[Cite as *State v. Burnett,* 2017-Ohio-7522.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Patricia A. Delaney, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 2017CA00055
	:	
CHRIS BURNETT	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2015CR1295A
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	August 28, 2017

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
JOHN D. FERRERO, JR. STARK CO. PROSECUTOR KRISTINE W. BEARD 110 Central Plaza South – Ste. 510 Canton, OH 44702-1413	CHRIS BURNETT, PRO SE Mansfield Correctional Inst. Inmate No. A680-350 Mansfield, OH 44901

Delaney, P.J.

{¶1} Appellant Chris Burnett appeals from the March 21, 2017 Judgment Entry of the Stark County Court of Common Pleas denying his petition for post-conviction relief. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶1} This case arose from the shooting of Cleave "Archie" Johnson ("Archie") and Albert Magee, resulting in Archie's death and serious injury to Magee. Appellant was indicted along with three co-defendants: Calvin Johnson, Sade Edwards, and Corey Campbell. The following facts are adduced from the record of appellant's jury trial and are relevant to the claims raised in the instant appeal.

{¶2} Magee knew Johnson for many years. In 2015, a dispute arose between Johnson and Magee's son.

{¶3} On August 10, 2015, Edwards drove appellant, Johnson, and Campbell around Alliance, where Archie and Magee happened to be drinking beer in front of Archie's house. Magee noticed the Edwards vehicle drive by. Johnson told Edwards to pull over around the corner and stop so he could "holler" at someone. Edwards stopped near a yard with a boat parked in it. Appellant and Johnson got out of the car and walked down an alley toward Archie's house; Campbell got out of the car but stayed behind to "take a leak."

{¶4} Magee observed two men come down the alley brandishing firearms: appellant and Johnson. Magee testified appellant smiled at him and fired two to three times. Magee was struck in the leg and tried to crawl toward his car. He saw Archie fall to the ground. Magee also saw Campbell running up a hill behind the house, and heard

one of the shooters yell, “This is how we do it in Chicago, [expletive]. Chicago style.” He also heard someone say “Come on man come this way [expletive] hurry up.” Magee crawled to a nearby house for help.

{¶5} Appellant, Johnson, and Campbell ran to Edwards’ car and left for appellant’s home in Akron. As they drove, Edwards’ mother called and said Magee had been shot and Edwards’ car had been spotted near the scene. Edwards discerned the shooting was the result of the “beef” between Johnson and Magee, and heard Johnson say to appellant, “Cuz, why did you start shooting so fast? I thought we were going to get closer.” Edwards also heard Johnson mention returning to the scene to get their “poles” (guns). Appellant and Johnson discussed throwing the guns under a porch into a hole and said they should have thrown them into the boat. After Edwards dropped the men off, Johnson called and asked her to take them back to Alliance to get their “poles.”

{¶6} In the meantime, Alliance police responded to the scene for shots fired and found Magee, who immediately identified Calvin Johnson as one of the shooters and said the other was an unknown man with “dreads.” Archie was unresponsive, lying in a fetal position on the front walk. Both victims were transported to the hospital. Archie died several days later from a gunshot wound to the head. Magee’s right femur was shattered and required surgery.

{¶7} While in the hospital, investigators showed Magee Facebook photos of appellant and Johnson. Appellant was shown in the photo with “dreads,” described by Magee as a braided “wild” hairstyle. Magee identified appellant and Johnson as the shooters and Edwards as the driver of the car, a silver Pontiac Grand Am.

{¶8} Investigators found the silver Grand Am outside Edwards' residence when they arrived to question her; she admitted she drove appellant, Johnson, and Campbell around Alliance, and that appellant and Johnson were involved in the shooting. She took police to the location where appellant and Johnson threw their guns, in the yard of the house with a boat. Police recovered a Hi-Point magazine, a .9 millimeter Hi-Point handgun, and an SCCY .9 millimeter handgun from under the front porch. The Hi-Point magazine fit inside the Hi-Point firearm. The SCCY magazine was empty and the gun had a .9 millimeter Luger round in the chamber.

{¶9} At the scene of the shootings, police had recovered Hi-Point shell casings and SCCY .9 millimeter shell casings.

{¶10} Appellant was arrested a week later during a traffic stop and transported to Alliance for questioning. He admitted he was with Johnson and Campbell on the night of the shooting. He also admitted he handled the Hi-Point firearm but denied firing it.

{¶11} The firearms were found to be operable. D.N.A. swabs from the Hi-Point firearm and magazine were consistent with samples of appellant's D.N.A.; Johnson, Campbell, Edwards, and Magee were excluded as contributors. Magee testified where appellant was standing during the shootings, and investigators determined eight shell casings taken from that area were fired from the Hi-Point firearm. The shell casings collected from where Johnson was standing were fired from the SCCY .9 millimeter firearm.

{¶12} Appellant's defense theory was that he was misidentified as the man with dreads. He argued at trial he was present but not one of the shooters; instead, he claimed Campbell was the second shooter.

{¶13} On October 28, 2015, the Stark County Grand Jury indicted appellant on one count of murder with a firearm specification in violation of R.C. 2903.02 and 2941.145, two counts of felonious assault with firearm specifications in violation of R.C. 2903.11 and 2941.145, and one count of tampering with evidence in violation of R.C. 2921.12. A jury trial commenced on December 14, 2015. The jury found appellant guilty of the two felonious assault counts with the attendant firearm specifications and the tampering count, and not guilty of the murder count. By judgment entry filed December 30, 2015, the trial court sentenced appellant to an aggregate term of twenty-two years in prison.

