

[Cite as *State v. Tate*, 2011-Ohio-69.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94026

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROMOND TATE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521618

BEFORE: Jones, J., Blackmon, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: January 13, 2011

ATTORNEYS FOR APPELLANT

Robert L. Tobik
Cuyahoga County Public Defender

BY: John T. Martin
Assistant Public Defender
310 Lakeside Avenue
Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Matthew Waters
Oscar E. Albores
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Romond Tate (“Tate”), appeals his felonious assault and domestic violence convictions. Finding no merit to the appeal, we affirm.

{¶ 2} In 2009, Tate was charged with felonious assault and felony domestic violence. The matter proceeded to trial, at which Tate elected to try the felonious assault charge to a jury and the domestic violence charge to the bench.

{¶ 3} The following evidence was adduced at trial.

Statement of Facts

{¶ 4} Tate was divorced from Chelsia Tate (“Chelsia”), and they had two children. Tate had two previous domestic violence convictions where Chelsia was the victim. In February 2009, Tate’s mother died and Chelsia went to the house to visit with the family. Tate’s former girlfriend, whom he had dated while married to Chelsia, was also at the house and was going to spend the night. Around 3 a.m., Chelsia decided to leave. Tate offered to drive Chelsia home and became angry when she refused. He tried to stop her by putting his hands on her neck and choking her.

{¶ 5} Chelsia testified that she was unable to breathe while Tate was choking her and almost blacked out. Tate finally released Chelsia, and she left. She started to walk home, but had to walk in the street due to the snow-covered sidewalks. Chelsia had walked a short distance when she saw Tate driving in his truck. At first, Tate followed Chelsia, trying to talk with her, and then he stopped the truck. Tate accelerated and struck Chelsia in the back, knocking her into a snowbank. He stopped momentarily and then sped off. Chelsia testified that she did not know what Tate meant to do when he hit her but she did not think he wanted to run her over, and that he was driving slow when he hit her.

{¶ 6} A few minutes later, Tate returned and began yelling at Chelsia, who had gotten up and resumed walking towards her house. Chelsia saw a police car and flagged it down. The officer testified that he patted Tate down for weapons and put him in the back of the police car because he felt Tate was a threat.

Chelsia testified that she did not tell the police officer about the choking or being hit by Tate's truck at the time because she did not want Tate to go to jail when his mother had just died.

{¶ 7} A few days later, Chelsia went to the police department and filed a formal police report.

{¶ 8} Before trial commenced, Chelsia refused to appear pursuant to subpoena, so the trial court issued a material witness warrant. Chelsia was arrested and held in jail overnight to ensure her presence at trial.

{¶ 9} Tate testified in his own defense that he was just trying to prevent Chelsia from leaving his mother's house because it was late and cold. He denied choking Chelsia or hitting her with his truck, but did admit that there had been prior domestic violence situations in which Chelsia was the named victim. Tate testified that he was driving alongside Chelsia when she failed to see a snow drift and fell into it. He stated that he did not stop to help her because he thought she would become more angry with him. Finally, Tate testified that his girlfriend witnessed the confrontation in the house, but was out of state and could not testify.

{¶ 10} The jury convicted Tate of felonious assault and the trial court found him guilty of domestic violence and sentenced him to a total of five years of community control sanctions.

{¶ 11} Tate now appeals, raising the following assignments of error for our review:

“I. Mr. Tate was denied due process by virtue of the prosecutor’s improper closing argument, which argued facts not in evidence and commented upon the defendant’s right not to present evidence in his defense.

“II. There was insufficient evidence of the essential element that Mr. Tate acted ‘knowingly’ to sustain a guilty verdict as to count one, felonious assault.

“III. The verdicts are against the manifest weight of the evidence.

“IV. Mr. Tate was denied effective assistance of counsel in violation of the sixth and fourteenth amendments to the United States Constitution and Article I, Section 10, of the Ohio Constitution.”

Prosecutorial Misconduct

{¶ 12} In the first assignment of error, Tate argues that the state committed prosecutorial misconduct when it made comments during closing argument that went outside the evidence presented at trial. First, we note that defense counsel failed to object to anything said during the state’s closing arguments, thus waiving all but plain error. *State v. Slagle* (1992), 65 Ohio St.3d 597, 604, 605 N.E.2d 916.

{¶ 13} Crim.R. 52(B) provides that “plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” The standard for noticing plain error is set forth in *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240:

{¶ 14} “By its very terms, the rule places three limitations on a reviewing court’s decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, i.e., a deviation from a legal rule. * * * Second, the error must be plain. To be ‘plain’ within the meaning of Crim.R. 52(B), an error

must be an ‘obvious’ defect in the trial proceedings. * * * Third, the error must have affected ‘substantial rights.’ We have interpreted this aspect of the rule to mean that the trial court’s error must have affected the outcome of the trial.” (Citations omitted.)

