

[Cite as *State v. Brady*, 2010-Ohio-242.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92510

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

ERIC BRADY

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-516655

BEFORE: Rocco, P.J., Boyle, J., and Sweeney, J.

RELEASED: January 28, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Thomas A. Rein
Leader Building
Suite 940
526 Superior Avenue
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Teresa L. Dirksen
Assistant Prosecuting Attorney
The Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant Eric Brady appeals from his conviction after a bench trial for improper discharge of a firearm at a habitation, with firearm specifications.

{¶ 2} Brady presents four assignments of error, arguing that his conviction is based upon insufficient evidence and is against the manifest weight of the evidence, that the trial court permitted improper testimony, and that his trial counsel rendered ineffective assistance by failing to object to the “improper” testimony.

{¶ 3} Since this court disagrees with each of his arguments, however, his assignments of error are overruled. Brady’s conviction, consequently, is affirmed.

{¶ 4} According to the testimony presented at trial, Brady’s conviction results from an incident that occurred on June 14, 2008. Brady had an altercation that day with his neighbor, William Leventry. Leventry was staying at his aunt’s residence, located at 2254 West 20th Street in Cleveland.

{¶ 5} The altercation involved Leventry’s cousin, 15-year-old Angel LaTorres, whom Brady invited to drive his car in the nearby alley. When Leventry noticed his cousin behind the wheel, he began shouting objections; he included an accusation that the car was “stolen.” Drawn by the noise, Leventry’s

friend Melody Pubill approached the scene. LaTorres also heard; he stopped the car and promptly obeyed Leventry when ordered into the house.

{¶ 6} Leventry told Brady, “[D]on’t let my little cousin drive the car.” Brady rejoined that Leventry should “stay out of his business.” After the two men exchanged more words, Brady briefly went into his girlfriend’s house. He emerged, telling Leventry that he “had something for” him. Leventry testified Brady carried a small “chrome gun.” Pubill also testified that after Brady returned outside, “he stood there with the gun, all right, waving it.”

{¶ 7} Leventry essentially dared Brady to use the weapon before he and Pubill reentered the house. Leventry then watched through a window as Brady “walked down the alleyway, and went and stood in the field and was pointing the gun at the [second story] window and then he shot it.” Pubill’s testimony echoed Leventry’s; she stated that Brady “turned [the gun] toward the house and it shot above the window.” LaTorres testified he heard a “boom” from where he stood that sounded “[l]ike a gunshot.”

{¶ 8} At that point, Leventry and Pubill called 911 as they herded the younger people into a rear bedroom of the house. They heard another gunshot, then a different loud sound at the front door; Leventry believed Brady “threw a brick” at it.

{¶ 9} By the time the police responded to the call, Brady was gone, but the residents noticed a defect in the wood near the house’s second-story window,

and pointed it out to the police. At trial, both Pubill and Leventry's aunt described the defect as a "bullet hole."

{¶ 10} Brady subsequently was indicted on two counts, viz., improper discharge of a firearm at a habitation, R.C. 2923.161(A)(1), and felonious assault, R.C. 2903.11(A)(2). Each count contained both a one-year and a three-year firearm specification.

{¶ 11} Brady executed a waiver of his right to a jury; therefore, his trial proceeded to the bench. After hearing the testimony of the state's witnesses and of the defense witnesses, the trial court found Brady guilty on count one, with the firearm specifications, but not guilty on count two. The court ultimately sentenced Brady to a prison term that totaled six years.

{¶ 12} Brady appeals from his conviction, presenting four assignments of error. His first and second will be addressed together.

"I. The trial court erred in denying Appellant's motion for acquittal as to the charge when the state failed to present sufficient evidence to sustain a conviction.

"II. Appellant's conviction is against the manifest weight of the evidence."

{¶ 13} Brady asserts "there was no viable evidence" that "the hole in the house actually came from a gun or a bullet." He claims that "no one" observed him actually firing a weapon, and points out that his witnesses testified they did

not hear any gunshots on the day of the incident. Brady consequently argues the trial court acted improperly both in denying his motion for acquittal and in convicting him for violating R.C. 2923.161(A)(1). This court disagrees.

{¶ 14} A defendant’s motion for acquittal should be denied if the evidence is such that reasonable minds could reach different conclusions as to whether each material element of the crimes has been proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 1997-Ohio-372; *State v. Jenks* (1991), 61 Ohio St.3d 259; *State v. Bridgeman* (1978), 55 Ohio St.2d 261. The trial court is required to view the evidence in a light most favorable to the state. *State v. Martin* (1983), 20 Ohio App.3d 172.

{¶ 15} The test to be applied when reviewing a claim that a conviction is against the manifest weight of the evidence was set forth in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, citing *State v. Martin*, supra. The test is “much broader” than the test for sufficiency; i.e., this court reviews the entire record to determine whether in resolving any conflicts in the evidence, the trier-of-fact “clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *Id.*, at 175.

{¶ 16} Moreover, this court must remain mindful that the weight of the evidence and the credibility of the witnesses are matters primarily for the trier-of-fact to assess. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶ 17} The trial court found Brady guilty of violating R.C. 2923.161(A)(1), which prohibits a person from “knowingly discharg[ing] a firearm at or into an occupied structure that is a permanent or temporary habitation” of a victim. Despite Brady’s assertion that “no one * * * actually observed” him firing a gun at the house, a review of the state’s witnesses’ testimony belies it.

