

[Cite as *State v. Lindsey*, 2010-Ohio-5768.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94040

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TRENT LINDSEY

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-523665

BEFORE: Gallagher, A.J., McMonagle, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: November 24, 2010
ATTORNEYS FOR APPELLANT

Robert Tobik
Chief Public Defender

BY: Paul Kuzmins
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Kristin Karkutt
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant, Trent Lindsey, appeals his conviction in the Cuyahoga County Court of Common Pleas for one count of attempted murder (R.C. 2923.02 and 2903.02(A)) and two counts of felonious assault (R.C. 2903.11(A)(1) and (2)), all with one- and three-year firearm specifications. For the reasons stated herein, we affirm.

{¶ 2} Appellant was charged with the above offenses, and the matter proceeded to a jury trial. The victim, M.C.,¹ and his brother, J.C., testified the following events occurred on April 8, 2009.

{¶ 3} J.C. and appellant engaged in an altercation at a library located in Cleveland. The victim and a friend witnessed the altercation. The victim stated that during the altercation, appellant threatened to shoot him and his brother, and he saw a gun fall from appellant's hip. The altercation was eventually broken up by appellant's stepfather. Both J.C. and the victim testified the fight was over a girl.

{¶ 4} The victim, J.C., and the friend then went to play basketball. J.C. stated that the basketball court is not far from the library and was "basically right across the street * * * like 15 to 30 seconds to walk there." J.C. dropped the victim off at the basketball court and was leaving to pick up another friend. As he was turning out of the parking lot, he heard gunshots, looked back, and saw the victim running with appellant chasing behind. J.C. testified that appellant was firing shots at the victim. J.C. did not observe any other individuals.

{¶ 5} The victim stated that after he got out of his brother's car, he saw the appellant, who said something and then began to shoot at him. The

¹ Because the victim was a juvenile at the time of the events and proceedings, we refer to him and his brother by their initials.

victim testified that he was only seven or eight feet from the appellant when he started to shoot. The victim stated nobody else was present. The victim ran across the street and behind a row of houses. He then hopped a gate to get to the library.

{¶ 6} J.C. called the victim to see if he was all right. The victim, who was halfway to the library, answered and told J.C., “call the ambulance, call the ambulance” and then hung up. J.C. then drove around the block, and when he saw an ambulance at the library, he stopped to go in. He was stopped by the police, and his vehicle was searched. He informed the police that he was the brother of the victim. The police did not find any weapons on J.C.’s person or in his vehicle.

{¶ 7} The victim had been shot in the chest, and the bullet exited at his hip. He appeared “woozy” and to be having trouble breathing. He was taken to the hospital and underwent surgery.

{¶ 8} J.C. and the victim identified appellant, who is also known as T-Man, as the person who shot the victim. Their testimony further indicated that an individual named Jerome Bryant was not the shooter. The victim claimed that a few days after the shooting he received a call from a restricted number. The caller apologized for the shooting.

{¶ 9} Several responding police officers also testified at trial. The police found shell casings in the area of the shooting; however, it could not be

ascertained if they were linked to this crime. They learned that the suspect's name was T-Man, who was also known as Trent Lindsey, and that the suspect lived less than 100 yards from the library. Appellant's mother consented to a search of the home, and the police found a bullet with the word T-Man written on it in a bedroom. They also found a small bag of bullets under a mattress in that room. Sgt. James Mangan identified a photo depicting the dresser in the bedroom, and indicated that it showed a grinder, a scale, and the T-Man bullet. Appellant eventually turned himself in to police custody.

{¶ 10} Appellant testified on his own behalf. He stated that on the date of the incident "a couple guys * * * jumped on me about [J.C.], of him stealing a gun from a man named Jerome Bryant." Appellant then flagged down the victim and J.C. and asked them "why did I just get jumped for something [J.C.] did." Appellant indicated that an altercation occurred, that a gun was pulled on him, and that the altercation was ultimately broken up by his stepfather. He stated he then went to his mother's house with his stepfather.

{¶ 11} Appellant denied shooting the victim. He also denied living at his mother's residence, which was searched by the police. He stated that he "used to stay there" and that it is "a second home" that he goes to "if I ever get put out[.]" He conceded the bullet with T-Man written on it was his, but

claimed the bag of bullets found under the mattress belonged to his brother. He further denied calling the victim to apologize.

{¶ 12} The jury returned a verdict of guilty on all counts, including the one- and three-year firearm specifications. The trial court sentenced appellant to a total prison term of eight years on the base counts plus three years on the firearm specifications, along with five years of postrelease control.