{¶ 15} An error that satisfies these three requirements may be corrected by the appellate court. However, notice of plain error should be done “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *State v. Long* (1978), 53 Ohio St.2d 91, 97, 372 N.E.2d 804.

{¶ 16} The test for prosecutorial misconduct is whether the prosecutor’s conduct at trial was improper and prejudicially affected the substantial rights of the defendant. *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293, cert. denied, 498 U.S. 1017, 112 L.Ed.2d 596. A prosecutor’s conduct during trial cannot be grounds for error unless the conduct deprives the defendant of a fair trial. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 24, 514 N.E.2d 394.

{¶ 17} Tate claims the prosecutor erred when the prosecutor said during closing arguments that Chelsia had “classic battered women’s syndrome” even though the state did not present expert testimony regarding battered women’s syndrome.

{¶ 18} In *State v. Hodge*, Lorain App. No. 98CA007056, 2000-Ohio-6608, appeal not allowed by *State v. Hodge* (2001), 91 Ohio St.3d 1459, 743 N.E.2d 399, the Ninth District Court of Appeals refused to find plain error where the

prosecutor made comments during closing arguments that characterized the abuse victim as a victim of battered women's syndrome. The court noted that the state presented evidence that the appellant was controlling and abusive in his relationship with the victim and the victim testified that she was frightened of the appellant because he was abusive during most of their relationship. *Id.* The court concluded that "the prosecutor's comments in closing argument, characterizing [the victim] as an abused, battered woman appear to be a proper interpretation of the evidence presented at trial. See *State v. Lott* (1990), 51 Ohio St.3d 160, 166 (holding a prosecutor may not allude to matters not supported by admissible evidence)." *Id.* at *7.

{¶ 19} In this case, Chelsia testified that she had been in an abusive relationship with Tate, but had not previously followed through with pressing charges against him. She stated on cross-examination, "I don't know what is wrong with me that every time he puts his hands on me, I always feel bad for him and I don't know why. * * * I've always dropped the charges, and I'm just tired of dropping the charges and he just gets to walk away after everything, like nothing has happened." In addition, Tate offered on cross-examination that he had been to court previously for harming Chelsia.

{¶ 20} Like *Hodge*, we do not find plain error in the prosecutor's comment regarding battered women's syndrome during closing arguments.

{¶ 21} Next, Tate argues the prosecutor improperly stated that Chelsia was a "willing participant at trial," when she really was not a willing witness. But a

review of the record shows that the statement was made in response to defense counsel's argument that Chelsia lied about Tate choking her and hitting her with his truck only after she was arrested on a material witness warrant. We find no error in the prosecutor's statement that Chelsia was willing to testify.

{¶ 22} Finally, Tate claims that it was improper for the prosecutor to comment on Tate's failure to call his girlfriend as a witness. Tate maintains that this violates his Fifth Amendment right not to call witnesses on his behalf. But "the comment that a witness other than the accused did not testify is not improper, *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 193, 616 N.E.2d 909, since the prosecution may comment upon the failure of the defense to offer evidence in support of its case. *State v. Williams* (1986), 23 Ohio St.3d 16, 19-20, 490 N.E.2d 906; *State v. Bies* (1996), 74 Ohio St.3d 320, 326, 658 N.E.2d 754." *State v. Clemons*, 82 Ohio St.3d 438, 1998-Ohio-406, 696 N.E.2d 1009, certiorari denied by *Clemons v. Ohio* (1999), 525 U.S. 1077, 119 S.Ct. 816, 142 L.Ed.2d 675; see, also, *State v. Taylor* (June 7, 2001), Cuyahoga App. No. 78383.

{¶ 23} Moreover, the trial court admonished the jury that closing arguments were not evidence. We presume that the jury followed the court's instructions. *State v. Loza*, 71 Ohio St.3d 61, 79, 1994-Ohio-409, 641 N.E.2d 1082.

{¶ 24} Therefore, we find that the prosecutor's statements during closing argument did not prejudice Tate and deny him a fair trial. We cannot say, and Tate has not demonstrated, that absent the prosecutor's statements, the outcome of the trial would have been different.

{¶ 25} The first assignment of error is overruled.

Sufficiency and Manifest Weight of the Evidence

{¶ 26} In the second assignment of error, Tate argues that the state failed to show sufficient evidence that he “knowingly” caused or attempted to cause physical harm to Chelsia by means of a deadly weapon. In the third assignment of error, Tate claims that his convictions were against the manifest weight of the evidence.

{¶ 27} When an appellate court reviews a claim of insufficient evidence, “the 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.” *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶77, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶37.

