[Cite as *State v. Giles*, 2009-Ohio-2661.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 08AP-941 (C.P.C. No. 07CR-8109)
v.	:	(REGULAR CALENDAR)
Sextor Giles,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 9, 2009

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins IV*, for appellee.

Kelly Jines, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Sextor Giles ("appellant"), appeals from the judgment of conviction of the Franklin County Court of Common Pleas entered after a jury trial in which appellant was found guilty of one count of burglary, a second-degree felony in violation of R.C. 2911.12.

{¶2} The following description of events underlying the charge herein was adduced at trial. Lawanda Newton ("Newton") and appellant had dated for several years until Newton wanted to end the relationship. According to Newton, she ended the relationship because "[appellant] keeps putting his hands on me, fighting me,

disrespecting me in front of my kids, and coming up there to where I live trying to get me evicted, doing stuff to my apartment." (Tr. 131.)

{¶3} On July 22, 2007, appellant called Newton and told her he was on his way over to her apartment at 750 Canoby Place, apartment 1-F, to "F" her up. (Tr. 131.) Knowing appellant had a gun and fearing for her safety, Newton called the police and went to a friend's apartment within the same apartment complex. Though she had not seen appellant with a gun that day, when Newton called the police, she described that appellant had threatened her and that he had a gun.

{¶4} When she left her apartment, she locked the door and "everything was how it was supposed to be." (Tr. 137.) When she returned approximately 20 minutes later, her door was kicked in, the television was on the floor, the closet doors were off the hinges, and her clothes and belongings were on the floor. Newton described the apartment as being "ransacked." (Tr. 138.) Thereafter, Newton called the police and filed a report with a burglary detective from the Columbus Police Department.

{¶5} On the date of this incident, Amanda Collins ("Collins"), lived at 750 Canoby Place, apartment 2-F, which is above Newton's apartment. Collins heard "a loud noise, thumping and stuff downstairs" that was uncommon for her to hear. (Tr. 121.) Therefore, Collins called the police. As she went outside, she saw appellant coming from Newton's apartment, and appellant said to Collins that this was not her problem and if she said anything, he would "get" her. (Tr. 122.) Appellant walked away and Collins waited for the police.

{¶6} Columbus Police Officer Nicholas Siers was dispatched to 750 Canoby Place on a report of a man with a gun inside the apartment complex. When Officer Siers

arrived at the complex, he saw appellant walking in the parking lot away from Newton's building. Appellant was detained and searched for a weapon pursuant to the dispatch the officers received. The search of appellant revealed no weapons or other contraband and he was released. After appellant was released, Officer Siers received another call from the apartment complex about an apartment that had been broken into. Upon going to Newton's apartment, Officer Siers observed that the door had been kicked in and the television was knocked over.

{¶7} Columbus Police Officer Joseph Riddle arrived at the scene approximately at the same time as Officer Siers. According to Officer Riddle, the police were dispatched to 750 Canoby Place on a call about a man with a gun. Appellant was the first person the officers saw that matched the given description, and appellant was searched for a weapon. Appellant did not have any weapons, but did have a bottle of alcohol on his person and appeared "a little intoxicated." (Tr. 97.) Appellant was released, and thereafter, the officers were informed that an apartment had been broken into.

{¶8} Columbus Police Detective Chris McIntosh spoke with Newton and Collins about this incident, and as a result of their conversations, an arrest warrant was issued for appellant. Because of the length of time between when the initial report was taken and when Detective McIntosh made contact with Newton, and because it appeared to be a domestic situation, no evidence was collected from the scene.

{¶9} On November 11, 2007, appellant was indicted for one count of burglary, a second-degree felony in violation of R.C. 2911.12. A jury trial commenced on June 30, 2008, and on July 2, 2008, the jury returned a verdict of guilty. A pre-sentence investigation report ("PSI") was ordered, and the matter proceeded to sentencing. On

July 22, 2008, the trial court sentenced appellant to a six-year term of incarceration and awarded 265 days of jail-time credit.

