[Cite as *State v. Vandyne*, 2017-Ohio-584.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Patricia A. Delaney, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. William B. Hoffman, J.
-vs-	:	
	:	Case No. 16CA10
	:	
NANCY VANDYNE	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Cambridge Municipal Court, Case No. 15CRB00155

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: February 8, 2017

APPEARANCES:

For Plaintiff-Appellee:

WILLIAM H. FERGUSON
CAMBRIDGE LAW DIRECTOR
150 Highland Ave., Ste. 2
Cambridge, OH 43725

For Defendant-Appellant:

RONALD D. YARWOOD
42 North Phelps St.
Youngstown, OH 44503

Delaney, P.J.

{¶1} Appellant Nancy VanDyne appeals from the Nunc Pro Tunc Entry of May 6, 2016 of the Cambridge Municipal Court. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} This case arose on February 12, 2015. At that time, appellant was still married to the victim in this case but the two were involved in a divorce proceeding and lived separately. The victim, however, had been diagnosed with Stage IV colon cancer and on this date had a chemotherapy port surgically installed in his aorta via a chest incision. The victim intended to return to the marital residence, where appellant still lived, to be taken care of by appellant.

{¶3} Appellant transported the victim from the hospital after the procedure and the two ran errands, with appellant driving and the victim in the front passenger seat. At some point as they drove, appellant became enraged at the victim and struck him in the face, neck and chest area. Appellant did not strike the port area directly but the victim stated the area was jarred by appellant's actions.

{¶4} Appellant dropped the victim off at the house where he had been staying. Shortly thereafter, two relatives came over and found the victim to be upset and crying. The witnesses observed red marks on the victim's upper body and face. One witness overheard a phone call from appellant to the victim in which appellant used foul language toward the victim and called him an "f-ing liar." The witnesses accompanied the victim to the Guernsey County Sheriff's Office.

{¶5} Deputy Oakley took a report from the victim, who stated he was struck by his wife. Oakley observed redness to the victim's face, neck, and shoulder area. He

recommended that the victim go to the hospital to check the port. Oakley proceeded to appellant's residence and spoke to her; she denied the victim's allegations. Oakley arrested appellant for domestic violence.

{¶6} Appellant was charged by criminal complaint with one count of domestic violence pursuant to R.C. 2919.25(A), a misdemeanor of the first degree. Appellant entered a plea of not guilty and requested a trial by jury. Defense counsel later submitted a waiver of jury trial signed by counsel but not by appellant. Prior to the start of the ensuing bench trial, appellant confirmed she waived her right to trial by jury but did not execute a written waiver. The trial court found appellant guilty as charged and set the matter for sentencing.

{¶7} Appellant hired new counsel and filed a motion to vacate the guilty finding on the basis that she did not execute a written waiver of her right to trial by jury. The trial court vacated the guilty finding and scheduled the matter for jury trial. Appellant filed a motion to dismiss, arguing retrial was barred by double jeopardy. The trial court overruled the motion to dismiss and appellant appealed to this Court in *State v. Van Dyne*, Guernsey App. No. 15CA26, 2016-Ohio-1476. We affirmed the judgment of the trial court and found appellant's first conviction was voidable because the trial court did not comply with appellant's right to trial by jury. Id., ¶ 21. Therefore, double jeopardy did not bar a jury trial upon remand. Id.

{¶8} The matter proceeded to trial by jury on May 5, 2016. Appellant made several motions for mistrial and also moved for judgment of acquittal pursuant to Crim.R. 29(A) at the close of appellee's evidence and at the close of all of the evidence. The motions were overruled. Appellant was found guilty as charged and sentenced to a jail

term of 90 days with 80 suspended; she was also ordered to pay court costs, to attend anger management counseling, and to have no contact with the victim.

{¶9} Appellant now appeals from the trial court's Nunc Pro Tunc Entry of May 6, 2016.

{¶10} Appellant raises four assignments of error:

ASSIGNMENTS OF ERROR

{¶11} "I. APPELLANT'S CONVICTION FOR DOMESTIC VIOLENCE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE REQUIRING REVERSAL."

{¶12} "II. APPELLANT WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW AS THE RESULT OF THE IMPROPER CONTACT BETWEEN DEPUTY OAKLEY AND A SEATED JUROR WHICH OCCURRED BEFORE THE FULL JURY."

{¶13} "III. APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL AS THE RESULT OF THE ADMISSION OF TESTIMONY RELATIVE TO PRIOR BAD ACTS."

{¶14} "IV. APPELLANT WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL AS THE RESULT OF THE CUMULATIVE EFFECT OF THE ERRORS THAT PERMEATED HER TRIAL."

ANALYSIS

I.

{¶15} In her first assignment of error, appellant argues her domestic violence conviction is against the manifest weight of the evidence. We disagree.

{¶16} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "reviewing the

entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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 overturned and a new trial ordered." *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997–Ohio–52, 678 N.E.2d 541. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." Id. A manifest-weight challenge "concerns 'the inclination of the *greater amount of credible evidence* * * * to support one side of the issue rather than the other.'" (Emphasis sic.) *State v. Montgomery,* Slip Opinion No. 2016–Ohio–5487, —— N.E.3d ——, ¶ 75 (Ohio), citing *Thompkins,* supra, 78 Ohio St.3d at 387, 678 N.E.2d 541, quoting *Black's Law Dictionary* 1594 (6th Ed.1990).

{¶17} Appellant argues her conviction upon one count of domestic violence is against the manifest weight of the evidence. R.C. 2919.25(A) states, "No person shall knowingly cause or attempt to cause physical harm to a family or household member." Appellant argues the victim's account of the attack and his ensuing injuries is not credible because he admitted doctors did not see signs of an attack, he was anesthetized earlier the same day for his surgical procedure, and he was on medications that might cause hallucinations. The weight of the evidence and the credibility of the witnesses are determined by the trier of fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 231, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 79.

{¶18} The jury was free to accept or reject any and all of the evidence offered by the parties and assess the witnesses' 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. McGregor,* 5th Dist. Ashland No. 15–COA–023, 2016–Ohio–3082, ¶ 10, citing *State v. Craig,* 10th Dist. Franklin No. 99AP–739 (Mar. 23, 2000). Indeed, the jurors need not believe all of a witness' testimony, but may accept only portions of it as true. Id.

{¶19} Our review of the entire record reveals no significant inconsistencies or other conflicts in appellee's evidence that would demonstrate a lack of credibility of appellee's witnesses, including the victim. *State v. Sanders*, 5th Dist. Ashland No. 15-COA-33, 2016-Ohio-7204, --N.E.3d--, ¶ 41. His testimony was corroborated by the testimony of appellee's other witnesses, including the family members who encountered him shortly after the incident and Deputy Oakley. The victim's account was also corroborated by the physical evidence of the redness to his torso, face, and neck observed by the family witnesses and Oakley. Appellant has not shown that "a miscarriage of justice" occurred or that the jury "lost its way" in finding her guilty of domestic violence.

{¶20} Appellant's first assignment of error is overruled.

II.

{¶21} In her second assignment of error, appellant argues she was denied a fair trial because of contact between Deputy Oakley (a trial witness) and a juror. We disagree.

{¶22} After the jury was seated but before trial began, the prosecutor advised the trial court Deputy Oakley approached one of the jurors (Atkins), shook his hand, and "thanked him for his service in Vietnam." The defense moved for a mistrial and argued

seating an alternate in place of Atkins was not an acceptable resolution because the entire panel observed the contact. The prosecutor responded that the conversation occurred as the jury was dismissed, the panel was facing away from the encounter, and thus did not observe it. Atkins was brought before the trial court and asked whether Oakley thanked him for his service and shook his hand; the juror replied yes to both questions. The trial court asked whether Oakley said anything else and the juror said no, further offering "I don't know the man." The juror stated the encounter would not affect his ability to remain fair and impartial and he would not grant Oakley's testimony greater weight. Appellant and appellee declined to question the juror further. The trial court overruled the motion for mistrial.

{¶23} Appellant argues the trial court should have granted the motion for mistrial on the basis of Ohio Crim. R. 33(A)(1), which permits a new trial as follows: "A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights: [i]rregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial[.]" The granting or denial of a motion for mistrial rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Crim.R. 33; *State v. Sage*, 31 Ohio St.3d 173, 182, 510 N.E.2d 343 (1987). "A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened * * *." *State v. McBride*, 5th Dist. Stark No. 2008-CA-00076, 2008-Ohio-5888, ¶ 29, citing *State v. Reynolds*, 49 Ohio App.3d 27, 33, 550 N.E.2d 490 (2nd Dist.1988). The granting of a mistrial is necessary only when a fair trial is no longer

possible. Id., citing *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991); *State v. Treesh*, 90 Ohio St.3d 460, 480, 739 N.E.2d 749 (2001).

{¶24} A court will not reverse a judgment based upon juror misconduct unless prejudice to the complaining party is shown. *State v. Owens*, 5th Dist. Richland No. 2004-CA-87, 2005-Ohio-4402, at ¶ 12, citing *State v. Keith*, 79 Ohio St.3d 514, 526–27, 1997-Ohio-367, 684 N.E.2d 47. In cases of improper outside juror communication, the defense must establish that the communication biased the juror. Id., citing *State v. Phillips*, 74 Ohio St.3d 72, 88–89, 656 N.E.2d 643 (1995). Furthermore, trial courts are granted broad discretion in dealing with the outside contact and determining whether to declare a mistrial or replace an affected juror. Id.

{¶25} We have reviewed the record and find no evidence of bias or prejudice arising from the encounter. Appellant has not demonstrated how he was prejudiced by the contact between Atkins and Oakley. “Conversations by a third person with a juror during the progress of a trial for the purpose of influencing the verdict may invalidate the verdict, but where there is nothing in the record to demonstrate that the decision might have been influenced by such conversation, the refusal of the trial court to grant a new trial will not be disturbed.” *State v. Lewis*, 67 Ohio St.3d 200, 207, 1993-Ohio-181, 616 N.E.2d 921 (1993), citing *State v. Higgins*, 70 Ohio App. 383, 41 N.E.2d 1022 (1st Dist.1942).

{¶26} Here, the trial court, upon being apprised of a problem, immediately conducted a hearing and provided all parties an opportunity to participate. See, *State v. Burkhart*, 10th Dist. Franklin No. 93APA11-1630, 1994 WL 409763, *5. Atkins denied the conversation was of any significance and that it would affect his view of Oakley’s

testimony or his deliberations. The trial court promptly investigated the problem when it became aware of the misconduct on the part of the state's witness. Id. While such conduct was clearly inappropriate, we find there has been no prejudice to appellant. Id. See also*, State v. Stallings*, 89 Ohio St.3d 280, 2000-Ohio-164, 731 N.E.2d 159 (2000); *State v. Gooden*, 2nd Dist. Montgomery No. 19231, 2003-Ohio-905, ¶ 27.

{¶27} We find the trial court did not abuse its discretion in overruling the motion for mistrial and choosing not to replace the juror. Atkins stated he could remain open minded despite the contact with Oakley. See, *State v. Meeks*, 2015-Ohio-1527, 34 N.E.3d 382, ¶¶ 117-118 (5th Dist.), appeal not allowed*,* 143 Ohio St.3d 1543, 2015-Ohio-4633, 40 N.E.3d 1180. A juror's belief in his or her own impartiality is not inherently suspect and may be relied upon by the trial court. Id., citing *State v. Phillips,* 74 Ohio St.3d 72, 89, 656 N.E.2d 643 (1995). “Unless an appellant demonstrates otherwise, we should assume that the members of the jury followed their oaths and deliberated only upon the evidence adduced at trial.” Id., citing *Gunnell,* supra, 132 Ohio St.3d 442, 2012-Ohio-3236, 973 N.E.2d 243, at ¶ 32, citing *State v. Durr,* 58 Ohio St.3d 86, 91, 568 N.E.2d 674 (1991).

{¶28} Appellant’s second assignment of error is overruled.

III.

{¶29} In her third assignment of error, appellant argues she was denied due process and a fair trial due to admission of testimony about “prior bad acts.” We disagree.

{¶30} The admission or exclusion of relevant evidence is a matter left to the sound discretion of the trial court. Absent an abuse of discretion resulting in material prejudice to the defendant, a reviewing court should be reluctant to interfere with a trial court’s decision in this regard. *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967).

In this case, appellant does not specify what "prior bad acts" she refers to, or establish how she was prejudiced by admission of the challenged evidence. We note that in the transcript pages cited in appellant's brief, the victim referred generally to appellant's tendency to "blow up" when angry, her "explosive temper," and claimed "[s]he is a very violent person." The trial court sustained appellant's objection to the last comment by the victim. These comments came in the midst of the victim's narrative testimony about the history of his relationship with appellant.

{¶31} Appellant argues the victim's statements violated Evid. R. 404(B), which states, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." As noted, no evidence was admitted concerning specific other crimes, wrongs or acts.

