

[Cite as *Cleveland v. Ellis*, 2017-Ohio-8874.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105338

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

TERRI ELLIS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2016 CRB 017579

BEFORE: Laster Mays, J., E.A. Gallagher, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: December 7, 2017

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ANITA LASTER MAYS, J.:

{¶1} Defendant-appellant Terri Ellis (“Ellis”) appeals her guilty verdict, asks this court to reverse her convictions, and grant her a new trial, or remand to the trial court for a new sentencing hearing. We affirm.

{¶2} Ellis was charge with one count of assault, a first-degree misdemeanor, in violation of Cleveland Codified Ordinance 621.03. Ellis was found guilty and sentenced to 180 days of incarceration with 177 days suspended; \$1000 fine with \$500 suspended; completion of an anger management class; completion of the community orientation program; and active community control supervision for one-year.

I. Facts

{¶3} On August 29, 2016, Ellis and Thomas Walker (“Walker”) both entered the parking lot of Home Depot in the city of Cleveland. Ellis was driving a sport utility vehicle and Walker was driving a motorcycle. As Ellis entered the parking lot, Walker honked his horn. According to Walker, Ellis “flipped him off.” Both Ellis and Walker parked their vehicles and entered into Home Depot without incident. Ellis exited first and claims that after she entered her vehicle and was headed to the exit that Walker rammed his shopping car into the side of her vehicle. Walker claims that Ellis was bumping him with her vehicle, and

Walker smacked the hood of Ellis’s vehicle. Ellis exited her vehicle, and testified that she retrieved a stick from her trunk and struck Walker with the stick. (Tr. 6.)

{¶4} Both Ellis and Walker called the police. When the police arrived, an officer reviewed the Home Depot's surveillance video. Ellis was arrested and subsequently charged with assault. A copy of the video was provided to the prosecutor, defense counsel, and the trial court. None of the parties were able to view the video because of a file formatting error. Ellis told the trial court that she had evidence of audio recordings that would prove her innocence. The court also attempted to listen to the 911 recording.

However, the trial court determined that the audio recordings of the 911 calls were not clear. After trial, Ellis was found guilty of first-degree misdemeanor assault. On a later date Ellis was sentenced. As a result, Ellis filed this timely appeal assigning two errors for our review:

- I. Ms. Ellis was denied her Sixth Amendment right to effective assistance of counsel when her attorney failed to review readily available exculpatory evidence, prompted and allowed her to admit guilt while testifying as a witness, failed to raise a Crim.R. 29 motion at the close of the city's case-in-chief, and failed to properly prepare for sentencing; and
- II. The trial court erred by considering evidence not introduced at trial when determining the appellant's sentence and failing to make the statutory findings mandated under R.C. 2929.22 at the sentencing hearing.

II. Ineffective Assistance of Counsel

{¶5} In Ellis's first assignment of error, she contends that she was denied effective assistance of counsel because her counsel failed to review exculpatory evidence, allowed her to admit her guilt, failed to raise a Crim.R. 29 motion, and failed to prepare her for sentencing.

Reversal of a conviction for ineffective assistance of counsel requires a defendant to show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *State v. Smith*, 89 Ohio St.3d 323, 327, 731 N.E.2d 645 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Defense counsel's performance must fall below an objective standard of reasonableness to be deficient in terms of ineffective assistance of counsel. See *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989). Moreover, the defendant must show that there exists a reasonable probability that, were it not for counsel's errors, the results of the proceeding would have been different. *State v. White*, 82 Ohio St.3d 16, 23, 693 N.E.2d 772 (1998).

To establish ineffective assistance of counsel, a defendant 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. *Strickland* at 687-688, 694; *Bradley* at paragraphs two and three of the syllabus.

In evaluating a claim of ineffective assistance of counsel, a court must give great deference to counsel's performance. *Strickland* at 689. "A reviewing court will strongly presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *State v. Pawlak*, 8th Dist. Cuyahoga No. 99555, 2014-Ohio-2175, ¶ 69.

State v. Jones, 8th Dist. Cuyahoga No. 102260, 2016-Ohio-688, ¶ 14-16.

A. Exculpatory Evidence

{¶6} Ellis claims that her counsel was deficient because he failed to review the video surveillance of the incident at Home Depot, which Ellis claims is exculpatory evidence.

Exculpatory evidence is defined as evidence favorable to the accused, which "if disclosed and used effectively, * * * may make the difference between conviction and acquittal." *State v. Braun*, 8th Dist. Cuyahoga No. 91131, 2009-Ohio-4875, ¶ 70, citing *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

State v. Jones, 8th Dist. Cuyahoga No. 101311, 2015-Ohio-1818, ¶ 20.

{¶7} We find that Ellis’s claim is without merit. The record reveals that at trial, the trial court, prosecutor, and defense counsel were unable to review the video due to formatting issues. Yet, Ellis argues that the video would actually show what happened and would have given defense counsel an opportunity to impeach Walker. In other words, Ellis claims that the video evidence would show that Walker hit her vehicle, causing her to get out of the car and hit him with a broomstick. This is not exculpatory evidence. Walker testified to that fact and defense counsel was able to cross-examine him on his memory issues. Ellis does not demonstrate that the video footage would result in her acquittal, especially because she does not contradict the fact that after Walker banged on her hood that she assaulted Walker.

B. Admitted Guilt

{¶8} Additionally, Ellis argues that her counsel’s performance was deficient because she received minimum to no preparation prior to taking the stand and defense counsel’s lack of preparation caused her to admit she assaulted Walker on the stand. During direct examination, Ellis’s counsel asked her about the incident. Ellis testified, “So, I got out of the vehicle. I went to the back and I grabbed the broom. I got out the vehicle, and I hit him with the broom on the side of his arm.” (Tr. 19-20.) Ellis’s counsel then asked her, “Okay. Why did you do that?” (Tr. 20.) To which Ellis replied, “Because he kept banging on my car * * *.” (Tr. 20.)

To evaluate an ineffective assistance of counsel claim, a reviewing court must determine whether the attorney’s performance was deficient, if so,

whether the deficient performance prejudiced the defendant. *State v. Gales*, 131 Ohio App.3d 56, 65, 721 N.E.2d 497, 503 (1999), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); *State v. Post*, 32 Ohio St.3d 380, 388, 513 N.E.2d 754, 762-763, certiorari denied (1988), 484 U.S. 1079, 108 S.Ct. 1061, 98 L.Ed.2d 1023. In order to demonstrate prejudice, the defendant must establish that because of trial counsel's errors, the result of the proceeding was unreliable. *State v. Ford*, 2000 Ohio App. LEXIS 3195 (5th Dist.2000), Stark App. No. 1999CA00177, unreported, citing *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995).

(Additional citation omitted.) *State v. King*, 8th Dist. Cuyahoga No. 76696, 2000 Ohio App. LEXIS 4175 (Sept. 14, 2000).

{¶9} We find that Ellis does not demonstrate that her attorney's performance was deficient. In her testimony, Ellis gave the court her reason for hitting Walker. This attempt at justification for Ellis's action equates to counsel's trial strategy.

A strong presumption exists that a licensed attorney is competent and that the challenged action is the product of sound trial strategy and falls within the wide range of professional assistance. *Id.* at 689. Generally, debatable trial tactics and strategies do not constitute ineffective assistance of counsel. *State v. Phillips*, 74 Ohio St.3d 72, 85, 656 N.E.2d 643 (1995); *State v. Clayton*, 62 Ohio St.2d 45, 402 N.E.2d 1189 (1980).

State v. Hines, 8th Dist. Cuyahoga No. 90125, 2008-Ohio-4236, ¶ 15.

Ellis cannot claim that her counsel was ineffective because his strategy did not work.

The trier of fact is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony. *State v. Kurtz*, 8th Dist. Cuyahoga No. 99103, 2013-Ohio-2999, ¶ 26, quoting *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 24.

State v. Pridgett, 8th Dist. Cuyahoga No. 101823, 2016-Ohio-687, ¶ 21.

The trial court listened, weighed the testimony, and made an unfavorable ruling against

Ellis. We find that Ellis has not shown where her defense counsel made an error that prejudiced her.

C. Motion for Acquittal

{¶10} Ellis contends that her trial counsel's performance was deficient because he failed to raise a Crim.R. 29 motion at the close of the city's case.

The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

Crim.R. 29(A).

{¶11} However,

"counsel's failure to make a Crim.R. 29 motion for acquittal is not ineffective assistance of counsel where such a motion would have been fruitless. *See Defiance v. Cannon*, 70 Ohio App.3d 821, 826-827, 592 N.E.2d 884 (1990); *Thomas v. United States*, 951 F.2d 902, 905 (S.D.IA.1991) (holding that a failure of defense counsel to raise a meritless claim does not constitute ineffective assistance). *See also, State v. Fields*, 102 Ohio App.3d 284, 288-289, 656 N.E.2d 1383 (1995); *State v. Turner*, 3d Dist. Allen No. 1-96-27, 1997 Ohio App. LEXIS 851 (Feb. 27, 1997). A motion for acquittal may be granted by the trial court only where, construing the evidence most strongly in favor of the state, the evidence is insufficient to sustain a conviction. *See Crim.R. 29; id. State v. McCroskey*, 9th Dist. Wayne No. 96CA0026, 1997 Ohio App. LEXIS 1276 (Apr. 2, 1997).

State v. Scott, 6th Dist. Sandusky No. S-02-026, 2003-Ohio-2797, ¶ 20.

{¶12} Ellis argues that had counsel viewed the video, defense counsel could have impeached Walker's testimony and potentially undermined the veracity of Walker's testimony. Ellis goes on to state that Walker's testimony went unchallenged leading to her

having to take the stand. However, the record reveals that the video was unable to be viewed and therefore, impeachment for those reasons were impossible. Additionally, Walker's testimony did not go unchallenged. Walker was cross-examined by defense counsel. At the close of the state's case, counsel has the option to request a Crim.R. 29 motion.

