[Cite as *State v. Williams*, 2009-Ohio-3237.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 08AP-719 (C.P.C. No. 06CR12-9337)
v.	:	(REGULAR CALENDAR)
Samuel D. Williams,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 30, 2009

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Toki M. Clark, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Samuel D. Williams, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

{¶2} In March 2006, appellant and David Ransom met playing pool and became friends. However, some tension arose between them around Thanksgiving of that year when appellant called Ransom late at night and then appeared, uninvited, at his house. On the night of December 5, 2006, Ransom drove appellant to a bar for a pool tournament. Ransom and appellant participated in the tournament on the same team.

After the tournament, appellant became upset because Ransom would not take him home when appellant wanted to leave. Ultimately, appellant, Ransom, and Ellis Searcy, another pool player, left the bar together in Ransom's car. On the way to appellant's apartment, Ransom and appellant got into an argument. Ransom stopped the car and asked appellant to get out. Searcy calmed the men down and persuaded Ransom to take appellant back to appellant's apartment.

{¶3} Ransom dropped appellant off at appellant's apartment. Appellant got out of the car and offered to shake Ransom's hand as a peace offering. Ransom declined and told appellant to leave. Appellant walked to his girlfriend's car and placed his pool sticks in the car. He then walked to his apartment. Ransom, however, did not immediately leave. He was concerned that appellant might go to his (Ransom's) house and cause trouble because of their argument. To protect his family, Ransom decided to wait in the parking lot of appellant's apartment in case appellant attempted to cause trouble.

{¶4} Within minutes of getting out of the car, appellant returned to Ransom's car. Ransom was still seated in the driver's seat. Appellant walked up to the car and opened the driver's side door. Appellant and Ransom exchanged harsh words, and appellant warned Ransom: "Don't make me shoot you." (Tr. 45.) After Ransom told appellant to get away from his car, Ransom heard a gunshot. Ransom was still seated in the driver's seat. Ransom did not see appellant with a gun. However, Searcy saw that appellant had a gun. After hearing the gunshot, Ransom got out of his car and stood up to check himself. He did not know he had been shot. Appellant stood nearby and said "I let you

live. I could have killed you." (Tr. 46.) Ransom got back into his car and drove off. Shortly thereafter, Ransom realized he had been shot in the leg and drove to the hospital.

{¶5} As a result of these events, a Franklin County Grand Jury indicted appellant with one count of felonious assault in violation of R.C. 2903.11. The indictment also contained firearm specifications pursuant to R.C. 2941.141. Appellant entered a not guilty plea and proceeded to a jury trial.

{¶6} At trial, Searcy and Ransom testified to the events described above. Appellant's testimony was largely consistent with their version of events until Ransom dropped appellant off at his apartment. Appellant testified that after Ransom dropped him off, he went into his apartment to eat some food. He also got his gun because he was going out with other people later that night. He left his apartment about ten minutes later and was surprised to see Ransom's car still in the parking lot. Appellant approached the car to find out why Ransom and Searcy were still there. Appellant testified that Ransom got out of his car and they got into another argument. Appellant, fearing that the verbal altercation would escalate into a physical altercation, turned around to place his cell phone on the ground. When he turned back around, he saw Ransom with a gun. Appellant testified that Ransom pulled the trigger, but the gun misfired. Appellant then fired his own gun at Ransom. Ransom got back into his car and drove away. Appellant did not know he shot Ransom.

{¶7} The jury rejected appellant's claim of self-defense and found him guilty of felonious assault and the firearm specification. The trial court sentenced appellant accordingly and also denied appellant's pro se motion for new trial.

