[Cite as *E. Cleveland v. Waters*, 2009-Ohio-3591.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91631

CITY OF EAST CLEVELAND

PLAINTIFF-APPELLEE

vs.

DONNA WATERS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
East Cleveland Municipal Court
Case Nos. CRB 00140, CRB 01118, CRB 01237

BEFORE: McMonagle, J., Gallagher, P.J., and Kilbane, J.

RELEASED: July 23, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Donna Waters, appeals her menacing, menacing by stalking, and violation of temporary protection order convictions, rendered after a jury trial. We affirm.

{¶ 2} Three criminal complaints were filed in the municipal court against Waters, one for each of the above-listed crimes. The cases were consolidated and proceeded to a jury trial. The jury found Waters guilty of all counts and the trial court sentenced her to a suspended 180-day sentence and two years of community control sanctions.

TRIAL TESTIMONY

{¶ 3} Waters, and one of the victims, Patrick Peacock, had been involved in an intimate relationship. During the same time Peacock was in his relationship with Waters, he was also in an intimate relationship with the other victim in this case, Francina Wherry. Eventually, Waters and Wherry became aware of their mutual and simultaneous involvement with Peacock, and their feelings toward, and encounters[1] with, one another were unpleasant.

{¶ 4} Wherry testified that Waters would repeatedly call her to ask why Wherry was calling Peacock, and Waters would repeatedly drive up and down

[1]Both worked at the same hospital, and they occasionally encountered one another.

Wherry's street. Wherry also claimed that Waters reported her for "making trouble" at work.

{¶ 5} Peacock testified that he no longer wished to have a relationship with Waters, but she continually called and followed him. He eventually obtained a temporary protection order against Waters, but she continued with her behavior.

{¶ 6} Waters claimed that Peacock raped her in November 2007.[2] She testified that, in her attempt to bring Peacock to justice on the rape charge, she occasionally followed him, then called the police to inform them of his whereabouts, in hopes that he would be arrested. She presented the testimony of a Cleveland Heights[3] police officer who testified that he told Waters if she saw Peacock, she should call the police, or alternatively, she could invite Peacock to her home and then call the police.

JURY OATH

{¶ 7} In her first assignment of error, Waters contends that the trial court erred by failing to administer the oath to the jury as required by R.C. 2945.28, which sets forth an oath that "shall" be administered to juries in criminal cases.

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[2]Peacock was acquitted of the charge. *State v. Peacock*, Cuyahoga County Court of Common Pleas Case No. CR-506993.

[3]The record indicates that the Cleveland Heights, East Cleveland, and Cleveland police departments were all involved in this situation at various times.

{¶ 8} The trial transcript is partial. It was prepared from an audio recording, contains only part of voir dire, and indicates "inaudible" in numerous instances. It is silent both as to any oath given to the prospective jurors prior to voir dire and to the jurors who were actually selected to hear the case. It abruptly transitions from the questioning of a prospective juror to the court's announcement that a jury had been seated. (See tr. 30-31.) Without a complete transcript of the trial proceedings, we must presume regularity below. See *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 400 N.E.2d 384. Moreover, defense counsel did not object that an oath was not given.

{¶ 9} In a similar case, *State v. Glaros* (1960), 170 Ohio St. 471, 166 N.E.2d 379, the trial judge examined prospective jurors during voir dire, but no oath or affirmation was administered before the jurors were examined, and no objection was made as to the failure to require the oath or affirmation. On appeal, the Ohio Supreme Court held:

{¶ 10} "It is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. * * *

{¶ 11} "Unquestionably, the trial judge should have avoided the error of failing to have an oath or affirmation administered to prospective jurors, as required by Section 2945.27, Revised Code, just as a trial judge should avoid all

errors in the course of a trial. If counsel for the defendant had requested the trial judge to avoid that error and the trial judge had refused to do so, then clearly this defendant should be able to rely upon such error as a ground for reversal of his conviction. * * * However, we do not believe that we should, without some good reason or unless required to do so by some applicable statute * * * approve a practice which would enable counsel to place his client in a position where he could take advantage of a favorable verdict and, at the same time, avoid an unfavorable verdict merely because of an error of the trial judge that counsel made no effort to prevent when he could have made such effort and when such error could have been avoided. Such a practice would enable counsel to obtain for his client more than the one fair trial to which he is entitled. * * *

