[Cite as *State v. Peaks*, 2024-Ohio-1678.]

Released 4/22/24

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 23CA1
	:	
v.	:	
	:	DECISION AND
JASON A. PEAKS,	:	JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	

APPEARANCES:

Byron L. Potts, Byron L. Potts & Co., L.P.A., Columbus, Ohio, for Appellant.

Andrew Noe, Gallipolis City Solicitor, Gallipolis, Ohio, for Appellee.

Smith, P.J.

{¶1} Appellant, Jason A. Peaks, appeals the judgment of the Gallipolis Municipal Court convicting him of sexual imposition, a third-degree misdemeanor in violation of R.C. 2907.06(A)(1). On appeal, Peaks raises two assignments of error contending: 1) that the State's evidence was insufficient to support a conviction for sexual imposition and that his conviction was also against the manifest weight of the evidence; and 2) that he received ineffective assistance of counsel. However, because we find that Peaks' conviction for sexual imposition was supported by sufficient evidence and was not against the manifest weight of

the evidence, his first assignment of error has no merit and is overruled. Further, because we find that Peaks has failed to demonstrate deficient performance on the part of his trial counsel, his second assignment of error is also overruled. Accordingly, having found no merit to either of the assignments of error raised on appeal, the judgment of the trial court is affirmed.

FACTS

{¶2} On July 20, 2022, Peaks was charged with unlawful restraint, a third-degree misdemeanor in violation of R.C. 2905.03(B), and sexual imposition, a third-degree misdemeanor in violation of R.C. 2907.06(A)(1). Both charges stemmed from events that occurred the evening prior involving M.P., the victim herein. The matter was tried to the court on December 8, 2022. The State presented four witnesses, which included the victim and two of her friends, Brandy Hoagland and Brice Pettit. Gary Waldron, the Gallipolis police officer who responded to the scene, also testified on behalf of the State. Peaks testified in his own defense and presented no other witnesses.

{¶3} The victim testified that she knew Peaks through Monica Penick, who was like a second mother to her. The victim had been living in a homeless shelter and was driving a van provided to her by Penick. When the van broke down on July 19, 2022, the victim testified that she called Penick, who was of out of town.

She testified that Penick sent her boyfriend, Peaks, to assist her. Peaks was known to the victim and had assisted the victim on previous occasions.

{¶4} The victim testified that Peaks picked up her and her friends and took them to the parking lot where her van had been left. She testified that when Peaks arrived, he had been drinking and that he insisted that she sit in the truck with him and that the others ride in the bed of the truck. She testified that while trying to get the van started, Peaks kept getting too close to her and was touching her breasts and butt. She testified that she told him to stop, but he continued. She stated that Peaks actually walked over to her and slapped her butt as she was trying to talk to Hoagland, who wasn't feeling well and "was about to have a seizure." The victim testified that she and Hoagland were able to walk away from Peaks a few times while he was working on her van, and then the two eventually just got into her van and waited. She testified that when Peaks left to go buy a battery, they called the police. The victim, Hoagland, and Pettit all provided written statements to the police officer upon his arrival.

{¶5} Hoagland testified that Peaks had been drinking and that he would not stop touching the victim. She testified that Peaks kept trying to hug the victim and in doing so, he touched her breasts. She testified that Peaks also touched the victim's butt. She stated that she heard the victim tell Peaks to stop more than once. Pettit was seated inside the van during most of the incident, however, he too

testified that Peaks had been drinking and that he witnessed Peaks touch underneath the victim's breasts, as well as touch the victim's neck and "rectum." He testified that he heard the victim tell Peaks "no" multiple times and to quit touching her.

{¶6} Gallipolis police officer, Gary Waldron, also testified at trial. He testified that he responded to the scene to find the victim upset. He testified that he took statements from the victim and the two witnesses. He testified that Peaks appeared "calm and collected." He explained that although he offered to allow Peaks to provide a written statement, he declined, stating that he would give his statement to "the Judge in person because he believed it was all a setup." Waldron further testified that while conducting a search of Peaks' person incident to his arrest, he located a condom "loose in [Peaks'] pocket." He testified that Peaks stated he had found it on the ground and picked it up.

