

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

AMY M. LAMBERT

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 09CA113

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Municipal
Court, Case No. 09TRC01135

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

June 15, 2010

APPEARANCES:

For Plaintiff-Appellee

DEBORAH L. KENNEY
One South Park Place
Newark, Ohio 43055

For Defendant-Appellant

ANDREW T. SANDERSON
Burkett & Sanderson, Inc.
21 West Church Street
Suite 201
Newark, Ohio 43055

Hoffman, J.

{¶1} Defendant-appellant Amy Lambert appeals her conviction and sentence entered by the Licking County Municipal Court on one count of OMVI, in violation of R.C. 4511.19(A)(1)(a); and one count of failure to maintain reasonable control, in violation of R.C. 4511.202, following a jury trial. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On February 7, 2009, Appellant was cited on the aforementioned charges. Appellant appeared before the trial court on February 11, 2009, and entered a plea of not guilty to the charges. The matter proceeded to jury trial on May 11, 2009.

{¶3} Sarah Runyon, a nursing assistant at Pine Kirk Care Center, testified she was working the night shift at the nursing home in February, 2009. While on a break during the early morning hours of February 7, 2009, Runyon heard a loud muffler sound. She looked out the front door and observed a small red vehicle traveling east on U.S. Route 40 toward the nursing home. The vehicle turned onto a side street, backed up quickly, and then traveled forward, skidding on an ice patch and almost hitting a vehicle owned by a Pine Kirk employee. The vehicle continued to travel, ultimately striking a metal post. Runyon saw the passenger, a woman, exit the vehicle and look at the car. The passenger began to yell at the driver. Although Runyon could hear the yelling, the passenger's words were incomprehensible. Thereafter, Runyon obtained the phone number for the police and provided it to a co-worker.

{¶4} Dustina Fields, a nursing assistant, testified she was working at Pine Kirk Care Center on February 7, 2009. Fields walked out of one building and proceeded toward another building which was part of the care center to purchase a beverage from

the vending machines. Fields observed a car traveling on a side road across the street from the care center. The driver backed the car onto Main Street and into an embankment of ice. The reddish-maroon compact car sped forward and struck a pole. After hitting the pole, the driver backed up a short distance and parked the vehicle. The passenger exited, inspected the front of the car, and began screaming at the driver. The passenger assisted the driver out of the car, and the two women walked arm and arm across the street. Fields testified she could tell both women were intoxicated just by the way they walked. Fields described the driver as a tall woman with long, bright blonde hair. She witnessed the two women enter a residence a couple of doors down from the nursing home. Fields telephoned the police.

{¶15} Ohio State Trooper Rusty Lanning testified he was on routine patrol during the early morning hours of February 7, 2009, when he heard Trooper Maines dispatched to a traffic crash in Kirkersville, Ohio. Trooper Lanning traveled to the area to assist Trooper Maines. After speaking with Trooper Maines and the witnesses, Trooper Lanning proceeded to the house Fields had seen the driver and passenger entering. The trooper looked through the windows and observed a person matching the description of the driver. The two troopers knocked on the front door and a woman, subsequently identified as Appellant's mother, answered. Trooper Maines questioned Appellant about the crash. Trooper Lanning recalled Appellant appeared to be highly intoxicated, noting her speech was very slurred, she was acting aggressively, and she was walking off balance. Additionally, Appellant was swaying as she stood, had an extremely strong odor of alcohol emanating from her breath, had red, glassy eyes, and flushed cheeks. Appellant responded to the troopers with a medley of curse words.

Trooper Maines provided Appellant with a BMV Form 2255, but Trooper Lanning could not recall whether Appellant signed it. Trooper Maines also asked Appellant to submit to a chemical test, to which she replied, "F- off".

{¶6} Tamera DeBoard, Appellant's sister, testified she is the owner of a maroon 1992 Nissan Sentra. DeBoard testified she and Appellant were drinking at the Kirkersville Tavern, arriving at approximately 9:00 pm on February 6, 2009, to celebrate Appellant's birthday. DeBoard recalled she and Appellant were drinking beer and had done a few shots, but could not remember how much either she or Appellant drank. On cross-examination, DeBoard stated neither she nor Appellant had driven that evening.

{¶7} Ohio State Trooper Chad Maines testified he began his shift at 10:00 pm on February 6, 2009. At approximately 3:21 am on February 7, 2009, Trooper Maines was dispatched to U.S. 40, also known as Main Street, in Kirkersville, Ohio. The dispatcher directed the trooper to a senior care center to meet with the witnesses. When he arrived, Trooper Maines spoke with Dustina Fields and Sarah Runyon. The women recounted the scene they had witnessed, and described the driver and passenger of the vehicle. Trooper Maines inspected the subject vehicle and found damage to the front right bumper, which he described as "mostly paint transfer". The trooper proceeded across the street to an alley on the side of a house, in which there were lights illuminated. Trooper Maines looked through a window and saw Appellant and her sister, sitting at the kitchen table, awake and talking. He returned to the care center and informed Trooper Lanning, he had seen two women who fit the descriptions provided by the witnesses.

{¶8} Trooper Maines subsequently made contact with Appellant. When he asked Appellant if she knew anything about a crash involving the Nissan, Appellant immediately became defensive, using profanities, raising her voice, and becoming very agitated. Appellant claimed no knowledge of the crash and claimed she had not been driving as she had walked home from the bar. Trooper Maines noted Appellant had a very strong odor of alcohol emanating from her breath, her face was flushed, her speech was slurred, her eyes were red and glassy, and she was unsteady on her feet. Due to Appellant's agitation level, her lack of cooperation, and the fact she was on private property, Trooper Maines did not conduct any field sobriety tests. He read the BMV Form 2255 to Appellant, and asked her if she would be willing to submit to a chemical test. Appellant told the trooper to "F - himself," which he considered a refusal. Thereafter, Trooper Maines cited Appellant for OMVI and failure to maintain reasonable control.

{¶9} After hearing all the evidence and deliberating, the jury found Appellant guilty of both charges. The trial court sentenced Appellant to 90 days in jail, suspending 30 days; suspended her operator's license for two years; and ordered her to pay fines in the amount of \$600 plus court costs. The trial court placed Appellant on probation for a period of two years, requiring her to attend outpatient alcohol counseling and prohibiting her use of drugs and alcohol.

{¶10} It is from these convictions and sentence Appellant appeals, raising the following assignments of error:

{¶11} “I. THE RECORD BELOW FAILS TO DEMONSTRATE THAT THE JURY WAS PROPERLY IMPANELED AND PRESENT IN THE COURT ROOM PRIOR TO THE ANNOUNCEMENT OF THE PURPORTED VERDICT.

{¶12} “II. THE DEFENDANT-APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.”

I

{¶13} In her first assignment of error, Appellant maintains the trial court record fails to demonstrate the jury was properly impaneled and present in the courtroom prior to the announcement of the verdict.

{¶14} Crim.R. (A) provides:

{¶15} “The verdict shall be unanimous. It shall be in writing, signed by all jurors concurring therein, and returned by the jury to the judge in open court.”

{¶16} Appellant submits the record in the instant action fails to demonstrate the verdict was “returned by the jury to the judge in open court” pursuant to Crim.R. 31(A). Appellant concludes the noncompliance with Crim.R. 31(A) renders her conviction void. Appellant concedes defense counsel failed to object; therefore, the issue must be reviewed under a plain error analysis.

{¶17} In order to prevail under a plain error analysis, Appellant bears the burden of demonstrating the outcome of the trial clearly would have been different, but for the error. Crim. R. 52(B). Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804.

{¶18} With respect to the jury’s verdict, the transcript demonstrates as follows:

{¶19} “(After receiving instruction from the Court, the jury began deliberations and thereafter the following proceedings were held.)

{¶20} “The Court: All right, Miss Lambert, Miss Phipps, the jury has returned what appears to be a unanimous guilty verdict. Would you care to have the jury polled?

{¶21} “Ms. Phipps: No, Your Honor.”

{¶22} Tr. at 142.

{¶23} We find no error, plain or otherwise. The trial court asked Appellant if she wanted the jury polled. By inquiring as such, we can only presume the jury was present in the courtroom. The record does not affirmatively demonstrate the error alleged. We find the trial court substantially, if not strictly, complied with Crim.R. 31(A).

{¶24} Appellant’s first assignment of error is overruled.

II

{¶25} In her second assignment of error, Appellant raises a claim of ineffective assistance of counsel. Specifically, Appellant asserts trial counsel was ineffective for failing to object to prejudicial and admissible evidence; failing to object to inflammatory and improper closing remarks by the prosecutor; and failing to object to the trial court’s acceptance of the jury verdict.

{¶26} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel’s performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel’s essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel’s ineffectiveness. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct.

2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley* at 142, 538 N.E.2d 373. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists counsel's conduct fell within the wide range of reasonable professional assistance. *Id.*

{¶27} In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. "Prejudice from defective representation sufficient to justify reversal of a conviction exists only where the result of the trial was unreliable or the proceeding fundamentally unfair because of the performance of trial counsel." *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 651 N.E.2d 965, citing *Lockhart v. Fretwell* (1993), 506 U.S. 364, 370, 113 S.Ct. 838, 122 L.Ed.2d 180.

{¶28} The United States Supreme Court and the Ohio Supreme Court have held a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley* at 143, 538 N.E.2d 373, quoting *Strickland* at 697.

{¶29} Appellant contends defense counsel was ineffective for failing to object to hearsay testimony elicited from law enforcement officials by the prosecutor. Appellant asserts the investigating officers testified as to the identity of the driver in question based upon statements made to them by the eyewitnesses. Appellant submits the admission of the statements was a violation of the United States Supreme Court's holding in *Crawford v. Washington* (2004), 541 U.S. 36.

{¶30} We find no *Crawford* violation. The eyewitnesses, upon whose testimony the investigating officers relied, testified at trial; therefore Appellant was given an opportunity to confront her accusers. Furthermore, we find the testimony of the investigating officers relating the information provided by the eyewitnesses was, at most, cumulative. As such, we find Appellant is unable to satisfy the second prong of *Strickland*.

{¶31} We now turn to Appellant's assertion trial counsel was ineffective for failing to object to remarks made by the prosecutor during closing arguments which called into question Appellant's invoking her constitutional rights to present a defense and to confront her accusers. Appellant submits the statements were made to inflame the jury, involved facts not in evidence, and vouched for the credibility of the witnesses. Assuming, arguendo, defense counsel's representation fell below an objective standard of reasonableness, we find Appellant is, nonetheless, unable to establish she was prejudiced by such ineffectiveness as the evidence against her was overwhelming.

{¶32} The third ground upon which Appellant predicates her claim of ineffective assistance of counsel is trial counsel's failure to object to the trial court's acceptance of the jury verdict. Having found, supra, no error in the trial court's acceptance of the jury verdict, we overrule this portion of Appellant's second assignment of error.

{¶33} Based upon the foregoing, Appellant's second assignment of error is overruled.

{¶34} The judgment of the Licking County Municipal Court is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Wise, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ John W. Wise
HON. JOHN W. WISE

