[Cite as *State v. Woods*, 2010-Ohio-1586.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 09AP-667
v.	:	(C.P.C. No. 08CR-06-4366)
Robert T. Woods,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 8, 2010

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV,* for appellee.

Douglas W. Bulson, Jr., for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Robert T. Woods, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty of felonious assault in violation of R.C. 2903.11, a felony of the second degree. Because (1) the trial court did not abuse its discretion in overruling defendant's request for a continuance, (2) the court did not abuse its discretion in excluding from evidence voicemail messages the victim allegedly

left on a cell phone, (3) defendant was not denied effective assistance of counsel, and (4) sufficient evidence and the manifest weight of the evidence support the jury's verdict finding defendant guilty, we affirm.

I. Procedural History

{¶2} By indictment filed on June 11, 2008, defendant was charged with one count of felonious assault. According to the victim, defendant punched her in the face, pushed furniture into her, and caused her injuries, including nasal and orbital bone fractures. The matter was tried to a jury beginning April 28, 2009; on May 1, 2009, the jury rendered a verdict finding defendant guilty. The trial court conducted a sentencing hearing on June 9, 2009 and imposed a sentence of two years plus court costs, journalizing its judgment entry on June 11, 2009. Defendant timely appeals.

II. Assignments of Error

{¶3} Defendant assigns four errors:

> I. The Court committed error/abused its discretion in overruling defendant's request for a reasonable opportunity to secure the attendance of a police officer witness.
>
> II. The Court erred as a matter of law in disallowing the jury to hear the voicemail messages left by the victim on a cellphone.
>
> III. Defendant was denied the effective assistance of counsel.
>
> IV. The verdict is not supported by sufficient evidence and is against the manifest weight of the evidence.

For ease of discussion, we address defendant's assignments of error out of order.

III. Fourth Assignment of Error – Sufficiency and Manifest Weight of the Evidence

{¶4} Defendant's fourth assignment of error contends neither sufficient evidence nor the manifest weight of the evidence supports the trial court's judgment.

{¶5} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency is a test of adequacy. Id. We construe the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387.

{¶6} When presented with a manifest weight argument, we engage in a limited weighing of the evidence to determine whether sufficient competent, credible evidence supports the jury's verdict to permit reasonable minds to find guilt beyond a reasonable doubt. *Conley,* supra; *Thompkins*, at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury thus may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, at ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶7} According to the victim, in May 2008 she was living at 6554 Cooper Meadow Road in an apartment where she had lived for approximately one year. In January or February of 2008, she began dating defendant; he moved in at approximately the same time because he needed somewhere to stay while going through a divorce.

{¶8} On the morning of May 8, 2008, the victim went to her job, whose hours typically extended from 9:00 a.m. until approximately 5:00 p.m., and intended to clean the apartment at the end of her workday. When she learned defendant was at the apartment drinking beer and "hanging out," she was a little upset and decided not to go home. Instead, she went to Pub 161, a pool hall, at approximately 6:00 p.m. where her friend worked as a barmaid. She there shot pool and drank beer. The victim intended to drive her friend home when her friend completed her work responsibilities around 11:00 p.m.

{¶9} During the evening she called defendant using someone else's cell phone, having left hers at her apartment. She reached him, and he was "upset" she was not home. (Tr. 80.) She continued to shoot pool. At one point during the evening, she saw defendant get kicked out of the pub. According to the victim, defendant appeared "[u]pset, definitely." (Tr. 82.) Defendant then called her on the cell phone from which she called him. When she spoke with him, he was yelling, but she was unsure why. She continued to shoot pool until shortly after 11:00 p.m. and then drove her friend home. She stayed there approximately 20 to 30 minutes, unsuccessfully tried calling defendant, and then went to her apartment.

{¶10} She arrived home at approximately 12:30 to 1:00 a.m. on May 9, 2008. When she walked in, she saw her cell phone on the floor broken; defendant was on the

couch sleeping. She threw his phone, upset he had broken her phone. She then went upstairs to a smaller bed in her bedroom.

