

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-05-128
- vs -	:	<u>OPINION</u> 12/21/2009
JESSE T. MURPHY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-11-2057

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HENDRICKSON, J.

{¶1} Defendant-appellant, Jesse Murphy, appeals his conviction in the Butler County Court of Common Pleas for one count of burglary. We affirm the decision of the trial court.

{¶2} After viewing a Craigslist advertisement, Murphy contacted Michael Koutny for more information on the laptop computer Koutny was selling. After several phone calls between the two, they agreed to meet at Koutny's residence in order to transact the

sale. Koutny, who had been working at a job site near Cincinnati, arrived at his residence in West Chester, Ohio at approximately the same time as Murphy. The two men entered Koutny's residence and went into his bedroom where the laptop computer was located. According to Koutny's testimony at trial, Murphy came only a step or two inside his bedroom, but soon exited into the living room in order to test the computer. After booting up the computer and verifying that it worked, Murphy completed the sale by giving Koutny his \$400 asking price.

{¶3} After the sale, Koutny walked Murphy to the front of his residence and walked out after Murphy exited. According to Koutny, when he left to return to the Cincinnati job site, Murphy and his car were in Koutny's driveway and he never saw Murphy leave his property.

{¶4} Soon after he reached Cincinnati, Koutny received a phone call from Murphy who expressed his pleasure at meeting him and his satisfaction with the transaction. According to Koutny's testimony, he considered the phone call odd, but did not think anything more of it until his son called him a short time later to report that their home had been broken into and that multiple items were missing from the bedroom. Koutny told his son to call the police, and soon returned to his house where he found his computer, flat-screen monitor, cell phone, and watch missing.

{¶5} Koutny informed police of the Craigslist transaction and of Murphy's unusual phone call. During an investigation, police discovered a partial thumbprint on a tin container in Koutny's bedroom that had once sat on the stolen computer equipment. After police matched the thumbprint to Murphy, he was indicted on one count of burglary. The jury found Murphy guilty after a two-day trial, and the court sentenced him to three years in prison and postrelease control.

{¶6} After his conviction, Murphy's family contacted an attorney who moved the

court for a new trial claiming Murphy's appointed trial counsel was ineffective. Though Murphy failed to file his motion in a timely manner, the trial court allowed Murphy's counsel to argue his ineffective assistance claim. During the hearing, Murphy's new counsel argued that Murphy's trial counsel was ineffective for several reasons.

{¶7} Generally, Murphy argued that his trial counsel failed to gather important evidence regarding the existence of his thumbprint on the tin, and that trial counsel should have subpoenaed witnesses who could have corroborated his explanation of why the thumbprint was there. Murphy also challenged his trial counsel's refusal to allow him to take the stand and testify in his own defense.

{¶8} However, the trial court did not find Murphy's arguments meritorious and refused to grant a new trial. Murphy therefore asserts his ineffective assistance claim to this court, raising the following assignments of error.

{¶9} Central to all of Murphy's assignments, we will consider the precepts set forth in the Sixth Amendment that pronounce an accused's right to effective assistance of counsel. However, and warning against the temptation to view counsel's actions in hindsight, the Supreme Court stated that judicial scrutiny of an ineffective assistance claim must be "highly deferential ***." *Strickland v. Washington* (1984), 466 U.S. 668, 689, 104 S.Ct. 2052.

{¶10} Also within *Strickland*, the Supreme Court established a two-part test that requires an appellant to establish that first, "his trial counsel's performance was deficient; and second, that the deficient performance prejudiced the defense to the point of depriving the appellant of a fair trial." *State v. Myers*, Fayette App. No. CA2005-12-035, 2007-Ohio-915, ¶33, citing *Strickland*.

{¶11} Regarding the first prong, an appellant must show that his counsel's representation "fell below an objective standard of reasonableness." *Strickland* at 688.

The second prong requires the appellant to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. Because the appellant must prove both prongs, a reviewing court need not address the deficiency issue if appellant was not sufficiently prejudiced by counsel's performance. Id. at 697.

{¶12} With these well-established principles in mind, we turn to Murphy's assignments of error.

{¶13} Assignment of Error No. 1:

{¶14} "THE APPELLANT'S TRIAL COUNSEL FAILED TO MAKE AN INITIAL INVESTIGATION INTO THE ALLEGED CRIME."

{¶15} In his first assignment of error, Murphy asserts that his trial counsel's performance during the pretrial phase was ineffective because he failed to gather necessary facts. This argument lacks merit.

