[Cite as *State v. Hill*, 2010-Ohio-500.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23468
v.	:	T.C. NO. 09 CRB 46
TONISSIA D. HILL	:	(Criminal appeal from County Court Area #1)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 12th day of February, 2010.

. . . . . .

RAYMOND J. DUNDES, Atty. Reg. No. 0041515, Area One Prosecutor, 195 S. Clayton Road, New Lebanon, Ohio 45345
Attorney for Plaintiff-Appellee

BROCK A. SCHOENLEIN, Atty. Reg. No. 0084707, 15 West Fourth Street, Suite 100, Dayton, Ohio 45402
Attorney for Defendant-Appellant

TONISSIA HILL, 2626 N. Gettysburg Avenue, Dayton, Ohio 45406
Defendant-Appellant

. . . . . .

DONOVAN, P.J.

{¶ 1} Defendant-appellant Tonissia D. Hill appeals from conviction and sentence for one count of assault, in violation of R.C. § 2903.13(B), a misdemeanor of the first

degree. Hill filed a timely notice of appeal with this Court on May 12, 2009.

I

{¶ 2} On January 12, 2009, Hill was charged by criminal complaint with one count of assault and one count of violation of a protection order, in violation of R.C. § 2919.27, both misdemeanors of the first degree. At her arraignment, Hill entered pleas of not guilty to both counts.

{¶ 3} A bench trial was held on March 31, 2009, after which the court took the matter under advisement. On April 7, 2009, the trial court issued a written decision in which it dismissed the complaint for violation of a protection order. With respect to the charge of assault, however, the court found Hill guilty, and sentenced her to ninety days in jail which was suspended. The trial court also sentenced Hill to serve a two-year term of community control and ordered her to pay court costs. On May 18, 2009, the trial court stayed the execution of Hill sentence pending the outcome of her appeal.

II

{¶ 4} The incident which gives rise to the instant appeal occurred on January 11, 2009, when police responded to a call at a bar named "Leo's II," located at 4155 Salem Avenue in Dayton, Ohio. Upon arriving at the parking lot in front of the bar, Officer Michelle L. Fournier was approached by Ashley Armstrong who stated that she had been attacked by Hill and an unknown female while she was dancing inside the bar. Armstrong stated that she was at the bar to celebrate her mother's upcoming birthday. Armstrong informed Officer Fournier that she was dancing by herself inside the bar when Hill, accompanied by the unidentified female, attacked her without any provocation, threw her to

the ground, and kicked her while she was down. Bouncers at the bar subsequently broke up the fight and took the women outside the bar. Armstrong stated that she called the police when she got outside, but Hill and her friend fled the scene before Officer Fournier arrived. Officer Fournier also questioned Armstrong's mother, Lynn Cantrell, as well as Nolan Beans and Anthony Jefferson, all of whom had witnessed the attack inside the bar.

{¶ 5} Hill was subsequently charged with one count of assault and one count of violation of a protection order. At the bench trial, the State presented the testimony of Armstrong, Cantrell, and Beans. Hill, who presented an alibi defense, testified on her own behalf that she was not the individual who attacked Armstrong because she was at home with her father, Tony Hill, on the night the attack allegedly occurred. Tony Hill also testified that his daughter was at home on the night that the attack occurred. Hill was found guilty of one count of assault, and was sentenced accordingly.

{¶ 6} It is from this judgment that Hill now appeals.

III

{¶ 7} On October 15, 2009, appellate counsel for Hill filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, stating that he can find no meritorious issues for appellate review. On October 21, 2009, we informed Hill that her attorney had filed an *Anders* brief and of the significance of an *Anders* brief, and we invited Hill to file pro se assignments of error within sixty days. We have not received any response from Hill.

IV

{¶ 8} As potential issues, Hill's counsel advances the following three assignments

of errors as follows:

{¶ 9} "THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER THE WITNESS' RESPECTIVE LEVELS OF INTOXICATION WHEN ARRIVING AT A DECISION."