{¶7} Peaks was the only defense witness. He testified that Monica Penick did not call and ask him to work on the victim's van, but rather, that the victim called him directly and said she needed "a jump." He explained that he had taken the victim to buy a battery in the days leading up to the incident, and had also taken her to the BMV to get the title to the van changed to her name. He testified that he had also taken her to the grocery store and purchased her groceries. He denied touching the victim's butt or breasts, or touching her in any other

inappropriate way on the night of the incident. He essentially testified that the entire situation had been fabricated.

{¶8} The trial court ultimately found Peaks not guilty of the unlawful restraint charge, but it found him guilty of sexual imposition. In a sentencing entry dated December 8, 2022, Peaks was sentenced to 60 days in jail and was classified as a Tier I sexually oriented offender. It is from this judgment that Peaks now brings his timely appeal, setting forth two assignments of error for our review.

ASSIGNMENTS OF ERROR

I. THE STATE'S EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR SEXUAL IMPOSITION AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE ALL THREE INCIDENT WITNESSES SUFFERED FROM KNOWN BIAS, AND WERE IMPEACHED.

II. MR. PEAKS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO CALL MONICA PENICK AS A WITNESS FOR THE DEFENSE.

ASSIGNMENT OF ERROR I

{¶9} In his first assignment of error, Peaks contends that his conviction for sexual imposition was not supported by sufficient evidence and that it was against the manifest weight of the evidence. His arguments are based upon his assertion that the State's trial witnesses "suffered from known bias, and were impeached." The State responds by arguing that substantial evidence was provided to support

the trial court's finding of guilt, that the trial court was aware there were inconsistencies between the witness statements and witness testimonies, but that credibility was for the trier of fact to resolve.

Standard of Review

{¶10} A claim of insufficient evidence invokes a due process concern and raises a question of whether the evidence is legally sufficient to support the verdict as a matter of law. *See State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "Whether the evidence is legally sufficient to sustain a verdict is a question of law." *Id.* "Therefore, our review is de novo." *State v. Groce*, 163 Ohio St.3d 387, 2020-Ohio-6671, 170 N.E.3d 813, ¶ 7, citing *In re J.V.*, 134 Ohio St.3d 1, 2012-Ohio-4961, 979 N.E.2d 1203, ¶ 3.

{¶11} When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. *See Thompkins* at syllabus. The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense proven beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Jenks*, 61 Ohio St.3d 259, 273, 574 N.E.2d 492 (1991). Furthermore, a reviewing

court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *Thompkins* at 390 (Cook, J., concurring).

{¶12} Thus, when reviewing a sufficiency-of-the-evidence claim, an appellate court must construe the evidence in a light most favorable to the prosecution. *See State v. Hill*, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); *State v. Grant*, 67 Ohio St.3d 465, 477, 620 N.E.2d 50 (1993). A reviewing court will not overturn a conviction on a sufficiency-of-the-evidence claim unless reasonable minds could not reach the conclusion that the trier of fact did. *State v. Tibbetts*, 92 Ohio St.3d 146, 162, 749 N.E.2d 226 (2001); *State v. Treesh*, 90 Ohio St.3d 460, 484, 739 N.E.2d 749 (2001).

{¶13} However, when an appellate court considers a claim that a conviction is against the manifest weight of the evidence, the court must dutifully examine the entire record, weigh the evidence and all reasonable inferences, and consider the witness credibility. *See State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 151; citing *State v. Thompkins*, *supra*, at 387. A reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve. *See State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Murphy*, 4th Dist. Ross No. 07CA2953, 2008-Ohio-1744, ¶ 31. "Because a trier of fact sees and hears the witnesses, appellate courts * * * will also afford substantial

deference to a trier of fact's credibility determinations." *State v. Colonel*, 2023-Ohio-3945, -- N.E.3d --, ¶ 54 (4th Dist.), citing *State v. Schroeder*, 2019-Ohio-4136, 147 N.E.3d 1, ¶ 61 (4th Dist.).