{¶16} During the pretrial phase, Murphy's trial counsel did not meet with him, and instead, the two had only a telephone conversation the night before the trial began. Because the two did not meet face-to-face or early enough in the pretrial phase, Murphy now contends that his counsel was unprepared to represent him.

{¶17} However, the record indicates that trial counsel was preparing for the trial, even absent a formal meeting. Before the trial began, Murphy's trial counsel requested a bill of particulars as well as a request for discovery. Murphy's trial counsel also answered the state's request for discovery and assisted Murphy in his decision to waive his right to a speedy trial. Moreover, trial counsel filed a notice of alibi in which he informed the state that Murphy was on the road back to his Kentucky home at the time the burglary occurred.

{¶18} These actions demonstrate that trial counsel was active during the pretrial

phase even absent a face-to-face meeting and was aware of the pertinent facts necessary to defend Murphy. See *State v. Steele* (Dec. 1, 1999), Hamilton App. No. C-990102 (finding trial counsel's assistance effective where counsel filed a request for a bill of particulars and demand for discovery even though counsel did not meet with defendant until the day before the trial).

{¶19} Having found no prejudice, Murphy's first assignment of error is overruled.

{¶20} Assignment of Error No. 2:

{¶21} "THE APPELLANT'S TRIAL COUNSEL FAILED TO PREPARE FOR TRIAL BY NOT GATHERING EVIDENCE AND WITNESSES FOR TRIAL THAT COULD HAVE EXONERATED THE APPELLANT."

{¶22} In his second assignment of error, Murphy claims that his trial counsel failed to gather available evidence and witnesses in preparation for his trial. We find no merit in this argument.

{¶23} According to Murphy, Koutny's original Craigslist posting advertised that the sale of the computer also included various external flash drives. The flash drives are an important aspect of Murphy's argument because according to his account, he entered Koutny's bedroom and helped him search for the flash drives, picking up the tin in the process. However, because trial counsel did not procure the original Craigslist advertisement or subpoena witnesses who could have verified the sale of the flash drives, the jury did not hear any explanation as to why Murphy's thumbprint would have been found on the tin.

{¶24} Although trial counsel should consult with their client in matters of important trial decisions, Ohio law is clear that great latitude is given to defense counsel regarding trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98. Additionally, counsel is strongly presumed to have rendered adequate assistance, and the defendant must

overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689-690.

{¶25} We are unable to say that trial counsel's failure to subpoena witnesses or procure the Craigslist advertisement was anything more than trial strategy. Regarding the advertisement, there is nothing in the record that indicates that trial counsel would have been able to access the original contents of Koutny's posting. Because Craigslist changes daily, and the trial was over a year after Koutny first posted his advertisement, we are unable to say that trial counsel would have been able to access the posting or to use it at trial.

{¶26} Additionally, the witnesses Murphy refers to are his great uncle and aunt who were the eventual recipients of the laptop and supposed flash drives. Because they were unwilling to participate in the trial, trial counsel would have been forced to subpoena them. According to Murphy, his aunt and uncle did not wish to participate in the trial due to family discord. However, even if trial counsel would have subpoenaed them, there is no guarantee that they would have corroborated Murphy's story or would have been beneficial to his case.

{¶27} Instead, it is possible that trial counsel would not have wanted to give the state the opportunity to examine two members of Murphy's family who were not only unwilling to come to his defense, but may have also had ill feelings toward him. See *State v. Dennis*, Franklin App. No. 04AP-595, 2005-Ohio-1530, ¶22 (noting that "decisions to call witnesses are within the purview of defense counsel's trial strategy and are not considered deficient performance absent a showing *** that the testimony of the witnesses would have significantly assisted the defense and affected the outcome of the case").

{¶28} Because we cannot say that Murphy was prejudiced by his trial counsel

not procuring the Craigslist advertisement or subpoenaing his aunt and uncle, he did not receive ineffective assistance of counsel and his second assignment of error is overruled.

{¶129} Assignment of Error No. 3

{¶130} "THE APPELLANT'S TRIAL COUNSEL FAILED TO ADVERSARIAL (sic) TEST THE APPELLEE'S FINGERPRINT EVIDENCE."

{¶131} In his third assignment of error, Murphy asserts that his trial counsel was ineffective for failing to properly explain why the police found his thumbprint on Koutny's tin. This argument lacks merit.

{¶132} As previously stated, Murphy asserts that his thumbprint was found in Koutny's bedroom because he moved the tin while helping Koutny find the external flash drives. Murphy therefore asserts that his trial counsel failed to properly cross-examine Koutny in order to establish that the flash drives were part of the purchase and that Koutny allowed Murphy into his room to search for the external devices. In considering this argument we are aware that "the scope of cross-examination falls within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶101.

