[Cite as *State v. Halsell*, 2009-Ohio-4166.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. TYREE D. HALSELL Appellant	C.A. No. 24464 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 08 03 0731

DECISION AND JOURNAL ENTRY

Dated: August 19, 2009

SLABY, Judge.

{¶1} Defendant-Appellant, Tyree D. Halsell, appeals his convictions and sentence in the Summit County Court of Common Pleas. This Court affirms in part and reverses in part.

{¶2} Dion Stephens was shot in the back as he ran from an altercation on the evening of April 18, 2008. A grand jury indicted Defendant on charges of attempted murder in violation of R.C. 2903.02(A) and felonious assault in violation of R.C. 2903.11(A)(1)/(2), each with a firearm specification pursuant to R.C. 2941.145, and on one charge of having weapons while under disability in violation of R.C. 2923.13(A)(1)/(3). The indictment issued as a supplement to the indictment in case number 2008-03-0731, which charged Defendant with two counts of receiving stolen property in violation of R.C. 2913.51(A); driving under suspension in violation of R.C. 4510.11; illegal use or possession of drug paraphernalia in violation of R.C. 2925.14(C)(1); possession of marijuana in violation of R.C. 2925.11; operating a motor vehicle without a tail light and rear illumination of the license plate in violation of R.C. 4513.05; and

improper registration in violation of R.C. 4549.08. These charges arose from an incident that occurred on March 2, 2008, and which was unrelated to the shooting of Dion Stephens.

{¶3} Defendant moved to sever the charges set forth in the original and supplemental indictments for purposes of trial pursuant to Crim.R. 14, but did not object to joinder of the offenses in the indictment under Crim.R. 8. The trial court denied Defendant's motion. A jury found Defendant guilty of attempted murder and felonious assault, with the accompanying firearm specifications, and of having weapons while under disability, receiving stolen property, driving under suspension, and illegal use or possession of drug paraphernalia. The remaining minor misdemeanor charges were tried to the court, which found Defendant guilty of each. Defendant moved for a new trial pursuant to Crim.R. 33(A)(1) and (A)(4). The trial court denied the motion, sentenced Defendant to an aggregate prison term of 16 years, assessed $450 in fines against him, and ordered him to make restitution. Defendant timely appealed. His assignments of error are rearranged for ease of disposition.

ASSIGNMENT OF ERROR I

> "TRIAL COURT ERRED TO APPELLANT'S PREJUDICE BY DENYING APPELLANT'S MOTION TO FOR [SIC] SEPARATE TRIAL OF THE RECEIVING STOLEN PROPERTY CHARGES AND THE ATTEMPTED MURDER CHARGES IN VIOLATION OF APPELLANT'S RIGHTS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS."

{¶4} Defendant's first assignment of error is that the trial court deprived him of his right to due process by permitting the charges arising from the March 2008 incident and the shooting of Dion Stephens to be tried together. As Defendant concedes, the motion to sever the counts was not renewed at the close of evidence. This error was, therefore, forfeited for purposes of appeal. See *State v. Hatfield*, 9th Dist. No. 23716, 2008-Ohio-2431, at ¶13-15; *State*

v. Williams, 9th Dist. No. 23560, 2008-Ohio-1048, at ¶4-7. Defendant's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE IN FAILING TO CONDUCT ANY FAIR INQUIRY BEFORE AND, WITHOUT ANY REMEDIAL ACTION, IN SUMMARILY DENYING APPELLANT'S MOTIONS FOR DISMISSAL OF THE JURY PANEL AND MISTRIAL WHERE POTENTIAL JURORS WERE PERMITTED TO SEE APPELLANT IN FULL JAILHOUSE GARB AND SHACKLES IMMEDIATELY BEFORE TRIAL AND DURING TRIAL JURORS SAW HIM ESCORTED IN HANDCUFFS."

{¶5} Defendant's second assignment of error is that the trial court erred by failing to grant a mistrial upon discovering that Defendant was escorted through the courthouse in jail garb and shackles past the room where potential jurors gathered before receiving a jury assignment. He also argues that he was entitled to a mistrial because the jury may have seen him in handcuffs during a break in the proceedings. We disagree.

