

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

STEPHANIE MALDONADO

Appellant

C.A. No. 01CA007924

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 00CR056733

DECISION AND JOURNAL ENTRY

Dated: May 8, 2002

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

SLABY, Presiding Judge.

{¶1} Defendant, Stephanie Maldonado, appeals from her conviction in the Lorain County Court of Common Pleas for aggravated burglary. We affirm.

{¶2} On November 29, 2000, the Lorain County Grand Jury indicted Defendant on two separate counts of aggravated burglary, in violation of R.C. 2911.11(A)(1) and (A)(2). A bench trial followed. Defendant moved for acquittal pursuant to Crim.R. 29; however, the trial court denied her motion. Subsequently,

the trial court found Defendant guilty of aggravated burglary, in violation of R.C. 2911.11(A)(1), and not guilty of aggravated burglary, in violation of R.C. 2911.11(A)(2). The trial court sentenced Defendant accordingly. Defendant timely appeals raising three assignments of error for review. For ease of review, we will address assignments of error two and three together as they concern similar issues of law and fact.

ASSIGNMENT OF ERROR I

{¶3} [Defendant's] constitutional rights to due process and right to counsel were prejudiced by the ineffective assistance of trial counsel.

{¶4} In her first assignment of error, Defendant contends that she was denied effective assistance of counsel, in violation of the United States and Ohio Constitutions, due to her counsel's failure to file a notice of an alibi and call various witnesses. Additionally, Defendant contends that the cumulative effect of her counsel's actions amounts to ineffective assistance of counsel. Defendant's contentions lack merit.

{¶5} The United States Supreme Court enunciated a two-part test to determine whether counsel's assistance was ineffective as to justify a reversal of sentence or conviction. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 80 L.Ed.2d 674. "First, the defendant must show that counsel's performance was deficient." *Id.* To show the deficiencies in counsel's performance, a defendant must prove "errors so serious that counsel was not functioning as the 'counsel'

guaranteed the defendant by the Sixth Amendment.” Id. Second, a defendant must establish that counsel’s deficient performance resulted in prejudice to the defendant which was “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Id.

{¶6} Upon reviewing counsel’s performance, there is a strong presumption that counsel’s actions were part of a valid trial strategy. Id. at 689. We note that there are numerous avenues in which counsel can provide effective assistance of counsel in any given case, and debatable trial strategies do not constitute ineffective assistance of counsel. *State v. Gales* (Nov. 22, 2000), 9th Dist. No. 00CA007541, at 17; *State v. Clayton* (1980), 62 Ohio St.2d 45, 49. Accordingly, “[d]ecisions regarding the calling of witnesses are within the purview of defense counsel’s trial tactics[]” and absent a showing of prejudice, the failure to call witnesses will not be deemed erroneous. *State v. Coulter* (1992), 75 Ohio App.3d 219, 230; *State v. Hunt* (1984), 20 Ohio App.3d 310, 312. Additionally, the decision to present an alibi constitutes a valid trial tactic. *State v. Yeager* (June 1, 1994), 9th Dist. No. 16592, at 5.

{¶7} Pursuant to the doctrine of cumulative error, a conviction will be reversed where the cumulative effect of multiple errors deprives a defendant of her constitutional right to a fair trial, even though each individual error does not constitute cause for reversal. *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus. Nevertheless, a defendant’s claim of cumulative

error is without merit in instances where prejudicial error is nonexistent. *State v. Garner* (1995), 74 Ohio St.3d 49, 64; *State v. Moreland* (1990), 50 Ohio St.3d 58, 69.

{¶8} Defendant argues that her counsel was ineffective for three reasons. First, Defendant asserts that the State presented witnesses whose credibility was questionable; therefore, her counsel should have countered their testimony by calling Eddie Oliver (“Oliver”) to testify. Upon a review of the record, it is evident that defense counsel thoroughly cross-examined the State’s witnesses and addressed issues of credibility. Furthermore, defense counsel presented witnesses that challenged the credibility of the State’s witnesses.

{¶9} Second, Defendant argues that her counsel was ineffective because he failed to file a notice of an alibi and failed to call an alibi witness. As the issue to present an alibi and call witnesses regarding an alibi fall squarely within defense counsel’s purview of trial tactics, we will not second-guess counsel’s decision to pursue an alternative defense strategy.

{¶10} In regard to these two arguments, Defendant has failed to illustrate how she was prejudiced by her counsel’s actions. Specifically, defense counsel thoroughly questioned the State’s witnesses and presented witnesses on behalf of Defendant. Also, Defendant took the stand and testified regarding the events of September 20, 2000, which further aided the defense’s strategy.

{¶11} Lastly, Defendant argues that the cumulative effect of her counsel's failure to call witnesses and file a notice of an alibi resulted in ineffective assistance of counsel. Since we have not found any instances of prejudicial error, Defendant's claim of cumulative error is without merit. See *Garner*, 74 Ohio St.3d at 64; *Moreland*, 50 Ohio St.3d at 69.

{¶12} Consequently, we find that counsel's performance did not constitute ineffective assistance of counsel. Accordingly, Defendant's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

{¶13} The trial court erred to the prejudice of [Defendant] when it overruled her motion for acquittal made pursuant to Crim.R. 29 of the Ohio Rules of Criminal Procedure.

ASSIGNMENT OF ERROR III

{¶14} The trial court erred to the prejudice of [Defendant] when it convicted her of aggravated burglary and the conviction is against the manifest weight of the evidence.