{¶ 28} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

{¶ 29} “The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence

and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387. In other words, a reviewing court asks whose evidence is more persuasive—the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387. '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.' Id. at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."

{¶ 30} Tate was convicted of felonious assault, in violation of R.C. 2903.11, that states in pertinent part: "(A) No person shall knowingly * * * (2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon * * * ."

{¶ 31} "The culpable mental state required for felonious assault is knowledge, not purpose or intent. A person acts knowingly when he is aware that his conduct will probably cause a certain result." *State v. Reed*, Cuyahoga App. No. 89137, 2008-Ohio-312, citing R.C. 2901.22(B). R.C. 2901.22(B) states: "A person acts knowingly, regardless of his purpose, when he is aware that his

conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.” Moreover, “[w]hen a defendant voluntarily acts in a manner that is likely to cause serious physical injury, the factfinder can infer that the defendant was aware that [her] actions would cause whatever injury results from [her] actions, or in other words, that [she] acted knowingly.” *Reed* at ¶10; see, also, *State v. Kessler*, Cuyahoga App. No. 93340, 2010-Ohio-2094.

{¶ 32} Chelsia testified that Tate followed her in his truck and momentarily stopped the truck before accelerating and hitting her. Although Tate denied he ever hit Chelsia with his truck, we find the weight of the evidence supports the finding that Tate was acting knowingly when he struck Chelsia with his truck.

{¶ 33} Tate was also convicted of domestic violence, which was charged as a felony because he had two prior convictions for domestic violence. Before trial, Tate stipulated to those convictions. In arguing that his convictions for domestic violence and felonious assault were against the manifest weight of the evidence, Tate maintains that his testimony was more credible than that of his former wife. But the determination of weight and credibility of the evidence is for the trier of fact. *State v. Chandler*, Franklin App. No. 05AP-415, 2006-Ohio-2070, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. The rationale behind this well-settled tenet is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses’ manner and demeanor, and determine whether the witnesses’ testimonies are credible. *State v. Tinsley*, Cuyahoga App.

Nos. 92335 and 92339, 2010-Ohio-2083; *State v. Williams*, Franklin App. No. 02AP-35, 2002-Ohio-4503. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Sheppard* (Oct. 12, 2001), Hamilton App. No. C-000553. Consequently, although we act as a “thirteenth juror” when considering whether the manifest weight of the evidence requires reversal, we are charged with the task of giving great deference to the factfinder’s determination of the witnesses’ credibility. *State v. Covington*, Franklin App. No. 02AP-245, 2002-Ohio-7037, at ¶22.

{¶ 34} We find this case is not one that weighs heavily against conviction and there is no evidence the jury “lost its way.”

{¶ 35} Accordingly, we overrule the second and third assignments of error.

Ineffective Assistance of Counsel

{¶ 36} In the fourth assignment of error, Tate argues that his rights were violated because he was afforded ineffective assistance of trial counsel.

{¶ 37} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that (1) the performance of defense counsel was seriously flawed and deficient and (2) the result of the appellant’s trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407. Judicial scrutiny of defense counsel’s performance must be highly deferential. *Strickland* at 689. In Ohio, there is a presumption that a properly licensed

attorney is competent. *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905.

{¶ 38} Tate maintains that his counsel's performance was deficient because the attorney failed to object during closing arguments and "opened the door" to testimony about Tate's previous acts of violence against Chelsia when counsel asked her why she appeared to testify.

{¶ 39} A review of the record shows that Tate was afforded the effective assistance of trial counsel. We have already found no error with the statements made by the state during closing arguments. In addition, the mere failure to object to error is not enough to sustain a claim of ineffective assistance of counsel. *State v. Holloway* (1988), 38 Ohio St.3d 239, 244, 527 N.E.2d 831. "To prevail on such a claim, a defendant must first show that there was a substantial violation of any of defense counsel's essential duties to his client and, second, that he was materially prejudiced by counsel's ineffectiveness." *Id.*

{¶ 40} Although in retrospect perhaps defense counsel should have tried to rein in Chelsia's responses to his questions that led to her disclosing the prior abuse, trial tactics, even questionable ones, are not grounds for reversal based on an ineffective assistance of counsel claim. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N.E.2d 547, ¶116. It is entirely reasonable that counsel made a conscious decision to ask Chelsia if she was appearing in court solely because she was arrested on a warrant as a part of trial strategy.

{¶ 41} Therefore, in finding that Tate is unable to meet either prong of the *Strickland* test, the fourth assignment of error is overruled.

{¶ 42} Accordingly, judgment is affirmed.

It is ordered that appellee recover of 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 common pleas court to carry this judgment into execution.

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

LARRY A. JONES, JUDGE

PATRICIA A. BLACKMON, P.J., and
MARY J. BOYLE, J., CONCUR