{¶6} This Court reviews the denial of a motion for mistrial for an abuse of discretion. See *State v. Patel*, 9th Dist. No. 24024, 2008-Ohio-4692, at ¶46. Under this standard, we must determine whether the trial court's decision was arbitrary, unreasonable, or unconscionable – not merely an error of law or judgment. See *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶7} A defendant cannot be compelled to stand trial while dressed in prison attire. *Estelle v. Williams* (1976), 425 U.S. 501, 512. As the Court observed in *Estelle*, however, "[T]he courts have refused to embrace a mechanical rule vitiating any conviction, regardless of the circumstances, where the accused appeared before the jury in prison garb. Instead, they have recognized that the particular evil proscribed is *compelling* a defendant, against his will, to be tried in jail attire." (Emphasis added.) Id. at 507. Similarly, a defendant may not be tried in visible physical restraints in the absence of a particularized need such as "physical security,

escape prevention, or courtroom decorum." *Deck v. Missouri* (2005), 544 U.S. 622, 628. When a jury's view of the defendant in restraints is "brief, inadvertent, and outside the courtroom," there is but a slight risk of prejudice. *State v. Kidder* (1987), 32 Ohio St.3d 279, 286.

{¶8} In this case, Defendant alleges two brief incidents in which members of the jury may have seen him in jail clothing or in shackles. In the first, Defendant claimed that he entered the courthouse in jailhouse garb and restraints and was led by deputy sheriffs past the room to which jurors report for assignment. He did not allege that the jury empanelled to try him or even the jury assembled for voir dire in his case actually saw him in jailhouse garb and shackles, but that the entire pool of jurors from which his jury was ultimately chosen *may have* seen him. In response to the trial court's inquiry during voir dire, none of the jurors indicated that they had seen Defendant before. The second incident occurred during a break in proceedings when, according to Defendant, he was led through the hallway in handcuffs while jurors were present in the vicinity. Defendant represented to the trial court that the deputy sheriff "placed his notes over the top of his hands" to conceal the handcuffs.

{¶9} Neither of these incidents rises to the level of constitutional concern recognized by the Supreme Court in *Estelle* and *Deck*. Defendant was not compelled to stand trial in prison attire, and none of the jurors empanelled in his case stated that they had seen Defendant prior to voir dire. Even assuming that Defendant's handcuffs were visible during the break in proceedings and that jurors were in the immediate area, the brief and inadvertent encounter outside the courtroom caused minimal risk of prejudice to Defendant. The trial court did not abuse its discretion by denying Defendant's motions for mistrial, and his second assignment of error is overruled.

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED TO APPELLANT'S PREJUUDICE [*SIC*] *BY* ALLOWING THE STATE TO INTRODUCE OVER OBJECTION PREJUDICIAL 'OTHER ACTS' TESTIMONY DENYING DUE PROCESS."

{¶10} Defendant's third assignment of error is that the trial court abused its discretion by allowing witnesses to testify regarding criminal acts that he committed in the past when their testimony did not fall within any exception set forth in Evid.R. 404(B). This assignment of error appears to relate to Defendant's convictions for attempted murder, felonious assault, and possessing a weapon under disability.

{¶11} Trial courts possess broad discretion in determining the admissibility of evidence. *State v. Maurer* (1984), 15 Ohio St.3d 239, 265, citing *State v. Hymore* (1967), 9 Ohio St.2d 122, 128. As such, this court will not overturn a trial court's evidentiary determination in the absence of an abuse of discretion that resulted in material prejudice to the defendant. *State v. Ristich*, 9th Dist. No. 21701, 2004-Ohio-3086, at ¶9.

{¶12} Evidence of other acts is not admissible to prove a propensity toward criminal conduct, but may be offered for one or more of the purposes set forth in Evid.R. 404(B), "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The connection between other acts and the crime at issue cannot be remote or inconsequential. Instead, "[p]roof of one of the purposes set forth in Evid.R. 404(B) must go to an issue which is material in proving the defendant's guilt[.]" *State v. Workman*, 9th Dist. No. 24437, 2009-Ohio-2995, at ¶16.

