COURT OF APPEALS
THIRD APPELLATE DISTRICT
UNION COUNTY

STATE OF OHIO

PLAINTIFF-APPELLEE **CASE NUMBER 14-99-08**

v.

JAMEY RENAI BERRY **O P I N I O N**

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: June 9, l999.

ATTORNEYS:

ALISON BOGGS
Attorney at Law
Reg. #0055841
P.O. Box 53
Marysville, OH 43040
For Appellant.

R. LARRY SCHNEIDER
Prosecuting Attorney
Rick Rodger
Reg. #0041574
P.O. Box 231
Marysville, OH 43040
For Appellee.

WALTERS, J. Defendant-Appellant, Jamey Renai Berry, appeals a judgment of the Court of Common Pleas of Union County entered pursuant to a jury verdict of guilty on one count of assault on a corrections officer, a fifth degree felony in violation of R.C. 2903.13(A).

Appellant asserts three assignments of error, all relating to a missing defense witness who failed to testify. Appellant argues that the trial court committed plain error in reviewing the case file to determine whether the witness had been served with a subpoena; that the court erred in granting only a fifteen minute recess to allow the witness to arrive at court; and that trial counsel was ineffective in failing to secure the witness's attendance or to proffer her anticipated testimony. For the reasons stated herein, we affirm the judgment of the trial court.

On August 7, 1998, Appellant was indicted on two counts of assault on a corrections officer and one count of harassment for her participation in an incident that occurred on March 27, 1998, while Appellant was being housed as an inmate in the Ohio Reformatory for Women. Appellant subsequently entered a not guilty plea to the charges and the cause was set for a jury trial.

The jury trial commenced on November 16, 1998, and, after hearing all of the evidence, the jury returned a guilty verdict on count one of assault as contained in the indictment. Appellant was found not guilty on the remaining two charges. On January 6, 1999, the trial court sentenced Appellant to a six month prison term,

which was ordered to run consecutively to any term Appellant was already serving at the institution.

Appellant appealed to this court, asserting three assignments of error for our review.

Assignment of Error I

The trial court committed plain error when it independently reviewed the case file and determined that one of Appellant's witnesses had not been served a subpoena, instead of consulting with the clerk of court, thereby depriving Appellant of her Sixth Amendment right to call witnesses on her own behalf.

On the afternoon of the first day of Appellant's jury trial, a discussion between the attorneys and the court revealed that there was some confusion as to whether a defense witness had been properly served. Based upon the court's file, the trial judge concluded that the witness had not been served, however, he allowed Appellant's attorney to wait until the next morning to make sure the witness was present to testify. In fact, the witness had been served by the Sheriff of Franklin County, Ohio on October 8, 1999, a full month prior to trial. Counsel for the defense never objected to the court's determination, and it appears as though counsel agreed with the court. Thus, we find that the issue has been waived.

Appellant, however, urges this court to review the issue based upon a plain error analysis. "Notice of plain error * * * is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of

justice." *State v. Long* (1978), 53 Ohio St.2d 91, 97. "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise. *State v. Biros* (1997), 78 Ohio St.3d 426, 436.

This alleged mistake certainly does not rise to the level of plain error. Appellant claims that the trial court denied her a fundamental right to present testimony while the record clearly demonstrates that the court willingly granted counsel a substantial period of time to be able to secure the witness's presence at trial the following morning. Furthermore, Appellant has not demonstrated that the trial court's actions resulted in a "manifest miscarriage of justice" or that the jury clearly would have acquitted Appellant on all three charges had they heard the additional testimony. Appellant's own brief merely states that "*there is a possibility*" that the outcome of the trial would have been different. For these reasons, we find that the trial court did not commit plain error.

Appellant's first assignment of error is overruled.

Assignment of Error II

The trial court abused its discretion when it granted a continuance of only fifteen minutes for Appellant's witness to arrive, even after Appellant's counsel notified the court the witness was en route to the courthouse.

