[Cite as *State v. Estright*, 2009-Ohio-5676.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No. 24401
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
JERELYN SUE ESTRIGHT	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 07 07 2369

DECISION AND JOURNAL ENTRY

Dated: October 28, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Jerelyn Estright, appeals from the decision of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On July 31, 2007, Appellant, Jerelyn Estright, was indicted on one count of theft from the elderly, in violation of R.C. 2913.02(A)(1)/(A)(2), a felony of the first degree. The charge stemmed from a report received by the Barberton Police Department in December of 2006 that alleged that Estright was mishandling her mother's finances. Estright's case proceeded to a trial before a jury.

{¶3} Estright's mother, Leora Hoffman testified at trial. Hoffman was 85 years old at the time of the trial. She explained that she has five children, one of whom is Jerelyn Estright. Hoffman explained that her husband had created a trust fund for her before he passed away and that she received monthly income from this trust.

{¶4} Hoffman testified that she sustained an injury in 2001 or 2002 that caused her to need ongoing assistance. Hoffman asked Estright to help her and thereafter, gave her power of attorney. Estright took leave from her job as a secretary at the University of Akron to help care for her mother. Hoffman eventually recovered and no longer needed Estright's assistance.

{¶5} In 2005, Hoffman became sick again and required hospitalization. Estright similarly assisted her mother at this time. Estright helped sell Hoffman's home and placed her in the Alterra assisted living facility in Barberton, near Estright's home. Hoffman testified that Estright helped her quite a lot each time she fell ill. She stated that she had authorized Estright to make certain smaller purchases such as groceries. She also testified that she had always purchased a lot of gifts for Estright.

{¶6} In 2006, Hoffman became suspicious about Estright's handling of her finances after she discovered $6000 worth of charges to her Discover card as well as several transactions from her bank account from the period of December of 2005 through October of 2006. The charges to the Discover card included such items as jewelry, hotel accommodations, airline tickets, plus-sized clothing and pet supplies. Hoffman explained that the jewelry was not purchased for her and that she did not travel during this period of time. She further explained that she cannot wear plus-sized clothing and that she does not have a pet. Hoffman stated that she did not authorize Estright to spend money on unnecessary items such as jewelry and trips. However, Hoffman did recognize some transactions including, among other items, expenditures for medicine, food and storage fees.

{¶7} Hoffman also testified about the joint bank account she shared with Estright. Hoffman testified that she was unaware of several transactions from the period of December 2005 through January 2006, including a deposit of $104,312.67 and a transfer into a savings

account in the amount of $94,000. Hoffman also testified regarding bank statements from January 2006 through October 2006, and explained that she was unfamiliar with a number of transactions.

{¶8} In addition, Hoffman testified that she learned that when her house was sold in December of 2005, Estright transferred $94,000 in proceeds from the sale of the house from the joint account to her own savings account. Hoffman testified that she was not aware that Estright had opened this savings account.

{¶9} Hoffman explained that in either September or October 2006, she and two of her daughters sought counsel from attorneys Orval Hoover and Jim Campbell. Donna Edwards, Hoffman's daughter, testified at trial that she, Hoffman and her sister, Wahneta Goon, met with Attorney Orval Hoover in September of 2006 to discuss some suspicions Hoffman had about Estright's misuse of her finances. Hoover had been handling Hoffman's trust account. Hoover sent Estright a letter dated September 25, 2006 in which he informed her that he was concerned about some of her expenditures. He asked Estright to contact him immediately.

{¶10} Campbell also testified at trial. Campbell stated that when he first met with Hoffman and two of her daughters, Hoffman explained to him that she believed that Estright had stolen money from her and that she wanted to get the money back. Campbell testified that at that first meeting, he drafted a new power of attorney which revoked Estright's power of attorney effective October 4, 2006. Campbell ultimately decided not to pursue a civil action and instead referred the matter to the Barberton Police Department as he felt Estright had possibly engaged in criminal conduct.

{¶11} Campbell explained at trial that Barberton Police Detective Jerry Antenucci investigated the matter. Detective Antenucci also testified at trial. Antenucci testified that he

interviewed both Hoffman and Estright as part of his investigation. He also investigated all of Hoffman's bank and credit card accounts.

{¶12} Antenucci testified that there were a few large transactions that aroused his suspicion. He noted that in December 2005, Estright deposited $94,000 from her joint account with Hoffman into her personal savings account. He also testified that on October 6, 2006, Estright made a withdrawal from her savings account in the amount of $47,219.39, the total amount in the account. That same day, she deposited this amount into a JPMorgan Chase savings account that she also opened on October 6, 2006.

{¶13} Antenucci testified that there were also several transactions on the Discover card that aroused his suspicion. He noted purchases for pet products and plus-sized clothing that did not seem to be purchases Hoffman would have made.

{¶14} Antenucci interviewed Estright on two separate occasions. The first interview took place on June 8, 2007. In that interview, Estright told Antenucci that she added herself to the Discover card account but that Hoffman was aware of this addition. Estright admitted that she had charged items to the Discover card without paying Hoffman back. Estright also admitted that she had transferred money from the sale of one of Hoffman's homes to her personal Chase Bank account. Estright told Antenucci that she knew that this money was not hers. She also confessed to having misused her power of attorney to purchase personal items. Estright also told Antenucci that she had used Hoffman's money as a means of survival because she had to quit her job at the University of Akron and she needed money to survive. She explained that she was taking care of her mother. Antenucci spoke with Estright a second time, on June 19, 2007.

{¶15} Antenucci testified that as of trial, Estright had not repaid Hoffman for any of the $47,219 that was originally transferred from the joint account to her Chase account. He also

testified that Estright never told him that her mother had given her this money as a gift. Further, he testified that she never told him that her mom was trying to help her pay her bills.

{¶16} Estright testified that at the end of 2002, her mother asked her not to return to work because she wanted Estright to take care of her. According to Estright, at this time, Hoffman offered to help Estright with her monthly expenses in exchange for her service to her. Estright testified that her mother agreed to pay for trips because they went on the trips together. Estright maintained that her mother had always purchased extravagant gifts for her and that her mother was very generous to her. Specifically, Estright testified that her mother had purchased several vehicles for her. She also testified that her mother had purchased a computer, copy machine, camera, video camera and other household furnishings for her, as well as various lessons and clothing items for her daughter. She also testified that Hoffman paid for cell phones for Estright and her daughter.

{¶17} Estright testified that she deposited the $94,000 into her savings account because she had been doing business on eBay and that someone had recently hacked into her PayPal account. She stated that she told Hoffman that because her checking account was tied to her PayPal account, she felt that they should change the location of the money. Estright testified that Hoffman knew that she was transferring $94,000 to her savings account and that she knew she was using this money to pay bills. Estright also testified that she frequently deposited money that she had personally earned into the joint checking account. Estright testified that from December 2005 through October 2006, she deposited approximately $9500 of personal earnings into the joint account. She also explained that after she deposited the $94,000 into her savings account, she slowly started transferring money back into the joint account to pay for bills for

both her and her mother. Estright did not deny withdrawing $47,000 from the savings account and putting it into her newly opened Chase account.

{¶18} In addition, she admitted that she never told Antenucci that her mother had given her this money as a gift. More significantly, Estright admitted that she had told Antenucci that she felt she had stolen from her mother. Further, she did not deny spending her mother's money after the power of attorney was revoked.

{¶19} Estright also testified that she took her mother to a medical exam in 2006 because she suspected that her mother might be suffering from Alzheimer's Disease. The doctor who performed the test concluded that Hoffman likely had Alzheimer's dementia and that she was quite impaired. Estright also took Hoffman to an eye doctor, who informed Estright that Hoffman should not drive. Estright testified that her mother was extremely upset with her when she told her that she could no longer drive. Estright stated that her mother told her that if she had a gun she would shoot her. Further, Estright testified that her mother was not happy about remaining at Alterra. Estright claimed that her relationship with her mother began to deteriorate after they discussed the doctor's prognosis and the consensus that she remain at Alterra.

{¶20} Estright testified that her mother never told her that she needed to go back to work because she was no longer willing to pay her living expenses. Further, she claimed that no one asked her to return money to her mother. Lastly, she testified that she offered to give the money back to her mother, plus return the car, but that her mother did not want the money. Estright testified that in June of 2007, her mother was preparing to move out of Alterra and into a duplex that she would share with Estright's sister.

{¶21} Estright's friend and neighbor, Janet Rhodes, testified on her behalf. Rhodes testified that in 2003, she was present when Hoffman told her that Estright was going to take care

of her and that in exchange, she was going to take care of Estright by paying bills so that she did not have to work. She also testified that, prior to 2006, Hoffman and Estright traveled together on at least a few occasions.

{¶22} The jury convicted Estright of the lesser included offense of theft from the elderly, a second degree felony, as property or services involved amounted to "$25,000 or more and less than $100,000." The trial court sentenced Estright to two years of incarceration. In addition, the trial court held a restitution hearing wherein it ordered Estright to make restitution in the amount of $47,219.00 to Hoffman.

{¶23} Estright appealed from the trial court's decision and has raised seven assignments of error for our review. We have rearranged her assignments of error to facilitate our review.

II.

ASSIGNMENT OF ERROR III

> "THE COURT ERRED AND ABUSED ITS DISCRETION IN RULING THAT LEONORA [SIC] ESTRIGHT [SIC], A [SIC] ELDERLY WOMAN SUFFERING FROM DEMENTIA, WAS COMPETENT TO TESTIFY BECAUSE SHE COULD NOT ACCURATELY RECOLLECT HER PRIOR COMMUNICATIONS OR OTHER'S PRIOR COMMUNICATIONS."

{¶24} In her third assignment of error, Estright argues that the trial court erred and abused its discretion in ruling that Hoffman was competent to testify. More specifically, Estright contends that Hoffman was not competent because she could not accurately recollect her prior communications or other's prior communications. We disagree.

{¶25} Decisions on witness competency are within the sound discretion of the trial court and will not be overturned absent an abuse of discretion. *State v. Clark* (1994), 71 Ohio St.3d 466, 469. An abuse of discretion is more than an error of law or judgment; rather, it is a finding that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*

(1983), 5 Ohio St.3d 217, 219. Under this standard of review, an appellate court may not merely substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶26} Evid.R. 601(A) provides, in pertinent part, that "[e]very person is competent to be a witness except *** [t]hose of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." See R.C. 2317.01. The Ohio Supreme Court has elaborated on this rule, explaining that "'[a] person, who is able to correctly state matters which have come within his perception with respect to the issues involved and appreciates and understands the nature and obligation of an oath, is a competent witness notwithstanding some unsoundness of mind.'" *State v. Bradley* (1989), 42 Ohio St.3d 136, 140, quoting *State v. Wildman* (1945), 145 Ohio St. 379, paragraph three of the syllabus. This Court has further held that "'some unsoundness of mind does not render a witness incompetent if the witness otherwise possesses the three basic abilities required for competency: the ability to accurately observe, recollect, and communicate that which goes on around him or her.'" *State v. Hashman*, 9th Dist. No. 06CA008990, 2007-Ohio-5603, at ¶10, quoting *State v. Cooper* (2000), 139 Ohio App.3d 149, 164.

{¶27} In this case, the court held a competency hearing in which Hoffman was questioned at length. Hoffman testified that she was 84 years old at the time of the hearing and that she is Estright's mother. Hoffman correctly testified regarding a variety of issues including the reason for her involvement in the case. Specifically, Hoffman explained that she was in court to try to get her life in order. She explained that she was missing several personal items and that

she believed that her daughter, Estright, had caused these items to be missing. She further explained that she was receiving credit card bills for items that she had not purchased.

