

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2005-11-103
- VS -	:	<u>O P I N I O N</u>
	:	10/23/2006
LISA J. BAKER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2004 CR 00518

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103, for plaintiff-appellee

Crowe and Welch Attorneys, Robert H. Welch III, 1019 Main Street, Milford, Ohio 45150, for defendant-appellant

WALSH, J.

{¶1} Defendant-appellant, Lisa Baker, appeals her conviction in the Clermont County Court of Common Pleas for robbery. We affirm the conviction.

{¶2} Around 11:00 PM, on December 5, 2003, Misty Bettinger and Danielle Whalen arrived at Frogger's, a bar in Clermont County, to meet a friend. As they walked toward the entrance from the parking lot, a voice called out, telling them to wait, and asking their names. Bettinger turned around to respond, and was struck in the face by a female. She fell to the

ground. The assailant returned to her parked car, then came back and took Bettinger's purse. Bettinger entered the bar and reported the incident to police, providing a description of the assailant. Police determined from her description and questioning of other bar patrons, that appellant was the likely perpetrator. Later, Bettinger and Whalen both picked out appellant as the assailant from a police photo array.

{¶3} Appellant was charged with robbery in violation of R.C. 2911.02(A)(2). She filed a notice of alibi, and a motion to suppress the evidence of her identification in the photo array. The motion to suppress was denied following a hearing, and the matter proceeded to a jury trial. At trial, the defense case focused on appellant's alibi. Appellant alleged that she was working at a different bar on the evening the assault occurred. The jury found appellant guilty and she was sentenced accordingly. She appeals, raising a single assignment of error:

{¶4} "[APPELLANT] WAS DEPRIVED OF HER RIGHT TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN CONTRAVENTION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTION 10 OF ARTICLE I OF THE OHIO CONSTITUTION."

{¶5} In order for a criminal defendant to prevail on an ineffective assistance of counsel claim, a defendant must make the two-pronged showing outlined in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, ¶159. First, the defendant must show that counsel's performance was deficient. *Id.* This requires the defendant to demonstrate that counsel's performance fell below an objective standard of reasonableness. *Strickland* at 688. Second, the defendant must show that the deficient performance caused prejudice, depriving her of a fair trial. *Bethel* at ¶159.

{¶6} There are "countless ways [for an attorney] to provide effective assistance in any given case," and this court must give great deference to counsel's performance.

Strickland at 689. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" when considering whether counsel's performance was deficient. *Id.* With respect to the second prong, the defendant must establish "that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus.

{¶7} Appellant first contends that trial counsel was ineffective for failing to subpoena several witnesses she contends would have supported her alibi claim.

{¶8} Decisions regarding the calling of witnesses are within the purview of defense counsel's trial tactics. *State v. Coulter* (1992), 75 Ohio App.3d 219, 230. The failure to subpoena witnesses for trial is not a substantial violation of defense counsel's essential duty absent a showing of prejudice. *Id.*, citing *State v. Hunt* (1984), 20 Ohio App.3d 310, 312; *State v. Reese* (1982), 8 Ohio App.3d 202, 203.

{¶9} At trial, counsel called Don Malicote to testify regarding appellant's alleged alibi. He testified that he saw appellant go into her place of employment around 8:00 PM on December 5, 2003, and that her car was still in the parking lot when he returned around 2:30 AM on December 6, 2003. Appellant alleges that several other witnesses could have confirmed her alibi, but that trial counsel failed to subpoena them. However, it cannot be ascertained from the record before us whether these witnesses could have supported appellant's alleged alibi. It would have been devastating to appellant's defense had counsel called an ineffective alibi witness, enabling the state to discredit the alleged alibi. Upon the record before us, we find that counsel's decision not to call the alibi witness constitutes trial strategy and does not constitute ineffective assistance. See *State v. Perkins*, Clinton App. No. 2005-01-002, 2005-Ohio-6557, ¶31.

{¶10} Appellant also contends that trial counsel was ineffective for failing to request a

continuance after the trial court overruled the motion to suppress the photo array evidence. Instead, the matter proceeded directly to trial the same day that the motion was ruled on. Appellant contends that trial counsel required additional time to prepare for trial based on the ruling on the motion to suppress. Appellant's contention is not supported by the record.

{¶11} The decision to seek a continuance is a matter of trial tactics. *State v. Samatar*, 152 Ohio App.3d 311, 2003-Ohio-1639, ¶90-92. In the present case, the matter had been pending for more than a year. Regardless of the trial court's decision on the motion to suppress, appellant's alibi defense remained the same, since the motion related only to suppression of the photo array evidence. Further, the state presented other identification evidence in addition to the photo array. The matter had been set for trial for several weeks, and review of the trial transcript provides no indication that trial counsel was unprepared to try the case on the scheduled date. Appellant has presented no evidence that counsel's decision not to seek a continuance was anything more than sound trial strategy.

{¶12} To establish ineffective assistance of counsel, appellant must demonstrate not only that trial counsel's performance was deficient, but also that there is a reasonable probability that but for the alleged errors, the result of the proceeding would have been different. *Bradley* at paragraph three of the syllabus. In the present case, appellant has failed to demonstrate either that counsel's performance was deficient, or that there is a reasonable probability of a different outcome had the alleged errors not occurred. The record fails to demonstrate what the other alibi testimony would have been; and it also fails to demonstrate that a continuance of the trial, had one been requested and granted, would have resulted in a different outcome. The assignment of error is overruled.

{¶13} Judgment affirmed.

POWELL, P.J., and YOUNG, J., concur.

[Cite as *State v. Baker*, 2006-Ohio-5507.]