[Cite as *State v. Trainer*, 2015-Ohio-2548.]

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

STATE OF OHIO,	:	
	:	Case No. 14CA21
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
DEIRDRE G. TRAINER,	:	
	:	
Defendant-Appellant.	:	**Released: 06/17/15**

APPEARANCES:

Matthew L. O'Leary, Circleville, Ohio, for Appellant.

Judy C. Wolford, Pickaway County Prosecutor, and Robert A. Chamberlain, Assistant Pickaway County Prosecutor, Circleville, Ohio, for Appellee.

McFarland, A.J.

{¶1} Appellant, Deirdre Trainer, appeals her convictions after a jury found her guilty of complicity to burglary, a second degree felony in violation of R.C. 2923.03(A)(2) and R.C. 2911.12(A)(2), and complicity to theft, a fifth degree felony in violation of R.C. 2923.03(A)(2) and 2913.02(A)(1). On appeal, Appellant contends that she was denied her Sixth Amendment right to the effective assistance of counsel when trial counsel failed to object to a detective's testimony that she was under investigation for other crimes. Because we conclude that trial counsel's performance was

not deficient, we cannot conclude that counsel was ineffective or that Appellant was prejudiced in any way. Accordingly Appellant's sole assignment of error is overruled and the judgment of the trial court is affirmed.

FACTS

{¶2} Paul Sharrett returned home to his residence, located in Pickaway County, Ohio, on October 10, 2013, to find a vehicle, specifically a red Pontiac, parked in his driveway. Sharrett noticed a female in the vehicle and asked if she needed help, to which she responded that she did not. The driver then beeped the horn, pulled out of the driveway and left. Upon entering his residence, Sharrett discovered that a screen had been removed, a door had been kicked in, and a jewelry cabinet had been relocated from a bedroom into the kitchen. Law enforcement responded to the residence with a canine, who followed a scent trail leading away from the house, but failed to locate a suspect.

{¶3} In investigating the incident, Detective Emrick, from Pickaway County, contacted the Ross County Sheriff's office. As a result of conversations with Ross County detectives, Detective Emrick identified Appellant, Deirdre Trainer, as a possible suspect and put together a photo array to present to Mr. Sharrett. Sharrett picked Appellant out of the array,

but stated he was only 50% sure she was the female in his driveway. Pickaway County detectives then went to Appellant's residence and interviewed her. Appellant admitted she drove a red Pontiac but initially denied that she was ever in Sharrett's driveway. Appellant later admitted to being in Appellant's driveway and speaking to him, but claimed that she was simply trying to pick up a friend who had called her for a ride.

{¶4} Appellant was later indicted on complicity to burglary, a second degree felony in violation of R.C. 2923.03(A)(2) and R.C. 2911.12(A)(2), and complicity to theft, fifth degree felony in violation of R.C. 2923.03.(A)(2) and R.C. 2913.02(A)(1). The matter proceeded to a jury trial and Appellant was convicted on both counts. The trial court sentenced Appellant to five-year terms of imprisonment on both counts and merged the terms for purposes of sentencing, by entry dated August 8, 2014. Appellant now brings her timely appeal, setting forth a single assignment of error for our review.

ASSIGNMENT OF ERROR

"I. APPELLANT WAS DENIED HER SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO OBJECT TO A DETECTIVE'S TESTIMONY THAT SHE WAS UNDER INVESTIGATION FOR OTHER CRIMES."

LEGAL ANALYSIS

{¶5} In her sole assignment of error, Appellant contends that she was denied her Sixth Amendment right to the effective assistance of counsel when her trial counsel failed to object to a detective's testimony that she was under investigation for other crimes. The State responds by arguing that the detective's "testimony in question in no way implicated that the Appellant was being investigated for other crimes." The State also contends that Appellant's trial counsel objected to the testimony at issue.

{¶6} Criminal defendants have a right to counsel, including a right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 770, 90 S.Ct. 1441 (1970); *State v. Stout*, 4th Dist. Gallia No. 07CA5, 2008-Ohio-1366, ¶ 21. To establish constitutionally ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Goff*, 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998). "In order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation. To show prejudice, the defendant must show a reasonable probability that, but

for counsel's error, the result of the proceeding would have been different." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95 (citations omitted). "Failure to establish either element is fatal to the claim." *State v. Jones*, 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 14. Therefore, if one element is dispositive, a court need not analyze both. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (stating that a defendant's failure to satisfy one of the elements "negates a court's need to consider the other").

{¶7} When considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. "A properly licensed attorney is presumed to execute his duties in an ethical and competent manner." *State v. Taylor*, 4th Dist. Washington No. 07CA11, 2008-Ohio-482, ¶ 10; citing *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment. *State v.*

Gondor, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62; *State v. Hamblin*, 37 Ohio St.3d 153, 156, 524 N.E.2d 476 (1988).

{¶8} To establish prejudice, a defendant must demonstrate that a reasonable probability exists that but for counsel's errors, the result of the trial would have been different. *State v. White*, 82 Ohio St.3d 16, 23, 693 N.E.2d 772 (1998); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. Furthermore, courts may not simply assume the existence of prejudice, but must require that prejudice be affirmatively demonstrated. See *State v. Clark*, 4th Dist. Pike No. 02CA684, 2003-Ohio-1707, ¶ 22; *State v. Tucker*, 4th Dist. Ross No. 01CA2592, 2002-Ohio-1597; *State v. Kuntz*, 4th Dist. Ross No. 1691, 1992 WL 42774. We are also mindful that "[t]he failure to do a futile act cannot be the basis for claims of ineffective assistance of counsel and is not prejudicial." *State v. Witherspoon*, 8th Dist. Cuyahoga No. 94475, 2011-Ohio-704, ¶ 33.

{¶9} Here, Appellant claims that trial counsel provided ineffective assistance by failing to object to a detective's testimony that she was under investigation for other crimes. This Court has held that a failure to object does not necessarily fall below an objective standard of reasonableness, and instead may be considered sound trial strategy. *State v. Topping*, 4th Dist. Lawrence No. 11CA6, 2012-Ohio-5617, ¶ 80; citing *State v. Brown*, 5th

Dist. Stark No. 2007CA15, 2008-Ohio-3118, ¶ 58 (stating that failure to object to prosecutor's statements during closing arguments may have been trial strategy and thus did not constitute deficient performance).

{¶10} " 'A competent trial attorney might well eschew objecting * * * in order to minimize jury attention to the damaging material.' " Id.; quoting *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 90; quoting *United States v. Payne*, 741 F.2d 887, 891 (C.A.7 1984). Accord. *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 42 (stating that "[a] reasonable attorney may decide not to interrupt his adversary's argument as a matter of strategy"). Thus, in order to establish that trial counsel performed deficiently by failing to object to error at trial, the defendant ordinarily must demonstrate that the error "is so compelling that competent counsel would have been obligated to object to [it] at trial." *Topping* at ¶ 80; quoting *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 233.

{¶11} Here, a review of the record reveals the following exchange between the prosecutor and Detective Rex Emrick during trial:

"Q. Okay. Let's move forward from that day. Where did your investigation go after that?

A. I had made contact with Detective Winfield from the Ross County Sheriff's Office in regard to other crimes in that area, and that I knew somebody in Ross County. I talked to him and he had given me --

MR. CARTER: Objection. Hearsay.

THE COURT: Sustained. Would counsel approach). [sic]

(Back in the presence of the jury:)

BY MR. TOOTLE:

Q. When you spoke with the detective in Ross County, did he give you information for Ms. Trainer?

A. Yes.

MR. CARTER: Objection. Leading.

THE COURT: Well, he's answered. Next question.

BY MR. TOOTLE:

Q. What did you do after you got that information?

A. Detective Strawser and I put a photo array together, and Sergeant Crooks was given the photo array to present to Paul Sharrett. As it turned out, Mr. Sharrett was not certain as to the person he picked out on the photo array."

Thus, based upon the foregoing excerpt from the trial transcript, Appellant's trial counsel clearly objected to the testimony at issue. Although Appellant's assignment of error indicates that no objection was made whatsoever, in her brief, Appellant details that trial counsel objected on hearsay grounds. She goes on, however, to claim that trial counsel should have objected on additional grounds, namely Evid.R. 403(A) and Evid.R. 404(B) and that the failure to do so constituted ineffective assistance of counsel. Based upon the following, we disagree.