{¶ 12} "* * *

{¶ 13} "Furthermore * * * there is nothing in the record in the instant case to indicate that defendant was in any way prejudiced by any false answer that a juror may have given on his voir dire examination. * * * It is not even suggested that any false answer was given by a juror on the voir dire examination of jurors. Hence, it is apparent that there is nothing in the record to show that the failure of the trial judge to have oaths or affirmations administered to prospective jurors before their voir dire examination could in any way have prejudiced the defendant." Id. at 475-476. (Citations omitted.) See, also, *State v. Conway*, 2003-Ohio-791, 842 N.E.2d 996 (the defendant did not object to the oath being

administered by the bailiff and, thus, waived all but plain error review. The defendant failed to present evidence showing that he was prejudiced and, therefore, was not entitled to a reversal of the jury's verdict.).

{¶ 14} Federal courts have also addressed the failure of a trial court to administer the oath to a jury. For example, in *United States v. Pinero* (1991), 948 F.2d 698, the Eleventh Circuit Court of Appeals addressed an instance where, as here, the record was silent as to whether the jury was sworn at the beginning of trial. The court held:

{¶ 15} "Appellants must meet their burden of proving that the jury was not sworn before being permitted to take advantage of that fact. [Appellants] offer this court no affidavits from attorneys, the court reporter, or anyone else present in the courtroom on February 1, 1990 to support their assertion that the jury did not receive its oath. Instead, appellants direct our attention solely to the record. The mere absence of an affirmative statement in the record, however, is not enough to establish that the jury was not in fact sworn. In *State v. Mayfield*, 235 S.C. 11, 109 S.E.2d 716 (1959), cert. denied, 363 U.S. 846, 80 S. Ct. 1616, 4 L. Ed. 2d 1728 (1960) – a decision with which the former Fifth Circuit expressed 'full agreement' in *United States v. Hopkins*, 458 F.2d 1353, 1354 (5th Cir. 1972) 5 – the Supreme Court of South Carolina held that the 'absence of [an] affirmative statement in the transcript that the jury was sworn furnishes no factual support for appellant's contention that it was not. Appellant's statement

that the jury was not sworn stands alone, and is, in our opinion insufficient to overcome the contrary presumption.' *Mayfield*, 109 S.E.2d at 723 (citation omitted)." *Pinero* at 700.

{¶ 16} In light of the above, the first assignment of error is overruled.

WEIGHT OF THE EVIDENCE

{¶ 17} In her second assignment of error, Waters contends that her convictions were against the manifest weight of the evidence.

{¶ 18} A court considering a manifest-weight claim "review[s] the entire record, weighs the evidence and all reasonable inferences, [and] considers the credibility of witnesses." *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. The question is "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." Id. See, also, *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. The weight of the evidence and credibility of the witnesses, however, are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The power to reverse a judgment of conviction as against the manifest weight must be exercised with caution and in only the rare case in which the evidence weighs heavily against the conviction. *Martin* at 175.

{¶ 19} Waters's manifest-weight claim attacks the credibility of the State's witnesses. Upon review, however, the testimony of the State's witnesses was not

so incredible that it weighs heavily against the conviction. The victims testified that Waters stalked and menaced them, and Waters testified that she was merely attempting to help the police bring Peacock to justice. The jury believed the victims. The result was not incredulous.

{¶ 20} Accordingly, the second assignment of error is overruled.

INEFFECTIVE ASSISTANCE OF COUNSEL

{¶ 21} For her third and final assignment of error, Waters contends that she was denied the effective assistance of counsel. We disagree.

{¶ 22} Under the Sixth Amendment to the United States Constitution, a criminal defendant has a right to effective assistance of counsel. Counsel is ineffective if: (1) his or her performance is deficient; and (2) prejudice arose from counsel's performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of syllabus, following *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. In order to show deficient performance, a defendant must prove that his counsel's performance fell below an objective level of reasonable representation. *Bradley* at 142. In other words, the court must determine if "there has been a substantial violation of any of defense counsel's essential duties to his client." *State v. Lytle* (1976), 48 Ohio St.2d 391, 396, 358 N.E.2d 623, vacated on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154.