The transcript demonstrates that at 9:02 a.m., on the second day of Appellant's jury trial, counsel for the defense informed the court that the remaining witness, Nikki Perry Woods, was not present to testify. Counsel stated

that he had been informed that the witness was on her way to the courthouse, but he was not aware of her specific location. The court then granted Appellant a fifteen-minute continuance to give the witness a chance to arrive. Thereafter, at 9:17 a.m., the trial court asked if the defense had any evidence to present. Defense counsel chose to rest its case since the witness had not arrived. Appellant's attorney never asked for more time, nor did he enter an objection to the amount of time already granted. Thus, we find that the issue has not been properly preserved.

Accordingly, any review of the alleged error must proceed under a plain error analysis. As we have previously discussed, "[p]lain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *State v. Biros* (1997), 78 Ohio St.3d 426, 436.

In this case, we find that the trial court's alleged error in granting a continuance of only fifteen minutes does not rise to the level of plain error. This is especially true since the evidence that the missing witness would have provided was not proffered to the court or otherwise made a part of the record. Thus, any suggestion that the outcome of Appellant's trial would have been different had this evidence been presented is based upon nothing but speculation.

Appellant's second assignment of error is overruled.

Assignment of Error III

> **Appellant was deprived affective [sic] assistance of counsel when her attorney failed to proffer the testimony of the missing witness; when he failed to object to the court giving him a fifteen minute continuance when he knew the witness was en route to the courthouse; and when he failed to request the court enforce the subpoena against the witness.**

The appropriate test to use when determining whether an offender has been denied effective assistance of counsel has been set forth as follows:

> **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 the 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. Lytle (1976), 48 Ohio St.2d 391, 396-397, vacated in part on other grounds (1978), 438 U.S. 910. See, also, *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142; *Strickland v. Washington* (1984), 466 U.S. 668, 687. To demonstrate that counsel violated a substantial duty owed to a client, there must be evidence tending to show that counsel performed below an "objective standard of reasonable representation." *State v. Keith* (1997), 79 Ohio St.3d 514, 534. In order to demonstrate prejudice, it must be established that without counsel's errors, a reasonable probability exists that the outcome of the trial would have been different. *Id.*

With regard to the first prong of the *Strickland* test, we find that although it is troubling that counsel neither requested an additional continuance nor proffered the testimony of the absent witness, we do not view these failures to be so egregious as to fall below a reasonable standard of representation. A proffer is only required when evidence is excluded as inadmissible. See, generally, *State v. Grubbs* (1986), 28 Ohio St.3d 199. Furthermore, it has been held that "[t]he decision not to present witnesses on behalf of a defendant is strategical [sic], and a defendant is not denied effective assistance of counsel when such a decision is made by counsel." *State v. McElfresh* (March 16, 1995), Licking App. No. 94 CA 44, unreported, citing *State v. Brown* (1988), 38 Ohio St. 3d 305, 319, citing *State v. Johnson* (1986), 24 Ohio St. 3d 87, 91. In the absence of either a proffer or a request for additional time, we must presume that counsel deemed the witness's testimony to be somewhat less than material to the ultimate issue of guilt or innocence on the charges, and that he exercised appropriate trial strategy in proceeding as he did.

Even if we were to assume that trial counsel in this case performed below a reasonable standard by failing to make certain objections, failing to proffer the testimony and by failing to request the court to enforce the subpoena, we further reject Appellant’s argument that she was denied effective assistance of counsel because Appellant cannot demonstrate on direct appeal that she was prejudiced by

any of these alleged errors. In other words, Appellant cannot satisfy the second prong of the *Strickland* test.

We note that this court finds it interesting that in opening statement, defense counsel indicated that the missing witness, corrections officer Nikki Perry Woods, had no involvement with the crimes alleged, and that she became involved in the situation only after Appellant was returned to Local Control. Nonetheless, other than the remarks made in opening statement, the record is devoid of evidence illustrating what the missing witness would have testified to. Therefore, we are not in a position to determine that there is a reasonable probability that the outcome of the trial would have been different had the testimony been presented to the jury. For the foregoing reasons, Appellant has not demonstrated that she was denied effective assistance of counsel.

Appellant's third assignment of error is overruled.

Having found no error prejudicial to the Appellant in the particulars assigned and argued, the judgment of the trial court is hereby affirmed.

Judgment affirmed.

HADLEY and SHAW, JJ., concur.

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