Barker v. Century Ins. Group*, 10th Dist. Franklin No. 06AP-377, 2007-Ohio-2729, ¶ 14, quoting *In re D.F.*, 10th Dist. Franklin No. 06AP-1052, 2007-Ohio-617, ¶ 26, fn. 3.

{¶ 23} Upon consideration of the evidence presented at trial, this court finds that there was substantial probative evidence upon which the jury could conclude that the elements of felonious assault had been proven beyond a reasonable doubt. Appellant's conviction is not against the manifest weight of the evidence. Appellant's first assignment of error is not well-taken.

Second Assignment of Error

{¶ 24} In his second assignment of error, appellant asserts:

> Appellant received ineffective assistance of counsel.

{¶ 25} To establish a claim for ineffective assistance of counsel, appellant "must show (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the proceeding's result would have been different." *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 204, citing *Strickland v. Washington,* 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus.

{¶ 26} Under this assignment of error, appellant argues trial counsel was ineffective by failing to secure the lead detective's appearance at the second trial. Appellant asserts: "In the first trial, Detective Applin testifies on behalf of the State of Ohio, and the result is a hung jury. In the second trial, Detective Applin does not testify, and the result is a conviction * * * ." Appellant argues that Detective Applin's testimony "was clearly not helpful to the State of Ohio" because he "essentially admitted that the only investigation done into this case was taking the statement of the victim, verifying her injuries, and arresting Appellant." However, there was no indication anywhere in the second trial that the police "investigated" the matter any further than taking the victim's statement, verifying her injuries, and arresting appellant. There is no reason to believe, as appellant suggests, that "[w]ithout the Detective's testimony, the second jury * * * could * * * believe that a normal, television-esque investigation took place."

{¶ 27} Whether or not trial counsel erred by failing to ensure the lead detective's appearance at the second trial, appellant failed to show that a reasonable probability exists that the outcome of the trial would have been different had counsel done so. Thus, appellant's second assignment of error is not well-taken.

{¶ 28} The judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant 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.

Arlene Singer, J.	_______________________ JUDGE
Thomas J. Osowik, J.	
James D. Jensen, J. CONCUR.	_______________________ JUDGE
	_______________________ JUDGE

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