{¶14} Appellant filed a direct appeal of his convictions and sentence in *State v. Burnett*, 5th Dist. Stark No. 2016CA00007, 2016-Ohio-7502 [*Burnett I*], motion for delayed appeal denied, 148 Ohio St.3d 1441, 2017-Ohio-1427, 72 N.E.3d 656. Appellant argued the trial court erred in its jury instruction on constructive possession and that his convictions were against the manifest weight and sufficiency of the evidence. We disagreed, overruled both assignments of error, and affirmed the convictions and sentence.

{¶15} On February 28, 2017, appellant filed a pro se petition for post-conviction relief, arguing he received ineffective assistance of counsel because counsel failed to investigate promising leads and that he was improperly sentenced upon two allied offenses of similar import. Appellee responded on March 16, 2017. The trial court denied the petition in a judgment entry dated March 21, 2017.

{¶16} Appellant now appeals from the judgment entry of the trial court denying his petition for post-conviction relief.

{¶17} Appellant raises two assignments of error:

ASSIGNMENTS OF ERROR

{¶18} "I. INEFFECTIVE ASSISTANCE OF COUNSEL" (*sic*).

{¶19} "II. ALLIED OFFENSES OF SIMILAR IMPORT" (*sic*).

ANALYSIS

I.

{¶20} In his first assignment of error, appellant argues he received ineffective assistance of counsel because counsel failed to call a witness named Joseph Williams to testify in his defense. We disagree.

{¶21} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that trial counsel acted incompetently. *See*, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). In assessing such claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689, citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158 (1955).

{¶22} "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland,* 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." *Id.* at 690.

{¶23} Even if a defendant shows that counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show that "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694.

{¶24} At trial, Albert Magee testified another man was present the evening of August 10, 2015, drinking beer with Magee and Archie: Joe Williams. Williams was present in the front of the house when Magee observed the Edwards vehicle drive by. Magee also mentioned Williams standing "in front of the porch" when the two men suddenly came out of the alley and started shooting, but he made no mention of Williams after that. It is not clear from Magee's testimony where Williams was when the shootings occurred, or even if he was still present. Williams was not called as a witness by either party. In our review of the trial record, there is no mention of Williams by any other witness.

{¶25} We have reviewed appellant's petition before the trial court for further explanation of Williams' purported role because we are unable to ascertain from his brief why he believes Williams would have been a key defense witness. In his petition, appellant asserts Williams allegedly testified at the preliminary hearing and before the grand jury, and was on appellee's witness list as a potential trial witness. From our review of the record, we conclude appellant's insistence that Williams could have provided exculpatory testimony is mere self-serving speculation because no testimony by Williams exists. His argument that counsel was ineffective in failing to call Williams as a defense witness has no evidentiary support. Appellant cannot show that if defense trial counsel had called Williams as a witness, appellant would have been acquitted.

{¶26} Appellant's claim with respect to both performance and prejudice rests on mere speculation, and "[s]uch speculation is insufficient to establish ineffective

assistance." *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 119, citing *State v. Perez,* 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 217; *State v. Were,* 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 219; *State v. Elmore,* 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N.E.2d 547, ¶ 121.

{¶27} We are unwilling to speculate the outcome of the trial would have been different but for failing to call Williams as a witness, and therefore find appellant did not receive ineffective assistance of counsel. See, *State v. Ducker*, 5th Dist. Stark No. 2012CA00193, 2013-Ohio-3658; *State v. Poulton,* 5th Dist. Muskingum No. CT2013–0030, 2014–Ohio–1198, appeal not allowed*,* 2014–Ohio–2487, 139 Ohio St.3d 1420, 10 N.E.3d 739. As appellee points out, we already found in *Burnett I*, supra, that appellant's convictions are not against the manifest weight and sufficiency of the evidence.

{¶28} Appellant has not demonstrated that the trial court erred in overruling the petition for post-conviction relief on the grounds of ineffective assistance of counsel. Appellant's first assignment of error is overruled.

II.

{¶29} In his second assignment of error, appellant argues his two convictions of felonious assault were allied offenses of similar import which should have merged for purposes of sentencing. We disagree.

{¶30} R.C. 2941.25 states:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶31} Appellant argues his two convictions of felonious assault should have merged for sentencing purposes.[1] In *State v. Jackson*, the Ohio Supreme Court instructed Ohio courts to utilize the allied-offenses analysis of *State v. Ruff*, in which the Court applied a three-part test to determine whether a defendant can be convicted of multiple offenses:

> As a practical matter, when determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must ask three questions when the defendant's conduct supports multiple offenses: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.

[1] As appellee acknowledges, appellant's allied-offenses argument is not barred by res judicata. *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 26 [imposing separate sentences for allied offenses of similar import is contrary to law and such sentences are void, thus res judicata does not preclude a court from correcting those sentences even after a direct appeal].

State v. Jackson, 149 Ohio St.3d 55, 2016-Ohio-5488, 73 N.E.3d 414, ¶ 128, reconsideration denied, 147 Ohio St.3d 1439, 2016-Ohio-7677, 63 N.E.3d 157, and cert. denied, 137 S.Ct. 1586, 197 L.Ed.2d 714 (2017), citing *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 31.

{¶32} Appellant's argument fails, however, because each felonious assault conviction represents a different victim, Archie and Magee. In *Ruff,* the Court noted two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable. *Ruff*, supra, 143 Ohio St.3d 114 at paragraph two of the syllabus. In the instant case, we have separate victims and separate, identifiable harm. Appellant was therefore properly convicted of and sentenced upon two counts of felonious assault.

{¶33} Appellant's allied-offenses argument is not well-taken and his second assignment of error is overruled.

CONCLUSION

{¶34} Appellant's two assignments of error are overruled and the judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, P.J.,

Wise, John, J. and

Baldwin, J., concur.