[Cite as *State v. Payne,* 2010-Ohio-1018.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-107 (C.P.C. 08CR-07-4889)
Jorgio L. Payne,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 16, 2010

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

W. Joseph Edwards, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Jorgio L. Payne ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas, entered upon a jury verdict convicting him of murder with a firearm specification, and upon a finding of guilt by the trial judge as to one count of having a weapon under disability. For the following reasons, we affirm that judgment.

{¶2} Appellant's convictions arise from an incident that occurred on South Ohio Avenue between McCallister Avenue and Mound Street, in Franklin County, Ohio, on

June 19, 2008. On that date, Ricky Palmer ("Ricky") was shot while sitting in his vehicle. Although he was able to drive a short distance, he died soon thereafter as a result of a single gunshot wound.

{¶3} On July 2, 2008, appellant and his co-defendant, Michael Vaughn ("co-defendant" or "Vaughn") were indicted by the Franklin County Grand Jury on charges of aggravated murder and aggravated robbery, both of which included firearm specifications, and on one charge each of having a weapon under disability.[1] Appellant entered pleas of not guilty and the case proceeded to trial.

{¶4} At trial, the state of Ohio ("state") called several witnesses to testify, including a prostitute named Carmen Goss, a resident of Ohio Avenue named Mario Lyles, criminalist Heather McClellan, and the co-defendant, Michael Vaughn, as well as a firefighter/paramedic and several witnesses employed by the Columbus Division of Police. Most relevant to this appeal is the testimony of Mr. Lyles, Ms. Goss, the criminalist, and the co-defendant.

{¶5} Mr. Lyles testified that he has lived on South Ohio Avenue for 18 or 19 years. He described the neighborhood as one riddled with drugs, prostitution, and gangs, comparing it to "Gotham City at night." (Tr. 71.) At approximately 1:00 a.m. on June 19, 2008, Mr. Lyles was sitting on his front porch drinking a beer when he observed a woman he knew to be a prostitute, and who later became known to him as Carmen Goss, exit a

[1] The indictment against co-defendant Vaughn also contained repeat violent offender specifications in addition to the firearm specifications. However, these additional specifications have no impact on this appeal involving appellant.

shiny maroon car. The woman approached a group of people on the street. Mr. Lyles assumed she was buying drugs.

{¶6} At about the same time, Mr. Lyles observed two males quickly approaching the passenger side of the shiny maroon car. He described one of the men as heavy and the other as slim. He heard one of the males telling the driver of the maroon vehicle, "don't come around here no more." (Tr. 82.) Next, he heard a gunshot coming from the area of the passenger side of the car and then observed the two males take off running. He testified that Ms. Goss was nearby and was walking back towards the maroon car when the gunshot was fired. Mr. Lyles testified that the car took off up Ohio Avenue and turned the corner on Mound Street.

{¶7} Ms. Goss testified that on that night, Ricky Palmer (whom she knew as "Mike") picked her up at the bus stop at Main Street and Champion Avenue, where she was working as a prostitute. She described Ricky's car as a brand new maroon car. They drove to the area of Ohio Avenue and McAllister Avenue so that Ms. Goss could buy some crack cocaine. Ms. Goss testified that she exited Ricky's car and got into a red Lumina to make the transaction. As she was exiting the red Lumina and returning to Ricky's car, she observed two African-American men who were also approaching Ricky's car. As she approached, Ricky tried to hand Ms. Goss her purse through the passenger side window, at which time Ms. Goss realized the two men had her "boxed in" and that the man to her right, whom she identified as appellant, had a gun. Ms. Goss testified that appellant fired one shot at Ricky. After the shot, Ricky pulled off and turned down Mound Street. The two men also took off running.

{¶8} Ms. Goss testified that, prior to the incident, she had seen appellant in the neighborhood on other occasions. She described appellant as being the taller of the two men, with a lighter complexion and a "sloppy" build. (Tr. 143.) Ms. Goss acknowledged that she previously identified appellant as the shooter via a police photo array shown to her approximately one week after the shooting. She also made an in-court identification of appellant. Ms. Goss described the gun used by appellant as a black, semi-automatic weapon. She further stated it looked like a Glock 9 and in fact looked like the same gun she had seen earlier in the day in the possession of a different individual.

{¶9} Ms. Goss testified that she did not recognize the other man involved at the time of the shooting, but that he was shorter and skinnier and had a darker complexion. She testified that she later identified him from a police photo array as well. Additionally, she testified that she never observed the man to her left (the co-defendant), who was toward the rear passenger side of the car, with a gun.

