[Cite as *State v. Harris*, 2010-Ohio-1688.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 09AP-578 (C.P.C. No. 07CR04-2837)
v.	:	No. 09AP-579 (C.P.C. No. 08CR05-3476)
Robert D. Harris,	:	
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on April 15, 2010

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Christopher M. Cooper Co., *LPA*, and *Crysta R. Pennington*, for appellant.

APPEALS from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Robert D. Harris, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

{¶2} Around 8:00 p.m. on September 8, 2006, Shana White and Gregory Guess were shot to death as they sat in White's white SUV in an apartment complex parking lot on the east side of Columbus, Ohio. Jimmie Hicks, a resident of the apartment complex, saw an individual get out of a nearby black SUV, approach White's passenger side door,

and begin shooting into the white SUV. That individual then opened the passenger door and rummaged through the white SUV. The individual removed a black duffle bag from the white SUV, returned to the black SUV, and got inside. A second individual then exited the black SUV, approached the white SUV, got inside and drove it away.

{¶3} Almost five hours after the shooting, police were called to a nearby intersection to investigate a report of an injured man walking in the area. Officer Gerald Ehrsam responded a little before 1:00 a.m. on September 9, 2006 and found appellant. Appellant had a gunshot wound in his arm but apparently no other injuries. Appellant told Ehrsam that he had been shot in a car with two other people in an apartment complex parking lot. Appellant told Ehrsam that three men attacked them. Appellant told another officer that he was in the back seat of an SUV when the shots began. Appellant was transported to a hospital for treatment. At the time, the police considered him to be a victim of the shooting. That view would soon change.

{¶4} On September 11, 2006, police found a white SUV in a field not far from where police had found appellant several days earlier. The bodies of White and Guess were inside the vehicle. Dr. Joseph Ohr of the Franklin County Coroner's Office performed autopsies on both of the victims. Results of those autopsies indicated that White and Guess died from gun shot wounds to the back of their heads. The firearm that inflicted Guess's head wound was less than an inch from, and possibly touching, his head at the time it was fired.

{¶5} Thereafter, a Franklin County Grand Jury indicted appellant with two counts of aggravated murder in violation of R.C. 2903.01 and one count of aggravated robbery[1]

[1] This count was dismissed and subsequently re-filed in case No. 08CR05-3476.

in violation of R.C. 2911.01. Each of those counts also contained a firearm specification pursuant to R.C. 2941.145. Appellant was also indicted with one count of tampering with evidence in violation of R.C. 2921.12. Appellant entered a not guilty plea to those charges and proceeded to trial.

{¶6} At trial, appellant testified that he was sitting in the back seat of White's SUV when two armed individuals approached the SUV and began firing. He testified that he ducked down to avoid being shot, but that the men opened the passenger doors to the SUV and shot him in the arm. According to appellant, one of the men then drove White's SUV away from the scene and repeatedly asked appellant and Guess for money. Appellant stated that a few minutes later, he jumped out of the car. He ran away from the car and into a field. Appellant passed out but later awoke and walked out of the field to find help. Appellant denied shooting either White or Guess.

{¶7} The state presented evidence indicating that appellant shot and killed White and Guess. Appellant admitted that he was seated in the back seat of White's SUV. The state's evidence demonstrated that gunshots were fired from the back seat of the SUV. First, Dr. Ohr testified that the entrance wounds of White's and Guess's fatal gun shot wounds were in the back of their heads, consistent with being shot from behind. Dr. Ohr also concluded that Guess's head wound was inflicted by a gun that was very close, and possibly touching, his head. Additionally, Gary Wilgus of the Ohio Bureau of Criminal Investigation analyzed bullet holes found in the SUV and concluded that a number of the bullets were fired from inside the SUV.

{¶8} The state also attempted to establish a motive for appellant to kill White and Guess. Christine Roberts, a member of the Columbus Police Department's Narcotics

division, testified that her unit and the United States Postal Service had previously found a package of 436 pounds of marijuana scheduled for delivery to three different addresses in the central Ohio area. Her unit performed controlled deliveries to two of the addresses where Guess and another man, Reginald Montgomery, each accepted delivery of the marijuana. As a result, both men were arrested and indicted with various drug offenses.

{¶9} Roberts considered Montgomery to be the leader of a drug ring. Roberts believed that Guess worked for Montgomery. She testified that she had made initial attempts to convince Guess to provide information to her about Montgomery's drug ring. The state theorized that appellant was hired by his friend, Montgomery, to kill Guess because Montgomery feared that Guess would testify against him. White had the misfortune of being with Guess when appellant completed his assignment.

{¶10} The state also attempted to show contradictions in appellant's version of events. For example, appellant claimed that the unknown assailants shot him while he was in the back seat of White's SUV. However, the state's expert witnesses testified that there was no evidence of appellant's blood in White's SUV.

{¶11} The jury found appellant guilty of all counts and specifications. The trial court sentenced him accordingly.

{¶12} Appellant appeals and assigns the following errors:

> [I]. APPELLANT WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.
>
> [II]. THE TRIAL COURT IMPROPERLY ADMITTED EVIDENCE OF THE VICTIM'S UNRELATED INDICTMENTS IN VIOLATION OF EVIDENCE RULE 403(A).
>
> [III]. THE TRIAL COURT IMPROPERLY ADMITTED EVIDENCE OF THE DEFENDANT'S OTHER CRIMES,

WRONGS, OR ACTS IN VIOLATION OF EVIDENCE RULE 404(B).

{¶13} We first address appellant's second and third assignments of error together. Appellant contends in both of these assignments of error that the trial court erred by admitting certain evidence.

{¶14} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. Thus, an appellate court will reverse the trial court's decision to admit testimony only if the court abused its discretion. *State v. Condon,* 152 Ohio App.3d 629, 2003-Ohio-2335, ¶80; *State v. Cunningham,* 10th Dist. No. 06AP-145, 2006-Ohio-6373, ¶33. An abuse of discretion connotes more than an error of law; it implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Widder*, 146 Ohio App.3d 445, 2001-Ohio-1521, ¶6.

{¶15} Appellant first claims that the trial court improperly admitted Guess's indictment for drug related offenses that was pending at the time he was murdered. Appellant claims the evidence was not relevant and unfairly prejudicial. We disagree.

{¶16} To be relevant, evidence must have a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *State v. Stewart*, 10th Dist. No. 08AP-33, 2009-Ohio-1547, ¶34, citing Evid.R. 401. The state claims that the indictment was relevant to show appellant's motive. We agree.

{¶17} Evidence of motive is always relevant and admissible in a murder case. *State v. Dixon* (Dec. 5, 2000), 10th Dist. No. 98AP-626, citing *State v. Lancaster* (1958), 167 Ohio St. 391, 396. Appellant and Montgomery were friends. Here, the state

attempted to show that appellant killed White and Guess because of concerns that Guess would talk to authorities about Montgomery's drug dealings. Guess's indictment is relevant because it provides the factual underpinning of the state's theory.

{¶18} However, just because evidence is relevant does not necessarily mean the evidence is admissible. Evid.R. 403(A) states, "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." In a sense, any evidence presented by a prosecutor in pursuit of a conviction could be viewed as prejudicial. Evid.R. 403 prohibits the admission of relevant evidence only if the probative value of the evidence is substantially outweighed by the danger of *unfair* prejudice. *State v. Skatzes,* 104 Ohio St.3d 195, 2004-Ohio-6391, ¶107, citing *State v. Wright* (1990), 48 Ohio St.3d 5, 8.

{¶19} "If unfair prejudice simply meant prejudice, anything adverse to a litigant's case would be excludable under [Evid.]R[.] 403. * * * Unfair prejudice is that quality of evidence which might result in an improper basis for a jury decision." *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St.3d 169, 172, 2001-Ohio-248, quoting Weissenberger's Ohio Evidence (2000) 85-87, Section 403.3; see also *State v. Broadnax* (Feb. 16, 2001), 2d Dist. No. 18169; *State v. Geasley* (1993), 85 Ohio App.3d 360. Unfavorable evidence is not the equivalent of unfairly prejudicial evidence. Id. at 373. Evidence that arouses emotions, evokes a sense of horror or appeals to an instinct to punish may be unfairly prejudicial. *State v. Cooper*, 147 Ohio App.3d 116, 2002-Ohio-617, ¶57; *Oberlin* (unfairly prejudicial evidence appeals to emotions rather than intellect).

{¶20} Appellant claims that even if the indictment was relevant to show motive, it unfairly prejudiced him by allowing the state to describe him as a "hired assassin." We disagree. The state's theory that Montgomery hired appellant to murder Guess and White is not unfairly prejudicial, as it does not evoke a sense of horror or appeal to an instinct to punish. Rather, it makes a reasonable inference from the facts of the case. Montgomery and Guess had both been indicted on drug charges. Officer Roberts testified that Guess worked for Montgomery and that she had made initial attempts to convince Guess to talk to her about Montgomery's drug dealings. Appellant and Montgomery were friends, and Montgomery called appellant twice shortly after White and Guess were murdered.

{¶21} Appellant also argues that the trial court admitted improper "other acts" evidence that he was a drug dealer. We disagree. Evid.R. 404(B) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of *motive,* opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." (Emphasis added.) The state made no attempt to use the evidence of appellant's drug dealing as proof of his character. Instead, the evidence was probative of appellant's motive in killing White and Guess. Accordingly, its admission did not violate Evid.R. 404(B). See *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, ¶174.

