[Cite as *State v. Ward*, 2010-Ohio-503.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23134
vs.	:	T.C. CASE NO. 08CR2682
GREGORY G. WARD	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 12th day of February, 2010.

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GRADY, J.:

{¶ 1} Defendant, Gregory Ward, appeals from his conviction and sentence for aggravated arson.

{¶ 2} On May 28, 2008, at 2:11 a.m., Kathleen Bauman flagged down Huber Heights Police Officer Timothy Maurath and told him that her boyfriend, Defendant Ward, had broken out the driver's

side window of her vehicle, and that Defendant was at their apartment at 4319 Powell Road in Huber Heights. Officer Maurath and Officer Thorton went to that location, along with Bauman.

{¶ 3} Upon their arrival the officers saw Defendant carring a flat screen television out of the apartment. Defendant was yelling that his apartment was on fire and that Bauman had set his stuff on fire. The officers observed smoke in the apartment and radioed for the fire department, which arrived and put out the fire. The officers testified at trial that Defendant appeared to be intoxicated.

{¶ 4} A fire investigator, Lt. Daniel Stitzel, determined that the fire was deliberately set and had started on the bed or on the floor near the bed. The day after the fire, Defendant admitted to his friend and neighbor, Richard Green, that he started the fire on the bed with a lighter. Defendant also commented to another neighbor, Matthew Cole, that he had to get out of town or he was going to jail.

{¶ 5} Defendant was indicted on one count of aggravated arson in violation of R.C. 2909.02(A)(1), a first degree felony, and one count of aggravated arson in violation of R.C. 2909.02(A)(2), a second degree felony. Following a jury trial Defendant was found guilty of both charges. The trial court sentenced Defendant to concurrent seven year prison terms on each charge.

{¶ 6} Defendant timely appealed to this court from his conviction and sentence.

FIRST ASSIGNMENT OF ERROR

{¶ 7} "THE DEFENDANT-APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL."

{¶ 8} In *State v. Collier*, Clark App. Nos. 2006CA102 and 2006CA104, 2007-Ohio-6349, at ¶49-51, we observed:

{¶ 9} "'When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.' *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, citing *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, 358 N.E.2d 623, 627, *vacated in part on other grounds* (1978), 438 U.S. 910, 98 S.Ct. 3135.

{¶ 10} "The above standard contains essentially the same requirements as the standard set forth by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. 'When a convicted defendant complains of the ineffectiveness

of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.' *Strickland,* supra, at 687-688. '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.' *Id.* Thus, counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. Id.

{¶ 11} "For a defendant to demonstrate that he has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, absent counsel's errors, the result of the trial would have been different. *Bradley,* supra, at 143. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland,* supra, at 694."

{¶ 12} Defendant argues that his counsel at trial performed deficiently in several respects. First, Defendant complains that during his opening statement counsel told the jury that the State would be unable to prove beyond a reasonable doubt that Defendant was the person who started the fire. Defendant points out that counsel was aware that State's witness Richard Green had provided

police with a written statement alleging that Defendant had admitted to him that Defendant started the fire. Defendant acknowledges that opening statements are not evidence, but claims that it was crucial that Defendant's counsel deliver upon his promise that the State would be unable to prove that Defendant was the person who started the fire. At trial, counsel made no objection to the admission of Richard Green's statement to the police.

{¶ 13} It is clear from this record that defense counsel's strategy was to attack the credibility of Richard Green, and show his bias

{¶ 14} and prejudice against Defendant. To that extent, counsel cross-examined Green on several matters, including his criminal history, the fact that he did not put all of Defendant's statements about the fire into his written statement, the fact that he did not immediately tell police about Defendant's admissions, and the fact that Defendant had previously testified in a criminal case against Green's girlfriend. Such matters could cause the jury to reject Green's testimony and statement, which would be to Defendant's benefit in relation to the reasonable doubt standard and the State's burden to offer evidence to satisfy that standard.

{¶ 15} Trial tactics and strategies, even debatable ones, do

not constitute ineffective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45; *State v. Martin*, Montgomery App. No. 20610, 2005-Ohio-1369. Counsel's strategy in this case to undermine Green's credibility and demonstrate his bias and prejudice against Defendant was reasonable. In light of that strategy, counsel's opening statement does not constitute deficient performance.

{¶ 16} Next, Defendant claims that his counsel failed to make a Crim.R. 29 motion for acquittal at the close of the State's case. Defendant asserts that given counsel's statement during opening arguments that the State would not be able to prove beyond a reasonable doubt that Defendant started this fire, it is only logical that counsel should make a Crim.R. 29 motion for acquittal on that basis at the close of the State's case.

{¶ 17} A Crim.R. 29 motion for acquittal tests the sufficiency of the evidence and will not be granted if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 261. A Crim.R. 29 motion for acquittal, had one been made by counsel, would have had no reasonable chance of success, because evidence the State had offered could allow reasonable minds to reach different conclusions as to whether each element of the crime charged had

been proven beyond a reasonable doubt. Counsel does not perform deficiently by failing to make a motion that has no reasonable chance of success. *State v. Kelly*, Montgomery App. No. 19150, 2002-Ohio-5130.

{¶ 18} Next, Defendant complains that his counsel failed to object to the trial court's finding fire investigator, Daniel Stitzel, qualified to testify as an expert witness. Evid.R. 702(B) provides that a witness may testify as an expert if the witness is qualified as an expert by specialized knowledge, skill, experience, training or education regarding the subject matter of his testimony. The trial court is afforded a substantial degree of discretion in determining whether to permit expert testimony in a particular case. *State v. Bidinost* (1994), 71 Ohio St.3d 449. Evid.R. 702(B) addresses the qualifications of a witness who may testify as an expert because of his knowledge, skill, training or education. Whether a witness qualifies as an expert is for the court to determine, pursuant to Evid.R. 104(A), and will be overturned only for an abuse of discretion. *State v. Akwal* (1996), 76 Ohio St.3d 324. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Adams* (1980), 62 Ohio St.3d 151, 157.

{¶ 19} Defendant offers no argument whatsoever as to why Daniel

Stitzel was not qualified to testify as an expert in fire investigation. Stitzel testified to his extensive education, training and experience as a fire investigator, and the trial court did not abuse its discretion in determining that Stitzel was qualified to testify as an expert in fire investigations. Counsel did not perform deficiently by failing to make an objection that had no reasonable possibility of success.

{¶ 20} Defendant additionally suggests that his counsel may have performed deficiently because he failed to call his own fire investigation expert to counter Stitzel's testimony. The record fails to demonstrate what, if anything, an expert would have testified to that would be favorable to Defendant. Therefore, we cannot find that such evidence, if offered, would have caused the outcome of this trial to be different. Under those circumstances counsel's failure to call his own fire investigation expert is simply a matter of trial strategy, and neither deficient performance nor resulting prejudice has been shown. *State v. Coleman* (1989), 45 Ohio St.3d 298, 307-308.

{¶ 21} Finally, Defendant complains that his counsel did not request a jury instruction on the lesser included offense of arson under R.C. 2909.03(A)(1). Failure to request instructions on lesser included offenses may be a matter of trial strategy and, in that event, does not constitute ineffective assistance of

counsel. *State v. Griffie*, 74 Ohio St.3d 332, 1996-Ohio-71. A review of this record readily reveals that Defendant's strategy was to argue that he was not the person who started the fire. If the jury so found, they would have to acquit Defendant of the charged offense as well as any lesser-included offense. Defendant elected to seek outright acquittal rather than conviction on a lesser included offense. Trial tactics and strategy, even if flawed or debatable, do not constitute ineffective assistance of counsel. *Clayton, supra*.

{¶ 22} Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 23} "THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING AN EXCESSIVE SENTENCE ON THE DEFENDANT."

{¶ 24} Defendant argues that the trial court abused its discretion in sentencing him to a seven year prison term. Defendant points out that he has no prior felony convictions, and he claims that his seven year concurrent sentences is excessive and amounts to cruel and unusual punishment.

{¶ 25} In *State v. Jeffrey Barker,* Montgomery App. No. 22779, 2009-Ohio-3511, at ¶36-38, we wrote:

{¶ 26} "The trial court has full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any findings or give its reasons for imposing

maximum, consecutive, or more than minimum sentences. *State v. Foster,* 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, at paragraph 7 of the syllabus. Nevertheless, in exercising its discretion the trial court must consider the statutory policies that apply to every felony offense, including those set out in R.C. 2929.11 and 2929.12. *State v. Mathis,* 109 Ohio St.3d 54, 846 N.E.2d 1, 2006-Ohio-855, at ¶ 37.

{¶ 27} "When reviewing felony sentences, an appellate court must first determine whether the sentencing court complied with all applicable rules and statutes in imposing the sentence, including R.C. 2929.11 and 2929.12, in order to find whether the sentence is contrary to law. *State v. Kalish,* 120 Ohio St.3d 23, 896 N.E.2d 124, 2008-Ohio-4912. If the sentence is not clearly and convincingly contrary to law, the trial court's decision in imposing the term of imprisonment must be reviewed under an abuse of discretion standard. *Id.*

{¶ 28} "'The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable.' *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144."

{¶ 29} Before sentencing Defendant the trial court indicated that it had considered the purposes and principles of felony sentencing, R.C. 2929.11, the seriousness and recidivism factors,

R.C. 2929.12, Defendant's sentencing memorandum, and the letters submitted on Defendant's behalf by his family members. The court also heard from Defendant's counsel, Defendant, and his girlfriend, who was one of the fire victims. The trial court complied with all applicable rules and statutes in imposing its sentence. Furthermore, the concurrent seven year prison terms imposed for felonies of the first and second degree are not the maximum sentence, and are clearly within the authorized range of available punishments for first and second degree felonies. R.C. 2929.14(A)(1), (2). Defendant's sentence is not clearly and convincingly contrary to law. *Kalish*.

{¶ 30} Defendant argues that the trial court abused its discretion in sentencing him to a seven year prison term. Defendant points out that he has no previous felony convictions. The trial court noted that Defendant failed to take any responsibility for his criminal conduct. The court also noted Defendant's prior criminal history, which includes convictions for DUI, indecent exposure, retail fraud, battery, domestic violence and disorderly conduct. Most importantly, the court observed that Defendant intentionally started a fire in an occupied apartment building, which put several other people's lives in danger. The court commented that it was a miracle that no one died or was hurt in this incident.

{¶ 31} The overriding purposes of felony sentencing are to protect the public from future crime by the offender and to punish the offender. R.C. 2929.11(A). This record reflects no abuse of discretion on the part of the trial court in imposing concurrent seven year prison terms on Defendant for multiple counts of aggravated arson that caused damage to an occupied structure and posed a substantial risk of serious physical harm to persons inside.

{¶ 32} Defendant's second assignment of error is overruled. The judgment of the trial court will be affirmed.

DONOVAN, P.J. And HARSHA, J., concur.

(Hon. William H. Harsha, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

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