{¶ 10} "THE TRIAL COURT ERRED WHEN IT ALLOWED THE ADMISSION OF IRRELEVANT TESTIMONY WHICH WAS DAMAGING TO DEFENDANT'S ALIBI WITNESS."

{¶ 11} "THE APPELLANT WAS PREJUDICED BY THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN COUNSEL FAILED TO SUBPOENA ANY NON-BIASED EYE-WITNESSES TO THE ALLEGED ASSAULT."

{¶ 12} Having thoroughly reviewed the record in the instant matter, we agree with the initial assessment of appellate counsel that his three suggested assignments of error have no arguable merit.

{¶ 13} Armstrong testified that she had only had one drink at the time that the she was assaulted by Hill. Cantrell testified that she had not ingested any alcohol when the assault occurred, and neither the State nor defense counsel asked Beans how much, if any, he had to drink on the night in question. Nevertheless, Armstrong, Cantrell, and Beans all positively identified Hill as the individual who perpetrated the attack on Armstrong at the bar. Clearly, the court had before it evidence regarding the State's witnesses' varying levels of alcohol consumption and still chose to believe their version of events. No evidence was introduced which demonstrated that any of the witnesses were intoxicated. "The decision whether, and to what extent, to credit the testimony of particular witnesses is within

the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Youngblood*, Clark App. No. 07-CA-118, 2009-Ohio-118, quoting *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 14} Moreover, the trial court did not abuse its discretion when it allowed the State to ask Tony Hill questions regarding the whereabouts of his son on the day the assault occurred. The admission or exclusion of evidence rests soundly within the trial court's discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, ¶ 2 of the syllabus. The trial court's decision concerning the admission or exclusion of evidence will not be reversed absent an abuse of that discretion. *Id*. at 182. An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio St. Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶ 15} Tony Hill testified that he was at home with his daughter, Hill, on the day the assault occurred. The State's questions in regards to the whereabouts of Tony's son were simply an attempt to determine the reliability of Tony's recollection of the day in question, and the trial court did not abuse its discretion in allowing the line of questioning.

{¶ 16} Lastly, Hill did not receive ineffective assistance of counsel when her trial counsel failed to subpoena any non-biased eye-witnesses to the assault. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable

representation and, in addition, the defendant was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To prove prejudice the defendant must demonstrate that were it not for counsel's errors, the result of the trial would have been different. *Id*.; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶ 17} In the instant case, Hill's trial counsel's performance was not deficient. Hill presented an alibi defense at trial. In particular, Hill presented evidence that she was with her father on the night the assault occurred. Appellate counsel argues that Hill's alibi defense would have been aided by testimony from the security staff at the bar that broke up the assault. It is suggested that the security staff would not implicate Hill.

{¶ 18} "Normally, an attorney's failure to subpoena witnesses [is] within the realm of trial tactics and, absent a showing of prejudice, [is] not deemed a denial of effective assistance of counsel, *State v. Hunt* (1984), 20 Ohio App.3d 310, and especially in the absence of any showing that the testimony of such a suggested witness would have assisted the defense. *State v. Reese* (1982), 8 Ohio App.3d 202." *State v. Maxwell* (October 7, 1993), Montgomery App. No. 13966. Without any evidence regarding what testimony the potential witnesses might offer, appellate counsel has failed to demonstrate that the actual outcome of the trial would have been different. Other than pure conjecture, Hill has failed to establish that his counsel's performance was deficient in any way.

{¶ 19} Pursuant to our responsibilities under *Anders*, we have independently examined the entire record and we conclude, as did appellate counsel, that there

are no arguably meritorious issues for review.

{¶ 20} Accordingly, the judgment of conviction and sentence will be affirmed.

. . . . . .

FAIN, J. and GRADY, J., concur.

Copies mailed to:

Raymond J. Dundes
Brock A. Schoenlein
Tonissia Hill
Hon. Adele M. Riley