[Cite as *State v. Erich,* 2012-Ohio-4006.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-146**
- vs -	:	
STEVEN E. ERICH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 11 CR 000119.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee,* Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Harvey B. Bruner, 700 W. St. Clair Ave., #110, Cleveland, OH 44113 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} After a trial by jury, appellant, Steven E. Erich, was convicted on seven counts of rape and sentenced by the Lake County Court of Common Pleas to an aggregate term of 28 years imprisonment. He now appeals from the judgment of conviction. At issue is whether appellant's trial counsel rendered ineffective assistance in defending him. For the reasons discussed in this opinion, we answer this question in the negative.

{¶2} On February 11, 2011, at approximately 3:30 p.m., appellant called the Wickliffe Police Department to report that his 16-year-old stepdaughter, T.B., was not at school when he arrived to pick her up. Officer Robert Kuhse responded to the call and met appellant at the Erich family's home. After a brief investigation, T.B. was found at a friend's house, located a short distance from Wickliffe High School. When the officer encountered T.B., she was visibly upset. Officer Kuhse asked the girl if she wanted to talk, but T.B. began crying uncontrollably. Eventually, T.B. agreed to accompany the officer to the police department where she remained emotionally distraught, but was able to provide officers with an account of several incidents of sexual abuse she had suffered at appellant's hands. According to T.B., appellant drank heavily and was a harsh disciplinarian who, on four separate occasions between mid-August 2010 and January 2011, entered her room in the middle of the night, restrained her and inserted his fingers and tongue into her vagina.

{¶3} T.B. stated that the first episode occurred sometime between August 16, 2010 and August 22, 2010, near the beginning of her junior year of high school. T.B. asserted she was asleep in her room when she was awakened by appellant opening her bedroom door. Appellant then knelt beside T.B.'s bed, pulled her sweatpants down, and placed his hands between her thighs and digitally penetrated her vagina. T.B., frightened and in pain, tried to move away; appellant, however, pulled the girl closer to him, pulled her pants down further, and, while holding her legs, placed his mouth in her vagina. T.B. kicked appellant in the chest, causing him to fall back. T.B. then wrapped herself tightly in her blanket and appellant eventually left her room.

{¶4} A little over a month later, between September 27, 2010 and September 30, 2010, T.B. was asleep when she was again awakened by the sound of her door opening. Appellant again situated himself at the side of T.B's bed, pulled her pants down and digitally penetrated the girl. T.B. rolled away from him and fell from the bed. Appellant asked her if she was okay; when T.B. said she was fine, appellant stated he heard a loud bump and wanted to make sure the girl was okay. Appellant left the room and did not return that night.

{¶5} The next incident occurred between November 29, 2010 and December 5, 2010. Again, T.B. was sleeping when she heard the door open and observed appellant enter her room and sidle to the side of her bed. Similar to the first episode, appellant, while restraining T.B., digitally and orally penetrated the girl. Although she tried to resist, she claimed she did not say anything because appellant was holding her down and she was "already scared of him."

{¶6} Finally, sometime between January 1, 2011 and January 9, 2011, appellant again entered T.B.'s room awakening the girl from her sleep. As he settled by the side of her bed, T.B. stated she saw appellant's face and smelled an odor of alcohol on him. T.B. tried to move away from appellant but was unsuccessful. Appellant proceeded to hold the girl down and digitally and orally penetrate her vagina. Although she said nothing, T.B. asserted she eventually kicked appellant in the chest causing him to stumble back and leave her room.

{¶7} After T.B. had related the episodic abuse to police, officers contacted appellant. Appellant spoke to officers voluntarily on three separate occasions. During the interview process, appellant told officers that on the evening of February 10, 2011,

he caught T.B. attempting to sneak her 19-year-old boyfriend, a young man appellant forbade the girl from seeing, into the family home. Appellant conceded he lost his temper, threatened the boy, and began calling T.B. names. Appellant additionally stormed into T.B.'s room and tore posters and awards from her wall. Appellant's interviews indicate that, after this incident, he was concerned T.B. would react negatively. When confronted with the abuse allegations, however, he characterized them as "crazy." Throughout the interview process, appellant maintained his innocence. Notwithstanding his overt denials, during one interview, he reflected aloud: "If I did, you know, do something, like what you said, * * * I wanna say I'm sorry."

{¶8} On April 20, 2011, the Lake County Grand Jury returned a 14-count indictment against appellant. Counts 1 and 2 alleged rape, a felony of the first degree, in violation of R.C. 2907.02(A)(2); Counts 3 and 4 alleged sexual battery, a felony of the third degree, in violation of R.C. 2907.03(A)(5). Each of these counts pertained to conduct that allegedly occurred on or between August 16, 2010 and August 22, 2010. Count 5 alleged rape, a felony of the first degree, in violation of R.C. 2907.02(A)(2); Count 6 alleged sexual battery, a felony of the third degree, in violation of R.C. 2907.03(A)(5). Each of these counts related to conduct allegedly occurring on or between September 27, 2010 and September 30, 2010. Counts 7 and 8 charged rape, a felony of the first degree, in violation of R.C. 2907.02(A)(2); Counts 9 and 10 alleged sexual battery, a felony of the third degree, in violation of R.C. 2907.03(A)(5). Each of these counts pertained to conduct allegedly occurring on or between November 29, 2010 and December 5, 2010. Counts 11 and 12 charged rape, a felony of the first degree, in violation of R.C. 2907.02(A)(2); Counts 13 and 14 alleged sexual battery, a

felony of the third degree, in violation of R.C. 2907.03(A)(5). Each of these crimes related to conduct allegedly occurring on or between January 1, 2011 and January 9, 2011. Appellant pleaded not guilty to all charges.

{¶9} After a trial by jury, appellant was found guilty on all counts alleged in the indictment. The matter was subsequently referred to the Adult Probation Department for a presentence investigation report and a victim impact statement. After a sentencing hearing, appellant was sentenced to 28 years in prison and labeled a Tier III sex offender. Appellant filed a timely appeal assigning three errors for this court's review. As the assignments of error are related, we shall address them together. Stated collectively, they allege:

{¶10} "[1.] Appellant received ineffective assistance of counsel when counsel failed to cross-examine the victim in a competent manner.

{¶11} "[2.] Appellant received ineffective assistance of counsel when counsel failed to object to the introduction of several edited DVDs of law enforcement interview with appellant.

{¶12} "[3.] Appellant received ineffective assistance of counsel when counsel failed to subpoena a single witness."

{¶13} To establish ineffective assistance of counsel, an appellant must show that his attorney's performance was deficient and that the alleged deficiencies prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Both the performance and prejudice prongs must be established to demonstrate counsel's ineffectiveness.

{¶14} An attorney's performance is deficient if, after considering the totality of the circumstances, his or her representation fell below an objective standard of reasonableness. *Id.* at 688. A court, however, "must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at 689. Debatable trial tactics do not generally constitute deficient performance. *State v. Phillips*, 74 Ohio St.3d 72, 85 (1995) citing *State v. Clayton*, 62 Ohio St.2d 45, 49 (1980).

{¶15} With respect to the prejudice prong, an appellant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, *supra*, at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome" of the proceeding. *Id.*

{¶16} Appellant first argues counsel was ineffective for failing to explore certain avenues of questioning during his cross-examination of T.B. In particular, appellant argues counsel failed to sufficiently question T.B.'s means of identifying him as the individual who abused her. Appellant further claims counsel should have further questioned T.B. about the manner in which she struggled against the sexual advances. And, finally, appellant asserts counsel failed to adequately explore T.B.'s admission that she had previously seen a therapist before she moved to Ohio.

{¶17} Preliminarily, appellant's arguments merely identify how, in his estimation, trial counsel's performance was purportedly deficient. Appellant's brief, however, contains no argumentation as to how counsel's performance prejudiced his defense. To assert a colorable claim for ineffective assistance of counsel, an appellant is required to submit argumentation relating to both prongs of the two-part test set forth in

Strickland, supra. *See e.g. State v. Jackson*, 11th Dist. No. 2004-T-0089, 2006-Ohio-2651, ¶118. As appellant has failed to specifically provide any argumentation as to how he was prejudiced by counsel's alleged deficiencies, he has failed to meet his legal burden under *Strickland*. For this reason alone, his initial arguments lack merit. *See e.g.* App.R. 16(A)(7).

{¶18} Assuming, however, appellant met his prima facie burden by connecting counsel's alleged deficiencies to some purported prejudice pursuant to *Strickland*, his arguments would still lack merit. With respect to the identification issue, T.B. testified she saw appellant enter and leave her room after sexually abusing her in January 2011. She further testified she saw appellant's face as he entered her room to sexually abuse her in relation to the late-November, early-December 2010 incident. Similarly, during the September 2010 incident, T.B. testified, after appellant sexually abused her, she fell off her bed, and she had an actual verbal exchange with appellant. Finally, although T.B. did not expressly testify she saw or spoke with appellant prior to, during, or after the August 2010 incident, she still identified him as the perpetrator of the abuse.

{¶19} In light of this testimony, counsel questioned T.B. about her identification based upon her knowledge of what she specifically saw on the nights the incidents occurred. Any further questioning on this issue would have been somewhat superfluous, however, because appellant's identification was not an issue; to wit, appellant's defense was premised upon his theory that T.B. manufactured the allegations to retaliate against appellant for threatening her and throwing her boyfriend out of the family home on February 10, 2011.

{¶20} Moreover, T.B. testified that, during each of the four incidents, she struggled in some fashion against appellant's sexual advances, e.g., she attempted to move away from appellant's advances, pushed him away, and, on two occasions, she physically kicked him causing him to fall back into her bedroom wall. Appellant claims that counsel should have further explored the sounds that were made as a result of the struggles. Because T.B.'s struggles occurred either during or after the commission of the sexual abuse, we fail to see how such an inquiry would have directly aided appellant in his defense or meaningfully influenced the outcome of the case. In other words, we fail to see how counsel can be held ineffective for not further exploring the auditory impact of the post- or contemporaneous-abuse struggle. If the sexual conduct was, in effect, complete, the sound of appellant falling would not necessarily be relevant to appellant's defense.

{¶21} Finally, any discussion of T.B.'s past therapy, presumably psychological, may have been specifically verboten by operation of a pre-trial court order. Prior to trial, the state filed a notice of intent to introduce evidence from T.B. that she had been sexually abused by defendant since she was four-years-old. Defense counsel duly opposed the motion. The court ultimately determined the state could not introduce this evidence. Given this background, counsel's failure to explore that issue could have been based upon the trial court's order, generated by defense counsel's reasonable opposition to the state's attempt to introduce prejudicial evidence against appellant, excluding evidence of abuse occurring before the incidents set forth in the indictment.

{¶22} Even assuming, for the sake of argument, her past therapy was unrelated to any potential past abuse, it is not obvious, and appellant fails to explain, how T.B.'s

previous experience with therapy in another state would be relevant to his defense. And, even if such questioning could have had some impact upon T.B.'s credibility, we cannot say, given the nature of the evidence introduced by the state, counsel's failure to explore the issue undermined confidence in the outcome. T.B.'s testimony unambiguously established that appellant, on four occasions, sexually abused her; during three of the four occasions, she testified to either seeing his face or speaking with him after it happened. She testified she was restrained during the incidents and tried unsuccessfully to extricate herself from or, at least, discourage appellant's advances. And she further testified her fear prevented her from directly confronting him while the sexual abuse occurred. Even assuming counsel should have pursued the issue of T.B.'s past therapy, we therefore fail to see how appellant was prejudiced.

{¶23} Generally, the scope of cross-examination falls within the ambit of trial strategy and, as a result, will not serve as a basis for an ineffective assistance claim. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶101. In this case, the record demonstrates counsel made a tactical decision to discredit T.B.'s testimony by focusing on her failure to disclose the abuse until the day after appellant had scolded and berated the girl for sneaking her boyfriend into the family home. By doing so, counsel was strategically attempting to demonstrate T.B. had a motive to malign appellant by bringing false charges of abuse. In support of this defense, counsel also aggressively cross-examined the reasonableness of T.B.'s version of the abuse. For instance, counsel called into question T.B.'s motivation for failing to disclose the abuse to her mother. He further questioned why, if she had been sexually abused, she did not do more to generally protect herself from the attacks, e.g., install locks on her bedroom

door, fight harder, confront appellant, or make noises to awaken the other family members. Counsel also attempted to create doubt as to T.B.'s fear of appellant when he questioned her why, if she had been repeatedly abused, she continued to permit appellant to take her to and from school and attend family functions with him.

{¶24} The record demonstrates defense counsel's cross-examination was designed to discredit T.B.'s testimony, thereby creating reasonable doubt as to the prosecution's theory of the case. The means counsel selected to achieve this end were reasonable and his failure to explore other, potentially superfluous, avenues of questioning at trial did not render his representation ineffective.

{¶25} Appellant next asserts counsel was ineffective for failing to object to the introduction of several edited recordings of appellant's interviews with police. Appellant claims trial counsel's "acquiescence" to the edited recordings was an "abdication" of his duty from which he suffered prejudice. Again, we do not agree.

{¶26} After trial, the prosecutor stated the following on record:

> **{¶27}** Prior to the commencement of this trial, the State and the Defense conducted a pretrial hearing related to State's Exhibits 2, 3, and 4 concerning the need for redaction, parts submitted for redaction. The Court ruled at that time and the exhibits, which included the redactions - - excuse me - - the exhibits that were played addressed the redactions that were discussed at those pre-trial matters and agreed upon by the parties.

{¶28} From this statement, made in open court, it is clear that both parties had the opportunity to view the recordings in their entirety. As a result, certain concerns and objections were raised and the recordings were edited accordingly. The prosecutor's

statement consequently indicates defense counsel was able to selectively remove any unfairly prejudicial aspects of the interview. We therefore hold counsel's agreement to permit the edited recordings into evidence was strategic and, by all appearances, based upon objections he voiced to the entirety of the interviews being played prior to trial. We discern nothing unreasonable in the manner in which counsel addressed the state's use of the recordings.

{¶29} Finally, appellant argues that trial counsel rendered ineffective assistance because he should have subpoenaed three witnesses to whom T.B. had specifically disclosed appellant's sexual abuse. He further asserts counsel should have called other members of T.B.'s family to question whether they had ever heard any unusual noises coming from her room at night. Appellant essentially contends the testimony of these witnesses would have been helpful in determining the credibility of T.B.'s testimony.

{¶30} This court has repeatedly held that the decision to call witnesses is a matter of trial strategy. *See e.g. State v. Kovacic*, 11th Dist. No. 2010-L-065, 2012-Ohio-219, ¶46. And, a claim for ineffective assistance of counsel cannot be premised upon speculative claims about what additional evidence may have been disclosed. *Id*. at ¶51. Appellant's argument presupposes that the testimony of certain witnesses would have undermined T.B.'s rendition of events. Such a claim, however, is fundamentally speculative. In fact, it is possible, if not reasonable, that counsel interviewed these potential witnesses. During discovery, the state included each of the witnesses appellant now identifies in its potential witness list. Hence, in the course of preparing for trial, counsel may have met with the witnesses and made a tactical

conclusion that their testimony would only serve to buttress T.B.'s testimony. Given the uncertain nature of the record, we must presume counsel's decision not to call the witnesses was sound trial strategy for which he cannot be held ineffective.

{¶31} Appellant's three assignments of error accordingly lack merit.

{¶32} For the reasons discussed in this opinion, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.