{¶14} As the Supreme Court of Ohio explained in *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517:

> " '[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment must be made in favor of the judgment and the finding of facts.
>
> * * *
>
> If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.' "

Eastley, supra at ¶ 21, quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273, FN. 3 (1984), in turn quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, 191-192 (1978).

Thus, an appellate court will leave the issues of weight and credibility of the evidence to the fact-finder, as long as a rational basis exists in the record for its decision. *See State v. Picklesimer*, 4th Dist. Pickaway No. 11CA9, 2012-Ohio-1282, ¶ 24; *see also State v. Howard*, 4th Dist. Ross No. 07CA2948, 2007-Ohio-6331, ¶ 6 ("We will not intercede as long as the trier of fact has some factual and rational basis for its determination of credibility and weight").

{¶15} Once the reviewing court finishes its examination, the court may reverse the judgment of conviction only if it appears that the fact-finder, when resolving the conflicts in evidence, "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist. 1983). *See also Thompkins, supra*, at 387. If the prosecution presented substantial credible evidence upon which the trier of fact reasonably could conclude, beyond a reasonable doubt, that the essential elements of the offense had been established, the judgment of conviction is not against the manifest weight of the evidence. *See State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978), syllabus, superseded by state constitutional amendment on other grounds in *State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668 (1997); *see also Eastley* at ¶ 12 and *Thompkins* at 387 (explaining that a judgment is not against the manifest weight of the evidence when "the greater amount of credible evidence" supports it). Thus, " '[w]hen conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony.' " *State v. Cooper*, 170 Ohio App.3d 418, 2007-Ohio-1186, 867 N.E.2d 493, ¶ 17 (4th Dist.), quoting *State v. Mason*, 9th Dist. Summit No. 21397, 2003-Ohio-5785, ¶ 17. Instead, a reviewing court should find a conviction against the manifest weight of the evidence only in the " ' "exceptional case in which the

evidence weighs heavily against the conviction." ' " *State v. Lindsey*, 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000), quoting *Thompkins* at 387, in turn quoting *Martin* at 175.

Legal Analysis

{¶16} The record before us indicates that Peaks was convicted of sexual imposition, a third-degree misdemeanor in violation of R.C. 2907.06(A)(1), which provides as follows:

> (A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:
>
> (1) The offender knows that the sexual contact is offensive to the other person, or one of the other persons, or is reckless in that regard.

R.C. 2907.01(B) defines "sexual contact" as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

{¶17} As set forth above, the culpable mental state for a violation of R.C. 2907.06(A)(1) is either knowledge or recklessness. Thus, in order to obtain a conviction for sexual imposition in violation of R.C. 2907.06(A)(1), the State is required to prove that the defendant knew that the sexual contact was offensive, or

that the defendant was reckless with respect to whether the sexual contact was offensive. "A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). R.C. 2901.22(B) further states that:

> A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

"A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22(C). "A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist." *Id.*

{¶18} The Third District Court of Appeals has further observed as follows regarding the offense of sexual imposition:

> In addition, "[t]he definition of sexual contact includes an express culpability requirement of 'purpose.' " *State v. Curtis*, 12th Dist. Butler No. CA2008-01-008, 2009-Ohio-192, ¶ 90, citing R.C. 2907.01(B) and *State v. Mundy*, 99 Ohio App.3d 275, 295 (2d Dist.1994); *State v. Dunlap*, 129 Ohio St.3d 461, 2011-Ohio-4111, ¶ 23-28. "A person acts purposely when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain

> nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature." R.C. 2901.22(A). " '[T]here is no requirement that there be direct testimony regarding sexual arousal or gratification.' " *State v. Young*, 12th Dist. Butler No. CA2018-03-047, 2019-Ohio-912, ¶ 47, quoting *State v. English*, 12th Dist. Butler No. CA2013-03-048, 2014-Ohio-441, ¶ 69. Rather, " '[w]hether the touching was performed for the purpose of sexual arousal or gratification is a question of fact to be inferred from the type, nature, and circumstances of the contact.' " *Id.*, quoting *State v. Gesell*, 12th Dist. Butler No. CA2005-08-367, 2006-Ohio-3621, ¶ 25.