{¶13} Defendant challenges the testimony of four witnesses. His arguments with respect to two, Sergeant Michael Yohe and Office Brian Boss, relate to their testimony for the purpose of establishing the element of disability in connection with the charge of possessing a

weapon under disability. When a prior conviction is an element of the charged offense, it may be admitted into evidence for the purpose of proving that element. *State v. Thompson* (Mar. 1, 2000), 9th Dist. No. 98CA007112, at *4. R.C. 2945.75(B)(1) explains the means of proving a prior conviction as an element of a charged offense:

> "Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction."

"Hence, even if a defendant's prior convictions are inadmissible under Evid.R. 404(B) and R.C. 2945.59, evidence of prior convictions maybe [*sic*] admissible under R.C. 2945.75." *Thompson* at *4. Facts surrounding a prior conviction that are beyond what is necessary pursuant to R.C. 2945.75, however, are admissible only to the extent permitted by Evid.R. 404(B). See id.

{¶14} Sergeant Yohe identified a judgment of conviction that reflected Defendant's prior conviction for possession of marijuana, and he identified Defendant as the individual whom he had arrested in 2004 in connection with that case. He did not testify regarding any of the facts underlying the conviction. Because Defendant was charged with possessing a weapon while under disability, the State was required to prove the existence of the disability, and the testimony of Sergeant Yohe was consistent with the method of proof set forth in R.C. 2945.75(B)(1). Officer Boss testified similarly regarding a second conviction for possession of drugs. See *State v. Ware*, 8th Dist. No. 82644, 2004-Ohio-1791, at ¶22. Officer Boss's testimony was also offered pursuant to R.C. 2945.75(B) and not to prove conduct in conformity with the prior conviction. Defendant has not demonstrated error by the trial court in admitting this testimony. See, generally, App.R. 16(A)(7).

{¶15} The testimony of the remaining two witnesses is troublesome. Nono Loretta Toe testified that during the summer of 1999, she had a misunderstanding with Defendant. Ms. Toe

testified that her recollection of the incident was limited, but that she recalled being shot in the back with a BB gun. She identified Defendant as the person who shot the BB gun. Before Ms. Toe testified, the trial court admonished the jury to consider her testimony "for the limited purpose of showing this defendant's identity, plan, absence of mistake, or common scheme or mode of operation in the crime in question." Chris Carney, an officer of the Akron Police Department, testified regarding a second incident. After describing his background and experience in narcotics interdiction, Officer Carney stated that on November 25, 2002, he initiated a traffic stop related to suspected drug activity. He identified Defendant as a passenger in the car and stated, "When I got him out of the car for a pat-down, a gun fell from his waistband down his left pant leg. *** It was a .22 revolver with seven shots." Officer Carney also testified that the car in which Defendant was a passenger had been stolen and that crack cocaine was later found on Defendant's person. As with Ms. Toe, the trial court admonished the jury regarding the purpose for which the testimony was offered.

{¶16} Evidence of other acts that demonstrates an "idiosyncratic pattern of conduct" may be admissible under Evid.R. 404(B) for the purpose of proving identity. *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, at ¶46. See, also, *State v. Cromartie,* 9th Dist. No. 06CA0107-M, 2008-Ohio-273, at ¶9, 15. The lynchpin of admissibility in such cases is that the evidence of other acts must demonstrate a degree of peculiarity and commonality that give the evidence probative value with respect to the alleged perpetrator. See *Craig* at ¶44-46. Other incidents must form a "unique, identifiable plan of criminal activity" that, while not necessarily identical in all respects, is probative of the identity of the accused. *State v. Jamison* (1990), 49 Ohio St.3d 182, 183.

{¶17} In *Craig*, consequently, the Supreme Court of Ohio determined that because other acts evidence demonstrated similarly between the locations, idiosyncratic manner, and age of the victims involved in two rapes, "[t]he evidence of the first rape tend[ed] to show the identity of the perpetrator of the second." Id. at ¶44. This Court reached a similar conclusion in *Cromartie*, concluding that evidence of other attacks on former lovers by the defendant demonstrated a high level of peculiarity:

> "The other acts evidence in this case characterizes Defendant's persistent, threatening, and frequently violent reaction to rejection by his love interests. It demonstrates technological savvy, use of tools and weapons, destruction of physical property, false criminal allegations, and complaints about Defendant's own allegedly ill health, as well as repeated use of rental vehicles and the notably peculiar practice of hiding in the cargo areas of automobiles." Id. at ¶15.

See, also, *State v. Powers*, 12th Dist. No. CA2006-01-002, 2006-Ohio-6547, at ¶8-13. The admissibility of other acts evidence for this purpose, however, is not without limitation:

> "A certain *modus operandi* is admissible not because it labels a defendant as a criminal, but because it provides a behavioral fingerprint which, when compared to the behavioral fingerprints associated with the crime in question, can be used to identify the defendant as the perpetrator. Other-acts evidence is admissible to prove identity through the characteristics of acts rather than through a person's character. To be admissible to prove identity through a certain *modus operandi*, other-acts evidence must be related to and share common features with the crime in question." (Italics in original.) *State v. Lowe* (1994), 69 Ohio St.3d 527, 531.

When other acts evidence does not demonstrate a common modus operandi characterized by "behavioral fingerprints" that are unique enough to prove probative of identity, those acts – although perhaps criminal in and of themselves – are not admissible under Evid.R. 404(B). Id. at 531. As the *Lowe* Court concluded, "that evidence *** does not belong in th[e] case." Id. at 532.

{¶18} As our cases demonstrate, this Court continues to recognize the importance of other acts evidence that is properly admitted under Evid.R. 404(B). The evidence admitted in

this case, however, strains the rule to its breaking point. The testimony of Officer Carney and Ms. Toe does not serve to identify any peculiarities, idiosyncrasies, or pervasive modus operandi on the part of Defendant. The logic underlying the presentation of Officer Carney's testimony appears to be Defendant's proclivity to use a firearm based on the fact that he has carried one on his person in the past. The additional testimony regarding drugs on Defendant's person is entirely superfluous. In short, this testimony is a textbook example of improper character evidence. Ms. Toe's testimony is equally offensive to the Rule. The State invites this Court to accept that an incident involving a juvenile who fired a BB gun at a family friend under circumstances that the victim could not recall is probative of the identify of an attempted murderer later in life. This Court will not make that leap.

{¶19} We agree that the trial court abused its discretion by permitting other acts testimony by Officer Carney and Ms. Toe. Defendant's third assignment of error is sustained to the extent that it relates to their testimony and to Defendant's convictions for attempted murder, felonious assault, and possessing a weapon under disability, although it is overruled to the extent that it relates to the testimony of Sergeant Yohe and Officer Boss.

ASSIGNMENT OF ERROR V

"THE TRIAL COURT ERRED TO DEFENDANT'S PREJUDICE IN DENYING A MOTION FOR NEW TRIAL."

{¶20} In his fifth assignment of error, Defendant argues that the trial court abused its discretion by denying his motion for a new trial. Specifically, Defendant alleged that he was entitled to a new trial pursuant to Crim.R. 33(A)(1) for the reasons set forth in his second assignment of error. He also alleged that he was entitled to a new trial because his convictions for attempted murder, felonious assault, and possessing a weapon under disability were supported by insufficient evidence pursuant to Crim.R. 33(A)(4).

{¶21} Crim.R. 33 provides, in relevant part:

> "A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:
>
> (1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;
>
> ***
>
> (4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified[.]"

Resolution of a motion for a new trial rests within the discretion of the trial court and will only be disturbed on appeal when there has been an abuse of discretion. *State v. Haddix* (1994), 93 Ohio App.3d 470, 480.

{¶22} In our discussion of Defendant's second assignment of error, we concluded that the incidents cited by Defendant in which members of the jury might have seen him in prison clothing and restraints did not rise to a level of constitutional concern or potential prejudice that warrants a mistrial. We find our resolution of the second assignment of error dispositive of this one as well. Considering the speculative nature of Defendant's arguments, the fact that no members of the jury stated that they had seen Defendant before, and the brief, inadvertent, out-of-court nature of the possible encounters, this Court cannot conclude that Defendant's substantial rights were materially affected. The trial court did not abuse its discretion in this regard.

{¶23} Defendant's second basis for the motion for a new trial was the sufficiency of the evidence underlying his convictions for attempted murder, felonious assault, and possessing a weapon under disability. Although our resolution of Defendant's second assignment of error

results in a new trial on these charges, we must nevertheless address this portion of his fifth assignment of error as well. See *Hudson v. Louisiana* (1981), 450 U.S. 40, 43-44 (concluding that whether a determination that a conviction was based on insufficient evidence occurs in the context of a motion for acquittal or a motion for a new trial, the determination invokes the constitutional protections against double jeopardy).

{¶24} A challenge to sufficiency questions the adequacy of the evidence underlying a conviction. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. In reviewing a challenge to the sufficiency of the evidence:

> "[a]n appellate court's function *** is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

Our concern is the same whether sufficiency is raised in the context of Crim.R. 33(A)(4) or Crim.R. 29. See *State v. Gilfillan*, 10th Dist. No. 08AP-317, 2009-Ohio-1104, at ¶30-31; *State v. Stephens*, 11th Dist. No. 2001-T-0044, 2002-Ohio-2976, at ¶26. We must consider all of the evidence admitted at trial, regardless of whether some evidence was admitted in error. *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, at ¶19-25. "Were it otherwise, the State, to be secure, would have to assume every ruling by the trial court on the evidence to be erroneous and marshal[] and offer every bit of relevant and competent evidence." Id. at ¶19, quoting *State v. Wood* (Mo. 1980), 596 S.W.2d 394, 398-99.

{¶25} Defendant was ultimately convicted of three offenses in connection with the shooting. R.C. 2903.02(A), which prohibits murder, provides that "no person shall purposely cause the death of another[.]" R.C. 2923.02(A), in turn, provides that "No person, purposely or

knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense." Felonious assault is prohibited by R.C. 2903.11(A), which provides that "No person shall knowingly *** [c]ause serious physical harm to another or to another's unborn; [or] [c]ause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance." Finally, R.C. 2923.13(A) provides that "no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if *** [t]he person is a fugitive from justice *** [or] [t]he person *** has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse[.]" With respect to each of these charges, Defendant maintained that there was insufficient evidence to prove his identity as the culprit.

{¶26} Dion Stephens testified that he was "drinking and riding around" with his brother and two other individuals on the evening of April 18, 2008. The group stopped on Nome Avenue, and Mr. Stephens stepped from the car. According to his testimony, a man with "a big gun" soon "came out of nowhere." Shots were fired, and Mr. Stephens fled on foot. He sustained a single gunshot wound and later identified Defendant from a photographic array. Although he testified that he knew of Defendant – who had fathered a child by the woman with whom Mr. Stephens was then in a romantic relationship – and had seen pictures of him before, Mr. Stephens testified that the two had never met. Detective James Pasheilich of the Akron Police Department interviewed Mr. Stephens' brother and another passenger in the vehicle. The passenger could not identify Defendant as the shooter through a photograph array, but narrowed his choices down to Defendant and two other individuals. Mr. Stephens' brother did identify Defendant as the shooter.

{¶27} Viewing this evidence in the light most favorable to the State, we are unable to conclude that the trial court abused its discretion by determining that Defendant's conviction was supported by sufficient evidence of identity and by denying his motion for a new trial on that basis.

{¶28} Defendant's fifth assignment of error is overruled.

ASSIGNMENT OF ERROR VI

"APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL."

{¶29} Defendant's sixth assignment of error is that he was denied the effective assistance of counsel at trial. We disagree.

{¶30} This Court must analyze claims of ineffective assistance of counsel under a standard of objective reasonableness. See *Strickland v. Washington* (1984), 466 U.S. 668, 688; *State v. Bradley* (1989), 42 Ohio St.3d 136, 142. Under this standard, a defendant must show (1) deficiency in the performance of counsel "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) that the errors made by counsel were "so serious as to deprive the defendant of a fair trial[.]" *Strickland*, 466 U.S. at 687. A defendant must demonstrate prejudice by showing that, but for counsel's errors, there is a reasonable possibility that the outcome of the trial would have been different. Id. at 694. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. at 691. A defendant must demonstrate actual prejudice, and speculation regarding the prejudicial effects of counsel's performance will not establish ineffective assistance of counsel. *State v. Downing*, 9th Dist. No. 22012, 2004-Ohio-5952, at ¶27.

{¶31} In applying this test, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Strickland*, 466 U.S. at 689. Trial strategy "must be accorded deference and cannot be examined through the distorting effect of hindsight." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, at ¶115. The decision not to raise objections at trial is one such strategic choice, and this strategy does not establish that trial counsel was ineffective. Id. at ¶103. See, also, *State v. Taylor*, 9th Dist. No. 01CA007945, 2002-Ohio-6992, at ¶76.

{¶32} Defendant alleges numerous incidents of ineffective assistance on the part of trial counsel, including several that relate specifically to Defendant's convictions for attempted murder, felonious assault, and possessing a weapon under disability. These include failure to file motions to suppress identifications based on the photograph array or testimony regarding Defendant's arrest for receiving stolen property; failure to draw attention to the fact that the fourth passenger in the vehicle at the time of the shooting was not called to testify; and failure to object to errors in sentencing. This Court's disposition of Defendant's third assignment of error renders this portion of his sixth assignment of error moot.

{¶33} In connection with the entire trial or, specifically, with Defendant's convictions arising out of the March 2008 incident, Defendant alleges that trial counsel was ineffective by virtue of insufficient investigation of the State's case and cross-examination of witnesses and by permitting an admission that Defendant was driving under suspicion in connection with the March 2008 incident. Defendant's allegation that trial counsel failed to adequately investigate the State's case finds no support in the record. On the other hand, the record demonstrates ample cross-examination by trial counsel throughout the trial. In neither regard has Defendant demonstrated deficiency in counsel's performance. Defendant's argument that trial counsel was

ineffective by virtue of an admission that his driver's license was under suspension is also without merit. An admission at trial does not necessarily constitute ineffective assistance of counsel, even when it proves unsuccessful as a defense strategy. See *State v. Edwards*, 9th Dist. No. 24546, 2009-Ohio-3558, at ¶9. In this case, the context demonstrates that Defendant's admission of drug-related charges and driving under suspension was a trial strategy calculated to bolster his chances of prevailing on the charge of receiving stolen property, which Defendant vigorously denied. We cannot conclude that counsel was ineffective in this regard.

{¶34} Defendant's final argument is that trial counsel's performance was ineffective because counsel failed to preserve error related to his motion to sever the counts in the indictment arising from the March 2008 incident from the shooting of Dion Stephens. In evaluating an ineffective assistance of counsel claim, however, the critical inquiry is the effect of counsel's errors on the trial. See *Strickland*, 466 U.S. at 687, 694. Failure to preserve error on appeal – even if professionally unreasonable – is not tantamount to ineffective assistance of counsel when there is no effect on the judgment below. See *State v. Leyland*, 9th Dist. Nos. 23833, 23900, 2008-Ohio-777, at ¶6. The balance of Defendant's sixth assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> "THE TRIAL COURT ERRED IN SENTENCING APPELLANT FOR BOTH ATTEMPTED MURDER AND FELONIOUS ASSAULT. HERE THOSE OFFENSES WERE ALLIED OFFENSES OF SIMILAR IMPORT. MULTIPLE SENTENCING VIOLATED DOUBLE JEOPARDY."

{¶35} Defendant's fourth assignment of error is rendered moot by our disposition of the third. See App.R. 12(A).

CONCLUSION

{¶36} Defendant's first, second, fifth, and sixth assignments of error are overruled. His third assignment of error is sustained with respect to the testimony of Officer Carney and Nono Loretta Toe and to his convictions for attempted murder, felonious assault, and possessing a weapon under disability, but overruled with respect to the testimony of Sergeant Yohe and Officer Boss and his convictions related to the March 2008 incident. Defendant's fourth assignment of error is moot. The judgment of the trial court is affirmed with respect to his convictions arising out of the March 2008 incident, but reversed with respect to his convictions arising from the shooting of Dion Stephens. The judgment of the trial court is, therefore, affirmed in part and reversed in part. This matter is remanded to the trial court for a new trial with respect to Defendant's convictions for attempted murder, felonious assault, and possessing a weapon under disability.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

LYNN C. SLABY
FOR THE COURT

CARR, P. J.
WHITMORE, J.
CONCUR

(Slaby, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to §6(C), Article IV, Constitution.)

APPEARANCES:

MARK H. LUDWIG, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.