{¶32} The target of appellant's argument is the victim's characterization of appellant as a violent, bad-tempered person. We are mindful that any conclusion the factfinder drew from the victim's testimony on this point is cumulative: appellant stood accused of striking a cancer patient in the area of his recently-installed chemo port, and both the victim and a witness testified to appellant's obscenity-laced phone rant directed toward the victim shortly thereafter. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Although relevant, evidence must be excluded "if its probative value is *substantially* outweighed by the danger of *unfair* prejudice, of confusion of the issues, or of misleading

the jury." (Emphasis added.) Evid.R. 403(A). We do not find this testimony to be unduly prejudicial.

{¶33} Assuming, arguendo, that this evidence was admitted in error under Evid. R. 404(B), we determine any error was harmless. The Supreme Court of Ohio has held error is harmless if "there is no reasonable possibility that the evidence may have contributed to the accused's conviction." *State v. Drew,* 10th Dist. Franklin No. 07AP467, 2008-Ohio-2797, at ¶ 31, quoting *State v. Bayless*, 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976), paragraph seven of the syllabus. Moreover, it is appropriate to find error harmless where there is "either overwhelming evidence of guilt or some other indicia that the error did not contribute to the conviction." *State v. Ferguson*, 5 Ohio St.3d 160, 166, fn. 5, 450 N.E.2d 265 (1983). "When considering whether error is harmless, our judgment is based on our own reading of the record and on what we determine is the probable impact the statement had on the jury." *State v. Drew,* supra, citing *State v. Kidder*, 32 Ohio St.3d 279, 284, 513 N.E.2d 311 (1987).

{¶34} Upon our review of the record, we find there is no reasonable probability this evidence contributed to appellant's conviction. See*, State v. Hollabaugh*, 5th Dist. Stark No. 2009 CA 00313, 2010-Ohio-6600, ¶ 37. The statements were fleeting and in the midst of the victim's narrative testimony. The victim's comments about appellant's alleged temperament are not decisive evidence in this case when family members and a police officer observed evidence of the victim's injuries corroborating his statement, and the family witnesses observed the victim's distress.

{¶35} We find no error by the trial court in admission of the testimony. Appellant's third assignment of error is overruled.

IV.

{¶36} In her fourth assignment of error, appellant argues her trial was permeated by cumulative errors that denied her due process of law and a fair trial. We disagree.

{¶37} Appellant cites the two instances she has separately assigned as error supra in her cumulative error argument: the juror contact with Oakley and the "prior bad acts" testimony. Appellant further cites two issues not separately assigned as error. First, during cross-examination of the victim, a bystander in the courtroom was making comments "mumbling to himself." (T. 135). The trial court advised the bystander to move to the back of the courtroom and overruled appellant's motion for mistrial. Second, Oakley testified he filed a domestic violence charge against appellant based upon "overwhelming evidence;" appellant objected to the conclusion and the trial court sustained the objection.

{¶38} In *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995), the Ohio Supreme Court held pursuant to the cumulative error doctrine "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." As determined supra, we rejected appellant's first two instances of alleged cumulative error.

{¶39} With regard to the latter two, appellant did not separately assign these issues as error or provide any supporting authority for her contentions, and we have previously rejected such arguments pursuant to App.R. 12(A)(2) and App.R. 16(A)(7). *State v. Pryor*, 5th Dist. Stark No. 2013CA00016, 2013-Ohio-5693, ¶ 43, appeal not allowed, 138 Ohio St.3d 1494, 2014 -Ohio- 2021, 8 N.E.3d 964, citing *State v.*

Blankenship, 9th Dist. Summit No. 18871, unreported, 1998 WL 852632, *11 (Dec 09, 1998), appeal not allowed, 85 Ohio St.3d 1443, 708 N.E.2d 209 (1999).

{¶40} Notwithstanding our past reluctance to embrace cumulative error as grounds for reversal, we have reviewed the pertinent parts of the record in this matter, and we do not find reversible error has been demonstrated on these bases as urged by appellant. *State v. Nelson-Vaughn*, 5th Dist. Stark No.2015 CA 00124, 2016-Ohio-1426, ¶ 82, citing *State v. Mascarella,* 5th Dist. Tuscarawas No. 94 AP 100075, unreported, 1995 WL 495390 (July 6, 1995).

{¶41} Appellant's fourth assignment of error is overruled.

CONCLUSION

{¶42} Appellant's four assignments of error are overruled and the judgment of the Cambridge Municipal Court is affirmed.

By: Delaney, P.J. and

Gwin, J.

Hoffman, J., concur.