

[Cite as *Cleveland v. Burgos*, 2015-Ohio-5423.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102751

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

ANGELA BURGOS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2014 CRB 032247

BEFORE: E.T. Gallagher, J., Celebrezze, A.J., and E.A. Gallagher, J.

RELEASED AND JOURNALIZED: December 24, 2015

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Angela Burgos (“Burgos”), appeals her conviction and sentence. She raises the following three assignments of error for our review:

1. The decision was against the manifest weight of the evidence.
2. The court violated appellant’s right to remain silent.
3. The court, at sentencing, failed to ask appellant if she wished to make a statement on her own behalf.

{¶2} We find some merit to the appeal and affirm the conviction, but remand the case to the trial court for resentencing.

I. Facts and Procedural History

{¶3} Burgos was charged with one count of criminal damaging. The case proceeded to a bench trial where witnesses described an incident that occurred at a Burger King restaurant located at the corner of Lake Avenue and Detroit Avenue in Cleveland. Amber Pruitt (“Pruitt”), a Burger King employee, testified that as she was returning to the restaurant from her break she discovered Burgos, Burgos’s six-year old son, and an adult man in a restricted area of the Burger King parking lot. Pruitt asked them to leave the restricted area and, according to Pruitt, Burgos became angry and threatened her. Following an oral confrontation, the man suggested to Pruitt that she leave the parking lot because Burgos was calling family members to come and “jump” her.

{¶4} At the time of the incident, Burgos lived close to the Burger King, and several family members were at her house for a birthday party. Before Pruitt could exit the parking lot to flee the scene, she was surrounded by a group of people attempting to

remove her from the car. Pruitt testified that some people were reaching inside the car to hit her and pull her hair. During the assault, Pruitt observed Burgos “kicking [her] car in with her knee.” (Tr. 12.)

{¶5} Two other Burger King employees observed the incident and also testified at trial. One of the employees, Tashara Byrd (“Byrd”), recognized Burgos as a frequent Burger King customer, who had recently applied for a job. Byrd witnessed Burgos kick the side of Pruitt’s car with her knee, and Byrd positively identified Burgos as the person who dented Pruitt’s car.

{¶6} Burgos and a neighbor, Alfredo Quinones (“Quinones”), testified for the defense. Quinones explained that he lived on West 76th Street, near Burgos’s house and the Burger King. On the night of the incident, he heard several women yelling at each other, and he saw Burgos’s six-year-old son walking home from Burger King by himself. Quinones walked over to the boy and observed three or four women surrounding Pruitt’s car. He also noticed that Burgos’s brother was standing nearby, but Quinones did not stay to watch the incident because he took the child home and away from the scene.

{¶7} Burgos testified on her own behalf. She alleged that Pruitt incited the altercation by accusing her of performing oral sex on the man who was with her in the restricted area. Burgos also testified that Pruitt was aggressive and lunged toward her in a threatening manner. Burgos denied that she ever touched Pruitt’s car.

{¶8} At the close of the evidence, the trial court found Burgos guilty of criminal damaging and referred Burgos to the probation department for a presentence

investigation. The prosecutor asked for restitution, but the court sentenced Burgos to 90 days in jail because she told the probation officer she would rather go to jail than pay restitution. Burgos now appeals the court's judgment and has been released from jail pending appeal.

II. Law and Analysis

A. Manifest Weight of the Evidence

{¶9} In the first assignment of error, Burgos argues the court's guilty verdict was against the manifest weight of the evidence. Burgos contends there was no credible evidence that she damaged Pruitt's car.

{¶10} "A manifest weight challenge * * * questions whether the prosecution met its burden of persuasion." *State v. Thomas*, 70 Ohio St.2d 79, 80, 434 N.E.2d 1356 (1982). The manifest weight of the evidence standard of review requires us to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine 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).

{¶11} The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997). Therefore, the discretionary power to grant a new trial should only be exercised in

exceptional cases where the evidence weighs heavily against the conviction. *Thompkins* at 386.

{¶12} Burgos was convicted of criminal damaging in violation of Cleveland Codified Ordinances 623.02, which states, in relevant part, that “[n]o person shall * * * [w]ithout privilege to do so, knowingly * * * damage * * * the property of another.”

{¶13} Burgos argues there is no credible evidence to prove that she knowingly damaged Pruitt’s car. She cites certain parts of Pruitt’s statements to support her argument. For example, Pruitt stated: “I couldn’t see what was going on,” and “I know she kicked my car, because when I got outside of my car, I seen the damage.” (Tr. 12.) Pruitt also stated: “I didn’t physically, you know what I’m saying, see her do it, but by the time I got out of my car, my car was damaged.” (Tr. 16.) When asked on cross-examination if she could identify who damaged her car, she replied, “I don’t know.” (Tr. 16.)

{¶14} However, when asked if Pruitt knew whether Burgos damaged her car, she emphatically replied: “I’m sure. I’m positively sure she did.” Pruitt later explained that Burgos and an unidentified woman reached into the car from opposite sides to hit her. The unidentified woman was by the driver’s side window, while Burgos was at the passenger’s side door. Pruitt’s car was dented on the passenger side door. Although Pruitt might not have seen the door itself become dented, she observed Burgos kicking it with her knee and testified “she definitely hit it.” That Pruitt found the door dented after the incident created a reasonable inference that Burgos, who had hit the door, dented it.

Pruitt admitted, however, that she was unable to identify who caused the damage to her front bumper.

{¶15} Two Burger King witnesses corroborated Pruitt's testimony. As previously stated, Byrd identified Burgos as the person who dented the car door. Burgos argues Byrd's testimony is unreliable because it was dark, and she was standing too far away to see what happened. Although it was dark at the time of the incident and Byrd was 20 to 30 feet away from the car, there was no evidence that the light in the parking lot or the street was inadequate or that Byrd's view of the incident was otherwise obstructed. Further, the trial court had the opportunity to assess her credibility and weigh that piece of evidence.

{¶16} Burgos, herself, testified that Pruitt exited her car and aggressively lunged at her. Burgos also denied that a group of people surrounded Pruitt's car. She testified that her mother did not arrive on the scene until the incident was over, suggesting that her family did not come to the scene until the incident was over. However, Quinones, Burgos's defense witness, contradicted her and corroborated Pruitt's testimony when he stated that four women surrounded Pruitt's car while Pruitt was seated in the car.

{¶17} Based on this testimony, the trial court reasonably found Pruitt and the other state witnesses' testimony more credible than Burgos's testimony. Therefore, we cannot say that the trial court lost its way when it found Burgos guilty of criminal damaging.

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

B. Right to Remain Silent

{¶19} In the second assignment of error, Burgos argues the trial court violated her Fifth Amendment right to remain silent.

{¶20} The Fifth Amendment to the U.S. Constitution provides that an individual shall not “be compelled in any criminal case to be a witness against himself.” Article I, Section 10, of the Ohio Constitution provides the same privilege against self-incrimination. “Any comment which infers that the defendant is guilty because he remained silent subverts the guarantees afforded him by the Fifth Amendment of the Constitution of the United States.” *State v. Williams*, 64 Ohio App.2d 271, 276, 413 N.E.2d 1212 (8th Dist.1979).

{¶21} At the beginning of the bench trial, Burgos voluntarily raised her right hand and was sworn in with all the other witnesses expected to testify. During opening statements, Burgos’s trial counsel indicated the evidence would show that Burgos was “understandably upset” by Pruitt’s accusation that she was performing oral sex in the parking lot. Defense counsel also stated that the Burger King manager spoke with Burgos at the scene and led her to believe that everything was “cool.”

