

[Cite as *State v. Motz*, 2010-Ohio-2170.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-10-137
- vs -	:	<u>OPINION</u> 5/17/2010
DAVID G. MOTZ,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09CR25685

Rachel A. Hutzel, Warren County Prosecuting Attorney, 500 Justice Drive, P.O. Box 238, Lebanon, Ohio 45036, for plaintiff-appellee

Ryan L. DeBra, 4914 Ridge Avenue, Cincinnati, Ohio 45209, for defendant-appellant

YOUNG, J.

{¶1} Defendant-appellant, David G. Motz, appeals from his conviction in the Warren County Court of Common Pleas for domestic violence. For the reasons outlined below, we affirm.

{¶2} On March 7, 2009, appellant was involved in a physical altercation with his live-in girlfriend, Josetta Miller, outside their South Lebanon home. Following a

police investigation, appellant was arrested and charged with domestic violence in violation of R.C. 2919.25(A), which, due to his two prior domestic violence convictions, rose to a third-degree felony. After a two-day jury trial, appellant was found guilty and sentenced to serve a three-year prison term.

{¶13} Appellant now appeals from his conviction, raising two assignments of error.

{¶14} Assignment of Error No. 1:

{¶15} "THE DEFENDANT-APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATE CONSTITUTION AND SECTION 10, ARTICLE 1 OF THE OHIO CONSTITUTION." [sic]

{¶16} In his first assignment of error, appellant argues that his trial counsel was ineffective. We disagree.

{¶17} To prevail on an ineffective assistance of counsel claim, an appellant must show that his trial counsel's performance fell below an objective standard of reasonableness and that he was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 693, 104 S.Ct. 2052. The failure to make an adequate showing on either the "performance" or "prejudice" prongs is fatal to an appellant's ineffective assistance of counsel claim. *State v. Bell*, Clermont App. No. CA2008-05-044, 2009-Ohio-2335, ¶177, citing *Strickland* at 697.

{¶18} Appellant argues that his trial counsel was ineffective because he "completely neglected to give any mention [to] the affirmative defense of self-defense until [he] took the stand." However, while appellant may claim that it is

"inconceivable" that such actions would be considered strategic, a strong presumption exists that a licensed attorney is competent and that the challenged action is the product of sound trial strategy that falls within the wide range of reasonable professional assistance. *State v. Melampy*, Brown App. No. CA2007-04-008, 2008-Ohio-5838, ¶21, citing *Strickland* at 689; *State v. Hoop*, Brown App. No. CA2004-02-003, 2005-Ohio-1407, ¶20. In turn, because even *debatable trial tactics* do not constitute ineffective assistance of counsel, we find appellant's trial counsel's decision to forego developing appellant's self-defense claim until after he took the stand was strategic, and, as a result, did not fall below the objective standard of reasonableness. *State v. Gleckler*, Clermont App. No. CA2009-03-021, 2010-Ohio-496, ¶10; see, also, *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶101. Therefore, having found his trial counsel's performance was not deficient, appellant's first assignment of error is overruled.

{¶9} Assignment of Error No. 2:

{¶10} "THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING DEFENSE COUNSEL'S MOTION FOR A MISTRIAL. ADDITIONALLY, THE COURT'S CURATIVE INSTRUCTION WAS INSUFFICIENT TO REMEDY THE PREJUDICE CAUSED BY THE IMPROPER TESTIMONY OF THE STATE'S WITNESS."

{¶11} In his second assignment of error, appellant argues that the trial court erred by not granting a mistrial after JoAnn Motz, the alleged victim's biological mother, "revealed to the jury that she had a prior temporary protection order against

[appellant.]"¹ We disagree.

{¶12} "A trial court should not grant a motion for a mistrial unless it appears that some error or irregularity has been injected into the proceeding that adversely affects the substantial rights of the accused, and as a result, a fair trial is no longer possible." *State v. Thornton*, Clermont App. No. CA2008-10-092, 2009-Ohio-3685, ¶11, citing *State v. Reynolds* (1988), 49 Ohio App.3d 27, 33; *State v. Blankenship* (1995), 102 Ohio App.3d 534, 549. The trial court's decision to grant or deny a mistrial rests within its sound discretion, and this court will not disturb such a determination absent an abuse of discretion. *State v. Stevens*, Butler App. No. CA2009-01-031, 2009-Ohio-6045, ¶11, citing *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, ¶92; *Thornton* at ¶11. An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130.

{¶13} During the state's direct examination of the alleged victim's mother, the following exchange occurred:

{¶14} "[THE STATE]: Okay. Would you have seen [appellant and the alleged victim] often while they were living in like the same house that you were?

{¶15} "[JOANN MOTZ]: I had a TPO on [appellant] and he wasn't really allowed there after –

{¶16} "[APPELLANT'S TRIAL COUNSEL]: Your Honor, may we approach?

{¶17} "THE COURT: Approach please."

{¶18} After holding a sidebar conference, during which the trial court denied

1. JoAnn Motz has been married to appellant's uncle for approximately 17 years. JoAnn Motz and her daughter, the alleged victim, are not biologically related to appellant.

appellant's motion for a mistrial, the court gave the following instruction:

{¶19} "THE COURT: Ladies and gentlemen, this witness just said something about a reference to a TPO and you may or may not know what a TPO is. If you do just disregard it, it's not relevant to the issues that's being presented in this trial.

{¶20} "Any other acts or actions again are not relevant. We're here to decide what did or did not occur on March 7, 2009, so you'll disregard that testimony of this witness as though you never heard it." [sic]

{¶21} Thereafter, once both parties had rested, the trial court instructed the jury, in pertinent part, as follows:

{¶22} "Any statements or answers that were stricken by the court or which you were instructed to disregard are not evidence and must be treated as though you never heard them."

{¶23} After a thorough review of the record, we find that the trial court did not err by denying appellant's motion for a mistrial. While appellant may claim the trial court's curative instruction was insufficient, "curative instructions have been held to be an effective means of remedying errors or irregularities that occur during trial * * *." *Thornton*, 2009-Ohio-3685 at ¶13, citing *State v. Zuern* (1987), 32 Ohio St.3d 56, 61. A jury is presumed to follow any curative instructions issued by the trial court, and there is nothing in the record to suggest the jury failed to do so in this case. See, e.g., *State v. Moshos*, Clinton App. No. CA2009-06-008, 2010-Ohio-735, ¶88; see, also, *Ahmed*, 2004-Ohio-4190 at ¶93. Therefore, because the trial court's decision to issue a curative instruction in lieu of granting a mistrial is accorded great deference, we find the trial court did not abuse its discretion by denying appellant's motion for a mistrial. *Thornton* at ¶14; see, also, *State v. Kersey*, Warren App. No. CA2008-02-

031, 2008-Ohio-6890, ¶8. Accordingly, appellant's second assignment of error is overruled.

{¶24} Judgment affirmed.

BRESSLER and RINGLAND, JJ., concur.