{¶15} In her second and third assignments of error, Defendant challenges the adequacy of the evidence presented at trial. Specifically, Defendant avers that the State failed to present sufficient evidence to support the trial court's denial of her Crim.R. 29 motion for acquittal and that her conviction for aggravated burglary was against the manifest weight of the evidence. An evaluation of the weight of the evidence, however, is dispositive of both issues in this case. Defendant's assignments of error lack merit.

{¶16} As a preliminary matter, we note that sufficiency of the evidence produced by the State and weight of the evidence adduced at trial are legally distinct issues. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

{¶17} Crim.R. 29(A) provides that a trial court “shall order the entry of a judgment of acquittal *** if the evidence is insufficient to sustain a conviction of such offense or offenses.” A trial court may not grant an acquittal by authority of Crim.R. 29(A) if the record demonstrates that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt. *State v. Wolfe* (1988), 51 Ohio App.3d 215, 216. In making this determination, all evidence must be construed in a light most favorable to the prosecution. *Id.* “In essence, sufficiency is a test of adequacy.” *Thompkins*, 78 Ohio St.3d at 386.

{¶18} “While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion.” *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, at 3, citing *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring). When a defendant asserts that his conviction is against the manifest weight of the evidence,

{¶19} “an appellate court must 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. Otten (1986), 33 Ohio App.3d 339, 340. This discretionary power should be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. *Id.*

{¶20} “Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency.” (Emphasis omitted.) *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96CA006462, at 4.

{¶21} Defendant was found guilty of aggravated burglary, in violation of R.C. 2911.11(A)(1). R.C. 2911.11(A)(1) provides that:

{¶22} “No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if [:]”

{¶23} “The offender inflicts, or attempts or threatens to inflict physical harm on another[.]”

{¶24} At trial, Jill Wilson (“Wilson”) testified that on September 20, 2000, she and Vince Smith (“Smith”) were lying in bed in her apartment. Wilson further testified that at approximately 12:00 a.m., Defendant entered her apartment through a back window. She stated that Defendant punched her in the face six to seven times, swore at her, and questioned her about being in bed with Smith. Wilson described her injuries as two black eyes and a “busted lip.” Next, she explained that after the assault, Defendant and Smith left her apartment. Wilson said that when the police questioned her, she told them that she was dating Smith; however, she acknowledged that she did not know Smith’s last name. Wilson also stated that Oliver, the father of her children, had been “seeing” Defendant when the incident occurred. Lastly, she admitted that she became upset when Oliver sold Defendant a car, which he had previously permitted her to drive.

{¶25} Hollie Jacquez (“Jacquez”) testified that she lived in the same apartment complex as Wilson. She further testified that on September 20, 2000, she was sitting outside of her apartment building and saw an individual in a black “hoody” walk toward the back of Wilson’s apartment building. Jacquez stated that she saw the individual in the black “hoody” approximately thirty minutes later, and the individual yelled “I fucked that bitch’s face up.” She also stated that the individual in the black “hoody” was alone. Jacquez explained that when she went to Wilson’s apartment, Wilson was crying and her “eye was messed up.” She further explained that Wilson told her that “Shorty” had entered her apartment

and punched her in the face. Jacquez declared that Defendant went by the nickname “Shorty.” Jacquez admitted that she did not know if the individual in the black “hoody” was Defendant.

{¶26} Patrolman Jay Loesch testified that he was dispatched to Wilson’s apartment on the night of the incident. He said that when he arrived at Wilson’s apartment she was upset and crying. Patrolman Loesch further said that the area underneath Wilson’s eyes was red and beginning to swell and bruise. Additionally, he stated her mouth was swollen and the injuries looked “fresh.” Patrolman Loesch confirmed that Wilson did not provide Smith’s last name when questioned, and admitted that it seemed strange that she did not know his last name. He also testified that he does not remember Wilson stating that Defendant entered her apartment through the window and, further, he testified that Wilson did not mention Oliver.

{¶27} Smith testified that on September 20, 2000, he had intercourse with Wilson and then left her apartment. He contradicted Wilson’s assertion that he had been her boyfriend. However, he stated that Defendant was currently his girlfriend.

{¶28} Defendant testified that on September 20, 2000, she left work at 11:30 p.m. and realized that she did not have her house key; therefore, she explained that she spent the night at Wesley Caper’s house. Defendant further testified that she is currently dating Smith. She also admitted that her nickname is

“Shorty.” Finally, Defendant stated that Oliver did sell her a car and this transaction upset Wilson.

{¶29} In the case sub judice, the judge had the opportunity to observe the witnesses’ testimony and weigh the credibility of the testimony; therefore, we must give deference to the judge’s decision. See *Berger v. Dare* (1994), 99 Ohio App.3d 103, 106. Upon careful review of the testimony and evidence presented at trial, we hold that the judge did not act contrary to the manifest weight of the evidence in convicting Defendant of aggravated burglary. Consequently, we conclude that Defendant’s assertion that the State did not produce sufficient evidence to support a conviction, therefore, is also without merit. Accordingly, Defendant’s second and third assignment of error is overruled.

{¶30} Defendant’s assignments of error are overruled. The conviction of the Lorain County Common Pleas Court is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

LYNN C. SLABY
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR

APPEARANCES:

GRAIG E. KLUGE, Attorney at Law, 7550 Lucerne Dr., Suite 401, Middleburg Heights, Ohio 44130, for Appellant.

GREGORY A. WHITE, Prosecuting Attorney, and J. ANTHONY RICH, Assistant Prosecuting Attorney, 226 Middle Avenue, 4th Floor, Elyria, Ohio 44035, for Appellee.