[Cite as *State v. Strait,* 2016-Ohio-7200.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- LISA M. STRAIT Defendant-Appellant	JUDGES: Hon. Sheila G. Farmer, P.J. Hon. William B. Hoffman, J. Hon. Patricia A. Delaney, J. Case No. 15-COA-043 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Ashland Municipal Court, Case No. 15CRB1084
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 29, 2016

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
ANDREW N. BUSH Assistant Director of Law 1213 E. Main St. Ashland, Ohio 44805	JOSEPH P. KEARNS, JR. Mason, Mason & Kearns P.O. Box 345 153 West Main Street Ashland, Ohio 44805

Hoffman, J.

{¶1} Defendant-appellant Lisa M. Strait appeals her convictions and sentence on one count of criminal trespass and one count of petty theft entered by the Ashland Municipal Court. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On August 5, 2015, Appellant entered an unoccupied house at 1301 Arch Street. Logan Harned drove his father, Steven Harned, and Appellant to the house, dropped them off and later returned to pick them up. The three then loaded items taken from the home into the trunk of the car.

{¶3} Appellant heard the house was abandoned from a co-worker and scheduled for demolition. She told Steven Harned about the house, and the two decided to take a look inside.

{¶4} Upon arriving at the house, Appellant observed the front door was standing wide open, trees were growing up by the front door, windows were missing, there was a hole in the roof, the house had no working utilities, it had been ransacked, and it was in a state of decay. The house appeared to have been unoccupied for years.

{¶5} Once inside, Steven Harned went to the second floor of the house, but Appellant stayed on the first floor. While on the first floor of the house, Appellant noticed three "new" candles in a pile of "trash" and picked them up. She asserted she believed the candles to be "abandoned," and decided to take them, placing them in the trunk of the car.

{¶6} A neighbor to the property called 911 to report individuals were in the “abandoned house across the street,” bringing stuff out of the house, and loading the

items in the trunk of their car. The caller provided the make, model and license plate number of the vehicle.

{¶7} Patrol Officer John Simmons of the Ashland Police Department responded to the 911 dispatch call. Officer Simmons initiated a traffic stop of the vehicle driven by Logan Harned. Officer Simmons interviewed the occupants separately. Appellant told Officer Simmons she and Steven Harned wanted to look at an "abandoned house." She also stated she knew she did not have permission to enter the house or to take anything. She stated she understood prior to entering she could “get into trouble” for going inside.

{¶8} Detective Brian Evans was in the area and responded to the traffic stop. Patrol Officer Simmons advised Detective Evans to investigate the Arch Street house. Detective Evans observed the house appeared to have not been lived in for "quite some time." The weight of the structure bowed, vegetation had grown up onto the porch and into the house, there were no windows, and there were holes in the roof. During his investigation, Detective Evans learned through records at the Ashland County Auditor's Office the owners of the property, Glen and Sarah Stutz, had passed away. The last transfer of the property occurred on July 7, 1975.

{¶9} Detective Evans interviewed Appellant at the Ashland Police Department. She stated she had previously driven by the house on Arch Street, and observed the door had been closed. On this occasion, Appellant observed the door was open. Appellant acknowledged she knew prior to driving to the house, she could get into trouble and could get charged for trespassing. Appellant asserted she believed no one was living at the Arch Street property.

{¶10} Appellant was issued a summons citing her with one count of criminal trespass and one count of petty theft. Appellant appeared in the Ashland County Municipal Court for a jury trial on December 10, 2015.

{¶11} At trial, Appellant requested the jury be given an instruction on the affirmative defense of abandonment as to the charge of theft. The trial court took the request under consideration during the pendency of trial; denying the request for an abandonment instruction prior to instructing the jury. The trial court found there was insufficient evidence to justify a reasonable finder of fact in finding the property was abandoned or Appellant had a reasonable belief the property was abandoned. The trial court noted Appellant's own statements and admissions acknowledging “she knew she couldn't just take the property.”

{¶12} The jury found Appellant guilty of both charges. The trial court sentenced Appellant to 150 days in the county jail on the petty theft count with 90 days suspended and two-years probation, to be served consecutively to the sentence imposed on the criminal trespass count of 30 days in the county jail with no days suspended. The trial court ordered Appellant pay a $150 fine as to the petty theft count, plus court costs, and a $100 fine as to the criminal trespass count. The trial court stayed the sentence pending appeal.

{¶13} Appellant assigns as error on appeal,

{¶14} “I. THE TRIAL COURT ERRED WHEN IT RULED THAT APPELLANT WAS NOT PERMITTED A JURY INSTRUCTION ON ABANDONED PROPERTY.

{¶15} “II. THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, WHICH FAILED TO SUBPOENA NECESSARY WITNESSES FOR TRIAL.

{¶16} "III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPOSED A MAXIMUM JAIL TERM FOR THE OFFENCE [SIC] OF CRIMINAL TRESPASS.

{¶17} "IV. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPOSED A DISPROPORTIONATE SENTENCE TO APPELLANT WHEN COMPARED TO THAT OF HER CO-DEFENDANTS."

I.

{¶18} In the first assigned error, Appellant maintains the trial court erred in not instructing the jury as to the affirmative defense of abandonment. We disagree.

{¶19} A trial court generally has broad discretion in deciding how to fashion jury instructions. *State v. Hamilton,* 4th Dist. Scioto No. 09CA3330, 2011-Ohio-2783, 2011 WL 2397088, ¶ 69. However, "a trial court must fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." *State v. Comen,* 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. "Additionally, a trial court may not omit a requested instruction, if such instruction is 'a correct, pertinent statement of the law and [is] appropriate to the facts * * *.' " *Hamilton* at ¶ 69, quoting *State v. Lessin,* 67 Ohio St.3d 487, 493, 620 N.E.2d 72 (1993). "When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case." *State v. Ellis,* 5th Dist. Fairfield No. 02 CA 96, 2004-Ohio-610, 2004 WL 251809, ¶ 19.

{¶20} Appellant was convicted of theft, in violation of R.C. 2913.02(A)(1),

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

(1) Without the consent of the owner or person authorized to give consent;

{¶21} Appellant was also convicted of criminal trespass, in violation of R.C. 2911.21(A)(1), which reads,

(A) No person, without privilege to do so, shall do any of the following:

(1) Knowingly enter or remain on the land or premises of another;

{¶22} Vacancy alone does not establish abandonment. Even if the house had been vacant for years, that fact alone would not necessarily demonstrate an abandonment of the premises or personal property inside. Abandonment requires affirmative proof of the intent to abandon coupled with acts or omissions implementing the intent. Mere non-use is not sufficient to establish the fact of abandonment, absent other evidence tending to prove the intent to abandon. *Kiser v. Board of Commrs.* (1911), 85 Ohio St. 129, 97 N.E. 52; see 1 Corpus Juris Secundum (1936) 10, Abandonment, Section 3b(2).

{¶23} Appellant did not know or attempt to determine the status of ownership of the property. Rather, Appellant admitted she understood she would be trespassing upon the property. Upon approach and questioning by Officer Simmons, Appellant admitted

she did not have permission to enter the property or to take anything from the premises. Tr. at 54. Further, Appellant admitted during questioning by Detective Evans she knew before entering the house on Arch Street she could be charged with trespassing for entering the house. Tr. at 84. In addition, she stated prior to the date in question, she had observed the door to the house closed when passing by the Arch Street house about a month prior, and on the date in question the door had been opened. Tr. at 84-85.

{¶24} The trial court concluded the evidence was not sufficient to justify a reasonable finder of fact in finding the Arch Street house was abandoned or Appellant had a reasonable belief it was abandoned and the items therein were abandoned. Tr. at 165. The trial court found of most significance Appellant's own statements acknowledging she knew she couldn't just take the property; which statements were inconsistent with Appellant's argument the property was abandoned and she was free to take it. Tr. at 165.

