**[Cite as *Toledo v. Brandeberry*, 2014-Ohio-1148.]**

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

City of Toledo — Court of Appeals No. L-13-1080

Appellee — Trial Court No. CRB-12-09357

v.

Mark A. Brandeberry — **DECISION AND JUDGMENT**

Appellant — Decided: March 21, 2014

* * * * *

David Toska, City of Toledo Chief Prosecutor, and
Jimmie Jones, Assistant Prosecutor, for appellee.

Alistair J. D. Thursby, for appellant.

* * * * *

**JENSEN, J.**

**{¶ 1}** Following a bench trial, defendant-appellant, Mark A. Brandeberry ("Brandeberry"), appeals the April 17, 2013 judgment of the Toledo Municipal Court finding him guilty of assault, a violation of Toledo Municipal Code 537.03A. For the reasons that follow, we affirm the trial court judgment.

## I. Background

**{¶ 2}** Brandeberry was charged with assault in connection with a March 11, 2012 argument between his family and the family of Eliseo Mendoza, who lives across the street from the Brandeberrys. The case was tried to the bench on February 19, 2013. Mendoza and his 13-year-old son, I.M., testified during the city's case-in-chief. Brandeberry's brother, George Brandeberry, Jr. ("George Jr."), and his mother, Shirley Brandeberry, testified during Brandeberry's case-in-chief.

**{¶ 3}** According to Mendoza's trial testimony, Brandeberry's father, George Brandeberry, Sr. ("George Sr."), confronted him because he was angry that Mendoza had not properly maintained the lawn on a property he purchased in the neighborhood. The argument with George Sr. ended and George Sr. was leaving Mendoza's yard when his son, George Jr., arrived home. Mendoza claims that George Jr. resumed the argument and upon hearing the commotion, Mendoza's son, Marco, came out. Marco and George Jr. began shoving and hitting each other. Mendoza claims that while Marco and George Jr. were quarreling, Brandeberry came up behind him and punched him in the back of the head, causing him to fall and break his ankle. I.M. witnessed the altercation from a second-floor window, and for the most part corroborated Mendoza's version of the events. Their testimony differed slightly from one another's, however, as to the angle from which Brandeberry approached Mendoza.

**{¶ 4}** Brandeberry denies that he punched Mendoza and, in fact, denies having been present at any point during the argument between the families. George Jr. testified

that he saw Mendoza on the ground, but did not know how he got there. He claimed that the first time he saw his brother was when his mother came out to break up the fight. At that time, Brandeberry was on the front porch of their home. George Jr. conceded, however, that while he was embroiled in the argument with Marco, there could have been enough time for Brandeberry to cross the street to the Mendoza home, punch Mendoza, then return home.

**{¶ 5}** Shirley testified that Brandeberry did not leave their house until she went outside to break up the fight. She said that she was in the living room and Brandeberry was on the second floor of the home. She explained that to leave the house, he would have had to pass by the living room and she would have seen him.

**{¶ 6}** Following his fall, Mendoza was treated at St. Charles Hospital. Toledo police officers Beningo Salazar and Timothy Sturtz spoke with Mendoza at the hospital and completed a crime report. The crime report listed George Jr.—not Brandeberry—as the suspect. Mendoza eventually made a supplemental crime report identifying Brandeberry.

**{¶ 7}** Both the city and Brandeberry subpoenaed the officers to appear at trial. Neither appeared. In lieu of having an officer present to authenticate the crime report, the city and Brandeberry stipulated to the admission of the report into evidence. The emergency room records from Mendoza's hospital visit were also admitted as an exhibit. Those records report that Mendoza "had [an] argument with his neighbor, who punched him left side of the face, twisted his left ankle and he fell down."

**{¶ 8}** After considering the testimony and the exhibits, the court found Brandeberry guilty of assaulting Mendoza. Brandeberry filed a motion for new trial on February 26, 2013, but the court denied his motion. On April 17, 2013, the court sentenced Brandeberry to a prison term of 180 days with 150 days suspended, placed him on active probation for a year, and ordered Brandeberry to make full restitution to Mendoza, seek and obtain gainful employment, complete anger management courses, avoid contact with Mendoza, and maintain good behavior. The court stayed Brandeberry's sentence pending appeal. In this timely appeal, Brandeberry assigns the following errors for our review:

> 1. The conviction not sufficiently supported by credible evidence was against the Manifest Weight of the Evidence[.]
>
> 2. Trial counsel was Ineffective which prejudiced Defendant/ Appellant's right to a fair trial as guaranteed by the U.S. and Ohio Constitutions.
>
> 3. Trial court abused its discretion when denying Defendant/ Appellant's Pre-sentence Motion for a new trial.

## II. Law and Analysis

### A. First Assignment of Error

**{¶ 9}** In his first assignment of error, Brandeberry claims that his conviction was not sufficiently supported by credible evidence and was against the manifest weight of the evidence. Brandeberry's primary argument is that the Mendozas, both of whom were

biased, gave differing statements of the events insofar as they did not agree upon the direction from which Brandeberry approached Mendoza. He emphasizes that the original report identified George Jr. as the suspect. He claims that in resolving those discrepancies against Brandeberry, the trial court lost its way.

**{¶ 10}** Whether there is sufficient evidence to support a conviction is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). In reviewing a challenge to the sufficiency of evidence, "[t]he 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." (Internal citations omitted.) *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). In making that determination, the appellate court will not weigh the evidence or assess the credibility of the witnesses. *State v. Walker*, 55 Ohio St.2d 208, 212, 378 N.E.2d 1049 (1978).

