

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-691 (C.P.C. No. 09CR12-7801)
Abigail C. Jordan,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on April 19, 2012

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

*Byron L. Potts*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Defendant-appellant, Abigail C. Jordan, 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} On August 3, 2009, Columbus Police Officers Jeremy Phalen and Charles Kneeland were patrolling the city's east side when they saw a man run across Livingston Avenue and get into a car that had illegally parked on that street. The officers followed the car and observed it make an improper left hand turn. As a result of that traffic violation, the officers initiated a traffic stop of the car. The car, driven by appellant, had four people in it. Officer Phalen talked to the two people on the passenger side and Officer Kneeland engaged appellant and the passenger behind her. The officers obtained personal information from all of the people in the car to check for any outstanding warrants.

Appellant got her driver's license out of a black purse that was on the floor in front of the passenger next to her. One of the occupants in the car had an outstanding arrest warrant. The officers took him out of the car and arrested him without incident.

{¶ 3} As the stop progressed, Officer Phalen told appellant what was happening and asked her for permission to search her car. She gave him permission. During that search, the officer saw a black purse on the front passenger floorboard. He moved the purse and felt a heavy object in the purse which he thought was consistent with a weapon or gun. He squeezed the object and determined it to be a gun. At that point, he took the object out of the purse and saw that it was a gun. The officers also found paperwork in the purse indicating that it was appellant's purse.

{¶ 4} As a result of these events, a Franklin County Grand Jury indicted appellant with one count of carrying a concealed weapon in violation of R.C. 2923.12 and another count of improperly handling a firearm in a motor vehicle in violation of R.C. 2923.16. Appellant entered a not guilty plea to the charges and proceeded to a bench trial.

{¶ 5} At trial, the officers testified to the above version of events. Appellant admitted that the officers found a gun in her purse but denied knowing the gun was in her purse or how it got there. The trial court found appellant guilty of both charges, concluding that it was not plausible that appellant did not know the gun was in her purse. The trial court sentenced appellant accordingly.

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

[1.] INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO APPELLANT'S TRIAL COUNSEL'S FAILURE TO PRESENT ANY WITNESSES OR EXPERT TESTIMONY AT TRIAL.

[2.] APPELLANT'S CONVICTION FOR CARRYING CONCEALED WEAPON AND IMPROPERLY HANDLING FIREARM IN A MOTOR VEHICLE WAS NOT SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE. THIS DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

[3.] THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PREJUDICIAL ERROR BY DENYING

APPELLANT'S TRIAL COUNSEL THE OPPORTUNITY TO  
DO A DNA FINGERPRINT ANALYSIS ON THE  
RECOVERED GUN IN THE CASE.

{¶ 7} For ease of analysis, we address appellant's assignments of error out of order.

**Appellant's Third Assignment of Error —Request for Continuance**

{¶ 8} Appellant argues in this assignment of error that the trial court abused its discretion by denying her request for a continuance to have DNA tests performed on the gun. We disagree.

{¶ 9} The grant or denial of a continuance is a matter that is entrusted to the sound discretion of the trial court. *State v. Presar*, 10th Dist. No. 09AP-122, 2009-Ohio-5127, ¶ 7, citing *State v. Unger*, 67 Ohio St.2d 65 (1981), syllabus. An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion. *Id.* at 67. An abuse of discretion refers to more than an error of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157 (1980). Whether a trial court has abused its discretion in denying a continuance depends upon the circumstances of each case, including the length of the requested delay, prior continuances requested and received, the presence or absence of legitimate reasons for the requested delay, appellant's participation or contribution to the circumstances giving rise to the request for a continuance, and any other relevant factors. *Unger* at 67-68.

{¶ 10} During appellant's testimony, trial counsel asked her if she would be willing to have a DNA sample taken to compare it to DNA found on the handgun.<sup>1</sup> She answered that she would. At that point, trial counsel asked that appellant's DNA sample be taken and that the trial court reserve a ruling (presumably its verdict) for the DNA sample to be tested. The trial court denied appellant's request. Appellant claims this was an abuse of the trial court's discretion. We disagree. First, we note that this trial had already been continued a number of times. Second, this request came in the middle of trial and, significantly, after appellant already received a continuance two months before trial to have DNA tests performed. Appellant did not explain why she did not perform those tests

in that time. *See State v. Brown*, 9th Dist. No. 25287, 2011-Ohio-1041, ¶ 28 (no abuse of discretion denying continuance request made during trial to obtain expert witness where defendant had opportunity to obtain witness before trial). Finally, there was no indication how long the continuance would have been and, as the trial court noted, it was not clear that a DNA test would be particularly helpful to appellant's case. *Id.* Based on the totality of the circumstances, the trial court did not abuse its discretion by denying appellant's request for a continuance.

{¶ 11} We overrule appellant's third assignment of error.

**Appellant's Second Assignment of Error – Sufficiency and Manifest Weight of the Evidence**

{¶ 12} Appellant first contends in this assignment of error that her convictions are not supported by sufficient evidence. We disagree.

{¶ 13} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally adequate to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Whether the evidence is legally sufficient to support a verdict is a question of law. *Id.*

{¶ 14} In determining whether the evidence is legally sufficient to support a conviction, " '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶ 34, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. A verdict will not be disturbed unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484 (2001).

{¶ 15} In this inquiry, appellate courts do not assess whether the state's evidence is to be believed, but whether, if believed, the evidence admitted at trial supports the conviction. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79-80 (evaluation of witness credibility not proper on review for sufficiency of evidence); *State v. Bankston*,

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<sup>1</sup> Apparently, the state recovered DNA samples from the handgun found in appellant's purse and compared those samples with DNA from one of the passenger's in appellant's car.