{¶12} Initially, we note that although trial counsel failed to object on the grounds that Appellant claims he should have, the objection was sustained nonetheless. Further, it appears that the questions to which Appellant objected were being asked by the State in an effort to explain the steps taken by detectives in the investigation, and ultimately, how investigators identified Appellant. Even if trial counsel had objected on the additional grounds, this Court has consistently held that " '[i]t is well settled that statements offered by police to explain their conduct while investigating a crime are not hearsay because they are not offered for their truth, but rather, are offered as an explanation of the process of investigation.' " *State v. Gerald*, 4th Dist. Scioto No. 12CA3519, 2014-Ohio-3629, ¶ 70; quoting *State v. Spires*, 4th Dist. Gallia No. 10CA10, 2011-Ohio-3661, ¶ 13; quoting

State v. Warren, 8th Dist. Cuyahoga No. 83823, 2004-Ohio-5599, ¶ 46; citing *State v. Price*, 80 Ohio App.3d 108, 110, 608 N.E.2d 1088 (1992); *State v. Braxton*, 102 Ohio App.3d 28, 49, 656 N.E.2d 970 (1995); *State v. Blevins*, 36 Ohio App.3d 147, 149, 521 N.E.2d 1105 (1987).

{¶13} Further, with regard to Appellant's argument that trial counsel should have objected on Evid.R. 403(A) grounds, *State v. Blevins*, supra, indicates that such an analysis is implicit in considering an objection to testimony seeking to illustrate or explain the steps taken during the course of an investigation. For instance, in *Blevins*, the court noted as follows:

> "It is important to note at the outset that not all out-of-court statements are hearsay. Hearsay is an out-of-court statement offered in court as evidence to prove the truth of the matter asserted. Evid.R. 801(C). Some statements are merely verbal parts of acts and are, as the acts are themselves, admissible. McCormick, Evidence (3 Ed. Cleary Ed.1984) 732, 733, Section 249. For example, where statements are offered to explain an officer's conduct while investigating a crime, such statements are not hearsay. *State v. Thomas* (1980), 61 Ohio St.2d 223, 232, 15 O.O.3d 234, 240, 400 N.E.2d 401, 408; *State v. Willis* (Dec. 15, 1981), Franklin App. No. 81AP-508,

> unreported, at 2 [Available on WESTLAW, 1981 WL 3672]; *State v. Robertson* (July 31, 1979), Franklin App. No. 78AP-584, unreported, at 14.
>
> As Dean McCormick notes, however, the potential for abuse in admitting such statements is great where the purpose is merely to explain an officer's conduct during the course of an investigation. McCormick, supra, Section 249, at 734. Our review of the relevant Ohio case law finds no specific standards for the admission of such statements. Accordingly, certain conditions should be met before the court admits statements which explain an officer's conduct during the course of a criminal investigation.
>
> The conduct to be explained should be relevant, equivocal and contemporaneous with the statements. 6 Wigmore, Evidence (Chadbourn Rev.Ed.1976) 267, 268, Section 1772. Additionally, such statements must meet the standard of Evid.R. 403(A)." *Blevins* at 149.

Applying this analysis, the *Blevins* court determined that the statements at issue were admissible, as they had independent legal significance as relevant foundation evidence related to how detectives came to know the defendant,

and that they neither implicated nor cleared defendant, but merely described the circumstances of how the detectives met the defendant. Id. We believe the same analysis is applicable to the case presently before us and results in the complained-of statements being admissible. See also, *State v. Spires*, supra, at ¶ 15 (affirming the admission of testimony from a detective that another detective informed him "he was working similar cases with that same vehicle and them two people.").