[W]hile it is customary for defense counsel to make a motion for acquittal as a matter of course to test the sufficiency of the state's evidence, the failure to follow that course of action did not mean the performance of appellant's trial counsel fell below a reasonable standard of representation.

Id. at ¶ 21. We find that defense counsel's failure to raise a Crim.R. 29 motion for acquittal would have been fruitless and did not constitute deficient performance.

D. Improper Preparation for Sentencing

{¶13} Ellis claims that her trial counsel's performance was deficient because he did not review the presentence report and made no argument on Ellis's behalf to mitigate the sentence imposed by the trial court.

Defense counsel has a duty to investigate mitigating circumstances in order to make informed tactical decisions about which information would be most helpful to a client's case. *State v. Jackson*, 10th Dist. Franklin No. 01AP-808, 2002-Ohio-3330, ¶ 84, citing *State v. Johnson*, 24 Ohio St.3d 87, 90, 494 N.E.2d 1061 (1986). However, out-of-record evidence that is merely cumulative of, or alternative to, other mitigation evidence defense counsel presented does not provide substantive grounds for a claim of ineffective assistance of counsel at mitigation. *State v. Combs*, 100 Ohio App.3d 90, at 98, 652 N.E.2d 205.

State v. Jackson, 8th Dist. Cuyahoga No. 104132, 2017-Ohio-2651, ¶ 42.

{¶14} Ellis does not demonstrate that her trial counsel's performance was deficient or that she was prejudiced by his decision not to mitigate during sentencing. In fact,

Ellis did not articulate where she was prejudiced. While reviewing her sentence, Ellis could have been sentenced to 180 days in jail and received a \$1000 fine, in addition to restitution to the victim. Instead, the trial court gave Ellis three days jail-time credit and suspended the remainder of her jail days. Ellis also was fined \$500 and no restitution was ordered. Therefore, Ellis has not demonstrated that she was denied effective assistance of counsel.

{¶15} Ellis's first assignment of error is overruled.

III. Sentencing

{¶16} In Ellis's second assignment of error, she argues that the trial court erred by considering the surveillance video evidence that she and the trial court were unable to view. She also argues that the trial court failed to make the statutory findings mandated under R.C. 2929.22 at the sentencing hearing.

{¶17} An appellate court reviews a misdemeanor sentence for an abuse of discretion. *Cleveland v. Peoples*, 8th Dist. Cuyahoga No. 100955, 2015-Ohio-674, ¶ 13.

"A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980)." *Id.* "When reviewing a sentence, an appellate court should be guided by the presumption that the trial court's findings were correct. *In the Matter Of: Michael L. Slusser*, 140 Ohio App.3d 480, 487, 748 N.E.2d 105 (3d Dist.2000)." *State v. Robles*, 7th Dist. Mahoning No. 06-MA-112, 2007-Ohio-5241, ¶ 69.

{¶18} The trial court gave no indication that it considered the Home Depot surveillance video in its sentencing decision. At sentencing, the trial court learned that the charging prosecutor and the trial prosecutor were different individuals. During sentencing, the charging prosecutor acknowledged viewing the Home Depot video, and the trial court commented that it was unable to see the video. (Tr. 11.) After reviewing the record, we find that there was nothing in the record that suggests that the trial court considered the surveillance video for purposes of sentencing.

{¶19} Ellis also contends that the trial court failed to make statutory findings at her sentencing hearing.

Failure to consider the sentencing criteria is an abuse of discretion; but when the sentence is within the statutory limit, a reviewing court will presume that the trial judge followed the standards in R.C. 2929.22, absent a showing otherwise. *State v. Wagner*, 80 Ohio App.3d at 95-96, 608 N.E.2d 852 (1992). Failing to explain the statutory reasons behind a certain sentence is only fatal if there are mitigating factors without any aggravating factors given at the sentencing hearing. *State v. Flors*, 38 Ohio App.3d 133, 140, 528 N.E.2d 950 (1987). A silent record raises the presumption that the trial court considered all of the factors listed in R.C. 2929.12. *State v. Fincher*, 76 Ohio App.3d 721, 727, 603 N.E.2d 329 (1991), citing *State v. Adams*, 37 Ohio St.3d 295, 525 N.E.2d 1361 (1988).

Id. at ¶ 70.

{¶20} We find that Ellis's sentence is within the statutory limit. At sentencing the trial court stated, "[f]ine is \$1000, 180 days. I'll suspend 177 days. I'm going to suspend \$500 of the fine. Take the COP class, anger management class, one-year active probation. I'm not ordering restitution." (Tr. 12.) After reviewing the record, we find that the trial court did not explain the statutory reasons behind its sentence but it was

not fatal. We, therefore, presume that the trial court considered all of the factors in R.C. 2929.22.

{¶21} Ellis's second assignment of error is overruled.

{¶22} Judgment is affirmed.

It is ordered that the appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cleveland Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANITA LASTER MAYS, JUDGE

EILEEN A. GALLAGHER, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR