

[Cite as *State v. Armstead*, 2001-Ohio-4045.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	No. 01AP-44
v.	:	(REGULAR CALENDAR)
David L. Armstead,	:	
	:	
Defendant-Appellant.	:	

O P I N I O N

Rendered on November 27, 2001

Ron O'Brien, County Prosecutor, and *Susan E. Day*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

KENNEDY, J.

Defendant-appellant, David L. Armstead, appeals the judgment of the Franklin County Court of Common Pleas convicting him of attempted murder with a fire-arm specification, felonious assault with a firearm specification, and having a weapon

while under disability. A jury trial commenced on the attempted murder and felonious assault charges. Appellant waived a jury trial on the weapon under disability charge.

The evidence and testimony submitted at appellant's trial establish the following factual background. The above-noted charges arose out of an incident that took place on July 9, 1999. On that date, Otis Lee Campbell was shot in the stomach, legs and buttocks. He survived the shooting, but suffered a severed nerve in his leg, which affected his ability to walk. Crystle Peters testified on behalf of appellee, the state of Ohio, that, on the evening of July 9, 1999, she was socializing with her friend Michelle Ledsome. She and Ledsome went to Trina Blade's apartment on East Fifth Avenue in Columbus, Ohio. Peters saw an individual later identified as appellant in the parking lot accompanied with another person. Peters described the other individual with appellant as "short, real dark and kind of stocky." According to Peters, Campbell joined the group about ten minutes after Peters and Michelle arrived, which was between midnight and 1:00 a.m.

Next, Peters indicated that Trina Blade and a woman nicknamed "Miss Freddy" began arguing. Peters noted that Campbell was a friend of both women and attempted to calm them down. According to Peters, the argument eventually stopped and Miss Freddy left. Peters testified that, after the argument ended between Blade and Miss Freddy, appellant approached Campbell and began arguing with him. Peters stated that appellant threw a punch at Campbell and a fistfight ensued. The witness then claimed that she saw the short, stocky individual open a van door and pull out a gun. He walked into the parking lot, waved the gun and told everyone to leave. Peters indicated that she proceeded to run across the street towards a bar, but turned around to watch what was

happening in the apartment parking lot. According to Peters, the individual with the gun was unsuccessful in firing it. She claimed that appellant then grabbed the gun and started shooting. After the shooting, according to Peters, appellant and the short, stocky individual fled the scene.

Campbell testified at trial and verified that he was with appellant and a short, dark-skinned individual in the apartment parking lot. He proceeded to describe the fight between Blade and Miss Freddy. Next, Campbell testified that appellant approached him and threw a punch at him. According to Campbell, a fistfight ensued. Campbell indicated that, while the fistfight was taking place, the short, dark-skinned individual appeared on the scene with a gun clip. According to Campbell, appellant shoved the clip into the gun and shot him. Campbell stated that, after he was shot, he fell to the ground and was unable to move. Ultimately, he was taken to the hospital.

Columbus Police Detective Kevin Jackson testified that he performed a gunshot residue test on an individual, later established at trial to be Delbert Miller. Jackson also collected five spent shells and a bullet fragment. Columbus Police Detective Edward Kallay testified that Miller was the initial suspect in the shooting. He noted that Miller tested positive for the gunshot residue test. Kallay then testified that appellant became another suspect as the investigation continued. Kallay also noted that, when he showed Campbell a photo array of suspects, Campbell identified appellant as the shooter. Columbus Police Officer Dennis Jude and Columbus Police Criminalist Mark Hardy also testified on behalf of appellee. Through the testimony of these witnesses, it was established that the gun used in the shooting was found in a vehicle occupied by Ronald Dawson and William Small.

Appellant's trial counsel called Michelle Ledsome to testify at trial. Ledsome testified that she was with Peters the night of the shooting. Ledsome stated that, sometime after the shooting, Columbus Police Officers asked her to look at a photo array to identify Campbell's shooter. Ledsome identified an individual who was not appellant. However, Ledsome did provide an in-court identification indicating that appellant was involved in a fistfight with Campbell.

The jury convicted appellant of felonious assault with a firearm specification and attempted murder with a firearm specification. The trial court found appellant guilty of the weapon under disability count that was tried to the bench. During sentencing, the trial court found that the attempted murder and felonious assault counts merged. The trial court ordered appellant to serve a ten-year sentence on the merged counts, and a consecutive three-year sentence was imposed on the merged firearm specifications. Lastly, the trial court imposed a concurrent twelve-month sentence on the weapon under disability charge.

Appellant appeals, raising four assignments of error:

FIRST ASSIGNMENT OF ERROR: The court erroneously ordered appellant remain shackled while in the courtroom in the presence of the jury.

SECOND ASSIGNMENT OF ERROR: The court erroneously overruled appellant's motion for a mistrial.

THIRD ASSIGNMENT OF ERROR: Appellant received ineffective assistance of counsel.

FOURTH ASSIGNMENT OF ERROR: The cumulative effect of the errors advanced in this brief entitles appellant to a new trial.

In his first assignment of error, appellant contends that the trial court erred in ordering him to remain shackled during trial. We disagree.

"[C]ourts have recognized that care should be taken by a trial court regarding the use of shackles as the physical presence alone of such devices can adversely impact on the presumption of innocence to which a defendant is entitled." *State v. Blackmon* (Feb. 14, 1995), Franklin App. No. 94APA05-773, unreported. However, a defendant does not have an absolute right to be free of shackles in the courtroom. *Id.* A prisoner may be shackled when such precaution is necessary to prevent violence or escape. *State v. Moss* (Apr. 12, 2001), Franklin App. No. 00AP-574, unreported, citing *State v. Woodards* (1966), 6 Ohio St.2d 14. A trial court's decision whether to shackle a defendant in the courtroom will not be reversed on appeal absent an abuse of discretion. *State v. Richey* (1992), 64 Ohio St.3d 353, 358, overruled on other grounds, *State v. McGuire* (1997), 80 Ohio St.3d 390. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

Here, the trial court had ample information to conclude that appellant needed to be shackled during trial to prevent violence or an escape. The trial court acknowledged that the sheriff's deputies were "of limited staffing" at the time. In addition, as noted by the sheriff's deputy, appellant was placed on "an extremely high bond." The trial court set appellant's bond at over one million dollars. The trial court set such a high bond, in part, because it was informed that appellant threatened the niece of one of his former defense attorneys. Moreover, the trial court was able to base its decision on the deputy informing it that appellant has an "affiliation to known gang members" and "was to be kept

separate from the jail when he was in there." Lastly, the sheriff's deputy asserted that appellant should be shackled during trial because of the nature of the charges filed against him. The trial court recognized this point and further noted that appellant was "here on three cases on today's docket and has another attempted murder charge and another case pending as well."

We further note that the trial court ordered the least noticeable restraints possible. The record establishes that appellant wore regular, personal attire during trial and his hands were free. The trial court emphasized that a skirt was placed around the defense counsel's table so the jurors would not be able to see the leg shackles. A skirt was placed around the prosecutor's table as well, so that both tables looked the same. Finally, the trial court indicated that it would ensure that the jurors would not see appellant walking into or out of the holding cell or see the leg shackles on him.

Accordingly, based on the above, we conclude that the trial court did not abuse its discretion when ordering appellant to wear leg shackles during trial. As such, we overrule appellant's first assignment of error.

Appellant's second assignment of error concerns an exchange between appellee and its witness, Crystle Peters. On direct examination, as Peters gave her account of events leading up to the shooting, she became uneasy:

A. I DON'T EVEN KNOW WHAT THEY [TRINA BLADE AND MISS FREDDY] WERE ARGUING ABOUT. THEY WERE ON THE SIDE OF THE HOUSE LIKE IN THE BACK. AND – I AM SORRY, ALL THOSE PEOPLE ARE LOOKING AT ME.

Later during the direct examination, appellee initiated the following exchange:

Q. YOU KEEP LOOKING OUT THE DOOR. ARE YOU NERVOUS TO BE HERE?

A. YES, SIR.

Q. ARE YOU AFRAID?

A. YES, SIR.

Q. OKAY. WE'LL GO SLOW AND KNOW THAT NOTHING CAN HAPPEN TO YOU HERE, OKAY?

Appellant's trial counsel objected to appellee asking Peters if she was afraid and moved for a mistrial. The trial court overruled the motion and, instead, issued the following curative instruction:

MS. PETERS' COMMENT ABOUT WHETHER SHE WAS CONCERNED ABOUT SOMETHING OR NOT IS NOT PART OF THIS CASE, AND YOU'RE INSTRUCTED TO DISREGARD THAT COMMENT, THAT QUESTION, AND THE RESPONSE ***.

In his second assignment of error, appellant contends that the trial court erred in not granting a mistrial. We disagree.

The granting or denial of a motion for mistrial rests within the sound discretion of the trial court. *State v. Treesh* (2001), 90 Ohio St.3d 460, 480. Great deference is given to the trial court's discretion "in recognition of the fact that the trial judge is in the best position to determine whether the situation in his courtroom warrants the declaration of a mistrial." *State v. Glover* (1988), 35 Ohio St.3d 18, 19. The granting of a mistrial is necessary only when a fair trial is no longer possible. *Treesh*, at 480, citing *State v. Franklin* (1991), 62 Ohio St.3d 118.

