

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

|                     |   |                                   |
|---------------------|---|-----------------------------------|
| STATE OF OHIO       | : |                                   |
|                     | : | Appellate Case No. 23071          |
| Plaintiff-Appellee  | : |                                   |
|                     | : | Trial Court Case No. 08-CRB-01105 |
| v.                  | : |                                   |
|                     | : |                                   |
| TANYA M. ENGLAND    | : | (Criminal Appeal from Area Two    |
|                     | : | County Court)                     |
| Defendant-Appellant | : |                                   |
|                     | : |                                   |

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OPINION

Rendered on the 21<sup>st</sup> day of August, 2009.

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FAIN, J.

{¶ 1} Defendant-appellant Tanya M. England appeals from her conviction  
and sentence for Assault, in violation of R.C. 2903.13. She contends that her trial  
counsel was ineffective. We have reviewed the entire video record of the trial, and  
we find nothing therein to bear out England's claim that her trial counsel was

ineffective. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 2} England and her husband, Roger, attended the St. Helen's Festival in Riverside. Roger England suffers from a physical infirmity, and uses a cane as an aid in walking. At some point, England became aware that her husband had sustained injuries as a result of an altercation in the men's bathroom at the festival.

{¶ 3} Damon Marshall was standing against, or at least very near, the wall in a hallway at the festival. According to Marshall, his wife Sondra, and two witnesses who were unacquainted with Marshall or England, England came around a corner in a hurry, confronted Marshall, grabbed him by his shirt collar, and asked him if he was the "motherfucker" who had injured (or had said something to – the accounts varied) England's husband. Marshall and his wife testified that he was pushed back against the wall when England grabbed him by his shirt collar.

{¶ 4} Marshall testified that he repelled England's attack upon him by pushing her back with his hands. He could not recall seeing that she fell as a result. The neutral witnesses testified that England did fall to the ground as a result of Marshall's having shoved her back.

{¶ 5} A police officer responding to the scene tased Marshall, who was 6' 2", as a result of which he fell to the ground.

{¶ 6} England admitted having confronted Marshall, although she acknowledged that she was not certain that Marshall had been involved in the attack against her husband. She admitted that she had not seen whatever had transpired

in the men's bathroom. She denied having grabbed Marshall by the shirt collar. She called Heather and Lance Lawson as witnesses in her defense. They did not see England grab Marshall by the shirt collar, but both admitted that they were behind England, and might not have been in a position to see England grab Marshall, if she did so.

{¶ 7} England denied initially having used profanity in confronting Marshall. According to her, Marshall said, "Fuck you, bitch," "cold-cocked" her, and pushed her down, causing her to fall. According to England, it was only after she had been cursed and shoved to the ground that she then called Marshall a "motherfucker."

{¶ 8} After the State had rested, England's trial counsel moved for a judgment of acquittal, which the trial court overruled. This case was tried to the court, without a jury. After all of the evidence, both sides presented arguments. Defense counsel argued that even if England had grabbed Marshall by his shirt collar, this did not amount to an assault. The State argued that the testimony by Marshall and his wife that he was knocked against the wall as a result of England's grabbing him would support a finding that England intended to cause Marshall some physical harm, even if only slight physical harm.

{¶ 9} Following the arguments of counsel, the trial court noted that neutral witnesses had corroborated the testimony of Marshall and his wife, and found England guilty of the Assault. England was sentenced to 180 days in jail and fined \$500. The trial court suspended 170 days of the jail time, and \$450 of the fine, upon condition that she serve ten days on electronic home detention (it is unclear whether these ten days were intended to constitute the balance of the 180 days of jail time

remaining after the suspension), pay off fines and costs within 180 days, have no future “violations,” and “attend anger management.”

{¶ 10} From her conviction and sentence, England appeals.

{¶ 11} England has not provided us with a written transcript of the video recording of the trial, as required by App. R. 9, but we have watched the entirety of the video recording of the trial, which, by virtue of App. R. 9(A), is considered the official record on appeal.

## II

{¶ 12} England’s sole assignment of error is as follows:

{¶ 13} “THE TRIAL COURT ERRED WHEN IT ALLOWED THE VERDICT TO BE RENDERED UPON INEFFECTIVE ASSISTANCE OF COUNSEL.”

{¶ 14} England contends that she did not receive effective assistance of trial counsel, in derogation of her rights under the Sixth Amendment to the United States Constitution as incorporated in the Due Process Clause contained in the Fourteenth Amendment to the United States Constitution. An ineffective assistance of counsel claim requires a demonstration that trial counsel’s performance was deficient, and that the deficient performance prejudiced the defendant. *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. Because in this case ineffective assistance of trial counsel is being asserted in a direct appeal, England must demonstrate both the deficient-performance and the prejudice prongs on the record.

{¶ 15} England argues in her brief that:

{¶ 16} “It is apparent from a review of the court proceedings *and a detailed interview with the Defendant-Appellant’s public defender* that the public defender committed at least two demonstrative offenses of ineffective assistance of counsel: (1) failure to adequately interview and prepare the Defendant-Appellant and failure to interview fully the ‘victim,’ and (2) failure to introduce, let alone argue, several affirmative defenses. (Trial Court transcript, *Ohio v. England*, Case No. 08CRB01105).” (Emphasis added.)

{¶ 17} We have not found “a detailed interview with the Defendant-Appellant’s public defender” in the record.

{¶ 18} England first argues that the record reflects that she “appeared confused, emotional, and extremely nervous when she was examined on the stand,” and that “it is evident that she did not know what to expect during her testimony.” We have found nothing in the video record of England’s direct, cross, and re-direct examinations to support these assertions. She does not appear to us to have been confused, emotional, or extremely nervous. She testified in an ordinary, unremarkable direct examination that she had found her husband on the floor, injured, unable to stand, with his clothes ripped, and that she called 911.

{¶ 19} On direct examination, England testified that she was not sure that it was Marshall who had injured, or otherwise participated in the attack upon, her husband, and that she did not recall having used profanity toward Marshall. Defense counsel, aware that England’s having testified that she did not recall having used profanity was somewhat at variance with the testimony of two neutral witnesses that she had used profanity, then asked England a question along the lines of “But

you've heard several people say that you did [use profanity]."<sup>1</sup>

{¶ 20} This question tends to demonstrate two things. First, it is the kind of question that experienced counsel will use to allow a client or a witness to reconcile her testimony with other evidence in the case, where possible, in order to make it more credible. Second, it is usually indicative of having prepared the witness to do just that, in response to the question. In this case, England responded to this question by explaining that Marshall said to her, "Fuck you, bitch," "cold-cocked" her, pushed her down, with the result that she fell, and then she called Marshall a "motherfucker," which is consistent with the testimony of others who said that she used that profanity to address Marshall, differing from their testimony only in the sequence of events.

{¶ 21} Of course, the response to this question opened up a new inconsistency between England's testimony and the testimony of other witnesses, none of whom testified that Marshall had "cold-cocked" England. Defense counsel dealt with this problem in two ways. First, when the prosecutor was making an issue of that discrepancy in his cross-examination of England, in a vigorous fashion, defense counsel interposed an objection that the prosecutor was badgering the witness. This objection was overruled. Then, on re-direct examination, defense counsel elicited from England that she had included the fact that Marshall had hit her in the police report following the incident, which at least partially rehabilitated England's testimony, by showing that it was not a recent fabrication.

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<sup>1</sup>The quotations from testimony appearing in this opinion should be taken with a grain of caution. The author made notes while watching the video recording. The notes may not represent a verbatim transcript of the testimony.

{¶ 22} Because England had included that reference to Marshall's having hit her, in her police report, it would not necessarily have been a good strategy to have omitted that fact from her trial testimony. Doing so might have allowed the prosecutor, on cross-examination, to elicit the reference in the police report to having been "cold-cocked," implying that before England knew that other witnesses would not corroborate that claim, she had been willing to make up a fact in an effort to avoid being criminally charged.

