[Cite as *State v. Ayala*, 2010-Ohio-889.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 09 CAA 010009
PETER A. AYALA	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Delaware County Court of Common Pleas, Case No. 08CRI06-0337
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 5, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
DAVID A. YOST PROSECUTING ATTORNEY KYLE ROHRER ASSISTANT PROSECUTING ATTORNEY 140 North Sandusky Street Delaware, OH 43015	WILLIAM T. CRAMER 470 Olde Worthington Road, Ste. 200 Westerville, OH 43082

Gwin, P.J.

{¶1} Defendant-appellant Peter A. Ayala appeals a judgment of the Court of Common Pleas of Delaware County, Ohio, which convicted and sentenced him for one count of felonious assault, a felony of the second degree, after a jury returned a verdict of guilty. Appellant assigns three errors to the trial court:

{¶2} "I. THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE ALLEGED VICTIM TO TESTIFY THAT THE ACTIVITIES OF THE DEFENSE INVESTIGATOR WERE HUMILIATING AND HAD A HORRIBLE IMPACT ON HER.

{¶3} "II. AYALA WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANT OF COUNSEL UNDER THE STATE AND FEDERAL CONSTITUTIONS.

{¶4} "III. THE CUMULATIVE EFFECT OF THE ERRORS IN THIS TRIAL VIOLATED AYALA'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL."

{¶5} Appellant was convicted of felonious assault in violation of R.C. 2903.11 (B)(1), which prohibits engaging in sexual conduct without disclosing to the other person he had tested positive as a carrier of a virus that causes Acquired Immune Deficiency Syndrome. The victim, W. C., lived with appellant for several months in 2006, during which time, she testified, she had sex, including vaginal intercourse, four or five times with appellant. W.C. testified she picked up medical prescriptions for appellant, asking why he was taking so much medication. W.C. specifically asked appellant if he had AIDS, and he denied it, telling her he had a bad liver.

{¶6} Appellant testified he was first diagnosed as HIV positive in 1998. He believed he was first informed of his legal obligation to disclose the information in 2001. Appellant testified he informed W.C. he is HIV positive.

I.

{¶7} In his first assignment of error, appellant argues the trial court abused its discretion in permitting W.C. to testify the actions of the defense's investigator were humiliating and had a horrible impact on her. The admission or exclusion of evidence is within the sound discretion of the trial court and will be reversed absent an abuse of discretion. *State v. Sage* (1987), 31 Ohio St. 3d 173, 182, 510 N.E. 2d 343. The Supreme Court has repeatedly defined the term abuse of discretion as implying that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E. 2d 1140.

{¶8} On direct examination, appellant testified defense counsel's investigator came to her home while there were other people there, including her three minor children. Appellant testified she was very angry and ordered the investigator off her property. The investigator requested she be allowed to question W.C.'s twelve year old son, and W.C. refused. Over defense objection, W.C. testified the investigator had spoken with other persons, who had later approached W.C. to ask about her HIV status. W.C. testified this had a horrible impact on her and she was humiliated when everybody found out she was exposed to the virus.

{¶9} Although appellant objected to the question of whether the investigator spoke with other people, appellant did not object to W.C.'s statement about the emotional impact of the defense's investigation. Appellant cross examined W.C. about

the investigator's visit and her reactions to it. In fact, the cross examination was more extensive than the direct.

{¶10} Appellant cites us to Evid. R. 402, which provides relevant evidence is evidence that has any tendency to make a fact of consequence more or less probable. Evid. R. 403 requires a court to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Appellant asserts this testimony was highly prejudicial, and did not tend to make any fact of consequence more or less probable.

{¶11} Appellee responds the testimony was relevant to issue of whether W.C. knew of the appellant's HIV status. Appellee states the testimony that W.C. was so distraught that the information about her exposure to HIV was revealed to her circle of family and friends makes her testimony that she did not know appellant was HIV positive more credible. Appellee asserts here, the issue for the jury was specifically the credibility of the witnesses, because the only real evidence before it was the conflicting testimony of appellant and W.C.

{¶12} We find the trial court did not abuse its discretion in admitting the testimony.

