[Cite as *State v. Reddy*, 2010-Ohio-3892.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-868 (C.P.C. No. 09CR02-954)
Lynda C. Reddy,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 19, 2010

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

John H. Pettorini, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Lynda C. Reddy, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

{¶2} Around midnight on September 25, 2007, fire damaged Gloria Copeland's car that was parked behind her house at 983 East 15th Avenue in Columbus, Ohio. Columbus Fire Department Investigator Robert Burton investigated the suspicious fire.

He concluded that the fire was intentionally set by someone introducing an open flame to ignitable fluid splashed on the front of Copeland's car.

{¶3} During his investigation, Burton began to suspect that appellant set Copeland's car on fire. Burton learned that appellant and Copeland were recently in a fight during which appellant sustained a black eye. Because appellant was unhappy with the legal resolution of the matter here, she called the "Judge Joe Brown Show" to resolve her claim against Copeland on television. Copeland agreed to go on the show, and the two went to Los Angeles to film the show. The judge found in appellant's favor but only awarded her $1 in damages. Appellant and her son flew home from Los Angeles after the show's taping. Their flight returned to Columbus at 10:37 p.m. on the night of September 25, 2007.

{¶4} Shortly before midnight on the night of September 25, Calvin Haynes was sitting in the backyard of a house directly across from Copeland's car. He saw a woman walking down the alley. He did not think much of the woman until he heard glass break and saw flames coming from a car. He then saw the woman running out of Copeland's yard and back to the alley to get to the street. Haynes later identified appellant as the woman he saw in the alley that night from a photo array.

{¶5} As a result, a Franklin County Grand Jury indicted appellant with one count of arson in violation of R.C. 2909.03. Appellant entered a not guilty plea to the charge and proceeded to a trial.

{¶6} At trial, Copeland testified about assaulting appellant and going on the "Judge Joe Brown Show" to resolve appellant's claim against her. She testified that appellant was angry after the show's judge awarded her only $1. Finally, Calvin Haynes

identified appellant as the woman he saw walking in the alley right before Copeland's car was set on fire.

{¶7} Burton testified that in his opinion, someone intentionally set Copeland's car on fire by igniting a flammable liquid that had been poured on the car. He also testified that he learned during his investigation that appellant's flight from Los Angeles landed in Columbus around 10:33 p.m.[1] Additionally, he identified a picture of a car matching the description of appellant's car leaving an airport parking lot at 11:17 p.m. on the night of September 25, 2007. Burton determined that the airport is about ten minutes away from Copeland's house. Burton also testified that when he talked to appellant about this timeline, she told him that her flight did not return to Columbus until around 1:00 a.m.

{¶8} Appellant presented two witnesses to prove an alibi defense. Her son, Brian Reddy, testified that he went to Los Angeles with his mother and that they returned to Columbus sometime between 11:30 p.m. and 12:30 a.m. They then drove to a friend's house in the Ohio State campus area and then to a bar downtown for a drink. They then went home. Brian's girlfriend also testified as an alibi witness. She testified that she spoke with Brian on the telephone for an hour sometime between 2:30 and 3:30 a.m. on the morning of September 26, 2007. She testified that Brian was at his house during that conversation and that appellant was in the house during that conversation.

{¶9} The jury found appellant guilty of one count of arson and the trial court sentenced her accordingly.

{¶10} Appellant appeals and assigns the following errors:

> ERROR NO. 1: DEFENDANT-APPELLANT'S TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE * * *.

[1] The parties stipulated that appellant's flight arrived at 10:37 p.m.

> ERROR NO. 2: * * * THE [TRIAL] COURT ERRONEOUSLY OMITTED JURY CHARGE OF "ALIBI".
>
> ERROR NO. 3: * * * THE [TRIAL] COURT ERRONEOUSLY DENIED DEFENSE'S MOTION FOR ACQUITTAL.

{¶11} For purposes of analysis, we address appellant's alleged errors in reverse order. Appellant contends in her third assignment of error that the trial court erroneously denied her Crim.R. 29 motion for acquittal. We disagree.

{¶12} A motion for judgment of acquittal, pursuant to Crim.R. 29, tests the sufficiency of the evidence. *State v. Knipp,* 4th Dist. No. 06CA641, 2006-Ohio-4704, ¶11. Accordingly, an appellate court reviews a trial court's denial of a motion for acquittal using the same standard for reviewing a sufficiency of the evidence claim. *State v. Darrington*, 10th Dist. No. 06AP-160, 2006-Ohio-5042, ¶15 (citing *State v. Barron,* 5th Dist. No. 05 CA 4, 2005-Ohio-6108, ¶38).