{¶28} Furthermore, the record reflects that Hoffman accurately explained the oath she took prior to testifying. Hoffman explained that she understood that when she took the oath she promised to tell the truth. She explained that the difference between the truth and a lie is that "[o]ne is what you shouldn't do and the other one is the best thing to do."

{¶29} While the record reflects that Hoffman did not accurately remember several details of her life, including the name of her second husband, her recent addresses and whether she possessed certain credit cards, and demonstrated some unsoundness of mind, we cannot find that the trial court abused its discretion in determining that she was competent to testify at trial. Hoffman was 84 years old at the time of the competency hearing. It is reasonable to expect that she might forget certain details of her life, especially in light of the unfamiliar courtroom environment and the questioning from the attorneys. Hoffman demonstrated "the ability to accurately observe, recollect, and communicate that which goes on around *** her" as she was able to explain her familial relationships, physical abilities and health care history as well as describe the numerous places at which she had lived in the past few years. *Hashman*, supra, at ¶10, quoting *Cooper*, 139 Ohio App.3d at 164

{¶30} We conclude that the trial court did not abuse its discretion in determining that Hoffman was competent to testify at trial. Hoffman satisfied the Supreme Court's test for competency. The record reflects that she adequately explained the main facts involved in the case, including details regarding purchases Estright made that she did not authorize and items that she was missing, and demonstrated that she appreciated and understood the nature and impact of the oath. *Bradley*, 42 Ohio St.3d at 140. Moreover, the trial court judge was in the

best position to view and assess Hoffman's understanding of the events involved in the matter as well as the oath. As we conclude that the trial court did not abuse its discretion in finding Hoffman competent to testify, we overrule Estright's third assignment of error.

ASSIGNMENT OF ERROR I

> "[ESTRIGHT'S] CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶31} In her first assignment of error, Estright argues that her conviction was against the manifest weight of the evidence. We disagree.

{¶32} "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 *1, citing *Thompkins*, 78 Ohio St.3d at 390.

{¶33} A determination of whether a conviction is against the manifest weight of the evidence does not permit this court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

> "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.

{¶34} Estright was convicted of theft of more than $25,000 and less than $100,000 from an elderly person, in violation of R.C. 2913.02(A)(1)/(A)(2), a second degree felony. R.C. 2913.02(A)(1)/(A)(2) states that

> "(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:
>
> "(1) Without the consent of the owner or person authorized to give consent;
>
> "(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent[.]"

{¶35} On appeal, Estright mainly contends that Hoffman's testimony should be disregarded because she was incompetent to testify. Estright points to several minor inconsistencies in Hoffman's testimony. However, as we have already disposed of Estright's challenge to the trial court's decision regarding Hoffman's competency, we need not further examine this contention.

{¶36} Both Estright and Hoffman testified at trial that as a result of several health problems Hoffman had experienced in the past few years, she relied on Estright to assist her with her financial matters. However, the trial court was clearly presented with inconsistent testimony regarding the details of the parties' relationship. Hoffman stated that she authorized Estright to make certain smaller expenditures but that she did not authorize Estright to purchase unnecessary items. In contrast, Estright testified that her mother agreed to take care of basically all of her financial needs in exchange for Estright's assistance. Hoffman testified that she did not have a Discover credit card. Conversely, Estright testified that Hoffman had a Discover card and that she had authorized that Estright be added as an authorized user on the card. Hoffman testified that she did not even know that Estright had a personal savings account to which she had transferred $94,000. In stark contrast, Estright testified that Hoffman knew she was transferring this money into the savings account.