{¶13} The first assignment of error is overruled.

II

{¶14} In his second assignment of error, appellant argues he was denied his right of effective assistance of counsel. To show ineffective assistance of counsel, appellant must satisfy a two-prong test. *Strickland v. Washington* (1984), 466 U.S. 668, 669. First, he must show that his trial counsel engaged in a " 'substantial violation of any

* * * essential duties to his client.' " *State v. Bradley* (1989), 42 Ohio St. 3d 136, 141, quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396. Second, he must show that his trial counsel's ineffectiveness resulted in prejudice. *Bradley*, 42 Ohio St. 3d at 141-142, quoting *Lytle*, 48 Ohio St.2d at 396-397. "Prejudice exists where there is a reasonable probability that the trial result would have been different, but for the alleged deficiencies of counsel." *State v. Velez,* 9th Dist. No. 06CA008997, 2007-Ohio-5122, at paragraph 37, citing *Bradley,* 42 Ohio St. 3d at paragraph three of the syllabus. This Court need not address both *Strickland* prongs if appellant fails to prove either one. *State v. Ray,* 9th Dist. No. 22459, 2005-Ohio-4941, at paragraph 10.

{¶15} Appellant cites us to two interrelated instances in which he maintains his counsel was ineffective. First, counsel solicited admissions from appellant on direct regarding his numerous prior convictions which were not otherwise available for impeachment purposes. Evid. R. 609 provides prior convictions may be used for impeachment if the prior crime was punishable by more than one year or involved dishonesty. Appellant testified he had been convicted of robbery, theft, endangering children, falsification, possession of criminal tools, and contributing to the delinquency of a minor. Thereafter, he testified to subsequent felony convictions for burglary, robbery, assault, attempted intimidation, vandalism, assaulting a police office, obstructing official business, and arson.

{¶16} Appellant asserts failing to warn a partner that he is HIV positive is different in kind from any of the previous offenses, and had defense counsel not put the prior offenses into evidence, the admissibility of his various prior convictions would have been much more limited.

{¶17} Debatable trial tactics and strategies do not constitute denial effective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St. 2d 45, 49, 402 N.E. 2d 1189. This court may not second guess counsel's decisions on trial strategies. *State v. Mason,* 82 Ohio St. 3d 144, 157, 1998-Ohio-370, 694 N.E. 2d 932.

{¶18} After eliciting appellant's criminal history, defense counsel inquired whether appellant had ever stood trial before. Appellant responded he had never been on trial and had never testified in court before, because he had pled guilty to all the foregoing charges. Defense counsel may have elicited information regarding appellant's previous criminal history to imply to the jury that if appellant had been guilty of this offense he would have pled guilty.

{¶19} The second instance appellant asserts demonstrates defense counsel ineffectiveness when, in eliciting extensive details about appellant's 1998 robbery conviction. On cross, appellee discussed appellant's statement at his sentencing on the robbery, in which he informed the court the robbery was all his son's idea. Appellant admitted he did make the statement, and it was not true.

{¶20} We find appellant has not demonstrated counsel's performance was deficient. Our review of the record leads us to conclude counsel very ably cross-examined the State's witnesses, including W.C., and on direct, attempted to present appellant in a sympathetic manner.

{¶21} The second assignment of error is overruled.

III.

{¶22} In his third assignment of error, appellant argues the cumulative effect of the alleged errors in I and II, supra, amounted to a denial of appellant's constitutional right to a fair trial. Because we find no error in the above, we conclude the trial court did not violate appellant's State and Federal constitutional right to a fair trial.

{¶23} The third assignment of error is overruled.

{¶24} For the foregoing reasons, the judgment of the Court of Common Pleas of Delaware, Ohio, is affirmed.

By Gwin, P.J.,

Wise, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. JOHN W. WISE

_____

HON. PATRICIA A. DELANEY

WSG:clw 0211

[Cite as *State v. Ayala*, 2010-Ohio-889.]

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
PETER A. AYALA	:	
Defendant-Appellant	:	CASE NO. 09 CAA 010009

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware, Ohio, is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

_____
HON. JOHN W. WISE

_____
HON. PATRICIA A. DELANEY