

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio

Court of Appeals No. S-10-001

Appellee

Trial Court No. 09 CR 1191

v.

Howard A. Chapman

DECISION AND JUDGMENT

Appellant

Decided: October 14, 2011

* * * * *

Howard A. Chapman, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} On June 3, 2011, we issued a judgment affirming appellant's conviction and sentence. (*State v. Chapman*, 6th Dist. No. S-10-001, 2011-Ohio- 2695). This matter is before the court upon the application of Howard Chapman, acting pro se, to reopen his appeal pursuant to App.R. 26(B) and assert a claim of ineffective assistance of appellate counsel.

{¶ 2} Pursuant to App.R.26(B), a defendant may reopen an appeal from the judgment of conviction and sentence in order to assert a colorable claim of ineffective

assistance of appellate counsel. The two-prong test developed in *Strickland v. Washington* (1984), 466 U.S. 668, 687, for determining whether counsel rendered ineffective assistance of counsel, is also the standard for determining whether an appellant has presented a genuine issue of a colorable claim of ineffective assistance of counsel that would mandate reopening his appeal. *State v. Smith*, 95 Ohio St.3d 127, 2002-Ohio-1753, ¶ 7, certiorari denied (2002), 537 U.S. 951. Therefore, we must first determine whether appellate counsel's performance was deficient and then determine whether that deficiency prejudiced the outcome of the appeal. *State v. Reed* (1996), 74 Ohio St.3d 534, 535. An appellant can demonstrate prejudice by demonstrating that had his claims been properly presented, there was a reasonable probability that they would have been successful in reversing his conviction. *State v. Goff*, 98 Ohio St.3d 327, 2003-Ohio-1017, ¶ 5, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus, certiorari denied (1990), 497 U.S. 1011.

{¶ 3} Appellant presents two issues that he believes his counsel should have raised on direct appeal. First, appellant asserts that his counsel should have argued there was insufficient evidence to support his conviction because the element of "force, stealth or deception" was not proven beyond a reasonable doubt. In order to convict appellant of violating R.C. 2911.11(A)(2), aggravated assault, appellee was required to establish beyond a reasonable doubt that appellant trespassed in the victim's home by use of force, stealth, or deception. Appellant contends that when the victim testified that she found the entire window frame in the kitchen had been pushed inward, she was basing her facts on

what the police told her and not her own observations. Furthermore, appellant contends that the investigating officer testified that the window was damaged by weathering and was not recently damaged by a person entering the premises.

{¶ 4} Upon a review of the testimony, we find that there was sufficient evidence to present the issue to the jury as to whether appellant entered the property by force, stealth, or deception. The investigating officer testified that the kitchen window had been pried away from the window frame and the victim confirmed that the damage had not been there the night before. Furthermore, when the victim walked through her house to determine where the noise was coming from, she was attacked by appellant who lunged at her from a chair next to the damaged window. The investigating officers also found screws and paint chips beneath the window. The jury was also presented with the testimony of the investigating officer on cross-examination that he did not attempt to pull the window out to determine whether appellant could have climbed in through the window. The officer assumed this was the point of entry since the front door was locked and the victim was standing at the back door when she heard the noise. Even if the cross-examination testimony may have presented contrary evidence of whether appellant entered the premises by force, stealth, or deception, the jury had sufficient evidence before it to make the determination. Therefore, appellant's counsel did not render ineffective assistance by failing to have raised the sufficiency of the evidence issue on appeal.

{¶ 5} Appellant also asserts that his appointed counsel was ineffective for failing to object to alleged prosecutorial misconduct during closing argument. Appellant asserts that the prosecutor instructed the jury to ignore the element of "force, stealth, or deception," suggested a motive which was outside the evidence presented, and shifted the burden of proof to appellant. Upon an examination of the closing arguments, we find appellant's assertions are unsupported by the transcript.

{¶ 6} Therefore, we find that appellant has failed to present a genuine issue of a colorable claim of ineffective assistance of appellate counsel that would mandate reopening appellant's appeal. Appellant's application is denied. Costs are assessed against appellant. It is so ordered.

APPLICATION DENIED.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
