

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-12-121
- vs -	:	<u>OPINION</u>
	:	12/19/2011
CHRISHAWNDA ZIELINSKI,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT
Case No. 2010CRB00365

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Chrishawnda Zielinski, 10499 Morrow-Rossburg Road, Pleasant Plain, Ohio 45162, defendant-appellant, pro se

POWELL, P.J.

{¶1} A mother convicted of domestic violence after a fight with her 15-year-old daughter asks this court to overturn her conviction by claiming she was exercising parental discipline, the trial court wrongfully excluded some evidence, and her trial counsel was ineffective. Finding none of the claimed errors well taken, we affirm the conviction.

{¶2} Chrishawnda Zielinski (mother) was charged in Warren County Court with

misdemeanor domestic violence for the 2010 altercation with her daughter, A.H. Mother was found guilty of domestic violence in a trial to the bench. Acting pro se, mother instituted this appeal, raising three assignments of error for our review.

{¶3} Assignment of Error No. 1:

{¶4} "THE TRIAL COURT ERRED WHEN IT ENTERED A JUDGEMENT AGAINST THE APPELLANT WHICH WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL[.]" [sic]

{¶5} Mother argues the evidence does not support the conviction because parental discipline is an affirmative defense for a parent charged with domestic violence.

{¶6} To summarize the evidence presented at trial, the altercation occurred on Mother's Day after A.H., who lives with her mother, returned home from a visit with her father. A.H. testified that she was upstairs in her room when mother asked her to work outside with the family. The two reportedly argued. Mother returned again upstairs at some point because, according to A.H., her mother thought she was "taking forever" to come downstairs.

{¶7} A.H. testified that her mother was standing in front of her and "came at me and I put my hands up, not to hit her or anything, but just put my hands up and she was so close, that I actually touched her and she got mad and she started swinging at me, * * * not really hard, just kind of swatting."

{¶8} A.H. said her mother was swatting at her when she pulled her mother's hair "like downwards and away from me, to get her off of me." A.H. said she tripped over things in her messy room and fell on her back and her mother fell on top of her. A.H. said she tried to crawl to the door, when mother "got on top of my back and put her arm around my neck" and was choking her. The daughter said she turned onto her back and mother was "on top of my stomach" and was holding A.H.'s arms back. "I was screaming and yelling and trying to get away."

{¶9} When asked how the fight ended, A.H. said "when I was on the ground, she punched me, one time right here, like right in the temple and two times right here on my bone (indicating face)." She said her mother told her to stop crying and she would let her up. A.H. said she "pulled it together really fast," her mother got up, and A.H. ran into her bathroom. The daughter said she began throwing things in her bathroom; "I was so upset." She called her father and stepmother on her cell phone and told them about the fight.

{¶10} A.H. testified that she had a bruise on her face and her wrist, her temple area was swollen, she had some blurred vision afterward, and her ribs and back hurt. She said her mother helped put ice on her face and she eventually went outside with the family.

{¶11} On cross examination, A.H. denied that the injury to her eye occurred "from the desk you ran into when you were falling over." She also denied the eye injury was caused by falling into the wall. A.H. said, "I was far enough distance from the wall that when I fell, I didn't hit it." She denied starting the physical fight. She admitted that she wanted to live with her dad and was now living with him at the time of trial.

{¶12} A deputy sheriff testified that he responded to the house after father and stepmother called authorities. He said he observed the daughter's left eye was swollen and black and blue. He talked with A.H. and mother. Mother told the deputy her daughter has "an attitude" whenever she is dropped off from her father's, and the two were arguing over the daughter not coming outside to help with yard work.

{¶13} The deputy testified A.H. said she accidentally hit mother. Mother told the deputy she punched her daughter. He said he observed several marks on mother's hand, including a bite mark that the daughter admitted to inflicting when she said mother's hand was around her neck. Photographs were taken of the visible injuries of both mother and daughter. The deputy indicated he placed mother and daughter in custody for domestic violence because he was unable to determine the primary aggressor.

{¶14} Mother testified that A.H.'s attitude was getting worse. "She's just been a little more mouthy and you know, typical teenager." Mother said that previously, the discipline they imposed on A.H. would include such things as taking away her cell phone. Mother felt that father and stepmother undermined her authority with her daughter. Mother indicated she and A.H. had not had a physical confrontation before this incident.

{¶15} Mother said the first physical altercation with her daughter started at the top of the steps when she pulled on her daughter's elbow "to try to you know, just tell her come downstairs and then she [A.H.] swung back like this and she had her fist up at me." Mother testified that she told A.H., "[d]on't you dare do that." Stepfather observed this encounter.

{¶16} Mother said no one witnessed the next encounter when she went back to her daughter's room to see why she still hadn't come downstairs. According to mother, the daughter was throwing and slamming things in her room. Mother said, "I didn't feel like listening to all her garbage at that time." She said A.H. was screaming at her, so "I grabbed her arm, she swings back at me and I swing back at her." "I don't remember hitting her at all." Mother said A.H. grabbed mother's hair and would not let go. Mother said she picked up her daughter to try to control the situation. Mother said she wanted to get on top of her daughter to get this to stop.

{¶17} Mother indicated that when she picked up her daughter, there were so many clothes, books, and things on the floor that "we end up falling and she hits the wall. She hit the wall so hard, she put a dent in my wall and at that point in time, when she hit the wall, I was concerned about her."

{¶18} According to mother, the fight continued when A.H. tried to get up off the floor. Mother said she grabbed her daughter's head as she was getting up and they fell back into the desk. Mother got on top of her daughter and A.H. bit her hand. Mother said her daughter called her a "bitch" and said she hated her. A.H.'s body finally went limp after mother

repeatedly told her daughter she wasn't getting up until she stopped what she was doing.

{¶19} Mother denied telling the deputy she punched her daughter. She said she told the deputy she "must've punched her, because look at her eye." Mother told the prosecutor she was frustrated at her daughter "swinging things all over the place, her talking to me, like I was a piece of crap and not doing what I asked her to do. That's what frustrated me. * * * And she was frustrated with me, because she didn't want to do it."

{¶20} Stepfather testified that he observed the earlier encounter on the stairs and indicated that the daughter reacted when mother "went to grab [A.H.'s] elbow," the daughter took a "step back and put both of her arms up in an aggressive manner." When asked if he had ever gotten into a physical confrontation with A.H., the stepfather said he had. The trial court sustained an objection by the prosecutor and no additional questions of that nature were asked.

{¶21} As previously noted, mother was charged and convicted of violating R.C. 2919.25, which states that no person shall knowingly cause or attempt to cause physical harm to a family or household member. "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." R.C. 2901.22(B). "A person has knowledge of circumstances when he is aware that such circumstances probably exist." *Id.*

{¶22} Mother challenges her conviction on appeal by arguing that A.H. was the initial aggressor and that mother used reasonable measures to control her daughter.

{¶23} Nothing in the domestic relations statute prevents a parent from properly disciplining his or her child. *State v. Suchomski* (1991), 58 Ohio St.3d 74, 75. The only prohibition is that a parent may not cause "physical harm" as that term is defined in R.C. 2901.01. *Id.* R.C. 2901.01(A)(3) states that: "Physical harm to persons" means any injury, illness, or other physiological impairment, regardless of its gravity or duration." "Injury" is

defined as " * * * [t]he invasion of any legally protected interest of another." *Suchomski*, citing Black's Law Dictionary (6 Ed.1990) 785.

{¶24} A child does not have any legally protected interest that is invaded by proper and reasonable parental discipline. *Suchomski; State v. Luke*, Union App. No. 14-10-26, 2011-Ohio-4330, ¶21. "Proper" has been defined as "suitable or appropriate," and "reasonable" has been defined as "not extreme or excessive." *Luke*.

{¶25} Where an alleged incident of domestic violence occurs between a parent and child, the parent may raise parental discipline as an affirmative defense. *Luke* at ¶21. Whether parental discipline is "extreme or excessive" is determined in light of the totality of the circumstances. *Id.* at ¶22. In analyzing the totality of the circumstances, a court should consider the following factors: (1) the child's age; (2) the child's behavior leading up to the discipline; (3) the child's response to prior non-corporal punishment; (4) the location and severity of the punishment; and (5) the parent's state of mind while administering the punishment. *Id.*

{¶26} A review of the record at trial indicates that mother also argued she was defending herself from A.H., who is about a foot taller than her mother.

{¶27} Whether mother was arguing reasonable parental discipline or self-defense, the accused has the burden of going forward with the evidence of an affirmative defense. R.C. 2901.05(A).

{¶28} Self-defense may be asserted as a defense to a charge of domestic violence. *State v. Boldin*, Geauga App. No. 2007-G-2808, 2008-Ohio-6408, ¶68. To establish self-defense as an affirmative defense, the accused must establish the following by a preponderance of the evidence: (1) that she was not at fault in creating the situation giving rise to the affray; (2) that she had a bona fide belief that she was in imminent danger of death or great bodily harm and that her only means of escape from such danger was in the use of

such force; and (3) that she must not have violated any duty to retreat or avoid danger. *State v. Williford* (1990), 49 Ohio St.3d 247, 249.

{¶29} However, the self-defense affirmative defense generally admits the facts claimed by the prosecution and then relies on independent facts or circumstances which the defendant claims exempt her from liability. *State v. Poole* (1973), 33 Ohio St.2d 18, 19. Mother admits a scuffle took place, but doesn't admit to punching her daughter, and argues, instead, that she didn't cause her daughter's injuries as those injuries occurred when A.H. fell into and struck the wall or desk during the scuffle.

{¶30} When confronted with a challenge to the weight of the evidence, we review the entire record, weigh the evidence and all inferences, consider the credibility of the witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶39. To reverse on this basis, we must disagree with the fact finder's resolution of the conflicting evidence. *State v. Lampe*, Hamilton App. No. C-020708, 2003-Ohio-3059, ¶8. Because the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact, we may exercise our power to grant a new trial only in exceptional cases. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231; *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52.

{¶31} After reviewing the record, we cannot say the trial court clearly lost its way and created a manifest miscarriage of justice. As the trier of fact, the trial court was in the best position to observe and assess witness credibility. *DeHass* at 231. Witness credibility rests solely with the trier of fact, and an appellate court is not permitted to substitute its judgment for the fact-finder. *State v. Awan* (1986), 22 Ohio St.3d 120, 123.

{¶32} We cannot refute the trial court's resolution of the conflicting evidence. The trial court could find from the manifest weight of the evidence that mother caused or

attempted to cause physical harm to her daughter as she was aware that her conduct would likely cause a certain result. Further, the trial court found that mother failed to sustain her burden regarding her affirmative defenses. In other words, mother failed to show that her actions were excused because she was defending herself or she was using proper and reasonable parental discipline to control her daughter. We find none of mother's arguments well taken, and her first assignment of error is overruled.

{¶33} Assignment of Error No. 2:

{¶34} "THE TRIAL COURT ERRED BY PREVENTING THE TESTIMONY OF THE APPELLANTS HUSBAND IN REGARDS TO THE ALLEGED VICTIMS PRIOR PHYSICALLY AGGRESSIVE BEHAVIOR[.]" [sic]

{¶35} Mother argues that her daughter's past response to discipline is one of the factors considered to determine if parental discipline and control is excessive and the trial court erred in excluding stepfather's testimony about his previous physical encounter with A.H.

{¶36} As previously noted, stepfather was asked whether he had ever had a physical confrontation with A.H. before this altercation, and he answered in the affirmative. The prosecutor objected. Mother's trial counsel argued that it would show daughter's "aggressive personality." Counsel told the trial court that she thought it was relevant in that A.H.'s behavior toward stepdad, as a member of the family, shows prior aggression "in regards to defying what the parents had asked her to do." The trial court indicated it disagreed and sustained the objection.

{¶37} Evid.R. 401 states that "'relevant evidence' means any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

{¶38} Evid.R. 404 and 405 set forth the applicable rules regarding the introduction of

character evidence. *State v. Moore*, Allen App. Nos. 1-06-89, 1-06-96, 2007-Ohio-3600, ¶156.

{¶39} Evid.R. 404(A)(2), provides in part, that evidence of a pertinent trait of character of the victim "offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible."

{¶40} Evid.R. 405 sets forth the proper methods for a proponent to introduce character evidence if that evidence is admissible under Evid.R. 404. *Moore* at ¶57. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion; on cross-examination, inquiry is allowable into relevant specific instances of conduct. Evid.R. 405(A).

{¶41} "In cases in which character or trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct." Evid.R. 405(B). It is well established that a defendant may successfully assert self-defense, without resort to proving any aspect of a victim's character. *State v. Barnes*, 94 Ohio St.3d 21, 24, 2002-Ohio-68. Therefore, Evid.R. 405(B) precludes a defendant from introducing specific instances of the victim's conduct to prove that the victim was the initial aggressor. *Id.*

{¶42} Under Evid.R. 103(A)(2), "[e]rror 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 the questions were asked."

{¶43} If the party claiming error is unable to establish it affected a substantial right, the error is deemed harmless. *State v. Walters*, Montgomery App. No. 22977, 2010-Ohio-304, ¶17. If the party is unable to establish the substance of the evidence, the error is

deemed waived. Id.

{¶44} A trial court has broad discretion to admit or exclude evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, an appellate court should not disturb the decision of the trial court. *State v. Issa*, 93 Ohio St.3d 49, 64, 2001-Ohio-1290.

{¶45} A review of the record indicates mother failed to proffer what additional testimony stepfather would provide with regard to his previous physical confrontation with A.H. Stepfather testified that he had a physical confrontation with A.H. and that response was not stricken from the record. We cannot speculate as to what additional evidence he might have provided. Therefore, mother has failed to establish the substance of the evidence.

{¶46} Further, we cannot say the trial court abused its discretion by excluding specific instances of A.H.'s conduct toward stepfather offered on direct examination. Finally, the record indicates mother presented other evidence to support her position that she was defending herself from her daughter's aggression and was attempting to exert parental control. Based on the record before us, mother failed to establish the claimed error affected a substantial right. Mother's second assignment of error is overruled.

{¶47} Assignment of Error No. 3:

{¶48} "COUNSEL FOR APPELLANT WAS INNEFFECTIVE DUE TO NOT PRESENTING PHYSICAL EVIDENCE AVAILABLE FOR THE APPELLANTS DEFENSE AND FOR FAILING TO PROPERLY ARGUE PARENTAL RIGHTS AND FOR FAILING TO FILE A MOTION FOR A NEW TRIAL[.]" [sic]

{¶49} To prevail on an ineffective assistance of counsel claim, mother must show that her trial counsel's performance fell below an objective standard of reasonableness and that she was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688,

693, 104 S.Ct. 2052.

{¶50} In order to demonstrate prejudice, mother must establish, but for counsel's errors, a reasonable probability exists that the result of her trial would have been different; a "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *State v. Ritchie*, Butler App. No. CA2008-12-304, 2009-Ohio-5280, ¶21. The failure to make an adequate showing on either prong is fatal to an ineffective assistance of counsel claim. *State v. Haynes*, Butler App. No. CA2010-10-273, 2011-Ohio-5743, ¶16.

{¶51} Mother argues that trial counsel was ineffective for failing to introduce a photograph of a dent in the wall to show how A.H. received her black eye. While the record does not indicate that a photograph of a dent in the wall existed or was discussed, we are being asked to find that trial counsel was ineffective for failing to introduce it. We decline to do so.

{¶52} Because of the difficulties inherent in making the evaluation of counsel effectiveness after the fact, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland* at 689-690.

{¶53} Assuming a photograph of a dent in the wall existed, mother has not overcome the presumption that, under the circumstances, choosing not to use the photograph, and the additional issues such a photograph might raise, would be considered sound trial strategy. Mother failed to show that her trial counsel was ineffective on this basis.

{¶54} Mother next argues trial counsel was ineffective for failing to use the affirmative defense of parental discipline, because an emphasis on self-defense was "not the best basis for defense."

{¶55} Based on a review of the record, the daughter was portrayed by mother as the

primary aggressor who was flaunting her mother's authority and was out of control; mother was portrayed as defending herself and attempting to gain or regain parental control over her daughter. However, mother's trial counsel said in closing that she wasn't arguing discipline; rather, she was arguing that mother was defending herself.

{¶156} The Ohio Supreme Court has held that deference to trial counsel is still given even when better strategies may have been available. *State v. Gibson*, Butler App. No. CA2007-08-187, 2008-Ohio-5932, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49. Even the best criminal defense attorneys would not defend a particular client in the same way. *Strickland* at 689-690.

{¶157} With the benefit of hindsight, mother now argues parental discipline was the only defense to use. If the trial court believed mother caused physical harm to her daughter, it might have rejected the parental discipline defense. See *Suchomski*, 58 Ohio St.3d at 75. We find the challenged actions are nothing more than the product of sound trial strategy that falls squarely within the wide range of reasonable professional assistance. *Id.* at 689.

{¶158} Mother also alleges her trial counsel was ineffective for failing to file a motion for a new trial under Crim.R. 33 for irregularity in the proceedings. See Crim.R. 33(A). Mother argues that a motion for a new trial could have raised the issues she now argues on appeal; further, she argues she deserved a new trial because the trial court was biased in favor of the daughter as evidenced by the trial court's statement that, "I find it unfortunate that we're going to have this hearing, with these circumstances with this child being placed in here."

{¶159} A new trial will not be granted nor any conviction reversed due to the admission or rejection of evidence unless the defendant was or may have been prejudiced thereby, nor for any other cause, unless it affirmatively appears from the record that the defendant was prejudiced thereby or was prevented from having a fair trial. See Crim.R. 33(E)(3) and (5).

{¶60} Since we have not found mother prejudiced by any of the issues she raised in this appeal, her trial counsel was not ineffective for failing to file a motion for a new trial on those claimed errors. Having reviewed the entire record of the trial, including the comments made by the trial court and the rulings it rendered, mother fails to show bias on the part of the judge and trial counsel's representation was not deficient for failing to file a motion on that basis.

{¶61} Mother's third assignment of error is overruled.

{¶62} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.