{¶11} She could hear defendant "talking to himself, like yelling." (Tr. 86.) He subsequently came upstairs, got within four inches of her face, and screamed, "Fuck you, you cunt, you whore, you bitch." (Tr. 86.) As she stood up to leave, he closed his fist and punched her in the face, striking her in the area of her left eye and the left side of her nose and knocking her to the floor instantly. Because blood was flowing from both sides of her nose, she grabbed a towel in the bathroom and ran past defendant down the stairs. She grabbed her purse and intended to try to run to her mother's apartment on the same street. As she attempted to unlock the dining room door, defendant threw her into the kitchen table and chairs. She pushed the chairs off of her and ran to the other door, but he threw her onto the coffee table. She ultimately escaped to her mother's apartment where her mother called 9-1-1. Officers Jacqueline Brandt and Adolph Adu-Owusu, officers with the Columbus Division of Police, responded.

{¶12} On responding, they met the crying victim who was a little hysterical at times and was bleeding from her nose, which appeared to be crooked. The officers went to the scene to secure it and look for the suspect. They found a broken kitchen table, spots of blood elsewhere, and a sink with bloodspots. The victim went to a family doctor the next day and was forwarded to the emergency room. She ultimately was diagnosed with a nasal fracture, fracture of the orbital bone around the eye, and contusions around her eye, left shoulder, wrists, medial wrists, and right foot. According to the doctor, the injuries were consistent with her description of the assault.

{¶13} Defendant's testimony differed significantly from the victim's. According to defendant, he and the victim were friends for five years and started dating about six months before the incident. He moved into her apartment three months after they began seeing each other, probably sometime in February 2008.

{¶14} On May 8, 2008, the victim called him. They had a joint social engagement at the victim's apartment entertaining friends, but the victim changed the plans and instead went out with a friend. After defendant's other friends left the apartment, he and Gary Adkins first went to the 8-Ball, where defendant received a call from the victim, who said she was at Pub 161. Defendant and Adkins went to the pub, but saw her car was not there. They returned to the 8-Ball when they received another call from the victim stating she was at Pub 161 and defendant needed to come there. He and Adkins returned to Pub 161.

{¶15} When defendant and Adkins entered the establishment, the victim would not associate with defendant. Instead, defendant talked to the victim's friend about leaving the victim. Although the victim's friend suggested the victim may not have been stable enough to receive such information, the victim's friend passed defendant's message to the victim. As defendant started walking down the hallway, the victim lunged for defendant's back or neck, but a barmaid held her back. Shortly after that, the victim threw a beer bottle that broke near Adkins and defendant, "screaming at the top of her lungs like somebody was killing her, really dramatic." (Tr. 167.) Defendant and Adkins were asked to leave, and a second bottle was thrown as they opened the door. Defendant dropped Adkins off at his home, and defendant returned to the victim's

apartment. During that time, he received telephone calls from the victim, but he did not answer them.

{¶16} Defendant lay down and in a half hour to an hour heard the back door slam. In the midst of the victim's "ranting and raving * * * she picked up something from the mantel." (Tr. 185.) Defendant already had packed his clothes and was attempting to disconnect his stereo equipment while he "was being kicked in [his] side and in [his] ribs and in [his] butt area and [his] arms got hits on them." (Tr. 185.) Deciding to leave the stereo equipment, defendant walked toward the back door and "heard this snap sound." (Tr. 186.) He "looked back all the way and her face was all bloody and her eye was bleeding out of the socket area." (Tr. 186.) She asked him to grab a towel; he replied, "I'm not grabbing anything, I'm out the door" and he left. (Tr. 186.) Defendant did not recall what the victim used to injure herself, but he noted candle fixtures on the mantel; '[i]t had to be one of them things, candle holder things." (Tr. 187.) He went to his wife and stayed with her that night.

{¶17} Defendant was charged with violating R.C. 2903.11, which defines felonious assault as knowingly causing serious physical harm to another. The victim's testimony, if believed, demonstrated defendant punched her in the face, causing her to fall instantly to the ground, pushed kitchen furniture on her, and then pushed her into a coffee table. Medical testimony confirmed that the victim sustained a fractured nose, fractured orbital bone, and multiple contusions. Construing the evidence in favor of the state, a reasonable juror could find, based on the victim's testimony, that defendant is guilty of felonious assault beyond reasonable doubt.

{¶18} The state's evidence was contested. The jury, however, was required to resolve the credibility issues presented in the vastly different testimony the victim and defendant offered. Although the victim's testimony was not without discrepancies, aspects of her testimony were corroborated through Dr. McKeon's medical testimony and law enforcement's testimony describing the scene encountered at the victim's apartment following the incident.

{¶19} Moreover, some aspects of the evidence defendant presented strained credulity. Although defendant decided he had to terminate his relationship with the victim, he testified he went to a bar and told not the victim, but her friend, and left it to the victim's friend to relay the information. Even though defendant's testimony portrayed the victim as completely out of control in Pub 161, defendant and his friend, not the victim, were asked to leave. While defendant testified he had just terminated his relationship with the victim, he nonetheless returned to her house, testifying he was unable to stay with Adkins because he was allergic to Adkins' pet cat.

{¶20} The totality of the evidence gave the jury an opportunity to weigh the witnesses' credibility and resolve the conflicting testimony. Because we cannot say the jury lost its way in resolving the credibility of the various witnesses, we likewise cannot say the judgment is against the manifest weight of the evidence.

{¶21} Defendant's fourth assignment of error is overruled.

IV. First Assignment of Error – Continuance

{¶22} Defendant's first assignment of error asserts the trial court abused its discretion in refusing his continuance to secure the testimony of Officer Moran.

{¶23} In *State v. Unger* (1981), 67 Ohio St.2d 65, 67, the Ohio Supreme Court noted "[t]he grant or denial of a continuance is a matter which is entrusted to the broad, sound discretion of the trial judge. An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion." See *State v. Adams* (1980), 62 Ohio St.2d 151, 157 (stating "[t]he term 'abuse of discretion' * * * implies that the court's attitude is unreasonable, arbitrary or unconscionable"). *Unger* further observed "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." Id., quoting *Ungar v. Sarafite* (1964), 376 U.S. 575, 589, 84 S.Ct. 841.

{¶24} In reviewing a trial court's exercise of discretion, an appellate court must weigh any potential prejudice to the defendant against a court's right to control its own docket and the public's interest in the efficient dispatch of justice. *Unger* at 67. When evaluating a motion for continuance, a court should consider, among other factors, "the length of delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case." Id. at 67, 68.

{¶25} On the morning of April 30, 2008, defendant, through counsel, advised the court that, on the previous day, he subpoenaed Officer Moran, of the Westerville police department, to appear in court that morning. Defendant requested a ten-minute break to determine from the Westerville liaison officer where Officer Moran was that morning. On returning from the break, defendant advised the court the officer, who defendant understood received the subpoena, went home ill the prior evening. When the trial court inquired why defendant was offering the officer's testimony, defendant stated the officer would testify the victim was intoxicated and was very emotionally upset over her breakup with defendant.

{¶26} At the conclusion of the next witness' testimony, defendant requested a continuance until the health of Officer Moran would allow her to testify. The trial court denied the continuance, noting both that defendant did not subpoena the officer until late the day before and that defendant could not state if the officer would be better the next day or, if not then, when.

{¶27} The trial court did not abuse its discretion in denying the requested continuance. Defendant's attorney admitted he was aware of the victim's accident well before trial, but he did not realize Westerville law enforcement was involved. The trial court properly could consider that defendant's failure to subpoena Officer Moran earlier both contributed to his request for a continuance and deprived the state of the opportunity to locate and interview the witness. *State v. Abdalla,* 10th Dist. No. 01AP-439, 2001-Ohio-3941. The trial court also could consider that defendant was unable to specify the length of delay he needed to procure Officer Moran's presence. *State v. Alexander* (Mar. 14,

1995), 10th Dist. No. 94APA04-593 (concluding the trial court did not abuse its discretion in overruling defendant's request for an indefinite continuance).

{¶28} Finally, the record fails to demonstrate prejudice from the trial court's decision. Based on the officer's written report, defendant stated through counsel he was offering the officer's testimony to reflect the victim was intoxicated and was emotionally upset over her breakup with defendant. To the extent defendant intended to use the officer's testimony to prove the victim was intoxicated, we note the officer did not charge the victim with an alcohol-related offense. Moreover, other evidence revealed the victim was drinking beer on the night of the incident.

