

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-061077
	:	TRIAL NO. B-0508824
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
ANGEL BALLARD,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant Angel Ballard shot Francine Clark in the arm. Following a bench trial, Ballard was convicted of felonious assault with a firearm specification. In three assignments of error, Ballard now argues that the trial court erred by admitting hearsay testimony in violation of her rights under the Confrontation Clause; that her conviction was against the weight of the evidence; and that defense counsel was ineffective.

We address Ballard’s second assignment of error first. In reviewing a challenge to the weight of the evidence, we sit as a “thirteenth juror.”² We must review the entire record, weigh the evidence, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice.³

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

³ *Id.*

At trial, the state presented the testimony of Francine Clark, her mother Stephanie Clark, her friend Shalonda Rembert, and Cincinnati Police Detective Robin Upchurch.

Francine Clark testified that, one night, she and Rembert were on their way to meet a friend. Clark testified that she rode a bicycle to the corner of 13th and Walnut Streets in downtown Cincinnati, as Rembert walked behind her.

As Clark approached the intersection, she saw Ballard, Ballard's mother, Casita McCrary, Ballard's sisters, and a man get out of a red car. Clark testified that she and McCrary were arguing when McCrary told Ballard to shoot Clark. Ballard pulled a gun from under her shirt and fired one shot, striking Clark in the arm.

With the exception of minor details, Rembert's testimony corroborated that of Clark.

Stephanie Clark testified that Ballard had told her that she had not meant to shoot Francine, but that she had tried to shoot Rembert.

Detective Upchurch testified that Clark, Rembert, and a third witness, Nakalee Hobbs, had identified Ballard as the shooter. Upchurch said that she had also spoken to Ballard and McCrary, that Ballard had provided an alibi, and that she had followed up on information that they had provided with respect to another individual named Ahkeela McCrary.

Anthony Watson testified for the defense. He said that, just before the shooting, Clark was "cussing and fussing," and was beating bus poles with a baseball bat. Watson was McCrary's friend, but saw neither her nor Ballard that night. Watson said that boys across the street were unhappy with Clark and her friend and began throwing bottles at them. Watson said that when he saw a man with a gun, he went into his apartment building.

The defense also presented the testimony of James Crutchfield, who said that Clark was hitting a pole with a bat. So Crutchfield approached her and asked why

she was “out there for a fight in early or late morning[.]” He told Clark to go home and take care of her child.

Ballard testified that, at the time of the shooting, she was at her apartment on Walnut Street with her children and her friend. She said that she had telephoned Clark’s mother and had left a message because Clark’s mother had asked her to call. Ballard said that she had not spoken to Clark or her mother.

Our review of the record does not persuade us that the trial court clearly lost its way and created a miscarriage of justice in finding Ballard guilty of the offense. Although Ballard provided an alibi, as well as supporting testimony from Watson and Crutchfield, the weight to be given the evidence and the credibility of the witnesses were primarily for the trier of fact.⁴ We overrule the second assignment of error.

In her first assignment of error, Ballard argues that the trial court erred by admitting testimony that violated her Sixth Amendment right to confront the witnesses against her.

During the direct examination of the detective, the state asked who had viewed a particular photographic array, and the detective responded that Clark, Rembert, and Hobbs had viewed it and that all three of them had identified Ballard. The court overruled a defense objection to the testimony.

Because Hobbs did not testify at trial, her testimonial statement should not have been admitted.⁵ However, Hobbs’ statement was merely cumulative of the in-court testimony of Clark and Rembert, so any error in its admission was harmless.

Also during the detective’s direct examination, the state played a tape recording of an interview where Ballard had claimed to have been home with a friend at the time of the shooting. During the interview, the detective told Ballard that she

⁴ *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212.

⁵ See *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354.

would not have been charged with the shooting without inculpatory information from an unnamed and disinterested third witness. Not surprisingly, Ballard did not object to the admission of the recording of her out-of-court alibi statement. Given the presumption that, in a bench trial, the court considers only relevant, material, and competent evidence in arriving at its decision, we find no error, plain or otherwise, in the admission of the recording.⁶

Ballard directs us to other instances where, during her direct examination, the detective referred to out-of-court statements by Hobbs and Ahkeela McCray. In each instance, the trial court sustained a defense objection. We have held that error may not be predicated on objections that have been sustained by the trial court.⁷

During cross-examination of the detective, defense counsel peppered the detective with questions about her willingness to charge the defendant with the shooting solely on the word of the victim, Clark, and her friend Rembert. The detective insisted that a third witness had identified Ballard from a photographic array as the shooter. Defense counsel was obviously trying to attack the detective's investigation as a sloppy rush to judgment that had neglected any information that did not implicate Ballard.

Then on re-direct examination, the detective reiterated that Hobbs had identified Ballard from an array. When asked if the matter had gotten "beyond a she said/she said situation," the detective responded, "[Y]es, because I had, at the time the charges were signed, three separate people telling me that this is who had done it."

Having elicited the detective's responses about the third witness on cross-examination, Ballard cannot now claim that she was prejudiced. Any error in

⁶ See *State v. Post* (1987), 32 Ohio St.3d 380, 384, 513 N.E.2d 754.

⁷ See *State v. Austin* (Dec. 17, 1986), 1st Dist. No. C-860148.

admitting the testimony was invited error.⁸ We overrule the first assignment of error.

In her third assignment of error, Ballard argues that counsel was ineffective. Ballard acknowledges that counsel had “made sufficient objections during the trial to the state’s introduction of testimonial hearsay to preserve that issue for appeal.” But she argues, “[i]n addition, and without contradiction,” that we must find that counsel was ineffective for failing “to object strenuously each and every [sic] the state attempted to interject the testimonial hearsay.”

Because Ballard has not demonstrated or even alleged that counsel's performance was deficient, we overrule the third assignment of error.⁹

Therefore, the judgment of the trial court is affirmed.

Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., HENDON and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on October 10, 2007

per order of the Court _____
Presiding Judge

⁸ See *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶102.

⁹ *State v. Newton*, 108 Ohio St.3d 13, 2006-Ohio-81, 840 N.E.2d 593, ¶97, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, and *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus.