

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-A-0013
ROGER R. GAU,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2003 CR 0081.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Roger R. Gau, pro se, Allen Correctional Institution, P.O. Box 4501, Lima, OH 45802 (Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Roger R. Gau, appeals the judgment of the Ashtabula County Court of Common Pleas denying his motion for new trial and his motion for acquittal following his conviction of multiple counts of rape of his own daughter beginning when she was seven years old. This case represents appellant’s third appeal following his conviction. For the reasons that follow, we affirm.

{¶2} Appellant was indicted on March 6, 2003, and charged with 21 counts of rape, felonies of the first degree, in violation of R.C. 2907.02. The indictment was based on a pattern of incestuous sexual assaults perpetrated by appellant on his minor daughter over a period of seven years from January 1, 1996 through October 31, 2002. Appellant pled not guilty to all counts. On May 3, 2004, the jury trial began.

{¶3} On May 5, 2004, the jury informed the court that it was unable to reach a verdict, and the trial court dismissed the jury without determining whether the jury had reached a verdict as to any of the 21 counts. After the jurors left, it was discovered that they had left notes and a partially completed verdict form in the jury room. The court instructed the bailiff to destroy the notes and the verdict form. In an effort to determine whether the jury had been able to reach a decision as to any of the 21 counts, on May 11, 2004, the court conducted an examination of the jury foreperson with counsel for both parties present. The foreperson testified that the jury did not reach a verdict as to any of the 21 counts. She said that the jurors reached a tentative “not guilty” verdict as to five of the 21 counts. She said she did not believe a final decision would have been unanimous as to these five counts or any other counts because some of the jurors had changed their minds and were going to delete their names from the verdict forms. She said the verdict forms were “never going to be turned in because everybody kept changing their mind.” In its May 13, 2004 entry, the trial court found it could not correct its “erroneous decision to dismiss the jury” and declared a mistrial.

{¶4} On June 28, 2004, the state filed a motion to amend the original indictment. Appellant objected to the amendment. On July 8, 2004, the trial court allowed the amendment. The amended indictment set forth seven counts of rape from

January 1, 1996 through October 31, 2002 against appellant as opposed to the original 21. Appellant was brought to jury trial on the amended indictment on August 15, 2005.

{¶5} On August 18, 2005, the jury found appellant guilty on all seven counts of rape as charged in the amended indictment. Appellant was sentenced to life imprisonment on counts one through five because, as to these counts, the jury found that he purposely compelled the victim to submit by force. See R.C. 2907.02(B). Appellant was sentenced to three years imprisonment for counts six and seven. All sentences were ordered to be served concurrently to one another.

{¶6} Appellant appealed the trial court's judgment of conviction, arguing that the court erred in allowing the amendment of the indictment and that the evidence presented was insufficient to support his conviction. This court affirmed his conviction in *State v. Gau*, 11th Dist. No. 2005-A-0082, 2006-Ohio-6531, motion for leave to file delayed appeal denied at 113 Ohio St.3d 1487, 2007-Ohio-1986 ("*Gau I*"). On August 30, 2007, nearly two years after his conviction, appellant filed a motion for delayed reopening of his appeal in which he argued that his double jeopardy rights were violated because he was tried for the same offenses for which he was found not guilty in his first trial. On November 7, 2007, this court denied the motion.

{¶7} Meanwhile, appellant filed a motion for postconviction relief, arguing his trial counsel was ineffective. On April 9, 2008, the trial court denied the motion, and this court affirmed the court's judgment in *State v. Gau*, 11th Dist. No. 2008-A-0030, 2008-Ohio-6988, discretionary appeal not allowed at 121 Ohio St.3d 1454, 2009-Ohio-1820 ("*Gau II*").

{¶8} On July 24, 2009, appellant filed a motion for new trial, in which he argued he was entitled to a new trial because the trial court had destroyed the verdict form signed by the first jury and violated his right to be free from double jeopardy by subjecting him to a second trial after being acquitted. In its September 23, 2009 judgment, the trial court found appellant was aware of the issues involving the jury deliberations following the first trial and the mistrial at least since May 13, 2004, the date of the court's judgment describing those events, and denied appellant's motion for new trial.

{¶9} Appellant did not appeal the trial court's denial of his motion for new trial, but instead filed another motion for new trial, the subject of this appeal, on February 3, 2010, asserting essentially the same argument advanced in his first motion for new trial. He argued the court erred in destroying the verdict form and in conducting an examination of the jury foreperson in his absence. On the same date, appellant also filed a motion for acquittal. The court denied appellant's motion for new trial and his motion for acquittal by its judgment entry of February 11, 2010. Hereafter, all references to appellant's motion for new trial will refer to his second motion for new trial, unless otherwise noted.

{¶10} Appellant appeals the trial court's judgment, asserting three assignments of error. For his first assigned error, he alleges:

{¶11} "The trial court erred to the prejudice of defendant-appellant in overruling his motion for new trial, because the judge destroyed the verdict forms signed not guilty by the jury, and abused his discretion by holding a hearing with the foreperson of the

jury without the defendant-appellant being present at the hearing, and not granting a acquittal [sic] to defendant-appellant.”

{¶12} “A motion for a new trial, made pursuant to Crim.R. 33, is addressed to the sound discretion of the trial court.” *State v. Valentine, III*, 11th Dist. No. 2002-P-0052, 2003-Ohio-2838, at ¶14, citing *State v. Schiebel* (1990), 55 Ohio St.3d 71, at paragraph one of the syllabus. “A trial court’s ruling on a Crim.R. 33(B) motion will not be disturbed absent an abuse of that discretion.” *Valentine, III*, supra. Further, “[t]he discretionary decision to grant a motion for a new trial is an extraordinary measure which should be used only when the evidence presented weighs heavily in favor of the moving party.” *Id.*, citing *State v. Otten* (1986), 33 Ohio App.3d 339.

{¶13} This court has recently stated that the term “abuse of discretion” is one of art, connoting judgment exercised by a court, which does not comport with reason or the record. *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, at ¶30, citing *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. The Second Appellate District recently adopted this definition of the abuse of discretion standard in *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶65, citing Black’s Law Dictionary (4 Ed.Rev.1968) 25 (“A discretion exercised to an end or purpose not justified by and clearly against reason and evidence”).

{¶14} Appellant argues he is entitled to a new trial because the trial judge instructed his bailiff to destroy the verdict form signed by the jurors following his first trial. He also argues that as a result of information provided by the jury foreperson, the state moved to amend the indictment to reduce the number of counts from 21 to seven, depriving him of the right to assert an alibi. He also argues he was entitled to a new trial

because the court conducted the examination of the juror in his absence when his trial counsel waived his appearance. Appellant's argument is not well taken for several reasons.

{¶15} First, appellant failed to timely file his motion for new trial. He argues the court's conduct amounted to an irregularity in the proceedings, entitling him to a new trial.

{¶16} "Application for a new trial shall be made by motion" and "may be granted *** for *** the following causes affecting materially [the defendant's] substantial rights: *** "Irregularity in the proceedings or in any order or ruling of the court *** because of which the defendant was prevented from having a fair trial." Crim.R. 33(B) and (A)(1).

{¶17} Crim. R. 33(B) provides that a motion for new trial, other than upon the ground of newly discovered evidence, must be filed within 14 days after the verdict was rendered "**** unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial ***."

{¶18} Here, the verdict was rendered on August 18, 2005, and appellant filed this motion for new trial on February 3, 2010. Thus, appellant failed to file his motion for new trial within 14 days from the date of the jury's verdict. In fact, he did not file his motion for new trial until more than four years after the verdict. Moreover, in the affidavit filed in support of his motion, appellant failed to offer any reasonable explanation concerning how he was "unavoidably prevented" from filing his motion for new trial for more than four years. He therefore failed to prove, let alone by clear and convincing evidence, that he was unavoidably prevented from filing his motion for new

trial within 14 days after the verdict was rendered. His motion is untimely and therefore not well taken.

