[Cite as *Cleveland v. Williams*, 2015-Ohio-1739.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101588

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

KIRK WILLIAMS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2013 CRB 035652

BEFORE: Blackmon, J., Keough, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: May 7, 2015

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Kirk Williams ("Williams") appeals his conviction following a bench trial in the Cleveland Municipal Court. Williams assigns the following errors for our review:

> I. The trial court erred in admitting hearsay statements describing the events and identifying appellant as the assailant.
>
> II. The state presented insufficient evidence of identification.
>
> III. Appellant was deprived of effective assistance of counsel.

{¶2} Having reviewed the record and pertinent law, we affirm Williams's conviction. The apposite facts follow.

{¶3} On November 13, 2013, the city of Cleveland ("the City") charged Williams with domestic violence in violation of R.C. 2919.25(A), assault in violation of R.C. 2903.13(A), and aggravating menacing in violation of Cleveland Codified Ordinance 621.06. At his arraignment, Williams entered pleas of not guilty to the charges. On May 13, 2014, the case proceeded to a bench trial.

Bench Trial

{¶4} Officer Carol Balensic-Newcomb, of the Cleveland Police Department's Dispatch Unit, testified that on October 23, 2013, she received a call from Selena Lewis indicating that she had just been beaten by her live-in-boyfriend and that she was five months pregnant. Officer Balensic-Newcomb testified that Lewis was very upset and emotional. During Officer Balensic-Newcomb's testimony, the City played a recording of the 911 call.

{¶5} Officer Robert Wagner of the Cleveland Police Department testified that he and his partner, Officer James Bresnahan, responded to Lewis's home as a result of the 911 call. Upon arrival, Officers Wagner and Bresnahan found Lewis very upset and crying. Officer

Wagner stated that Lewis had a large bump on the right side of her face, close to her eye, and had red marks on her neck, as well as on her nose. Officer Wagner said that Lewis indicated that Williams, the father of her unborn child, had assaulted her.

{¶6} Officer Bresnahan added that Lewis identified Williams, who was not present when they arrived, as her assailant. Officer Bresnahan stated that Lewis provided Williams's personal information including date of birth, height, and weight.

{¶7} Lewis did not appear in court to testify. At the close of the City's case, defense counsel made a Crim.R. 29 motion that was denied by the trial court. The trial court found Williams guilty of domestic violence and assault, but not guilty of aggravated menacing. On June 3, 2014, the trial court sentenced Williams to seven days in jail, but gave him credit for seven days previously served. The trial court also imposed one year of active probation.

Hearsay Statements

{¶8} In the first assigned error, Williams argues that his rights under the Sixth Amendment's Confrontation Clause were violated when the trial court admitted inadmissible hearsay statements.

{¶9} The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." Thus, "testimonial statements of a witness who did not appear at trial" may not be admitted unless the witness "was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

{¶10} In the instant case, Williams contends that since Lewis did not testify at trial, he was convicted solely on the police officers' testimony regarding Lewis's out-of-court statements.

{¶11} Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Pursuant to Evid.R. 802, hearsay is inadmissible unless it falls within an exception provided by the rules of evidence.

{¶12} Here, Officers Wagner's and Bresnahan's testimonies regarding Lewis's statements were properly admitted because the statements were not hearsay, as they would fall under the excited utterance exception to the hearsay rule contained in Evid.R. 803(2). Evid.R. 803(2) defines an "excited utterance" as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

{¶13} For an alleged excited utterance to be admissible, four prerequisites must be satisfied: (1) a startling event produced a nervous excitement in the declarant, (2) the statement was made while still under the stress of excitement caused by the event, (3) the statement related to the startling event, and (4) the declarant personally observed the startling event. *See State v. Ray*, 189 Ohio App.3d 292, 2010-Ohio-2348, 938 N.E.2d 378 (8th Dist.). There is no magic time limit to determine whether a victim of domestic violence is making a statement under the stress of a startling occurrence; these statements must "be analyzed in light of the particular facts and circumstances in which [they were] made." *State v. Griffitts*, 2d Montgomery No. 18755, 2002-Ohio-921, citing *State v. Justice*, 92 Ohio App.3d 740, 746, 637 N.E.2d 85 (9th Dist.1994). Lewis was visibly upset and crying; her face was swollen; and she had bruises on her face, as well as on her neck when she made the statements to the police officers. In our view, the trial court's decision to admit these statements was reasonable.