{¶13} The Supreme Court of Ohio delineated the role of an appellate court presented with a sufficiency of the evidence argument in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

{¶14} Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Indeed, 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, 99 S.Ct. 2781, 2789. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. A verdict will not be disturbed 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* at 273.

{¶15} In order to convict appellant of arson, the state had to prove beyond reasonable doubt that she knowingly caused or created a substantial risk of physical harm to another's property, without the other person's consent, by means of fire or explosion. R.C. 2909.03(A)(1).[2]

{¶16} Appellant argues that the state's evidence was not sufficient to find her guilty of arson because Haynes did not see her start the fire. We disagree.

{¶17} No witness testified that appellant set Copeland's car on fire. However, a conviction can be sustained based on circumstantial evidence alone. *State v. Franklin* (1991), 62 Ohio St.3d 118, 124 (citing *State v. Nicely* (1988), 39 Ohio St.3d 147, 154-155). Indeed, circumstantial evidence may be as persuasive as direct evidence, or more so. *State v. Ballew*, 76 Ohio St.3d 244, 249, 1996-Ohio-81 (citing *State v. Lott* (1990), 51 Ohio St.3d 160, 167).

[2] Because Copeland testified that her car's value exceeded $500, appellant was convicted of a fourth degree felony.

{¶18} Although Haynes did not see appellant set Copeland's car on fire, his testimony placed her at the scene of the arson at the time the car was set on fire. The state's other evidence provided a motive for appellant to damage Copeland's car: she was upset with Copeland because she assaulted her and because she only received a small monetary award in her dispute. In fact, the arson occurred just hours after appellant returned to Columbus, the same day she received her small monetary award. Considering all of this circumstantial evidence in the light most favorable to the state, reasonable minds could conclude that appellant had the opportunity and motive to set Copeland's car on fire and, therefore, was the person who set Copeland's car on fire. See *State v. Mellert*, 9th Dist. No. 08CA0068-M, 2009-Ohio-2297, ¶8 (conviction supported by sufficient circumstantial evidence that demonstrated both motive and opportunity).

{¶19} Because appellant's conviction is supported by sufficient evidence, the trial court did not err by denying her motion for acquittal. Accordingly, appellant's third assignment of error is overruled.

{¶20} Appellant contends in her second assignment of error that the trial court erred by not instructing the jury regarding her alibi defense. We disagree.

{¶21} After the state presented its case in chief, appellant attempted to present two alibi witnesses: appellant's son and his girlfriend. The state objected to those witnesses because appellant had not filed a notice of its intent to present an alibi defense. Crim.R. 12.1. Appellant's trial counsel admitted that he had not filed a notice pursuant to the criminal rules. He argued, however, that the omission was accidental, as he thought the notice had been filed. After a brief continuance, the trial court allowed appellant to

present her alibi witnesses. The trial court did not specifically instruct the jury regarding appellant's alibi defense.

{¶22} Appellant now claims the trial court should have instructed the jury about her alibi defense. However, appellant's trial counsel did not request an alibi instruction, nor did he object to the trial court's jury instructions as given. Appellant has, therefore, waived all but plain error in this regard. *Parma v. Cosic* (Mar. 30, 2000), 8th Dist. No. 76034; *State v. Mills* (Oct. 21, 1994), 11th Dist. No. 92-T-4818. Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. To constitute plain error, there must be: (1) an error, i.e., a deviation from a legal rule, (2) that is plain or obvious, and (3) that affected substantial rights, i.e., affected the outcome of the trial. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27. Even if an error satisfies these prongs, appellate courts are not required to correct the error. Appellate courts retain discretion to correct plain errors. Id*; State v. Litreal,* 170 Ohio App.3d 670, 2006-Ohio-5416, ¶12. Courts are to notice plain error under Crim .R. 52(B) " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Barnes,* quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of syllabus.

{¶23} The trial court's failure to give an alibi instruction is not plain error, as it is not clear that the failure to give the instruction affected the outcome of the trial. An alibi defense is a denial that the defendant committed the act. A jury instruction on an alibi defense is nothing more than a reminder that the defendant presented evidence of an alibi. *State v. Sims* (1981), 3 Ohio App.3d 321, 335. Thus, if a jury convicts a defendant who presented evidence of an alibi, the jury must have considered and rejected the

defendant's alibi evidence and instead, found the defendant guilty beyond a reasonable doubt. Here, the jury obviously rejected appellant's alibi defense and instead found her guilty beyond a reasonable doubt. In light of the sufficiency of the state's evidence, we cannot say that a reminder that appellant presented evidence of an alibi would have affected the outcome of appellant's trial. *State v. Shaw* (Sept. 23, 1999), 10th Dist. No. 98AP-1338 (trial court did not err by omitting alibi instruction); *Mills*; *State v. Lockett (*Dec. 24, 1986), 5th Dist. No. CA-2420.

{¶24} The trial court did not commit plain error by not instructing the jury on appellant's alibi defense. Appellant's second assignment of error is overruled.

{¶25} Lastly, appellant contends in her first assignment of error that she received ineffective assistance of trial counsel. We disagree.

{¶26} To prevail on a claim of ineffective assistance of counsel, appellant must satisfy the two-prong test enunciated in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; accord *State v. Bradley* (1989), 42 Ohio St.3d 136. Initially, appellant must show that counsel's performance was deficient. To meet that requirement, appellant must show counsel's error was so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Appellant may prove counsel's conduct was deficient by identifying acts or omissions that were not the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. *Strickland* at 690. Appellant's failure to satisfy one prong of the Strickland test negates a court's need to consider the other. Id. at 697.

{¶27} In analyzing the first prong under *Strickland,* there is a strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. Id. at 689. Appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Id., citing *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164. Tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558.

{¶28} If appellant successfully proves that counsel's assistance was deficient, the second prong under *Strickland* requires appellant to prove prejudice in order to prevail. Id. at 692. To meet that prong, appellant must show counsel's errors were so serious as to deprive her of a fair trial, "a trial whose result is reliable." Id. at 687. Appellant would meet this standard with a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

{¶29} Appellant argues that her trial counsel was ineffective based upon: (1) counsel's failure to file a motion to suppress Haynes' pre-trial identification, (2) counsel's failure to timely file a "Notice of Alibi" or to request a jury instruction for her alibi defense, (3) counsel's decision to call appellant's son, and not appellant, as her alibi witness, and (4) counsel's unprofessional conduct in front of prospective jurors.

{¶30} The failure to file or pursue a motion to suppress does not automatically constitute ineffective assistance of counsel. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448. Failure to file a motion to suppress can only constitute ineffective

assistance of counsel where the record demonstrates that the motion would have been granted. *State v. Lee,* 10th Dist. No. 06AP-226, 2007-Ohio-1594, ¶12 (citing *State v. Robinson* (1996), 108 Ohio App.3d 428).

{¶31} Before out-of-court identification testimony may be suppressed, the trial court must first find that the procedure employed was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification. *State v. Barnett* (1990), 67 Ohio App.3d 760, 767. The defendant has the initial burden to show that the identification procedure was unduly suggestive. *State v. Harris*, 2d Dist. No. 19796, 2004-Ohio-3570, ¶19. If the defendant meets that burden, the court must then consider whether the identification, viewed under the totality of the circumstances, is reliable despite its suggestive character. Id. (citing *State v. Wills* (1997), 120 Ohio App.3d 320, 324). If the pretrial confrontation procedure was not unduly suggestive, any remaining questions as to reliability go to the weight of the identification, not its admissibility, and no further inquiry into the reliability of the identification is required. *Wills* at 325; *State v. Beddow* (Mar. 20, 1998), 2d Dist. No. 16197.

{¶32} Whether an identification was suggestive depends on factors such as the size of the array, the manner in which the array is presented, and the contents of the array. *State v. Merriman*, 10th Dist. No. 04AP-463, 2005-Ohio-3376, ¶17 (citing *Reese v. Fulcomer* (C.A.3, 1991), 946 F.2d 247, 260). A photo array is suggestive if the " 'picture of the accused, matching the descriptions given by the witness, so stood out from all of the other photographs as to "suggest to an identifying witness that [that person] was more likely to be the culprit." ' " Id. (citing *Jarrett v. Headly* (C.A.2, 1986), 802 F.2d 34, 41).

{¶33} Appellant contends that the photo array used for Haynes' identification was unduly suggestive because her picture was the only picture in the array that was not a typical "mug-shot." Her picture was from the Department of Bureau of Motor Vehicles. However, the photo array itself does not indicate the source of the pictures. More significantly, the photo array itself was not suggestive. The photo array given to Haynes contained six computer-generated black and white photographs of African-American women from their neck up, who generally have similar features, including short, black hair. The pictures in the array are similar in nature. We find nothing suggestive about the photo array, as appellant's photograph does not stand out from the rest so as to suggest that she was the suspect. See *State v. Murphy*, 91 Ohio St.3d 516, 534, 2001-Ohio-112 (photo array not suggestive where five other photos in array were all reasonably close in appearance). Absent suggestiveness, a motion to suppress would not have been granted.

