

[Cite as *State v. Murphy*, 2004-Ohio-638.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 82945

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	
vs.	:	AND
	:	
	:	OPINION
	:	
DELORES MURPHY	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION: February 12, 2004

CHARACTER OF PROCEEDING: Criminal appeal from Common Pleas Court Case No. CR-432241

JUDGMENT: AFFIRMED

DATE OF JOURNALIZATION: _____

APPEARANCES:

For Plaintiff-Appellee: WILLIAM D. MASON
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ANTHONY O. CALABRESE, JR., J.

{¶1} Defendant-appellant Delores Murphy ("appellant") appeals from the decision of the trial court finding appellant guilty in a two-count indictment. Appellant was indicted for felonious assault and patient abuse. Having reviewed the arguments of the parties and the pertinent law, we affirm the lower court.

I

{¶2} On December 31, 2002, the Cuyahoga County Grand Jury indicted appellant for felonious assault in violation of R.C. 2903.11, and patient abuse in violation of R.C. 2903.34. On March 19, 2003, the case was tried to the bench. On April 29, 2003, the judge sentenced the appellant to three years of community control sanctions. Appellant was ordered to perform 50 hours of community work service in a non-nursing home setting, to submit to random drug testing, to take anger management classes, and to refrain from employment involving caring for the elderly. Appellant's license was surrendered in abeyance pending an appeal. Appellant appealed the decision to this court on May 23, 2003.

{¶3} The case at bar involves the injury of an elderly patient; namely, Donald Tyhulski ("Tyhulski"). Appellant is a licensed practical nurse who was employed at a care facility regulated by the Department of Health. The facility is called the Franklin Plaza ("Plaza"). In addition to appellant, there were three other individuals responsible for Tyhulski's care. They

included Monique Spraggins, Latisha Blade, and Alesia Eiland.¹ Appellant worked the 11:00 p.m. to 7:00 a.m. shift and was assigned to the east wing of the Plaza's second floor. Tyhulski was a patient of the Plaza under appellant's care at the time of the incident. Tyhulski was known to be a difficult patient, especially when he did not get his medicine on time.

{¶4} Monique Spraggins, a state-licensed nursing assistant, testified that, at approximately 4:00 a.m. on September 24, 2002, Tyhulski became agitated and demanded his medication. Tyhulski came out to the nurses' station where appellant was sitting and demanded his Darvocet and aerosol treatment.² According to appellant, she told him to return to his room and she would be in shortly. Tyhulski went into his room and appellant entered his room about five minutes later. There was an altercation of some type in the room. Two of the nursing assistants, Alesia Eiland and Latisha Blade, were nearby and heard screaming coming from Tyhulski's room, with a female voice saying, "Come help me."³ The nursing assistants entered the room and observed Tyhulski sitting on the bed, holding his nose and saying, "She broke my nose. My nose broke."⁴

{¶5} Tyhulski described that night as follows: "I went to ask

¹Tr. 51.

²Tr. 272.

³Tr. 75.

⁴Tr. 77.

her for medication, and she wouldn't give it to me."⁵ "I said something, I don't remember what I said. But I remember her swinging at me and cracking my nose."⁶ "She hit me with a fist and I heard a crack."⁷ "If I remember, all I heard is a crack to part of my nose *** I must have got knocked unconscious *** I don't remember too much after that."⁸

{¶6} Wilson, a registered nurse, testified that she was the supervising nurse that night in charge of the LPNs and STNAs.⁹ Wilson further testified that it was appellant's duty to apprise her of any incidents occurring during appellant's shift. Wilson further indicated that, according to Plaza policy, the appellant should have gathered information from the nurses' aides and filled out an incident report prior to leaving the shift.¹⁰ The evidence in the case demonstrates that appellant did not complete the necessary paperwork prior to clocking out at work.¹¹ In addition, Ms. Wilson told the court that because Tyhulski was in a low bed and there was no nightstand near his bed, she could not report that he had hit the headboard, the side rails, or the nightstand.

⁵Tr. 104.

⁶Tr. 103.

⁷Tr. 103.

⁸Tr. 107.

⁹Tr. 117.

¹⁰Tr. 117.

¹¹Tr. 133.

{¶7} As previously stated, the trial court found appellant guilty of felonious assault and patient abuse via a bench trial. Appellant was sentenced to three years of community control sanctions and surrendered her license in abeyance pending her appeal. It is this decision that appellant is now appealing.

II

{¶8} Appellant's first assignment of error focuses on the witness/victim's competency to testify and appellant's fourth assignment has substantial involvement with this testimony. The basis for appellant's ineffective assistance of counsel claim involves the competency of the victim/witness, Tyhulski. Appellant's first and fourth assignments of error are substantially interrelated. Therefore, for the sake of judicial economy, we will address them together.

{¶9} Appellant's first assignment of error states: "The trial court committed plain error in accepting the testimony from the alleged victim without first determining that the witness was competent to testify." Appellant's fourth assignment of error states: "The defendant was denied her right to effective assistance of counsel."

{¶10} Appellant argues that Tyhulski suffered from some degree of dementia, was assigned a guardian, and was, therefore, unfit to testify. The record shows that Tyhulski was competent to testify under Evid.R. 601(A). Evid.R. 601(A) restates the language of R.C. 2317.01. It states: "Every person is competent to be a witness

except: (A) *those of unsound mind*, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." (Emphasis added.)

{¶11} In the case sub judice, there was nothing about the way Tyhulski acted during or after his injury indicating a failure in his ability to perceive, recall, or communicate accurately. Tyhulski's conduct during the investigation and his testimony were sound. In fact, Cleveland Police Detective Gerald Horval's testimony about visiting Tyhulski several weeks after his accident supports the soundness of Tyhulski's mental health and his competency as a witness. Detective Horval visited Tyhulski after the accident and conducted a one-on-one interview with Tyhulski, at which time Tyhulski was able to inform the detective how he was injured and who did it.

{¶12} Where a person is neither determined to be mentally ill nor committed at the time of testifying, the witness is presumed competent to testify, and the burden of proving incompetency rests with the party challenging the witness. *Bradley*, supra.

{¶13} Appellant cites *State v. Frazier* (1991), 6 Ohio St.3d 247, and *State v. Kinney* (1987), 35 Ohio App. 84, to support the proposition that Tyhulski is an unfit witness. However, we find that not to be the case. *Frazier* and *Kinney* both involve the competency of child witnesses. The case at bar involves an *adult* as well as an individual whose competency was not called into

question before trial. This case is, therefore, distinguishable and does not apply.

{¶14} In order to successfully assert ineffective assistance of counsel under the Sixth Amendment, the dual prongs of the test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, must be satisfied. A defendant must show not only that the attorney made errors so serious that he was not functioning as "counsel" as guaranteed by the Sixth Amendment, but also that the deficient performance was so serious as to deprive him of a fair and reliable trial. *Id.* at 687.

{¶15} The Ohio Supreme Court set forth a similar two-part test:

"First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness."

{¶16} *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, (quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, certiorari denied (1990), 497 U.S. 1011.)

{¶17} Because there are countless ways to provide effective assistance in any given case, the scrutiny of counsel's performance must be highly deferential, and there will be a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, supra; accord *State v. Bradley*, supra. In sum, it must be proven that counsel's

performance fell below an objective standard of reasonable representation, and that prejudice arose from his performance. *Id.*

{¶18} In reviewing a claim of ineffective assistance of counsel, it *must* be presumed that a properly licensed attorney executes his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299. "Judicial scrutiny of counsel's performance must be highly deferential ***, " and "*** a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance ***." *Strickland*, *supra*, at 689.

{¶19} We find that Tyhulski was a competent witness within the meaning of the law and overrule appellant's last assignment of error. The conduct in this case did not constitute a substantial violation of any of defense counsel's essential duties to the client. Furthermore, in a separate analysis, we find that the record demonstrates that defendant was not prejudiced by counsel.

{¶20} Appellant's first and fourth assignments of error are overruled.

III

{¶21} Appellant's second and third assignments of error will be addressed together below.

{¶22} Appellant's second assignment of error states: "The verdict below is not supported by sufficient evidence."

Appellant's third assignment of error states: "The verdict below is against the manifest weight of the evidence."

{¶23} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. With respect to sufficiency of the evidence, sufficiency is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law. In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process. *State v. Thompkins* (1997), 78 Ohio St.3d 380.

{¶24} Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence. Weight of the evidence concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief. When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a thirteenth juror and disagrees with the fact finder's resolution of the conflicting testimony. *Id.*

{¶25} As to the weight of the evidence, the issue is whether the jury created a manifest miscarriage of justice in resolving conflicting evidence, even though the evidence of guilt was legally sufficient. *State v. Issa* (2001), 93 Ohio St.3d 49, 67; also, see, *State v.*

Thompkins, Id.

{¶26} The evidence in this case demonstrates that the trial court’s verdict was proper. The record in this case includes detailed transcripts of witness testimony and photographs of the victim’s injuries. Indeed, two witnesses testified that the appellant and the victim were in the room alone when the injury occurred. Ten of the twelve witnesses testified that the appellant was exiting as they entered the room. Ten of the eleven witnesses testified that the victim told them that appellant had hit him and caused the injury. The victim testified that appellant punched him.¹²

{¶27} The trial court judge listened to all of the evidence before properly evaluating it and coming to a verdict. The trial court stated: “Only one conclusion can be drawn or reached, and that is that the appellant exerted the force necessary to break the defendant’s nose before leaving the room and that she knew whatever force used could result in injury.”¹³ Appellant is a professional and, as such, should act accordingly. Appellant worked in a nursing home environment, had worked with Tyhulski on previous occasions, and knew he could be cantankerous. Tyhulski was under appellant’s care and should have been treated in a safe and professional manner; he was not.

{¶28} Appellant’s second and third assignments of error are overruled.

{¶29} The judgment is affirmed.

Judgment affirmed.

ANN DYKE, P.J., and KENNETH A. ROCCO, J., concur..

¹²Tr. 39, 54, 84, 103, 129, 182.

¹³Tr. 380.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANTHONY O. CALABRESE, JR.
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