State v. Wrasman, 3rd Dist. Auglaize No. 2-20-03, 2020-Ohio-6887, ¶ 10.

{¶19} Peaks contends that the evidence was insufficient to support his conviction and that his conviction was against the manifest weight of the evidence because "[t]he three witnesses called by the State suffered from bias, credibility issues, or both." Peaks argues that although the trial court judge correctly concluded that the evidence did not support the charge of unlawful restraint, "the judge failed to consider the bias and credibility of the witnesses as it pertained to the charge of sexual imposition." Peaks argues that because Brandy Hoagland testified that she was the victim's best friend, and because Brice Pettit testified that he had a "very close familial-like relationship" with the victim and considered her a "sister," that they "demonstrated bias." He further argues that "all three incident witnesses suffer from severe credibility issues."

{¶20} More specifically, Peaks argues that all three witnesses testified that Peaks "forced or attempted to force M.P. into his truck," but yet M.P. admitted on

re-cross that Peaks "never forced nor tried to force her into his car." Peaks contends that the trial judge "appropriately relied on this testimony" in finding him not guilty of the unlawful restraint charge, the judge noting "that the testimony was incongruent with the witnesses' written statements at the time of the incident[,]" but that "the judge did not consider these false statements' impact on the witnesses' credibility." Peaks also challenges the victim's testimony regarding the fact that it was her practice to always bring Hoagland and Pettit with her if she was going to be alone with a man, considering that she also testified that Peaks had taken her grocery shopping and paid for her groceries earlier that day, and that Peaks had a history of helping her.

{¶21} Peaks further argues that there were inconsistencies in not only the victim's description of the events, but in the other witnesses' descriptions. For instance, he argues that in her written statement the victim stated that Peaks was "trying to touch [her] boobs." However, in the same statement, she stated that Peaks "touched her breasts."[1] Further, in Pettit's written statement, Pettit stated that Peaks touched the victim "below her breasts[,]" while Hoagland testified that Peaks was trying to hug the victim.[2] Peaks also argues, with regard to the claim

[1] The second reference to Peaks' conduct in the victim's written statement was that Peaks touched "her boobs." Thus, Peaks appears to be trying to draw a distinction between the victim reporting that he was *trying* to touch her "boobs" versus *actually touching* them.

[2] The transcript actually reveals that Hoagland testified that " [l]ike when he would grab her, trying to hug her he would touch her on her breast. I seen that once myself and then like when he would hold her he grabbed her butt and it make [sic] her feel really uncomfortable and me being her friend was like, okay, well this isn't okay."

that Hoagland suffered a seizure during the timeframe in question, that "anyone with a seizure is likely to have memory problems immediately afterward[,]" and thus, that her ability to recall the events of the evening "is subject to question."

{¶22} However, as set forth above, when reviewing whether a conviction is supported by sufficient evidence, it is not this Court's role to question whether the evidence is to be believed, but rather, we must consider whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. Furthermore, in our consideration, we must view the evidence in a light most favorable to the prosecution. As noted by Peaks, the victim's testimony regarding her allegation that Peaks forced her into his truck was inconsistent. Further, in our view, the line of questioning that the victim was presented with was very hard to follow as it seemed to jump back and forth in time between when Peaks initially picked them up and when Peaks appeared to be trying to get them to leave after it was clear the van could not be started. As set forth above, the trial court found Peaks not guilty of the unlawful restraint charge, which was based upon the allegation that Peaks forced, or tried to force, the victim into his truck.

{¶23} However, the trial court heard testimony from the victim and two eyewitnesses regarding the elements of the sexual imposition charge and although each had slight variations in their recall of the events, their testimony was more consistent than it was different. The victim, Hoagland and Pettit all testified that

Peaks had been drinking at the time the incident occurred. Both the victim and Hoagland, who were standing together outside of the vehicles, testified that Peaks was too close and that he touched the victim's breasts and buttocks, despite the victim repeatedly telling him to stop. Hoagland testified more specifically, stating that Peaks kept trying to hug the victim and in doing so, was touching her breasts. Pettit, who was seated inside the van during the majority of the incident, testified that he saw Peaks touch the victim below her breasts and he saw some "touching" and "grabbing" around the neck area. He also testified that Peaks touched the victim's "rectum." He further testified that he heard the victim tell Peaks "no" and to quit touching her multiple times.

