**[Cite as *State v. Schultz*, 2015-Ohio-3909.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
**Nos. 102306 and 102307**

## STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

## JANET SCHULTZ

DEFENDANT-APPELLANT

**JUDGMENT:**
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-14-584691-A and CR-13-581100-A

**BEFORE:** Jones, J., Celebrezze, A.J., and Boyle, J.

**RELEASED AND JOURNALIZED:** September 24, 2015

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LARRY A. JONES, SR., J.:

**{¶1}** Defendant-appellant, Janet Schultz, appeals her felonious assault conviction. We affirm.

**{¶2}** In December 2013, Schultz was charged with two counts of assault on a peace officer and two counts of assault on a corrections officer in Cuyahoga C.P. No. CR-13-581100. In October 2014, she pleaded no contest to the charges and was found guilty.

**{¶3}** In May 2014, she was charged with two counts of felonious assault in this case. The case proceeded to a jury trial at which the following pertinent evidence was presented.

**{¶4}** On March 21, 2014, 48-year-old Schultz and her 76-year-old boyfriend, Wesley Reese, went to a Mexican restaurant and ordered food and a pitcher of margaritas. According to Reese, Schultz drank more than half of the pitcher and he consumed the rest. They next went to a bar where they each drank another one to two beers. After leaving the bar, the couple went to Schultz's apartment. Reese sat on a stool in the kitchen. "All of a sudden something happened," and Schultz ran at Reese with a small bar stool. Reese put his hands up to try and deflect the impending blow, but the next thing he remembered was lying on the floor, looking down at his foot where "toes were pointing back where his heel used to be."

**{¶5}** Reese called 911 on his cell phone and reported that he had been beaten and had a broken leg. Officer Lou Gneza of the North Royalton Police Department responded to the scene and found Reese still lying on the floor. Schultz told the officer that Reese injured himself when he became angry and started throwing things around. Reese corroborated Schultz's story to the police, and told the police and paramedic that he tripped and injured himself.

**{¶6}** Reese was transported to the emergency room. Emily Dunn ("Dunn"), an emergency room nurse, performed a head-to-toe assessment. Reese told the nurse that he and his girlfriend had gone out for drinks and when they came home, his girlfriend could not find her drugs in the freezer, became upset, and began hitting him with a stool.

**{¶7}** Dr. Vladimir Dubchuk evaluated Reese and found his blood sugar level was elevated and he also had a high blood alcohol level. Reese told the doctor that he had been in a fight with his girlfriend and she "beat him up."

**{¶8}** Reese suffered fractures to his right orbital bone, both sides of his nose, his rib, and his right leg. CT scans also revealed healing rib and spinal fractures.

**{¶9}** Dr. Dubchuk noted that the combined high blood sugar level and high blood alcohol level could impair a persons's judgment and cause slurred speech but it would be unusual to suffer the type and severity of Reese's injuries from a mere fall.

**{¶10}** Reese stayed in the hospital for five days before he was transferred to a nursing

home where he spent an additional three months recovering from his injuries.

**{¶11}** The jury convicted Schultz of one count of felonious assault. The trial court sentenced her to a total of five years in prison to run concurrent to one year in her assault case, Case No. CR-13-581100. At the time of sentencing, Reese still walked with a cane and told the court he attended daily physical therapy.

**{¶12}** Schultz filed two notices of appeal. Sua sponte, we consolidated the appeals for record, briefing, hearing, and disposition. Schultz raises the following assignments of error:

> I: The trial court erred when it allowed into evidence testimony by medical professionals and medical records containing statements made by the alleged victim as to the cause of his injuries.
>
> II: There was insufficient weight of evidence to support a conviction.

**{¶13}** As an initial matter, although Schultz indicated in her notices of appeal that she was appealing the convictions from both this case and her 2013 assault case, her assigned errors deal solely with her felonious assault case, Cuyahoga C.P. No. CR-14-584691. Therefore, we will not consider any issues that may pertain to her 2013 assault case, CR-13-581100.

**{¶14}** In the first assignment of error, Schultz argues that the trial court erred when it allowed Reese's statements to the treating physician and the emergency room nurse regarding the cause of his injuries into evidence because the statements were not pertinent to Reese's

medical diagnosis or treatment and were, therefore, hearsay.

**{¶15}** The admission or exclusion of evidence rests within the sound discretion of the trial court. *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343 (1987). To find an abuse of discretion, we must find that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

**{¶16}** Hearsay is an out of court statement offered to prove the truth of the matter asserted. Evid.R. 801(C). Hearsay is not admissible unless it falls within one of the exceptions enumerated in the rules of evidence. Evid.R. 802. Should hearsay statements be admitted improperly, however, such error does not necessarily require reversal of the outcome of the trial if it was harmless. *State v. Buzanowski*, 8th Dist. Cuyahoga No. 99854, 2014-Ohio-1947, ¶ 46, *appeal not allowed*, 141 Ohio St.3d 1454, 2015-Ohio-239, 23 N.E.3d 1196.

**{¶17}** One of the exceptions to the hearsay rule is found in Evid.R. 803(4), which allows "[s]tatements for purposes of medical diagnosis or treatment and describing medical history or past or present symptoms, pain, or sensation, or in the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Thus, based on this rule, courts must decide whether challenged statements are pertinent to diagnosis or treatment of the witness. *State v. Chappell*, 97 Ohio App.3d 515, 531, 646 N.E.2d 1191 (8th Dist.1994).

**{¶18}** Statements that are admissible under Evid.R. 803(4) are understood to be reliable because: (1) the effectiveness of treatment frequently depends upon the accuracy of the information related to the physician, and (2) such statements are "reasonably relied on by a physician in treatment or diagnosis." *State v. Cockrell*, 10th Dist. Franklin No. 04AP-487, 2005-Ohio-2432, ¶ 31, citing *State v. Dever*, 64 Ohio St.3d 401, 596 N.E.2d 436 (1992). Given these dual rationales for the hearsay exception, courts have adopted a two-part test to determine the admissibility of hearsay statements under Evid.R. 803(4): (1) Is the declarant's motive consistent with that of a patient seeking treatment; and (2) Is it reasonable for the physician to rely on the information in diagnosis or treatment. *Cockrell* at ¶ 32, citing *State v. Clary*, 73 Ohio App.3d 42, 52, 596 N.E.2d 554 (10th Dist.1991).

**{¶19}** In this case, Schultz claims that Reese's statements to the nurse, specifically that she beat him up after she became angry because she could not find her drugs, did not aid in the treatment or diagnosis of his injuries, therefore, they should have been excluded.

**{¶20}** Dunn testified that when a patient comes to the emergency room, it is standard procedure to perform a head-to-toe assessment of the patient, ask the patient what brought him or her to the hospital, current complaints, and questions in regard to home life and medical and surgical history. The nurse then coordinates the patient's care with the physician.

**{¶21}** Dunn testified that it is important to know what brings a patient to the hospital so that the staff can determine how to care for the patient and what services the patient will

need. The patients are also screened for personal safety in the home so that "[i]f anything is going on at home, any domestic concerns, we consult social services." Dunn testified that it is important to know whether a patient received his or her injuries as the result of an assault "for the safety of everyone involved. We screen for visitors that come in, but also if anyone wants to pursue any charges or police reports."

**{¶22}** Although Dunn testified that part of the purpose for asking a patient about the case of his or her injuries was "if anyone wants to pursue any charges or police reports," which would fall outside the scope of Evid.R. 803(4), she also testified as to the importance of the safety screening in determining how to care for the patient. Thus, the statements at issue fall under the exception to hearsay. Moreover, there was no evidence or testimony presented during trial that Dunn asked Reese any questions beyond what was necessary in order for him, as the patient, to be properly diagnosed and treated for his injuries. *See Cockrell,* 10th Dist. Franklin No. 04AP-487, 2005-Ohio-2432, at ¶ 33. Thus, the trial court did not abuse its discretion in allowing in the nurse's statements into evidence.

**{¶23}** Schultz also claims that the challenged statements of identification made by Reese to his treating physician, Dr. Dubchuk, fall outside the Evid.R. 803(4) exception because the doctor devised a treatment plan for Reese prior to assessing him. According to Schultz, naming her as Reese's assailant did not affect the treatment plan or assist the doctor in providing better treatment; therefore, the trial court should have excluded Reese's statement to

Dr. Dubchuk identifying Schultz as his assailant.

**{¶24}** Dr. Dubchuk testified that as a trauma surgeon, he evaluates all trauma patients, coordinates their care, and performs any necessary surgeries. As part of the patient evaluation, Dr. Dubchuk performs physical exams, orders studies and x-rays, and devises a treatment plan for the patient. For Reese, once he was discharged from the emergency room and admitted into the hospital, Dr. Dubchuk took over his care. He conferred with the house physician and devised a management plan. He also performed the physical exam, reviewed hospital data, ordered tests, and, based upon Reese's specific complaints, ordered a series of CT scans.

**{¶25}** Contrary to Schultz's claim, it is not clear from the record that Dr. Dubchuk's treatment plan was completed prior to Reese's physical examination or that the history Reese told the doctor did not affect the doctor's care plan. In fact, the doctor testified that he ordered the CT scans based on Reese's complaints of pain to his head, face, and lower extremities, and loss of mobility.

**{¶26}** Thus, we find that the trial court did not abuse its discretion in determining that the doctor's statements were made for purposes of Reese's medical diagnosis and treatment by Dr. Dubchuk.