{¶34} Because the record does not demonstrate that a motion to suppress would have been granted, trial counsel was not ineffective for failing to file such a motion. *Lee* at ¶14.

{¶35} Next, appellant contends her trial counsel was ineffective for not filing a notice of alibi pursuant to Crim.R. 12.1.[3] The failure of a defendant to file such a notice could lead to the exclusion of any evidence offered by the defendant to prove an alibi. However, notwithstanding trial counsel's failure to file a notice of alibi, the trial court allowed appellant to present two alibi witnesses. Thus, because appellant was allowed to

[3] To the extent appellant also claims that trial counsel's attempt to present an alibi defense was an "eleventh hour and fifty-ninth minute" decision, we note that appellant's trial counsel subpoenaed the two alibi witnesses to testify at trial more than two weeks before trial.

present evidence of an alibi, she was not prejudiced by trial counsel's failure to file a notice of alibi. *State v. Moman*, 7th Dist. No. 02 CO 52, 2004-Ohio-1387, ¶53-54.

{¶36} Similarly, appellant claims that trial counsel was ineffective for not requesting a jury instruction on her alibi defense. As already discussed, appellant cannot demonstrate that the outcome of the trial would have been different had the trial court given such an instruction. Thus, appellant cannot demonstrate trial counsel's failure to request an alibi instruction prejudiced her. As a result, she cannot demonstrate ineffective assistance of counsel in this regard. Id. at ¶55-58; *State v. McWhorter*, 8th Dist. No. 87443, 2006-Ohio-5438, ¶28-29.

{¶37} Appellant also claims that counsel was ineffective for refusing to allow her to testify and instead, for relying on her son as an alibi witness. In general, " 'counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court.' " *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, ¶125 (quoting *State v. Treesh* (2001), 90 Ohio St.3d 460, 490). More specifically, " '[i]t is difficult to imagine a better example of trial strategy than a decision of whether a defendant should testify on his own behalf.' " *State v. Hoop*, 12th Dist. No. CA2004-02-003, 2005-Ohio-1407, ¶20 (quoting *State v. Mabry* (Oct. 9, 1996), 9th Dist. No. 2514-M).

{¶38} Appellant claims that trial counsel's decision to rely on her son's testimony to substantiate her alibi was ineffective because counsel had not talked to her son and did not know the extent of her son's criminal record, for which the state impeached him at trial. However, there is no evidence in the record to prove either of these two allegations. Absent such evidence, appellant cannot prove that her trial counsel acted deficiently in

this regard. *State v. Rodriguez*, 12th Dist. No. CA2001-04-077, 2002-Ohio-3978, ¶25. Moreover, we note that one of the first questions trial counsel asked appellant's son was "Brian, you have a felony conviction, do you not?" (Tr. Vol 2, 128.) Therefore, it appears that trial counsel had some knowledge of appellant's son's criminal record.

{¶39} Appellant also claims that her trial counsel refused to allow her to testify on her own behalf. However, there is no evidence in the record indicating that appellant sought to testify or, if she did, why she did not testify. See *State v. Brock*, 6th Dist. No. L-08-1304, 2009-Ohio-4590, ¶14 (no evidence in record to support claim that defendant sought to testify on own behalf). Absent such evidence, we cannot say appellant's trial counsel refused to allow appellant to testify. Therefore, trial counsel cannot be ineffective in this regard.

{¶40} Lastly, appellant alleges that trial counsel was ineffective for arguing with her in front of prospective jurors. This allegation is based on an argument that occurred off the record and is, therefore, not proper in a direct appeal.[4] Instead, this claim may be raised in a petition for postconviction relief. *State v. Medina*, 10th Dist. No. 05AP-664, 2006-Ohio-1648, ¶26; *State v. Smith* (June 20, 1996), 10th Dist. No. 96APA02-249.

{¶41} Appellant has not demonstrated ineffective assistance of counsel. Accordingly, her first assignment of error is overruled.

[4] While the potential jurors who overheard the argument brought it to the trial court's attention, they did not provide the surrounding circumstances of the argument, nor did they repeat what was said during the argument.

{¶42} In conclusion, appellant's three assignments of error are overruled. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and FRENCH, JJ., concur.