[Cite as *State v. Klenfeld*, 2010-Ohio-1372.]

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

STATE OF OHIO	C. A. No. 24736
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
ERIKA FERN KLEINFELD	AKRON MUNICIPAL COURT COUNTY OF SUMMIT, OHIO
Appellant	CASE No. 09CRB00453

DECISION AND JOURNAL ENTRY

Dated: March 31, 2010

MOORE, Judge.

{¶1} Appellant, Erika Kleinfeld, appeals from the judgment of the Akron Municipal Court. We affirm.

I.

{¶2} On January 14, 2009, the State of Ohio charged Kleinfeld with two counts of gambling in violation of R.C. 2915.02(A), both misdemeanors of the first degree, two counts of operating a gambling house in violation of R.C. 2915.03(A)(1), both misdemeanors of the first degree, operating or conducting an entertainment arcade without a license in violation of Akron City Code 111.03(A)(1), a misdemeanor of the third degree, and failure to register an entertainment device in violation of Akron City Code 111.033(C), an unclassified misdemeanor.

{¶3} The charges were tried to a jury from March 18, 2009 to March 20, 2009. Prior to trial, Kleinfeld filed a motion in limine[1] with regard to evidence of a civil settlement from a

[1] The motion in limine is not part of the record on appeal.

nuisance action in Portage County between Kleinfeld, other defendants and the Ohio Attorney General. The court held argument on the motion, but declined to exclude the settlement or testimony regarding the Portage County action. During the trial, the court permitted the State to enter into evidence a copy of the civil settlement from Portage County. The settlement in the civil case stated that a temporary restraining order had been granted against Kleinfeld on the basis that illegal gambling had occurred and that the buildings and addresses in question at specific locations in Portage County had been padlocked as a result. The agreement required that Kleinfeld and the other defendants permanently remove gaming, gambling, skill-based amusement and sweepstakes machines and computers from the premises. The settlement agreement also provided that any violation of the agreement would be considered contempt of court, subjecting the party to penalties as determined by the Portage County Court of Common Pleas. The State also introduced the testimony of an attorney with the Ohio Attorney General's office who had participated in the Portage County action. Kleinfeld's counsel objected to the first question put to the assistant attorney general regarding the Portage County action and requested a sidebar. The sidebar took place off the record. The prosecutor resumed questioning the assistant attorney general without further objection by Kleinfeld's counsel. During this questioning, the record reflects that the prosecutor handed the assistant attorney general a copy of the Portage County civil settlement. The assistant attorney general identified the document and answered questions about it. The defense did not object during direct examination of the

witness. Further, the defense cross examined the witness. The next day, the State called additional witnesses before resting, pending admission of its exhibits. After the State rested, Kleinfeld's counsel objected to the admission of the Portage County civil settlement document into evidence. The trial court overruled the objection and admitted the settlement document, which was considered by the jury during deliberations.

{¶4} The jury in the criminal case below returned guilty verdicts on all charges. The trial court sentenced Kleinfeld accordingly, merging and dismissing one count of gambling and one charge of operating a gambling house.

{¶5} Kleinfeld timely filed a notice of appeal and raised one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

> "IN A JURY TRIAL ON CRIMINAL CHARGES AGAINST [] KLEINFELD, THE COURT IMPROPERLY ADMITTED A SETTLEMENT AGREEMENT FROM A CIVIL CASE FROM A DIFFERENT COUNTY, INVOLVING DIFFERENT PARTIES, AND IMPROPERLY ALLOWED TESTIMONY AND ARGUMENT ABOUT THE SAME CASE, IN CONTRAVENTION OF EVIDENCE RULES 403, 404 AND 408, AND TO THE PREJUDICE OF [] KLEINFELD."

{¶6} In her assignment of error, Kleinfeld contends that the trial court erred when it allowed the introduction of a settlement from a Portage County civil case involving different parties into evidence. We disagree.