**{¶27}** Finally, Schultz claims that the trial court erred in admitting unredacted medical records into evidence because the documents contained hearsay that identified Schultz as

Reese's assailant. Schultz fails, however, to support this argument with more than her mere assertion that the records prejudiced her.

**{¶28}** Generally, authenticated medical records are admissible at trial. *Hunt v. Mayfield*, 65 Ohio App.3d 349, 352, 583 N.E.2d 1349 (2d Dist.1989). Although potentially replete with hearsay problems, medical records are admissible under the exception to the hearsay rule for records of regularly conducted activity set forth in Evid.R. 803(6). *State v. Humphries*, 79 Ohio App.3d 589, 595, 607 N.E.2d 921 (12th Dist.1992). Evid.R. 803(6) provides that records of regularly conducted activity are not excluded by the hearsay rule. The records include:

> A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Evid.R. 803(6).

**{¶29}** Any error in the admission of unredacted medical records was harmless pursuant to Crim.R. 52(A), because it was merely cumulative to the admissible testimony Reese offered. *See State v. Fears*, 86 Ohio St.3d 329, 715 N.E.2d 136 (1999) (witness's testimony was cumulative and constituted harmless error because the error did not contribute to the verdict); *State v. Smith*, 8th Dist. Cuyahoga No. 90476, 2008-Ohio-5985 (statement in

medical record identifying boyfriend as attacker was harmless because it was cumulative to the admissible testimony by the victim).

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

**{¶31}** In the second assignment of error, Schultz argues that there is insufficient evidence to support her conviction.

**{¶32}** Crim.R. 29 mandates that the trial court issue a judgment of acquittal where the state's evidence is insufficient to sustain a conviction for the offense; Crim.R. 29(A) and a sufficiency of the evidence review require the same analysis. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37.

**{¶33}** In analyzing whether a conviction is supported by sufficient evidence, the reviewing court must view the evidence "in the light most favorable to the prosecution" and ask whether "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *State v. Carter*, 72 Ohio St.3d 545, 651 N.E.2d 965 (1995).

**{¶34}** Although Schultz argues that there was insufficient evidence to support her conviction, her argument under this assignment of error centers solely on Reese's credibility and her claim that no rational trier of fact could have found beyond a reasonable doubt that Schultz knowingly caused physical harm to Reese. Schultz does not argue that the state

presented insufficient evidence to sustain the conviction nor does she challenge the manifest weight of the evidence; therefore, this court could summarily overrule this assignment of error. *See* App.R. 16.

**{¶35}** But because cases are best decided on their merits, we will consider both the sufficiency and the manifest weight of the evidence. Unlike a claim involving sufficiency of the evidence, when reviewing a challenge to the manifest weight of the evidence, this court, 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 trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). Reversing a conviction as being against the manifest weight of the evidence is reserved for only the exceptional case in which the evidence weighs heavily against the conviction. *Id.* It is not the function of an appellate court to substitute its judgment for that of the trier of fact. *Jenks* at 279.

**{¶36}** Schultz was convicted of violating R.C. 2903.11(A)(1), felonious assault, which provides, in part, that no person shall knowingly cause or attempt to cause serious physical harm to another.

**{¶37}** Reese testified that they went to Schultz's apartment after a day of drinking and Schultz attacked him with a stool "all of the sudden." He called 911 and reported he had a

broken leg and had been beaten. Reese was taken to the hospital with a broken nose, eye-socket, rib, and leg. This testimony alone is sufficient to sustain Schultz's felonious assault conviction.

**{¶38}** Schultz claims that Reese's ever-changing story to account for his injuries made his testimony incredible. We disagree.

**{¶39}** Reese testified how Schultz attacked him with a bar stool, punched him, and left him lying on the floor with his toes pointing back where his heel should be. He further testified that he told police and paramedics that he fell because he did not want his girlfriend to get into trouble.

**{¶40}** Officer Gneza testified that he was responding to a report of an assault or disturbance and when he arrived he found Reese lying on the floor in "obvious pain." Reese told the officer, in Schultz's presence, that he had fallen and injured himself.

**{¶41}** At the hospital, Reese was examined by trauma surgeon Dr. Dubchuk. Dr. Dubchuk noted the reports from the paramedics and the critical care unit and specialists as part of his evaluation. Dr. Dubchuk ordered CT scans that confirmed multiple broken bones. The doctor testified that based upon his experience in treating trauma patients and in considering all of Reese's injures, it would be unusual that the injuries were the result of a fall.

**{¶42}** The jury, as the trier of fact, had the opportunity to judge the credibility of the witnesses. As such, it cannot be said that the jury clearly lost its way; nor is this one of those

exceptional cases in which the evidence weighs heavily against the conviction.

**{¶43}** The second assignment of error is overruled.

**{¶44}** 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 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.

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LARRY A. JONES, SR., JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
MARY J. BOYLE, J., CONCUR