{¶ 18} Leventry stated that, after Brady emerged from his girlfriend’s home with a “handgun,” Leventry “took everybody in the house.” Leventry further stated that, once inside, “me and my cousin was looking out the window” at Brady while he held the weapon, “then [Brady] pointed it at the house and shot, pow.” Only after this did the residents flee into the rear of the house.

{¶ 19} Leventry’s aunt testified that she arrived home later to notice a new defect on the side of the house by the upstairs window. She described the defect as “a bullet hole.” She also identified photographs that depicted the defect for the trial court.

{¶ 20} Based upon the evidence presented, the trial court did not err in denying Brady’s motion for acquittal of the charge.

{¶ 21} Similarly, a review of the record demonstrates Brady’s conviction is supported by the manifest weight of the evidence. Leventry’s testimony about the circumstances surrounding the incident was corroborated by both LaTorres and Pubill, and even, to some extent, by Brady’s girlfriend.

{¶ 22} The photographs of the house depict a defect near the upstairs window, and Leventry’s aunt testified the defect had not existed prior to the incident. Moreover, each witness who viewed the defect described it as a “bullet hole.”

{¶ 23} Although Brady downplayed the altercation, and his defense witnesses indicated nothing unusual occurred that day, their testimony was contradicted by the 911 tape introduced into evidence. The trial court thus acted within its prerogative to believe the testimony of the state’s witnesses.

{¶ 24} Accordingly, Brady’s first and second assignments of error are overruled. *State v. Parker*, Cuyahoga App. No. 90256, 2008-Ohio-3681.

{¶ 25} Brady’s third assignment of error states:

“III. Appellant was denied his right to a fair trial when the trial court allowed expert testimony from a witness who was not an expert in firearms or ballistics.”

{¶ 26} Brady argues that state’s witness Det. Elliott Landrau was improperly permitted to provide his opinion regarding the defect he observed in the side of the house, i.e., that the defect was a “bullet hole.” Brady asserts this testimony was offered pursuant to Evid.R. 702, but Landrau acknowledged during cross-examination that he lacked “special training” with respect to the issue. Although Brady concedes he raised no objection to Landrau’s testimony on this

basis in the trial court, nevertheless, his argument is rejected for two other reasons.

{¶ 27} First, the record reflects that, prior to Landrau’s testimony, Leventry, Leventry’s aunt, and Pubill each described the defect as a “bullet hole.” Since none of these witnesses’ descriptions are characterized on appeal as improper “expert testimony,” Brady’s argument founders.

{¶ 28} Second, a review of Landrau’s testimony demonstrates it, too, was not offered pursuant to Evid.R. 702. Landrau simply described the course of his investigation; this included a personal effort to determine whether a bullet was lodged in the house’s siding. He admitted his effort was unsuccessful.

{¶ 29} Under these circumstances, Brady’s third assignment of error lacks merit. It is, accordingly, overruled.

{¶ 30} Brady’s fourth assignment of error states:

“IV. Appellant was denied effective assistance of counsel as guaranteed by Section 10, Article 1 of the Ohio Constitution and the Sixth and Fourteenth Amendments of the United States Constitution when defense counsel failed to object to a nonexpert to testify [sic] about firearms and ballistics.”

{¶ 31} In this assignment of error, Brady seeks to lay the blame for the introduction of Landrau’s testimony about the “bullet hole” at the feet of his trial attorney; Brady claims that his trial counsel’s failure to object to Landrau’s

description of the defect amounted to constitutionally ineffective assistance. The record fails to support his claim.

{¶ 32} A claim of ineffective assistance of counsel requires proof that counsel’s “performance has fallen below an objective standard of reasonable representation” and, in addition, prejudice arises from that performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. The establishment of prejudice requires proof “that there exists a reasonable probability that were it not for counsel’s errors, the result of the trial would have been different.” *Id.*, paragraph three of the syllabus.

{¶ 33} The appellant has the burden of proving ineffective assistance of counsel, and there is a strong presumption that a properly licensed trial counsel rendered adequate assistance. *State v. Smith* (1985), 17 Ohio St.3d 98, at 100. A court reviewing the issue thus is required to apprehend there is a wide range of reasonable professional assistance; that is, appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *State v. Hall*, Cuyahoga App. No. 88476, 2007-Ohio-3531, ¶33, citing *Strickland v. Washington* (1984), 466 U.S. 668.

{¶ 34} This court will not second-guess what could be considered to be a matter of trial strategy. *State v. Smith*, *supra*. Decisions about the use of objections at trial are matters of strategy. *State v. Hall*, *supra*, ¶35.

{¶ 35} A review of the record in this case demonstrates defense counsel's questions of Landrau were deliberate and considered. Counsel sought to undermine the effect of Landrau's testimony about his examination of the defect in the house by challenging his expertise in matters of ballistics and bullet trajectories.

{¶ 36} This court cannot gainsay counsel's strategy in this case, because counsel was successful in securing Brady's acquittal on the other charge against his client, that of felonious assault. Under the circumstances presented, Brady's claim of ineffective assistance is unsupported.

{¶ 37} Brady's fourth assignment of error, therefore, also is overruled.

{¶ 38} Brady's conviction is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, PRESIDING JUDGE

MARY J. BOYLE, J., and
JAMES J. SWEENEY, J., CONCUR