{¶14} Further, in *Crawford*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court found that the Confrontation Clause of the Sixth Amendment bars

the admission of "testimonial hearsay" unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine the declarant. *Id*. at 68. Although the Supreme Court did not provide a comprehensive definition of the term "testimonial," the court indicated that the term "testimonial" applies, at a minimum, to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and responses to police interrogations. *Id.*; *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶ 101. The threshold determination, therefore, is whether the statements in question are classified as testimonial. *Id.*

{¶15} In determining whether a statement constitutes "testimonial hearsay," the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), are instructive. In *Davis*, the United States Supreme Court held that statements made during police "interrogations" are nontestimonial when they are made "under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency." *Id*. at paragraph one of the syllabus. Such statements are testimonial when "the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id*. at 822.

{¶16} In *Hammon*, the hearsay statements at issue were made to police officers responding to a domestic-violence complaint after they had secured the scene. *Id*. at 817-821. The Supreme Court held that these statements were testimonial and were barred by the Sixth Amendment because the police questioned the victim about possibly criminal past conduct. *Id.* at 829-832. The court explained that "there was no immediate threat" to the victim and "no emergency in progress," because the police had separated the abusive husband from his wife. *Id.* at 829-830.

{¶17} The court further explained that when the officer questioned the victim, he was "not seeking to determine 'what is happening,' but rather 'what happened.'" *Id.* at 830. In fact, the interrogating police officer testified that there was no emergency in progress, the victim told police she was fine and the police interrogation of the victim occurred some time after the events had passed. *Id.* at 829-830. Accordingly, the court concluded that "[o]bjectively viewed, the primary, if not indeed the sole purpose of the interrogation was to investigate a possible crime * * *." *Id.*

{¶18} Although Williams contends that the statements were inadmissible, the transcript of the proceedings established that Lewis made the statements about a startling event and she was still under the influence of the event when she made the statements.

{¶19} During Officer Wagner's testimony, the following exchange took place:

Q. And when you arrived on scene, who was there?
A. When we arrived on scene, the victim, Ms. Lewis, is the one that answered the door.

Q. Okay. And describe your interaction with her, did she have any injuries?

A. Yes. She opened the door. She was crying and she had a large bump on the right side of her face by her eyes.

Q. Okay. And what was her emotional state like at that time?

A. Very upset. She was crying.

Q. She was crying, okay. So she had an injury on her face and she was crying?

A. Yes.

Tr. 15-16.

{¶20} The above exchange satisfies all of the foundational requirements for admission of Lewis's statements as an excited utterance: the existence of a startling or shocking event, the

declarant possessing firsthand knowledge of that event and being under the stress or excitement caused by the event when her statements were made, and the declarant's statements that relate to that startling event.

{¶21} Further, we do not find Lewis's statements were testimonial in nature. Although Williams was not at home when the police arrived, the emergency was still in progress. In contrast to *Hammon* where the police questioned the victim some time after the events occurred and the witness told police she was fine, the events in the instant case occurred just moments before police arrived, and Lewis exhibited signs of distress. Williams had not yet been apprehended, and Lewis was injured and crying. The present circumstances objectively indicate that the primary purpose of the interrogation was to enable the police to assist the victim in an ongoing emergency. *See Cleveland v. Colon*, 8th Dist. Cuyahoga No. 87824, 2007-Ohio-269. Therefore, Lewis's statements did not constitute testimonial hearsay and were properly admitted. Accordingly, we overrule the first assigned error.

Insufficient Evidence of Identification

{¶22} In the second assigned error, Williams argues the City failed to properly identify him during trial, and therefore, the trial court erred in denying his Crim.R. 29 motion for acquittal. We find no merit in this assertion.

{¶23} Crim.R. 29(A) provides for a judgment of acquittal "if the evidence is insufficient to sustain a conviction of such offense or offenses." The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Chandler*, 8th Dist., Cuyahoga No. 98866, 2013-Ohio-2903, ¶ 15. 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. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶24} It is well settled that the state may rely on circumstantial evidence to prove an essential element of an offense because "circumstantial evidence and direct evidence inherently possess the same probative value." *Id.* at paragraph one of the syllabus. "'Circumstantial evidence' is the proof of certain facts and circumstances in a given case, from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind." *State v. Duganitz*, 76 Ohio App.3d 363, 601 N.E.2d 642 (8th Dist.1991), quoting *Black's Law Dictionary* (5th Ed. 1979) 221.

