

[Cite as *Dayton v. Turic*, 2005-Ohio-131.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

CITY OF DAYTON	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 20149
v.	:	T.C. NO. 03 CRB 04480
	:	
MICHELLE M. TURIC	:	(Criminal Appeal from
	:	Municipal Court)
Defendant-Appellant	:	
	:	

**OPINION**

Rendered on the 14<sup>th</sup> day of January, 2005.

MARY E. WELSH, Atty. Reg. No. 0067542, Assistant Prosecutor, 335 West Third Street, Room 372, Dayton, Ohio 45402  
Attorney for Plaintiff-Appellee

MICHELLE M. TURIC, 1563 Emmons Ave., Dayton, Ohio 45410  
Defendant-Appellant

WOLFF, J.

{¶ 1} Michelle M. Turic was found guilty after a bench trial in the Dayton Municipal Court of resisting arrest, a misdemeanor of the second degree, and disorderly conduct, a minor misdemeanor. She was ordered to pay a fine of \$100 on each count plus costs. Turic appeals from her convictions.

{¶ 2} The state's evidence established the following facts:

{¶ 3} At approximately 4:20 p.m. on May 8, 2003, Turic purchased food at a Subway restaurant on Linden Avenue in Dayton, Ohio. After paying for her food and getting her drink, Turic returned to the clerk, Andrea Barney. Turic had used two coupons and she questioned whether the cost of her order had been properly calculated. They spoke for several minutes, trying to correct the overcharge. Kevin Vest, who was waiting with his wife, Cami, to pay for their sub and salad, became impatient and complained to Turic that she was taking too much time arguing over fifty cents. Turic responded by throwing the Vests' food at him, hitting him in the chest and nearly hitting his wife in the face. Cami Vest testified that she then pushed Turic "to get her out of my face." Turic then swung at Cami with her fist. A few more swings were thrown before the fight broke up. During the fight, Kevin Vest asked Nova Smith, another restaurant clerk, to call the police. After the fight concluded, Cami cleaned up the food from the floor, the Vests' food was re-made, and another clerk fixed Turic's overcharge.

{¶ 4} Officer Tonina Lamanna of the Dayton police department arrived at the scene shortly thereafter. The officer approached the clerk and asked who had called. Cami Vest approached the officer, and Lamanna asked for her identification. She handed it to the officer. After the officer had asked Cami Vest for her identification, Lamanna asked Turic for her identification. Turic denied doing anything wrong and refused to provide her identification. According to Lamanna, Turic responded, "Fuck you." When Lamanna attempted to ask her more questions, Turic said "I'm out of here" and headed to the exit doors. Lamanna followed Turic and repeatedly instructed

her to stop. Turic ignored the officer's instruction. When Turic exited the Subway, Lamanna grabbed Turic's arm in an attempt to stop her from leaving the facility. Lamanna asked her step back inside; Turic refused. Lamanna proceeded to handcuff Turic. Lamanna testified that Turic swung her arms in an effort to get free from Lamanna, scratching Lamanna in the process. Lamanna called for backup. Eventually, Lamanna was able to put handcuffs on Turic and bring her back into the Subway.

{¶ 5} On May 10, 2003, Turic was charged with resisting arrest in violation of R.C. 2921.33, a misdemeanor of the second degree, and disorderly conduct in violation of R.C. 2917.11(A)(2), a misdemeanor of the fourth degree. On August 18, 2003, Turic was tried before a judge. Cami Vest and Lamanna testified for the state; Turic and Barney testified for the defense. The City's third witness, Nova Smith, was not permitted to testify because she had not left the courtroom after the court had granted a motion to separate witnesses. Turic was convicted of resisting arrest as charged and of disorderly conduct as a minor misdemeanor.

{¶ 6} Although not clearly articulated, Turic raises six assignments of error on appeal. For simplicity, we address Turic's claims of error as outlined by the City of Dayton.

#### ***Unavoidably Prevented From Discovery***

{¶ 7} In her first assignment of error, Turic claims that she was unavoidably prevented from obtaining evidence within 120 days as provided in Crim.R. 33(B). As examples, she specifies in her reply brief that she could not obtain the following: (1) City of Dayton Incident Report #0305080527; (2) narrative to report #0305080527 by Detective Gary A. Pilgram, entered on May 10, 2003; (3) letter to Sergeant Carter from

Officer Parker, dated October 29, 2003; (4) letter to Major Rainey from Sergeant Carter, dated November 19, 2003; and (5) a newspaper article, dated July 17, 2003. (In her motion for a new trial, Turic specified fourteen items.) She asks that this additional evidence be considered on appeal.

