

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

STATE OF OHIO,	:	APPEAL NO. C-150282
Plaintiff-Appellee,	:	TRIAL NO. C-15CRB-4205
vs.	:	<i>JUDGMENT ENTRY.</i>
DARIN BAKER,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Darin Baker appeals the judgment of the trial court finding him guilty of criminal damaging in violation of R.C. 2909.06(A)(1). The trial court sentenced him to 30 days' imprisonment, suspended 27 days, and gave him credit for three days served. The trial court also imposed a six-month community-control sanction, and ordered Baker to pay court costs, a \$150 fine, and \$478.30 in restitution. Baker timely appealed.

Baker was arrested and charged with criminal damaging for breaking a hotel window at the Motel 6 on Hauck Road in Sharonville, Ohio. Baker pleaded not guilty, and the case proceeded to a bench trial. At trial, the state, represented by a licensed intern and supervising attorney, called two witnesses. The first witness, Sharonville Police Officer Eric Asbrock, testified that on February 20, 2015, Sharonville police officers were called to respond to a disturbance that involved a

female in distress at the Motel 6 on Hauck Road. When police arrived on the scene, officers found Baker passed out on the bed of a hotel room and the hotel room window shattered. Officer Asbrock noticed that Baker had blood on his hands and injuries to his right-hand knuckles. The state also called the hotel manager of the Motel 6, Kenneth Keller, as a witness. Keller testified that he was “surprised” to see that the hotel window had been shattered. Keller explained that the double-panel windows are common in hotels, as they are thicker in order to withstand people coming and going. He also testified that it takes a lot of force to break double-panel windows. After listening to the testimony and viewing the evidence, the trial court found Baker guilty of criminal damaging.

Baker asserts three assignments of error in his appeal. In his first assignment of error, Baker contends that the trial court erred in finding him guilty, as that finding was not supported by sufficient evidence. We disagree.

In reviewing the record for sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution and determine whether “any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *See State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. The elements of criminal damaging are defined by R.C. 2909.06(A)(1), which states that “[n]o person shall cause, or create a substantial risk of physical harm to any property of another without the other person’s consent: knowingly, by any means.”

Here, Keller testified that it takes a great deal of force to shatter a double-panel window like the one at the Motel 6. Keller testified that he was surprised to have arrived on the scene to see the window shattered. Further, Officer Asbrock testified that Baker had injuries to his right-hand knuckles and that there had been

blood on his hands. When viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that Baker, knowingly and without the consent of Motel 6, shattered the hotel window. Baker's first assignment of error is overruled.

In his second assignment of error, Baker argues that his conviction is also against the manifest weight of the evidence. This argument is without merit.

For a manifest-weight claim, “[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [fact finder] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1983). “The weight to be given to the evidence and the credibility of the witnesses are primarily for the trier of the facts.” *See State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 90. The appellate court’s discretionary power to grant new trials should be used only in exceptional cases where the evidence weighs heavily against conviction. *See Thompkins* at 387; *Martin* at 175. Given the testimony of the two witnesses and the photographs of the scene, we do not find that the trial court lost its way when it found Baker guilty of criminal damaging. Baker’s second assignment of error is overruled.

In his third assignment of error, Baker asserts that the trial court violated the separation of powers doctrine and denied him his right to due process and a fair trial.

Baker argues the trial court “cease[ed] to be impartial and remind[ed] the prosecutor to prove venue at trial,” referring to an exchange between the trial court and the licensed intern who was examining the state’s first witness. The exchange

occurred immediately after the court took a break to handle another matter, and involved the court asking the licensed intern, “[I]n your practice, if you’ll have a little box at the top of your sheet to get through venue first.” The exchange occurred early in the trial proceedings, and the defendant did not object to the trial court’s comments. Therefore, the defendant has forfeited all but plain error. *See State v. Hartman*, 93 Ohio St.3d 274, 282, 754 N.E.2d 1150 (2001); *State v. Childs*, 14 Ohio St.2d 56, 62, 236 N.E.2d 545 (1968). “Plain error exists only when it is clear that the verdict would have been otherwise but for the error.” *State v. Sanders*, 92 Ohio St.3d 245, 263, 750 N.E.2d 90 (2001). “Notice of plain error under Crim.R. 52 is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice.” *State v. Phillips*, 74 Ohio St.2d 72, 80, 656 N.E.2d 643 (1995).

Baker argues that by commenting to the intern about venue, the trial court assumed the executive role of prosecutor and violated the separation-of-powers doctrine, and denied Baker due process when it ceased to be impartial.

As an initial matter, we note that the allegation that Baker did not have an impartial judge is a serious charge, and one with which we do not agree. Nevertheless, Baker can only pursue such a claim by filing an affidavit of disqualification with the Supreme Court. *See State v. Earls*, 1st Dist. Hamilton No. C-040531, 2006-Ohio-4029, ¶ 16-18. We lack jurisdiction to void a judgment of the trial court because of a judge’s bias or prejudice.

We also disagree that the trial court assumed the role of prosecutor. Pursuant to Evid.R. 611(A), trial courts are required to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence in order to make them effective for the ascertainment of the truth and to avoid needless consumption

of time. Additionally, Evid.R. 614 permits courts to call witnesses and ask questions.

In *Vermeer of S. Ohio, Inc. v. Argo Constr. Co.*, 144 Ohio App.3d 271, 276, 760 N.E.2d 1 (1st Dist.2001), we found frequent interruptions by the trial court and displays of the court's impatience did not deprive the litigant of due process.

[T]he court's remarks, questions and displays of impatience, however officious, appear, when viewed in context, to have been directed toward advancing the goals set forth in Evid.R. 611(A)(1) and 611(A)(2), *i.e.*, to aid the court, sitting as the trier of fact, in "ascertaining \* \* \* the truth" and to speed the process along and thus "avoid needless consumption of time."

*Id.* at 276. See *State v. Camplese*, 11th Dist. Ashtabula No. 2007-A-0072, 2008-Ohio-3254, ¶ 49 (trial court did not step into shoes of an advocate for the state after suggesting a line of questioning to clarify ownership of a vehicle). It is apparent from the record that comments made by the trial court in this instance were well within the appropriate function of the court and did not cross the line into the role of the prosecutor.

We also hold that the trial court did not deny Baker due process and a fair trial. Baker argues the trial court's comments were prejudicial, and refers to the five-factor test for determining prejudice in a jury trial set forth in *State v. Jackson*, 8th Dist. Cuyahoga No. 82724, 2004-Ohio-2332, ¶ 65, and *State v. Wade*, 53 Ohio St.2d 182, 188, 373 N.E.2d 1244 (1978). However, this was a bench trial where the trial court, rather than a jury, was the fact finder. Therefore, the test cited by Baker is inappropriate to apply in this case.

We find that the comments of the trial court do not constitute plain error. Here, the trial court simply commented to the licensed intern about a good habit of

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trial practice, and any error was harmless. The licensed intern had already elicited enough information from the witness to establish venue, as venue does not need to be established in expressed terms. *See State v. Jackson*, 141 Ohio St.3d 171, 2014-Ohio-3707, 23 N.E.3d 1023, ¶ 143. Therefore, we overrule Baker's third assignment of error. The judgment of the trial court is affirmed.

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.

**CUNNINGHAM, P.J., MOCK and STAUTBERG, JJ.**

To the clerk:

Enter upon the journal of the court on December 30, 2015  
per order of the court \_\_\_\_\_.

Presiding Judge