

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 24976

Appellee

v.

JOHN T. BEKELESKY

APPEAL FROM JUDGMENT
ENTERED IN THE
BARBERTON MUNICIPAL COURT
COUNTY OF SUMMIT, OHIO
CASE No. 08 CRB 3760

Appellant

DECISION AND JOURNAL ENTRY

Dated: May 19, 2010

CARR, Judge.

{¶1} Appellant, John Bekelesky, appeals his conviction out of the Barberton Municipal Court. This Court affirms.

I.

{¶2} Bekelesky was charged with one count of assault in violation of R.C. 2903.13(A), a misdemeanor of the first degree. Both he and the victim requested and submitted to polygraph examinations. Bekelesky stipulated to the expertise of the polygrapher and to the admission of the results at trial.

{¶3} Bekelesky requested a jury trial, then withdrew that request and opted to proceed to trial before the court. On July 8, 2009, the trial court issued a judgment entry in which it noted that Bekelesky had filed a motion to allow an expert to challenge the results of the polygraph examination and that the court had denied that motion. The record does not contain a written motion to that effect. However, defense counsel orally raised the issue immediately prior

to trial. Defense counsel informed the trial court that, in anticipation of the court's ruling, he had already released his expert witness, Bill Evans. Although Bekelesky had moved the trial court to appoint named individuals as process servers to serve subpoenas on numerous witnesses, Bill Evans was not named as one of those witnesses in the motion. Moreover, the record does not contain any subpoena to testify for Bill Evans. Bekelesky did not proffer Mr. Evans' testimony.

{¶4} The trial court found Bekelesky guilty of assault and sentenced him accordingly. Bekelesky moved for a stay of sentence pending appeal, which stay was granted. Bekelesky filed a timely appeal, raising two assignments of error for review. Because Bekelesky consolidated his assignments of error, this Court does the same.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRED AS A MATTER OF LAW TO THE PREJUDICE OF DEFENDANT AND ABUSED ITS DISCRETION WHEN IT DENIED DEFENDANT’S TRIAL COUNSEL THE OPPORTUNITY TO PRESENT EVIDENCE CHALLENGING THE CREDIBILITY OF A STIPULATED POLYGRAPH EXAMINATION UPON WHICH THE TRIAL COURT RELIED TO SUPPORT ITS CONVICTION OF THE DEFENDANT.”

ASSIGNMENT OF ERROR II

“THE TRIAL COURT’S VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE INASMUCH AS IT WAS PREDICATED UPON THE RESULTS OF A POLYGRAPH EXAMINATION THAT DEFENDANT WAS PRECLUDED FROM CHALLENGING AS TO CREDIBILITY.”

{¶5} Bekelesky argues that the trial court abused its discretion by refusing to allow him to present the testimony of an expert to challenge the credibility of two stipulated polygraph examinations. He further argues that his conviction was against the manifest weight of the evidence solely because he was precluded from challenging the credibility of the polygraph examinations upon which the trial court relied in convicting him. This Court disagrees.

{¶6} The admission or exclusion of expert testimony lies in the sound discretion of the trial court and will, therefore, not be overturned absent an abuse of that discretion. *State v. Biros* (1997), 78 Ohio St.3d 426, 452.

{¶7} It is important to note that Bekelesky does not challenge the admissibility of the results of the polygraph examination. Rather, he argues that the trial court erred by refusing to allow him to present expert testimony challenging the credibility of the results. Bekelesky did not identify any specific problems with the polygraph examination which he alleged impugned the weight and credibility of that evidence. Instead, he merely asserted prior to trial that his proposed expert “should be able to testify as to *** the items that he disputes with regard to those charts [of the polygraph examiner].”

{¶8} This Court has held:

“A party may not predicate error on the exclusion of evidence during the examination in chief unless *two* conditions are met: (1) the exclusion of such evidence must affect a substantial right of the party *and* (2) the substance of the excluded evidence was made known to the court by proffer *or* was apparent from the context within which questions were asked. (Emphasis sic.)” *State v. Prade* (2000), 139 Ohio App.3d 676, 695, quoting *State v. Gilmore* (1986), 28 Ohio St.3d 190, syllabus.