{¶10} Heather McClellan, a forensic scientist employed with the Columbus Police Crime Laboratory who specializes in firearms identification, testified the day after Ms. Goss. She testified that she became involved in the case after receiving a request from the investigating detective asking her to conduct a bullet and casing comparison on the ballistics evidence collected from this shooting.

{¶11} Generally, in examining a casing, Ms. McClellan testified that she attempts to identify the manufacturer of the ammunition, as well as the round of the ammunition. She also conducts a microscopic exam to determine whether there are any possible individual characteristics that would make the casing suitable for identification in the future. With respect to spent bullets, she performs various measurements to attempt to

determine the caliber and rounds of ammunition. She also examines the rifling and lands and grooves of the spent bullet to possibly compare it to a firearm, if one was recovered. Additionally, she examines spent bullets microscopically to determine whether there are individual characteristics that could be useful for identification later.

{¶12} Specifically, in this case, she examined the spent bullet and identified it as a .38 caliber bullet, most likely a .380 auto bullet. She discovered a significant class characteristic of rifling on the left nine, which is unique to the firearm manufacturer Hi-Point. As a result, she opined that the bullet at issue was likely fired by a Hi-Point firearm. Additionally, she identified the spent casing as a Winchester .380 auto casing. Based upon the unique impression on the breech of this casing, she opined that it too was likely fired by a Hi-Point semi-automatic. Although the spent casing and spent bullet had similar characteristics, Ms. McClellan could not positively conclude that the two were a match or that they were once part of the same cartridge.

{¶13} Following this testimony, which was elicited upon direct examination by the state, proceedings were conducted outside the presence of the jury, at the request of appellant's counsel. Appellant's counsel advised the court he was surprised by Ms. McClellan's testimony, given that the ballistics report he had received from the state did not contain her opinion that the spent casing and spent bullet at issue had likely been fired by a Hi-Point firearm or how that conclusion was reached. Appellant's counsel also indicated that, just a few days prior to the start of this trial, all of the evidence and the witnesses in this case had always suggested the weapon at issue was a .9mm Glock. Appellant's counsel asked the trial court to strike any testimony from the criminalist opining that the spent casing and spent bullet were likely fired from a Hi-Point weapon.

{¶14} Upon further discussion amongst the trial court and counsel outside the presence of the jury, and upon further questioning of Ms. McClellan outside the presence of the jury, it was determined that the state had just learned of the criminalist's opinion, regarding the type of weapon from which the bullet and casing had been fired, on the morning of her testimony. Additionally, it was determined that this information had been included in Ms. McClellan's notes, which were maintained at the crime lab and which could be made available upon request, but it was not included in her official report because the request she received from the investigating detective did not specifically ask her to report on it.

{¶15} It was further determined that, just a few days prior to trial, the state had learned, as a result of a proffer by the co-defendant, that the co-defendant believed the weapon used in the shooting was a Hi-Point firearm and that he intended to testify to that effect.[2] Appellant argued that the newly revealed opinion of the criminalist would now corroborate and significantly bolster the testimony of the co-defendant, thereby prejudicing appellant's defense strategy.

{¶16} The trial court found the criminalist's opinion constituted a result or report of a scientific examination under Crim.R. 16(B)(1)(d), that it was within the possession, custody, or control of the state, and that its existence would become known to the state, upon the exercise of due diligence. (Tr. 300-02.) While finding that the state had violated Crim.R. 16, and possibly *Brady,*[3] in failing to turn this evidence over to appellant, the trial

[2] On Thursday, December 11, 2008, the co-defendant, as part of a proffer, stated for the first time that the weapon used by appellant in the shooting was a Hi-Point firearm. The trial in this matter began on Monday, December 15, 2008. Ms. Goss testified on Tuesday, December 16, 2008. Ms. McClellan testified on Wednesday, December 17, 2008. Co-defendant Vaughn was scheduled to testify after Ms. McClellan.

[3] *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194.

court determined there was very little prejudice which resulted, and therefore exclusion was not a proper remedy under these circumstances.

{¶17} Although the trial court refused to grant appellant's motion to exclude the opinion of the criminalist, the trial court informed appellant it would preclude the state from offering testimony from the co-defendant as to the type of weapon he believed had been used to commit the crime. Counsel for appellant also reached an agreement with the state that he would not assert in closing arguments that Ms. Goss had identified the weapon involved as a Glock, which was contrary to the opinion of the criminalist.