{¶29} To the extent defendant intended to use the officer's testimony to support his contention that the victim was emotional about defendant's terminating their relationship, the report does not state the victim was upset about the broken relationship, but over an argument. Because the victim admitted in her testimony she was upset over defendant's inviting friends to her apartment and thwarting her plans to clean, the testimony of the officer would have added little to the evidence presented. Under those circumstances, defendant did not suffer prejudice from the trial court's denying his request for a continuance.

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

V. Second Assignment of Error – Voicemail Messages

{¶31} Defendant's second assignment of error contends the trial court erred in refusing to allow into evidence the voicemail messages the victim allegedly left for defendant.

{¶32} The admission or exclusion of evidence rests within the sound discretion of the trial court. *State v. Robb* (2000), 88 Ohio St.3d 59, 68. Absent an abuse of discretion and material prejudice to the appellant, an appellate court will not disturb the trial court's ruling as to the admissibility of evidence. *State v. Martin* (1985), 19 Ohio St.3d 122, 129; *Adams* at 157 (noting an abuse of discretion "implies that the court's attitude is unreasonable, arbitrary, or unconscionable").

{¶33} At the end of the state's direct examination of the victim, defendant, through counsel, informed the court he received two voicemail messages from the victim on the night at issue. Defendant advised the court the messages conveyed two points: (1) the victim "sounds either upset or intoxicated, one of the two," and (2) the victim "is talking about being in a car accident and that she's upset over – she's crying to him about having got in a car accident." (Tr. 102.) Further discussion revealed the trial court's concerns about authentication and foundation for the voicemail messages. With that caution, the court allowed defendant to cross-examine the victim.

{¶34} During the course of cross-examination, the victim testified that once she arrived at her friend's home, she called defendant an unspecified number of times and was unable to reach him. When asked whether she recalled leaving him voicemail message, she replied, "I probably left him messages throughout that night." (Tr. 117.) When further asked whether she recalled leaving him a voicemail message that "I backed into a car because I'm crying over you," the victim replied, "I might have. I don't recall it." (Tr. 117.) She, however, advised that she did not remember saying "[t]he cops are here, come and get me," or "I can't have you hating me." (Tr. 117.) Because the victim

indicated hearing the voicemail messages might refresh her recollection, the court dismissed the jury, and the messages were played in open court. The transcript reflects that, "[d]ue to the unintelligible nature of the calls, they were not transcribed." (Tr. 119.)

{¶35} On hearing the voicemails, the victim stated, "I don't even understand what I'm saying." (Tr. 119.) When again asked whether she was the person speaking on the phone, the victim testified, "I couldn't really tell. I assume so. I guess." (Tr. 120.) At a later point in the trial and at defendant's request, the trial court allowed defendant to recall the victim, when she was asked if she was involved in an accident. The victim stated, "It was not a car accident. I brushed against a vehicle that was parked." (Tr. 133-34.)

{¶36} During defendant's direct examination, defendant was sure the victim left messages for him. He explained he played them the next day and saved them. Although defendant acknowledged his phone subsequently was broken, he testified he retrieved the messages from his phone using a landline and another friend's phone to which all the messages were forwarded. When defendant again sought to admit the messages, the court engaged in an extensive discussion about whether the voicemails were hearsay and inquired whether defendant, who in all probability would indicate the victim sounded drunk on the voicemails, was an expert on that subject.

{¶37} In the end, the trial court decided not to allow the messages into evidence, explaining that "[i]t doesn't come within – there was a way, I think, for this perhaps to have come in, but bringing it in through him is not the way that it should come in." (Tr. 179.) The court further noted that "it seems to me that having heard the recording myself, I don't know how you can say, yes, this is somebody that's drunk versus this is somebody

that's upset." (Tr. 180.) When defendant advised that it was a question for the jury to determine, the court replied, "No, because we want to give jurors evidence that isn't based upon speculation, and I think that it's getting pretty speculative." (Tr. 180.) As direct examination resumed, defendant was asked whether "[o]n the voicemails, did [the victim] sound intoxicated?" (Tr. 182.) Defendant replied, "[y]es." (Tr. 182.)