{¶133} According to the record, trial counsel discussed the laptop sale during his cross-examination of Koutny. First, trial counsel asked Koutny if he had a copy of his original Craigslist posting, to which Koutny answered he did not. Counsel later asked Koutny what he included in the sale of the laptop, and Koutny answered that nothing else was included in the sale. However, trial counsel then followed up his question and Koutny admitted that the sale actually included the laptop case, manuals, and a charger.

{¶134} While Murphy asserts that his trial counsel was ineffective because he never expressly cross-examined Koutny on the contents of the Craigslist posting or that

the sale included external flash drives, counsel was successful at raising several questions regarding Koutny's credibility. In addition to the actual contents of the sale discussed above, Murphy's trial counsel also cross-examined Koutny on details of the burglary that raised questions of Koutny's creditability.

{¶35} Specifically, the jury heard Koutny's claim that his front door had a shoeprint on it demonstrating that it had been kicked in, only to have trial counsel point out that none of the photographs of the crime scene contained the supposed shoeprint and that police concluded that force was not used to gain entrance into Koutny's home. Murphy's counsel also raised Koutny's prior inconsistent statement in which he said he locked his front door after leaving with Murphy on the day of the burglary, and compared it to the evidence that the door was not locked and that Koutny changed his story and later admitted to not locking the door.

{¶36} Although Murphy claims that his trial counsel should have used the Craigslist advertisement and his great aunt and uncle's testimony to further impeach Koutny's creditably, we have already established that the posting may not have been available and that not calling the unwilling witnesses was sound trial strategy. Instead, trial counsel effectively raised several issues regarding Koutny's credibility and Murphy cannot show that he was prejudiced by his trial counsel's cross-examination of Koutny. Murphy's third assignment of error is therefore overruled.

{¶37} Assignment of Error No. 4

{¶38} "THE APPELLANT'S TRIAL COUNSEL FAILED TO PLAN A DEFENSE STRATEGY."

{¶39} In his fourth assignment of error, Murphy claims that his counsel was ineffective because he failed to present a defense, and instead rested his case after the state rested its own. There is no merit to this argument.

{¶40} In *State v. Brown* (1988), 38 Ohio St.3d 305, the Ohio Supreme Court stated that a defendant is not denied effective assistance of counsel simply because trial counsel decides for strategic reasons not to pursue every possible trial strategy. Therefore, we "must refrain from second-guessing the strategic decisions of trial counsel." *State v. Carter*, 72 Ohio St.3d 545, 558, 1995-Ohio-104.

{¶41} Murphy asserts that his trial counsel rested because he failed to prepare a case to present to the jury. While it is true that Murphy's trial counsel rested rather than calling witnesses or presenting evidence, a review of the record indicates that Murphy's counsel presented a defense by cross-examining the state's witnesses as a way to demonstrate reasonable doubt.

{¶42} According to Murphy's account, he did not steal anything from Koutny's house and instead, was driving home towards Kentucky when the burglary occurred. To support this contention, Murphy's trial counsel cross-examined Koutny and established that Koutny never saw Murphy leave his home with the stolen property, that Koutny left the door to his residence unlocked, and that Koutney's credibility was questionable. However, by virtue of the jury's guilty verdict, it chose to accept Koutny's testimony as credible and that the state had proven Murphy's guilt beyond a reasonable doubt.

{¶43} While Murphy claims that his trial counsel had no defense planned, his trial counsel simply chose a strategy that proved unsuccessful. However, the fact that the trial strategy was ultimately unsuccessful or that there was another possible and better strategy available does not amount to ineffective assistance of counsel. Instead, Murphy again states that his trial counsel should have pursued the Craigslist posting and subpoenaing his uncle and aunt. However, Murphy's proposed trial strategy is no more guaranteed to result in an acquittal than the strategy employed by his trial counsel.

{¶44} Even if the jury saw the original advertisement and heard from Murphy's

aunt and uncle that external flash drives were part of the transaction, such evidence merely demonstrates that Koutny's testimony was subject to a credibility attack for having said that nothing else was included in the purchase besides the computer itself. However, Murphy's trial counsel did address several credibility issues regarding what exactly was included in the sale, as well as issues with the front door of Koutny's residence.

{¶45} While Murphy continually asserts that the flash drives prove why his thumbprint was on the tin, we are unable to make the same leap that Murphy does. Even if Murphy were granted a new trial and his counsel was somehow able to prove that the external flash drives were included in the sale, the jury could still conclude that he came back after Koutny left the house and stole the computer equipment. The drives merely illustrate Murphy's explanation, they do not, however, establish a reasonable probability that, but for counsel not introducing the flash drive-related evidence, the result of the proceeding would have been different.