{¶10} This appeal followed, and appellant brings the following two assignments of error for our review:

> I. When Two Different Attorneys For The Appellant Fail To Investigate Material and Potentially Exculpatory Information, Where The Investigation Is Simple and Does Not Require Excessive Time, Money, Or Other Resources, The Appellant Is Denied Effective Assistance Of Counsel, As Is Guaranteed By The Sixth And Fourteenth Amendments To The United States Constitution.
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> II. In The Absence Of Sufficient Evidence Of A Burglary, A Trial Court Violates A Defendant's Rights To Due Process, A Fair Trial, The Fifth And Fourteenth Amendments To The United States Constitution, And Section 16, Article I Of The Ohio Constitution When It finds The Defendant Guilty.

{¶11} In his first assignment of error, appellant contends he was denied effective assistance of counsel. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052, 2064. In order to establish a claim of ineffective assistance of counsel, a defendant must first demonstrate that his trial counsel's performance was so deficient that it was unreasonable under prevailing professional norms. Id. at 687. The defendant must then establish "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

{¶12} According to *Strickland*:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

{¶13} "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, 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, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 100-101, 76 S.Ct. 158, 163-64. A verdict adverse to a criminal defendant is not of itself indicative that he received ineffective assistance of trial counsel. *State v. Hester* (1976), 45 Ohio St.2d 71, 75.

{¶14} Specifically, appellant claims his counsel was ineffective for failing to investigate a recording on his cell phone that allegedly contained exculpatory evidence.

{¶15} Appellant had two different attorneys during the proceedings in the trial court. On January 16, 2008, when this matter was first set for trial, appellant's original counsel told the trial court that appellant told him there was a cell phone containing an exculpatory statement made by Newton. Appellant himself further elaborated to the court that Newton stated she was lying about this case and that she wanted to see appellant go to prison. According to appellant, he recorded their conversation on his cell phone. At the January 16, 2008 hearing, appellant's counsel stated he and the prosecutor tried to listen to the recording but the phone would not work. Thereafter, counsel gave the prosecutor his personal charger, and the phone was charged "all day." (Tr. 6.) However, the phone still did not function. The prosecutor indicated he had checked with the Columbus Police Department and was in contact with a person that may be able to retrieve the information on the phone. At this time, the trial court denied appellant's request to have the cell phone in the courtroom during trial, but did allow for a continuance to have an expert examine the phone.

{¶16} The parties met again on the record on May 1, 2008, and appellant appeared with his newly appointed counsel. Again the subject of the cell phone was raised, and appellant's counsel indicated there were questions about "some possible evidence" on the cell phone. Appellant's counsel stated that she was in possession of the cell phone and would be bringing it to court the following week so that appellant could have an opportunity to look at it. (Tr. 26.) Again on June 25, 2008, the issue regarding the cell phone was raised, and the following exchange occurred:

> [The Court]: All right. Where do we stand with respect to the cell phone?

> [Appellant's counsel]: I brought it with me today, Your Honor. It has been charged. I have the charger with it in case it needs to be plugged in.
>
> [The Court]: Fine. Mr. Giles, you wanted to take a look and examine the cell phone and see if you can get it to play?
>
> [Appellant]: Yes. I will take the chance. There is a shortage in it, Your Honor.
>
> * * *
>
> [Appellant]: There is – we are aware there is a shortage in the phone, so it may take me a little time here.
>
> [The Court]: Well, I am going to give you a little bit of time.

(Tr. 35-36.)

{¶17} Just prior to the hearing's conclusion, appellant's counsel stated:

> Your Honor, it appears, I think there is a short in the phone itself. It is not working. I think the problem [appellant] is having is that our office had taken it to somebody who is knowledgeable in cell phones, who is actually currently employed by Verizon. [Appellant] feels like since this is a Nextel, he would like somebody from Nextel to take a look at it. I don't know at this point if there is anything else that we can do. We got the charger. Certainly, that wouldn't be done by Monday, and I know he wants to get on with his trial. That is kind of where we are right now.

(Tr. 37.)

{¶18} Despite all of these proceedings, appellant contends both his original and newly appointed counsel were deficient in their actions to retrieve the alleged exculpatory evidence. It is clear from the record, however, and appellant concedes, that both attorneys did attempt to retrieve the alleged recording. Though appellant now disagrees with the way in which the matter was handled, such does not rise to the level of

ineffectiveness as it does not appear counsel's performance was so deficient that it was unreasonable under prevailing professional norms. *Strickland*, at 687.

{¶19} Further, appellant is unable to establish prejudice. The record is completely devoid of any evidence that the alleged recording even existed, much less that it contained exculpatory evidence. Secondly, the record is also devoid of any evidence that a different service center or a different person would have been able to access the recording allegedly contained on the phone. Proof of ineffective assistance of counsel must be more than vague speculation. *State v. Otte* (1996), 74 Ohio St.3d 555, 565; *State v. Ingram*, 10th Dist. No. 06AP-984, 2007-Ohio-7136. Because such vague speculation, like that currently presented by appellant, is insufficient to establish ineffective assistance of counsel, we find appellant's arguments unpersuasive.

{¶20} Accordingly, we overrule appellant's first assignment of error.

{¶21} In his second assignment of error, appellant challenges the sufficiency of the evidence presented to sustain the conviction entered by the trial court. The Supreme Court of Ohio described the role of an appellate court presented with a sufficiency of the evidence argument in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction 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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, followed.)

{¶22} Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. In determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. Thus, a verdict will not be disturbed unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484; *Jenks* , at 273.

{¶23} While this case turns on circumstantial evidence, the Supreme Court of Ohio has held that "[a] conviction can be sustained based on circumstantial evidence alone." *State v. Franklin* (1991), 62 Ohio St.3d 118, 124, citing *State v. Nicely* (1988), 39 Ohio St.3d 147, 154-55. In fact, circumstantial evidence may " ' "be more certain, satisfying and persuasive than direct evidence." ' " *State v. Ballew* (1996), 76 Ohio St.3d 244, 249, quoting *State v. Lott* (1990), 51 Ohio St.3d 160, 167, quoting *Michalic v. Cleveland Tankers, Inc*. (1960), 364 U.S. 325, 330, 81 S.Ct. 6, 11.

{¶24} Appellant was convicted of burglary in violation of R.C. 2911.12, which provides in relevant part:

> (A) No person, by force, stealth, or deception, shall do any of the following:

> (1) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense;
>
> (2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense;
>
> (3) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense;
>
> (4) Trespass in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present.

{¶25} While appellant is correct that the record is void of any testimony or other direct evidence that appellant was seen in Newton's apartment, we find that viewed in the light most favorable to the state, the circumstantial evidence presented could convince the trier of fact of appellant's guilt beyond a reasonable doubt.

{¶26} Newton testified appellant called her and told her he was coming over to her apartment to "F" her up. (Tr. 131.) Knowing that appellant owned a gun, as he had shown it to her on prior occasions, Newton called the police to report the threat and then left to stay at a friend's apartment. Newton returned approximately 20 minutes later to find that her apartment door was kicked in and that her apartment was in disarray. Collins, who lived above Newton, heard loud noises and thumping coming from Newton's apartment. Because this was uncommon to her, Collins called the police and then went

outside. As she went outside, Collins testified she saw appellant "coming from [Newton's apartment]." (Tr. 22.) According to Collins, appellant told her this was not her problem, and if she said anything, appellant was going to "get" her. (Tr. 22.) Appellant then walked away.

{¶27} The police, responding to a call of a man with a gun, arrived at the scene to see appellant walking in the parking lot away from Newton's building. At this time, the only call of which the police were aware was that of a man with a gun, so they detained appellant and searched him for firearms. Finding none, appellant was released. Shortly thereafter, the officers received a call of a burglary. Officer Siers went to Newton's apartment and observed the broken door and the television on the floor.

{¶28} Contrary to appellant's assertion, the evidence does more than merely place appellant in the general area of the victim's residence as appellant suggests. Based on the evidence and the testimony of the witnesses, viewed in the light most favorable to the prosecution, a reasonable trier of fact could have found the essential elements of the crime of burglary proven beyond a reasonable doubt.

{¶29} Under this assigned error, appellant also contends that the evidence is insufficient because Collins' testimony was inconsistent in some respects. In essence, appellant contends Collins' testimony is not credible. Credibility issues are irrelevant, however, in a sufficiency of the evidence analysis. *State v. Gilfillan*, 10th Dist. No. 08AP-317, 2009-Ohio-1104, ¶34, citing *Jenks*, paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79.

{¶30} Having found sufficient evidence to sustain appellant's conviction, we overrule appellant's second assignment of error.

{¶31} For the foregoing reasons, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BROWN and SADLER, JJ., concur.

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