{¶38} Defendant proffered what he believed to be the content of the voicemail messages. According to defendant, the first stated, "Hello. You need to know what is going on, like, a, the cops are here because apparently I backed into a car because I'm crying over you. I wish I had an excuse but you are the only reason." (Tr. 323-24.) The second voicemail at 12:30 a.m. on May 9 stated, "Robert, I drove Katie home. * * * I cannot drive. You aren't answering. I can't have you hating me and being in trouble at the same time." (Tr. 324.)

{¶39} The trial court did not abuse its discretion in refusing to admit the voicemail messages into evidence. Initially, the foundation for admitting the voicemails was tentative. More significantly, however, the tape was played in open court for the victim and was of such poor quality the court reporter was unable to transcribe even a word of it. Given the poor quality of the tape, the trial court rightly concluded that submitting the voicemails to the jury would require them to engage into speculation about whether the victim was intoxicated or upset. *State v. Combs* (1991), 62 Ohio St.3d 278 (excluding evidence that would have been "unintelligible to the ordinary lay person").

{¶40} Even if the trial court erred, defendant suffered no prejudice because the evidence was admitted through "other means." *State v. West,* 10th Dist. No. 06AP-11,

2006-Ohio-6259, ¶10. To the extent defendant sought to use the messages to establish the victim was upset or intoxicated, other evidence addressed those issues. The victim testified she consumed between three and four beers that evening. Defendant's friend, Gary Adkins, corroborated her being intoxicated or upset when he noted her conduct at Pub 161, testifying the victim not only was "grabbing stuff, flinging it off the bar, yelling, screaming," and yelling obscenities, but kept getting more and more hysterical. (Tr. 149, 150, 153, 157.) Defendant, too, described her as "[s]creaming at the top of her lungs like somebody was killing her" and stated she sounded intoxicated on the voicemails. (Tr. 167.) To the extent defendant sought admission of the voicemails to demonstrate the victim was in an accident, she admitted her brush with another car when defendant cross-examined her. The voicemails would have been cumulative of the evidence already presented.

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

VI. Third Assignment of Error – Ineffective Assistance of Counsel

{¶42} In his third assignment of error, defendant contends defense counsel was ineffective, depriving defendant of his constitutional right to the effective assistance of counsel.

{¶43} To prove ineffective assistance of counsel, defendant must show that counsel's performance was deficient. *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Id. Second, the defendant must show that the deficient performance prejudiced the defense. Id. Thus,

defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Id. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. Id.

{¶44} Defendant initially contends his attorney should have called additional witnesses. Because the record does not specify what evidence the additional witnesses may have presented, we are unable to ascertain that defendant suffered any prejudice from counsel's failure to call additional witnesses at trial. Defendant also contends his attorney should have earlier conducted a record check with Westerville in order to ascertain the victim's contact with that police department during the evening at issue. Even if counsel should have checked with Westerville, rather than with the city of Columbus, the record at this point fails to demonstrate prejudice to defendant, as the testimony he anticipated eliciting from the officer was presented through other means.

{¶45} To the extent defendant relies on counsel's failure to procure admission of the voicemail messages, his contention once again fails. Even if counsel were ineffective in failing to secure admission of the messages, defendant suffered no prejudice because the information allegedly on the voicemails was cumulative of other evidence presented during the trial. Similarly, to the extent defendant contends trial counsel was deficient in failing to move for a new trial in order to secure the attendance of Officer Moran, he again cannot demonstrate prejudice. If she testified according to her report, the evidence was admitted through other sources; if defendant suggests she had other testimony to offer, we cannot discern from this record what that testimony might be and thus we cannot

conclude whether defendant was prejudiced. Lastly, defendant contends trial counsel was ineffective in failing to thoroughly cross-examine the victim. Contrary to defendant's contentions, defense counsel thoroughly cross-examined the victim twice having the opportunity during the trial. To the extent defendant contends his attorney should have asked additional or different questions, the decision whether to ask such questions fits well within the trial counsel's discretion to make strategic decisions regarding the cross-examination and presentation of defendant's case. *State v. Chavis* (Dec. 26, 1996), 10th Dist. No. 96APA04-508, citing *Strickland.*

{¶46} Because, even if defense counsel were ineffective, defendant fails to demonstrate prejudice, we overrule defendant's third assignment of error.

{¶47} Having overruled all four of defendant's assignments of error, we affirm the judgment of the trial court.

Judgment affirmed.

BROWN and McGRATH, JJ., concur.

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