

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
Plaintiff-Appellee	:	Hon William B. Hoffman, P.J.
	:	Hon. Julie A. Edwards, J.
-vs-	:	Hon. John F. Boggins, J.
	:	
JAMES SHIFFERLY	:	
	:	Case No. 04-CA-45
Defendant-Appellant	:	
	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Richland County Court of
Common Pleas, Case No. 03-CR-618D
And Case No. 03-CR-617D

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: MARCH 2, 2005

APPEARANCES:

For Plaintiff-Appellee

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Boggins, J.

{¶1} This an appeal from a conviction for attempted murder, robbery and two counts of assault in the Richland County Common Pleas Court.

STATEMENT OF THE FACTS AND CASE

{¶2} On September 13, 2003, at about 2:30 a.m., Appellant James Shifferly, Ivory Perdue, Deon Cornelius and Trumeyne Rodgers went to the vicinity of Mr. P's Bar. At such time, the State asserted that Appellant entered into a conspiracy to rob the first person exiting the bar.

{¶3} Craig Smith exited the bar and the evidence was to the effect that he was robbed. He then ran back into Mr. P's and several other patrons came out to assist. James Ferris was then robbed and Jeremy Yankovich was knocked down and kicked in the head, suffering severe injuries.

{¶4} As a result, Shifferly, Perdue, Cornelius and Ridgers were all charged.

{¶5} Deon Cornelius was acquitted of the charges.

{¶6} Both James Shifferly and Ivory Perdue were convicted for attempted murder, robbery and assault.

{¶7} Trumeyne Rodgers pled in exchange for his testimony.

{¶8} Ivory Perdue separately appeals his conviction in Case No. 04CA46.

{¶9} Appellant Shifferly herein appeals his conviction and raises the following four Assignments of Error:

ASSIGNMENT OF ERROR OF DEFENDANT-APPELLANT SHIFFERLY

{¶10} AI. THE COURT ERRED IN REFUSING TO REQUIRE THAT HEZRON RUMPF BE PRODUCED TO TESTIFY FOR APPELLANT, THEREBY DENYING

APPELLANT HIS RIGHT TO PRESENT A DEFENSE AS ALLOWED BY THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶11} “II. THE COURT ERRED IN ALLOWING TESTIMONY OF PRIOR ACTS OF APPELLANT BE INTRODUCED INTO EVIDENCE IN VIOLATION OF EVIDENCE RULE 404(B).

{¶12} “III. THE COURT COMMITTED PLAIN AND PREJUDICIAL ERROR IN ALLOWING INTO EVIDENCE STATEMENTS OF A CO-DEFENDANT WHO COULD NOT BE CONFRONTED.

{¶13} “IV. APPELLANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL.”

I.

{¶14} The First Assignment of Error asserts that the trial court prevented the testimony of Hezron Rumpf. Such potential witness had been subpoenaed by both the State and by this Appellant but did not appear.

{¶15} A statement by Mr. Rumpf was proffered (T. 1641), by Appellant as his Exhibit 2E.

{¶16} Such Exhibit concerned statements Mr. Rumpf said were made by Ivory Perdue to him while both were cellmates at the Richland County Jail concerning the event at P.J.'s Bar which resulted in the criminal charges being filed. Such statement identified Appellant, James Shifferly, as a cousin of Ivory Perdue.

{¶17} Such statement indicated that Appellant Shifferly knocked the “dude” down but did not kick him and that Perdue and certain others kicked him after he was down, including kicking him in the head and face.

{¶18} The court ruled (T. Vol. IV. 1551) that such hearsay statement being offered by Appellant Shifferly was inadmissible and accepted the State's argument that such would not comply with the hearsay exception of Evidence Rule 801(D)(2).

{¶19} Such Rule, as to statements which are not hearsay, provides:

{¶20} "Admission by party-opponent. The statement is offered against a party and is (a) his own statement, in either his individual or a representative capacity, or (b) a statement of which he has manifested his adoption or belief in its truth, or (c) a statement by a person authorized by him to make a statement concerning the subject, or (d) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (e) a statement by a co-conspirator or a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy."

{¶21} Appellant contends that Evidence Rule 804(B)(3) would permit introduction.

{¶22} Such Rule states:

{¶23} "Statement against interest. A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true, a statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement."

{¶24} Appellant also cites *Washington v. Texas* (1967), 388 U.S. 14 and *State v. Yarborough* (2002), 87 Ohio St.3d 227, in support of admission.

{¶25} Upon review, we agree with the trial court that the statements purportedly made by Ivory Perdue to Mr. Rumpf do not qualify as admissible under either of such rules of evidence nor under the cited cases.

{¶26} The First Assignment of Error is rejected.

II.

{¶27} Appellant Shifferly's Second Assignment asserts error in the introduction of testimony of other acts of such Appellant.

{¶28} Evidence Rule 404(B) states:

{¶29} "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted 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."