**{¶ 11}** "In a bench trial, the trial court assumes the fact-finding function of the jury." *Cleveland v. Welms*, 169 Ohio App. 3d 600, 2006-Ohio-6441, 863 N.E.2d 1125, 1128, ¶ 16 (8th Dist.). Accordingly, to warrant reversal from a bench trial under a manifest weight of the evidence claim, 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 evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be

reversed and a new trial ordered." *Id.*, citing *Thompkins* at 387; *Brooklyn v. Nova*, 8th Dist. Cuyahoga. No. 83550, 2004-Ohio-3610.

**{¶ 12}** Toledo Municipal Code 537.03A provides that "No person shall knowingly cause or attempt to cause physical harm to another." The victim and the victim's son both testified that it was Brandeberry who punched him, causing him to fall to the ground and break his ankle. We find that this evidence was sufficient to survive Brandeberry's Crim.R. 29 motion for acquittal.

**{¶ 13}** We also find no evidence that the trial court clearly lost its way or created a manifest miscarriage of justice. The trial judge provided a detailed explanation of the reason for her verdict. She indicated that although she had reviewed the police report, she gave little weight to the fact that the suspect was originally misidentified as George Jr. She determined that there was probably confusion at the time the police took the report, especially given the fact that there were two Georges involved, as well as a Mark and a Marco. She concluded that there must have been a mistake or a misunderstanding. She found the medical reports consistent with Mendoza's version of what occurred. And she explained that she found the city's witnesses to be very credible, especially I.M., and that George Jr.'s testimony added very little because of the fact that he was involved in a physical altercation with Marco at the time that Mendoza claims to have been punched.

**{¶ 14}** This case rested entirely on the credibility of the testifying witnesses. The trial judge was there to observe the demeanor of the witnesses and to evaluate their

truthfulness. She resolved those credibility issues in favor of the city. We find no error in this conclusion and we find Brandeberry's first assignment of error not well-taken.

**B. Second Assignment of Error**

**{¶ 15}** In his second assignment of error, Brandeberry claims that his trial counsel was ineffective and that he was deprived of his Sixth Amendment right to a fair trial. The basis of this argument is that defense counsel allowed the case to proceed to trial despite the fact that the police officers he had subpoenaed failed to appear at trial. Instead of moving for a continuance based on the witnesses' failure to appear, trial counsel went forward with a stipulation from the prosecutor that the original police report would be admitted into evidence.

**{¶ 16}** Reversal of a conviction on the grounds of ineffective assistance of counsel requires that the defendant show, first, that counsel's performance was deficient, and second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *State v. Keith*, 79 Ohio St. 3d 514, 518-19, 684 N.E.2d 47 (1997), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

**{¶ 17}** "An attorney's failure to call a witness falls within the realm of trial tactics." *State v. Jones*, 8th Dist. Cuyahoga No. 81112, 2003-Ohio-3004, ¶ 28. Before trial began, counsel for Brandeberry indicated that he had subpoenaed the officers so that they could authenticate the police report. He stated nothing—and Brandeberry has provided nothing—to suggest that the officers would have provided testimony that would

have benefited Brandeberry. *See, e.g., State v. Kachovee,* 4th Dist. Scioto No. 98CA2562, 1999 WL 38994, * 5 (Jan. 25, 1999) (concluding that appellant's ineffective assistance of counsel claim failed where appellant failed to provide substance of the missing witness's testimony). Because Brandeberry has failed to establish that counsel's performance was deficient or that he was prejudiced, we find his second assignment of error not well-taken.

### C. Third Assignment of Error

**{¶ 18}** In his third assignment of error, Brandeberry claims that the court abused its discretion in denying his presentence Crim.R. 33 motion for a new trial. He claims that the police officers' failure to appear warranted a new trial. He contends that the trial court merely guessed at the reason for the discrepancy between the original police report and the witnesses' trial testimony and that no evidence was presented to justify the trial court's conclusion that the first report was merely a mistake or misunderstanding.

**{¶ 19}** Crim.R. 33(A) provides:

> A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:
>
> (1) Irregularity 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;
>
> (2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) That the verdict is not sustained by sufficient evidence or is contrary to law. * * *;

(5) Error of law occurring at the trial;

(6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. * * *.

**{¶ 20}** As recognized by Brandeberry, we review the trial court's denial of a motion for new trial under an abuse-of-discretion standard. *State v. Schiebel*, 55 Ohio St. 3d 71, 76, 564 N.E.2d 54, 62 (1990). An abuse of discretion is "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

**{¶ 21}** Mendoza testified that he could not recall what he had told the police officers at the hospital and had no explanation for why the original police report identified George Jr. as the suspect. But while Mendoza could not offer an explanation for the discrepancy in the report, Brandeberry also failed to offer testimony or other evidence to explain it. There were two conclusions that the trial court could have reached: (1) that the Mendozas' testimony that Brandeberry punched Mendoza was untrue; or (2) that there was a mistake or a misunderstanding that resulted in George Jr.

being identified as the suspect in the initial crime report. The trial court chose to believe the latter. We find nothing improper about the trial court's explanation for its verdict. Brandeberry has not established the existence of any of the grounds listed in Crim.R. 33(A) entitling him to a new trial. We, therefore, find his third assignment of error not well-taken.

## III. Conclusion

**{¶ 22}** After considering the errors assigned by Brandeberry, we find all of them not well-taken and affirm the April 17, 2013 judgment of the Toledo Municipal Court. The costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE