

[Cite as *State v. Mielke*, 2011-Ohio-277.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 10AP-48
Plaintiff-Appellee,	:	(C.P.C. No. 09CR-08-5070)
v.	:	
	:	(REGULAR CALENDAR)
Willie L. Mielke,	:	
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on January 25, 2011

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*,
for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Willie L. Mielke, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court found him guilty, pursuant to a jury verdict, of two counts of felonious assault, in violation of R.C. 2903.11, which is a felony of the third degree.

{¶2} Craig Scott and Joshua Puls worked in the maintenance department at Colonial Village Apartments, where they both lived. The victim in the present case, Sarah Morse, had recently ended a relationship with appellant and, along with her and

appellant's daughter, was living with Puls and his girlfriend, Kimberly Watkins. On August 14, 2009, Watkins called Puls while he and Scott were working to tell him that appellant had been at the apartment banging on their door but had left. Puls called Scott and asked him to go to the apartment. Scott drove to the apartment, while Puls ran there. Puls was nearing the apartment when appellant arrived in his vehicle. Appellant quickly exited the vehicle carrying at least one knife and attacked Morse, who was outside the apartment. Puls tried to get appellant off Morse. Scott was in his car nearby, and tried to help Puls and Morse by striking appellant. Appellant then ran back to his car and fled the scene in his vehicle. After an automobile and foot chase, police eventually captured appellant. Puls sustained a wound to his arm, and Morse received a cut on her back. Both received treatment at a hospital.

{¶3} Appellant was indicted on one count of attempted murder, two counts of felonious assault, and one count of failure to comply with an order or signal of a police officer. On November 3, 2009, a jury trial commenced. Prior to the presentation of evidence, the trial court granted appellant's motion to dismiss the failure to comply with an order of a police officer charge. On November 9, 2009, the jury found appellant not guilty of attempted murder and guilty on the two counts of felonious assault. On December 10, 2009, appellant filed a motion for new trial, which the court denied on January 14, 2010. On January 15, 2010, the trial court sentenced appellant to eight years incarceration on each of the felonious assault counts and ordered them to be served concurrently. Appellant appeals the judgment of the trial court, asserting the following five assignments of error:

[I.] The trial court erred in permitting the state to introduce a prior consistent statement to bolster the testimony of one of its critical witnesses in violation of the Rules of Evidence and due process protections under the state and federal Constitutions.

[II.] The trial court erred in permitting the state to introduce evidence that handcuffs and binoculars were found in the rental car driven by Appellant on the grounds that the relevance of the evidence had not been demonstrated under Evid.R. 401 and the evidence should have been excluded under Evid.R. 403(A).

[III.] The prosecutor engaged in misconduct during closing argument by injecting comments about his integrity and not seeking to convict an innocent man. This behavior deprived Appellant of due process and a fair trial.

[IV.] The trial court erred in denying the defense motion for a new trial.

[V.] Appellant was denied the effective assistance of counsel under the state and federal Constitutions because of trial counsel's failure to call a critical defense witness.

A. Trial counsel violated essential duties owed to his client.

B. Appellant was prejudiced by counsel's ineffectiveness.

{¶4} Appellant argues in his first assignment of error that the trial court erred when it permitted the state to introduce a prior consistent statement to bolster the testimony of one of its critical witnesses, Craig Scott. At trial, Scott testified that appellant got out of his car with a knife and attacked Morse. On cross-examination, Scott was unable to recall some details surrounding the incident. The defense then asked Scott whether he fabricated the story that appellant attacked Morse to protect Puls because, in fact, it was Puls who first saw appellant and then struck him in the side of his head, which Scott denied. Scott then testified that he was no longer friends with Morse because Morse had an affair with Puls after the incident and broke up Puls' relationship.