{¶25} We find the trial court did not abuse its discretion in its decision not to instruct the jury as to the affirmative defense of abandonment.

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

II.

{¶27} In the second assignment of error, Appellant maintains her trial counsel was ineffective in failing to subpoena the deceased property owners' daughter, as a necessary witness.

{¶28} The standard for reviewing claims for ineffective assistance of counsel was set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984). Ohio adopted this standard in the case of *State v. Bradley,* 42 Ohio St.3d 136,

538 N.E.2d 373(1989). These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel.

{¶29} {¶ 6} First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and volatile of any of his essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether the defense was actually prejudice by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. We apply the *Strickland* test to all claims of ineffective assistance of counsel, either trial counsel, or appellate counsel. *State v. Blacker,* 5th Dist. No.2005–CA–41, 2006–Ohio–5214.

{¶30} When counsel's alleged ineffectiveness involves the failure to pursue a motion or legal defense, this actual prejudice prong of *Strickland* breaks down into two components. First, the defendant must show that the motion or defense “is meritorious,” and, second, the defendant must show that there is a reasonable probability that the outcome would have been different if the motion had been granted or the defense pursued. See *Kimmelman v. Morrison,* 477 U.S. 365, 375, 106 S.Ct. 2574, 2583, 91 L.Ed.2d 305 (1986); see, also, *State v. Santana,* 90 Ohio St.3d 513, 739 N.E.2d 798 (2001), citing *State v. Lott,* 51 Ohio St.3d 160, 555 N.E.2d 293 (1990).

{¶31} Here, Appellant maintains her trial counsel was ineffective in failing to subpoena Sarah Marker, the daughter of the deceased home owners. Appellant claims the witness would have testified she had no interest in the property, and her intent was to abandon the property.

{¶32} Appellant's argument is speculative at best. Appellant has not demonstrated Sarah Marker is the actual owner of the property. Rather, Detective Evans testified there has been no legal transfer of ownership of the property since July 7, 1975. Appellant speculates Sarah Marker is the only heir of the property owners with an interest in the property and likely has abandoned the house and its contents, but we find nothing in the record establishes that conclusion. Appellant has not demonstrated the outcome of the trial would have been otherwise, but for the alleged error of trial counsel.

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

III. and IV.

{¶34} In the third and fourth assignments of error, Appellant argues the trial court abused its discretion in imposing the maximum sentence for the offense of criminal trespass and a disproportionate sentence compared to the sentences imposed on her co-defendants.

{¶35} At sentencing herein, the trial court stated on the record,

> I will tell you, Miss Strait - - I'm not trying to provoke a response, but before I sentence you I guess I want you to understand how I view it and why I view it the way I do. And you know Mr. Mason's advocating on your behalf, that's his job. And he's done a nice job of doing that. But I will tell you that I disagree with him very strongly that this is the least serious form of trespass. Quite frankly, I can't think of too many forms of trespass that are more serious than going into somebody's house and stealing something. And, you know, it's been referred to as a trash heap. Which quite frankly, you know, maybe that fits someone's description. It could also

be referred to as a house that didn't belong to you. And I don't know if you understand or appreciate this, but Mr. Stimpert is exactly right that you could have very easily been charged with a felony. You trespassed in an unoccupied structure with the purpose to commit a theft offense. You did commit a theft offense inside it. That's B and E; that's a felony. And people have gone to prison for that.

So the fact that you were not charged with a felony, to me shows that you already got considerable consideration from the State of Ohio. Now I'm not second guessing the prosecuting attorney of Ashland County. They decided not to charge you guys with felonies. But the fact remains that this was so serious that this conduct was felonious. And the fact that it was let go as a 4th degree misdemeanor is a little shocking to me to be perfectly frank. But it is what it is, and that's what we have is a 4th degree misdemeanor. In my view this is about the most serious form of trespassing you can have. So I disagree with that very much.

