[Cite as *State v. Hobbs*, 2015-Ohio-2419.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
		No. 14AP-225
v.	:	(C.P.C. No. 12CR11-5927)
Brandon L. Hobbs,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 18, 2015

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Pritchard*, for appellant.

Dennis W. McNamara, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Defendant-appellant, Brandon L. Hobbs, appeals from a judgment of conviction entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

I. Factual and Procedural Background

{¶ 2} On November 20, 2012, a Franklin County Grand Jury indicted appellant on counts of murder in violation of R.C. 2903.02, carrying a concealed weapon in violation of R.C. 2923.12, and having a weapon while under disability in violation of R.C. 2923.13. The charges arose out of the shooting death of Jaron Kirkling. Appellant entered a not guilty plea to the charges and proceeded to a jury trial.

{¶ 3} In September 2012, appellant sold his Chevy Suburban to Kirkling. Appellant told Kirkling that he could keep the license plates on the car until Kirkling could transfer the title to his name. Kirkling, however, had some difficulty obtaining title in his name. In October 2012, appellant received a speeding ticket in the mail arising from Kirkling's driving of the Suburban. Appellant received it because the car was still in his name. Appellant contacted Kirkling to resolve the matter. Kirkling told him that he would pay for the ticket and that he would transfer the title to his name as soon as he could. Appellant was becoming annoyed that it was taking Kirkling so long to transfer the title and repeatedly talked to him on the phone about doing it.

{¶ 4} On November 11, 2012, Kirkling and his cousin, Brandon Mackey, who had arranged the sale of the car, were sitting in the Suburban in Mackey's driveway. Appellant and his girlfriend, Shelby Abrams, drove up in their car and parked behind the Suburban. Appellant got out of the car, walked to the front of the Suburban, and took the front license plate off the car. When he walked to the back of the Suburban, Kirkling got out of the car and asked him what he was doing. Appellant told Kirkling that it had taken him too long to transfer the title so he was going to take the license plates. Kirkling did not want him to take the license plates and they began yelling at each other. Mackey tried to calm them down and asked his girlfriend, Melody Gaston, to come out of the house to tell the two men to leave the property. At this time, Abrams got out of appellant's car to take the license plate off the back of the Suburban. Kirkling walked around to that part of the car and pushed, moved, or somehow came into contact with Abrams to stop her from taking the plate. What happened next was the central dispute at trial.

{¶ 5} Appellant testified that he was angry when he saw Kirkling push Abrams and started yelling at him. According to appellant, he and Kirkling continued to yell at one another until Kirkling pulled out a gun from his waistband and aimed it at him, which scared appellant. Within a second or two of seeing Kirkling's gun, appellant pulled out his own gun, stepped back and started shooting. Appellant shot four times at Kirkling who then fell to the ground. Kirkling did not fire his gun. Appellant fired two more shots and then took the gun from Kirkling's hands. He and Abrams then drove away.

{¶ 6} Abrams supported appellant's version of events. She testified that Kirkling deliberately knocked her to the ground as she attempted to remove the license plate.

Appellant came to her aide and yelled at Kirkling not to touch her. She then saw Kirkling pull out a gun. She ran to the safety of the car. She heard four initial shots and then four more shots a few seconds later. She did not see who fired the shots. (Tr. 491-92.) Appellant and Abrams then drove away. In the car, Abrams saw that appellant had two guns.

{¶ 7} Mackey and Gaston described the shooting differently. According to Mackey and Gaston, Kirkling did not pull out a gun when the incident occurred. Rather, appellant shot Kirkling because he was upset with him after he pushed Abrams. Nor did Gaston see appellant take a gun from Kirkling.

{¶ 8} More than a year after the shooting, and only days after appellant's arrest, his former lawyer contacted the police and told them that he had two guns that had something to do with appellant's case. One was a Smith & Wesson M & P .40 caliber handgun and the other was a .357 caliber Glock Model 31 handgun. (Tr. 262.) Appellant admitted to shooting Kirkling with the .357 Glock during the confrontation. He also testified that he took the Smith & Wesson .40 caliber handgun from Kirkling that day. He had separately wrapped the two guns in plastic bags and delivered them to his lawyer. Police did not find any guns at the scene of the murder but found several .357 caliber bullet casings. There were no .40 caliber bullet casings.

{¶ 9} DNA found on the barrel of the Smith & Wesson handgun was compared to DNA samples of appellant and Kirkling. That testing found a mixture of DNA from at least two individuals. Kirkling could not be excluded as the major contributor to that mixture of DNA. This DNA evidence arguably supported appellant's claim that Kirkling had a gun at the time of the shooting. In response, the state attempted to show other ways that Kirkling's DNA could have ended up on the handgun, such as an indirect transfer of the DNA from one person to another. The state also attempted to show that appellant often let other people handle guns that he had in his house although there was no evidence that Kirkling had ever been to appellant's house.

{¶ 10} The jury rejected appellant's self-defense theory and found him guilty of murder and the attendant firearm specification as well as the two weapons charges. The trial court sentenced appellant accordingly.

II. The Appeal

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

> 1. Trial counsel's acts and omissions deprived appellant of his right to effective assistance of counsel.
>
> 2. The trial court erred when it did not merge for purpose of sentencing the offenses of murder, carrying a concealed weapon, and having a weapon under a disability.

A. First Assignment of Error–Ineffective Assistance of Counsel

{¶ 12} In his first assignment of error, appellant argues that he received ineffective assistance of counsel. We disagree.

{¶ 13} To establish a claim of ineffective assistance of counsel, appellant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced him. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 133, citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to make either showing defeats a claim of ineffective assistance of counsel. *State v. Bradley*, 42 Ohio St.3d 136, 143 (1989), quoting *Strickland* at 697. ("[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

{¶ 14} In order to show counsel's performance was deficient, the appellant must prove that counsel's performance fell below an objective standard of reasonable representation. *Jackson* at ¶ 133. The appellant must overcome the strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Strickland* at 689. To show prejudice, the appellant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶ 204.

{¶ 15} Appellant argues that his trial counsel was ineffective for eliciting certain "other acts" testimony that described his history of selling drugs and possessing guns and for failing to object to similar testimony presented by the state in violation of Evid.R. 404(B). He claims that the state presented this testimony to portray appellant as an armed drug dealer and that his trial counsel was ineffective for not preventing this and, in some instances, eliciting this inadmissible testimony by his own questioning.

{¶ 16} Before any of this testimony, the trial court heard a motion in limine which addressed anticipated testimony regarding appellant's prior drug sales as well as his gun possession. (Tr. 230.) The trial court concluded that it would allow witnesses to testify about appellant having a gun and his drug sales if they occurred at the same time. The witnesses could not, however, simply provide gratuitous testimony regarding appellant's drug sales if a gun was not involved with those sales.

{¶ 17} Appellant contends, however, that the state violated the trial court's ruling by simply portraying him as a drug dealer. First, in Gaston's direct examination, the prosecutor asked about her previous interactions with appellant. Gaston testified that she had previously bought drugs from appellant at his house and that he had guns in his house that he let other people handle. Appellant's trial counsel objected to those questions but, the trial court overruled the objections. Appellant's trial counsel, in an attempt to impeach Gaston, then questioned her extensively about her drug usage and about the quantity of drugs she bought from appellant. At some point during that questioning, the trial court instructed appellant's trial counsel to stop questioning Gaston about her drug usage because it was not relevant to the case.

{¶ 18} Appellant contends that this portrayal of him as a drug dealer continued in the prosecutor's cross-examination of Abrams. The prosecutor asked Abrams whether appellant sold drugs, whether he possessed guns, and whether he sold drugs to Gaston. Abrams testified that appellant was a drug dealer and had sold drugs to Gaston. She also testified that appellant had a Smith & Wesson handgun. (Tr. 505.) Trial counsel did not object to most of these questions.

{¶ 19} Appellant then testified on his own behalf. He introduced himself to the jury by informing them that he had lived in Columbus all his life and that his employment included "sell[ing] drugs from time to time." (Tr. 553.) During the direct questioning of appellant, his trial counsel asked appellant about his history of selling drugs and his use and possession of guns. He also asked appellant how he got the gun that he used to shoot Kirkling. Appellant admitted that he bought the gun off the street. He also admitted that he went to Mackey's house to sell him drugs that day and that he had a gun because he was carrying a lot of money from drug sales.

{¶ 20} During the state's cross-examination of appellant, the prosecutor questioned appellant about his history of selling drugs and then inquired about the link between selling drugs and carrying guns. Appellant described the different situations in which he would or would not have a gun. Those situations depended on whether he was carrying a large amount of drugs or money. The prosecutor also questioned appellant about how he came to be in possession of the gun (Glock Model 31) that he used to shoot Kirkling. Appellant testified that he bought the gun from a friend. He explained that he did not know whether that gun or the Smith & Wesson had been stolen. The prosecutor further questioned appellant about "all the different guns you've had at your house." (Tr. 636.) Appellant described two or three guns that he owned. Trial counsel did not object to any of this questioning.