{¶25} Identification can be proved by circumstantial evidence, just like every other element the state must prove. *State v. Collins*, 8th Dist. Cuyahoga No. 98350, 2013-Ohio-488, ¶ 19; *State v. Kiley*, 8th Dist. Cuyahoga Nos. 86726 and 86727, 2006-Ohio-2469, ¶ 10. As this court has recognized:

> It is well settled that, in order to warrant a conviction, the evidence must establish beyond a reasonable doubt the identify of the accused as the person who actually committed the crime. *State v. Scott*, 3 Ohio App.2d 239, 244, 210 N.E.2d 289 (1965). However, there is no general requirement that the defendant must be visually identified in court by a witness. *Id.* Rather, direct or circumstantial evidence is sufficient to establish the identity of the accused as the person who committed the crime. *State v. Irby*, 7th Dist. Mahoning No. 03 MA 54, 2004-Ohio-5929, ¶ 16-21.

Collins at ¶ 19, quoting *State v. Lawwill*, 12th Dist. Butler No. CA2007-01-014, 2008-Ohio-3592, ¶ 11.

{¶26} We find there was sufficient circumstantial evidence presented by the state that would allow the factfinder to find beyond a reasonable doubt that Williams was the person who assaulted Lewis in her apartment on October 23, 2013. Officer Balensic-Newcomb testified that

she received a 911 call from Lewis that day, and Lewis told her that she had just been beaten by her live-in boyfriend, Kirk Williams. The 911 tape was played during trial and confirmed that Lewis identified Williams as her live-in boyfriend.

{¶27} Further, Officer Wagner testified that when he and Officer Bresnahan responded to Lewis's apartment, Lewis told them that she lived with Williams and that he had assaulted her. Lewis then told the officers Williams's age, date of birth, and social security number, and gave a physical description of him. At trial, Officer Bresnahan testified that Williams's date of birth and address matched the information received from Lewis; Williams neither objected to this testimony nor offered any evidence disputing Officer Bresnahan's testimony. Likewise, Williams did not object when Officer Wagner identified him in court as the perpetrator of the assault on Lewis.

{¶28} Based on the evidence presented by the City and the trial court proceedings, the judge had sufficient evidence to identify Williams as the defendant named in the indictment. *United States v. Boyd*, 447 Fed. Appx. 684, 690-691 (6th Cir. 2011) (jury had sufficient circumstantial evidence to identify the defendant where none of the witnesses at trial suggested he was the wrong man, defendant never objected to the prosecutor's references to him as the defendant named in the indictment, and defendant did not challenge witnesses on cross-examination regarding their identification of him). Consequently, the trial court did not err in denying Williams's Crim.R. 29 motion for acquittal. Accordingly, we overrule the second assigned error.

Ineffective Assistance of Counsel

{¶29} In the third assigned error, Williams argues he was denied the effective assistance of counsel.

{¶30} To succeed on a claim of ineffective assistance, a defendant must establish that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Counsel will only be considered deficient if his or her conduct fell below an objective standard of reasonableness. *Strickland* at 688.

{¶31} In *Strickland*, the United States Supreme Court also stated that a court's scrutiny of an attorney's work must be deferential. The court further stated that it is too tempting for an appellant to second-guess his attorney after conviction and appeal and that it would be all too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Accordingly, this court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and the defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *Id.* at 689. Further, to establish resulting prejudice, a defendant must show that the outcome of the proceedings would have been different but for counsel's deficient performance. *Id*. at 694.

{¶32} In the instant case, Williams argues that defense counsel was ineffective for failing to object to the officers' hearsay testimony.

{¶33} However, as the Ohio Supreme Court explained in *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶ 139-140, such tactical decisions do not give rise to a claim for ineffective assistance:

> [F]ailure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel. 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. *State v. Holloway* (1988), 38 Ohio St.3d 239, 244, 527 N.E.2d 831. * * *
>
> [E]xperienced trial counsel learn that objections to each potentially objectionable event could actually act to their party's detriment. * * * In light of this, any single failure to object usually cannot be said to have been error unless the evidence sought is so prejudicial * * * that failure to object essentially defaults the case to the state. Otherwise, defense counsel must so consistently fail to use objections, despite numerous and clear reasons for doing so, that counsel's failure cannot reasonably have been said to have been part of a trial strategy or tactical choice. *Lundgren v. Mitchell* (C.A.6, 2006), 440 F.3d 754, 774. Accord *State v. Campbell*, 69 Ohio St.3d 38, 52-53, 1994-Ohio-492, 630 N.E.2d 339.

{¶34} The record reveals no such failure by Williams's trial counsel. Much to the contrary, defense counsel in this matter that was tried to the bench, argued strenuously in his motion for acquittal and during closing arguments that Lewis's statements to the police should not be considered. Williams has not demonstrated that his trial counsel's performance fell below objective standards of reasonable representation or that he was prejudiced as a result. Accordingly, we overrule the third assigned error.

{¶35} Judgment 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 be sent to said 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.

PATRICIA ANN BLACKMON, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
ANITA LASTER MAYS, J., CONCUR