

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

STATE OF OHIO, : Case No. 16CA11
Plaintiff-Appellee, :
v. : DECISION AND
SARA R. GILLIAN, : JUDGMENT ENTRY
Defendant-Appellant. : RELEASED 12/3/2018

APPEARANCES:

Brian A. Smith, Brian A. Smith Law Firm, LLC, Akron, Ohio, for appellant.
Adam R. Salisbury, Gallipolis City Solicitor, Gallipolis, Ohio, for appellee.

Hoover, P.J.

{¶1} Following her jury trial Sara R. Gillian appeals her convictions for operating a motor vehicle while under the influence of alcohol (“OVI”) and failure to control. On appeal, Gillian contends that her trial counsel provided ineffective assistance of counsel; that the trial court erred when it denied her motion to separate witnesses during the opening statements; and that her convictions for OVI and failure to control are against the manifest weight of the evidence. After a careful review of the record, we conclude that all of Gillian’s assignments of error are without merit. Accordingly, we affirm the judgment of the trial court.

I. Facts and Procedural History

{¶2} A state trooper filed a complaint in the Gallipolis Municipal Court charging Gillian with OVI in violation of R.C. 4511.19(A)(1)(a) and failure to control in violation of R.C.

4511.202. The trial court appointed counsel for her; and she entered a plea of not guilty to the charges.

{¶3} The case proceeded to a jury trial. The following facts are adduced from the trial.

{¶4} At around 6:30 a.m. on July 27, 2014, Trooper Michael Jordan of the Ohio State Highway Patrol was dispatched to U.S. 35 on a call of a woman walking down the roadway and frantically flagging down traffic. Trooper Jordan responded to the area and once there he encountered Gillian walking down U.S. 35 near milepost 8 in Gallia County. Soon thereafter Trooper Jordan determined that Gillian was highly intoxicated and was unable to care for herself. Trooper Jordan noted at trial that Gillian was “staggering down the roadway”, had red bloodshot eyes, slurred speech, and had a hard time standing. He also observed that Gillian had a strong odor of alcohol coming from her breath. When Trooper Jordan asked Gillian how she had got there and where she was going, Gillian was unable to give a “coherent story”. When Trooper Jordan asked Gillian how much she had to drink she responded “a case of beer”. Trooper Jordan administered a portable breath test, which read .18, and confirmed his suspicion that Gillian was intoxicated. Trooper Jordan then arrested Gillian for disorderly by intoxication¹ and transported her to the Gallia County Jail. Trooper Jordan also testified that Gillian had a set of keys on her person at the time she was arrested, and that Gillian told him that the keys belonged to her.

{¶5} Later on that same day, July 27, 2014, at approximately 9:30 a.m., Trooper Chad Clingenpeel of the Ohio State Highway Patrol was dispatched to investigate a single vehicle traffic crash on State Route 850 near the town of Bidwell, Ohio. When he arrived to the scene there were no occupants in the vehicle. Trooper Clingenpeel determined that the vehicle had been traveling northbound on 850, and when it crested a hill, it lost control and went off the left side of the road. Trooper Clingenpeel noted “[it] actually um, tire marks had gone off the

¹ Gillian later pleaded guilty to this charge in a separate case.

pavement on the right side slightly into the gravel and then veer off to the left going off the left side of the road. Um, traveled a ways until it struck some small trees.” He estimated that the vehicle came to rest about 50-70 feet from the roadway. Trooper Clingenpeel believed the cause of the crash to be unsafe speed for the conditions. Trooper Clingenpeel also noted that there was a lot of clutter inside the vehicle, including two car seats and clothes in the back, and trash and clothes on the floorboard and cushion of the front passenger seat. He opined that based on his observations there could have been only one occupant, the driver, in the vehicle at the time of the crash. Trooper Clingenpeel further noted that he could smell the odor of alcoholic beverage coming from the inside of the vehicle; but he did not locate any alcoholic beverages when he searched it. Trooper Clingenpeel ran the license plate of the vehicle through the computer LEADS system and was able to determine that Gillian was the owner of the vehicle. Trooper Clingenpeel testified that the crash most likely occurred in the early morning hours of July 27th, but he could not provide an exact time of the accident. Trooper Clingenpeel also testified that at the time of his initial investigation he did not know that Gillian had been arrested that morning, and did not learn about her arrest until the following day.