{¶ 13} Appellant filed this appeal and has raised eight assignments of error for our review. His first assignment of error provides as follows:

{¶ 14} “I: The appellant’s convictions are against the manifest weight of the evidence.”

{¶ 15} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether “there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” (Internal citations and quotations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 81.

{¶ 16} Appellant was convicted of one count of attempted murder and two counts of felonious assault, all with one- and three-year firearm specifications. Appellant argues that his convictions were against the manifest weight of the evidence because there were several inconsistencies in the testimony of the victim and J.C. He claims that the inconsistencies in their testimony undermine the confidence in the jury's verdict.

{¶ 17} The evidence in this case establishes that the victim sustained a gunshot wound to his chest. Prior to the shooting, appellant and J.C. engaged in an altercation witnessed by the victim. Both J.C. and the victim identified appellant as the shooter and testified to similar events occurring during the shooting. The victim testified he was only seven or eight feet from appellant when he began to shoot. The police learned the suspect's identity was appellant, also known as T-Man. The police found a bullet with T-Man written on it in a room in appellant's mother's home, and a bag of bullets was found under a mattress in that same room.

{¶ 18} Although there were some inconsistencies in the testimony provided, we cannot say that the inconsistencies were so substantial as to render either the witnesses' testimony not worthy of belief or to undermine the jury's verdict. Accordingly, we conclude appellant's convictions are not against the manifest weight of the evidence and his first assignment of error is overruled.

{¶ 19} Appellant's third and fourth assignments of error provide as follows:

{¶ 20} "III: Trial counsel was ineffective for failing to request a continuance in order [to] adequately investigate newly discovered and potentially exculpatory evidence."

{¶ 21} "IV: The trial court erred in not granting a continuance so that defense counsel could adequately investigate the underlying charges and recently discovered evidence."

{¶ 22} On the date of trial, appellant's trial counsel informed the court that Jerome Bryant, who was appellant's pod mate, had purportedly confessed to the shooting. Defense counsel specifically indicated he needed "time to bring him in." He further asked for additional time to investigate new allegations concerning a gun possibly involved in the crime. After the court made it clear that it had already granted numerous continuances, that counsel had the weekend ahead to investigate further, and that the court was proceeding with trial, defense counsel acknowledged he was not going to get a continuance from the court. The court then expressed its dismay at defense counsel's history of presenting a new defense theory at the point of trial and called in the jury.

{¶ 23} Upon this record, we find no merit to appellant's assertion that defense counsel was ineffective for failing to push for a continuance. The

record reflects that defense counsel did request a continuance and explained his reasons for the request. However, the trial court made it clear that it would not grant a continuance and was proceeding with trial.

{¶ 24} A trial court has broad discretion when ruling on a motion for continuance. *State v. Unger* (1981), 67 Ohio St.2d 65, 67, 423 N.E.2d 1078. Relevant factors to be considered include the length of delay requested, prior continuances, inconvenience, the reasons for the delay, whether the defendant contributed to the delay, and other relevant factors. *State v. Landrum* (1990), 53 Ohio St.3d 107, 115, 559 N.E.2d 710.

{¶ 25} A trial court's denial of a motion for a continuance will only be reversed on appeal if the trial court abused its discretion. *Id.* An abuse of discretion connotes more than an error of law or judgment, and implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 26} In this case, there had been four prior continuances. The court had previously admonished defense counsel and noted "this defendant has sat in jail since April 10, 2009 — that will be almost five (5) months. The man is entitled to a trial — especially since the defendant's counsel state defendant is not involved in the crime." When defense counsel requested yet another continuance on the date of trial, September 4, 2009, it was on the purported basis that he had discovered new, possibly exculpatory, evidence. The trial

court refused to continue the case yet again and indicated that defense counsel had all weekend to investigate.² Under the circumstances of this case, we do not find that the denial of a continuance amounted to an abuse of discretion by the trial court.

{¶ 27} Appellant's third and fourth assignments of error are overruled.

{¶ 28} Appellant's second, fifth, sixth, seventh, and eighth assignments of error all challenge the effective assistance of counsel. In order to substantiate a claim of ineffective assistance of counsel, the appellant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *State v. Trimble*, 122 Ohio St.3d 297, 310, 2009-Ohio-2961, 911 N.E.2d 242, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland*, 104 S.Ct. at 2065. In Ohio, there is a presumption that a properly licensed attorney is competent. *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905. The defendant

² When trial resumed the following week, a side-bar was held discussing further information learned by defense counsel related to his defense theory in the case. Defense counsel was able to question the witnesses on his theory that the initial confrontation between between appellant and J.C. arose after appellant had been accused of stealing a gun belonging to Jerome Bryant when it had actually been taken by J.C. and that Jerome Bryant was the actual shooter.

has the burden of proving his counsel rendered ineffective assistance. *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶223.

