

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

State of Ohio

Court of Appeals No. L-11-1036

Appellee

Trial Court No. CR00201002701

v.

Terrance Jermain Pernell

DECISION AND JUDGMENT

Appellant

Decided: December 23, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Patricia Horner, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals a judgment of conviction for murder with a firearm specification entered on a jury verdict in the Lucas County Court of Common Pleas. For the reasons that follow, we affirm.

{¶ 2} The events underlying this matter began near midnight on Saturday, June 26, 2010, at the 101 Club, a center city Toledo bar. Words were exchanged between appellant, Terrance Jermain Pernell, and another bar patron, Lamar Carswell. The dispute escalated into a full blown fistfight at which, by all accounts, Carswell prevailed. Indeed Carswell had to be pulled off appellant by Carswell's friend, Ryland Garrett. After the fight, Carswell and Garrett drove to another bar where they were joined by three other men. Shortly before 1:00 a.m., the five men returned to the 101 Club.

{¶ 3} In the meantime, appellant, accompanied by several others, went onto the sidewalk in front of the 101 Club. According to witnesses, appellant was extremely upset, bouncing up and down and saying "Where's he at?" Appellant also castigated those present for not assisting him during the fight. At this point, Carswell, Garrett and the others arrived and parked in a parking lot across the street.

{¶ 4} According to the owner of the bar, when Carswell and the others arrived, appellant, followed by the crowd, began to cross the street to meet them. According to witnesses, as this confrontation was developing, someone in the crowd passed appellant a handgun.

{¶ 5} On sight of the handgun, Carswell and the others fled. Garrett remained in the street, his hands raised with appellant pointing the gun at his head. The two spoke, but witnesses could not make out what was said. Appellant then snapped his hand downward, firing a single shot into Garrett's torso. According to the coroner, the bullet passed through several vital organs causing Garrett's death.

{¶ 6} On September 20, 2010, a Lucas County Grand Jury handed down an indictment, charging appellant with aggravated murder with a firearm specification for the death of Ryland Garrett. Appellant pled not guilty and the matter proceeded to trial.

{¶ 7} At trial, the bar owner and two other witnesses testified to the events at the 101 Club on Saturday night and Sunday morning June 27. An assistant county coroner testified that Garrett died from a single gunshot wound. At the conclusion of the state's case, the state moved to amend the indictment from aggravated murder to murder. Without objection, the court granted the motion. Appellant's Crim.R. 29 motion was denied. Appellant rested without presenting testimony of his own. On deliberation, the jury found appellant guilty of the amended charge and specification. The trial court sentenced appellant to a mandatory 15 years to life sentence with an additional three years sentence for the firearm specification to be served prior to and consecutive with the principal sentence.

{¶ 8} From this judgment of conviction, appellant now brings this appeal. Appellant sets forth the following three assignments of error:

{¶ 9} "I. The jury verdict was against the manifest weight of the evidence

{¶ 10} "II. Defendant was denied the right to a fair trial

{¶ 11} "III. Defendant was denied effective assistance of counsel"

I. Manifest Weight

{¶ 12} In his first assignment of error, appellant contends that the jury's guilty finding was against the manifest weight of the evidence.

{¶ 13} In a criminal context, a verdict or finding may be overturned on appeal if it is either against the manifest weight of the evidence or because there is an insufficiency of evidence. In the former, the appeals court acts as a "thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. In the latter, the court must determine whether the evidence submitted is legally sufficient to support all of the elements of the offense charged. *Id.* at 386-387. Specifically, we must determine whether the state has presented evidence which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime proven beyond a reasonable doubt. *Id.* at 390 (Cook, J., concurring); *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. See, also, *State v. Eley* (1978), 56 Ohio St.2d 169; *State v. Barns* (1986), 25 Ohio St.3d 203.

{¶ 14} Appellant does not argue an insufficiency of evidence, but suggests that the jury lost its way in evaluating the evidence that was before it. Appellant suggests that the bullet track through the victim's body was inconsistent with witness accounts, the descriptions of the handgun were varied and the crime scene was contaminated by the large number of people at the scene before police arrived.