{¶ 23} Next, England argues that: "Additionally, at no time did the Defendant-Appellant's counsel question the arresting officers or victim about potential affirmative defenses (cross-examination portion of Trial Court transcript)." The arresting officers were not cross-examined because they did not testify at the trial.

{¶ 24} The affirmative defense that England appears to be arguing that her trial counsel should have pursued through her cross-examination of the victim, Marshall, she lays out as follows:

{¶ 25} "In the second instance, if a person in good faith and upon reasonable grounds believes a family member is in imminent danger of death or serious bodily harm, such person may use reasonable necessary force to defend the family member to the same extent as the person would be entitled to use force in self-defense, See *State v. Wilford* (1990), 49 Ohio St.3d 247, 151 [sic], Hagel, T., 2007, Ohio Criminal Practice Guide 16.104.6, 279. This is known as the 'alter-ego rule.' *Ellis v. State* (1992), 64 Ohio St.3d 391, 395-396. Failure to introduce a rationale [sic] affirmative defense to a crime constitutes plain error. *State v. Marsh*

(1990, Portage Co.), 71 Ohio App.3d 64. To be pertinent, a bona fide belief of danger should be demonstrated. *State v. Thomas* (1977), 77 Ohio St.3d 323, 330-331. Relying on *Thomas*, Ohio relies on an intermediate position or test, whereby the defender should have reasonably believed she was in imminent danger.

This is interpreted in Ohio as a subjective test under *State v. Koss* (1990), 49 Ohio St.3d 213, 215, to be analyzed by the jury or bench.

{¶ 26} “In the case at bar, when the Defendant entered the ‘sphere of altercation,’ the evidence indicates that she may well have had reason to believe that her own safety was imperiled. The fact that Mr. Marshall was tazered twice indicates either (1) that the police concurred with the Defendant-Appellant that situation was serious, or (2) that the police used excessive force. Therefore, the additional affirmative defense of self-defense also should have been allowed to be raised and examined during the July 9, 2008, trial of the Defendant-Appellant. Here, there is abundant evidence to support either defense of a family member or self-defense. Yet, the court proceedings indicated that at no time were these proffered or even discussed. The Defendant-Appellant was not given the opportunity to put on evidence to that effect. This comprises plain and reversible error, or at the very least ineffective assistance of counsel on remediable [sic] through a fresh hearing of the evidence at a new trial. \* \* \* .”

{¶ 27} As far as the defense-of-family-member defense is concerned, England’s own testimony was clear that she did not see how her husband came by his injuries in the men’s bathroom, but only saw him as he was lying on the floor, afterwards. At that time, there is no testimony in this record that anyone was

attacking England's husband, or threatening to attack him. It was therefore too late for England to have come to the defense of her husband; he had already been injured.

{¶ 28} As far as the defense of self-defense is concerned, England's testimony is consistent with the testimony of every other witness that she confronted Marshall while he was standing in a hallway. If Marshall had participated in the attack on her husband, and she admitted that she was not sure that Marshall had done so, that attack was over. There is no testimony that Marshall menaced or threatened England in any way when she confronted him in the hallway. The evidence in the record suggests that the police arrived at the scene at the tail end of, or just after, the confrontation between Marshall and England, with England down on the floor, and Marshall standing in the hallway, which would explain why the police officer tasered Marshall.

{¶ 29} According to the State's witnesses, England grabbed Marshall's shirt collar before Marshall pushed her away. According to England, she did not touch Marshall before he shoved her. Under the State's theory, England assaulted Marshall before he did anything to which she could claim to have been reacting either in self-defense or in defense of her husband; under England's theory, she did not assault Marshall, period. Under either theory, there was no demonstrable basis, in the record in this case, for a defense of self-defense or a defense of defense-of-family-member.

{¶ 30} We conclude that there is nothing in this record to support England's claim that she did not receive the effective assistance of trial counsel. England's

sole assignment of error is overruled.

III

{¶ 31} England's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, P.J., and BROGAN, J., concur.

Copies mailed to:

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