{¶8} Appellant appeals and assigns the following errors:

> [1.] THE CONVICTION OF APPELLANT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> [2.] TRIAL COUNSEL WAS INEFFECTIVE DURING TRIAL, RESULTING IN A VIOLATION OF APPELLANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE STATE AND FEDERAL CONSTITUTIONS.
>
> [3.] A TRIAL COURT VIOLATES A CRIMINAL DEFENDANT'S RIGHT WHEN IT ALLOWS THE STATE OF OHIO TO AMEND THE INDICTMENT, RESULTING IN A MODIFICATION OF THE IDENTIFY [sic] OF THE OFFENSE CHARGED.
>
> [4.] THE TRIAL COURT ERRED WHEN IT OVERRULED DEFENDANT'S MOTION TO PRESENT NEW EVIDENCE.

{¶9} For ease of analysis, we address appellant's assignments of error out of order. Appellant contends in his third assignment of error that the trial court erred by allowing the state to amend his indictment before trial. We disagree.

{¶10} Pursuant to Crim.R. 7(D), a court may, before, during, or after a trial, amend an indictment, provided no change is made in the name or identity of the crime charged. An amendment may also not change the penalty or degree of the offenses charged. *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, syllabus (amendment that changes the penalty or degree of offense changes the identity of the offense under Crim.R. 7(D) and, therefore, is impermissible).

{¶11} A trial court's decision allowing an amendment that changes the name or identity of the offense charged constitutes reversible error regardless of whether the accused can demonstrate prejudice. *State v. Martin*, 10th Dist. No. 05AP-818, 2006-Ohio-2749, ¶8, citing *State v. Honeycutt*, 2d Dist. No. 19004, 2004-Ohio-3490. If an amendment does not change the name or identity of the crime charged, we review the trial court's decision under an abuse of discretion standard. *State v. Kittle,* 4th Dist. No.

04CA41, 2005-Ohio-3198, ¶13; *State v. Beach,* 148 Ohio App.3d 181, 2002-Ohio-2759, ¶23. The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶12} The two amendments at issue in this case did not change the name or identity of the offenses charged, nor did they change the penalty or degree of the charged offense. Specifically, the original indictment stated "SPECIFICATION ONE TO THE ONE COUNT." The first amendment clarified that the specification was "to Count One" instead of "to the one count." The second amendment inserted appellant's name where it was mistakenly omitted. These amendments corrected two typographical errors in appellant's indictment. A trial court may, pursuant to Crim.R. 7(D), amend an indictment to correct typographical or clerical errors. *State v. Alexander*, 10th Dist. No. 06AP-647, 2007-Ohio-4177, ¶43-44; *State v. Moore* (Apr. 19, 2000), 9th Dist. No. 19544.

{¶13} When an amendment is allowed that does not change the name or identity of the offense charged, the accused is entitled to a discharge of the jury or a continuance, " 'unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made. ' " *Honeycutt,* quoting Crim.R. 7(D).

{¶14} Appellant does not allege that he was misled or that the amendments prejudiced his case. Absent prejudice, appellant was not entitled to a continuance or a discharge of the jury. In any event, appellant did not request a discharge of the jury or a continuance but, instead, chose to proceed with the trial. In fact, appellant did not even object to the amendments. Under these circumstances, the trial court did not abuse its

discretion by allowing the amendments to appellant's indictment. Therefore, we overrule appellant's third assignment of error.

{¶15} Appellant contends in his first assignment of error that his felonious assault conviction is against the manifest weight of the evidence. A manifest weight of the evidence claim concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *State v. Brindley,* 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16. When presented with a challenge to the manifest weight of the evidence, an appellate court, after " '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 jury 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* (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " Id.

{¶16} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson* (Mar. 19, 2002), 10th Dist. No. 01AP-973; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. The trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams,* 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No.

01AP-194. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must also give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington,* 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶28; *State v. Hairston,* 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶74.

{¶17} Appellant claims the jury lost its way by believing Searcy and Ransom's version of events over his own version of events. We disagree. A conviction is not against the manifest weight of the evidence simply because the jury believed one witness's testimony instead of another witness's testimony. *State v. Houston*, 10th Dist. No. 04AP-875, 2005-Ohio-4249, ¶38, overruled on other grounds, *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109.