{¶37} The evidence presented at trial demonstrated that Estright knowingly exerted control over Hoffman's finances without Hoffman's express consent and exceeded Hoffman's

express and implied consent to make financial decisions. Estright admitted depositing $94,000 of the proceeds from the sale of her mother's home into her personal savings account. Further, she admitted withdrawing $47,000 from the savings account after her mother had revoked the power of attorney and closed the joint account, and admitted putting this amount into her newly opened Chase account. Moreover, Estright admitted to Antenucci that she had charged items to the Discover card without paying Hoffman back. Further, she did not deny spending her mother's money after the power of attorney was revoked.

{¶38} Estright admitted to Antenucci that she felt she had stolen from her mother and that she knew that the money was not hers. Estright also admitted that she had not repaid Hoffman for any of the $47,219 that was originally transferred from the joint account to her Chase account.

{¶39} Rhodes' testimony that in 2003, she was present when Hoffman told her that Estright was going to take care of her and that in exchange, she was going to take care of Estright by paying bills so that she did not have to work, does not adequately refute the allegations. Even if Hoffman did make the statement in 2003, the transactions at issue in this case occurred in 2005 and 2006 – years after that time. Rhodes did not testify that Hoffman agreed to pay for all of Estright's future trips and expenses. More importantly, Hoffman specifically stated that these transactions were made without her consent.

{¶40} Here, the jury found the evidence presented by the State more credible than the evidence presented by Estright. After reviewing the entire record and considering the credibility of the witnesses, we cannot conclude that the jury clearly lost its way and created a manifest miscarriage of justice when it believed the testimony presented by the State over Estright and

convicted her of theft from the elderly. See *Otten*, 33 Ohio App.3d at 340. Accordingly, Estright's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT IMPROPERLY DENIED THE MOTION TO DISMISS AT THE END OF THE STATE'S AND THE DEFENSE'S CASE."

{¶41} In her second assignment of error, Estright contends that the trial court improperly denied her Crim.R. 29 motion to dismiss based on insufficiency of evidence. We disagree.

{¶42} When considering a challenge to the sufficiency of the evidence, the court must determine whether the prosecution has met its burden of production, while a manifest weight challenge requires the court to examine whether the prosecution has met its burden of persuasion. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). To determine whether the evidence in a criminal case was sufficient to sustain a conviction, an appellate court must view that evidence in a light most favorable to the prosecution:

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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 crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶43} As in her manifest weight argument, in this assignment of error, Estright mainly contends that Hoffman's testimony should be disregarded because she was incompetent to testify. As we have already disposed of Estright's challenge to the trial court's decision regarding Hoffman's competency, we need not further examine this contention. Moreover, the State presented ample evidence aside from Hoffman's testimony, including Estright's own statements to Detective Antenucci, to support its case.

{¶44} Viewing the evidence in the light most favorable to the State, we conclude that the State submitted sufficient evidence that Estright knowingly exerted control over Hoffman's finances without Hoffman's express consent and exceeded Hoffman's express and implied consent to make financial decisions. *Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Therefore, any rational trier of fact could have found beyond a reasonable doubt that Estright committed theft from the elderly. Estright's second assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO GIVE [SIC] JURY INSTRUCTION CONCERNING JOINT BANK ACCOUNTS AND THE COMPLETE REQUESTED INSTRUCTION ON DEPOSITS TO BOTH PERSONS."

{¶45} In her fourth assignment of error, Estright contends that the trial court erred in failing to give a jury instruction concerning joint bank accounts and in failing to give the complete instruction she requested regarding deposits to both persons. We disagree.

{¶46} "A trial court must charge a jury with instructions that are a correct and complete statement of the law. *Marshall v. Gibson (*1985), 19 Ohio St.3d 10, 12. However, the precise language of a jury instruction is within the discretion of the trial court. *Youssef v. Parr, Inc.* (1990), 69 Ohio App.3d 679, 690". *Callahan v. Akron Gen. Med. Ctr.*, 9th Dist. No. 22387, 2005-Ohio-5103, at ¶6. In reviewing jury instructions, this Court has stated:

> "[A]n appellate court reviews the instructions as a whole. If, taken in their entirety, the instructions fairly and correctly state the law applicable to the evidence presented at trial, reversible error will not be found merely on the possibility that the jury may have been misled. Moreover, misstatements and ambiguity in a portion of the instructions will not constitute reversible error unless the instructions are so misleading that they prejudicially affect a substantial right of the complaining party." (Internal citations omitted.) *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 410.

This Court, therefore, must affirm the trial court's jury instructions absent an abuse of discretion. *State v. Franklin*, 9th Dist. No. 22771, 2006-Ohio-4569, at ¶10. The phrase "abuse of discretion" connotes more than an error of judgment; rather, it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *Blakemore*, 5 Ohio St.3d at 219. When applying the abuse of discretion standard, this court may not substitute its judgment for that of the trial court. *Pons* , 66 Ohio St.3d at 621.

{¶47} Estright challenges the jury instructions on two grounds. First, Estright argues that the trial court should have instructed the jury, as she requested, on R.C. 1109.07, which concerns deposits in the name of two or more persons and deposits payable on death. She argues that "[t]he requested instruction *** would have provided guidance to the jurors to establish that once funds [sic] properly deposited into joint account, *** then the monies are joint funds; in fact the bank could pay the amount on deposit directly to either of the named persons on the account, and would have been properly discharged on their obligation with the funds."

{¶48} A review of the transcript reflects that the trial court considered this statute but found it inapplicable. R.C. 1109.07 concerns the obligation of banks with regard to deposits made in the name of two or more persons and deposits payable on death. Neither such a deposit made in the name of two or more people, nor a deposit made payable on death, was at issue in this case. We conclude that the trial court did not abuse its discretion in declining to give this instruction as it was inapplicable to this matter.

{¶49} Estright's second challenge concerns the trial court's refusal to give the instruction she requested defining the word "implied". To convict Estright of theft pursuant to R.C. 2913.02(A)(1)/(A)(2), the State was required to prove that, with purpose to deprive her mother of property or services, Estright knowingly obtained or exerted control over Hoffman's

property either without her consent or beyond the scope of her express or *implied* consent. Estright had requested that the trial court use the following Black's Law Dictionary's definition of "implied": "To express or involve directly. To suggest or to infer. To [i]mpose on equitable or legal grounds." The trial court agreed to include a shortened version of the definition Estright proposed. Accordingly, the court defined "implied" as "to express or involve directly, to suggest or infer."

{¶50} Estright contends on appeal that to properly instruct the jury that there was a valid contract between the parties and that Estright properly relied and acted upon this contract, the trial court needed to include the last part of the definition – "to impose on equitable or legal grounds". She argues that "[t]he failure to instruct on this prejudiced [Estright] because [the] jury was not afforded the appropriate instruction on whether there was a contract, and thus the legal justification for Jere's reliance on same, and, justification for all of Jerelyn's actions."

{¶51} Estright has not argued that the instruction was incorrect as a matter of law. Rather, she challenges the trial court's failure to give all the possible definitions for the word "implied" as provided in Black's Law Dictionary. The record reflects that the trial court only slightly modified the proposed definition. As "the precise language of a jury instruction is within the discretion of the trial court," we cannot conclude that the trial court abused its discretion in failing to give the exact definition Estright proposed. *Callahan*, supra, at ¶6. Estright's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

> "THE TRIAL COURT FAILED TO CONSIDER THE PRINCIPLES OF SENTENCING, PER R.C. 2929.11 AND FAILED TO BALANCE THE FACTORS OF SERIOUSNESS AND RECIDIVISM PURSUANT TO R.C. 2929.12."

{¶52} In her fifth assignment of error, Estright asserts that the trial court failed to consider the principles of sentencing as required by R.C. 2929.11 and failed to balance the factors of seriousness and recidivism pursuant to R.C. 2929.12.

