[Cite as *State v. Miller*, 2010-Ohio-3710.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 10CA2
vs.	:	
JOHNNY MILLER,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: David Reid Dillon, 106 Fourth Street West, South Point, Ohio 45680[1]

COUNSEL FOR APPELLEE: J.B. Collier, Jr., Lawrence County Prosecuting Attorney, and Robert C. Anderson, Lawrence County Assistant Prosecuting Attorney, One Veteran's Square, Ironton, Ohio 45638

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 8-5-10

ABELE, J.

{¶ 1} This is an appeal from a Lawrence County Common Pleas judgment of conviction and sentence. Johnny Miller, defendant below and appellant herein, pled guilty to two counts of burglary in violation of R.C. 2911.12(A)(2). Appellant assigns the following error for review:

> "APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL

[1] Different counsel represented appellant during the trial court proceedings.

> FAILED TO ADVISE HIM THAT HE WAS ARGUABLY NOT GUILTY OF THE DEGREE OF OFFENSE CHARGED, THUS RENDERING HIS GUILTY PLEA INVOLUNTARY."

{¶ 2} In October 2009, appellant was charged with two counts of burglary. After appellant waived indictment and pled guilty to both charges, the trial court sentenced him to serve concurrent six year prison terms. This appeal followed.

{¶ 3} In his assignment of error, appellant asserts that he received constitutionally ineffective assistance from his trial counsel. The gist of his argument involves the two robbery charges that involve a trespass into the victims' homes with the purpose to commit a "criminal offense." See R.C. 2911.12(A)(2).[2] Appellant argues that no evidence exists that he intended to commit any criminal offense inside the homes. In support he points to trial counsel's comments at the sentencing hearing:

> "[I]n considering sentencing, circumstances really didn't even involve a [sic] intent to commit a crime while in the residences. I don't think there was any evidence to that fact and we're not trying to argue his conviction but I think that should be considered when you are deliberating for sentencing."

Appellant thus reasons that the greatest offenses that the prosecution could prove are R.C. 2911.12(A)(4) violations, both fourth degree felonies.[3] By allowing appellant to plead guilty to the subsection (A)(2) offenses, which constitute second degree felonies,

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[2] R.C. 2911.12(A)(2) states, inter alia, that no "person, by force, stealth, or deception, shall . . . [t]respass in an occupied structure . . . that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense." (Emphasis added.)

[3] R.C. 2911.12(A)(4) states, inter alia, no "person, by force, stealth, or deception, shall . . . [t]respass in a permanent . . . habitation of any person when any person other than an accomplice of the offender is present or likely to be present."

appellant contends that counsel provided constitutionally defective assistance.

{¶ 4} Our analysis begins with the settled premise that a criminal defendant has a right to counsel, and that right includes the right to the effective assistance from counsel. McMann v. Richardson (1970), 397 U.S. 759, 770, 90 S.Ct. 1441, 25 L.Ed.2d 763; State v. Lytle (Mar. 10, 1997), Ross App. No. 96CA2182. To establish ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient, and (2) such deficient performance prejudiced the defense and deprived him of a fair trial. See e.g. Strickland v. Washington (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; State v. Issa (2001), 93 Ohio St.3d 49, 67, 752 N.E.2d 904. However, both prongs of this "Strickland test" need not be analyzed if a claim can be resolved under one prong. State v. Madrigal (2000), 87 Ohio St.3d 378, 389, 721 N.E.2d 52. To establish the existence of prejudice, a defendant must show a reasonable probability exists that, but for counsel's alleged error, the result of the trial would have been different. State v. White (1998), 82 Ohio St.3d 16, 23, 693 N.E.2d 772; State v. Bradley (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, at paragraph three of the syllabus.

{¶ 5} In the case sub judice, appellant first argues about the absence of evidence to prove that he had purpose to commit criminal offenses inside the homes. However, appellant, by virtue of his guilty plea, waived his right to a trial and his right to require the prosecution to satisfy its burden of proof on this issue. The fact that no evidence exists in this particular record to establish a purpose on appellant's part to commit separate criminal offenses does not mean no such evidence exists. Rather,

such evidence was not adduced because appellant pled guilty to the charges and no trial occurred.

{¶ 6} Second, in a form titled "Proceeding on Plea of Guilty," (filed October 29, 2009) when asked if he believed that a factual basis exists for his plea appellant answered in the affirmative. He further responded affirmatively when asked whether he understood the proceedings against him. In the same document, appellant responded negatively when asked if he or his counsel had any competent evidence to show that he was not guilty of the offenses. Thus, appellant conceded in this document that he did, in fact, trespass into these residences with purpose to commit another criminal offense. See R.C. 2911.12(A)(2).

{¶ 7} Third, with regard to trial counsel's actual comments, we note that counsel did not say that no evidence existed of an intent to commit a crime. Instead, she remarked that "circumstances really didn't even involve a [sic] intent." (Emphasis added.) The precise circumstance to which she refers is unclear from the record, but the use of the word "really" to preface her argument suggests that she might have conceded the technical presence of such intent, but attempted to downplay that intent before the court pronounced sentence.

{¶ 8} Fourth, as the prosecution notes, we believe that this remark must be read in context with the remainder of counsel's remarks. The following statement in the transcript reveals that defense counsel admitted that she was "not trying to argue his [appellant's] conviction." Thus, counsel apparently believed that sufficient evidence existed as to this element. Generally, attorneys licensed to practice law in Ohio are

presumed to be competent. See State v. Tall, Lucas App. No. L-08-1112, 2010-Ohio-2629, at ¶21; State v. Westbrook, Scioto App. No. 09CA3277, 2010-Ohio-2692,at ¶28. It is doubtful that counsel would have agreed with her client to plead guilty if she truly doubted the existence of any evidence on this particular point or any other element of the offense.

{¶ 9} Fifth, it is well-settled that arguments of counsel are not evidence. Trial courts routinely instruct juries on this proposition, and reviewing courts point to such instructions as negating instances when attorneys attempt to represent argument as fact. See State v. Kaufman, Mahoning App. No. 08MA57, 2010-Ohio-1536, at ¶154; State v. White, Stark App. No. 2009CA53, 2009-Ohio-4151, at ¶56. Here, defense counsel sought to place appellant under the most favorable light prior to the trial court's sentence. Rather than characterize this action as ineffective, counsel acted as an advocate and presented the sentencing court with arguments on her client's behalf.

{¶ 10} Finally, we believe that appellant's argument is highly speculative. Appellant does not assert that he lacked the requisite intent to commit these crimes. Rather, he argues that trial counsel "alluded" to the lack of intent and that no evidence exists in this particular record to prove intent. Further, appellant does not show that the outcome of this matter would have been different had he proceeded to a trial on the merits.

{¶ 11} It is well-settled that courts must not presume the existence of prejudice under the Strickland standard but, instead, must require that prejudice be affirmatively established. See State v. Hairston, Scioto App. No. 06CA3089, 2007-Ohio-3707, at

¶16; State v. Tucker (Apr. 2, 2002), Ross App. No. 01CA2592. Here, appellant has not persuaded us that the outcome of the trial court proceedings would have been different if counsel had mounted a challenge to the prosecution's contention that he trespassed into the homes with intent to commit a criminal offense.

{¶ 12} For all these reasons, we hereby overrule appellant's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, P.J. & Kline, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.