{¶ 8} As we previously stated in our decision and entry of April 26, 2004, “[t]his court is unable to consider any evidence not considered by the trial court.” “It is axiomatic that an appellate court will not consider matters outside of the appellate record.” *Alex-Bell Oxford Limited Partnership v. Woods* (June 5, 1998), Montgomery App. No. 16038, citing *State v. Ishmail* (1978), 54 Ohio St.2d 402, 377 N.E.2d 500, paragraph one of syllabus. Any request to consider additional evidence with the hope of a new trial must first be raised with the trial court. Turic has filed such a motion with the trial court, and we leave it to the trial court to resolve.

{¶ 9} The first assignment of error is overruled.

***Ineffective Assistance of Counsel***

{¶ 10} In her second assignment of error, Turic claims that her trial counsel rendered ineffective assistance. In order to demonstrate ineffective assistance of counsel, Turic must establish that her counsel’s representation fell below an objective standard of reasonableness and that she has been prejudiced by her counsel’s deficient performance, i.e., that there exists a reasonable probability that, were it not for counsel’s errors, the result of the trial would have been different. *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. Trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable

assistance. See *Strickland*, 466 U.S. at 689. Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel. See *id.*; *State v. Parker*, Montgomery App. No. 19486, 2003-Ohio-4326, at ¶13.

{¶ 11} First, Turic asserts that her attorney rendered ineffective assistance when he failed to file a motion for discovery. Turic claims that she would have been able to obtain the names and addresses of the complainants – particularly Smith and Nina J. Click – and determine whether inconsistencies in their anticipated testimony existed. As noted by the City, Turic has failed to demonstrate that the failure to request discovery prejudiced her in this regard. Turic was aware that Smith was an eyewitness. In addition, Smith, an anticipated witness for the prosecution, was not permitted to testify, because she had failed to leave the courtroom after the court had ordered the separation of witnesses. Accordingly, Turic was not prejudiced in any way by her inability to obtain her name through formal discovery. Likewise, the complaint demonstrates that Click merely signed the complaint based on Lamanna's report and that she was not a witness to the events at the Subway restaurant. Accordingly, we find no prejudice in Turic's counsel's failure to request information about Click through discovery.

{¶ 12} Second, Turic claims that her trial counsel failed to furnish her prior criminal record and her work history in order to bolster her credibility. Again, Turic has not demonstrated that there was a reasonable probability that, were it not for counsel's errors, the result of her trial would have been different. Turic's criminal record and work

history are not part of the record before us, and we find no evidence that they played or would have played any role in the trial court's determinations.

{¶ 13} Third, Turic asserts that her attorney dismissed her request to confront the “person who initiated the incident, complainants, and persons who witnessed the incidents.” The record demonstrates, however, that Turic was able to cross-examine Cami Vest and Lamanna and was able to offer the testimony of Barney on her behalf. Although Smith and Kevin Vest did not testify, it is doubtful, at best, that their testimony would have been helpful to Turic – Smith had been called as a prosecution witness and Kevin Vest was the object of Turic's outburst at the Subway. Finally, because Click was not a witness and merely signed the complaint based on Lamanna's report, there is no indication that she had any relevant, admissible testimony to offer. Accordingly, Turic has not demonstrated that her counsel was ineffective in this regard.

{¶ 14} Finally, Turic complains that her counsel waived her right to a jury trial. Whether to try a case to the bench or to a jury is matter of trial strategy. Even debatable trial tactics do not establish the ineffective assistance of counsel. *State v. Hoffner*, 102 Ohio St.3d 358, 365, 2004-Ohio-3430, 811 N.E.2d 48, ¶45; *State v. Clayton* (1980), 62 Ohio St.2d 45, 402 N.E.2d 1189. Moreover, we can only speculate as to whether Turic would have been more favorably received by a jury.

{¶ 15} The second assignment of error is overruled.

***Impeachable Statements by Officer Lamanna; Manifest Weight of the Evidence, Insufficient Evidence***

{¶ 16} In her third assignment of error, Turic claims that Lamanna made several untrue statements during her trial testimony and that her testimony was internally

inconsistent. In particular, Turic states that Lamanna was not truthful when she testified that Turic had scratched and fought with her when she tried to handcuff Turic. Turic maintains that she was holding her sub and drink order when she allegedly scratched the officer and could not have fought with her. In addition, Turic states that there were inconsistent statements as to how and why a supervisor was called to the Subway restaurant. Turic also argues that there were inconsistencies in the descriptions of how Turic was handcuffed.

