[Cite as *State v. Evans,* 2015-Ohio-2298.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2014-L-070**
- vs -	:	
PEGGY E. EVANS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 12 CR 000657.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee,* Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Matthew C. Bangerter, P.O. Box 148, Mentor, OH 44061 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Peggy Evans, appeals her conviction, following a jury trial, in the Lake County Court of Common Pleas of assault on a peace officer. At issue is whether the court improperly limited appellant's right of cross-examination and whether her conviction was supported by sufficient, credible evidence. For the reasons that follow, we affirm.

{¶2} Appellant was indicted for assault on a peace officer, a felony of the fourth degree, in violation of R.C. 2903.12(A). She pled not guilty and the case was tried to a jury.

{¶3} During the evening of September 15, 2012, appellant had an argument with her husband, during which she left the house with a kitchen knife threatening to harm herself. As a result, appellant's husband called 911 and Lake County Sheriff's Deputies responded. One of the deputies prepared a "pink slip" authorizing appellant to be held at a hospital for 72 hours or until she could be cleared by medical staff to ensure she was no longer a danger to herself or others. Pursuant to the pink slip, sheriff's deputies took appellant to TriPoint Medical Center in Concord, Lake County for a medical evaluation.

{¶4} Lake County Sheriff's Deputy Kurt Banford testified that, while working security as a Lake County Sheriff's Deputy at TriPoint that night, at about 11:15 p.m., he learned the Sheriff's Department had brought appellant, who had been pink-slipped, to the emergency room for evaluation. He said the hospital's policy is that individuals who are pink-slipped are not allowed to leave the hospital until they are cleared by medical staff.

{¶5} TriPoint Security Guards, Vernon Hall and Melissa Sadowski, who were also working that night, confirmed that if a patient who has been pink-slipped is brought into the emergency room, he or she is not permitted to leave without being cleared by medical staff. If such a patient leaves, security is required to bring them back inside. Ms. Sadowski said that whenever a patient comes into the hospital who is pink-slipped, he or she is told they are not allowed to leave until the medical evaluation is completed.

{¶6} Deputy Banford testified that at about 11:30 p.m., while in the emergency room hallway, he saw appellant step out of her room. A nurse and a technician told her to go back into her room and that she could not leave until she was evaluated. Deputy Banford said appellant was argumentative with them so he stepped in to calm her down before the situation escalated. The deputy told appellant she could not leave until her evaluation was complete. He told her she should just go along with the program and, if she did, she could leave in no time. Appellant returned to her room.

{¶7} A few minutes later, Deputy Banford saw the tech escorting appellant down the hall. The tech told the deputy she was taking appellant to the bathroom. Deputy Banford followed them to make sure nothing unusual happened. Then, just as someone was leaving the emergency room into the main lobby and the double doors opened, appellant started running at full speed down the hall toward the lobby. A nurse tried to block her path, but stepped aside so appellant would not run into her. Appellant ran into the lobby. Deputy Banford yelled at her to "stop" while the tech was in pursuit, but appellant continued running out of the building.

{¶8} Once outside, Deputy Banford radioed the Lake County Sheriff's Communications Center, reporting that he was in pursuit of a pink-slipped female who had just run out of the hospital and asking for assistance.

{¶9} Deputy Banford said that appellant ran out of the hospital; went across the driveway used by the public to drop off and pick up patients; and then ran into the parking lot.

{¶10} Security Guards Vernon Hall and Melissa Sadowski testified they saw Deputy Banford chasing a female, who they knew had been pink-slipped, through the

emergency room toward the lobby. The two security guards followed Deputy Banford into the parking lot.

{¶11} Mr. Hall testified he and Ms. Sadowski lost sight of appellant and started looking for her between parked cars in the parking lot. He found appellant crouched down between two cars. Mr. Hall said that when appellant saw him, she appeared surprised. He told her she needed to go back inside and could not leave until she was signed out. However, instead of cooperating, appellant jumped up and started running again. Mr. Hall ran after her and grabbed her. She pulled away from him and started running again. Deputy Banford and Mr. Hall caught up to her and grabbed her. While appellant was fighting them, they brought her gently to the ground on her back.

