[Cite as *State v. Fogle*, 2010-Ohio-2805.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

BRET FOGLE

Defendant-Appellant

JUDGES:
Hon. Julie A. Edwards, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 09 CA 114

O P I N I O N

CHARACTER OF PROCEEDING: Criminal Appeal from the Municipal Court, Case No. 08 CRB 1501

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 17, 2010

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellant Bret Fogle appeals his conviction and sentence entered on August 17, 2009, in the Licking County Municipal Court on one count of Domestic Violence following a trial by jury.

{¶2} Appellee is State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} On June 10, 2008, Appellant Bret Fogle and his wife Lisa Darby were involved in an altercation following an evening consuming alcohol with other family members at the home of Fogle's cousin. (T. at 32-33). At some point during the evening, Darby left to walk a dog and tripped over the dog and fell. Id. After the fall, she returned to the cousin's house briefly and then proceeded to go home. (T. at 29). When Appellant returned home later, Darby informed him that she was leaving him and that she had found someone else. (T. at 34-35). Darby then asked Appellant to roll some cigarettes for her. Id. According to Darby, Appellant began screaming at her. (T. at 35). Darby pointed a finger at Appellant and told him to stop talking to her that way. Id. Appellant responded by biting her finger. (T. at 36).

{¶4} On June 13, 2008, Darby went to the police and filed a complaint. (T. at 44). She also sought medical attention for her injuries on that day. Id. According to Darby, she suffered a puncture wound to her fingers due to the bite she received from Appellant, along with injuries to her ribs, knee, breast and buttocks. (T. at 42).

{¶5} Based on the above, Appellant was charged with one count of domestic violence, a first degree misdemeanor.

{¶6} On June 27, 2008, Appellant appeared before the trial court and entered a plea of Not Guilty to one count of Domestic Violence as contained in the complaint filed against him.

{¶7} On October 13, 2008, a jury trial was held on the charge. At the conclusion of the trial, the jury returned a verdict of guilty.

{¶8} The trial court sentenced Appellant, imposing a $250.00 fine and 180 days in jail, with credit for time served.

{¶9} Appellant now appeals, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶10} "I. THE RECORD BELOW FAILS TO DEMONSTRATE THAT THE JURY WAS PROPERLY IMPANELED AND PRESENT IN THE COURT ROOM PRIOR TO THE ANNOUNCEMENT OF THE PURPORTED VERDICT.

{¶11} "II. THE DEFENDANT-APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

{¶12} "III. THE CONVICTION OF THE DEFENDANT-APPELLANT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED BELOW."

I.

{¶13} In his first assignment of error, Appellant assigns as error the failure of the jury verdict to be returned to the judge in open court, arguing that, as a result, his conviction is improper. We disagree.

{¶14} Crim.R. 31(A) requires that a verdict " * * * be unanimous. It shall be in writing, signed by all jurors concurring therein, and returned by the jury to the judge in open court."

{¶15} This Court has reviewed both the written transcript and the video recording of the trial in this matter and finds that while the written transcript does not reflect the returning of the jury verdict in open court, the video recording does confirm that such did occur, in open court, on the record and in the presence of the jury and Appellant. (See video recording at 3:24:23).

{¶16} App.R. 9 provides:

{¶17} "**(A) Composition of the record on appeal**

{¶18} **"** *** A videotape recording of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form. Proceedings recorded by means other than videotape must be transcribed into written form. When the written form is certified by the reporter in accordance with App.R. 9(B), such written form shall then constitute the transcript of proceedings. When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcripts to their briefs.

{¶19} "***

{¶20} "**(E) Correction or modification of the record**

{¶21} "If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court

of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals."

{¶22} Pursuant to App.R. 9(A) as set forth above, it was the responsibility of counsel for Appellant to "type or print those portions of such transcript necessary for the court to determine the questions presented." It appears from the record that counsel for Appellant did, in good faith, order the complete record to be transcribed; however, the court reporter or transcriptionist in this case failed to include that portion of the record where the jury reconvened after deliberations and returned their verdict to the judge in open court.

{¶23} As set forth above, App.R. 9(E) provides a means to correct and/or supplement any errors or omissions in the record. This correction may be initiated by the "parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative."

{¶24} While this Court has the authority, based on the foregoing, to have the court reporter correct the record and have the supplemental record certified and transmitted, we find that such is not necessary in this case because App.R. 9(A) provides that the videotape recording, or in this case a CD ROM, constitutes the transcript of the proceedings. However, we think the better practice in cases such as these would be for the State to ask to have the transcript be corrected and supplemented to accurately reflect the proceedings.