{¶18} Outside the presence of the jury, the state proffered co-defendant's testimony that the weapon used by appellant was a Hi-Point.

{¶19} In the presence of the jury, Vaughn testified regarding his plea deal, which included his agreement to testify truthfully against appellant. Vaughn testified that he had known appellant for a few months prior to the shooting and that he and appellant both sold drugs in the same area and watched out for one another. On the night of the incident, Vaughn testified that he had seen appellant with a black gun off and on earlier that night and that appellant had periodically "put up" the gun and hidden it in various different places, such as the bushes, or a friend's house, throughout the night. (Tr. 355.)

{¶20} Around 1:00 a.m. Vaughn observed appellant's maroon car drive into the area of Ohio and McCallister Avenues. Next, he saw a woman get out of the car and approach a different car, presumably to buy drugs. As he and appellant quickly approached the maroon car together, he believed appellant intended to conduct a drug transaction with the driver of the car, and thus, he believed his role was to act as the lookout, in the event the police were in the area. Vaughn testified that he leaned up

against the maroon car and observed appellant reach into the back of his pants. He assumed appellant was reaching for his drugs, but when he looked back again, he saw appellant holding the same gun he had seen earlier in the day.

{¶21} Vaughn testified he heard appellant say "brace yourself," and then heard a gunshot, after which he and appellant both took off running. (Tr. 370.) Vaughn further testified that Ms. Goss was close enough to have fired a gunshot, but that she did not have a gun and that it was in fact appellant who shot Ricky.

{¶22} Additionally, Vaughn testified that appellant had threatened him and his family and instructed him to keep quiet regarding appellant's role in the shooting.

{¶23} Prior to resting its case, the state and appellant's counsel entered into various stipulations, one of which included a stipulation that the co-defendant's palm print was found on the exterior rear passenger side of Ricky's vehicle. None of the stipulations are at issue in this appeal.

{¶24} The jury returned a verdict on December 22, 2008, finding appellant guilty of murder, the lesser-included offense of Count 1 of the indictment. The jury was unable to reach a unanimous verdict as to the aggravated robbery charge in Count 2 of the indictment. The court deferred its finding regarding the weapon under disability charge until sentencing.

{¶25} At sentencing, the trial court found appellant guilty of having a weapon while under disability. Appellant was sentenced on the murder count and the weapon under disability count and received a total prison sentence of 23 years to life.

{¶26} Appellant filed a timely appeal and asserts the following assignments of error for our review:

FIRST ASSIGNMENT OF ERROR

I. THE TRIAL [COURT] SHOULD HAVE GRANTED A MISTRIAL AND/OR FASHIONED ANOTHER APPROPRIATE REMEDY WHEN THE STATE COMMITTED A *BRADY* VIOLATION AND FAILED TO TURN OVER A SCIENTIFIC TEST RESULT FROM A BAL[L]ISTIC EXPERT THEREBY VIOLATING DEFENDANT-APPELLANT'S RIGHT TO A FAIR TRIAL UNDER THE OHIO AND FEDERAL CONSTITUTIONS

SECOND ASSIGNMENT OF ERROR

II. WHEN COUNSEL'S PERFORMANCE IS DEFICIENT IN THE CONDUCT OF TRIAL COUPLED WITH PREJUDICE INURING TO THE DETRIMENT OF THE APPELLANT, HIS RIGHT TO A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL ARE VIOLATED CONTRA THE OHIO AND FEDERAL CONSTITUTIONS

{¶27} In his first assignment of error, appellant argues that a *Brady* violation occurred when the state failed to provide appellant with the criminalist's opinion regarding the type of firearm that likely fired the spent bullet and spent shell casing recovered and linked to Ricky's murder. Appellant further argues the trial court erred by failing to declare a mistrial or by failing to devise an appropriate remedy for this violation, thereby violating appellant's right to a fair trial. We disagree.

{¶28} In *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, the United States Supreme Court held that a criminal defendant can claim denial of due process when the prosecution fails to disclose the existence of potentially exculpatory evidence. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment,

irrespective of the good faith or bad faith of the prosecution." Id. at 87, 1196-97. See also *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶27.