1. Was this Trial Strategy?

{¶ 21} Appellant argues that his trial counsel was ineffective for allowing and, in some instances, assisting the state in portraying him in a bad light through the "other acts" testimony concerning his drug dealing and history of gun possession in violation of Evid.R. 404(B). We disagree.

{¶ 22} Evid.R. 404(B) provides that "[e]vidence 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."

{¶ 23} The state does not argue that the admission of the above testimony was proper under Evid.R. 404(B). Instead, the state argues that trial counsel's strategy was to portray appellant as completely candid and truthful to the jury so that they would believe him when he testified that he shot Kirkling in self-defense. Therefore, the state argues, trial counsel made a strategic decision not to object to this testimony and, in fact, elicited some of this testimony in his own questioning, in an attempt to make appellant seem more candid and honest. We agree that this could be a legitimate trial strategy under the facts of this case.

{¶ 24} Evidence of other crimes which come before the jury due to defense counsel's neglect, ignorance, or disregard of defendant's rights, and which bears no

reasonable relationship to a legitimate trial strategy, will be sufficient to render the assistance of counsel ineffective. *State v. Hester*, 10th Dist. No. 02AP-401, 2002-Ohio-6966, ¶ 10; *State v. Rutledge*, 10th Dist. No. 92AP-1401 (June 1, 1993), citing *State v. Martin*, 37 Ohio App.3d 213, 214 (10th Dist.1987). Hindsight, however, is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel. *State v. Fritz*, 163 Ohio App.3d 276, 2005-Ohio-4736, ¶ 18 (2d Dist.), citing *Strickland*; *State v. H.H*, 10th Dist. No. 10AP-1126, 2011-Ohio-6660, ¶ 25, quoting *State v. Jackson*, 107 Ohio St.3d 300, 2006-Ohio-1, ¶ 138 ("Although introducing evidence of prior convictions or bad acts may be a questionable strategy in hindsight, this court generally 'refrains from second-guessing strategic decisions counsel makes at trial, even when counsel's trial strategy was questionable.' ").

{¶ 25} Here, appellant testified in support of his claim of self-defense. He testified that he was at Mackey's house to sell him drugs and that he had a gun because of the large amount of money he was carrying from other drug sales. Therefore, trial counsel would have understood that the jury was going to hear testimony about appellant's prior convictions,[1] drug sales, and firearm use. Counsel's apparent trial strategy was to admit certain acts to lessen their significance to the jury and to bolster appellant's credibility so that the jury would believe his testimony that Kirkling threatened him with a gun and that appellant fired in self-defense. *Hester* at ¶ 13-14 (concluding that in light of evidence presented, calling defendant's parole officer in an attempt to bolster defendant's credibility was legitimate trial strategy). Credibility of witnesses is a critical factor in a case such as this where the state's witnesses and the defense witnesses tell two dramatically different versions of the shooting. Especially in such a case, it may be a legitimate trial strategy to admit to the jury bad things, thereby lessening the impact of those bad things on the jury and hopefully bolstering an accused's credibility by seeming completely honest. *State v. Ryan*, 6th Dist. No. WD-05-5120, 2006-Ohio-5120, ¶ 31-36 (questioning of defendant about prior convictions was a reasonable tactical decision and not ineffective); *State v. Delgado*, 8th Dist. No. 60587 (June 11, 1992) ("A knowledgeable

[1] Generally, when an accused testifies at trial, evidence of the accused's prior convictions is admissible to impeach under Evid.R. 609(A)(2) and (3). *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, ¶ 132.

trial counsel in an attempt to diminish the impact of an accused's character on the jury when introduced by the prosecution, can preempt the prosecution by first introducing such a character trait. It is a trial tactic that we cannot consider unreasonable as a matter of law.").

{¶ 26} Trial counsel seemed to acknowledge this strategy in his closing argument, noting that "[t]his case is not a popularity contest. You're not being called upon to like [appellant]. Whether you do or whether you don't, quite honestly, is totally irrelevant with this case." (Tr. 750.) Trial counsel also highlighted appellant's honesty in an attempt to make him more credible to the jury.

> [Appellant] did not seek to hide from the truth. In fact, he wanted the truth to be told during this trial. If you listen to his testimony [and Gaston's], they were very straightforward with you. They didn't try to hide anything. They didn't try to minimize anything. They told you like it was.
>
> It didn't matter whether or not the fact[s] were good; it didn't matter whether or not the facts were bad; it didn't matter whether the facts were ugly. They told you. This young man got on the stand and said, "Yes, I sold drugs. Yes, I have convictions. Yes I possessed of a firearm and I shouldn't have had possession of a firearm.["] He didn't try to hide from that.

(Tr. 762-63.)

{¶ 27} We conclude that trial counsel's decision not to object and, in fact, to raise appellant's prior acts during direct examination is consistent with a legitimate trial strategy and, therefore, is not ineffective assistance of counsel. To the extent that trial counsel's cross-examination of Gaston addressed appellant's extensive history of drug sales, the scope of cross-examination clearly falls within trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel. *State v. Campbell*, 90 Ohio St.3d 320, 339 (2000); *State v. Otte*, 74 Ohio St.3d 555, 565 (1996). Trial counsel's questioning of Gaston about her history of buying drugs from appellant was an attempt to impeach her and was consistent with the strategy of freely admitting appellant's drug dealing history in an attempt to bolster his credibility. We will not second-guess that strategic decision. *State v. Carter*, 72 Ohio St.3d 545, 558 (1995) ("Judicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel").

{¶ 28} In light of trial counsel's legitimate trial strategy, we conclude that appellant has not demonstrated ineffective assistance of counsel. Accordingly, we overrule appellant's first assignment of error.

B. Second Assignment of Error–Merger Issues

{¶ 29} In his second assignment of error, appellant contends that the trial court erred by not merging all of his convictions for purposes of sentencing because they were all committed with a "single discrete act." We disagree.

{¶ 30} Appellant did not request merger or object to his sentence in the trial court and has, therefore, forfeited this argument on appeal absent plain error. *State v. Taylor*, 10th Dist. No. 10AP-939, 2011-Ohio-3162, ¶ 34, citing *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶ 127. A trial court commits plain error, however, when it imposes multiple sentences for allied offenses of similar import. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 31.

{¶ 31} R.C. 2941.25, Ohio's multiple count statute, provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 32} R.C. 2941.25(A) allows only a single conviction for conduct that constitutes "allied offenses of similar import." But under R.C. 2941.25(B), a defendant charged with multiple offenses may be convicted of all the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus. *State v. Ruff*, __ Ohio St.3d __, 2015-Ohio-995, ¶ 13. While the statute may seem clear, as the Supreme Court of Ohio has recently noted, "[a]pplication of the statute has generated considerable debate." *Id.* at ¶ 14.

{¶ 33} In *Ruff,* the Supreme Court of Ohio again waded into that debate to determine how and when offenses merge under this statute. After reviewing the numerous decisions and directions the court has gone through over the years in applying this statute, the court set forth a test for determining whether offenses merge under the statute:

> [W]hen determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must ask three questions when defendant's conduct supports multiple offenses: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.

Id. at ¶ 31.

{¶ 34} Applying that test to the present case, the trial court did not err by sentencing appellant for all three of his convictions. First, the murder and firearms convictions are not offenses of similar import. The murder was an act committed separately from appellant's gun possession and resulted in harm separate and identifiable from his firearm offenses. *Id.* at ¶ 23 (offenses of dissimilar import exist when defendant's conduct involves separate victims or if harm that results from each offense is separate and identifiable). Additionally, offenses are not of similar import if they are not alike in their significance and the resulting harm. *Id.* at ¶ 21. It is plain that the significance and harm of appellant's firearm convictions are dissimilar to a murder conviction. For these reasons, appellant's murder conviction does not merge with his firearms convictions.

{¶ 35} In regards to appellant's two firearms convictions, a line of cases predating *Ruff* has concluded that carrying a concealed weapon and having a weapon under disability are committed with separate animus and, therefore, should not be merged. *State v. Rice*, 69 Ohio St.2d 422, 427 (1982); *State v. Willis*, 12th Dist. No. CA-2012-08-155, 2013-Ohio-2391, ¶ 41-43; *State v. Young*, 2d Dist. No. 2011-Ohio-747, ¶ 46-49; *State v. Ryan*, 7th Dist. No. 10-MA-173, 2012-Ohio-1265, ¶ 53. *Ruff* does not change the rationale or validity of those cases because *Ruff* still prohibits merger if offenses are committed with separate animus. *Ruff* at ¶ 31.

{¶ 36} The trial court did not err by not merging appellant's three convictions. Accordingly, we overrule appellant's second assignment of error.

III. Conclusion

{¶ 37} Having overruled appellant's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and DORRIAN, JJ., concur.