{¶24} This testimony, if believed, supports the conviction for sexual imposition. Thus, we cannot conclude that Peaks' sexual imposition conviction was not supported by sufficient evidence. Further, based upon the record before us, we simply cannot conclude that the trial court lost its way or that this case constitutes an exceptional case where the evidence weighs heavily against the conviction. Despite Peaks' arguments that the eyewitnesses were biased or that their testimony lacked credibility, the trial court was in the best position to hear the testimony, observe the witnesses and evidence, and determine their reliability. Moreover, the trial court, " 'sitting as the trier of fact, [was] free to believe all, part or none of the testimony of any witness who appears before it.' " *State v. Reyes*-

Rosales, 4th Dist. Adams No. 15CA1010, 2016-Ohio-3338, ¶ 17, quoting *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23. Thus, "[w]e defer to the trier of fact on these evidentiary weight and credibility issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility." *State v. Hess*, 4th Dist. Meigs No. 20CA1, 2012-Ohio-1248, ¶ 16, citing *State v. Reyes-Rosales, supra*, at ¶ 17 and *State v. Koon*, 4th Dist. Hocking No. 15CA17, 2016-Ohio-416, ¶ 18.

{¶25} In summary, the trial court was free to accept the State's evidence and reject Peaks' testimony that this entire ordeal was fabricated and never occurred. Moreover, the record clearly demonstrates that the trial court grappled with some of the conflicting testimony that was offered by the State, as evidenced by its not guilty finding on the unlawful restraint charge. Our review of that testimony indicates that the testimony offered in support of the unlawful restraint charge was not so much inconsistent, as it was confusing and at times, incomplete. However, the fact that there were some inconsistencies in each witnesses' reporting of the events as compared to one another, and as compared to their own prior statements, does not warrant a finding by this Court that the trial court lost its way in reaching its verdict, thus resulting in a manifest miscarriage of justice. Rather, the record before us indicates that the trial court grappled with the evidence

before it and resolved the inconsistencies in favor of the State on the sexual imposition charge, which was within its province to do.

{¶26} In light of the foregoing, we conclude Peaks has failed to demonstrate that his conviction for sexual imposition was not supported by sufficient evidence or that it was against the manifest weight of the evidence. Accordingly, because we find no merit to the arguments raised under Peaks' first assignment of error, it is overruled.

ASSIGNMENT OF ERROR II

{¶27} In his second assignment of error, Peaks contends he received ineffective assistance of counsel. Peaks argues that his trial counsel was ineffective for failing to call his girlfriend, Monica Penick, as a defense witness at trial. The State responds by arguing that defense counsel's failure to call a witness at trial who was out of town and thus, not even present at the scene of the incident, constituted neither deficient, nor prejudicial conduct by counsel.

Standard of Review

{¶28} To establish constitutionally ineffective assistance of counsel, a criminal defendant must show: (1) that his or her counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense and deprived him or her of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). *Accord State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904

(2001); *State v. Goff*, 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998). "In order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95. Further, "[t]o show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id.* "Failure to establish either element is fatal to the claim." *State v. Jones*, 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 14.

{¶29} When considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Strickland* at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.*, quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955). " 'A properly licensed attorney is presumed to execute his [or her] duties in an ethical and competent manner.' " *State v. Taylor*, 4th Dist. Washington No. 07CA11, 2008-Ohio-482, ¶ 10, quoting *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were so serious that he

or she failed to function as the counsel guaranteed by the Sixth Amendment. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 61.

{¶30} "Furthermore, courts may not simply assume the existence of prejudice, but must require that prejudice be affirmatively demonstrated." *State v. Walters*, 4th Dist. Washington Nos. 13CA33, 13CA36, 2014-Ohio-4966, ¶ 24; *State v. Jones*, 2018-Ohio-239, 104 N.E.3d 34, ¶ 21-24 (4th Dist.). We have repeatedly recognized that speculation is insufficient to establish the prejudice component of an ineffective assistance of counsel claim. *E.g. State v. Dailey*, 4th Dist. Adams No. 18CA1059, 2018-Ohio-4315, ¶ 33 and cases cited therein; *State v. Thacker*, 4th Dist. Lawrence No. 19CA18, 2021-Ohio-2726, ¶ 54-57.

Legal Analysis

{¶31} "Generally, the decision whether to call a witness 'falls within the rubric of trial strategy and will not be second-guessed by a reviewing court.' " *State v. Teets*, 4th Dist. Pickaway No. 17CA21, 2018-Ohio-5019, ¶ 20, quoting *State v. Treesh*, 90 Ohio St.3d 460, 490 (2001). *See also State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, ¶ 127 (noting that decisions about "which witnesses to call * * * are committed to counsel's professional judgment"); *State v. Betts*, 4th Dist. No. 03CA25, 2005-Ohio-2913, ¶ 18. In in order to establish deficient performance by counsel as a result of failure to call a necessary witness, a defendant must make a showing of prejudice. *State v. Purvis-Mitchell*, 4th Dist.

Washington No. 17CA30, 2018-Ohio-4032, ¶ 56. Moreover, it has been held that defendants generally have no constitutional right to determine trial tactics and strategy of counsel. *See State v. Groves*, 4th Dist. Scioto No. 20CA3904, 2022-Ohio-443, ¶ 58; *State v. Cowans*, 87 Ohio St.3d 68, 72, 717 N.E.2d 298 (1999); *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 150. " 'When there is no demonstration counsel failed to research the facts or the law or counsel was ignorant of a crucial defense, a reviewing court defers to counsel's judgment in the matter.' " *State v. Crank*, 5th Dist. Stark No. 2016CA00042, 2016-Ohio-7203, ¶ 18, quoting *State v. Clayton*, 62 Ohio St.2d 45, 49, 402 N.E.2d 1189 (1980). Thus, witness presentation at trial, questioning, and cross-examination usually fall within the ambit of trial strategy. Furthermore, debatable trial tactics do not generally establish ineffective assistance of counsel. *See Groves, supra*; *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 45.

{¶32} Here, Peaks argues that his counsel was deficient and that he suffered prejudice as a result of his trial counsel's failure to call Peaks' girlfriend, Monica Penick, as a witness at trial. He relies on his prior argument that Hoagland and Pettit were biased in favor of the victim and had no "bonds" toward him. He argues that "[a]lthough Monica was not present at the scene, she could have resolved several contentious issues, including who contacted Mr. Peaks for help on

the day in question, the nature of the relationships, and whether she asked Mr. Peaks to help M.P. and the confusion surrounding the automobiles."

{¶33} As set forth above, the decision whether or not to call a witness at trial is generally left to the discretion of counsel, falls within the rubric of trial strategy, and will not be second-guessed by this Court. Further, even assuming arguendo that counsel may have been deficient in failing to call Penick at trial, the testimony Peaks argues she would have provided would not have related to any material fact at issue in the case. Who contacted Peaks, the nature of the relationships of the witnesses, and the ownership of the automobiles had no bearing on any of the material facts or the elements of the offense for which Peaks was convicted. Despite the fact that the trial court made a statement on the record wondering why Penick was not called as a witness, "since she apparently played a major part in this underlying event[,]" the record is clear that Penick was not present the night in question and she was not a witness to any of the events that occurred. Thus, we are not persuaded by Peaks' argument that he was prejudiced by his trial counsel's failure to call her as a witness.

{¶34} Furthermore, as was discussed above related to our analysis of Peaks' first assignment of error, Peaks' conviction was supported by sufficient evidence and was not against the manifest weight of the evidence. Thus, we cannot

conclude that Peaks has demonstrated a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.

{¶35} Accordingly, his argument that he received ineffective assistance of counsel is without merit and it is therefore overruled.

{¶36} Having found no merit to either of Appellant's assignments of error, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Gallipolis Municipal Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

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

Abele, J. and Wilkin, J. concur in Judgment and Opinion.

For the Court,

_____

Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.