{¶ 29} First, appellant claims trial counsel was ineffective for failing to cross-examine J.C. about a pending felony indictment. The pendency of charges in another case is admissible to prove the bias of a witness. *State v. Drummond*

{¶ 30} 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 104. In this case, there was no suggestion that J.C. was offered a plea bargain or any other inducement to testify. He was cross-examined about his activities on the day of the shooting and he acknowledged his role in the altercation with the appellant prior to the shooting. Further, the jury was aware that J.C. was the brother of the victim and was aware of his potential bias. Accordingly, we find any ineffectiveness in this regard was harmless and did not deprive appellant of a fair trial.

{¶ 31} Second, appellant claims trial counsel was ineffective by failing to adequately investigate the charges, failing to call certain witnesses, and failing to develop certain theories. The record in this case reflects that defense counsel conducted an investigation into the charges and alleged facts and was continuing to pursue his theories right up until trial. Although certain witnesses were not called, the decision to call or not call witnesses is generally a matter of trial strategy and will not be second-guessed by a

reviewing court. *State v. Treesh*, 90 Ohio St.3d 460, 490, 2001-Ohio-4, 739 N.E.2d 749. Appellant has not shown that testimony from the purported witnesses would have significantly assisted his defense or affected the outcome of the case. We can conclude only that defense counsel's failure to present testimony from these witnesses and decision not to pursue certain theories was the result of reasonable trial strategy. Finally, insofar as appellant argues defense counsel allowed the jury to remain under the impression that appellant called the victim and apologized for the shooting, the appellant denied making the call during his testimony. Absent a showing of prejudice, this court will not consider such decisions ineffective assistance.

{¶ 32} Third, appellant claims trial counsel was ineffective for failing to seek the suppression of the ammunition, drugs, and drug paraphernalia seized by the government. "Typically, the decision not to file a motion to suppress or other pretrial motion does not constitute ineffective assistance of counsel 'when doing so was a tactical decision, there was no reasonable probability of success, or there was no prejudice to the defendant.'" *State v. Meyers*, Summit App. Nos. 23864 and 23903, 2008-Ohio-2528, ¶ 67, quoting *State v. Nields*, 93 Ohio St.3d 6, 2001-Ohio-1291, 752 N.E.2d 859, ¶ 42. The record reflects that police had the consent from appellant's mother to search the residence and appellant denied that he lived there at the time of the

shooting. Because appellant has failed to establish a reasonable probability that a motion to suppress would have been granted or that suppression of the evidence would have changed the outcome of trial, we find no merit to this claim of ineffective assistance of counsel.

{¶ 33} Fourth, appellant claims that trial counsel was ineffective for failing to object to the admission of certain evidence he claims was irrelevant and prejudicial, and for failing to request a limiting instruction on “other acts” evidence. He asserts that defense counsel failed to object to references to the paraphernalia seized at his mother’s residence, the picture depicting the paraphernalia, commentary on the T-Man bullet, and hearsay references that appellant was known to carry a gun and the type of gun he carried. However, we recognize the victim testified he saw a gun fall from appellant’s hip, the police found bullets in the searched residence, both the victim and J.C. identified appellant as the shooter, and the shooting occurred shortly after J.C. and appellant engaged in an altercation. When examined against the entire record, appellant has not established a reasonable probability that, but for his trial counsel’s failure to object, the outcome of his trial would have been different.

{¶ 34} Fifth, appellant claims that the cumulative effect of trial counsel’s ineffectiveness deprived him of a fair trial. Additionally, he claims trial counsel failed to elicit testimony of the alleged confession by Jerome Bryant.

We find no ineffective assistance of counsel occurred with regard to the alleged confession of Jerome Bryant. Without knowing whether the alleged confession was reliable, we cannot say counsel provided constitutionally ineffective assistance.

{¶ 35} We find that appellant received a fair trial and that his claimed errors did not rise to the level of ineffective assistance of counsel, and we reject his “cumulative error” argument. Appellant’s remaining assignments of error are overruled.

Judgment 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.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

CHRISTINE T. MCMONAGLE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