{¶ 17} In its response, the City of Dayton contends that Turic did not raise most of these arguments before the trial court and that she has relied upon evidence not in the record. The City also construes Turic's third assignment of error as raising claims that her convictions were based on insufficient evidence and were against the manifest weight of the evidence. Although Turic does not expressly raise these claims in this assignment of error (or any other), these claims are implicitly argued throughout her brief. For simplicity, we will likewise construe Turic's third assignment of error to include these challenges.

{¶ 18} In support of her argument that Lamanna's testimony was incredible, Turic cites to the Detective Investigation reports. These reports are not part of the record and cannot be considered. Likewise, no one – including Turic – testified that she had been assaulted by police officers or that she had been holding her sub order and drink when she left the restaurant and when Lamanna attempted to handcuff her. Accordingly, that evidence also cannot be considered and may not form a basis for a reversal. Upon review of the record in its entirety, we find nothing in Lamanna's testimony or the testimony of others that makes the officer's testimony incredible.

{¶ 19} Turic further asserts that her convictions were based on insufficient evidence and were against the manifest weight of the evidence. Criminal Rule 29(A) provides that the trial court shall enter a judgment of acquittal on one or more offenses charged in the indictment if the evidence is insufficient to sustain a conviction of such offense or offenses. " '[S]ufficiency' 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." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541, citing Black's Law Dictionary (6th Ed.1990) 1433. When reviewing the sufficiency of evidence, the relevant inquiry is whether any rational finder of fact, viewing the evidence in a light most favorable to the state, could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 430, 1997-Ohio-372, 683 N.E.2d 1096, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed. 2d. 560. A guilty verdict will not be disturbed on appeal unless "reasonable minds could not reach the conclusion reached by the trier-of- fact." *Id.*

{¶ 20} In contrast, when a conviction is challenged on appeal as being against the manifest weight of the evidence, we must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. Because the trier of fact sees and hears the witnesses and is particularly competent to

decide “whether, and to what extent, to credit the testimony of particular witnesses,” we must afford substantial deference to its determinations of credibility. *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288. “Contrastingly, the decision as to which of several competing inferences, suggested by the evidence in the record, should be preferred, is a matter in which an appellate judge is at least equally qualified, by reason and experience, to venture an opinion.” *Id.* A judgment should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *Martin*, 20 Ohio App.3d at 175.

{¶ 21} In order to establish disorderly conduct in violation of R.C. 2917.11(A)(2), the prosecution must prove that the defendant recklessly “caused inconvenience, annoyance, or alarm to another by \*\*\* [m]aking unreasonable noise or an offensively course utterance, gesture, or display or communicating unwarranted and grossly abusive language to any person.” In her reply brief, Turic asserts that she was the victim of disorderly conduct by the Vests – not the instigator of the disorderly conduct. She states that Kevin Vest began the altercation by making multiple profane verbal comments and that Cami Vest’s assault was unprovoked. She further argues that she “was inconvenienced by the clerk who misunderstood her order, and annoyed by the language and behavior of Kevin Vest’s multiple profane verbal comments.”

{¶ 22} Each of the witnesses testified that Kevin Vest complained to Turic about the time she was spending having her overcharge corrected. According to Turic’s testimony, Kevin Vest stated: “Would you quit bitching about fifty cents. Let’s hurry up. I’m hungry. I haven’t eaten.” Turic responded: “Just wait a minute ‘til I get this taken care of.” Turic admits, however, that when Kevin Vest again said to stop complaining

about fifty cents, she responded by throwing his bag of food and salad at him, hitting him in the chest. Barney testified that Turic's behavior shocked her, that she cried, and that she was afraid that she would be hurt. Cami Vest also testified that Turic's actions inconvenienced her. She testified that her glasses were knocked off during the altercation and her food order needed to be remade. Construing the evidence in the light most favorable to the City, a reasonable factfinder could determine that the City had presented sufficient evidence of disorderly conduct by Turic. Moreover, a reasonable factfinder could conclude that Turic's reaction of throwing the Vests' food was an unreasonable response and constituted disorderly conduct. Accordingly, her disorderly conduct conviction was not against the manifest weight of the evidence.

{¶ 23} Under R.C. 2921.33(A), "[n]o person, recklessly or by force, shall resist or interfere with a lawful arrest of the person or another." The trial court found that Turic's arrest was lawful, finding: "Defendant was guilty of DC [disorderly conduct] and refused to show identification, therefore subjecting herself to arrest. Further, defendant was subject to arrest for obstructing official business." Turic claims that the trial court erroneously concluded that the arrest was lawful and that she resisted the arrest.