{¶14} Finally, with respect to Appellant's argument that trial counsel should have objected to the testimony on Evid.R. 404(B) grounds, we note that the Supreme Court of Ohio has recognized that if counsel decides, for strategic reasons, not to pursue every possible trial strategy, the defendant is not denied effective assistance of counsel. *State v. Black*, 4th Dist. Ross No.12CA3327, 2013-Ohio-2105, ¶ 40; *State v. Brown*, 38 Ohio St.3d 305, 319, 528 N.E.2d 523 (1988). "Speculation regarding the prejudicial effects of counsel's performance will not establish ineffective assistance of counsel." *State v. Leonard*, 4th Dist. Athens No. 08CA24, 2009-Ohio-6191, ¶ 68; quoting *State v. Cromartie*, 9th Dist. Medina No. 06CA0107-M, 2008-Ohio-273, ¶ 25. An appellate court reviewing an ineffective assistance of counsel claim "must refrain from second-guessing the strategic decisions of

trial counsel." *Black*, supra; quoting *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995).

{¶15} Appellant essentially contends that the statements at issue could not have survived an Evid.R. 404(B) objection had it been made. Again, we disagree. Evid.R. 404 "Character evidence not admissible to prove conduct; exceptions; other crimes" provides as follows in section (B):

> "Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. *It may, however, be admissible for other purposes, such as proof of* motive, opportunity, intent, preparation, plan, knowledge, *identity*, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this rule *shall provide reasonable notice in advance of trial*, or during trial if the court excuses pretrial notice on good cause shown, *of the general nature of any such evidence it intends to introduce at trial*." (Emphasis added).

Although the detective's attempted testimony could not be offered to prove action in conformity therewith, it was permissible for other purposes, such as proof of identity. This is precisely the context in which this testimony was

initially offered, to show the steps taken in the investigation and how detectives identified and eventually interviewed Appellant.

{¶16} Further, although Appellant claims the State failed to comply with the notice requirement contained in Evid.R. 404(B), the record reveals otherwise. The State filed a criminal complaint with an attached crime summary on November 25, 2013. The crime summary detailed the fact that Detective Emrick, from Pickaway County, obtained information regarding Appellant from Detective John Winfield in the Ross County Sheriff's Department. The State provided discovery to Appellant on February 10, 2014, referencing the crime summary, among other documents, and indicated that it intended to use the crime summary as evidence in its case-in-chief. The trial did not begin until June 23, 2014. As such, the State provided notice of its intent to use this evidence well in advance of trial and the notice requirements of Evid.R. 404(B) were met. Accordingly, an objection based upon Evid.R. 404(B) grounds would have been meritless. As noted above, "[t]he failure to do a futile act cannot be the basis for claims of ineffective assistance of counsel and is not prejudicial." *State v. Witherspoon*, supra, at ¶ 33.

{¶17} Our conclusions are further supported by the instructions the trial court provided to the jury prior to deliberations. Although Appellant

argues that trial counsel should have requested a limiting instruction, the trial transcript indicates the jury was advised as follows:

> "You must not speculate as to why an objection was sustained to any questions or what the answer to such question might have been because these are questions of law and rest solely on the court. You must never assume or speculate on the truth of any suggestion or insinuation included in a question put to a witness by counsel, unless it was confirmed by the witness."

Here, with respect to the first question at issue, which included reference to other crimes in Ross County, it must initially be remembered that the trial court sustained counsel's hearsay objection mid-sentence. Secondly, this limiting instruction properly instructed the jury as to how to handle the information contained in the attempted question. Courts have long held that juries are presumed to follow limiting, or curative, instructions. See e.g. *State v. Martin*, 4th Dist. Scioto No. 04CA2946, 2005-Ohio-4059, ¶ 17; *State v. Wasmer*, 4th Dist. Jackson No. 714, 1994 WL 90400 (Mar. 16, 1994). With respect to the next question at issue, in which it was stated that Appellant's name was provided by the Ross County detective, although trial counsel may have objected to the form of the question, the State would have easily been able to get that information into the record by simply rephrasing

the question. For instance, the detective could have simply testified that after talking with Ross County detectives he interviewed Appellant.

{¶18} In light of the foregoing, we cannot conclude Appellant's trial counsel was ineffective. Thus, we find no merit to Appellant's sole assignment of error. Based upon the foregoing, Appellant's sole assignment of error is overruled. Accordingly, the decision of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway 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 BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Hoover, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland,
Administrative 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.