10th Dist. No. 08AP-668, 2009-Ohio-754, ¶ 4 (noting that "in a sufficiency of the evidence review, an appellate court does not engage in a determination of witness credibility; rather, it essentially assumes the state's witnesses testified truthfully and determines if that testimony satisfies each element of the crime.").

{¶ 16} In order to find appellant guilty of either of these charges, the trial court had to find beyond a reasonable doubt that appellant knowingly had, carried, or transported a gun. R.C. 2923.12; R.C. 2923.16(B). Appellant argues that the state did not present any evidence that she knew the gun was in her purse. We disagree. Simply put, the evidence indicates that the police found a gun in appellant's purse. Appellant does not dispute that it was her purse and, in fact, paperwork found in the purse indicates that it was her purse. Viewing this evidence in the light most favorable to the state, a rational trier of fact could conclude that appellant knew the gun was in the purse because it was her purse. *See State v. Harvath*, 5th Dist. No. 2005CA00330, 2006-Ohio-5549, ¶ 35. Accordingly, the state presented sufficient evidence to conclude that appellant knew the gun was in her purse.

{¶ 17} Appellant's assignment of error also argues that her convictions are against the manifest weight of the evidence. Appellant does not, however, address this argument in her brief. App.R. 16(A)(7) states, in relevant part, that an appellant's brief shall include "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions." App.R. 12(A)(2) states that "[t]he court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A)." Accordingly, pursuant to App.R. 12(A) and 16(A), we decline to address appellant's manifest-weight argument, given that she has failed to present "reasons in support of the contentions" behind the argument. *State v. Gonzalez*, 10th Dist. No. 10AP-628, 2011-Ohio-1193, ¶ 28-29.

{¶ 18} Having rejected appellant's sufficiency argument, we overrule her second assignment of error.

#### **Appellant's First Assignment of Error —Ineffective Assistance of Counsel**

{¶ 19} Appellant contends in her first assignment of error that she received ineffective assistance of trial counsel. We disagree.

{¶ 20} To establish a claim of ineffective assistance of counsel, appellant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced him. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 133, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). The failure to make either showing defeats a claim of ineffective assistance of counsel. *State v. Bradley*, 42 Ohio St.3d 136, 143 (1989), quoting *Strickland* at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

{¶ 21} In order to show counsel's performance was deficient, the appellant must prove that counsel's performance fell below an objective standard of reasonable representation. *Jackson* at ¶ 133. The appellant must overcome the strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Strickland* at 689. To show prejudice, the appellant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶ 204.

{¶ 22} Appellant first contends that her trial counsel was ineffective because he failed to present witnesses on her behalf. We disagree. 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 (10th Dist.), citing *State v. Williams*, 74 Ohio App.3d 686, 694, (8th Dist.1991). Appellant has not demonstrated that counsel's failure to call additional witnesses was prejudicial. Appellant speculates without any evidentiary support that other witnesses "could have provided exculpatory evidence about how the gun ended up in Appellant's purse." (Appellant's brief, at 7.) Thus, it is pure speculation to conclude that the result of appellant's trial would have been different had any additional witnesses testified. *State v. Williams*, 10th Dist. No. 08AP-719, 2009-Ohio-3237, ¶ 35, citing *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. Hamilton*, 10th Dist. No. 10AP-543, 2011-Ohio-3305, ¶ 28. This type of vague speculation is insufficient

to establish ineffective assistance of counsel. *State v. Wiley*, 10th Dist. No. 03AP-340, 2004-Ohio-1008, ¶ 30.

{¶ 23} Appellant next contends that trial counsel did not effectively cross-examine the state's witnesses. We disagree. Decisions regarding cross-examination are within trial counsel's discretion and generally do not form the basis for a claim of ineffective assistance of counsel. *State v. Harris*, 10th Dist. No. 09AP-578, 2010-Ohio-1688, ¶ 28, citing *State v. Flors*, 38 Ohio App.3d 133, 139 (8th Dist.1987). The extent and scope of cross-examination clearly falls within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶ 146. " '[A]n appellate court reviewing an ineffective assistance of counsel claim must not scrutinize trial counsel's strategic decision to engage, or not engage, in a particular line of questioning on cross-examination.' " *State v. Dorsey*, 10th Dist. No. 04AP-737, 2005-Ohio-2334, ¶ 22, quoting *In re Brooks*, 10th Dist. No. 04AP-164, 2004-Ohio-3887, ¶ 40. Additionally, appellant fails to show how trial counsel's questioning of these witnesses (assuming it was deficient) was prejudicial. Appellant's contention that cross-examination regarding the ability of others in the car to put the gun in her purse would be beneficial to her is, again, purely speculative. *State v. Brodbeck*, 10th Dist. No. 08AP-134, 2008-Ohio-6961, ¶ 65.

{¶ 24} Lastly, appellant argues that trial counsel was deficient by not having DNA tests performed on the gun before trial. Again we disagree. Resolving this issue in appellant's favor would be purely speculative, as nothing in the record indicates what the results of any DNA testing would have been. Because appellant cannot demonstrate, based on evidence in the record, that trial counsel's failure to have DNA testing prejudiced her, we reject this claim of ineffective assistance of counsel. *State v. Carter*, 89 Ohio St.3d 593, 606 (2000) (rejecting claim of ineffectiveness for counsel's failure to pursue MRI testing in the penalty phase); *State v. Wallace*, 10th Dist. No. 08AP-2, 2008-Ohio-5260, ¶ 59 (rejecting ineffective assistance claim where claim could only be proven with evidence outside the record).

{¶ 25} Appellant has not demonstrated that she received ineffective assistance of counsel. Accordingly, we overrule her first assignment of error.

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

*Judgment affirmed.*

BROWN, P.J., and FRENCH, J., concur.

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