

[Cite as *State v. Miller*, 2010-Ohio-4004.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93585

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

ELLIOT MILLER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-513120

BEFORE: Rocco, P.J., Blackmon, J., and Sweeney, J.

RELEASED AND JOURNALIZED: August 26, 2010

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KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant Elliot Miller appeals from his convictions after a jury found him guilty of five counts of gross sexual imposition and one count of kidnapping with a sexual motivation specification.

{¶ 2} Miller presents three assignments of error. He claims his trial counsel rendered ineffective assistance for failing both to present witnesses for the defense and to challenge evidence that he fled after the crimes were committed. He additionally asserts the trial court erred in admitting the evidence of his flight.

{¶ 3} The record, however, demonstrates trial counsel’s representation was not deficient. Furthermore, appellate counsel presents no legal authority to support Miller’s third assignment of error. Consequently, Miller’s assignments of error are overruled, and his convictions are affirmed.

{¶ 4} The victim, MN,¹ testified that in the summer of 2007, she, her child, and her boyfriend George moved into George’s house located at 1122 East 68th Street in Cleveland, Ohio. At that time, MN’s son was two years old.

{¶ 5} The house was in some disrepair. Although George performed some renovation of the house, he also had a full-time job. George decided to hire Miller, who lived next door, to perform some of the necessary plumbing work.

{¶ 6} Miller arrived in the morning on August 20, 2007. He worked in the home for a time in the first-floor bathroom before George left for work at approximately 1:30 p.m. MN remained, for most of that time, upstairs on the second floor with her child.

{¶ 7} During the later part of the afternoon, Miller asked MN for some help in installing the “flush valve.” She came downstairs. The two of them lifted the toilet, and MN then waited to see if he required any additional assistance.

{¶ 8} MN testified that when they “got done with everything,[she] went to leave the bathroom, and that was when [Miller] started coming on to” her. She

¹This court’s policy is to protect the identity of victims of sexual assault.

stated Miller “kept trying to rub on” her body and to kiss her; she told him to stop and endeavored to push him away. MN further stated Miller blocked the door to prevent her escape.

{¶ 9} MN testified she managed to extricate herself, but, shortly thereafter, Miller called her to the top of the stairway that led to the basement. When she approached to see what he wanted, Miller, who stood only a few steps down, “grabbed” her by one of her hands and pulled her into the basement.

{¶ 10} MN testified that Miller cornered her between the sink and the washing machine, “pulled his private part out,” pushed her up against the wall, placed her hand on his penis, and also attempted to take off her clothing. She stated he touched her breasts, stomach area, buttocks, thighs, and “private area” during this encounter as she protested and struggled to get away. Her effort caused him to “eventually * * * let go of” her.

{¶ 11} Upon escaping Miller’s unwanted attentions, MN ran up two flights of stairs and retrieved her son before leaving the house. She sought out a pay telephone and called George. George told MN to call the police, then came home.

{¶ 12} George returned to the house at approximately 6:00 p.m. MN was inside, and Miller was “sitting on his front porch” with another man. When George confronted Miller, he denied anything occurred. However, by the time

the police arrived, Miller had left his home. The police officers advised MN to file a report about the incident with the “sex crimes unit.”

{¶ 13} The detective originally assigned to MN’s case testified that he went to Miller’s home to speak with him about the matter, but he was “unsuccessful in trying to locate” Miller. Another detective received the assignment in May 2008.

{¶ 14} Miller was indicted in this case in July 2008. The indictment charged him with five counts of gross sexual imposition, one count of kidnapping with a sexual motivation specification, and one count of attempted gross sexual imposition. The trial court issued a capias for his arrest.

{¶ 15} Miller’s arraignment took place in January 2009. He entered a plea of not guilty to the indictment. Three weeks later, Miller retained counsel to represent him.

{¶ 16} Miller’s case proceeded to a jury trial. After hearing the state’s case-in-chief, the trial court denied Miller’s motion for acquittal as to the first six counts of the indictment, but granted the motion with respect to count seven. Subsequently, the jury found Miller guilty on the remaining counts.

{¶ 17} The trial court ultimately imposed a prison sentence of three years for Miller’s convictions. Miller challenges his convictions in this appeal with three assignments of error.

{¶ 18} **“I. Trial counsel, after having promised the jury in opening statement that a number of persons would be called as witnesses and**

would undercut the credibility of the victim, failed to call those witnesses or to present a defense, thereby [he] failed to provide effective assistance of counsel.

{¶ 19} “II. Defense counsel failed to move to exclude evidence, testimony and argument that defendant-appellant had fled the scene and avoided prosecution for these offenses and failed to object to the prosecutor’s insinuation that this conduct showed consciousness of guilt and thereby failed to provide effective assistance of counsel.

{¶ 20} “III. The trial judge erred and permitted irrelevant evidence and argument by the prosecuting attorney to the effect that Elliot Miller had fled the scene, avoiding prosecution and was therefore conscious of his own guilt in this action, thereby the defendant-appellant was denied his constitutional right to due process of law.”