{¶ 23} To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 694.

{¶ 24} Waters bases her claim upon counsel's failure to object to: (1) the court's failure to administer the oath to the jury; (2) hearsay and irrelevant testimony; and (3) improper comments made by the prosecutor during opening statement.

{¶ 25} In regard to Waters's first ground, relative to administration of the oath to the jury, as already discussed in resolving the first assignment of error, Waters has failed to establish that the oath was not administered and, thus, we presume the regularity of the proceeding. This ground therefore is meritless.

{¶ 26} Waters's second ground, that counsel failed to object to hearsay and irrelevant testimony, is similarly meritless. The record is replete with instances where she objected to such testimony, and the court sustained her objections.[4]

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[4]See, for example, the following: page 49, objection sustained to question posed to a State's witness about sugar being in the tank of one of Peacock's trucks; pages 58-59, objection sustained to question posed to a State's witness about his mom (Wherry) being afraid to leave the house; page 109, objection sustained to question posed to Wherry about Waters's rape allegation against Peacock; page 110, objection sustained to question posed to Wherry about sugar being in the tank of one of Peacock's trucks; page 138, objection sustained to question posed to Peacock about Waters previously lying to him; page 149, objection sustained to question posed to Peacock about whether he believed Waters was "fatally attracted" to him; and page 188, objection sustained on cross-examination of a defense witness (police officer) about Waters waiting to report rape

Not objecting to every instance of alleged hearsay or irrelevant testimony is "within the realm of trial tactics" and does not per se establish ineffective assistance of counsel. *State v. Hunt* (1984), 20 Ohio App.3d 310, 311, 486 N.E.2d 108.

{¶ 27} Finally, Waters's claim of ineffective assistance of counsel based upon counsel's failure to object to statements made by the prosecutor during opening statement is without merit.[5] The trial court instructed the jury that opening statements and closing arguments were not evidence. Again, it was within counsel's realm of tactical decision-making to choose to avoid interrupting opening statement to voice an objection. See *State v. Keene*, 81 Ohio St.3d 646, 668, 1998-Ohio-342, 693 N.E.2d 246. The failure to object to prosecutorial misconduct "does not constitute ineffective assistance of counsel per se, as that failure may be justified as a tactical decision." *State v. Gumm*, 73 Ohio St.3d 413, 428, 1995-Ohio-24, 653 N.E.2d 253.

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allegation against Peacock.

[5]The specific complaints are: (1) the prosecutor's characterization of the case as "Baby Mama Drama"; (2) the prosecutor's statement that "as far back as June the office of the prosecutor has had to intervene in this situation, and your tax dollars have been working to contain and curtail the excessive irresponsibility and menacing and stalking of this woman, Ms. Waters"; and (3) the prosecutor's statement that "we have nothing personal against Ms. Waters. We would love for her to be able to go on with her life and raise her five or six children happily, but * * * she [went] out of her way to intrude in the life [of the victims]."

{¶ 28} In addition to not finding counsel's performance deficient, we also do not find that Waters was prejudiced by counsel's performance, that is, that the result of the trial would have been different but for counsel's representation.

{¶ 29} Accordingly, the third assignment of error is sustained.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the East Cleveland Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, P.J., CONCURS

MARY EILEEN KILBANE, J., DISSENTS WITH OPINION

MARY EILEEN KILBANE, J., DISSENTING:

{¶ 30} For the following reasons, I respectfully dissent from the majority opinion that concluded it was not reversible error to fail to administer an oath to the venire or the empaneled jury pursuant to R.C. 2945.28.

{¶ 31} R.C. 2945.28 states:

> "(A) In criminal cases jurors and the jury shall take the following oath to be administered by the trial court or the clerk of the court of common pleas, and the jurors shall respond to the oath 'I do swear' or 'I do affirm': 'Do you swear or affirm that you will diligently inquire into and carefully deliberate all matters between the State of Ohio and the defendant (giving the defendant's name)? Do you swear or affirm you will do this to the best of your skill and understanding, without bias or prejudice? So help you God.'
>
> A juror shall be allowed to make affirmation and the words 'this you do as you shall answer under the pains and penalties of perjury' shall be substituted for the words, 'So help you God.'"