{¶25} Based on the foregoing, we find Appellant's first assignment of error not well-taken and overrule same**.**

II.

{¶26} In his second assignment of error, Appellant argues that he was denied the effective assistance of counsel. We disagree.

{¶27} Our standard of review is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and whether counsel violated any of his or her essential duties to the client.

{¶28} If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. Id. at 141-142. Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie,* 81 Ohio St.3d 673, 675, 1998-Ohio-343. Tactical or strategic trial decisions, even if ultimately unsuccessful, will not substantiate a claim of ineffective assistance of counsel. *In re M.E.V.,* 10th Dist. No. 08AP-1097, 2009-Ohio-2408, ¶ 34.

{¶29} Appellant specifically cites trial counsel's failure to object to the failure of the trial court to read and accept the jury's verdict in open court.

{¶30} Upon review and based on our disposition of Appellant's first assignment of error, we cannot say that Appellant's counsel's performance fell below the standard.

{¶31} Appellant's second assignment of error is overruled.

III.

{¶32} In his third and final assignment of error, Appellant argues that his conviction was against the manifest weight of the evidence. We disagree.

{¶33} On review for manifest weight, a reviewing court is to examine 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 jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. See also, *State v. Thompkins,* 78 Ohio St.3d 380, 678 N.E.2d 541, 1997-Ohio-52. In making this determination, the Supreme Court of Ohio has outlined eight factors for consideration, which include "whether the evidence was uncontradicted, whether a witness was impeached, what was not proved, that the reviewing court is not required to accept the incredible as true, the certainty of the evidence, the reliability of the evidence, whether a witness' testimony is self-serving, and whether the evidence is vague, uncertain, conflicting, or fragmentary." *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23-24, 514 N.E.2d 394, citing *State v. Mattison* (1985), 23 Ohio App.3d 10, 490 N.E.2d 926, syllabus. Ultimately, however, "[t]he discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin,* 20 Ohio App.3d at 175, 485 N.E.2d 717.

{¶34} 'When 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.' *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."

{¶35} In the case sub judice, Appellant was convicted of domestic violence in violation of R.C. §2919.25(A) which states, "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member."

{¶36} At trial, the State presented the testimony of the victim as well as her medical records and photographs of her injuries. She testified that the injuries she sustained were caused by Appellant.

{¶37} Appellant claims that the testimony of Appellant's relatives support his position that the victim sustained her injuries in the fall which occurred when walking the dog. Appellant further argues that the fact that he, and not the victim, filed for divorce and the fact that the victim did not report the incident or seek medical treatment until days later render her testimony incredible.

{¶38} Upon review, while we find that the testimony of Timothy Fogle and David Fogle support the fact that the victim, upon her return after walking the dog, told everyone that she had fallen and that she complained of being sore, we find that neither Timothy Fogle nor David Fogle were present during the altercation which ensued between Appellant and the victim later in the evening and neither can say when or where she sustained her injuries. The victim's fall earlier in the evening does not negate the possibility that she sustained injuries later at the hand of Appellant.

{¶39} In this case, as in many domestic violence cases, the altercation between the Appellant and the victim occurred when no one else was present. At trial, both the victim and Appellant testified to conflicting versions of events. The jury was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence". *State v. Craig* (Mar. 23, 2000), Franklin App. No. 99AP-739, citing *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09-1236 Indeed, the jurors need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver,* Franklin App. No. 02AP-604, 2003-Ohio-958, at ¶ 21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.; *State v. Burke,* Franklin App. No. 02AP1238, 2003-Ohio-2889, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096.

{¶40} The jury in this matter chose to believe the victim.

{¶41} While appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide. *State v. DeHass* (1967), 10 Ohio St.2d 230. Therefore, based on the evidence presented, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice when it convicted Appellant.

{¶42} Based on the foregoing, we find the jury did not lose its way, and find no manifest miscarriage of justice.

{¶43} Appellant's third assignment of error is overruled.

{¶44} For the reasons stated in the foregoing opinion, the judgment of the Municipal Court of Licking County, Ohio, is affirmed.

By: Wise, J.

Edwards, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE

/S/ JULIE A. EDWARDS

/S/ PATRICIA A. DELANEY

JUDGES

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IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
BRET FOGLE	:	
Defendant-Appellant	:	Case No. 09 CA 114

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Municipal Court of Licking County, Ohio, is affirmed.

Costs assessed to Appellant.

/S/ JOHN W. WISE

/S/ JULIE A. EDWARDS

/S/ PATRICIA A. DELANEY

JUDGES