[Cite as *State v. Raypole*, 2015-Ohio-827.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-05-009
	:	O P I N I O N
- vs -		3/9/2015
	:	
FOSTER L. RAYPOLE III,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 14 CRI 00071

Jess C. Weade, Fayette County Prosecuting Attorney, 110 East Court Street, Washington C.H., Ohio 43160, for plaintiff-appellee

Melissa S. Upthegrove, 254 East Court Street, Washington C.H., Ohio 43160, for defendant-appellant

HENDRICKSON, J.

{¶ 1} Defendant-appellant, Foster L. Raypole III, appeals his convictions and sentence in the Fayette County Court of Common Pleas for two counts of robbery. For the reasons discussed below, we affirm.

{¶ 2} Around 11:30 p.m. on February 5, 2014, appellant and Johnny Williams knocked on Jerry B. Penwell and Monica Currence's apartment door. Penwell and Currence

resided in an upper-level apartment at Twin Acres Apartments, located in Washington Court House, Fayette County, Ohio. Currence answered the door and let appellant and Williams into the apartment. Appellant and Williams pulled out handguns and demanded money, jewelry, and anything else of value. Penwell and Currence, who were unemployed at the time, had recently withdrawn $330 from the bank after receiving their unemployment checks. The money was in Currence's purse, which was on the floor near the couch in the living room where both Currence and Penwell were seated.

{¶ 3} Although appellant and Williams were both brandishing weapons and demanding money, Currence refused to give them her purse or the money contained within it. Williams got angry, grabbed a glass bottle that was sitting on the coffee table in front of the couch, and smashed the bottle. Appellant encouraged Williams to cut Currence with the broken glass when she would not hand over her purse or money. Appellant tried to hit Penwell in the head with the base of his gun, but Penwell deflected the blow by raising his arm up. Eventually, appellant went to put his gun away and the gun went off. The gun made an air pressure "puffing noise," which led Penwell and Currence to the realization that the gun was not real but, rather, was a toy. Appellant fled the apartment immediately after his gun went off. Williams quickly grabbed Currence's purse and attempted to follow appellant out of the apartment, but Penwell tackled him. The two struggled for a few seconds before Williams was able to escape with the money from Currence's purse. While fleeing from the apartment, one of the men dropped his gun. The gun was found by one of Penwell and Currence's neighbors, Cody Bowen. Bowen had heard Penwell and Currence's screams for help and had come out of his apartment, which was located directly below Penwell and Currence's apartment.

{¶ 4} Bowen and Penwell chased after appellant and Williams, and they saw the two men flee the apartment parking lot in a white Dodge pickup truck. Penwell was able to get

the last few numbers of the truck's license plate before it fled. Penwell relayed the information about the white truck to Currence, who was on the phone with 911. Currence gave the information to the 911 dispatcher, and officers from the Washington Court House Police Department were dispatched to the scene.

{¶ 5} While in route to the scene, Officer Jeffrey Heinz came upon a white truck that was traveling away from Twin Acres Apartments. Appellant was driving the vehicle and Williams was in the passenger seat. Heinz conducted a traffic stop of the vehicle. Upon questioning, appellant denied robbing anyone and stated that he had picked Williams up at "Country Connections" before the two went to a nearby apartment where one of his sister's friends resided. Upon being informed by Officer Heinz that Country Connections had been closed for some time, appellant changed his story and stated that he picked up Williams at a gas station near State Route 22. Williams' story was somewhat different. Although Williams stated that he and appellant had been at appellant's sister's friend's house, he claimed that he had been dropped off at the residence by his friend "Trent." Officer Heinz searched appellant, Williams, and appellant's truck, but he did not find any guns or money. A subsequent search of area the truck had traveled away from Penwell and Currence's apartment also did not result in the discovery of a gun or money. However, the search was hindered by the eight-to-nine inches of snow that had accumulated on the ground.

{¶ 6} On March 28, 2014, appellant was indicted on one count of aggravated robbery in violation of R.C. 2911.01(A)(3), a felony of the first degree, and on two counts of robbery in violation of R.C. 2911.02(A)(2), felonies of the second degree. Each count was accompanied by a repeat violent offender specification, alleging that appellant had been previously convicted of aggravated robbery in 2008 in Clinton County Common Pleas Court Case No. CRI2008-5145.

{¶ 7} A jury trial was held on May 14, 2014. At this time, the state dismissed the

aggravated robbery charge, and appellant stipulated to his prior conviction for aggravated robbery in Clinton County. The state called Penwell, Currence, Bowen, Officer Heinz, Officer Matt Pfeifer, a patrolman with the Washington Court House Police Department, and appellant's sister, Alicia Hawkins, to testify about the events of February 5, 2014. Following the presentation of the state's case-in-chief, appellant made a Crim.R. 29 motion for acquittal, which was denied by the trial court. Thereafter, appellant submitted photographs of Penwell and Currence's apartment into evidence. Appellant did not testify on his own behalf or present any witnesses in support of his defense.

{¶ 8} The matter was then submitted to the jury, who found appellant guilty on both robbery counts. The jury further found that appellant, in the commission of the offenses, did attempt to cause or threaten to cause serious physical harm to Currence and Penwell. The trial court imposed a mandatory prison term of six years for each robbery conviction, but ordered that the terms be served concurrently with each other. The court also ordered that the remainder of appellant's postrelease control from his previous conviction in Clinton County Case No. CRI2008-5145, totaling four years and seven days, be served consecutively to the mandatory six-year prison term.

{¶ 9} Appellant timely appealed, raising two assignments of error.

{¶ 10} Assignment of Error No. 1:

{¶ 11} THE TRIAL COURT ERRED BY NOT STATING ITS FINDINGS FOR THE IMPOSITION OF CONSECUTIVE PRISON TERMS.

{¶ 12} In his first assignment of error, appellant argues that the trial court failed to comply with the requirements of R.C. 2929.14(C)(4) in imposing consecutive sentences. Specifically, appellant argues that the trial court was required to make the statutory findings set forth in R.C. 2929.14(C)(4) before ordering that his sentence for violating postrelease control be served consecutively to his sentence for the robberies. We find no merit to

appellant's argument.

{¶ 13} The version of R.C. 2929.141 in effect at the time of appellant's sentencing, which deals with the commission of an offense by a person under postrelease control, provided as follows:

> (A) Upon the conviction of or plea of guilty to a felony by a person on post-release control at the time of the commission of the felony, the court may terminate the term of post-release control, and the court may do either of the following regardless of whether the sentencing court or another court of this state imposed the original prison term for which the person is on post-release control:
>
> (1) In addition to any prison term for the new felony, impose a prison term for the post-release control violation. The maximum prison term for the violation shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the person has spent under post-release control for the earlier felony. In all cases, any prison term imposed for the violation shall be reduced by any prison term that is administratively imposed by the parole board as a post-release control sanction. *A prison term imposed for the violation shall be served consecutively to any prison term imposed for the new felony.* The imposition of a prison term for the post-release control violation shall terminate the period of post-release control for the earlier felony.
>
> (2) Impose a sanction under sections 2929.15 to 2929.18 of the Revised Code for the violation that shall be served concurrently or consecutively, as specified by the court, with any community control sanctions for the new felony.

(Emphasis added.) Former R.C. 2929.141.[1]

{¶ 14} In the present case, the record reflects that at the time appellant robbed Penwell and Currence, he was on postrelease control. The trial court elected to terminate appellant's postrelease control and impose the time remaining thereon, specifically four years and seven days. Pursuant to the express language of R.C. 2929.141(A)(1), "[a] prison term

1. R.C. 2929.141 was amended by 2014 Am.Sub.S.B. No. 143, which became effective on September 19, 2014. Appellant was sentenced on May 14, 2014, before the statute was amended.

imposed for the violation [of postrelease control] *shall be served consecutively* to any prison term imposed for the new felony." (Emphasis added.) The trial court, therefore, was required to run the sentence for the postrelease control violation consecutively to the six-year prison term for the robberies, the new felony offenses. R.C. 2929.141 mandates the imposition of consecutive sentences without reference to the R.C. 2929.14(C)(4) consecutive sentencing factors, thereby indicating that a trial court is not required to make any findings before terminating postrelease control and imposing a specific prison sentence for the violation. *State v. Sheehi*, 10th Dist. Franklin No. 12AP-641, 2013-Ohio-2213, ¶ 13; *State v. Proctor*, 12th Dist. Butler Nos. CA2006-03-042 and CA2006-03-043, 2007-Ohio-909, ¶ 4-8. "Simply stated, the * * * consecutive factors in [R.C. 2929.14(C)(4)] have no application to the present instance, where the trial court sentenced appellant for a new felony violation, and then proceeded to sentence him for a postrelease control violation." *Id.* at ¶ 8.

{¶ 15} Accordingly, for the reasons set forth above, we find no error in the trial court's imposition of appellant's sentence. Appellant's first assignment of error is, therefore, overruled.

{¶ 16} Assignment of Error No. 2:

{¶ 17} DEFENDANT-APPELLANT WAS DENIED THE INEFFECTIVE [SIC] ASSISTANCE OF COUNSEL.

{¶ 18} In his second assignment of error, appellant contends that he was denied the effective assistance of trial counsel as his attorney (1) failed to object to Currence's testimony regarding appellant's prior criminal history, (2) failed to request a mistrial, (3) failed to request specific jury instructions, and (4) failed to understand the penalties for a felony conviction. As the first three alleged deficiencies revolve around Currence's trial testimony and the curative steps taken by the trial court to correct her testimony, we will address appellant's arguments together. Appellant's contention that trial counsel was deficient for failing to understand the

penalties for felony sentencing will be separately addressed.

{¶ 19} To prevail on an ineffective assistance of counsel claim, an appellant must establish (1) that his trial counsel's performance was deficient and (2) that such deficiency prejudiced the defense to the point of depriving the appellant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052 (1984); *State v. Vore*, 12th Dist. Warren Nos. CA2012-06-049 and CA2012-10-106, 2013-Ohio-1490, ¶ 14. Trial counsel's performance will not be deemed deficient unless it "fell below an objective standard of reasonableness." *Strickland* at 688. To show prejudice, the appellant must prove there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. An appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other. *State v. Madrigal*, 87 Ohio St.3d 378, 389 (2000).

Currence's Testimony

{¶ 20} During cross-examination, defense counsel asked Currence to describe the location of the couch she was sitting on in proximity to the front door of the apartment. In answering this question, Currence stated the following:

> When you come in the front door, Mr. Williams like I said, was standing behind it with his, when they came in Mr. Williams instantly, the door was open okay when I let them in like a dummy. He stood kinda like behind the door Mr. Williams did with his hood on and the whole time [appellant] went right in front of our entertainment center where Jerry's laying on the floor, went right in front of there, start[ed] talking to Jerry. Like I said, I don't pay no attention when Jerry talks to friends. I mean that's their conversation, whatever. *He only knew him because he used to live in the apartments years ago before he got sent away the last time*. (Emphasis added.)

{¶ 21} Defense counsel did not object to Currence's statement that appellant "used to live in the apartments years ago before he got sent away the last time." Following the close of the state's case, the trial court, outside the presence of the jury, addressed the state and

defense counsel about Currence's statement as follows:

> [THE COURT]: Now, for the record * * * there was during the testimony of Monica Currence, * * * Ms. Currence was responding to a question of [defense counsel and said] * * * "He only knew him because he used to live in the apartments years ago before he got sent away the last time." Now there was no object[ion] raised at that point and the witness simple [sic] kept on talking. The Court felt that there was a potential problem with that statement. Again that statement not being elicited by the State of Ohio and also not being responsive to the question posed by [defense counsel]. So at the lunch break we played, or the Court replayed that particular portion of the testimony to counsel * * *.
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> * * *
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> I then instructed counsel to research the issue and we would address it at one o'clock. At one o'clock we reconvened and [defense counsel] requested time to talk with [appellant] about that and she did do that and informed the Court, again this was off the record, that there was not going to be any motion for a mistrial and that there was going to be no consent to a mistrial. So [defense counsel] I want to first have you verify that for the record.
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> [DEFENSE COUNSEL]: Yes Your Honor.
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> [THE COURT]: [Appellant] is that correct?
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> [APPELLANT]: Yea
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> [THE COURT]: Answering in the affirmative. The Court's [sic] in reviewing additional case law, the criminal rules and specifically Supreme Court case law, it would appear to the Court that had there been an objection by the defense * * * the Court would have stricken the statement. Ordered that the jury disregard that statement, but the Court did not have the opportunity. * * *
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> * * *
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> The Court's position is that this is the only reference for which there is any implication that this defendant has some prior criminal history. I think that it's incumbent on the Court. I don't see that the Court should respond to any, is faced with a mistrial situation, especially in light of the fact that the defense has not requested that. The Court still feels it necessary to inform the jurors and I will do that before I call the defense case, that about [sic] this statement * * *. I will simply state generally what was said and inform the jurors that whoever [sic] and whatever this

> statement referred to is not relevant or material to this case and must be disregarded.

Thereafter, in the presence of the jury, the trial court instructed the jury as follows with respect to Currence's testimony:

> [THE COURT]: Ladies and gentlemen the State has rested its case. Before I call for the defense case I need to give you some brief instructions. During the testimony of the witness Monica Currence there was a statement that she made that was not responsive to a question and it was not objected to. So her statement just carried right through. Generally what she said was something about, he knew him because he used to live in the apartment years ago before he got sent away the last time. I'm required to point out to you that whatever she meant by that and whoever [sic] she meant by that is not relevant to or material to any issue that you have to decide including the credibility of Ms. Currence. You are to disregard that statement. If you didn't hear it then there's nothing to worry about. If you did hear it you're simply to disregard it. Does anyone have any problems doing that? Seeing none. * * *

{¶ 22} Appellant now claims that his trial counsel should have objected to Currence's testimony, should have moved for a mistrial, and should have requested specific jury instructions with respect Currence's statement, and that defense counsel's failure to do so prejudiced his right to a fair trial. We disagree.

{¶ 23} As an initial matter, we note that trial counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *State v. Hendrix*, 12th Dist. Butler No. CA2012-05-109, 2012-Ohio-5610, ¶ 14. It is not the role of the appellate court to second guess the strategic decisions of trial counsel. *State v. Lloyd*, 12th Dist. Warren Nos. CA2007-04-052 and CA2007-04-053, 2008-Ohio-3383, ¶ 61.

{¶ 24} Here, although Currence's statement that appellant "used to live in the apartments years ago before he got sent away the last time" was a nonresponsive answer to defense counsel's question about the location of the couch, we find that defense counsel was

not ineffective for failing to object to the question. Trial counsel is not ineffective for choosing, for tactical reasons, not to pursue every possible trial objection. *State v. Steele*, 12th Dist. Butler No. CA2003-11-276, 2005-Ohio-943, ¶ 100. "Objections tend to disrupt the flow of a trial and are considered technical and bothersome by a jury." *Id.*, citing *State v. Hill*, 75 Ohio St.3d 195, 211 (1996). Although Currence's statement that appellant lived in the apartments before he was "sent away the last time" may have been in reference to appellant's criminal history, defense counsel, for tactical reasons, may have chosen not to disrupt the flow of the trial by objecting to Currence's statement, and we will not second guess her strategic decision. *See Lloyd*, 2008-Ohio-3383 at ¶ 61.

{¶ 25} Moreover, we find that appellant cannot demonstrate that he was prejudiced by trial counsel's failure to object Currence's statement. Any mistake in allowing Currence to make such a statement was addressed and corrected by the trial court when it gave a curative instruction to the jury. We must presume that the jury followed the trial court's instructions and disregarded Currence's statement. *State v. Smith*, 12th Dist. Fayette No. CA2006-08-030, 2009-Ohio-197, ¶ 59. In fact, the jurors indicated to the trial court that they would have no problem disregarding Currence's statement.