{¶5} Upon redirect, the prosecutor for the State of Ohio, plaintiff-appellee, sought permission from the court at sidebar to have Scott read his statement given to police at the time of the incident, which was consistent with his testimony that appellant had gotten out of his car with a knife and attacked Morse. The prosecutor claimed this statement was a prior consistent statement, under Evid.R. 801(D), that could be used to rebut the defense's implication on cross-examination that Scott had recently fabricated the story that appellant attacked Morse to get back at Morse for breaking up Puls' relationship, and he knew Morse did not want appellant to go to jail. At the sidebar, defense argued that appellant's theory was not that Scott recently fabricated the story at trial because he was now mad at Morse; rather, the defense asserted that Scott had lied to the police at the time of the incident because he had a friendship with Puls and Morse at that time, and he continued the lie at trial so as not to change his story. The court permitted the prosecutor to present this prior consistent statement to rebut the charge of a recent fabrication.

{¶6} Evid.R. 801(D)(1) provides, in pertinent part:

(D) Statements which are not hearsay. A statement is not hearsay if:

(1) *Prior statement by witness.* The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * (b) consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive[.]

{¶7} This court has explained the scope of Evid.R. 801(D)(1)(b):

What the rule permits is the rehabilitation of a witness whose credibility has been attacked by means of a charge that he recently fabricated his story or falsified his testimony in response to improper motivation or influence, by admitting into evidence a consistent statement made by the witness

prior to the time of the suggested invention or of the emergence of the motive or influence to invent or falsify, as tending to rebut the charge.

Motorists Mut. Ins. Co. v. Vance (1985), 21 Ohio App.3d 205, 207.

{¶8} Here, appellant argues that Scott's claims to police and at trial that he attacked Morse are untrue and have always been untrue. Appellant claims that any motive Scott had to implicate appellant arose at or before the time of the incident. Thus, appellant asserts the statement to police did not fall under the purview of Evid.R. 801(D)(1)(b) because there was no claim of recent fabrication. We disagree. The admission of prior consistent statements by a witness to rebut an implied charge of recent fabrication is favored in the sense that a generous view should be taken of the entire trial setting in determining whether impeachment of the witness's credibility amounts to a charge of recent fabrication, improper motivation, or improper influence. *Id.* at paragraph two of the syllabus.

{¶9} In the present case, the issue is whether the defense attempted to impeach Scott's testimony by charging he recently fabricated his claim against appellant. Although we agree with appellant that there was no overt charge of recent fabrication, taking a generous view of the entire trial demonstrates that the jury could infer from the defense's questioning of Scott that the defense was implying he recently fabricated his testimony. During cross-examination, defense counsel argued at sidebar that the fact that the victim, Morse, was Scott's marijuana supplier would give Scott a reason to lie about appellant assaulting Morse. Defense counsel was then permitted to question Scott with regard to this fact. Defense counsel asked Scott, "And the reason that you all are no longer – you all no longer have a relationship is because she put you in a position of having to lie for

her, correct?" Scott denied he was lying or that this was the reason he and Morse were no longer friends. None of this testimony up to this point would have permitted the state to present the prior consistent statement because the motive to lie would have arisen before the incident.

{¶10} However, immediately after Scott made the above denial, Scott said he and Morse were no longer friends because Morse had an affair with Puls after the incident and broke up Puls' family. Scott then testified that the affair "still don't have nothing to do with this." After Scott made this statement, defense counsel then emphasized that Morse and Puls had the affair after the incident. At this point, there was an implication that Scott might be lying in his testimony about appellant's involvement in the assault in order to get revenge on Morse for breaking up Puls' family, knowing Morse did not want appellant to go to jail. Key to this implication are Scott's denial that the affair "still don't have nothing to do with this" and defense counsel's follow-up questioning regarding the timing of the affair. From this testimony, the jury may have inferred that Scott had lied at trial to get back at Morse. Therefore, because this motive to falsely testify arose after the prior consistent statement made to police, the state could properly rehabilitate Scott's testimony with the prior consistent statement pursuant to Evid.R. 801(D)(1). For these reasons, appellant's first assignment of error is overruled.

{¶11} Appellant argues in his second assignment of error that the trial court erred when it permitted the state to introduce evidence that handcuffs and binoculars were found in the rental car driven by appellant on the grounds that (1) they were not relevant under Evid.R. 401; (2) the relevance was substantially outweighed by risk of unfair prejudice under Evid.R. 403(A); and (3) they suggested other bad acts, in violation of

Evid.R. 404(B). Appellant points out that the officer who testified about the items, Jeremy Phalen, testified the binoculars were on the floorboard on the passenger's side; the handcuffs were wedged between the seat and center console; the car was a rental vehicle in the name of appellant's sister; the car was littered with trash, fast food wrappings, and other items not belonging to appellant; and he did not know who owned the handcuffs or why they were in the car. Appellant contends that, based upon these facts, the handcuffs and binoculars were inadmissible.

{¶12} With regard to relevance under Evid.R. 401 and 403(A), appellant asserts that, without establishing that the handcuffs and binoculars recovered from the rental car belonged to appellant or that they were possessed as part of a scheme related to the assault, the items lacked relevance. Appellant also contends that the danger of unfair prejudice resulting from the admission of evidence related to the handcuffs and binoculars substantially outweighed any probative value due to the speculative nature of the evidence. The admission of relevant evidence, pursuant to Evid.R. 401, rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. An appellate court that reviews the trial court's admission or exclusion of evidence must limit its review to whether the lower court abused its discretion. *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107. The term "abuse of discretion" connotes more than an error of law; it implies that the court acted unreasonably, arbitrarily or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Evid.R. 403(A) provides that, even if relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

{¶13} We find that whether the items should be given any weight was best left for the jury to decide. The jury could have concluded that the binoculars were relevant to the felonious assaults because they could have shown appellant was watching Morse from afar and waiting for the opportunity to attack her. The possible relevance of the binoculars was supported by the evidence showing appellant arrived on the scene quickly and jumped out of the car to chase Morse only after she was outside the apartment. The jury could have also concluded that appellant intended to use the handcuffs to subdue Morse before, during or after the assault. The existence of both items in the vehicle he was driving could have shown that he planned the assault.

{¶14} We also find that the probative value of the handcuffs and binoculars was not substantially outweighed by the danger of unfair prejudice. Again, the jury could decide whether it found evidence of the handcuffs and binoculars probative of the crimes, and that any prejudice resulting from the admission of the evidence would not be unfair. Importantly, the defense effectively cross-examined Officer Phalen, eliciting from him that the vehicle was rented by appellant's sister, appellant had borrowed it the day of the incident, the handcuffs and binoculars were out of sight, the officer had no idea what the intent was for the handcuffs, the officer did not know who the handcuffs belonged to, and the officer did not know who else had been riding in the car in the past. Thus, defense counsel, through cross-examination regarding the handcuffs and binoculars, effectively placed the weight of the evidence in doubt and guarded against any unfair prejudice.

{¶15} With regard to Evid.R. 404(B), evidence of other acts that are wholly independent of the crime charged is generally inadmissible. *State v. Thompson* (1981), 66 Ohio St.2d 496, 497. In that vein, Evid.R. 404(B) provides: "Evidence 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." Accordingly, evidence of other crimes committed by the accused either before or after the crime charged is inadmissible to show a propensity to commit crimes, but may be relevant and admissible to show motive or intent, the absence of mistake or accident, or a scheme, plan or system in committing the act in question. *State v. Broom* (1988), 40 Ohio St.3d 277, paragraph one of the syllabus. Evidence of an accused's other acts is thus admissible only when it "tends to show" one of the material elements in the charged offense and only when it is relevant to the proof of the accused's guilt for such offense. *State v. Curry* (1975), 43 Ohio St.2d 66, 68-69.

{¶16} Here, appellant contends the state improperly used the binoculars and handcuffs to show that he was likely to commit the charged offenses as part of a broader plot to kidnap and kill Morse, citing the following excerpt from the prosecutor's closing statement:

You can infer his intent from the surrounding facts and circumstances. You can look at those items and make that inference.

What else do you do with a pair of handcuffs? I think Officer Phalen said, "I know what I do with my handcuffs." What do you think he was going to do with those?

{¶17} Immediately preceding the above-quoted passage, the prosecutor also stated:

The Judge will instruct you that planning or preparation is not enough to sustain a criminal attempt conviction. Although we do have evidence of planning, we do have evidence of

preparation, the car that he was found in, that he fled in, in it was located a pair of binoculars and a pair of handcuffs.

{¶18} From the prosecutor's statements above, it is clear that the state was using evidence of the binoculars and handcuffs to demonstrate appellant's intent and plan. The jury could have interpreted this evidence as showing that appellant had a plan. The jury could have believed appellant possessed the binoculars to watch for an opportune time to attack Morse and that he could have used the pair of handcuffs to subdue her before or during the assault. Both of these activities would show appellant's intent, planning, and preparation for the crimes for which he was charged. For the foregoing reasons, we find the trial court did not err when it allowed the state to submit evidence of the binoculars and handcuffs found in appellant's vehicle at the time of the crimes. Appellant's second assignment of error is overruled.

{¶19} Appellant argues in his third assignment of error that the prosecutor engaged in misconduct during closing argument when he stated that he had too much integrity as a prosecutor to charge and seek to convict an innocent man, and he took it as a personal affront to suggest he would prosecute an innocent man. Appellant contends this placed the integrity of the prosecutor, as an officer of the state, behind the decision to file charges and encouraged the jury to infer that the prosecutor's office concluded appellant was guilty based on evidence admitted or not admitted.

{¶20} Parties are given wide latitude when making their closing arguments. *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, ¶116, citing *State v. Lott* (1990), 51 Ohio St.3d 160. The state can summarize the evidence and draw conclusions as to what the evidence shows. *Lott* at 165. However, the prosecution must avoid insinuations and

assertions that are calculated to mislead the jury. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. Prosecutors also may not render their personal beliefs regarding the guilt of the accused. *Id.* Nevertheless, since isolated instances of prosecutorial misconduct are usually harmless, any alleged misconduct in the closing argument must be viewed within the context of the entire trial to determine if any prejudice has occurred. See *State v. Lorraine* (1993), 66 Ohio St.3d 414, 420. To determine if the alleged misconduct resulted in prejudice, an appellate court should consider the following factors: (1) the nature of the remarks, (2) whether an objection was made by counsel, (3) whether corrective instructions were given by the court, and (4) the strength of the evidence against the defendant. *State v. Braxton* (1995), 102 Ohio App.3d 28.

{¶21} Here, appellant maintains that the prosecutor, by commenting upon his personal integrity, encouraged the jury to infer that the state believed appellant to be guilty of the offenses. Appellant points to the prosecutor's following statement in closing argument:

The defense is throwing everything at the wall in the hope to confuse you, in the hope that in all of this you'll be confused and you'll lose your way and you'll just say, oh, not guilty.

I know it's a great rah-rah speech we got from Ms. Dennison. I can almost see Mount Rushmore and the stars and stripes behind her talking about the defendant's rights and the burden[s] on the State.

I've got better things to do with my week than to try to convict a[n] innocent man; I really do. I've got better things going on in my life.

Every one of his rights have been protected, and I take it as a personal insult to suggest –

MS. DENNISON: Your Honor, I object.

MR. BROWN: -- that I have nothing better to do than to convict an innocent man.

MS. DENNISON: Your Honor, I object.

THE COURT: Sustained. Let's keep the personal references out of it.

{¶22} Even if the prosecutor's statements rose to the level of misconduct, we find there was no reversible error. Because the trial court sustained the defense's objections to the personal references and warned the prosecutor to keep personal references out of his closing argument, the statements lacked any prejudicial effect warranting reversal. See *State v. Leonard*, 4th Dist. No. 08CA24, 2009-Ohio-6191, ¶58, citing *State v. Carter*, 7th Dist. No. 06-MA-187, 2009-Ohio-933, ¶89, citing *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, ¶94 (the prosecutor's reference to the subject matter of a suppression hearing lacked prejudicial effect because the trial court sustained objection to the reference). See also *State v. Root*, 2d Dist. No. 20366, 2005-Ohio-448, ¶8 (no prejudice resulted from alleged prosecutorial misconduct during closing argument when defendant's objection was sustained). Furthermore, appellant did not request a curative instruction regarding the statement. See, e.g., *Root* at ¶8, citing *State v. Davie*, 80 Ohio St.3d 311, 1997-Ohio-341 (any residual prejudice resulting from alleged prosecutorial misconduct during closing argument was waived when defendant failed to request a curative instruction that might have avoided it). In addition, the prosecutor made no similar remarks after the trial court sustained the defense's objection, lessening the likelihood of prejudice. See *State v. Ware*, 8th Dist. No. 82644, 2004-Ohio-1791, ¶19 (for purposes of a claim of prosecutorial misconduct, defendant failed to demonstrate that he was