{¶46} Though the trial strategy employed by Murphy's trial counsel was ultimately unsuccessful, Murphy has failed to demonstrate that such strategy resulted in prejudice or that the results of his trial would have been different had different trial tactics been pursued. Murphy's fourth assignment of error is overruled.

{¶47} Assignment of Error No. 5:

{¶48} "THE APPELLANT'S TRIAL COUNSEL FAILED TO REASONABLY UNDERSTAND THE EMERGED NECESSITY OF PLACING THE APELLEE (sic) ON THE WITNESS STAND."

{¶49} In his fifth assignment of error, Murphy claims that his counsel was ineffective because he did not permit Murphy to testify in his own defense. This argument lacks merit.

{¶50} According to Murphy, once he realized that his counsel was not going to use the Craigslist posting or subpoena his aunt and uncle, he expressed his fervent desire to testify on his own behalf. Through this testimony, Murphy asserts that the jury would have heard his account of the transaction, including him driving back to Kentucky at the time the burglary occurred, an explanation for the thumbprint on the tin, and his reason for calling Koutny on the phone after the sale was completed that afternoon.

{¶51} While we certainly recognize why Murphy would contend that this information would have been beneficial for the jury to hear, trial counsel's decision to not put Murphy on the stand was well within his trial strategy. See *State v. Adkins* (2001), 144 Ohio App.3d 633, 646 (noting that "the decision whether to call a defendant as a witness falls within the purview of trial tactics"). According to the record, Murphy's trial counsel was aware that Murphy had been convicted of a felony sex offense. His decision, therefore, may have been directed at completely foreclosing the possibility that the jury would hear the details of Murphy's criminal history.

{¶52} We also note that while Murphy was surely acting on his counsel's advice, the decision as to whether a defendant takes the stand ultimately rests with the defendant. See *State v. Bey*, 85 Ohio St.3d 487, 497, 1999-Ohio-283 (holding that "the defendant's right to testify is regarded both as a fundamental and a personal right that is waivable only by an accused"). While Murphy may now regret his decision to submit himself to his trial counsel's advice, we cannot state that such submission is the result of ineffective assistance of counsel. Murphy's fifth assignment of error is therefore overruled.

{¶53} Assignment of Error No. 6:

{¶54} "THE APPELLANT'S TRIAL COUNSEL FAILED TO OBJECT TO THE APPELLEE'S SIGN ADVERTISING 'BURGLARY' DISPLAYED PROMINENTLY

BEFORE THE JURY IN OPEN COURT."

{¶155} In his final assignment of error, Murphy claims that his trial counsel was ineffective for failing to object to a state's exhibit that contained the word 'burglary'. This argument lacks merit.

{¶156} On the first day of Murphy's two-day trial, the state entered its fifth exhibit into the record, which contained a large comparison of Murphy's thumbprint and the one taken from the tin in Koutny's bedroom. The poster also included the caption 'BURGLARY.' On the second day of trial, Murphy's counsel objected to the poster, and the trial court sustained the objection and ordered that the burglary caption be redacted from the exhibit. While Murphy now asserts that his trial counsel was ineffective for failing to object when the exhibit was first offered into evidence, we disagree.

{¶157} As the Ohio Supreme Court has stated, "any single failure to object usually cannot be said to have been error unless the evidence sought is so prejudicial * * * that failure to object essentially defaults the case to the state. Otherwise, defense counsel must so consistently fail to use objections, despite numerous and clear reasons for doing so, that counsel's failure cannot reasonably have been said to have been part of a trial strategy or tactical choice." *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶140, quoting *Lundgren v. Mitchell* (C.A.6, 2006), 440 F.3d 754, 774.

{¶158} While Murphy's trial counsel eventually made a successful objection and the word burglary was redacted from the exhibit, the fact that the jury saw the word on the exhibit on the first day of trial was not so prejudicial that it essentially defaulted the case to the state. Instead, the record demonstrates that the state referenced the exhibit when discussing the fingerprint comparison police performed when matching the latent print found in Koutny's bedroom with that of Murphy. Therefore, the exhibit itself had probative value separate from the burglary caption, and we are not convinced that the

jury seeing the word 'burglary' on an exhibit during a burglary trial constituted ineffective assistance of counsel. Murphy's sixth assignment of error is therefore overruled.

{¶59} Judgment affirmed.

YOUNG, P.J., and RINGLAND, J., concur.