{¶19} Second, appellant's argument is also barred by *res judicata*. The trial court in its September 23, 2009 judgment denying appellant's first motion for new trial found that the issues presently being raised by appellant involving the jury deliberations in his first trial "were known to the defendant, at least from May 13, 2004, the date of filing the Judgment Entry describing the examination of the foreperson." He therefore could have asserted this argument at his second trial, which began on August 15, 2005, or on direct appeal, but he failed to do so. In addition, although appellant raised this identical issue in his first motion for new trial, he failed to appeal the court's September 23, 2009 judgment denying that motion.

{¶20} "Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.*" (Emphasis sic.) *State v. Szefcyk*, 77 Ohio St.3d 93, 95, 1996-Ohio-337, quoting *State v. Perry* (1967), 10 Ohio St.2d 175, at paragraph nine of the syllabus.

{¶21} Third, in his motion for new trial, appellant failed to demonstrate that he was prejudiced as a result of the trial court's instruction to the bailiff to discard the verdict form or the court's examination of the juror. In any event, we note that such actions and proceedings occurred in the context of the first trial and were therefore irrelevant to the second trial. Moreover, as this court held in *Gau I*, the evidence

presented in the second trial supported appellant's convictions for rape. Based on our thorough and complete review of the record in this case, there is nothing to suggest that, were it not for the court's actions following the first trial, the result of the second trial would have been different.

{¶22} We therefore hold the trial court did not abuse its discretion in denying appellant's motion for new trial.

{¶23} Appellant's first assignment of error is overruled.

{¶24} For his second assigned error, appellant alleges:

{¶25} "The trial court erred to the prejudice of defendant-appellant in overruling his motion for new trial, because Sixth Amendment right [sic] to counsel guarantees a defendant's right to conflict-free assistance of counsel."

{¶26} Appellant states in his affidavit filed in support of his motion for new trial that because his trial counsel represented his brother in a previous case, in which his brother was charged with obstructing official business in 1995, this somehow created a conflict of interest, which deprived him of his right to effective assistance of counsel.

{¶27} In order to establish a claim of ineffective assistance of counsel, it must be shown that an attorney's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687.

{¶28} In order to establish deficient performance, it must be shown that, under the totality of the circumstances, counsel's representation fell below an objective standard of reasonableness. *Id.* at 688. A court "must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance." *Id.* at 689. Debatable trial tactics and strategies generally do not constitute deficient

performance. *State v. Phillips*, 74 Ohio St.3d 72, 85, 1995-Ohio-171, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49.

{¶29} In order to establish prejudice, it must be shown that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome" of the proceeding. *Id.* "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *State v. Loza*, 71 Ohio St.3d 61, 83, 1994-Ohio-409, citing *Strickland* at 697.

{¶30} Appellant argues that his trial counsel was ineffective due to a conflict of interest arising from counsel's prior representation of appellant's brother. Appellant's argument, however, is not well taken because he does prove or even allege facts, which, if true, would suggest a conflict of interest. The fact that appellant's trial counsel represented his brother in another case ten years earlier, which had nothing to do with the instant case, does not raise a conflict issue. The term "conflict of interest" requires a situation in which regard for one duty tends to lead to disregard of another. *State v. Knepper* (May 19, 1989), 11th Dist. No. 3950, 1989 Ohio App. LEXIS 1855, *9-*10. The obvious example of this is representation of clients with incompatible interests. *Id.* at *10. "A lawyer represents conflicting interests when, on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." *Id.*, citing *Columbus Bar Assn. v. Grelle* (1968), 14 Ohio St.2d 208, 211. Further, there is no conflict where two defenses do not result in one defendant assigning blame to the other. *Kaplan v. Bombard* (C.A. 2, 1978), 573 F.2d 708, 713.

{¶31} Appellant has failed to demonstrate a conflict of interest because he and his brother were not co-defendants in the same case. As a result, it cannot be said that his counsel was ineffective. Further, appellant has failed to show that the court had a duty to inquire as to a potential conflict of interest since there was no joint representation or any other apparent conflict of interest. *Knepper*, supra, citing *State v. Manross* (1988), 40 Ohio St.3d 180, syllabus.

{¶32} Further, appellant failed to allege or prove that he was prejudiced as a result of his trial counsel's prior representation of his brother. The actions of his counsel about which he complains, such as waiving his appearance at the juror's examination and not objecting to certain leading questions at trial are debatable trial tactics and strategies, and do not constitute deficient performance. *Phillips*, supra. We note that in *Gau I*, we held "that the failure of Gau's trial counsel to object to the series of [leading] questions described above did not fall below an objective standard of reasonableness. Furthermore, even if the trial counsel's failure to object was deemed unreasonable, it was not prejudicial as there was additional evidence in the record to support the convictions for rape." *Id.* at ¶44.

{¶33} We therefore hold the trial court did not err in finding that appellant failed to demonstrate his trial counsel was ineffective.

{¶34} Appellant's second assignment of error is overruled.

{¶35} Appellant alleges the following for his third and final assigned error:

{¶36} "The trial court erred to the prejudice of defendant-appellant in overruling his motion for acquittal, because it clear [sic] that defendant-appellant was found not

guilty by the first jury, the second trial is clearly prejudice [sic] to defendant-appellant. The defendant-appellant has a right to be acquitted of all charges.”

{¶37} Appellant argues the trial court erred in denying his Crim.R. 29 motion for acquittal because, he claims, “the hearing showed that the first jury signed verdict forms not guilty on some of the charges.” However, in *Gau I*, appellant also challenged the sufficiency of the evidence.

{¶38} “***** ‘[S]ufficiency’ is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.’ *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, quoting Black’s Law Dictionary, (6 Ed. 1990), 1433. Appellate review of the sufficiency of the evidence requires a court to determine whether or not the prosecution submitted evidence as to each element of the crime. *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *14. ‘In other words, the standard to be applied on a question concerning sufficiency is: when viewing the evidence “in a light most favorable to the prosecution,” *** “a reviewing court [should] not reverse a jury verdict where there is substantial evidence upon which the jury could reasonably conclude that all of the elements of an offense have been proved beyond a reasonable doubt.”’ *Id.* (Citations omitted). ***** *Gau I*, *supra*, at ¶14.

{¶39} Following this court’s thorough and exhaustive review of the evidence in *Gau I*, this court held:

{¶40} “Considering the evidence in a light most favorable to the prosecution, we do not agree with *Gau* that there was insufficient evidence to convict *Gau* of rape.

Although Gau denied the occurrence of these sexual acts, there was sufficient evidence in the record from which the jury could conclude that Gau raped the victim repeatedly over a five-year period. ***” Id. at ¶20.

{¶41} As noted above, appellant was aware of his argument concerning the jury’s deliberations in the first trial at the latest by May 13, 2004 and therefore long before he filed his appeal in *Gau I*. However, he did not make that argument as part of his sufficiency argument in that case. It is therefore also barred by res judicata. *Szefcyk, supra*.

{¶42} Appellant also suggests, without specifically arguing, that his right to be free from double jeopardy was violated by his retrial. However, as noted above, he raised the identical issue in his motion for delayed reopening filed in *Gau I*. In denying that motion, this court held that because the jury foreperson in the first case testified the jury did not reach a final decision that would have been unanimous on any of the counts and further because the court declared a mistrial, the double jeopardy clause was not implicated. For this additional reason, his argument is barred by res judicata.

{¶43} We therefore hold the trial court did not err in denying appellant’s motion for acquittal.

{¶44} Appellant’s third assignment of error is overruled.

{¶45} For the reasons stated in the Opinion of this court, the assignments of error are without merit. It is the judgment and order of this court that the judgment of the Ashtabula County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

TIMOTHY P. CANNON, J.,

concur.