{¶ 26} Additionally, we find no merit to appellant's argument that trial counsel was ineffective for not requesting specific jury instructions regarding Currence's statements. The record before us demonstrates that the trial court properly instructed the jury to disregard Currence's statements on two occasions. The court specifically addressed Currence's statements prior to appellant's presentation of his defense, as set forth above, and then before submitting the case to the jury. With respect to the latter instance, the court stated the following:

> [THE COURT]: Statements or answers that were stricken by the court or which you were instructed to disregard are not evidence and must be treated as though you never heard them. You must

> not speculate as to why the court sustained the objection to any question or what the answer to such question might have been. You must not draw any inference or speculate on the truth of any suggestion included in a question that was not answered.

We find that such instructions by the trial court were proper and that any failure by defense counsel to suggest an alternative instruction did not result in prejudice to appellant.

{¶ 27} Finally, we find that defense counsel was not ineffective for failing to request a mistrial following Currence's testimony. Mistrials should only be declared when the ends of justice so require and a fair trial is no longer possible. *State v. Gilbert*, 12th Dist. Butler CA2010-09-240, 2011-Ohio-4340, ¶ 83, citing *State v. Garner*, 74 Ohio St.3d 49, 59 (1995). The decision to move or not move for a mistrial is a tactical decision that falls within the range of competent assistance of trial counsel. *Id.* Under the facts of this case, where the trial court took extraordinary steps to ensure that appellant would not be prejudiced by Currence's statement, we find that appellant cannot meet the second prong of the *Strickland* test. *See State v. Harris*, 10th Dist. Franklin No. 04AP-612, 2005-Ohio-4676, ¶ 36 (finding that defense counsel was not ineffective for not immediately moving for mistrial following a witness's improper remarks about a defendant's prior criminal record where the trial court provided a curative instruction to the jury to prevent prejudice to the accused). The trial court's curative instruction was an effective means of remedying the error or irregularity of Currence's statement. *State v. Johnson*, 12th Dist. Fayette No. CA2013-04-012, 2014-Ohio-1694, ¶ 32.

{¶ 28} Furthermore, the decision to grant or deny a motion for a mistrial is left to the trial court's discretion. *Gilbert*, 2011-Ohio-4340 at ¶ 83. Even if trial counsel had immediately moved for a mistrial following Currence's testimony, it would not have been an abuse of discretion for the trial court to deny the motion. *Harris* at ¶ 36. Given the trial court's ability to provide a curative instruction regarding Currence's testimony, appellant's claim that "had [d]efense counsel requested a mistrial it would have been granted" is merely speculative and,

therefore, insufficient to show prejudice.

{¶ 29} Accordingly, we conclude that appellant failed to demonstrate that defense counsel was ineffective for failing to object to Currence's testimony, failing to request specific jury instructions regarding Currence's testimony, or failing to request a mistrial.

Penalties for Felony Sentencing

{¶ 30} Appellant also contends that defense counsel was ineffective for failing to "understand the penalties for a felony conviction." In support of his argument, appellant references his sentencing hearing where his trial counsel asked the court to "fashion * * * some type of rehab" for appellant so that he can obtain assistance for his drug dependency. Appellant argues that trial counsel's mention of rehab demonstrates counsel's erroneous belief that a community control sanction could be imposed at sentencing. Appellant does not, however, specify how such belief, if true, affected the outcome of trial.

{¶ 31} As we stated above, in order to succeed on an ineffective assistance of counsel claim, a defendant must prove both that his counsel's performance was deficient *and* that such deficiency prejudiced his defense to the point of depriving him of a fair trial. *Strickland*, 466 U.S. at 687-688. In the present case, appellant has failed to demonstrate, or even indicate, how trial counsel's request that the court fashion some type of rehab for appellant affected the outcome of the proceedings or prejudiced his right to a fair trial. As such, we find no merit to appellant's ineffective assistance of counsel argument.

{¶ 32} Accordingly, having found no merit to appellant's contention that he was denied the effective assistance of trial counsel, we overrule appellant's second assignment of error.

{¶ 33} Judgment affirmed.

PIPER, P.J., and M. POWELL, J., concur.