

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

STATE OF OHIO,	:	APPEAL NO. C-081065
Plaintiff-Appellee,	:	TRIAL NO. B-0800295
vs.	:	<i>JUDGMENT ENTRY.</i>
BILLIE JO HARRIS,	:	
Defendant-Appellant.	:	

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

Billie Jo Harris appeals her conviction for attempted murder. We conclude that her assignments of error do not have merit, so we affirm the judgment of the trial court.

Harris was indicted for two counts of felonious assault and one count of attempted murder. During a jury trial, the state alleged that Billie Jo and her husband Jeff had been having marital problems. According to Jeff, Billie Jo had a drinking problem. On January 10, 2008, after the tension had escalated between the two due to Billie Jo's drunkenness, Jeff informed Billie Jo that he was leaving her. He gathered some belongings and left the house. According to Jeff, he returned to the house when he realized that he had left behind some medication and work-related documents. Jeff testified that he had to enter the house through the basement because the front door was locked. Jeff stated that he had met Billie Jo in the kitchen. When Billie Jo saw him, Jeff testified, she looked him in the eyes, said,

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

“Intruder,” and shot him in the stomach with a shotgun. Jeff called 911 and told the operator that he had been shot by his wife. Jeff also testified that while he was talking to the 911 operator, Billie Jo hit him in the head with an ashtray. During the police investigation, Jeff told Detective Greg Miller that his wife had shot him. Jeff also told the same version of the incident to his friend Deb Crawford, his stepson, and his stepdaughter.

When Officer Thomas Icenogle arrived at the Harris home in response to the 911 call, he saw Billie Jo standing in the doorway. According to Icenogle, Billie Jo would not open the door to the house for about a minute. Then, when she did let him in the house, Billie Jo said, “I’m sorry, I’m sorry.”

Billie Jo was taken to police headquarters. Deputy Sheriff Randy Fore testified that he tried to determine whether he could ask her questions, but that Billie Jo was not sufficiently alert. At one point, Billie Jo asked Fore if her husband was dead yet and if she was going to go to prison. When Fore asked her if she wanted to talk about the incident, she passed out again. A gunshot-residue test indicated that Billie Jo had residue on both hands.

Billie Jo called witnesses in an attempt to suggest that Jeff had shot himself. She also presented evidence that Jeff had attempted suicide several months earlier.

At the conclusion of the trial, the jury found Billie Jo guilty of attempted murder and both counts of felonious assault. The felonious-assault offenses were merged with the attempted-murder count for purposes of sentencing. The trial court imposed a sentence of 10 years’ confinement with a consecutive three-year term for a gun specification.

In her first assignment of error, Harris asserts that the trial court erred in not granting her motion to suppress the statements that she had made to Fore. Fore testified that he had not informed Harris of her *Miranda* rights before she asked if her husband was dead yet and if she was going to go to prison. Harris’s defense

counsel objected to the testimony and then filed a motion to suppress. The trial court refused to strike the testimony.

Motions to suppress evidence must be filed within 35 days after arraignment or seven days before trial, whichever is earlier.² If a defendant does not file a timely motion to suppress, she waives her objection to the introduction of the evidence.³ But if the defendant can show good cause for failing to file a timely motion, the trial court may grant relief from the waiver.⁴ We review a trial court's denial of an untimely motion to suppress for an abuse of discretion.⁵ Here, Harris demonstrated no good cause for failing to file a timely motion to suppress. And even if she had filed the motion on time, it is unlikely that the court would have granted the motion. Harris's statements were not made in response to questions from Fore. No *Miranda* violation occurred. The first assignment of error is overruled.

In her second assignment of error, Harris asserts that she was deprived of a fair trial due to prosecutorial misconduct. We review the assistant prosecutor's conduct to determine whether it was improper, and if so, whether it "prejudicially affected substantial rights of the defendant."⁶

Harris contends that the assistant prosecutor improperly commented on Harris's decision not to testify. During her closing argument, the assistant prosecutor said, "What are the words of Billie Jo Harris? What are the words that she has told us about what happened? 'I'm sorry. I'm Sorry. Is he dead yet? Am I going to prison?' Those are the words of the defendant about what happened." Rather than being a comment on Harris's failure to testify, the assistant prosecutor's statements were fair comment on the statements made by Harris to police officers. We have determined that those statements were admissible. The assistant

² Crim.R. 12(C)(3) and (D).

³ Crim.R. 12(H).

⁴ Id.

⁵ *State v. Shelton*, 1st Dist. Nos. C-060789 and C-060790, 2007-Ohio-5460.

⁶ *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883.

prosecutor's reference to the comments was not improper. The second assignment of error is not well taken.

We consider the next three assignments of error together. In the third assignment, Harris asserts that her conviction was not supported by sufficient evidence. In the fourth, she asserts that her conviction was against the manifest weight of the evidence. And in the fifth, she asserts that the trial court erred when it overruled her Crim.R. 29 motion for an acquittal.

The standard of review for a sufficiency claim and for the denial of a Crim.R. 29 motion for an acquittal is the same. When an appellant challenges the sufficiency of the evidence, we must determine whether the state presented adequate evidence on each element of the offense.⁷ On the other hand, when reviewing whether a judgment is against the manifest weight of the evidence, we must determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice.⁸

Although Harris refers to the guilty verdicts for felonious assault, in addition to the attempted-murder conviction, we need only consider whether the state presented sufficient evidence of attempted murder, since the felonious-assault counts were merged for purposes of sentencing. We conclude that the state presented sufficient evidence of attempted murder in violation of R.C. 2923.02(A). And having reviewed the record, we cannot say that the jury lost its way when it found Harris guilty of the offense. The jury was in the best position to judge the credibility of the witnesses. The third, fourth, and fifth assignments of error are overruled.

The final assignment of error is that the trial court abused its discretion when it imposed a ten-year sentence. Harris concedes that the sentence, which was within the statutory guidelines, was not contrary to law.⁹ But she argues that the sentence

⁷ See *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

⁸ See *id.* at 387.

⁹ See *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶14.

amounted to an abuse of discretion because it was excessive. We disagree. The trial court did not abuse its discretion when it sentenced her to the maximum sentence for a first-degree felony.¹⁰ The sixth assignment of error is not well taken.

Therefore, we affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., SUNDERMANN and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on November 25, 2009

per order of the Court _____.
Presiding Judge

¹⁰ See id. at ¶17.