{¶ 21} Miller argues in his first and second assignment of error that his retained attorney provided constitutionally ineffective assistance at trial on two grounds: 1) defense counsel alluded during opening statements to defense witnesses whom he subsequently did not summon to testify; and, 2) defense counsel raised no objections to either evidence or the prosecutor’s comment during closing argument that Miller could not be located after the offenses were committed.

{¶ 22} In order to present a successful claim of ineffective assistance of counsel, a defendant must demonstrate not only that counsel's performance was deficient, but also that the deficient performance prejudiced the defense. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, citing *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To establish the first portion of the claim, i.e., that counsel's performance was deficient, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.* Then, to establish prejudice, a defendant must show that there is a reasonable possibility that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

{¶ 23} A properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-156, 524 N.E.2d 476. Thus, judicial scrutiny of counsel's performance is highly deferential, and the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, at 689.

{¶ 24} A defendant is not deprived of effective assistance of counsel when counsel chooses, for strategic reasons, not to pursue every possible trial tactic. *State v. Brown* (1988), 38 Ohio St.3d 305, 319, 528 N.E.2d 523. Decisions regarding the calling of witnesses fall within the ambit of trial tactics. *State v. Coulter* (1992), 75 Ohio App.3d 219, 230, 508 N.E.2d 1324; *State v. Hunt* (1984), 20 Ohio App.3d 310, 312, 486 N.E.2d 108. So, too, are decisions regarding

when to raise objections and whether to request a particular jury instruction. *State v. Davis*, Cuyahoga App. No. 91943, 2009-Ohio-3894.

{¶ 25} In this case, the record shows the trial court began the proceedings by instructing the jury, inter alia, that during opening statements, the attorneys would set forth what “they expect the evidence will show.” Moreover, after the state’s evidence, “the defendant may present evidence, but again, the defendant need not present any evidence in this case because the defendant has the presumption of innocence.” The trial court concluded by reminding the jurors that “any remarks made by the attorneys,” including opening statements, were not evidence.

{¶ 26} After the prosecutor presented his opening statement, defense counsel told the jury, in relevant part, that, in listening to the evidence, the jurors must keep in mind that, “As the judge indicated, we weren’t there. The prosecutor wasn’t there. The police officers weren’t there when this happened. * * * There’s no physical evidence. * * * There’s no witnesses to corroborate what she said.

{¶ 27} “However, the defense will produce witnesses that will come here and tell you what they saw and what they did not hear.” Defense counsel indicated that the homes in that neighborhood stood very close together, and if MN’s version of the incident were true, someone in the neighborhood would have become aware of her plight.

{¶ 28} Defense counsel also explained that, after the alleged incident, his client “was there. He doesn’t want to have any problems with this lady or George. He leaves. He doesn’t flee. He’s there when George gets home. He’s there for the discussions. He’s there outside while all this goes on. And he leaves because now he doesn’t want to get in any arguments with George or with this lady. He feels it’s best if he goes.” Counsel asserted, though, that Miller “didn’t flee Cleveland. He was right here. He didn’t go anywhere. If the police wanted to find him, they could have * * *.” Trial then proceeded.

{¶ 29} The state had presented most of its evidence when defense counsel stated on the record as follows:

{¶ 30} “ * * * I had three witnesses that were going to testify that *we’ve agreed not to put on the stand.*

{¶ 31} “Now, I’ve been in situations before where, in the event there would ever be a conviction here, you know, the first thing you hear is, you know, you didn’t put the witnesses on the stand. But I want the record to be very clear, *all the witnesses are here, and with the family and my client’s approval, we decided not to put the witnesses on * * *.*” (Emphasis added.)

{¶ 32} Since Miller took part in this decision, he cannot demonstrate that counsel’s failure to call the witnesses Miller now claims would have assisted his defense amounted to deficient performance. Neither can Miller show these witnesses would have changed the result of the proceedings. Indeed, the

testimony of these witnesses obviously had the potential to be adverse to his interests. *Coulter*; see, also, *State v. Williams*, Cuyahoga App. No. 90845, 2009-Ohio-2026.

{¶ 33} Similarly, with respect to any “insinuation” by the prosecution that Miller “fled,” defense counsel handled the matter by putting the state to its proof of the assertion. Under these circumstances, defense counsel lacked any legitimate basis upon which to seek a jury instruction on the defendant’s “flight” after the offenses occurred. *Davis*, supra.

{¶ 34} Since Miller cannot demonstrate his claim of ineffective assistance of trial counsel, his first and second assignments of error are overruled.

{¶ 35} Miller argues in his third assignment of error that the trial court somehow acted improperly in permitting the prosecutor to argue and introduce evidence that Miller could not be located after MN made her accusations against him.

{¶ 36} However, Miller presents no authority for his argument as required by App.R. 16(A)(7). This court thus declines to address it. App.R. 12(A)(2); *State v. Watson* (1998), 126 Ohio App.3d 316, 710 N.E.2d 340.

{¶ 37} Miller’s third assignment of error, accordingly, also is overruled.

{¶ 38} Miller’s convictions are affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

KENNETH A. ROCCO, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
JAMES J. SWEENEY, J., CONCUR