{¶ 15} All of appellant's inconsistencies were before the jury which is tasked with determining the veracity of the testimony. The jury apparently believed the testimony of

the witnesses who said they saw appellant do the shooting. There is nothing in the record to suggest that the jury lost its way in reaching this determination. Accordingly, appellant's first assignment of error is not well-taken.

II. Fair Trial

{¶ 16} In his second assignment of error, appellant maintains that he was denied his Sixth Amendment right to a fair trial due to plain error that occurred during jury selection. With other prospective jurors present, one of the veniremen, a U.S. marshal, testified that he would hold the testimony of a police officer "more credible" because "I understand the consequences of perjury for a law enforcement officer." The court sua sponte excused the prospective juror from service. No objection or request for a corrective instruction was interposed. Appellant suggests that this statement tainted the jury pool by creating a bias in favor of the prosecution.

{¶ 17} Purported errors not brought to the attention of the court at a time when that error could have been avoided or rectified by the trial court are waived absent plain error. *State v. Hill* (2001), 92 Ohio St.3d 191, 196. To constitute plain error, there must be an obvious defect in the trial proceedings that affects a defendant's substantial rights. Crim.R. 52(B), *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶ 16. In order to affect a substantial right, the error must have affected the outcome of the trial. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27.

{¶ 18} Even had the other prospective jurors heard the marshal's remark and were persuaded that law enforcement officers were more likely to be truthful, this could not

have affected the outcome of this trial. The key witnesses here were not police, but three witnesses who testified that appellant shot Ryland Garrett. Consequently any harm the marshall's statement may have engendered was harmless. Civ.R. 52(A). Accordingly, appellant's second assignment of error is not well-taken.

III. Ineffective Assistance of Counsel

{¶ 19} In his final assignment of error, appellant asserts that he was denied his Sixth Amendment right to effective assistance of counsel.

{¶ 20} "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction * * * has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. * * * Unless a defendant makes both showings, it cannot be said that the conviction * * * resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. Accord *State v. Smith* (1985), 17 Ohio St.3d 98, 100.

{¶ 21} Scrutiny of counsel's performance must be deferential. *Strickland v. Washington* at 689. In Ohio, a properly licensed attorney is presumed competent and the burden of proving ineffectiveness is the defendant's. *State v. Smith*, supra. Counsel's actions which "might be considered sound trial strategy," are presumed effective. *Strickland v. Washington* at 687. "Prejudice" exists only when the lawyer's performance

renders the result of the trial unreliable or the proceeding unfair. *Id.* Appellant must show that there exists a reasonable probability that a different verdict would have been returned but for counsel's deficiencies. See *id.* at 694. See, also, *State v. Lott* (1990), 51 Ohio St.3d 160, for Ohio's adoption of the *Strickland* test.

{¶ 22} Appellant states only that his eleventh hour request for appointment of different counsel and trial counsel's failure to object or request an instruction following the marshall's statement during voir dire demonstrate the ineffectiveness of his trial counsel. We have already concluded that the marshall's statement did not operate to appellant's prejudice.

{¶ 23} Concerning appellant's request for another appointed counsel, this motion came on the same day as the jury was to be empaneled and after two prior continuances at appellant's request. Moreover, appellant articulated no rationale for this request, other than that he was dissatisfied with trial counsel.

{¶ 24} An accused's " * * " right to counsel must be balanced against the public's right to prompt, orderly and efficient administration of justice. Moreover, the right of a defendant to select his own counsel is inherent only in the cases where the accused is employing counsel himself. Therefore, the right to have counsel assigned by the court does not impose a duty on the court to allow the defendant to choose his own counsel. In fact, to discharge a court-appointed attorney, the defendant must show a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to

effective assistance of counsel. The decision whether to discharge court-appointed counsel is within the trial court's sound discretion." *State v. Hernandez*, 6th Dist. Nos. L-06-1388, L-06-1389, 2009-Ohio-386, ¶ 58. (Citations omitted.)

{¶ 25} Appellant's request for new appointed counsel occurred literally as the trial was to begin. Appellant stated nothing on the record that would suggest that there was a breakdown in the attorney-client relationship of a degree to jeopardize appellant's rights. Appellant had already been granted two prior continuances. On these facts, we cannot say that the trial court abused its discretion in denying appellant's request. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 26} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

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:
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