{¶18} Here, the jury heard all of the evidence and chose to believe Searcy and Ransom's testimony over appellant's testimony. This was within the province of the jury. *State v. Lee,* 10th Dist. No. 06AP-226, 2006-Ohio-5951, ¶14. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230. The jury was free to believe or disbelieve appellant's testimony. *Jackson*.

{¶19} Given the conflicting testimony presented, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice. The jury simply believed the version of events presented by the state's witnesses and disbelieved appellant's version of events. This was within the province of the jury. Accordingly, appellant's conviction is not against the manifest weight of the evidence. Appellant's first assignment of error is overruled.

{¶20} Appellant contends in his fourth assignment of error that the trial court erred by denying his motion for new trial based on newly discovered evidence. We disagree.

{¶21} Crim.R. 33(A) provides the grounds upon which a defendant may move for a new trial. In pertinent part, Crim.R. 33(A)(6) provides grounds for a new trial:

> When new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given * * *.

{¶22} To grant a new trial based on newly discovered evidence, the new evidence must:

> * * * (1) disclose[ ] a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence.

State v. Petro (1947), 148 Ohio St. 505, syllabus; *State v. Wilson*, 10th Dist. No. 02AP-1350, 2003-Ohio-5892, ¶14.

{¶23} A motion for new trial pursuant to Crim.R. 33(B) is addressed to the sound discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion. Id., citing *State v. Schiebel* (1990), 55 Ohio St.3d 71, paragraph one of the syllabus; *State v. LaMar,* 95 Ohio St.3d 181, 2002-Ohio-2128, ¶82. The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Adams*.

{¶24} Appellant's alleged newly discovered evidence was testimony from Star Wallace. Appellant claimed that Wallace would dispute some of Ransom and Searcy's testimony about what happened at the bar and who drove Searcy's car after they left the bar. Appellant contends Wallace's testimony would have cast doubt on Searcy's credibility and "softened" any motive appellant had to shoot Ransom that night.

{¶25} For a number of reasons, we find that the trial court did not abuse its discretion by denying appellant's motion for new trial. First, appellant did not provide an affidavit from Star Wallace indicating what her testimony would have been. Thus, there is no "newly discovered evidence," just appellant's representation of what Wallace would say if she were to testify.

{¶26} Second, appellant's motion fails to satisfy a number of the *Petro* requirements. Appellant does not explain why he was unable to discover Wallace's testimony before trial. Appellant and Wallace were teammates and played pool together on the night of the shooting. Appellant obviously knew Wallace and could have called her as a witness if her testimony would have been helpful. In addition, Wallace's purported testimony would impeach relatively minor aspects of Ransom and Searcy's testimony and does not indicate a strong probability that it would change the result if a new trial is granted. Searcy and Ransom testified that appellant shot Ransom as he sat in his car. Wallace was not present when the shooting occurred. Her purported testimony would impeach relatively minor aspects of Searcy and Ransom's testimony. *State v. Dudley*, 10th Dist. No. 06AP-1272, 2008-Ohio-390, ¶25 (affirming denial of new trial motion where evidence that merely impeached prior testimony did not portray a strong probability that it would change the result if a new trial is granted). Cf. *Columbus v. New* (Sept. 4, 1980),

10th Dist. No. 80AP-255 (alleged newly discovered evidence was merely cumulative and, therefore, did not disclose strong probability of new result).

{¶27} For all these reasons, the trial court did not abuse its discretion by denying appellant's motion for new trial. Accordingly, we overrule appellant's fourth assignment of error.

{¶28} Lastly, appellant contends in his second assignment of error that he received ineffective assistance of counsel. We disagree.

{¶29} In order to prevail on an ineffective assistance of counsel claim, appellant must meet the two-prong test enunciated in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; accord *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-42. Initially, appellant must show that counsel's performance was deficient. To meet that requirement, appellant must show counsel's error was so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Appellant may prove counsel's conduct was deficient by identifying acts or omissions that were not the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. *Strickland* at 690.

{¶30} In analyzing the first prong of *Strickland,* there is a strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. Id. at 689. Appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Id., citing *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158. Tactical or strategic trial

decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558.

{¶31} If appellant successfully proves that counsel's assistance was deficient, the second prong of the *Strickland* test requires appellant to prove prejudice in order to prevail. Id. at 692. To meet that prong, appellant must show counsel's errors were so serious as to deprive him of a fair trial, a trial whose result is reliable. Id. at 687. Appellant would meet this standard with a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

{¶32} Appellant first contends that trial counsel was ineffective for failing to introduce police reports of interviews with Ransom that allegedly contain statements inconsistent with his trial testimony. There are no police reports in this record. Because appellant's claim relies on evidence outside the record, it is impossible to discern whether counsel was ineffective. See *State v. Medina*, 10th Dist. No. 05AP-664, 2006-Ohio-1648, ¶26 ("It is impossible for a court to determine on direct appeal from a criminal conviction whether counsel was ineffective in his representation where the allegation of ineffectiveness is based on facts dehors the record."). Appellant's proper vehicle to raise this claim of ineffective assistance of counsel is through a petition for postconviction relief. Id.

{¶33} Similarly, appellant claims that trial counsel failed to expose other prior inconsistent statements made by Ransom and Searcy. Appellant does not specifically identify these prior inconsistent statements or indicate where they can be found in the

record. Without specifically identifying in the record the alleged prior inconsistent statements, and without explaining how those statements likely would have changed the result of the trial, appellant has not shown ineffective assistance of counsel. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶142.

{¶34} Appellant also contends trial counsel was ineffective for failing to call Star Wallace and an expert witness. Appellant has not demonstrated how the failure to call these witnesses constitutes ineffective assistance of counsel. The decision whether to call a witness is generally a matter of trial strategy and, absent a showing of prejudice, does not deprive a defendant of effective assistance of counsel. *State v. Samatar*, 152 Ohio App.3d 311, 2003-Ohio-1639, ¶90, citing State *v. Williams* (1991), 74 Ohio App.3d 686, 694.

{¶35} Appellant has not demonstrated that counsel's failure to call Wallace was prejudicial. Appellant did not submit an affidavit from Wallace. Without an affidavit, we do not know the substance of Wallace's testimony. It is pure speculation to conclude that the result of appellant's trial would have been different had Wallace testified. *State v. Thorne,* 5th Dist. No.2003CA00388, 2004-Ohio-7055, ¶70 (failure to show prejudice without affidavit describing testimony of witnesses not called); *State v. Stalnaker,* 5th Dist. No. 21731, 2004-Ohio-1236, ¶9. Moreover, even if appellant's speculation regarding the substance of Wallace's testimony were accurate, it is unlikely that her testimony would have changed the result.

{¶36} Similarly, nothing in the record indicates that expert testimony would have changed the result of the trial. *State v. Madrigal*, 87 Ohio St.3d 378, 390-91, 2000-Ohio-448. Appellant does not even identify an expert witness who would have been willing to

testify on his behalf. *State v. Gann*, 154 Ohio App.3d 170, 2003-Ohio-4000, ¶58. Although appellant speculates that an expert could have testified regarding the angle of fire required to inflict Ransom's wound, appellant does not explain how expert testimony about the angle of fire required to inflict Ransom's wound would have changed the result of the trial. Appellant admitted he shot at Ransom. There was no evidence that anyone other than appellant fired a shot. Under these circumstances, we cannot conclude on this record that the result of appellant's trial would have been different had an expert witness testified on appellant's behalf. Id.; *State v. Brown*, 2d Dist. No. 2002-CA-23, 2003-Ohio-2959, ¶9.

{¶37} Appellant has failed to demonstrate ineffective assistance of counsel. Accordingly, we overrule appellant's second assignment of error.

{¶38} Having overruled appellant's four assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and McGRATH, JJ., concur.