{¶29} However, evidence suppressed by the prosecution is a *Brady* violation only if there is a "reasonable probability" that the result of the trial could have been different if the evidence had been disclosed to the defense. Id., citing *Kyles v. Whitley* (1995), 514 U.S. 419, 433-34, 115 S.Ct. 1555, 1565. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *State v. Johnston* (1988), 39 Ohio St.3d 48, paragraph five of the syllabus, following *United States v. Bagley* (1985), 473 U.S. 667, 105 S.Ct. 3375.

{¶30} Furthermore, the duty to disclose exculpatory evidence also extends to those officials acting within the prosecutorial arm of the government or on the government's behalf, including the police. *Kyles* at 437, 115 S.Ct. 1567.

{¶31} However, if the evidence is disclosed *during* the trial, there is no *Brady* violation. *State v. Bruce*, 10th Dist. No. 07AP-355, 2008-Ohio-4370. See also *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, ¶82; *State v. Iacona*, 93 Ohio St.3d 83, 2001-Ohio-1292. But, in *State v. Banks*, 10th Dist. No. 01AP-1179, 2002-Ohio-3341, ¶23, citing to *Iacona*, we recognized that some federal courts have found that disclosure during trial was so late that it violated due process. The *Iacona* court found:

> It has, however, been held that the philosophical underpinnings of *Brady* support the conclusion that even disclosure of potentially exculpatory evidence during trial may constitute a due process violation if the late timing of the disclosure significantly impairs the fairness of the trial. Even where information may be exculpatory, "no due process violation occurs as long as *Brady* material is disclosed to a defendant in time for its effective use at trial."

Id. at 100, quoting *United States v. Smith Grading & Paving, Inc*. (C.A.4, 1985), 760 F.2d 527, 532.

{¶32} Here, unlike in *Brady*, the evidence was disclosed during trial, and thus, there is no *Brady* violation. We further find that even in spite of the unarguably late timing of the disclosure, the fairness of the trial was not significantly impaired, as the evidence was disclosed in time for its effective use at trial and therefore, it did not violate appellant's due process rights or the philosophical underpinnings of *Brady*. While the evidence was disclosed after the testimony of Ms. Goss, thereby preventing appellant's counsel from using the opinion of the criminalist to attempt to discredit Ms. Goss' testimony on cross-examination with respect to the make and model of the gun,[4] the evidence was disclosed prior to the testimony of the co-defendant, whom appellant's counsel referred to as the state's "last and best witness." (Tr. 307.) This allowed appellant to address the state's intended use of the evidence, which was to use the evidence to bolster the testimony of the co-defendant, and to address that issue and any resulting prejudice.

{¶33} Additionally, we find there is no "reasonable probability" that the result of the trial could have been different if the evidence had been disclosed to the defense earlier. In fact, when asked by the trial court how they would have responded if the suppressed evidence had been provided earlier, appellant's counsel admitted, "[b]ut I don't know what we would have done differently." (Tr. 305.) Thus, the trial court properly determined there was very little prejudice here when it found, "[s]o I guess even though there is a

[4] Appellant's counsel likely could have attempted to re-call Ms. Goss to the stand, given this new information, but, given that he had already made significant efforts to paint Ms. Goss as completely incredible in all respects, he apparently chose not to exercise that as an option.

[discovery] violation, I don't see where things would have changed if the rules had been complied with fully in my view by the prosecution. I just don't see how there has been prejudice." (Tr. 310.) Therefore, we find the timing of the disclosure fails to support a due process violation under *Brady*. Furthermore, the state's failure to disclose this evidence does not undermine confidence in the outcome of the trial. See *State v. Waddy* (1992), 63 Ohio St.3d 424, 432-34.

{¶34} We further note that, although the trial court did not clearly articulate whether it was specifically finding a violation under *Brady*, it did clearly find that there was an unintentional discovery violation under Crim.R. 16(B)(1)(d), due to the state's failure to provide appellant with the complete results of the criminalist's scientific examination or testing of the spent casing and spent bullet at issue, despite a general request for such evidence having been made by appellant. To the extent appellant contends the trial court erred in the manner in which it handled the prosecution's discovery violation, thereby denying appellant a fair trial, we disagree.

