[Cite as *State v. Moore*, 2000-Ohio-2555.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	**CASE NO. 97-C.A.-39**
	)	
- VS -	)	**OPINION**
	)	
ERIC L. MOORE,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	**Criminal Appeal from Mahoning County Common Pleas Court Case No. 96 CR 136**
JUDGMENT:	**Affirmed**
APPEARANCES:	
For Plaintiff-Appellee:	**Atty. Paul J. Gains Mahoning County Prosecutor Atty. Janice T. O'Halloran Asst. County Prosecutor Mahoning County Courthouse Youngstown, Ohio 44503**
For Defendant-Appellant:	**Atty. Albert A. Palombaro Pinewood Center 1032 Boardman-Canfield Rd. Suites 101 & 103 Youngstown, Ohio 44512**
JUDGES:	

Hon. Edward A. Cox
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: September 29, 2000

COX, P.J.

{¶1} This matter presents a timely appeal from a jury verdict and judgment rendered upon such verdict by the Mahoning County Common Pleas Court, finding defendant-appellant, Eric L. Moore, guilty of aggravated murder, in violation of R.C. 2903.01(A), and attempted aggravated murder, in violation of R.C. 2923.02 and R.C. 2903.01(A), including attendant firearm specifications, in violation of R.C. 2941.141 and R.C. 2929.71(A), for each offense, along with his subsequent sentencing thereon.

{¶2} On January 27, 1996, a dance was held at The Pub, which is located in Kilcawley Center on the campus of Youngstown State University, in the city of Youngstown, Mahoning County, Ohio. (Tr. 41). In attendance at the dance were several YSU football players, namely William Walker, Leon Jones, John Phillip Baptiste, and the victim, Jermaine Hopkins. (Tr. 41, 210, 385-86).

{¶3} While at the dance, an altercation erupted when William Walker's girlfriend accidentally bumped into Timothy Slocum, a co-defendant in this case. (Tr. 42). When Walker approached Slocum to apologize, Slocum pushed him and a fight ensued. (Tr. 42). Jones, Baptiste and Hopkins tried to break up the fight and separate the combatants. (Tr. 42-43). Eventually, the YSU police arrived, canceled the dance and ordered everyone to leave. (Tr. 43-44). However, Slocum continued to make threats; saying that he

would be back and that he was going to kill all of the men involved in the fight. (Tr. 49).

{¶4} Upon leaving the dance, the football players went to prepare for an after-dance party at a house located at 107 Park Avenue in Youngstown where several YSU football players, including Hopkins and Jones, resided. (Tr. 36, 209, 211-212, 388).

{¶5} Meanwhile, Slocum and an individual named Anthony Howell went to the Class Act bar. (Tr. 266). After a short stay at the Class Act, Slocum left the bar with appellant and several others and proceeded in separate vehicles to the after-dance party being held by the football players at 107 Park Avenue in Youngstown. (Tr. 267).

{¶6} When Slocum arrived at the party, Mack Gilchrist, another YSU football player, stopped him and asked him to leave. (Tr. 76-77). Slocum said that he wanted the men involved in the fight at The Pub. (Tr. 254). Ultimately, punches were thrown, shots were fired and Jermaine Hopkins was hit in the head and subsequently died. (Tr. 652).

{¶7} Eboni Witherspoon, who was patting down female guests before they entered the party, testified that she observed two men approach the party, saw appellant throw a punch at Baptiste, saw a gun and heard three gun shots. (Tr. 131, 135, 137, 143). Elizabeth Williams provided the police with a statement which indicated that she witnessed appellant shoot the gun. (Tr. 171). Darnell Bracy, a football player that was affiliated with Slocum on the night in question, also informed the police that appellant was the shooter and that he saw appellant shoot Jermaine Hopkins. (Tr. 252, 352).

{¶8} Leon Jones also testified that he saw appellant approach the party and pull a gun out from behind his back. (Tr. 392). Jones further testified that appellant shot the gun right over his ear, prompting him to run inside the house. (Tr. 392, 394).

{¶9} Following a jury trial, appellant was found guilty of aggravated murder and attempted aggravated murder, along with firearm specifications on each. Accordingly, on February 11, 1997, appellant was sentenced to life imprisonment on the aggravated murder charge; an indefinite incarceration term of not less than ten nor more than twenty-five years on the attempted aggravated murder charge; and, three years on each firearm specification to be served consecutively with the prior imposed sentences. It is from this conviction that appellant appeals to this court.

{¶10} Appellant sets forth four assignments of error on appeal.

{¶11} Appellant's first assignment of error alleges:

{¶12} "THE TRIAL COURT'S OPEN AND OBVIOUS BIAS AGAINST THE APPELLANT-DEFENDANT, DENIED HIM A FAIR TRIAL."

{¶13} Appellant argues that the trial court exhibited its impatience and lack of respect for his trial counsel by interrupting him forty-eight times during cross-examination, which was rarely prompted by an objection from plaintiff-appellee, State of Ohio. Additionally, appellant points out that though the trial court also interrupted appellee, it did so in order to provide assistance to appellee in presenting their case.

{¶14} Evid.R. 614(B) permits a trial judge to interrogate a witness as long as the questions are relevant and do not suggest a

bias for one side or the other. *Metropolitan Life Ins. Co. v. Tomchik* (1999), Columbiana App. No. 98-CO-22, unreported, citing *State v. Blankenship* (1995), 102 Ohio App.3d 534, 548. Absent a showing of bias, prejudice or prodding of the witness to elicit partisan testimony, it is presumed that the trial court interrogated the witness in an impartial manner in an attempt to ascertain a material fact or develop the truth. *Tomchik, supra.* A trial court's interrogation of a witness is not deemed partial for purposes of Evid.R. 614(B) merely because the evidence elicited is potentially damaging to the defendant. *Tomchik, supra.*

{¶15} Under Evid.R. 611(A), a trial court has discretion to control the flow of a trial. *Tomchik, supra,* citing *State v. Prokos* (1993), 91 Ohio App.3d 39, 44. Since a trial court's powers pursuant to Evid.R. 611 and Evid.R. 614 are within its discretion, a court reviewing a trial court's interrogation of witness must determine whether the trial court abused its discretion. *Tomchik, supra,* citing *Mentor-on-the-Lake v. Giffin* (1995), 105 Ohio App.3d 441, 448. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶16} In addition, Evid.R. 614(C) provides that "[o]bjections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present." Therefore, a party seeking to challenge a trial court's questioning of a witness is required to raise an objection with the trial court. *Mentor-on-the-Lake, supra.* "The failure of a party to object in accordance with Evid.R. 614(C)

waives consideration of the claimed error on appeal because the failure to object deprives the trial court of any opportunity to correct the alleged error." *State v. Davis* (1992), 79 Ohio App.3d 450, 455.

{¶17} In *State v. Wade* (1978), 53 Ohio St.2d 182, 188; (vacated on other grounds 438 US 911, 57 L Ed 2d 1157), the Ohio Supreme Court initiated the following guidelines:

{¶18} "(1) The burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in light of the circumstances under which they are made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel."

{¶19} Review of the entire transcript fails to demonstrate that the trial court abused its discretion under either Evid.R. 611 or Evid.R. 614(B). Rather, the trial court's comments and questions demonstrate a reasonable attempt to maintain order in the courtroom and to monitor the presentation of evidence. The trial court's actions did not go beyond an impartial search for the underlying truth, so as to deny appellant a fair and impartial trial. It is within the sound discretion of the trial court to question witnesses during trial and appellant's trial counsel failed to object to any of the trial court's questioning of the witnesses during trial. Appellant has failed to demonstrate any bias or prejudice on the part of the trial court herein. Accordingly, the trial court did not abuse it's discretion.

{¶20} Appellant's first assignment of error is found to be without merit.

{¶21} Appellant's second assignment of error alleges:

{¶22} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT PERMITTED THE STATE TO IMPEACH TWO OF ITS OWN WITNESSES WITHOUT A SHOWING OF EITHER SURPRISE OR AFFIRMATIVE DAMAGE."

{¶23} Appellant avers that the trial court erred in allowing appellee to impeach the testimony of Elizabeth Williams and Darnell Bracy based upon prior inconsistent statements. Specifically, appellant alleges that the trial court did not require appellee to make a showing of surprise to warrant the impeachment. Rather, appellant maintains that the trial court placed the burden on the defense to prove lack of surprise.

{¶24} Evid.R. 607 permits a party to attack the credibility of its own witnesses under certain situations, stating:

{¶25} "The credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage."

{¶26} Appellant admits in his brief that his trial counsel conceded affirmative damage. (Tr. 765). Thus, appellee merely had to prove surprise by the prior inconsistent statements under Evid.R. 607.

{¶27} Surprise is best defined in *State v. Moore* (1991), 74 Ohio App.3d 334, 343, where the court stated:

{¶28} "The existence of surprise is a factual issue left to the trial court's discretion * * * and surprise may be shown if the witness's trial testimony is materially inconsistent with his prior written or oral statement, and counsel lacked reason to believe that the witness would recant when called to testify * * * ."

{¶29} In *State v. Davie* (1997), 80 Ohio St.3d 311, 323, the Ohio Supreme Court reiterated that "Under Evid.R. 607, a party may

not impeach its own witness with a prior inconsistent statement without showing surprise and affirmative damage." In *Davie*, the Court held that:

> {¶30} "* * * the prosecution sufficiently showed surprise and affirmative damage, since [the witness'] trial testimony varied from her grand jury testimony and her statement to the police on the day of the murders. At trial, when defense counsel objected to the prosecution's use of [the witness'] prior statement, the trial judge ruled that [the witness'] testimony was adverse to the prosecution." *Davie, supra.*

{¶31} The trial court in the case at bar ruled on several occasions that the testimony solicited from Williams and Bracy constituted sufficient surprise to allow appellee to impeach on the basis of prior inconsistent statements.

{¶32} During direct examination of Elizabeth Williams by appellee, appellant's trial counsel raised an objection and a hearing was conducted in chambers regarding whether sufficient surprise existed to allow appellee to impeach Williams. (Tr. 166-169). At the conclusion of the in-chambers hearing, the trial court stated "[l]et the record show that he's (appellee) been taken by surprise at her change of story and she now has become a belligerent witness and he has a right to cross examine her." (Tr. 168).

{¶33} Prior to Darnell Bracy's testimony, the trial court held an in-chambers hearing to discuss his divergence from a prior statement given to the Youngstown Police Department. (Tr. 327-340). Bracy arrived accompanied by his own counsel and informed the judge, appellant and appellee that he would recant material portions of his testimony. When the hearing had ended, the trial court determined that the evidence of the prior inconsistent

statement would be admissible, but when faced with the question of surprise, the trial court side-stepped the issue. (Tr. 332-333). However, on direct and redirect examination by appellee, the trial court ruled, over several objections by appellant's trial counsel, that appellee had been surprised by the testimony and allowed him to cross-examine Bracy. (Tr. 355, 371, 374-375).

{¶34} Finally, at the close of all of the evidence adduced at trial, a hearing was held on the issue of surprise in which appellant's trial counsel notified appellee and the trial court that he had filed a motion to strike the testimony of Williams and Bracy, relying upon the Eight Appellate District's ruling in *State v. Blair* (1986), 34 Ohio App.3d 6. (Tr. 764). At the completion of the hearing the trial court, once and for all, held:

{¶35} "THE COURT: All right. This matter was before the Court on a motion to strike the testimony of Darnell Bracy and Elizabeth Williams, and we have had the evidentiary hearing subject to that motion. The Court has reviewed the case of the *State of Ohio v. Blair, 34 Ohio App.3d 6*, has reviewed Evidence Rule 607, concludes that the issue of surprise is a factual one, that the facts that have been presented are such that the prosecution has been taken by surprise and is permitting the testimony of Bracy and Williams to remain into the record." (Tr. 828).

{¶36} Thus, the trial court had several instances in which to ponder the issue of surprise and ultimately determined that sufficient surprise had existed. "The existence of surprise is a factual issue left to the trial court's discretion." *Moore, supra*. Accordingly, the Ohio Supreme Court has held that "the scope of review is limited and therefore we will not ordinarily review factual matters." *State v. Reed* (1981), 65 Ohio St.2d 117, 125.

{¶37} Also entangled in appellant's second assignment of error is his assertion that the trial court did not instruct the jury that they could not use the witness' prior inconsistent statements to prove the guilt of appellant, but only to test the credibility of that particular witness.

{¶38} At the conclusion of trial, the court instructed the jury:

{¶39} "During the course of this trial, the State has presented to you prior statements made by some of the State's witnesses. These prior statements are not to be considered by you as substantive evidence or are not to be considered by you as truth of the matter asserted in the statement but to show the inconsistency between the witness's trial and pretrial statements." (Tr. 911).

{¶40} Crim.R. 30 states, in pertinent part:

{¶41} "On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection."

{¶42} The record is devoid of either a request for an additional instruction or any objection by appellant to the instructions given. As a result, appellant is precluded from raising this issue on appeal. It is well settled law that failure to raise a timely objection to jury instructions waives the issue on appeal. *State v. Underwood* (1983), 3 Ohio St.3d 12, 13.

{¶43} Appellant's second assignment of error is found to be without merit.

{¶44} Appellant's third assignment of error alleges:

{¶45} "THE INDICTMENT WAS INVALID BECAUSE AN UNAUTHORIZED INDIVIDUAL WAS PRESENT IN THE GRAND JURY ROOM WHEN ELIZABETH WILLIAMS TESTIFIED."

{¶46} Appellant asserts that the presence of Detective Morales before the grand jury during Elizabeth Williams' testimony was prejudicial. In furthering this argument, appellant purports to argue that the presence of Detective Morales tainted Ms. Williams' testimony because he had previously threatened her with jail when she wanted to recant her identification of appellant as the shooter of Jermaine Hopkins.

{¶47} "Where the sufficiency of the indictment is not raised upon trial, the indictment must be held sufficient unless so defective that it does not by any reasonable construction, charge the offense for which defendant was convicted." *State v. Stone* (1971), 30 Ohio App.2d 49, 56. In fact, R.C. 2941.08 specifically provides:

> {¶48} "An indictment or information is not made invalid, and the trial, judgment, or other proceedings stayed, arrested or affected:
>
> {¶49} "* * *
>
> {¶50} "(K) For other defects or imperfections which do not tend to prejudice the substantial rights of the defendant upon the merits."

{¶51} R.C. 2945.83 further provides, in pertinent part:

> {¶52} "No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:
>
> {¶53} "(A) An inaccuracy or imperfection in the indictment, * * *, provided that the charge is sufficient to fairly and reasonably inform the accused of the nature and cause of the accusation against him;
>
> {¶54} "* * *

{¶55} "(E) * * * unless it appears affirmatively from the record that the accused was prejudiced thereby or was prevented from having a fair trial."

{¶56} Appellant failed to raise any issue of prejudice before the trial court and also failed to claim that the indictment was insufficient to apprise him of the charges. Crim.R. 12(B)(2) specifically mandates that "objections based upon defects in the indictment" must be raised before trial. Crim.R. 12(G) further holds that the failure to raise such objection results in a waiver of the objection.

{¶57} In *State v. Frazier* (1995), 73 Ohio St.3d 323, 332, the Ohio Supreme Court stated that pursuant to Crim.R. 12(B)(2), any objections to an indictment must be brought before trial, not after the prosecution finishes its case-in-chief. Therefore, other than plain error, a defendant waives any argument concerning the validity of the indictment if such argument is not raised before trial. In fact, *Frazier, supra* at 332, cited to *Russell v. United States* (1962), 369 U.S. 749, 763-64, wherein the United States Supreme Court set out two criteria by which the sufficiency of an indictment is to be determined: (1) whether the indictment contained the elements of the offense charged; and, (2) whether the indictment sufficiently apprised a defendant of the charges against him.

{¶58} Appellant did not timely challenge any issues in regard to his indictment. It is well settled that the failure to present and argue error before the trial court results in a waiver of such issue on appeal. *State v. Williams* (1996), 74 Ohio St.3d 569, 579. The failure to raise issues in the trial court results in "a

deviation from this state's orderly procedure and therefore need not be heard for the first time on appeal." *State v. Smith* (1991), 61 Ohio St.3d 284, 293. Accordingly, this court's discretionary review of the alleged error must proceed, if at all, under the plain error analysis of Crim.R. 52(B).

{¶59} Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise. *State v. Joseph* (1995), 73 Ohio St.3d 450, 455. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 97. The record in the instant cause does not meet the above criteria nor does it contain a plain error or defect within the meaning of Crim.R. 52(B).

{¶60} Appellant's third assignment of error is found to be without merit.

{¶61} Appellant's fourth assignment of error alleges:

{¶62} "DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE TO THE DEFENDANT."

{¶63} Appellant alleges that he did not receive effective assistance counsel based upon three separate instances of inaction by his trial counsel.

{¶64} Initially, appellant reinstates the argument offered under his first assignment of error, asserting that his trial counsel was interrupted forty-eight times by the trial court and only objected once. Additionally, appellant avers that at a hearing held on January 22, 1997, the trial court openly displayed bias against appellant without objection from counsel. Thus,

appellant insists that since counsel was aware of the trial court's bias prior to the commencement of trial, he should have made a record of it and continued to do so during the trial.

{¶65} Secondly, appellant submits that counsel had a right to request, and should have requested, at each instance wherein appellee sought to improperly impeach Elizabeth Williams and Darnell Bracy, an instruction that the jury could not use the witness' prior inconsistent statements to establish appellant's guilt, but only to test the credibility of that particular witness. Appellant continues by stating that at the end of the case, counsel should have both requested it in the charge and argued it to the jury, but he did neither.

{¶66} Finally, appellant contends that since counsel had the transcript of Elizabeth Williams' grand jury testimony prior to trial, he had the opportunity to move to dismiss the indictment prior before trial, but he did not. Appellant suggests that if counsel would have done so, it would have been discovered that Ms. Williams was afraid of Detective Morales and would recant her testimony, therefore, eliminating the impeachment of her testimony at trial.

{¶67} We reiterate our discussion and disposition under appellant's first assignment of error and now address his continuing argument based upon whether he received effective assistance of counsel.

{¶68} The United States Supreme Court provided a standard for determining ineffective assistance of counsel in *Strickland v. Washington* (1984), 466 U.S. 668. In order to demonstrate ineffective assistance of counsel, an appellant must first show that his defense counsel was deficient. *Strickland, supra*. This

requires that appellant show that his defense counsel's performance fell below an objective standard of reasonableness. *Strickland, supra.* The second part of the *Strickland* test requires that appellant prove that he was prejudiced by defense counsel's deficiency. To demonstrate prejudice, an appellant must, "* * * show that there is a reasonable probability that but for [defense] counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland, supra* at 694.

{¶69} The Ohio Supreme Court adopted the *Strickland* test in *State v. Bradley* (1989), 42 Ohio St.3d 136, and held that there is a presumption of effective assistance of counsel. "Appellate review of counsel's performance must be highly deferential * * * because of the difficulties inherent making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland, supra* at 689, *Bradley, supra* at 142. Furthermore, a reviewing court cannot use the benefit of hindsight in determining whether a defendant received effective assistance of counsel. *Strickland, supra.* A different opinion which varies from the theory used at trial does not depict ineffective assistance of counsel. *State v. Combs* (1994), 100 Ohio App.3d 90, 103. Consequently, the benchmark for establishing ineffectiveness must be "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial court be relied on as having produced a just result." *State v. Walker* (1993), 90 Ohio App.3d 352, 359, citing *State v. Frazier* (1991), 61 Ohio St.3d 247, 254.

{¶70} The United States Supreme Court's decision in *Strickland* also provides courts with further guidance in determining whether

a criminal defendant has been prejudiced by counsel's ineffectiveness:

> {¶71} "* * * [A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors of the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Strickland, supra* at 695-696.

{¶72} Though the Court in *Strickland* discussed the performance component of an ineffective assistance of counsel claim prior to the prejudice component, the Court noted that it is not necessary for a deciding court to inquire in that order or even to address the two components of the inquiry if the defendant does not make a sufficient showing on one. *Strickland, supra.* The Court continued, stating:

> {¶73} "In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to

defense counsel that the entire criminal justice system suffers as a result." *Strickland, supra* at 697.

{¶74} All of appellant's claims with respect to this fourth assignment of error relate to an alleged failure to object by defense counsel or a tactical decision. "[F]ailure to object is not a per se indication of ineffective assistance of counsel because counsel may refuse to object for tactical reasons." *State v. Bowen* (1999), Columbiana App. No. 96-C.O.-68, unreported, citing *State v. Riffle* (1996), 110 Ohio App.3d 554, 557. "Furthermore, a trial tactic does not establish a lack of effective counsel." *State v. Hamm* (2000), Jefferson App. No. 97-JE-54, unreported, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49. Therefore, defense counsel's conduct did not fall below an objective standard of reasonableness and appellant has failed to demonstrate that there was a reasonable probability that but for defense counsel's alleged instances of inaction, the outcome of the trial court would have been different. *Strickland, supra.*

{¶75} Appellant's fourth assignment of error is found to be without merit.

{¶76} The judgment of the trial court is affirmed.

Donofrio, J., concurs.

Vukovich, J., concurs.