{¶22} Because the trial court did not abuse its discretion by admitting Guess's indictment and by admitting testimony that appellant was a drug dealer, we overrule appellant's second and third assignments of error.

{¶23} Appellant contends in his first assignment of error that he received ineffective assistance of trial counsel. We disagree.

{¶24} To prevail on a claim of ineffective assistance of counsel, appellant must satisfy the two-prong test enunciated in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; accord *State v. Bradley* (1989), 42 Ohio St.3d 136. Initially, appellant must show that counsel's performance was deficient. To meet that requirement, appellant must show counsel's error was so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Appellant may prove counsel's conduct was deficient by identifying acts or omissions that were not the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. *Strickland* at 690. Appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other. Id. at 697.

{¶25} In analyzing the first prong under *Strickland,* there is a strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. Id. at 689. Appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Id., citing *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164. Tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance. *State v. Carter*, 72 Ohio St.3d 545, 558, 1995-Ohio-104.

{¶26} If appellant successfully proves that counsel's assistance was deficient, the second prong under *Strickland* requires appellant to prove prejudice in order to prevail. *Strickland* at 692. To meet that prong, appellant must show counsel's errors were so

serious as to deprive him of a fair trial, "a trial whose result is reliable." Id. at 687. Appellant would meet this standard with a showing "that 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.

{¶27} Appellant first contends trial counsel was deficient for failing to cross-examine Hicks. We disagree.

{¶28} " 'Trial counsel need not cross-examine every witness * * *. The strategic decision not to cross-examine witnesses is firmly committed to trial counsel's judgment.' " *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, ¶216, quoting *State v. Otte*, 74 Ohio St.3d 555, 565, 1996-Ohio-108. Thus, decisions regarding cross-examination are within trial counsel's discretion and generally do not form the basis for a claim of ineffective assistance of counsel. *State v. Flors* (1987), 38 Ohio App.3d 133, 139; *State v. Woods*, 4th Dist. No. 09CA3090, 2009-Ohio-6169, ¶25 (counsel's decision not to cross-examine witness cannot form basis of ineffective assistance of counsel claim).

{¶29} Additionally, appellant has not demonstrated how his counsel's failure to cross-examine Hicks prejudiced him. Id. First, he does not explain what questions trial counsel should have asked Hicks. Moreover, Hicks's testimony described the events he observed in the parking lot and did not directly implicate appellant. He did not identify appellant as being involved in the shooting. In fact, Hicks's testimony was largely consistent with appellant's own description of the shooting. Thus, we cannot see how the failure to cross-examine Hicks prejudiced appellant.

{¶30} Next, appellant claims that trial counsel was ill prepared and unfamiliar with documents received during discovery. Appellant does not give specific reasons why he believes his trial counsel was unprepared. Such general claims of lack of preparation are insufficient to support a claim of ineffective assistance of counsel. *State v. Yearby* (Jan. 24, 2002), 8th Dist. No. 79000. Additionally, appellant does not address how his counsel's alleged lack of preparation prejudiced him. To the contrary, our review of the record reveals a well-prepared trial counsel who diligently and competently represented his client throughout a lengthy criminal trial.

{¶31} Appellant's only specific example of trial counsel's failure to prepare is an alleged failure to listen to certain jail phone calls. Although appellant claims that the jail calls could have contained exculpatory evidence that trial counsel missed, mere speculation is insufficient to prove prejudice. *State v. Turner*, 10th Dist. No. 04AP-364, 2004-Ohio-6609, ¶27, citing *Otte* (noting that an appellant must demonstrate more than vague speculations of prejudice to show that counsel was ineffective). Additionally, the specific phone calls appellant identifies were not admitted as evidence nor were they ever played to the jury. Finally, after the state raised the issue, the trial court as well as appellant's trial counsel listened to the calls.

{¶32} Finally, appellant claims trial counsel did not adequately provide John Nixon, appellant's expert witness, with materials necessary to support his testimony. Specifically, appellant claims that trial counsel failed to provide Nixon with a door panel from the white SUV in order to conduct proper bullet trajectory testing. Appellant speculates that Nixon could not properly perform his testing without the door panel. However, Nixon testified at trial that the missing door panel impacted his analysis only

with respect to one bullet hole. (Tr. 1629-30.) He also testified that even with the missing door panel, he was unsure whether his trajectory testing could have been performed satisfactorily for that bullet hole. (Tr. 1631.) Appellant also claims that Nixon lost credibility with the jury as a result of trial counsel's failure. This speculation is insufficient to demonstrate prejudice. *Turner*. Finally, we note that appellant's expert witness agreed in large part with the opinions of the state's expert witness regarding bullet trajectories.

{¶33} Appellant has not demonstrated that his trial counsel was ineffective. Accordingly, we overrule his first assignment of error.

{¶34} In conclusion, we overrule appellant's three assignments of error and, accordingly, affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH and CONNOR, JJ., concur.

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