[Cite as *State v. Fuller,* 2015-Ohio-1325.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 2014-CA-27
	:	
v.	:	Trial Court Case No. 2014-CR-118
	:	
JAVIS B. FULLER	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 3rd day of April, 2015.

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WELBAUM, J.

{¶ 1} Defendant-appellant, Javis B. Fuller, appeals from his conviction and sentence in the Greene County Court of Common Pleas after a jury found him guilty of two counts of domestic violence and one count of felonious assault. Appellant challenges his conviction on grounds that his trial counsel rendered ineffective

assistance. We disagree, and for the reasons outlined below, the judgment of the trial court will be affirmed.

{¶ 2} On March 7, 2014, Appellant was indicted on two counts of domestic violence in violation of R.C. 2919.25(A), both felonies of the fourth degree, and one count of felonious assault in violation of R.C. 2903.11(A)(2), a felony of the second degree. The charges arose as the result of Appellant engaging in physical altercations with his brother, Travis Fuller, his stepbrother, Daniel Hall, and his stepfather, Charles Hall, on March 1, 2014, at their home in Yellow Springs, Greene County, Ohio. Appellant pled not guilty to the charges and, on May 19, 2014, the matter proceeded to a jury trial. At trial, the jury heard testimony from Travis Fuller, Charles Hall, and two responding officers, Deputy Rick Spatz and Officer Sean J. Kessel of the Green County Sherriff's Department.

{¶ 3} The testimony revealed that on March 1, 2014, Appellant was at home drinking alcohol throughout the day. Early in the day, Appellant asked his stepfather, Charles, to get him marijuana. Charles refused. Thereafter, Charles left their home and Appellant later asked his stepbrother, Daniel, to take him to get marijuana. Daniel also refused. In response, Appellant became angry and violent toward Daniel. Travis, Appellant's biological brother, testified that Appellant attempted to break down the door to Daniel's bedroom, which is located in the basement next to Travis's bedroom. When Daniel eventually came out of his room, Travis observed Appellant and Daniel begin to wrestle. Travis then left the basement and went outside. Appellant and Daniel eventually separated and Travis returned to his room in the basement once things calmed down.

{¶ 4} While Travis was in his room, Appellant, who was unprovoked, came at Travis with a knife in each hand. As Appellant was approaching, Appellant got caught in a sheet that Travis used as a door to his bedroom. At that time, Travis attempted to grab Appellant's wrists and Travis's right hand was cut during the struggle. Daniel came to help Travis and they were eventually able to remove the knives from Appellant's grasp. Appellant then left the basement and got another knife. In the meantime, Daniel and Travis telephoned Charles from inside Daniel's bedroom. Appellant then returned to the basement and began sticking his arm through a hole in Daniel's door while reaching around with a knife in his hand. Travis was able to grab Appellant's arm and remove the knife without injury. Thereafter, Appellant ran out of the house and into the woods.

{¶ 5} When Charles returned home, Appellant was in an abandoned house on their property screaming and banging things around. Charles called for Appellant to come out of the house and Appellant came out swinging a knife saying "I'll kill you." Trial Trans. Vol. I (May 19, 2014), p. 201. Thereafter, Charles called 911 and threw his phone on the ground to focus on Appellant. Appellant came toward Charles aggressively, and then switched his direction towards Daniel, who came outside to help. As Appellant was coming at Daniel, Charles distracted Appellant by calling his name, which gave Daniel the opportunity to grab Appellant from behind. Charles and Daniel then wrestled Appellant to the ground. Travis later joined Charles and Daniel in subduing Appellant.

{¶ 6} When Officer Kessel and Deputy Spatz arrived on the scene they observed the men attempting to subdue Appellant. The officers secured Appellant, who they described as being belligerent and intoxicated, but lucid. The officers also obtained medical attention for Travis, whose hand was still bleeding. Additionally, the officers

took pictures of the scene and collected evidence, including the knife Appellant had been wielding. The officers then took Appellant to jail.

{¶ 7} After hearing this testimony, the jury deliberated and found Appellant guilty of felonious assault and both counts of domestic violence. Following the verdict, Appellant renewed a prior motion for acquittal he made under Crim.R. 29. In response to the renewed motion, the trial court ruled that the domestic violence convictions were first-degree misdemeanors as opposed to fourth-degree felonies, because there was insufficient evidence to apply the sentencing specification in R.C. 2919.25(D)(3). That specification requires a domestic violence offense under section (A) of R.C. 2919.25 to be classified as a fourth degree felony if it is shown that the offender was previously convicted of domestic violence or a similar violation against a family or household member. At sentencing, the trial court merged one of the domestic violence counts with the felonious assault charge and imposed an aggregate prison sentence of three years.

{¶ 8} Appellant now appeals from his conviction and sentence, raising one assignment of error for review. His sole assignment of error is as follows:

> INEFFECTIVE ASSISTANCE OF COUNSEL EXISTED DUE TO NOT CALLING A WITNESS DEFENDANT FELT WAS NECESSARY TO TESTIFY AT TRIAL.

{¶ 9} Under his single assignment of error, Appellant contends that his trial counsel was ineffective in failing to call his stepbrother, Daniel Hall, as a witness at trial. Specifically, Appellant argues that his trial counsel's decision to not call Daniel as a witness constitutes an actual conflict of interest since Appellant wanted him to testify. We disagree.

{¶ 10} A claim of ineffective assistance of trial counsel requires both a showing that trial counsel's representation fell below an objective standard of reasonableness, and that the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A reviewing court "must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at 689. The prejudice prong requires a finding that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, with a reasonable probability being "a probability sufficient to undermine confidence in the outcome." *Id*. at 694; *see also State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989).

{¶ 11} With regard to conflicts of interest in the context of ineffective assistance claims, we stated in *State v. Brewer*, 2d Dist. Greene No. 95-CA-96, 1996 WL 339940 (June 14, 1996) that:

> One of the components of the Sixth Amendment right to effective assistance of counsel is the right to representation free from conflicts of interest. [*Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *State v. Dillon*, 74 Ohio St.3d 166, 657 N.E.2d 273 (1995)]. The term "conflict of interest" bespeaks a situation where regard for one duty tends to lead to disregard of another duty, such as with the representation of multiple clients with competing interests. A lawyer represents conflicting interests when, on behalf of one client, it is the lawyer's duty to contend for that which a duty to another client requires him to oppose. [*State v. Manross*, 40 Ohio St.3d 180, 532 N.E.2d 735 (1988)]. If, during the course

> of the representation, the clients' interests do so diverge, an actual conflict of interest exists. * * * If, on the other hand, the interests of the clients simply may diverge at some point so as to place the attorney under inconsistent or conflicting duties, then a possibility of a conflict of interest exists. * * *.

Brewer at *3.

{¶ 12} In this case, Appellant did not allege that his trial counsel's representation was adversely affected by counsel having divided loyalties to other clients with interests opposing his. Rather, Appellant merely argued that he and his trial counsel had conflicting views about trial strategy with respect to calling Daniel as a witness.

{¶ 13} " 'Generally, counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court.' " *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 222, quoting *State v. Treesh*, 90 Ohio St.3d 460, 490, 739 N.E.2d 749 (2001). Moreover, " '[a]ttorneys need not pursue every conceivable avenue; they are entitled to be selective.' " *State v. Murphy*, 91 Ohio St.3d 516, 542, 747 N.E.2d 765 (2001), quoting *United States v. Davenport*, 986 F.2d 1047, 1049 (7th Cir.1983). "Even unsuccessful tactical or strategic decisions will not constitute ineffective assistance of counsel." *State v. Williams*, 2d Dist. Montgomery No. 24548, 2012-Ohio-4179, ¶ 28, citing *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995).

{¶ 14} Here, Appellant has not overcome the strong presumption that his trial counsel's decision not to call Daniel as a witness was anything other than sound trial strategy. There is nothing in the record indicating that Daniel would have testified any

differently than the other eyewitnesses who testified against Appellant at trial. Having Daniel recount the same events a third time in front of the jury would clearly not be in Appellant's best interest. Because Appellant has not established that Daniel's testimony would have been different from the other witnesses or helpful to his case, he necessarily cannot demonstrate that Daniel's testimony would have changed the outcome of his case. Accordingly, Appellant cannot satisfy either prong of the *Strickland* test.

{¶ 15} For the foregoing reasons, Appellant's sole assignment of error is overruled and the judgment of the trial court is affirmed.

Conclusion

{¶ 16} Having overruled Appellant's sole assignment of error, the judgment of the trial court is affirmed.

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FAIN, J. and HALL, J., concur.

Copies mailed to:

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