{¶12} Deputy Banford and Mr. Hall testified that, once on the ground, appellant was thrashing her arms and kicking her feet and doing whatever she could to get away from them. While Deputy Banford was straddling appellant, he tried to control her arms by holding down her wrists, and Mr. Hall tried to stop her from kicking by holding down her legs. Appellant was able to get her right hand free, and punched Deputy Banford in the face with a closed fist, forcing his glasses inward toward his face and injuring the bridge of his nose. Deputy Banford said he immediately felt blood coming from his nose and his glasses fell to the ground. Mr. Hall and Ms. Sadowksi said that when appellant punched Deputy Banford in the face, she was holding a cell phone in her hand. Ms. Sadowski said she grabbed appellant's hand to keep her from hitting Deputy Banford again and took the cell phone from her. Ms. Sadowski also picked up the deputy's glasses.

{¶13} Deputy Banford testified that in order to get appellant to stop fighting them, he applied pressure to her collarbone with one hand and, with the other hand, covered her face, which was sideways on the ground. Deputy Banford learned these maneuvers, which are designed to control uncooperative individuals without causing injury, as part of his law enforcement training.

{¶14} Deputy Banford said he and Mr. Hall held appellant still until Deputy Angela Gondor arrived and assisted them in controlling her. Ms. Sadowski said blood was dripping from Deputy Banford's face. To stop the bleeding, she grabbed a glove from her pocket and used it to apply pressure to the bridge of his nose.

{¶15} Lake County Sheriff's Deputy Angela Gondor testified she responded to Deputy Banford's request for assistance. As she approached him in the parking lot, appellant was on the ground on her back. Deputy Banford, who had been injured before Deputy Gondor arrived, was kneeling over appellant on her left side holding her down. Mr. Hall was on the same side assisting and Ms. Sadowski was on appellant's right side. Deputy Gondor said that because appellant was pink-slipped and had tried to escape and Deputy Banford had been injured, she handcuffed appellant and escorted her back into the emergency room to complete her medical evaluation.

{¶16} Deputy Gondor said that while appellant was waiting to be evaluated, she was complaining that Deputy Banford's blood had dripped onto her face and asked for a nurse to clean it. The nurse was busy so Deputy Gondor cleaned appellant's face herself. Deputy Gondor said she did not see any injuries to appellant's face and appellant never complained of any injuries.

{¶17} Ms. Sadowski gave appellant's phone to one of the sheriff's deputies, and stood guard outside appellant's room to make sure she did not run away again.

{¶18} Deputy Banford sustained lacerations to his nose, under his right eye, his cheek, and chin. His injuries healed after about one month. Deputy Banford said he never struck appellant and she sustained no injuries as a result of this incident.

{¶19} Deputy Gondor said that at about 6:00 a.m. the following morning, she picked up appellant, who by then was medically cleared, and took her into custody for assaulting Deputy Banford.

{¶20} Appellant testified on her own behalf and provided a very different version of events. She admitted her husband called 911 because she held a knife to her wrist and was threatening to harm herself. She admitted that she was taken to TriPoint for a medical evaluation. She said she told the nurse in the emergency room that she wanted to leave and that the nurse told her she was not allowed to leave until her medical evaluation was completed. Appellant told her she was leaving anyway, and the nurse said she could not. Appellant testified she waited until she had an opportunity to run. She admitted she lied to the nurse and told her she had to use the bathroom so she could escape. She said that while Deputy Banford was following her, she took off running and, although she heard the deputy yelling for her to "stop," she ignored his orders and continued outside. She said she ran as fast as she could and squatted down behind a car to hide from the deputy. While hiding, she texted her husband on her cell phone telling him to come and pick her up.

{¶21} Appellant said Mr. Hall found her and grabbed her arm. She said she yanked away from him and started to run again. She said Deputy Banford caught up to

her; grabbed her; and threw her to the ground. She said he got on top of her and started punching her in the nose. She said she threw her hands up and he started to choke her.

{¶22} Appellant said she did not know if she hit Deputy Banford, but, after looking at the photographs of his injuries, she said it looks like she hit him. She said she was thrashing her arms not to hurt him, but, rather, to stop him from injuring her. She denied punching Deputy Banford, and said if she did, his injuries would have been much worse. Appellant said that Deputy Banford, Ms. Sadowski, and Mr. Hall all lied when they testified she punched Deputy Banford. She also said that she was not holding a cell phone in her hand when she hit the deputy and that Ms. Sadowski and Mr. Hall lied when they said she was.

{¶23} Appellant said that a doctor examined the injuries to her nose. However, on cross-examination, she admitted she had no medical records showing her nose was injured in any way.