{¶9} Moreover, Evid.R. 103(A)(2) provides:

“Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and *** [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. ***”

{¶10} Assuming, without deciding, that one may present expert testimony to challenge the credibility of the results of a stipulated polygraph examination, Bekelesky failed to proffer Mr. Evans’ testimony. In addition, the substance of the evidence was not otherwise made known to the court, nor was it apparent from context. In the absence of such evidence in the record,

Bekelesky cannot establish prejudice. In addition, in the absence of a proffer, he may not predicate error on the trial court's exclusion of his expert's testimony. See *Prade*, 139 Ohio App.3d at 695. Furthermore, Bekelesky did not renew his objection to the trial court's preliminary ruling on the admissibility of his expert's testimony. Accordingly, Bekelesky failed to preserve these issues for appellate review. See *State v. Barton*, 108 Ohio St.3d 402, 2006-Ohio-1324, at ¶67, citing Evid.R. 103(A)(2) ("Although rejecting the merits of his position on legal grounds, we also note that Barton failed to preserve the issue for appellate review because he failed to renew his objection *** and neglected to proffer the evidence he wished to present ***.") Therefore, this Court cannot conclude that the trial court abused its discretion by denying Bekelesky the opportunity to present expert evidence challenging the credibility of the stipulated polygraph examination. Bekelesky's first assignment of error is overruled.

{¶11} Bekelesky next argues that his conviction is against the manifest weight of the evidence because the trial court refused to admit evidence challenging the credibility of the polygraph examination. This Court has previously determined that the trial court did not abuse its discretion when it refused to allow Bekelesky to present Mr. Evans' testimony.

"In determining whether a criminal conviction is against the manifest weight of the evidence, 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, paragraph one of the syllabus.

This discretionary power should be exercised only in exceptional cases where the evidence presented weighs heavily in favor of the defendant and against conviction. *Id.* at 340.

{¶12} Bekelesky was convicted of assault in violation of R.C. 2903.13(A) which states in relevant part that “[n]o person shall knowingly cause or attempt to cause physical harm to another ***.” R.C. 2901.22(B) states:

“A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.”

R.C. 2901.01(A)(3) defines “physical harm to persons” as “any injury, illness, or other physiological impairment, regardless of its gravity or duration.”

{¶13} The Ohio Supreme Court has held that the results of a polygraph examination are admissible only for purposes of corroboration or impeachment. *State v. Souel* (1978), 53 Ohio St.2d 123, syllabus.

{¶14} The victim, Thomas Manely, testified that he and Bekelesky were both working at Roadway Express late one winter evening. Manely testified that he was looking for an empty trailer to hook up to his truck when he heard someone yell to him about his headlights. He testified that he walked over to the man whom he identified as Bekelesky. He testified that Bekelesky was standing on a platform approximately four-and-a-half feet off the ground. Manely testified that Bekelesky began to threaten him. He testified that he turned his head and suddenly felt as though he had been kicked in the face. He testified that he looked but saw that Bekelesky had left. Manely suffered swelling, bruising, and cuts requiring multiple stitches to his face and mouth. He testified that he only knew Bekelesky as a co-worker and that there had never been any prior trouble between them. Manely submitted to a polygraph examination which indicated that there was no physiological change indicative of deception when he stated that Bekelesky kicked him in the face and caused his injuries.

{¶15} Bekelesky testified in his own defense. He testified that he knew Manely as a co-worker and that there had never been any negative or violent incidents between them. He testified that he did not have any conversation or contact with Manely on the evening of the incident. Bekelesky stipulated to the admission of a polygraph examination which indicated the existence of physiological change indicative of deception when he denied that he kicked Manely in the face or otherwise caused Manely's injuries.

{¶16} Based on a thorough review of the record, this Court finds that this is not the exceptional case, where the evidence weighs heavily in favor of Bekelesky. A thorough review of the record compels this Court to find no indication that the trier of fact lost its way and committed a manifest miscarriage of justice in convicting Bekelesky of assault. The weight of the evidence supports the conclusion that Bekelesky knowingly kicked Mr. Manely in the face and caused him physical harm. The results of the polygraphs examinations corroborated the victim's testimony. The trial court did not abuse its discretion when it refused to allow Bekelesky to present expert testimony challenging the credibility of the results of the polygraph examinations. Accordingly, Bekelesky's conviction for assault is not against the weight of the evidence.

{¶17} Bekelesky's assignments of error are overruled.

III.

{¶18} Bekelesky's assignments of error are overruled. The judgment of the Barberton 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 Barberton 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.

DONNA J. CARR
FOR THE COURT

MOORE, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

J. ANTHONY TERILLA, Attorney at Law, for Appellant.

HOLLY REESE, Assistant Prosecuting Attorney, for Appellee.