{¶30} R.C. 2945.59 states:

{¶31} "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

{¶32} Specifically, Appellant Shifferly references the introduction of testimony by Candice Layne and Jeff Henry.

{¶33} The testimony of Ms. Layne was:

{¶34} "Can you tell the jury what happened when Jeremy got outside the bar?"

{¶35} “He walked out the door and next thing I know he was punched, knocked out cold.” (T. at 745).

{¶36} “And were you shown a photo array with Mr. Shifferly’s picture in it?”

{¶37} “Yes.

{¶38} “And were you able to identify his picture?”

{¶39} “Yes.

{¶40} “How sure were you that he was the one that punched Jeremy and knocked him out cold?”

{¶41} “A hundred percent.” (T. at 747).

{¶42} T. at 748-749:

{¶43} “My question was: How were you able to tell the police, and how were you so sure that it was James Shifferly that was the one that hit Jeremy Yankovich and punched him and knocked him out old [SIC]?”

{¶44} “Because the weekend before that he got me and my friend Gary walking out the door.

{¶45} “Tell the Jury about that.

{¶46} “It was bar closing time, and we were leaving the bar to go home—” (T. at 748-749).

{¶47} “And I walked out the door, this time I walked out the right side to the parking lot. And he just walked up to me, and he hit me on the right side of my jaw, I fell and hit the ground. The next thing I know him and my friend Gary was fighting.

{¶48} “That was the week before—

{¶49} “The weekend before this.

{¶50} “Before what happened to Jeremy?”

{¶51} “Yes.

{¶52} “And when you saw him, when he hit Jeremy, did you recognize him immediately that that’s the same guy that hit me out here the week before?”

{¶53} “Yes.” (t. at 749).

{¶54} The testimony of Jeff Henry to which this Assignment is directed is:

{¶55} “As we were pulling in, I noticed to my left there were some gentlemen on the other side of the street. One in particular that I recognized from a few days before doing the same thing that happened that night.

{¶56} “Did you get a good look at him a couple days before?”

{¶57} “Yes.

{¶58} “And what was he doing a couple days before that drew your attention to his face?”

{¶59} “Same thing that happened that night.

{¶60} “By the same thing, let them know—

{¶61} “Jumped somebody that come out the door.” (T. at 797).

{¶62} And again in reference to the earlier event of Appellant Shifferly attacking someone as he came out of the bar at Page 814:

{¶63} “I just happened to be looking over to my left as we were coming up the street, and seen him standing over there.”

{¶64} “****Did you see him earlier, before that night, doing something?”

{¶65} “Yeah, when they were up there before doing the same thing.”

{¶66} “****How long ago was that?”

{¶67} “I believe that was the weekend before.”

{¶68} These statements by both witnesses were primarily used not only to identify Appellant Shifferly as one of the persons involved in the incident forming the basis of the

facts underlying Appellant Shifferly's trial and this appeal but also to indicate a similar plan or scheme to attack patrons exiting from this bar.

{¶69} As correctly stated by Appellant Shifferly, the Ohio Supreme Court has held that the standard as to admissibility of other act evidence is very strict and are to be construed against admissibility. *State v. Broom* (1988), 40 Ohio St.3d 277.

{¶70} In this case the identity of Appellant Shifferly as the perpetrator of the acts leading to the charges was, as always, necessary for conviction. However, contrary to Appellant Shifferly's assertions that the admission was to buttress the memory of the witnesses, we find, as stated above, that the record indicates a scheme or plan of the same type of activity at the same bar previously and the witnesses' memories were not necessarily enforced or "buttressed", but that they clearly connected Appellant Shifferly to both events. Such testimony under the evidence rule and statute was clearly probative for consideration by the jury.

{¶71} The Second Assignment is rejected.

III.

{¶72} Appellant Shifferly asserts a violation of *Bruton v. United States* (1968), 391 U.S. 123, in his Third Assignment of Error.

{¶73} In *Bruton*, supra, a co-defendant's confession was admitted into evidence in a joint trial with such defendant not testifying and therefore not subject to cross examination. The United States Supreme Court held that this admission violated Bruton's constitutional right to confrontation. U.S.C.A. Amend. 6.

{¶74} In addressing Appellant Shifferly's Third Assignment we find that his reliance on *Bruton*, supra, to be misplaced. No confession was involved.

{¶75} The facts in *Bruton*, supra, were significantly different from the facts sub judice.

{¶76} Here, the statements were made with identification of Appellant as having light skin and as the one doing most of the talking and while not all of the witnesses as to these statements, Rapp, Layne and Henry, were complete in their testimony as to who made the various statements, there was overall sufficient identification and each witness was subject to cross examination.

{¶77} The Third Assignment is denied.

IV.

{¶78} Appellant raises ineffective assistance of counsel as error in his Fourth Assignment.