{¶24} For the state's rebuttal case, Lake County Sheriff's Detective Randy Woodruff testified he went to TriPoint following appellant's attempt to flee from the hospital to investigate the incident. He said he saw Deputy Banford, who is in his sixties, had sustained several cuts, scratches, and lacerations, and there was blood on his face. Detective Woodruff said that when he took appellant's statement in the emergency room, she said that Deputy Banford punched her in the face. However, Detective Woodruff said he did not see any injuries to her face and she did not say she had sustained any injuries. He said that in the course of his investigation, he interviewed the witnesses and none of them reported that Deputy Banford hit appellant.

{¶25} The jury found appellant guilty of assaulting a peace officer, a felony of the fourth degree. The court referred appellant for a pre-sentence report.

{¶26} The case came on for sentencing. The court placed appellant on community control for one year and ordered that she serve 21 days in jail. The court transferred appellant's community control to Texas where she now resides.

{¶27} Appellant appeals her conviction, asserting three assignments of error. For her first, she contends:

{¶28} "The trial court erred to the prejudice of the defendant-appellant when it denied the defendant the ability to cross-examine the witness on issues directly related to his credibility."

{¶29} The state filed a motion in limine regarding disciplinary action taken against Deputy Banford in 2007, wherein he was given a few days off work for being untruthful regarding the cause of an accident in which his cruiser was damaged. Before Deputy Banford was cross-examined, counsel presented their argument on the issue at a sidebar conference and the trial court reviewed the reports concerning the deputy's discipline. The court granted the state's motion and prevented the defense from cross-examining the deputy regarding this prior incident. As grounds, the court said the deputy's 2007 report was not made under oath and nothing about which he testified in this case made the 2007 incident relevant for purposes of cross-examination.

{¶30} "'The admission or exclusion of relevant evidence rests within the sound discretion of the trial court.'" *State v. Thompson*, 11th Dist. Trumbull No. 2014-T-0013, 2014-Ohio-4318, ¶26, quoting *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus. Further, "[a] trial court's decision to exclude evidence will not be

overturned absent an abuse of discretion." *Thompson, supra*. This court has held that an abuse of discretion is a term of art, which connotes a judgment of the court that does not comport with reason or the record. *State v. DelManzo*, 11th Dist. Lake No. 2009-L-167, 2010-Ohio-3555, ¶23.

{¶31} "[G]enerally, the scope of cross-examination is within the sound discretion of the trial judge." *State v. Ferguson*, 5 Ohio St.3d 160, 166 (1983). Moreover, "[a] criminal defendant's right to confront and cross-examine a witness is not unlimited." *State v. Minier*, 11th Dist. Portage No. 2000-P-0025, 2001-Ohio-4285, ¶8. This court stated in *Minier, supra:*

> **{¶32}** A trial court retains "wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, * * * or interrogation that is repetitive or only marginally relevant." [*Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)]. Thus, "'the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defense might wish.'" *Id.*, quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985).

{¶33} Further, Evid.R. 608(B), regarding "specific instances of conduct," provides:

> **{¶34}** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness,

> other than conviction of crime as provided in Evid.R. 609, may not be proved by extrinsic evidence. They may, however, *in the discretion of the court*, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness * * * concerning the witness's character for truthfulness or untruthfulness * * *. (Emphasis added.)

{¶35} Appellant argues she should have been allowed to cross-examine Deputy Banford based on his 2007 discipline because he was untruthful as to the cause of the accident in which his cruiser was damaged. She argues that because the deputy was on duty at the time of the 2007 incident, his untruthfulness in that proceeding is relevant to the instant case. If we were to assume the accuracy of appellant's argument, the trial court's ruling would have been error because witness credibility is always relevant. Evid.R. 607(A). However, appellant did not proffer the reports concerning the 2007 discipline, which the trial court considered before making its ruling. Thus, there is nothing for us to review, and no evidence before us on which to conclude the trial court abused its discretion in ruling that the deputy's seven-year-old discipline was irrelevant.

{¶36} In any event, any error in excluding this evidence was harmless beyond a reasonable doubt for several reasons. Crim.R. 52(A). "Lack of an opportunity to fully cross-examine is harmless error when there is overwhelming, untainted evidence supporting a conviction." *State v. Green*, 66 Ohio St.3d 141, 148 (1993), citing *Harrington v. California*, 395 U.S. 250, 253-254 (1969). Here, the trial court gave appellant's counsel great leeway in cross-examining Deputy Banford. *See State v. McKinney*, 8th Dist. Cuyahoga No. 99270, 2013-Ohio-5730, ¶16, citing *Green, supra*, at

147. Moreover, the state presented two independent eyewitnesses, who corroborated the deputy's testimony that appellant punched him in the face. *McKinney, supra.* Thus, the state presented overwhelming, untainted evidence of appellant's guilt.