{¶35} "Violations of Crim.R. 16 by the prosecution may result in reversible error only upon a showing that (1) the prosecution's failure to disclose was a willful violation of the rule, (2) foreknowledge of the information would have benefited the accused in preparing a defense, and (3) the accused has suffered prejudice." *LaMar* at ¶38, citing *State v. Joseph*, 73 Ohio St.3d 450, 458, 1995-Ohio-288. Here, assuming, arguendo, that the failure to disclose the information at issue is a violation of Crim.R. 16, the record supports the determination that: the lack of disclosure was inadvertent rather than willful; appellant's trial counsel could not say how he would have handled the case differently; and appellant was not able to establish prejudice, as noted above.

{¶36} Furthermore, despite finding very little prejudice, but, in an abundance of caution, the trial court found there was a Crim.R. 16(B)(1)(d) discovery violation and then attempted to meet defense counsel's concerns by conducting extensive discussions with both counsel. Appellant's counsel requested that the court strike the criminalist's testimony with respect to her opinion that the spent casing and bullet were likely fired from a Hi-Point weapon. The state, on the other hand, suggested the trial court grant a short continuance for appellant's counsel to further investigate the basis for the criminalist's opinions. When appellant's counsel implied that plea negotiations may have been conducted differently if he had known this information in advance, the state then made the same plea negotiation offer mid-way through trial as it had prior to the start of trial, despite the fact that it had withdrawn that offer at the start of the trial.

{¶37} While the trial court determined that the circumstances here did not warrant the striking of the criminalist's testimony, the trial court did find that a sanction was appropriate and did make a suggestion as to a remedy, which was adopted and then requested by appellant's counsel. As a result, the trial court ordered that the co-defendant was prohibited from identifying the manufacturer of the weapon used in the shooting. Exclusion of this testimony was structured to prevent the state from using the newly revealed evidence to bolster the testimony of its "last and best witness," the co-defendant.

{¶38} Crim.R. 16(E)(3) provides that if a party has failed to comply with the discovery rules, "the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances."

{¶39} Here, the trial court determined striking the evidence not disclosed was neither warranted nor likely to do any good, since the witness had already testified on the subject. ("I don't think that the remedy of telling this jury to disregard what is already in front of them is at all going to be helpful.") (Tr. 321.) Instead, the trial court determined the better remedy was to issue a different order which it believed was just under the circumstances. The order was structured to sanction the state and to work to appellant's benefit. It was not prejudicial to appellant in any way. Although many courts may have chosen the more conventional sanction of striking the testimony not previously disclosed, a trial court has a certain amount of discretion in dealing with sanctions imposed for discovery violations. See *State v. Parson* (1983), 6 Ohio St.3d 442, 445.

{¶40} Appellant also argues that, in light of the events that occurred regarding the testimony of the criminalist, the trial court should have sua sponte declared a mistrial. However, the decision as to whether to declare a mistrial is one that is in the sound discretion of the trial court, since it is in the best position to determine whether the circumstances necessitate the declaration of a mistrial, or whether there are other corrective measures which are adequate. See *Parker v. Elsass*, 10th Dist. No. 01AP-1306, 2002-Ohio-3340, ¶19. Here, counsel for appellant did not request a mistrial. A trial court's authority to declare a mistrial sua sponte is limited. See *State v. Glover* (1988), 35 Ohio St.3d 18. A reviewing court will not second-guess such a determination absent an abuse of discretion. *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, ¶92. Appellant has failed to demonstrate how the trial court abused its discretion in failing to declare a mistrial sua sponte under the circumstances here.

{¶41} Based upon the reasoning set forth above, we overrule appellant's first assignment of error.

{¶42} In his second assignment of error, appellant argues his counsel was ineffective because he failed to understand the significance of the criminalist's testimony regarding the type of weapon that likely fired the spent bullet and shell casing at issue, and the fact that her testimony was contradictory to the testimony of Ms. Goss. Appellant argues Ms. Goss' testimony was more valuable to the state than the testimony of the co-defendant, since Ms. Goss did not "cut a deal" with the state. As a result, appellant argues it was more important for his counsel to attack Ms. Goss' credibility than to prevent the co-defendant from testifying about the type of weapon involved simply because his testimony would coincide with the opinion of the criminalist, thereby providing corroboration to his testimony. Thus, appellant essentially argues that it would have been a better strategy to use the newly disclosed information to discredit Ms. Goss, who was a stronger witness for the state, than to exclude certain testimony from the co-defendant, since his credibility was subject to attack for other reasons.

{¶43} In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301. Therefore, the burden of showing ineffective assistance of counsel is on the party asserting it. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675. Additionally, in fairly assessing counsel's performance, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶101.