{¶6} On July 28, 2014, Gillian arrived at the Highway Patrol Post in Gallipolis to retrieve her vehicle. Trooper Delmar Hurd was at the post and took a written statement from Gillian regarding the traffic crash. Trooper Hurd testified that he read the *Miranda* warnings to Gillian prior to taking her statement. In her statement Gillian remarked that she did not remember anything about the crash, that she was at home watching television, and that she did not remember leaving her home the night/morning of the crash. However, Gillian also remarked that she drank “about 2 cases of beer” that night/morning, and in response to the question of whether she thought she was “driving drunk” when the crash occurred, Gillian remarked “I don’t

know why I can't remember, it appears that I was impaired during the crash." After taking her statement, and speaking to the other troopers involved, Trooper Hurd issued a citation to Gillian for OVI and failure to control.

{¶7} Gillian testified in her own defense at trial. Gillian testified that she lives about 90 miles north of the scene of the incident. She testified that her boyfriend and his friend planned a fishing trip to Gallipolis. Her boyfriend traveled to Gallipolis on Friday, July 25, 2014; but she stayed behind to watch her two children. She testified that she tried contacting several friends on Saturday to give her a ride to Gallipolis. Her plan was to have a friend drive her vehicle to meet her boyfriend and then to have the friend drive the vehicle back to her home; and she would then ride back with her boyfriend on Monday. She testified that close to midnight on Saturday evening, she finally found someone to give her a ride. She testified, however, that by the time she found someone to give her a ride she had drunk about eight beers and was drunk. Gillian claimed that she could not remember the friend who came to give her a ride. According to her testimony, the last thing she remembers was that someone came to pick her up late Saturday evening; and after that, the next thing she remembers was being stopped by Trooper Jordan on the side of the roadway on Sunday morning. However, she did testify that she knew she did not drive her vehicle Saturday night or Sunday morning. Gillian was released from the jail on Sunday evening; and her boyfriend drove her home. Later on Sunday, she spoke on the telephone with a trooper about retrieving her vehicle; and according to Gillian, the trooper told her that she would have to come to the patrol post and complete a statement before her vehicle would be released. She testified that she travelled to the patrol post the next day, Monday evening, and completed her statement. She denied ever being read her *Miranda* rights. She also denied that there was any damage to her vehicle from the crash, and she implied that the vehicle had been

parked off the side of the road as opposed to having been involved in a crash. She testified that a few months before the incident her boyfriend had hit a deer with the vehicle, and that the vehicle sustained minor damage to the hood and fender that had never been repaired.

{¶8} Ultimately, the jury found Gillian guilty of OVI in violation of R.C. 4511.19(A)(1)(a) and failure to control in violation of R.C. 4511.202. The trial court sentenced Gillian to three days in jail and community control, and imposed a fine, court costs, and license suspension for the OVI charge. Gillian timely appealed her OVI sentence but this Court determined that there was not a final appealable order because the trial court failed to sentence Gillian on the failure to control charge. Therefore, we dismissed the appeal and remanded the matter back to the trial court to enter a final judgment disposing of both charges. *See State v. Gillian*, 4th Dist. Gallia No. 15CA3, 2016-Ohio-3232.

{¶9} On remand, the trial court sentenced Gillian on the failure to control conviction; and the sentencing entry was journalized on July 5, 2016. Gillian again appealed, but her counsel moved for leave to withdraw under *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). In accordance with this Court's decision in *State v. Wilson*, 2017-Ohio-5772, 83 N.E.3d 942 (4th Dist.), we appointed new counsel to file a merit brief on Gillian's behalf. *See State v. Gillian*, 4th Dist. Gallia No. 16CA11, 2017-Ohio-7386. That merit brief is now before the Court.

II. Assignments of Error

{¶10} Gillian assigns the following errors for our review:

First Assignment of Error:

The failure of Appellant's trial counsel to obtain pictures of the accident scene constituted ineffective assistance of counsel under Article I, Section 10 of the Ohio Constitution and the Sixth Amendment to the United States Constitution.

Second Assignment of Error:

The trial court's denial of Appellant's motion for separation of witnesses during Appellant's counsel's opening statement was an abuse of discretion.

Third Assignment of Error:

Appellant's convictions were against the manifest weight of the evidence in violation of Article IV, Section 3 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

III. Law and Analysis

A. Assistance of Counsel

{¶11} In her first assignment of error, Gillian contends that her trial counsel performed deficiently by failing to acquire photographs of the traffic accident and vehicle, and argues that the prejudicial effect of the error deprived her of her right to the effective assistance of counsel.

{¶12} To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish (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 result of the proceeding would have been different. *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Failure to satisfy either part of the test is fatal to the claim. *Strickland* at 697; *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989). "Because this issue cannot be presented at trial, we conduct the initial review." *State v. Plymale*, 4th Dist. Gallia No. 15CA1, 2016-Ohio-3340, ¶ 34.

{¶13} The defendant has the burden of proof because in Ohio, a properly licensed attorney is presumed competent. *State v. Gondor*, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶ 62. In reviewing the claim of ineffective assistance of counsel, we must indulge in “a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” (Quotations omitted.) *Strickland* at 689. Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel’s errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment. *Gondor* at ¶ 61.

{¶14} Here, it is clear from reviewing the record that the State Highway Patrol, during its investigation, took photographs of the scene of the traffic accident and of the vehicle. It is also clear that the State never provided those photographs to Gillian during pre-trial discovery. The parties were aware that the photographs existed, even weeks before trial, and on the day before trial was set to begin the parties had an in-chambers discussion with the trial court regarding the existence of the photographs and the State’s failure to turn them over during discovery. The trial court ultimately ruled that neither party would be permitted to discuss the photographs at trial. The trial court noted that Gillian’s counsel waived any argument regarding discovery violations, because at a pre-trial hearing held a week prior, he told the court that no outstanding discovery disputes existed. Now, on appeal, Gillian argues that her counsel’s failure to procure the photographs amounts to ineffective assistance of counsel.

{¶15} Arguably, trial counsel’s failure to acquire the photographs could be considered trial strategy. For instance, on several occasions during cross-examination of Trooper Clingenpeel, defense counsel insinuated that the investigation was not thorough by asking

whether there was “any evidence for this jury to substantiate” his testimony regarding the tire marks, or whether he had “any evidence to show the jury” regarding the purported damage to the vehicle. Defense counsel also noted while forming the predicate to a question in his cross-examination of Trooper Clingenpeel that “[w]e don’t see any black [tire] marks” And during his examination of Gillian, defense counsel explicitly asks whether the State Highway Patrol ever mentioned “other evidence of damage” to the vehicle. Finally, during his closing argument, defense counsel again noted the State’s lack of visual evidence, stating as follows:

Now most people when they have a car crash, especially I’d liked, I would have liked for you to see the scene really, we’d know exactly what happened. Listen carefully, the defendant says there’s no damage to the car. Proof, proof. If a car had been totaled wouldn’t you have wanted to see it? Yet the defendant says the car that car wasn’t totaled. Who has the burden of proof? Who has that burden? The State.

{¶16} When reviewing the record, it is obvious that defense counsel formulated a strategy to chip away at the State’s case by remarking on the lack of visual evidence and thoroughness of the investigation. He was able to do so because the State could not produce photographs of the traffic accident scene or of the vehicle. Thus, one could argue that counsel’s performance was not deficient. *See State v. Madden*, 4th Dist. Adams No. 09CA883, 2010-Ohio-176, ¶ 25 (noting that debatable trial tactics do not establish ineffective assistance of counsel).

{¶17} Nevertheless, even if a deficiency occurred, we conclude that Gillian cannot prove that she was prejudiced by counsel’s performance. Gillian argues that had her counsel obtained the photographs, “he *may* have been able to utilize them in order to corroborate [her] testimony and show that there was room for two people inside [her] vehicle.” (Emphasis added.)

She also argues that “[t]he pictures *may* also have shown the location of the crash and in which direction the vehicle was travelling, which could have further given support to [her] testimony that she was travelling to Gallipolis to see her boyfriend.” (Emphasis added.)