prejudiced by prosecutor's improper remarks when, among other things, there were no further similar remarks). For all these reasons, we fail to find any prejudice resulted from the prosecutor's statements above. See generally *Ware* at ¶¶18-19 (for purposes of a claim of prosecutorial misconduct, defendant failed to demonstrate that he was prejudiced by prosecutor's improper remarks about defense counsel when trial court sustained defendant's objection, defendant failed to request a curative instruction, defendant failed to ask that the comment be stricken, and there were no further similar remarks). Appellant's third assignment of error is overruled.

{¶23} Appellant argues in his fourth assignment of error that the trial court erred when it denied his motion for a new trial. Appellant's motion for new trial was based upon a claim of prosecutorial misconduct. Appellant submitted an affidavit from Morse, in which Morse indicated she was ready, willing, and able to testify on behalf of the state but was not called; she was not stabbed; she did not suffer any puncture wounds; she had a cut on her back but did not receive any stitches; she did not know what caused the cut; the brown knife recovered at the scene belonged to her and was in her possession; appellant bought her the taser for her protection; and she thought the case had been blown out of proportion. Appellant argued in the motion for new trial that the state was aware of these facts and declined to call Morse as a witness because it knew her testimony would undermine its case. Appellant points out that, during trial, the prosecutor made repeated references to "stabbing," when the prosecutor knew Morse said she had not been stabbed, and stated several times that appellant possessed four knives and such was "uncontroverted," when the prosecutor knew that Morse contended one of the knives was hers.

{¶24} A Crim.R. 33 motion for a new trial is addressed to the sound discretion of the trial judge. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 76. An appellate court will not reverse a trial court's decision on a motion for new trial absent an abuse of discretion. *Id.*; *State v. Townsend*, 10th Dist. No. 08AP-371, 2008-Ohio-6518, ¶8; *Blakemore* at 219, citing *State v. Adams* (1980), 62 Ohio St.2d 151 (noting an abuse of discretion implies the court's attitude is unreasonable, arbitrary or unconscionable).

{¶25} Pursuant to Crim.R. 33(A)(2), a new trial may be granted based on "[m]isconduct of the jury, prosecuting attorney, or the witnesses for the state." It is clear from the language of Crim.R. 33 that a new trial is not to be granted unless it affirmatively appears from the record that a defendant was prejudiced by one of the grounds stated in the rule, or was thereby prevented from having a fair trial. *Columbus v. Carroll* (Aug. 27, 1996), 10th Dist. No. 96APC01-90, citing Crim.R. 33(E).

{¶26} In the present case, we find no prosecutorial misconduct. Initially, Morse was not asked to testify at trial. If the defendant desired to controvert any of the state's claims regarding the number of knives possessed by appellant or whether Morse was "stabbed," it could have called Morse as a witness. The state was likely reluctant to call Morse as a witness because she was sympathetic to appellant and was at risk to lie about the incident, which is supported by her admission in her affidavit that she needed appellant to be released from prison so he could help her raise their child. Appellant presents no authority for the proposition that the state was under a duty to call Morse as a witness, and the defense was free to do so. As pointed out by the state, the defense was reluctant to call Morse to testify because any favorable or exculpatory testimony would have been severely impeached by the state on cross-examination. The state had

evidence of a phone call between appellant and Morse after the incident, in which Morse stated, "You tried to fucking kill me." The August 14, 2009 investigative report also indicates that Morse told the police that appellant began "stabbing her in the back of her neck and her back." Furthermore, at the bond hearing, Morse stated that she did not receive any stitches, "so it wasn't that serious of an injury," which indicates that she did have some injury.