{¶7} Kleinfeld's argument has two branches. We consider them in reverse order. Kleinfeld contends the trial court improperly allowed testimony and argument about the settlement document. The record reflects that the assistant attorney general was called to the witness stand and asked questions regarding the civil case from Portage County. The defense

objected and requested a sidebar. The proceedings at side bar were not recorded, or at least the transcript was not made a part of the record on appeal. As a result, this court has no ability to pass upon the basis for the objection. The trial court did not rule upon the objection, and we must consider it as having been overruled. See *Lorence v. Goeller*, 9th Dist. No. 04CA008556, 2005-Ohio-2678, at ¶47, quoting *Fed. Home Loan Mtge. Corp. v. Owca* (Nov. 17, 1999), 9th Dist. No. 2897-M. See, also, *Hayes v. Smith* (1900), 62 Ohio St. 161 (where the court fails to rule on an objection during trial, it will be presumed to have overruled the objection.) Following the sidebar, the witness resumed his testimony, discussing both the facts of the Portage County civil case as well as the details of the settlement agreement. The defense offered no objection. The *testimony* regarding the issue of settlement in the civil case was unchallenged. Had Kleinfeld preserved an objection at sidebar, it was her duty to provide this court with a record on appeal to support her claim of error. Loc.R. 5(A) (it is the appellant's duty to provide a transcript, "App.R. 9(C) statement, or App.R. 9(D) statement, as may be appropriate, and to ensure that the appellate court file actually contains all parts of the record that are necessary to the appeal[]"); *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199 (in the absence of an adequate record, we must presume regularity in the trial court proceedings).

{¶8} This brings us to consideration of the admission of the *document* setting forth the terms of the settlement. The law is well settled that failure to contemporaneously object during the identification of a document and testimony regarding it forfeits appellate review. *State v. Gray*, 9th Dist. No. 08CA0057, 2009-Ohio-3165, at ¶7 (challenge to admission of photographs was forfeited where defendant "filed a pre-trial motion in limine, but failed to contemporaneously object during the presentation of and testimony about the photographs[,]" but waited until the close of the State's case to object to the admission of documents.) Here,

Kleinfeld failed to contemporaneously object during the identification of the document and testimony regarding it, but waited until the close of the State's case.

> "[A] motion in limine does not preserve the record on appeal[;] *** [a]n appellate court need not review the propriety of such an order unless the claimed error is preserved by an objection *** when the issue is actually reached *** at trial. The failure to timely advise a trial court of possible error, by objection or otherwise, results in a [forfeiture] of the issue for purposes of appeal." (Internal citations and quotations omitted.) Id.

{¶9} See, also, *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, at ¶59; *State v. Bethel*, 110 Ohio St. 3d 416, 2006-Ohio-4853, at ¶92 (forfeiture declared where State called a witness who identified photographs of witness and the defendant together flashing gang signs; photo was published to the jury, with no objection by defense until the close of the case when exhibits were offered into evidence). Kleinfeld's challenge occurred at the close of the State's case, when the State moved to have its evidence admitted.

{¶10} "By forfeiting the issue for appeal, [Kleinfeld] has confined our analysis to an assertion of plain error." *Gray* at ¶7, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶23; Crim.R. 52(B). "While a defendant who forfeits such an argument still may argue plain error on appeal, this court will not sua sponte undertake a plain-error analysis if a defendant fails to do so." (Citation omitted.) *Akron v. Lewis*, 179 Ohio App.3d 649, 2008-Ohio-6256, at ¶22; App.R. 16(A)(7); App.R. 12(A)(2); Loc.R. 7(B)(7). As Kleinfeld did not assert plain error, we will not undertake such analysis.

{¶11} We overrule Kleinfeld's single assignment of error.

III.

{¶12} Appellant's single assignment of error is overruled. The judgment of the Akron Municipal Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Akron Municipal Court, 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

CARR, J.
DICKINSON, P. J .
CONCUR

APPEARANCES:

ERIC R. WAITE, Attorney at Law, for Appellant.

CHERI CUNNINGHAM, Director of Law, DOUGLAS J. POWLEY, Chief City Prosecutor, for Appellee.