{¶ 24} We agree with Turic that Lamanna could not have lawfully arrested her for disorderly conduct at the time she was arrested. Lamanna testified that, when Turic was being placed under arrest, she had not been able to complete her investigation or to interview all the witnesses to find out what charges, if any, should be filed regarding the altercation between the Vests and Turic. There is no evidence in the record that Lamanna had probable cause at that time to arrest Turic based on Turic's actions regarding the Vests.

{¶ 25} However, the record supports the City's assertion that Turic was properly arrested for obstructing official business. Barney testified – and Turic admitted – that Turic refused to show identification to Lamanna upon request and attempted to exit the restaurant. Lamanna testified that she followed Turic, “told her several times to stop, that I was doing my investigation.” (On rebuttal, Lamanna testified that she told Turic “you need to stop or you’ll go to jail.” It is not clear whether the trial court credited this testimony.) Cami Vest also testified that Lamanna repeatedly told Turic to stop. Lamanna also testified that Turic had cursed at her prior to leaving. Although Barney testified that she did not hear Turic use profanity and that Lamanna had told Turic “if there was something wrong you need to tell [me] or [I am] gonna arrest [you],” the trial court was free to credit Lamanna's and Cami Vest's testimonies that the officer had instructed Turic to stop, particularly since Barney indicated that she was upset and crying at the time. In addition, although Turic claims that she did not use profanity and that she was going outside to wait for a supervisor, it is undisputed that Turic did not stop walking away from Lamanna until Lamanna grabbed her and tried to handcuff her.

{¶ 26} In our judgment, Turic's belligerent conduct, her refusal to give her identification and her refusal to stop walking away from the officer when instructed to stop obstructed the officer's investigation of the altercation between Turic and the Vests at the Subway. See *In re Sommer*, Stark App. No. 2004CA74, 2004-Ohio-5885; *State v. Mills*, Medina App. Nos. 02CA37-M, 02CA38-M, 2002-Ohio-7323. When Turic repeatedly refused to comply with Lamanna's instructions, the officer was within her rights to arrest Turic for obstructing official business. We do not suggest that a citizen necessarily violates R.C. 2921.31 whenever he or she refuses to provide identification

to a police officer or walks away from an officer, regardless of the facts and circumstances. Under the facts of this case, however, Lamanna had a lawful basis for arresting Turic.

{¶ 27} Turic also claims that she did not resist or interfere with her arrest. She states that she was holding her food and beverage and that she did not scratch Lamanna when she was being arrested. Turic testified, however, that she “kept her arms up” even when Lamanna was attempting to lower them to apply handcuffs. Such conduct is sufficient to demonstrate resisting an arrest. Accordingly, the City of Dayton provided sufficient evidence that Turic resisted her arrest and her conviction was not against the manifest weight of the evidence.

{¶ 28} The third assignment of error is overruled.

#### ***Prosecutorial Misconduct***

{¶ 29} In her fourth assignment of error, Turic claims that the prosecutor engaged in misconduct by withholding evidence that would tend to exculpate her or reduce her penalty, by failing to disclose the “incorrect and misleading” nature of Lamanna’s testimony, and by citing to traffic cases. Turic also claims that the prosecutor wrongfully called her “uncredible” and referred to her testimony as untruthful during closing argument.

{¶ 30} The test for prosecutorial misconduct is whether the remarks or conduct were improper and, if so, whether it prejudicially affected substantial rights of the accused. *State v. Bey*, 85 Ohio St.3d 487, 494, 1999-Ohio-283, 709 N.E.2d 484; *Smith*, 14 Ohio St.3d at 14. The focus of that inquiry is on the fairness of the trial, not the culpability of the prosecutor. *Bey*, 85 Ohio St.3d at 495. In determining whether the

prosecutor's actions were prejudicial, the state's argument must be viewed in its entirety. *Ballew*, 76 Ohio St.3d at 255.

{¶ 31} Upon review of the record, we cannot conclude that the prosecutor's conduct prejudicially affected Turic's substantive rights. There is no evidence that Lamanna's testimony was perjured or that the prosecutor knew her testimony to be such. Moreover, we find no misconduct in the prosecutor's citation to legal authorities. We find no evidence in the record that the prosecutor withheld exculpatory evidence.