{¶37} We therefore hold that, because no evidence was proffered for our review regarding the disciplinary proceeding and further because any error would not have changed the outcome and thus would be harmless, the trial court did not abuse its discretion in preventing appellant from cross-examining Deputy Banford about his 2007 disciplinary proceeding.

{¶38} Appellant's first assignment of error is overruled.

{¶39} For appellant's second assigned error, she alleges:

{¶40} "The trial court erred to the prejudice of the defendant-appellant in denying his motion for acquittal made pursuant to Crim.R. 29(A)."

{¶41} An appellate court reviewing the sufficiency of the evidence examines the evidence admitted at trial and determines whether, after viewing the evidence in a light most favorable to the state, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 273 (1991). "On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390 (1997) (Cook, J., concurring). Whether the evidence is legally sufficient to sustain a verdict is a question of law, which we review de novo. *Id*. at 386.

{¶42} An appellate court also applies the foregoing test in reviewing the trial court's ruling on a motion for acquittal under Crim.R. 29 as such motion also tests the

sufficiency of the evidence. *State v. Hall*, 11th Dist. Trumbull No. 2011-T-0115, 2012-Ohio-4336, ¶7.

{¶43} R.C. 2903.13(A) provides that "[n]o person shall knowingly cause or attempt to cause physical harm to another * * *. R.C. 2903.13(C)(5) provides that assault is a felony of the fourth degree "[i]f the victim of the offense is a peace officer * * * while in the performance of their official duties."

{¶44} "A person acts knowingly * * * when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B).

{¶45} Appellant argues the evidence was insufficient to prove she *knowingly* caused injury to Deputy Banford because the evidence showed she was merely flailing her arms and only accidentally struck Deputy Banford. However, appellant ignores the testimony of three eyewitnesses that she deliberately punched the deputy in the face. When asked how appellant injured him, Deputy Banford testified: "*It was a hard closed fist punch to the face, not a flail or a waving of the hands*." (Emphasis added.) Mr. Hall testified that appellant punched Deputy Banford in the face while holding a cell phone in her hand. Similarly, Ms. Sadowski testified that she saw appellant hit Deputy Banford in the face with a phone in her hand. The state thus presented evidence that appellant acted knowingly because, by punching Deputy Banford, she was aware her conduct would probably cause him to be injured. This testimony, if believed, was sufficient to support appellant's conviction.

{¶46} Appellant's reliance on *State v. Santiago-Dennis*, 8th Dist. Cuyahoga No. 100661, 2014-Ohio-4204, is misplaced because in that case, the defendant, in resisting arrest, was merely flailing his arms when he struck the officer. There was no evidence

in *Santiago-Dennis* that the defendant punched the officer. The Eighth District held there was no evidence of an intent to knowingly cause harm. *Id*. at ¶28.

{¶47} Appellant's remaining "sufficiency" arguments have nothing to do with the sufficiency of the evidence and thus lack merit. For example, she argues that if anyone with authority had explained to her that she was required to remain in the hospital until she was released, "things might have ended up differently." However, the record reveals that several hospital employees and law enforcement officers told appellant she was not allowed to leave until her evaluation was completed. When appellant first stepped out of her room, a nurse and the tech told her to go back into her room and that she could not leave until her evaluation was completed. Also, Deputy Banford repeated this instruction to her. Later, when the deputy saw appellant running out of the emergency room toward the exit doors, he yelled to her to stop. In addition, when Mr. Hall found appellant hiding between cars, he told her she was required to go back into the hospital and that she could not leave until she was signed out. Thus, appellant was told by several authorized personnel that she was required to stay and could not leave until she was medically evaluated.

{¶48} Appellant also argues that Deputy Banford's testimony lacked credibility because he provided a "completely different" version of events at the preliminary hearing. However, the *only* discrepancy to which appellant refers is that at the preliminary hearing the deputy initially said he and Mr. Hall brought appellant to the ground *on her stomach* rather than her back. In any event, during the preliminary hearing, the deputy corrected himself and said that she was on her back. Appellant did

not offer the preliminary hearing transcript in evidence so we cannot determine exactly how the discrepancy was corrected, but the record shows it was corrected.

