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Court of Appeals, Eighth Appellate District

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September 6, 2018

105125 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
VICTORIA DANIELS, ET AL. v NORTHCOAST ANESTHESIA PROVIDERS, INC., ET AL.

Reversed and remanded.

Decision En Banc:

Melody J. Stewart, J., Patricia Ann Blackmon, J., Mary J. Boyle, J., Frank D. Celebrezze, Jr., J., Eileen A. Gallagher, A.J., Eileen T. Gallagher, J., Sean C. Gallagher, J., Larry A. Jones, Sr., J., Kathleen Ann Keough, J., Mary Eileen Kilbane, J., and Anita Laster Mays, J., concur. Tim McCormack, J., recused.

Decision of the Merit Panel:

Melody J. Stewart, J.; Eileen T. Gallagher, J., concurs in judgment only with separate opinion; Kathleen Ann Keough, P.J., concurs in judgment only in part, and dissents in part with separate opinion.

KEY WORDS: Cumulative error.

The cumulative effect of multiple trial errors deprived the defendants of a fair trial. Cumulative error doctrine applies to civil cases.

105865 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v NATHAN FORD

Affirmed.

Mary Eileen Kilbane, P.J., Eileen T. Gallagher, J., and Frank D. Celebrezze, Jr., J., concur.

KEY WORDS: Rape; kidnapping; defense witness; ineffective assistance of counsel; mistrial; prejudicial testimony; Evid.R. 806; Evid.R. 609; Crawford violation; Sixth Amendment; Evid.R. 803(4); sufficiency of the evidence; manifest weight of the evidence.

Judgment affirmed. Defendant's rape and kidnapping convictions affirmed where the state presented sufficient evidence and the evidence is not against the manifest weight of the evidence. Defense counsel was not ineffective by calling Dr. Layton as a defense witness because the defendant was provided with the opportunity he requested — testimony that would assist with his defense. A reviewing court may not second-guess decisions of counsel that can be considered matters of trial strategy. The trial court did not abuse its discretion when it denied defendant's motion for a mistrial because defendant essentially testified without taking the stand and could be impeached under Evid.R. 806 and 609. Victim's statements to medical professional that medical professional testified to at trial are admissible under Evid.R. 803(4) and do not violate the confrontation clause.

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106008 GARFIELD HTS. MUNI. G CIVIL MUNI. & CITY
SANCTUARY CONDOMINIUM ASSOCIATION INC. v CHRISTINE E. CASTRO

Dismissed.

Anita Laster Mays, J., and Mary Eileen Kilbane, P.J., concur; Sean C. Gallagher, J., concurs in judgment only.

KEY WORDS: *App.R. 4(A), untimely appeal, Civ.R. 60(B), motion to vacate judgment.*

This court's dismissal of appellant's previous untimely appeal pursuant to App.R. 4(A) divested the trial court of jurisdiction to take further actions on the merits of the case where the dismissal was not challenged by further appeal or a motion to vacate the prior judgment that remains in effect.

106106 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v MICHAEL LARICHE

Affirmed in part, reversed in part and remanded.

Eileen A. Gallagher, A.J., Larry A. Jones, Sr., J., and Kathleen Ann Keough, J., concur.

KEY WORDS: *Maximum sentences; principles and purposes of felony sentencing; R.C. 2929.11; aggravating and mitigating factors; R.C. 2929.12; termination of community control sanctions; consecutive sentences; R.C. 2929.14(C); proportionality finding; conceded error.*

Defendant made no showing that trial court did not comply with its obligation to consider all of the relevant sentencing principles, purposes and factors under R.C. 2929.11 and 2929.12 when sentencing him to maximum sentences after he violated community control sanctions and pled guilty to escape for removing a court-ordered GPS monitoring device. Record did not support defendant's claim that his felony sentences were clearly and convincingly contrary to law. As conceded by the state, trial court erred in failing to make require proportionality finding for imposing consecutive sentences.

106224 CLEVELAND MUNI. C CRIMINAL MUNI. & CITY
CITY OF CLEVELAND v GEORGE MINCY

Vacated and remanded.

Mary J. Boyle, J.; Eileen A. Gallagher, A.J., concurs; Anita Laster Mays, J., dissents with separate

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opinion.

KEY WORDS: *Sufficiency, R.C. 2919.25, physical injury, fair trial, trial court interrogation, right to remain silent.*

The appellant's conviction for domestic violence was supported by sufficient evidence. The trial court's interrogation of the victim was not prejudicial to the appellant and, therefore, did not violate his right to a fair trial. The trial court's comments concerning the appellant's decision not to testify, however, did violate the appellant's right to a fair trial.

106235 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v CHARLES C. HUNDLEY

Affirmed.

Anita Laster Mays, J., and Frank D. Celebrezze, Jr., J., concur; Sean C. Gallagher, P.J., concurs in judgment only in part with separate opinion.

KEY WORDS: *Prearrest silence, Fifth Amendment to United States Constitution, Article I, Section 10, Ohio Constitution, manifest weight of the evidence, Evid.R. 609, effective assistance of counsel.*

Appellant's constitutional right to remain silent was not infringed by the state's reference during trial to appellant's prearrest silence because appellant was not in custody at the time, appellant testified at trial that opened the door to impeachment evidence, the trial court is presumed to consider only relevant, material, and competent evidence during the bench trial, and the record does not demonstrate that the allegedly unlawful testimony contributed to the conviction.

Appellant's conviction was not against the manifest weight of the evidence where eyewitnesses testified appellant removed the firearm from his waist band, pointed, and fired and appellant admitted ownership and possession of the gun.

Counsel was not ineffective in failing to impeach a witness under Evid.R. 609 where counsel was able to elicit testimony regarding the witness' criminal history and appellant could not demonstrate that, but for the error, the outcome of the trial would have been different.

106364 CLEVELAND MUNI. C CRIMINAL MUNI. & CITY
CITY OF CLEVELAND v K.C.

Reversed and remanded.

Mary Eileen Kilbane, P.J., Eileen T. Gallagher, J., and Patricia A. Blackmon, J., concur.

KEY WORDS: *Violation of protection order; R.C. 2919.27(A)(1); State v. Smith, 136 Ohio St.3d 1, 2013-Ohio-1698, 989 N.E.2d 972; service of a protection order; essential element; offense.*

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(Case 106364 continued)

Judgment reversed and remanded with instructions to vacate conviction. The city failed to present an essential element of the offense when it did not establish that the defendant was served with the protection order. As a result, there was insufficient evidence to sustain the defendant's conviction.

106527 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
TONJA M. HALL v GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY

Affirmed.

Patricia Ann Blackmon, J., Mary Eileen Kilbane, P.J., and Eileen T. Gallagher, J., concur.

KEY WORDS: App.R. 9(A); App.R. 9(B); presumption of regularity; Civ.R. 48; verdict.

Where the appellant failed to file a transcript, this court presumed regularity in the issuance of a verdict that was allegedly rendered without having the jury return to the courtroom.

106531 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
SCOTT SCHEEL v ROCK OHIO CAESARS CLEVELAND, LLC, ET AL.

Affirmed.

Mary J. Boyle, J.; Eileen T. Gallagher, P.J., concurs; Patricia Ann Blackmon, J., dissents in part with separate opinion.

KEY WORDS: Summary judgment, negligence, duty, foreseeability, spoliation of evidence.

The trial court properly awarded summary judgment on the appellant's negligence claim to the appellee-security company because it did not have a duty to ensure that the Casino's security plan was adequate, and the appellant's injury was not foreseeable to the security company. The trial court also properly awarded summary judgment on the appellant's spoliation of evidence claim to the security company because the appellant offered no evidence creating a genuine issue of material fact as to whether the security company had possession or control over the evidence.

106554 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v DAYMOND FOSTER

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Affirmed.

Tim McCormack, P.J., Eileen T. Gallagher, J., and Mary J. Boyle, J., concur.

KEY WORDS: *Felonious assault; sufficiency of the evidence; manifest weight; serious physical harm.*

Defendant-appellant's felonious conviction was supported by sufficient evidence where there was significant testimony and documentary evidence regarding the extent of the victim's injuries. The defendant-appellant's conviction was not against the manifest weight of the evidence because the totality of the evidence showed that the victim suffered serious physical harm.

106621 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
STACY L. BERRY v PROGRESSIVE DIRECT INSURANCE COMPANY

Affirmed.

Larry A. Jones, Sr., J., Eileen A. Gallagher, A.J., and Kathleen Ann Keough, J., concur.

KEY WORDS: *Civ.R. 56/summary judgment; Civ.R. 36/ requests for admissions.*

Appellant failed to apply the remedies available to her to obtain the documents she claimed she needed in order to answer appellee's requests for admissions. The disputed admissions were properly deemed admitted.

The cooperation clause in an insurance policy is an enforceable contract provision. The trial court's grant of appellee's motion for summary judgment on appellee's denial of appellant's alleged theft claim was proper. Appellant failed to cooperate in appellee's investigation of appellant's alleged theft claim and also failed to respond to appellee's motion for summary judgment.

106867 CLEVELAND MUNI. C CRIMINAL MUNI. & CITY
CITY OF CLEVELAND v MERCEDES ANDUJAR

Reversed and remanded.

Sean C. Gallagher, P.J., Patricia Ann Blackmon, J., and Anita Laster Mays, J., concur.

KEY WORDS: *Conceded error; explanation of circumstances.*

Reversible error occurs if a trial court enters a finding of guilt on a no contest plea where there was not an explanation of circumstances or an explicit waiver and such an error is akin to the failure to establish facts sufficient to support a conviction.

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106960 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v RANDY COSTLOW

Dismissed.

Mary J. Boyle, J., Mary Eileen Kilbane, P.J., and Melody J. Stewart, J., concur.

KEY WORDS: *Anders brief; appointed counsel; independent review.*

After independent review pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), this court found no errors in the trial court that were prejudicial to appellant. Appointed counsel's motion to withdraw is granted.

107129 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v JAMES AUSTIN

Reversed and remanded.

Mary Eileen Kilbane, P.J., Sean C. Gallagher, J., and Patricia A. Blackmon, J., concur.

KEY WORDS: *Conceded error; motion to withdraw a guilty plea; Crim.R. 32.1; jurisdiction of trial court on appeal.*

Judgment is reversed, and the matter remanded to the trial court with instructions to vacate its denial of defendant-appellant's Crim.R. 32.1 motion to withdraw his guilty plea and hold the motion in abeyance pending resolution of defendant-appellant's direct appeal. Under State v. Moon, 8th Dist. Cuyahoga No. 101930, 2015-Ohio-1648 and State v. Drake, 8th Dist. Cuyahoga No. 105908, 2017-Ohio-7328, the trial court was without jurisdiction to rule on defendant-appellant's motion to withdraw his guilty plea during the pendency of his direct appeal. As a result, the trial court's denial of the motion during the direct appeal was a nullity.