{¶53} The record reflects that Estright did not object to her sentence. Therefore, she has forfeited this issue on appeal. Typically, if a party forfeits an objection in the trial court, reviewing courts may notice only "[p]lain errors or defects affecting substantial rights[.]" Crim.R. 52(B). Pursuant to Crim.R. 52(B), a plain error or defect that affects a substantial right may be noticed although it was not brought to the attention of the trial court. "A plain error must be obvious on the record, such that it should have been apparent to the trial court without objection." *State v. Kobelka* (Nov. 7, 2001), 9th Dist. No. 01CA007808, at *2, citing *State v. Tichon* (1995), 102 Ohio App.3d 758, 767. As notice of plain error is to be taken with utmost caution and only to prevent a manifest miscarriage of justice, the decision of a trial court will not be reversed due to plain error unless the defendant has "established that the outcome of the trial clearly would have been different but for the alleged error." *Kobelka*, supra, at *2, citing *State v. Waddell* (1996), 75 Ohio St.3d 163, 166, and *State v. Phillips* (1995), 74 Ohio St.3d 72, 83. Estright has argued plain error on appeal. As such, we will address her arguments regarding her sentence.

{¶54} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Ohio Supreme Court found that "there is no mandate for judicial fact-finding in the general guidance statutes. The court is merely to 'consider' the statutory factors." *Foster*, supra, at ¶42. Moreover, post-*Foster*, it is axiomatic that "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." Id. at paragraph seven of the

syllabus. In its journal entry, the trial court specifically stated that it had considered "the record, oral statements, as well as the principles and purposes of sentencing under O.R.C. 2929.11, and the seriousness and recidivism factors under O.R.C. 2929.12."

{¶55} Following *Foster*, a plurality of the Supreme Court of Ohio declared that appellate courts should implement a two-step test when reviewing sentencing. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. The Court stated:

> "First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." Id.

{¶56} Therefore, we must first determine if the sentence is contrary to law. "In so doing, we examine whether the trial court complied with applicable rules and statutes." *State v. Coryell*, 9th Dist. No. 24338, 2009-Ohio-1984, at ¶12, citing *Kalish*, supra, at ¶26. Estright was convicted of one second-degree felony. Accordingly, the trial court was permitted to utilize its discretion to sentence her within the range of two to eight years. R.C. 2929.14(A)(2). Estright was sentenced to two years of incarceration. Therefore, her sentence falls within the statutory range set forth in R.C. 2929.14. Next, we must determine whether the trial court abused its discretion in imposing the sentence. *Kalish*, supra, at ¶26.

{¶57} R.C. 2929.11 provides in pertinent part as follows:

> "(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.
>
> "(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this

> section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders."

{¶58} Estright contends that because the trial court did not specifically enumerate the factors that it considered pursuant to R.C. 2929.12, it failed to balance the seriousness and recidivism factors under R.C. 2929.12. This argument lacks merit.

{¶59} R.C. 2929.12(A) states, in pertinent part, that

> "a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing."

{¶60} Although it is clear from the record that the trial court considered the factors set forth in R.C. 2929.12 regarding the seriousness of Estright's conduct and her likelihood of recidivism, there is no requirement under R.C. 2929.12 that the trial court on the record provide an analysis of the factors it considered. Rather, pursuant to *Foster*, the trial court was simply required to consider these factors. Further,

> "[i]f a sentence is within the statutory range for the particular offense, it is presumed that the court considered the relevant statutory sentencing factors. A silent record raises the presumption that the trial court considered the factors contained in R.C. 2929.12. To rebut the presumption, a defendant must either affirmatively show that the court failed to do so, *** or that the sentence the court imposed is strikingly inconsistent with the statutory factors as they apply to his case." (Internal citations and quotations omitted.) *State v. Rutherford*, 2d Dist. No. 08CA11, 2009-Ohio-2071, at ¶34.