{¶49} Finally, appellant contends that Deputy Gondor's testimony conflicted with the testimony of Deputy Banford and the two hospital security guards because she said Deputy Banford was holding appellant down from the side while the other witnesses said that Deputy Banford was on top of appellant. However, Deputy Gondor arrived at the scene after appellant had assaulted Deputy Banford. Further, Deputy Gondor obviously saw the participants from an angle different from theirs. Thus, the difference in Deputy Gondor's testimony regarding Deputy Banford's position is inconsequential. In any event, consistent with Deputy Banford's testimony, Deputy Gondor said that as she approached, appellant was on the ground on her back and Deputy Banford was kneeling *over her*.

{¶50} In view of the foregoing, the trial court did not err in overruling appellant's motion for acquittal.

{¶51} Appellant's second assignment of error is overruled.

{¶52} For her third and final assigned error, appellant alleges:

{¶53} "The trial court erred to the prejudice of the defendant-appellant when it returned a verdict of guilty against the manifest weight of the evidence."

{¶54} In contrast to a sufficiency challenge, a court reviewing the manifest weight of the evidence observes the entire record, weighs the evidence and all reasonable inferences, and considers the credibility of the witnesses. *Thompkins, supra*, at 387. The court determines whether, in resolving conflicts in the evidence and deciding witness credibility, the trier of fact clearly lost its way and created such a

manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *Id*. The discretionary power to grant a new trial should only be exercised in the exceptional case in which the evidence weighs heavily against the conviction. *Id*. Witness credibility rests solely with the finder of fact, and an appellate court is not permitted to substitute its judgment for that of the jury. *State v. Awan*, 22 Ohio St.3d 120, 123 (1986). "The jury is entitled to believe all, part, or none of the testimony of any witness." *State v. Archibald*, 11th Dist. Lake Nos. 2006-L-047 and 2006-L-207, 2007-Ohio-4966, ¶61. The role of the reviewing court is to engage in a limited weighing of the evidence in determining whether the state properly carried its burden of persuasion. *Thompkins, supra, at 390*. If the evidence is susceptible to more than one interpretation, an appellate court must interpret it in a manner consistent with the verdict. *State v. Banks*, 11th Dist. Ashtabula No. 2003-A-0118, 2005-Ohio-5286, ¶33.

{¶55} Appellant argues the evidence weighed in favor of a finding that she accidentally hit the deputy rather than a finding that she consciously inflicted his injury. However, while the state presented three eyewitnesses who testified appellant deliberately punched Deputy Banford, appellant did not present any witnesses to corroborate her testimony that the assault was accidental. Appellant's version of events directly contradicted the state's testimony. As the trier of fact, the jury was entitled to find that the state's witnesses were more credible than appellant. In doing so, we cannot say the jury clearly lost its way and created such a manifest miscarriage of justice that appellant's conviction must be reversed and a new trial ordered.

{¶56} Appellant's third assignment of error is overruled.

{¶57} For the reasons stated in this opinion, appellant's assignments of error lack merit and are overruled. It is the order and judgment of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs in judgment only,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶58} I respectfully dissent.

{¶59} Evid.R. 608(B) vests a trial court with discretion to allow cross-examination about specific instances of conduct of a witness "if clearly probative of truthfulness or untruthfulness." *State v. Brooks*, 75 Ohio St.3d 148, 151 (1996). Thus, there is a requirement that instances of prior conduct be clearly probative of the witnesses' truthfulness or untruthfulness. *State v. Miller*, 11th Dist. Trumbull No. 2004-T-0082, 2005-Ohio-5283, ¶36. There is, however, no requirement that the prior conduct be related to whether the witness is telling the truth regarding their current testimony before the court.

{¶60} Appellant argues that she should have been able to cross examine Deputy Banford about an incident in 2007 where he was disciplined for being untruthful regarding an accident involving his police cruiser. The majority states that, assuming appellant's argument about the 2007 incident is accurate, the trial court's ruling would have been error as witness credibility is always relevant. The majority notes that as

appellant failed to proffer the deputy's personnel file there is no evidence before this court from which we can conclude that the trial court abused its discretion.

{¶61} However, even though the deputy's disciplinary file was not proffered, the trial court reviewed the file and noted, on the record, that the deputy was disciplined for being untruthful about the damage done to the police cruiser. As such this court has sufficient evidence before it to determine that the deputy was untruthful regarding his official duties in 2007.

{¶62} The deputy's prior discipline for being untruthful is clearly probative of his truthfulness or untruthfulness. As such it was up to the jury to determine the deputy's credibility in light of this prior incident of being untruthful.

{¶63} Therefore, I dissent.