{¶79} A claim of ineffective assistance of counsel requires a two prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell* (1993), 113 S.Ct. 838, 122 L.Ed. 2d 180; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶80} In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley*, 42 Ohio St.3d at 142. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

{¶81} In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. This requires a showing that there is a reasonable probability that but for counsel's unprofessional errors, the result of the

proceeding would have been different. *Bradley, supra* at syllabus paragraph three. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* It is with this framework in mind that we address the instances of alleged ineffectiveness of counsel raised by appellant in the instant case.

{¶82} An attorney is not ineffective for failing to raise an objection which would have been denied. *State v. Gibson* (1980), 69 Ohio App.2d 91, 95.

{¶83} Also if a counsel's decision not to object was clearly a matter of trial strategy, cannot be regarded as ineffective assistance of counsel. See: *State v. Coleman* (1989), 45 Ohio St.3d 298, 308.

{¶84} Appellant argues that the witnesses did not identify the source of statements heard.

{¶85} At T. at 689, it was stated:

{¶86} "And who as doing most of the talking?"

{¶87} "The light skinned one.

{¶88} "The one up here in the first seat?"

{¶89} "Yeah. And then after he hit the Harley man, that's when the one in the middle started in, too."

{¶90} T. at 691:

{¶91} "Then what happened?"

{¶92} "The light skinned one cracked him, hit him hard.

{¶93} "Was this a punch?"

{¶94} "Yeah.

{¶95} "Did he say anything to him when he hit him or before he hit him?"

{¶96} "Huh uh, he just hit him.

{¶97} “And after the light skinned guy, who you have identified sitting here today at the first table, by Attorney O’Donnell?” (Appellant Shifferly’s Attorney).

{¶98} “Correct.”

{¶99} T. at 693:

{¶100} “What happened?”

{¶101} “After he fell and hit his head on the concrete, the guy in the middle, the dark skinned one, went over and was kicking him like a football in his head.

{¶102} “You are saying that’s the middle guy?”

{¶103} “Yes.

{¶104} “The guy that kicked him, was that the tallest guy, the shortest guy?”

{¶105} “Middle guy.”

{¶106} “****Did anybody else kick him? Was it just one guy, or was it more than one guy?”

{¶107} “It was the light skinned one, too.

{¶108} “So based on what you saw, you are saying that this guy sitting by Attorney O’Donnell kicked Jeremy in the head?”

{¶109} “Yeah.

{¶110} “And then you are saying it was this guy (indicating)?”

{¶111} “Yes, they both did it.

{¶112} “But it wasn’t the tallest guy in the four, it was the middle height [SIC] guy that was doing the kicking?”

{¶113} “Right.

{¶114} “Did they say anything to him while these two guys were kicking him?”

{¶115} T. at 694:

{¶116} “He said that’s what you fucking get, you honkey.”

{¶117} T. at 695:

{¶118} “Did you ever hear the word die that night?”

{¶119} “Yeah.

{¶120} “Who said that?”

{¶121} “I’m pretty sure it was the dark skinned on.

{¶122} “What did he say?”

{¶123} “Die, you fucking honkey, that’s what you get.

{¶124} “That was when Jeremy was being kicked?”

{¶125} “Yeah.”

{¶126} T. at 750:

{¶127} “Yes. Then they began kicking him in the head.

{¶128} “Who is they?”

{¶129} “Shifferly, and the other one I really can’t identify. I know Shifferly for sure.”

{¶130} T. at 752:

{¶131} “Were they saying anything while they were kicking him?”

{¶132} “I heard him telling him die, bitch, die.”

{¶133} T. at 805:

{¶134} “Describe for us who hit him, if you know? Who was the guy who hit him?”

{¶135} “The gentleman in the front over there.

{¶136} “This fellow next to Attorney O’Donnell, that fellow right over there?”

{¶137} “Yes.

{¶138} “In the green shirt over there?”

{¶139} “Yes.

{¶140} “How positive are you of that?”

{¶141} “A hundred percent.

{¶142} “You have no doubt about that?”

{¶143} “None.”

{¶144} T. at 806:

{¶145} “And were any words exchanged by these individuals or said while they were kicking Jeremy when he was down on the ground?”

{¶146} “Yes.

{¶147} “Will you let the jury know what was being said?”

{¶148} “I kept hearing die, mother-fucker, die, you son of a bitch. That’s what I heard.

{¶149} “Were both of these individuals saying that?”

{¶150} “No, I don’t believe so, just the one. Because at the time only one was kicking in the head.”

{¶151} Clearly these statements by such witnesses were admissible and sufficiently identified the actors who, as this was a joint trial, were observable by the jury. As such, an objection to admission would not, in all probability, be successful.

{¶152} The Fourth Assignment is not well taken.

{¶153} This case is affirmed at Appellant's costs.

By: Boggins, J.

Hoffman, P.J. concurs separately

Edwards, J. concurs separately

JUDGES

Hoffman, P.J., concurring

{¶156} I concur in the majority's analysis and disposition of appellant's second assignment of error.

{¶157} With respect to appellant's first, third and fourth assignments of error, I concur in judgment only.

JUDGE WILLIAM B. HOFFMAN

JUDGES