Here, as noted above, the trial court gave a curative instruction, ordering the jury to disregard the exchange. It is well-established that the jury is presumed to have

followed the trial court's instructions. *State v. Fears* (1999), 86 Ohio St.3d 329, 334. Thus, absent evidence in the record compelling us to conclude otherwise, we must presume that the jury followed the above-noted instruction and disregarded the exchange relating to Peters' being afraid to be in the courtroom testifying against appellant. Accordingly, we conclude that the trial court did not err in overruling appellant's motion for mistrial. As such, we overrule appellant's second assignment of error.

In his third assignment of error, appellant contends that he received ineffective assistance of counsel. We disagree.

To establish an ineffective assistance of counsel claim, appellant must first show that, in light of all the circumstances, his trial counsel's performance was outside the range of professionally competent assistance and, thus, was deficient. *Strickland v. Washington* (1984), 466 U.S. 668, 687. Second, appellant must show that he was prejudiced by such deficient performance. *Id.* Appellant was prejudiced by his trial counsel's performance if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.*

Appellant first contends that his trial counsel was ineffective for failing to excuse two jurors who claimed to know Franklin County Assistant Prosecuting Attorney Doug Stead. Although Stead is an assistant prosecuting attorney, he was not involved in the trial of appellant's case. During jury voir dire, one juror indicated that she and Stead were neighbors. The juror also mentioned that she and Stead socialized occasionally. Another juror indicated that his daughter had been on a softball team with Stead's daughter.

In *State v. Misencik* (Apr. 22, 1992), Licking App. No. CA-3737, unreported, the Licking County Court of Appeals reviewed a defendant's claim that he received ineffective assistance of counsel when his trial counsel failed to excuse a juror who was an acquaintance with a prosecutor in the case. The appellate court concluded that the defendant did not receive ineffective assistance of counsel for his trial counsel's failure to excuse the juror, noting that the juror "asserted that the acquaintance would not make it difficult for her to sit as a fair and impartial juror."

Similarly, in *State v. Auel, Jr.* (Dec. 19, 1997), Champaign App. No. 97 CA 02, unreported, the Champaign County Court of Appeals concluded that a defendant did not receive ineffective assistance of counsel when his trial counsel failed to excuse two jurors who claimed to know the prosecuting attorney in the case. One juror claimed to have a child on the same soccer team as a child of the prosecuting attorney in the case. Another juror had a son who was once represented by the attorney. In rejecting the defendant's ineffective assistance of counsel claim, the appellate court emphasized that "[e]ach stated that he or she would not be affected by that knowledge and experience."

In this case, as noted above, Stead was not involved in the trial of appellant's case. Moreover, as was the case in *Misencik* and *Auel*, the juror who was a neighbor of Stead confirmed that she would not "believe everything that comes out of the State's witnesses' mouth" because of her being acquainted with Stead. She also verified that her relationship with Stead would not affect her ability to listen to witnesses and make decisions in the case. Likewise, the juror who had a daughter on a softball team with Stead's daughter confirmed that his knowing Stead would not keep him from being fair and impartial. In addition, the juror indicated that he knew nothing about appellant's case.

Accordingly, we conclude that appellant did not receive ineffective assistance of counsel when his trial counsel failed to excuse two jurors who knew Assistant Prosecuting Attorney Stead.

Appellant further contends that he received ineffective assistance of counsel when his trial counsel called Ledsome to testify at trial. Appellant asserts that Ledsome prejudiced his defense because she supplied an in-court identification of appellant. However, as noted above, Ledsome only identified appellant as an individual involved in a fistfight with Campbell. Appellant maintained, in his trial defense, that he was not involved in the shooting of Campbell. Ledsome supported this theory to the extent that she testified to have been shown a photo array and identified an individual other than appellant as the one who shot Campbell. Thus, we conclude that appellant did not receive ineffective assistance of counsel when his trial counsel called Ledsome to testify.

In his third assignment of error, appellant also asserts that he received ineffective assistance of counsel through his trial counsel's failure to object to Criminalist Mark Hardy testifying about gunshot residue. Appellant's trial counsel stipulated to Hardy's qualifications on firearms' examination and identification, and Hardy proceeded to testify on such matters on behalf of appellee. During the direct examination, appellee asked:

Q. YOU'VE HEARD OF GUNSHOT RESIDUE BEFORE,
HAVE YOU NOT?

A. YES.

Q. ARE YOU AN EXPERT IN THAT FIELD?

A. NO.

Nonetheless, as noted by appellant, the witness proceeded to confirm that someone "standing around the person firing the gun" would have gunshot residue on them and that "the person that is being shot with the gun" would also have gunshot residue on them. In addition, Hardy verified that the person firing the weapon would have gunshot residue on them. Appellant contends that his trial counsel was required to object to such testimony because Hardy claimed that he was not an expert in gunshot residue.

However, appellant has failed to establish that an objection would have led to the trial court precluding Hardy from testifying about gunshot residue. Hardy provided some testimony on his experience as a criminalist and clarified that he could testify as to "what gunshot residue is about" and that he does "feel comfortable" within his "knowledge of gunshot residue" to testify about when persons are exposed to gunshot residue after a gun is fired. Furthermore, Hardy's testimony did not prejudice appellant's defense. The record establishes that Miller was found with gunshot residue. However, the record does not establish the presence of gunshot residue on appellant because he was never tested for such residue. Because of this information in the record, Hardy's testimony precluded the jury from inferring that appellant fired a gun at Campbell; however, Hardy's testimony left open the possibility that Miller fired the gun at Campbell, as was appellant's contention. Accordingly, we conclude that appellant did not receive ineffective assistance of counsel when his trial counsel failed to object to Hardy testifying about gunshot residue.

Appellant's third assignment of error also concerns Campbell's testimony. During opening statements, appellee indicated that Campbell is a "drug addict and that I did him a favor." However, neither appellee nor appellant's trial counsel questioned Campbell about any benefits he received from appellee. Appellant contends that his trial

counsel was ineffective for failing to cross-examine Campbell about any benefits given to him by appellee.

Matters on which a witness is cross-examined are within the realm of counsel's trial strategy and tactics. See *State v. Otte* (1996), 74 Ohio St.3d 555, 565; *State v. Jones* (June 13, 2000), Franklin App. No. 99AP-704, unreported. It is well-established that courts must generally refrain from second-guessing strategic decisions of trial counsel. *State v. Sallie* (1998), 81 Ohio St.3d 673, 674.

Here, the record demonstrates that appellant's trial counsel attacked Campbell's credibility on cross-examination by highlighting his frequent drug usage and heavy alcohol consumption. As well, appellant's trial counsel questioned Campbell's ability to recall events surrounding the shooting after having consumed an admitted eighty ounces of alcohol. Thus, appellant's trial counsel did not allow Campbell to testify unchallenged and we will not second-guess the decision of appellant's trial counsel to forgo additional challenges about Campbell receiving a benefit from appellee. As such, we conclude that appellant's trial counsel was not ineffective for failing to question Campbell about any benefit he received from appellee.

Lastly, appellant's third assignment of error concerns appellant's trial counsel's cross-examination of Detective Kallay. Appellant's trial counsel began cross-examination by establishing that Delbert Miller had already been sentenced for his role in the shooting of Campbell, and that he is also in jail on another attempted murder case. Appellant notes that, on re-direct, appellee asked the detective about Miller's other attempted murder case. On re-cross, it was established that Miller had been arrested on numerous occasions. In his third assignment of error, appellant contends that he re-

ceived ineffective assistance of counsel when his trial counsel cross-examined Detective Kallay about Miller's other bad acts. We disagree.

We have previously stated in this opinion that matters on which a witness is cross-examined are within the realm of counsel's trial strategy and tactics, and that we must generally refrain from second-guessing strategic decisions of trial counsel. See *Otte*, at 565; *Sallie*, at 674; *Jones*. Here, as noted above, appellant's trial counsel contended that appellant had nothing to do with the shooting and that Delbert Miller actually shot Campbell. The cross-examination of Kallay compliments this trial strategy and promotes appellant's trial counsel's attempts to portray Miller, and not appellant, as the villain in this case. Accordingly, we have no cause to second-guess the strategic decision of appellant's trial counsel to cross-examine Kallay about other bad acts of Miller. As such, we conclude that appellant did not receive ineffective assistance of counsel when his trial counsel elicited such testimony on cross-examination.

As demonstrated above, we conclude that appellant did not receive ineffective assistance of trial counsel. As such, we overrule appellant's third assignment of error.

In his fourth assignment of error, appellant contends that the cumulative effect of the errors advanced in his appellate brief entitles him to a new trial. We disagree.

The Ohio Supreme Court recognized the doctrine of cumulative error in *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus. "Pursuant to this doctrine, a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State*

v. Garner (1995), 74 Ohio St.3d 49, 64. The doctrine of cumulative error is not applicable unless there are multiple instances of harmless error. *Id.* The doctrine of cumulative error is not applicable to appellant's case because we have found no merit in his claims of trial court error. Accordingly, we overrule appellant's fourth assignment of error.

In summary, we overrule appellant's first, second, third and fourth assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and BROWN, JJ., concur.