{¶ 32} Turic complains that the prosecutor wrongfully called her incredible during closing argument. The prosecutor stated:

{¶ 33} "Your honor, the officer testified that she was scratched by the person she was trying to put handcuffs on, and this is the reaction she's getting. The officer's perception of what's happening to her should have a great deal of credibility [–] not the person who's doing it in an attempt to resist or perhaps to escape.

{¶ 34} "I believe we have extremes of Michelle Turic's testimony about how she wasn't wrong, she was justified in throwing the food, she never did anything. She never used profanity. Everything just misunderstood. Everything was exactly the opposite and it never happened this way.

{¶ 35} "I believe, your honor, that the extreme testimony clearly indicates someone who's credibility can not be believed in relation to what the officer was perceiving. The defense counsel has tried to minimize the officer's questions. \*\*\* I believe Officer Lamanna's testimony and the testimony of both the clerks and of our witness who was a customer, your honor, carries a great deal more credibility than the defendant."

{¶ 36} Viewing the closing argument as a whole, the prosecutor's statements fell within the permissible latitude afforded to counsel during closing arguments. Generally, prosecutors are entitled to considerable latitude in opening and closing arguments. *Maggio v. Cleveland* (1949), 151 Ohio St. 136, 140, 84 N.E.2d 912; *State v. Ballew*, 76 Ohio St.3d 244, 255, 1996-Ohio-81, 667 N.E.2d 369. A prosecutor may freely comment on what the evidence has shown and what reasonable inferences the prosecutor believes may be drawn therefrom. *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293. Indeed, in our adversarial system, prosecutors are not only permitted but also encouraged to argue fervently for conviction. *State v. Stephens* (1970), 24 Ohio St.2d 76, 82, 263 N.E.2d 773; *State v. Hart* (1994), 94 Ohio App.3d 665, 671, 641 N.E.2d 755. Although it is improper for an attorney to express his personal belief or opinion as to the credibility of a witness or as to the guilt of the accused, *State v. Smith* (1984), 14 Ohio St.3d 13, 13-14, 470 N.E.2d 883, the challenge to Turic's credibility was based upon a comparison of Turic's testimony and the testimony of the other witnesses.

{¶ 37} The fourth assignment of error is overruled.

***Outrageous Arrest Charges, Due Process Violations, and Errors in Trial Court Processing of Turic***

{¶ 38} In her fifth assignment of error, Turic alleges that she was deprived of life and property as a result of the charges. She states that she was incarcerated for 56 hours in the Montgomery County jail and was subsequently denied a second-level accounting position with the Montgomery County Juvenile Courts due to her convictions. She further asserts that she was not afforded a chance to enter a plea

until May 29, 2003. Turic states that her arraignment had been scheduled for May 9, 2003, but she had been placed in a “large urine and feces filled cell” and “lost” for four hours. As a result, she was denied the ability to enter her plea at that time, to see her attorney, to obtain timely medical treatment, and to eat lunch.

{¶ 39} As noted by the City, Turic has not raised any of these arguments before the trial court. We will not review them for the first time on appeal.

{¶ 40} The fifth assignment of error is overruled.

***Trial Court’s Reliance on State v. Davis***

{¶ 41} In her sixth assignment of error, Turic claims that the trial court erred in relying upon *State v. Davis* to support her resisting arrest conviction. The City responds that this opinion must be disregarded, because neither the trial court nor Turic provided a citation to the case. It further notes that any error by the trial court in this regard is harmless, because the convictions were based on sufficient evidence and were not against the manifest weight of the evidence.

{¶ 42} Although the trial court did not provide a citation for *Davis*, we can discern which case is at issue. In *State v. Davis* (2000), 140 Ohio App.3d 751, 749 N.E.2d 322, the First District upheld the conviction of a pedestrian for obstructing official business in violation of R.C. 2921.31 when he continued to walk away from officers after he became aware that they were trying to detain him. The officers in *Davis* intended to issue a citation for jaywalking. We find no fault with the trial court’s reference to this case. Although *Davis* is not binding authority, the Ohio courts of appeals have diverged as to what is necessary to violate R.C. 2921.31. *Davis* provided persuasive authority for the trial court. In addition, as stated supra, we likewise have

concluded that the facts before us constituted obstructing official business in violation of R.C. 2921.31.

{¶ 43} The sixth assignment of error is overruled.

{¶ 44} Having overruled each of the assignments of error, the judgment of the trial court will be affirmed.

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FAIN, J. and YOUNG, J., concur.

Copies mailed to:

Mary E. Welsh  
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