I think Mr. Stimpert's point is well made about the co-defendants. Now, we don't impose trial penalties in this court. People got a right to try their case, and you have a right to try your case. And I don't enhance sentences on people for trying their case. But the fact remains you had two co-defendants here, and they both accepted responsibility for their actions; they both pled guilty. And you did not do that. You've been very defiant about it. It's not just having a jury trial, but your conduct on this witness stand I thought was outrageous. Disrespectful to the prosecutor, dismissive

to the victims. You know, combative, and accepting absolutely no responsibility for your own conduct, which I think was outrageous. The idea that you are somehow entitled to enter a house that doesn't belong to you and steal stuff that doesn't belong to you just because the house is in disrepair is absurd. So I see this as very serious.

And I would tell you, I don't know if you're in contact with Logan or Mr. Harned or you know what sentences they got. Logan set 15 days in the county jail, and he accepted responsibility for what he did. And he never even went inside and didn't steal anything. Steven Harned pled, I think, he sat 45 days. Now - - and he also accepted responsibility and admitted to theft. And I think people should get credit for that. So in my view you're more culpable than Logan. He didn't go inside, you did. I don't care if it was two feet or two miles. You crossed the threshold into somebody else's house. And he didn't go in at all. He didn't steal anything, you did. So I think you're more culpable than he is. You're probably no more culpable than Steven. I mean, I take the prosecutor's point that you found the house and reported it back to the rest, but you're probably no more culpable than Steven. But that remains, he should get some credit for accepting responsibility, and I don't feel compelled to give you that. Since you haven't to this moment accepted any responsibility.

On the theft, I'm going to sentence you to 150 days in the county jail. Now given the fact that you have no prior history of similar offenses, I'm going to suspend 90 of those; that will leave you 60 to serve. The trespass

is a separate animus and a separate offense, which I think is also serious. I am going to sentence you to 30 days on that. And I think failing to run those consecutively would be demeaning to the seriousness of your conduct quite frankly. So those sentences will be served consecutively for a total of 90 days. That will leave you with 90 suspended, 90 to serve. And I'm going to place you on probation for a period of two years with this Court. Tr. at 212-215.

{¶36} R.C. 2929.22(B) provides,

(B)(1) In determining the appropriate sentence for a misdemeanor, the court shall consider all of the following factors:

(a) The nature and circumstances of the offense or offenses;

(b) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender has a history of persistent criminal activity and that the offender's character and condition reveal a substantial risk that the offender will commit another offense;

(c) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender's history, character, and condition reveal a substantial risk that the offender will be a danger to others and that the offender's conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences;

(d) Whether the victim's youth, age, disability, or other factor made the victim particularly vulnerable to the offense or made the impact of the offense more serious;

(e) Whether the offender is likely to commit future crimes in general, in addition to the circumstances described in divisions (B)(1)(b) and (c) of this section;

(f) Whether the offender has an emotional, mental, or physical condition that is traceable to the offender's service in the armed forces of the United States and that was a contributing factor in the offender's commission of the offense or offenses;

(g) The offender's military service record.

(2) In determining the appropriate sentence for a misdemeanor, in addition to complying with division (B)(1) of this section, the court may consider any other factors that are relevant to achieving the purposes and principles of sentencing set forth in section 2929.21 of the Revised Code.

{¶37} We presume a trial court has considered the statutory factors set forth and the principles and purposes of sentencing absent an affirmative demonstration to the contrary. Here the trial court specifically found Appellant committed the most serious form of the offense of criminal trespass in sentencing Appellant. Further, the trial court found Appellant had not accepted responsibility herein, as did her codefendants. The trial court found Appellant more culpable than codefendant Logan Harned. The court also found Appellant defiant during the trial proceedings, in addition to, disrespectful and dismissive

of the victims herein. We do not find the trial court abused its discretion in sentencing Appellant as the trial court had discretion in considering any relevant factors in achieving the principles and purposes of sentencing.

{¶38} The third and fourth assignments of error are overruled.

{¶39} Appellant's sentence in the Ashland Municipal Court is affirmed.

By: Hoffman, J.

Farmer, P.J. and

Delaney, J. concur