{¶61} Estright did not make an attempt to rebut this presumption. As Estright has failed to rebut the presumption that the trial court properly considered the factors in R.C. 2929.12, we conclude that the trial court did not abuse its discretion in sentencing her. Estright's fifth assignment of error is overruled.

ASSIGNMENT OF ERROR VI

"THE SENTENCING OF [ESTRIGHT], WITHOUT MAKING THE FINDS [SIC] REQUIRED BY R.C. 2929.13 AND 2929.14 AFTER THE SEVERANCE IN FOSTER OPERATED AS AN EX POST FACTO LAW AND DENIED [ESTRIGHT] DUE PROCESS."

{¶62} In her sixth assignment of error, Estright contends that the trial court's application of *State v. Foster* is unconstitutional and violates due process. We disagree.

{¶63} This Court has repeatedly considered and rejected this argument. See *State v. Bigley*, 9th Dist. No. 08CA0085-M, 2009-Ohio-2943, at ¶19; *State v. Rowles*, 9th Dist. No. 24154, 2008-Ohio-6631, at ¶10; *State v. Newman*, 9th Dist. No. 23038, 2006-Ohio-4082, at ¶¶10 and 11. Accordingly, Estright's sixth assignment of error has no merit and is overruled.

ASSIGNMENT OF ERROR VII

"[ESTRIGHT] RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND THIS VIOLATED [HER] SIXTH AMENDMENT RIGHT TO COUNSEL."

{¶64} In her seventh assignment of error, Estright contends that her trial counsel was ineffective. We disagree.

{¶65} The Sixth Amendment of the United States Constitution guarantees a criminal defendant the effective assistance of counsel. *McMann v. Richardson* (1970), 397 U.S. 759, 771. To prove an ineffective assistance claim, Estright must show that: (1) counsel's performance was deficient to the extent that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment [,]" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington* (1984), 466 U.S. 668, 687. To demonstrate prejudice, the defendant must prove that "there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. "An error by counsel, even if professionally unreasonable,

does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. Furthermore, the Court need not address both *Strickland* prongs if Appellant fails to prove either one. *State v. Ray*, 9th Dist. No. 22459, 2005-Ohio-4941, at ¶10. We begin with the prejudice prong as we find it to be dispositive.

{¶66} Estright contends that her counsel was ineffective for several reasons including (1) she failed to object to Estright's sentence, (2) she failed to object to Detective Antenucci's testimony regarding the amount of money Estright had in her savings account in June and July of 2007, (3) she failed to renew her objection to Hoffman's competency when Hoffman testified at trial.

{¶67} As we have addressed Estright's challenges to her sentence in our disposition of her fifth and sixth assignments of error, she has not been prejudiced by her counsel's failure to object to her sentence at the sentencing hearing and this argument is moot. We similarly find no merit in Estright's argument concerning Detective Antenucci's testimony. We have consistently held that "'trial counsel's failure to make objections is within the realm of trial tactics and does not establish ineffective assistance of counsel.'" *State v. Windham*, 9th Dist. No. 05CA0033, 2006-Ohio-1544, at ¶24, quoting *State v. Taylor*, 9th Dist. No. 01CA007945, 2002-Ohio-6992, at ¶76; *State v. Guenther*, 9th Dist. No. 05CA008663, 2006-Ohio-767, at ¶74.

{¶68} Lastly, Estright's counsel properly raised and addressed the issue of Hoffman's competency. The trial court conducted a competency hearing and determined that Hoffman was competent to testify at trial. Estright's counsel's continuing objection to this testimony would not have affected the outcome of the trial. Estright's seventh assignment of error is overruled.

III.

{¶69} Estright's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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 Summit, 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.

CARLA MOORE
FOR THE COURT

DICKINSON, J.
WHITMORE, J.
CONCUR

APPEARANCES:

WESLEY A. JOHNSTON, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.