{¶22} Based on the fact that Burgos was sworn in as a witness, and her lawyer indicated the evidence would show Burgos’s subjective view of the incident, the prosecution thought Burgos was probably going to testify. The prosecutor asked for clarification as to whether Burgos would be testifying, and the court replied:

She’s going to have to with the statements defense is making. This is about what he believes the evidence will show as this is opening statement so * * * This is opening statement so your — he’s testifying when he makes a statement what he believes the evidence will show.

{¶23} The court did not violate Burgos's right to remain silent because the court's statement does not create an inference of guilt resulting from a decision not to testify. Further, defense counsel implied she would be testifying in his opening statement, and Burgos was sworn in as a witness. Indeed, Burgos did in fact testify, and there is no evidence that she was forced to do so.

{¶24} An accused may voluntarily waive the Fifth Amendment right against self-incrimination. *State v. Otte*, 74 Ohio St.3d 555, 562, 660 N.E.2d 711 (1996). A suspect's decision to waive his privilege against self-incrimination is presumed voluntary absent evidence that her capacity for self-determination was critically impaired because of coercion. *Id.*, citing *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

{¶25} There is no evidence that Burgos's capacity for self-determination was impaired or that she was coerced to testify. The case was tried to the bench as opposed to a jury. A trial judge understands the defendant's right to remain silent and would not be prejudiced against Burgos if she later decided not to testify even though she was sworn in as a witness. Burgos was represented by competent counsel, who would protect her right to remain silent if she chose to exercise it.

{¶26} Furthermore, the record suggests that Burgos intended to exercise her right to testify in her own defense. As previously stated, she voluntarily swore to testify truthfully and her trial counsel indicated in opening statement that she would be

testifying. Under these circumstances, it is apparent that Burgos waived her right against self-incrimination.

{¶27} The second assignment of error is overruled.

C. Allocution

{¶28} In the third assignment of error, Burgos argues the trial court violated her right of allocution.

{¶29} Ohio law provides an absolute right of allocution. *State v. Green*, 90 Ohio St.3d 352, 358, 738 N.E.2d 1208 (2000). “The purpose of allocution is to permit the defendant to speak on his own behalf or present any information in mitigation of punishment.” *State v. Reynolds*, 80 Ohio St.3d 670, 684, 697 N.E.2d 1358 (1998). The remedy for a violation of one’s right of allocution is to vacate the sentence, remand for resentencing, and provide the defendant an opportunity to speak prior to the resentencing. *State v. Cook*, 8th Dist. Cuyahoga No. 85186, 2005-Ohio-4010, ¶ 6-7.

{¶30} The trial court summarily sentenced Burgos to 90 days in jail because she told a probation officer that she would prefer to go to jail than pay restitution to the victim. The trial court did not provide Burgos the opportunity to make a statement on her behalf. Although Burgos requested jail time in lieu of restitution, she asked to speak at the sentencing hearing, and the trial court denied her request. Under these circumstances, we find the trial court violated Burgos’s right of allocution.

{¶31} The third assignment of error is sustained.

III. Conclusion

{¶32} Burgos's conviction is not against the manifest weight of the evidence where several witnesses provided almost identical accounts of the incident, all of which contradicted Burgos's testimony and showed that she dented Pruitt's car door. The trial court did not violate Burgos's right to remain silent because Burgos waived that right. However, the trial court violated Burgos's right of allocution when it denied her request to speak at the sentencing hearing.

{¶33} Therefore, the Cleveland Municipal Court's judgment is affirmed in part and reversed in part. We affirm Burgos's criminal damaging conviction, but vacate the sentence, and remand the cause to the trial court for resentencing to afford Burgos the right to be heard in mitigation of sentence.

It is ordered that appellee and appellant share the 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 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 resentencing to afford Burgos the right to be heard in mitigation of sentence.

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

EILEEN T. GALLAGHER, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
EILEEN A. GALLAGHER, J., CONCUR