

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2009-06-022
 :
 - vs - : OPINION
 : 6/1/2010
 :
 NICHOLAS RAY, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. CR2008 2250

Jessica Little, Brown County Prosecuting Attorney, Mary McMullen, 200 East Cherry Street, Georgetown, Ohio 45121, for plaintiff-appellee

Jeremy J. Masters, Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Nicholas Adam Ray, appeals his conviction in the Brown County Court of Common Pleas for domestic violence. We affirm.

{¶2} On October 6, 2008, appellant was indicted on three counts of domestic violence, with specifications of prior convictions, in violation of R.C. 2919.25(A), all felonies of the third degree. The charges stemmed from allegations that on July 23, 2008, appellant choked and hit his ex-wife, Melissa Hamilton, and pushed Hamilton's two daughters when they attempted to intervene on their mother's behalf.

{¶13} On November 18, 2008, appellant requested a bill of particulars from the state, but the state failed to comply with appellant's request. Appellant took no further action regarding the bill of particulars until the day of trial, when appellant informed the court that the state had failed to comply with his request. Appellant argued that the state's failure to provide a bill of particulars deprived him of the opportunity to fully prepare his defense. Specifically, appellant argued that the state failed to disclose its intent to produce testimony regarding red marks on Ms. Hamilton's body until the day of trial. Appellant argued that such information should have been provided in the bill of particulars, and moved to exclude the testimony. In overruling appellant's motion, the trial court stated that both parties "had an ample opportunity to conduct their investigations into what the anticipated testimony of witnesses [would] be. The Court does not find there to be any prejudice[.]"

{¶14} The jury acquitted appellant of Counts 2 and 3, but found him guilty of Count 1 and further found that he had been convicted of two prior domestic violence offenses. The trial court sentenced appellant to four years in prison.

{¶15} Appellant appeals, raising two assignments of error.

{¶16} Assignment of Error No. 1:

{¶17} "THE TRIAL COURT ERRED BY FAILING TO REQUIRE THE STATE TO PROVIDE A BILL OF PARTICULARS AFTER MR. RAY'S TIMELY REQUEST, DENYING MR. RAY HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL. SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; SECTION 10, ARTICLE 1 OF THE OHIO CONSTITUTION; OHIO RULE OF CRIMINAL PROCEDURE 7(E)."

{¶18} In his first assignment of error, appellant argues that he was prejudiced by the state's failure to provide a requested bill of particulars.

{¶9} Appellant argues that he was unable to properly prepare his defense without a bill of particulars. Specifically, appellant argues that a bill of particulars was necessary to: (1) clarify the charges against him, and (2) notify him of the state's intent to offer evidence regarding the red marks allegedly visible on the victim's body.

{¶10} R.C. 2919.25(A), the basis for appellant's charges, reads: "No person shall knowingly cause or attempt to cause physical harm to a family or household member." However, Count 1 of appellant's indictment originally read, in pertinent part, as follows: "[appellant] * * * did knowingly by *force, stealth*, cause or attempt to cause physical harm to Melissa Hamilton, a family or house hold member, a violation of Section 2919.25(A), of the Ohio Revised Code, a third degree felony." (Emphasis added.) Appellant argues that this misstatement of the elements "rendered the indictment more than indefinite, vague, or uninformative," and that a bill of particulars was necessary to clarify the charges and facilitate the preparation of his defense.

{¶11} Although Crim.R. 7 provides a criminal defendant with the right to obtain a bill of particulars, the failure to provide such does not automatically constitute reversible error. See *State v. Cossack*, Mahoning App. No. 03 MA 110, 2005-Ohio-2784, ¶34; *State v. Rothman* (Mar. 14, 1985), Cuyahoga App. No. 48608, at *2. An appellate court may only reverse a conviction for a failure to provide a timely requested bill of particulars if appellant demonstrates that his "lack of knowledge concerning the specific facts a bill of particulars would have provided him actually prejudiced him in his ability to fairly defend himself." *State v. Chinn*, 85 Ohio St.3d 548, 569, 1999-Ohio-288.

{¶12} In the case at bar, appellant failed to show that he was prejudiced in any way by the state's failure to provide a bill of particulars. In fact, appellant prepared his defense without a bill of particulars and did not complain of its absence until the day of trial. A "proper method of protesting the state's failure to provide a bill of particulars

would have been to file a motion to compel compliance with the order." *Rothman*, Cuyahoga App. No. 48608 at *2. However, appellant failed to file a motion to compel, and likewise failed to request a continuance to resolve the matter. Instead, after notifying the court of the state's failure to provide a bill of particulars, appellant's counsel indicated that she was ready to immediately proceed with opening statements.

{¶13} Further, this court notes that the state's evidence regarding red marks on Ms. Hamilton's body is not the type of information typically included in a bill of particulars. A bill of particulars is designed to provide the accused, upon proper demand, with greater detail concerning the nature of the offense charged and of the criminal conduct alleged to constitute the offense. *State v. Cooper* (2000), 139 Ohio App.3d 149, 162. However, a bill of particulars is not designed to provide the accused with specifications of evidence or to serve as a substitute for discovery. *Id.* In the case at bar, evidence of the red marks on Ms. Hamilton's body was readily available in the documents provided by the state during discovery. Specifically, the state's 911 call log states "[e]veryone in the home is ok at this time but she does have marks on her. Several to be in fact." Thus, appellant had every opportunity to assess the evidence that the state planned to present at trial, including the "marks" on Ms. Hamilton's body.

{¶14} Thus, "while the denial of a timely request for a bill of particulars should never occur, appellant suffered no prejudice as a consequence of the denial that occurred in this case." See *Chinn*, 85 Ohio St.3d at 569. Because appellant has failed to prove he was prejudiced by the state's failure to provide a bill of particulars, his first assignment of error is overruled.

{¶15} Assignment of Error No. 2:

{¶16} "TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBTAIN A BILL OF PARTICULARS."

{¶17} In his second assignment of error, appellant argues that his trial counsel's failure to file a motion to compel a bill of particulars constituted ineffective assistance. Appellant argues that had his counsel filed such a motion, the outcome of his trial would likely have been different.

{¶18} In *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, the United States Supreme Court established a two-part test to determine ineffective assistance of counsel. In order to demonstrate ineffective assistance of counsel, an appellant must satisfy both prongs. *Id.* at 687. First, an appellant must show that his trial counsel's performance was deficient, and second, that the deficient performance prejudiced the defense to the point of depriving the appellant of a fair trial. *State v. Bell*, Clermont App. No. CA2008-05-044, 2009-Ohio-2335, ¶76. Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland* at 694. A strong presumption exists that licensed attorneys are competent and that the challenged action is the product of a sound trial strategy and falls within the wide range of professional assistance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 143, certiorari denied (1990), 497 U.S. 1011, 110 S.Ct. 3258. The failure to prove either prong of the *Strickland* two-part test makes it unnecessary for a court to consider the other prong. See *Toledo v. Flugge, III*, Lucas App. No. L-06-1121, 2007-Ohio-98, ¶11.

{¶19} In the case at bar, the state's failure to provide appellant with a timely requested bill of particulars, while clearly erroneous, did not prejudice appellant. See Crim.R. 7(E). Despite any potential defects in the indictment, the correct elements and date of the alleged offenses were fully aired prior to the jury's finding of guilty. The trial court instructed the jury as to the correct charges facing appellant and the date of their

alleged occurrence prior to voire dire and during final instructions.¹ See also *State v. Sellards* (1985), 17 Ohio St.3d 169, 171 ("the failure to provide dates and times in an indictment will not alone provide a basis for dismissal of the charges"); *State v. Rogers*, Butler App. No. CA2006-03-055, 2007-Ohio-1890, ¶24-27.

{¶20} In sum, appellant has failed to demonstrate how he would have defended the case differently had he received a bill of particulars. If trial counsel would have made a motion to compel prior to trial, the bill would have provided no additional information. See *State v. Fink*, Butler App. No. CA2005-11-480, 2006-Ohio-5657. Therefore, the failure of appellant's trial counsel to file a motion to compel a bill of particulars did not constitute ineffective assistance of counsel. See *Flugga*, 2007-Ohio-98; *State v. Kimbrough* (Mar. 2, 2000), Cuyahoga App. Nos. 75642, 75643, 75644, at *2.

{¶21} Appellant's second assignment of error is overruled.

{¶22} Judgment affirmed.

YOUNG, P.J., and BRESSLER, J., concur.

1. During final instructions to the jury, the trial court stated: "Before you can find the Defendant guilty, you must find, beyond a reasonable doubt, that on or about the 23rd day of July, in the year, Two Thousand and Eight in Brown County, Ohio, the Defendant knowingly caused or attempted to cause physical harm to Melissa Hamilton, a family or household member, in violation of 2919.25(A) of the Ohio Revised Code, a third-degree felony."