{¶18} However, Gillian’s trial counsel noted at trial, during a side bar conference, that he had never seen the photographs. Furthermore, there is no indication in the record that suggests the photographs support Gillian’s version of events, or are in any way exculpatory. Gillian never attempted to introduce her own photographs of the vehicle. Gillian never introduced another witness to corroborate her story.

{¶19} In short, Gillian’s prejudice contention is premised entirely on speculation, i.e., on what the photographs *may* depict. It is well established that an ineffective assistance claim premised merely on speculation is insufficient. *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 119 (mere speculation cannot support either the deficient-performance or prejudice requirements of an ineffective assistance claim); *State v. Williams*, 4th Dist. Jackson No. 15CA3, 2016-Ohio-733, ¶ 37 (defendant cannot base claim of ineffective assistance of counsel on speculation that evidence outside the record would establish prejudice); *accord State v. Blanton*, 4th Dist. Adams No. 16CA1031, 2018-Ohio-1275, ¶ 73. Accordingly, Gillian’s ineffective assistance claim is without merit and her first assignment of error is overruled.

B. Separation of Witnesses

{¶20} In her second assignment of error, Gillian challenges the trial court’s decision to allow the State’s witnesses to remain in the courtroom during opening statements.

{¶21} Prior to the State’s opening statement, Gillian’s trial counsel moved for separation of witnesses, including during the opening statement. Trial counsel explained his reasoning as “he [the prosecutor] is going to be making an opening statement what evidence he’s going to

present and etcetera of what they'll prove. They, the officers are going to be testifying, this is part of the trial. They, I'm asking that they be not in the courtroom." Gillian's trial counsel further argued that by allowing the troopers to remain in the courtroom during opening statements they would be able to hear exactly what was expected to be the content of their testimony; and it eliminated any possibility of inconsistency between them. The trial court refused to order separation of witnesses during opening statements; but it did order the witnesses to be separated during the testimony phase of trial. In ruling on the motion, the trial court noted, *inter alia*, that opening statements are "not testimony".

{¶22} Gillian cites Evid.R. 615, which states in part:

* * * [A]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses * * *. An order directing the "exclusion" or "separation" of witnesses or the like, in general terms without specification of other or additional limitations, is effective only to require the exclusion of witnesses from the hearing during the testimony of other witnesses.

{¶23} "To the extent [Gillian] relies on Evid.R. 615 to establish error on the trial court's part, the reliance is misplaced. The plain language of the rule requires exclusion only so that the witnesses cannot hear *testimony* of other witnesses." (Emphasis sic.) *State v. Barney*, 4th Dist. Meigs No. 97CA12, 1999 WL 378755, *7 (June 7, 1999); *State v. Rogers*, 4th Dist. Scioto Nos. 98CA2620, 98CA2625, 2000 WL 1728076, *7 (Nov. 15, 2000). "The court's refusal to enforce a separation of witnesses beyond that was within its sound discretion." *Barney* at *7; *Rogers* at *7; *Oakwood v. Makar*, 11 Ohio App.3d 46, 48, 463 N.E.2d 61 (8th Dist.1983).

{¶24} Here, the witnesses were separated during the testimony phase of trial.

Furthermore, we see no abuse of discretion in allowing the witnesses to remain in the courtroom

for opening statement. If the State's witnesses later tailored their testimony to conform to the arguments raised in opening statement, as Gillian alleges, the defense had the opportunity to cross-examine these witnesses and test whether their testimony was truthful and within their personal knowledge. *Accord Barney* at *7 (addressing precisely the same issue). Accordingly, Gillian's second assignment of error is overruled.

C. Manifest Weight of the Evidence

{¶25} In her third assignment of error, Gillian contends that her convictions were against the manifest weight of the evidence because the State offered no direct evidence that she was operating the vehicle at the time of the accident, because the State could not verify the exact time of accident, because she testified that she did not drive the vehicle, and because the witness statement she gave to the police should be given "reduced evidentiary weight" given the circumstances.

{¶26} In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 119. If the State presented substantial credible evidence upon which the trier of fact reasonably could conclude, beyond a reasonable doubt, that the essential elements of the offense had been established, the judgment of conviction is not against the manifest weight of the evidence. *State v. Adams*, 2016-Ohio-7772, 84 N.E.3d 155, ¶ 22 (4th Dist.), citing *State v. Eley*, 56 Ohio St.2d

169, 383 N.E.2d 132 (1978), syllabus, (superseded by state constitutional amendment on other grounds in *State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668 (1997)).