{¶44} Trial strategy and even debatable trial tactics do not establish ineffective assistance of counsel. Id. A reviewing court must be "highly deferential to counsel's performance and will not second-guess trial strategy decisions." *State v. Tibbetts*, 92 Ohio St.3d 146, 166-67, 2001-Ohio-132. Strategic choices made after substantial investigation "will seldom if ever" be found wanting. *Strickland* at 681, 104 S. Ct. at 2061. "Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment." Id.

{¶45} "[T]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result." Id. at 686, 104 S.Ct. at 2064. In order to succeed on a claim of ineffective assistance of counsel, appellant must satisfy a two-prong test. First, he must demonstrate that his trial counsel's performance was deficient. Id. at 687, 104 S.Ct. at 2064. This requires a showing that his counsel committed errors which were "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. If he can show deficient performance, he must next demonstrate that he was prejudiced by the deficient performance. Id. To show prejudice, he must establish there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is one sufficient to erode confidence in the outcome. Id. at 694, 104 S.Ct. at 2068.

{¶46} Based upon the record, it is clear that appellant's trial counsel made a strategic decision to attempt to limit the testimony that would corroborate the co-

defendant's version of events, rather than to use such testimony to attack the credibility of Ms. Goss. It is also clear from the record that trial counsel conducted a substantial investigation in this case. ("And I think probably twenty or thirty people were contacted in this case. I've been to the scene, I personally have been to the jail to talk to people involved in this case. This wasn't as if we were sitting back on our laurels not preparing this case, not doing the things that were appropriate to get this case ready for trial because we were.") (Tr. 304.)

{¶47} Appellant's trial counsel asserted in his closing argument that Ms. Goss, rather than appellant, should have been the key suspect involved in the shooting, and that she likely lured Ricky Palmer to the area and set him up to be killed. Trial counsel pointed out the numerous inconsistencies in Ms. Goss' version of events and repeatedly reminded the jury that Ms. Goss had admitted to being high on crack and up for three straight days. Trial counsel may have reasonably believed that he could sufficiently attack her credibility, as well as her ability to perceive the events, and thus discredit her testimony using these facts, without pointing out the discrepancy regarding the type of weapon used in the shooting. ("I don't intend to argue that any of Carmen Goss' testimony has any veracity to it [.]") (Tr. 321.) Notably, although counsel did not point out the discrepancy between the testimony of Ms. Goss and the testimony of the criminalist in his closing argument, the jury nevertheless presumably heard the conflicting testimony during the direct-examination of the two witnesses and could have drawn its own conclusions. Such an approach by counsel is not deficient.

{¶48} Additionally, contrary to appellant's assertions on appeal, appellant's trial counsel may have reasonably believed that the co-defendant, whom he described as the

state's "last and best witness," was likely to provide more damaging testimony than Ms. Goss and that the better strategy was to prevent the jury from hearing any testimony from him which could be corroborated by a disinterested witness, such as the criminalist. Again, this is not a deficient performance, but is, in fact, trial strategy.

{¶49} Appellant has failed to show deficient performance on the part of his trial counsel. However, even if he could demonstrate deficient performance, he is unable to demonstrate prejudice as a result. Appellant cannot establish a reasonable probability that the result of the trial would have been different if counsel had not committed unprofessional errors.

{¶50} With or without reference to the specific make and model of the handgun that was likely used in this shooting, there is still significant evidence which points to appellant as the shooter, including identification of appellant as the shooter by two separate witnesses, one of whom knew appellant prior to the shooting, and both of whom had no connection to one another, as well as testimony from a third witness who corroborates the facts testified to by the other two witnesses. The palm print of the co-defendant on Ricky Palmer's vehicle also corroborates the testimony of Ms. Goss and the co-defendant as to where the co-defendant was standing at the time of the shooting.

{¶51} Furthermore, the conviction in this matter is neither directly tied to nor completely reliant upon testimony as to the manufacturer of the weapon allegedly used in the shooting. In fact, the handgun used in this murder was never recovered. The physical evidence recovered and related to the weapon used only included the spent shell casing and the spent bullet fragment recovered from Ricky Palmer's body.

{¶52} We find appellant has failed to demonstrate that his trial counsel was deficient and that he was prejudiced by such deficiency. Accordingly, appellant's second assignment of error is overruled.

{¶53} For the foregoing reasons, appellant's first and second assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK, P.J. and BRYANT, J., concur.