{¶27} Notwithstanding, as to appellant's specific arguments with respect to the number of knives and whether Morse was "stabbed," as mentioned above, the August 14, 2009 investigative report supported the state's comments that appellant "stabbed" Morse. Puls and Scott also both testified that appellant was "stabbing" Morse. The medics who treated Morse also testified that she had a "stab" wound. Again, if appellant wished to challenge the state's evidence and statements in this respect, it could have called Morse to testify. Furthermore, whether appellant "stabbed" or "cut" Morse is largely a semantic issue for the jury to contemplate and determine based upon the evidence and testimony of all of the trial witnesses.

{¶28} As to the number of knives found at the scene, at one point the prosecutor stated in his closing argument that appellant had "at least" three knives and "up to" four knives in his possession when he went to see Morse, and, at another point, the prosecutor said appellant had four knives. Thus, it appears the prosecutor's statements left some room for the possibility that one of the knives may not have belonged to appellant. Although appellant complains that the prosecutor stated that the testimony regarding the knives was "uncontroverted," appellant fails to point to any contrary evidence presented at trial. The evidence showed that four knives were found at the

scene, and appellant failed to present evidence at trial that showed Morse possessed one of the knives. Furthermore, although appellant argues that the state was aware that Morse possessed a knife, the only support he points to is the August 14, 2009 investigative report, which indicated, "believing that Mr. Mielke was going to come by anyway[,] that when she would go outside she carried a knife." However, the rest of the investigative report fails to reveal that Morse actually carried the knife out of the house at the time of the incident, and Scott and Puls testified that she did not have a knife. Also, even if she had been carrying a knife, there is no description of the knife and no evidence in the record that her knife was one of the four knives recovered at the scene. Therefore, for all of the above reasons, we find the trial court did not err when it denied appellant's motion for new trial with respect to these issues. Appellant's fourth assignment of error is overruled.

{¶29} Appellant argues in his fifth assignment of error that he was denied the effective assistance of counsel under the state and federal Constitutions because of his trial counsel's failure to call Morse as a witness. Appellant contends Morse was a critical witness, as she was the victim, and was also a favorable witness, as demonstrated by her subsequent affidavit. It is well-established that, in order to prevail on a claim of ineffective assistance of counsel, appellant must demonstrate that trial counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 U.S. 2052, 2064. The standard of proof requires appellant to satisfy a two-pronged test. First, appellant must show that counsel's representation fell below an objective standard of reasonableness. Second, appellant must show by a reasonable

probability that, but for counsel's perceived errors, the results of the proceeding would have been different. *Id.* Further, in Ohio, a properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 156.

{¶30} Appellant asserts his trial counsel was ineffective when she failed to call Morse as a witness. The failure to do so was cited by the trial court to support its denial of appellant's motion for new trial. However, trial counsel's failure to call Morse was most likely a result of sound trial strategy. The decision to call or not call witnesses is generally a matter of trial strategy and will not be second-guessed by a reviewing court. *State v. Treesh*, 90 Ohio St.3d 460, 490, 2001-Ohio-4. Here, the state had evidence of a phone call between appellant and Morse after the incident, in which Morse stated, "You tried to fucking kill me." The August 14, 2009 investigative report also indicates that Morse told the police that appellant began "stabbing her in the back of her neck and her back." The report also indicates Morse told the police that appellant's behavior was becoming increasingly violent, and appellant had charged at her with a knife in each hand. Furthermore, at the bond hearing, Morse stated that appellant had injured her during the incident. Therefore, if the defense would have called Morse as a witness, and Morse tried to diminish the seriousness of appellant's actions or deny any injury, the state could have challenged her credibility with damaging impeachment evidence. This impeachment evidence could have also severely damaged appellant's entire defense theory, which was that he did not commit the crimes at all and was attacked himself. In addition, as pointed out by the state, appellant used Morse's absence from the trial as a tactic throughout closing arguments to assert the state failed to sustain its burden because Morse did not testify about her actions. For these reasons, we find appellant's trial counsel did not

provide ineffective assistance of counsel when she failed to call Morse as a witness.

Appellant's fifth assignment of error is overruled.

{¶31} Accordingly, appellant's five assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT, P.J., and TYACK, J., concur.