{¶27} Moreover, when reviewing the evidence under this standard, we are aware that the weight and credibility of the evidence are to be determined by the trier of fact; we thus defer to the trier of fact on these issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility. *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23. Thus the trier of fact is free to believe all, part, or none of any witness's testimony. *Id.*

{¶28} Ultimately, a reviewing court should find a trial court's decision is against the manifest weight of the evidence only in the exceptional case where the evidence weighs heavily against the decision. *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 330.

{¶29} The jury convicted Gillian of one count of OVI in violation of R.C. 4511.19(A)(1)(a), which provides that "[n]o person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation * * * [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them." "Operate" means "to cause or have caused movement of a vehicle, streetcar, or trackless trolley." R.C. 4511.01(HHH).

{¶30} The jury also convicted Gillian of one count of failure to control in violation of R.C. 4511.202, which provides that "[n]o person shall operate a motor vehicle * * * on any street, highway, or property open to the public for vehicular traffic without being in reasonable control of the vehicle * * *."

{¶31} In the case sub judice, the State presented ample evidence that Gillian was the operator of the vehicle and that she was impaired at the time of the accident. For instance, the

evidence showed that Gillian was found, highly intoxicated, and near in proximity to where her vehicle was found wrecked and abandoned. Gillian admitted to Trooper Jordan that she had drunk beer, she admitted in her witness statement that she drank beer, and she testified at trial that she drank beer to the point that she could not remember many details from the night/morning of the incident. When she was found walking along the highway she had her keys on her person. Trooper Clingenpeel testified that based on his observations of the vehicle, only one person could have been traveling in the vehicle at the time of the accident; and that the vehicle smelled of alcohol. Gillian was also found intoxicated near in time to when the accident was discovered. The vehicle was registered in her name, and while Gillian alleges that she received a ride from a friend, she could not recall her friends' name. In short, the evidence gives rise to a permissible inference that Gillian was impaired and driving her car when she lost control and veered off the side of the roadway. And while Gillian attempted to provide an alternate version of events, the jury, as the fact finders, chose to credit the testimony of the State's witnesses over her testimony.

{¶32} With regards to the issue of weight to be given Gillian's witness statement, we note that the jury was well aware of the circumstances under which the statement was given. Gillian's trial counsel exhaustively cross-examined the officers on the issue, and Gillian herself testified about the subject. Thus, the jury had plenty of evidence before it when determining how much weight and credibility to give the statement. As a reviewing court, we must defer to the jury's determination unless it is patently clear that the fact finder lost its way.

{¶33} Although most of the evidence in this case is circumstantial, this evidence, if believed, could lead a reasonable juror to conclude that Gillian operated her vehicle while under the influence of alcohol and failed to reasonably control her vehicle. Moreover, it is well established that “ ‘a defendant may be convicted solely on the basis of circumstantial evidence.’

” *State v. Wickersham*, 4th Dist. Meigs No. 13CA10, 2015-Ohio-2756, ¶ 39, quoting *State v. Nicely*, 39 Ohio St.3d 147, 151, 529 N.E.2d 1236 (1988). “Circumstantial evidence and direct evidence inherently possess the same probative value * * *.” *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph one of the syllabus (superseded by statute and constitutional amendment on other grounds). “Circumstantial evidence is defined as ‘[t]estimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved. * * *’” *Nicely* at 150, quoting Black’s Law Dictionary (5th Ed.1979) 221.

{¶34} In sum, based on the evidence before us, we cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered. The jury was in the best position to hear the testimony, observe the witnesses, and determine their reliability. Accordingly, we hold that the jury’s finding that Gillian was guilty of OVI and failure to control was not against the manifest weight of the evidence. Gillian’s third assignment of error is overruled.

IV. Conclusion

{¶35} Having overruled all of Gillian’s assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the costs.

The Court finds that reasonable grounds existed for this appeal.

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

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J. and Abele, J.: Concur in Judgment and Opinion.

For the Court

By: _____
Marie Hoover, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.