{¶ 32} The majority relies on the fact that the transcript is silent as to an oath being administered and that there may be inaudible or missing portions of the transcript, citing *Knapp*, supra, that without a complete trial transcript, regularity is presumed.

{¶ 33} In *Knapp*, the court reporter failed to transcribe the transcript, therefore, the appellate court had no record with which to review the appellant's assignments of error. *Knapp* at 199. Here, a transcript of the audio recording reveals no record of the prospective and empaneled jurors having been sworn. Appellant cannot present this error in a transcript, as it is her contention the oath was never administered.

{¶ 34} Appellee states that the trial was documented by turning a tape recorder on and off throughout the proceedings, implying the record may not be complete. The appellee never conclusively states portions are missing, however, in their analysis the majority presumes portions may have been omitted. I cannot accept the broad notion of the majority that regularity is presumed in a proceeding where, through no fault of the appellant, the tape recorder may not have been activated during the relevant error.

{¶ 35} The majority relies heavily on the language in *Glaros*, supra, where the prospective jury was not sworn prior to voir dire. *Glaros* at 475. However, in the instant case no oath was given either prior to voir dire or to the empaneled jury prior to the commencement of trial. While in *Glaros*, the court concluded that there was no indication the prospective jurors gave false answers in absence of their oath, here the jury was never administered the oath stating their responsibilities prior to deliberations. While jurors must be sworn in both prior to voir dire and once empaneled, the failure to swear in prospective jurors as in *Glaros*, is far less significant than failing to swear in the empaneled jury as occurred in this case.

{¶ 36} There have been several Ohio cases that have concluded strict compliance with R.C. 2945.28 is not required. In *Conway*, supra, the Ohio Supreme Court concluded that, although the statute expressly requires the trial

court to administer the oath, the defendant was not prejudiced by the bailiff delivering the oath.

{¶ 37} Similarly, in *State v. Boykin*, Montgomery App. No. 19896, 2004-Ohio-1701, the Second District Court of Appeals concluded that deviation from the specific language of R.C. 2945.28 does not merit reversal. The *Boykin* court specifically stated, "[t]he record indicates that the trial court's jury instructions emphasized the jurors 'sworn duty' to accept the instructions given as well as the importance of the jurors' role in being the 'sole judges of the facts, the credibility of the witness and the weight of the evidence." *Boykin* at ¶165. "There is no indications that the jurors did not believe they were properly sworn, or that they failed to appreciate the importance of the oath." Id. Although the *Boykin* court ultimately determined the oath did not have to be read verbatim from the statute, it clearly emphasized the importance of the oath being given.

{¶ 38} The instant case is substantially different from *Conway* and *Boykin* where the issue was that of strict compliance with the statute. Here, there is no evidence the statute was complied with in any manner. The majority points to no Ohio case concluding that the failure to administer the oath to the prospective and empaneled jurors prior to trial is inconsequential. Further, while the majority decides a defendant is required to object when the oath is not given, administration of the jury oath is the trial court's responsibility and should not be overlooked for counsel's failure to object. The Ohio Supreme Court has

previously stated in *State v. Wilson* (1972), 29 Ohio St.2d 203, 211, 280 N.E.2d 915, that when a defendant elects to be tried by a jury, both the state and the defendant are entitled to an impartial jury that will abide by the oath administered pursuant to R.C. 2945.28. Although the Ohio Supreme Court concluded in *Conway* that the individual administering the oath is not crucial, the court's statement in *Wilson* obviously reflects that an oath must be administered to every empaneled jury.

{¶ 39} R.C. 2945.28 states that the jury "shall" receive an oath. The clear wording of the statute dictates the oath is mandatory and not merely discretionary. The Ohio Supreme Court has previously found that where the requirements of a statute are clear and unambiguous, they must be enforced as written by the courts. *State v. Pless*, 74 Ohio St.3d 333, 340, 1996-Ohio-102, 658 N.E.2d 766.

{¶ 40} This case is significantly different from numerous other Ohio cases where there was simply some deviation from the procedure outlined in R.C. 2945.28.

{¶ 41} I would find the transcript's silence on whether the oath outlined in R.C. 2945.28 was administered mandates reversal.