

[Cite as *State v. Samilton*, 2010-Ohio-439.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92823

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHARON SAMILTON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART
AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-518140

BEFORE: Cooney, J., Blackmon, P.J., and Dyke, J.

RELEASED: February 11, 2010

JOURNALIZED:

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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).

COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Charon Samilton (“Samilton”), appeals his sentence and conviction for intimidation. Finding some merit to the appeal, we affirm in part and reverse in part pursuant to *State v. Singleton*, Slip Opinion No. 2009-Ohio-6434.

{¶ 2} In November 2008, Samilton was charged with intimidation of his parole officer, Kathy Shorts (“Shorts”). The matter proceeded to a jury trial, at which he was found guilty. The trial court sentenced him to four years in prison, to be served consecutive to his other cases, and imposed three years of postrelease control. The following evidence was adduced at trial.

{¶ 3} In July 2008, Shorts, a parole officer with the Ohio Adult Parole Authority, was assigned Samilton’s case. At that time, Samilton was approaching his one-year review.¹ Shorts met with Samilton to advise him that he may be eligible for early release from postrelease control. As part of the early release process, Shorts performed a records check, which indicated that Samilton was arrested on July 28, 2008. Shorts testified that Samilton never reported this arrest to her, which constituted a violation of the conditions of his postrelease control. As a result, she recalled the early release paperwork and initiated the postrelease control revocation process.

¹Samilton was placed on three years of postrelease control in August 2007.

{¶ 4} In August 2008, Shorts met with Samilton at the Cuyahoga County jail to notify him of his postrelease control violation. When she attempted to inform Samilton of the charges and his hearing date, Samilton cursed at Shorts and told her, “[d]o you know who I am? I can call out anything.” She asked him if he was threatening her and he replied, “[t]ake it at my word.” He then jumped from his chair, screaming and cursing. She tried to calm him down, but he continued to rant. He told Shorts that she needed to check his record and verify with another parole officer, who would tell her what he is capable of doing. Shorts testified that she knew that Samilton was a gang member because she had reviewed his record and took his threats seriously. A corrections officer overheard Samilton and offered Shorts his assistance. Shorts accepted his offer, and another corrections officer came to take Samilton back to his jail cell.

{¶ 5} Samilton now appeals, raising three assignments of error for our review.

Postrelease Control

{¶ 6} In the first assignment of error, Samilton argues that his sentence is void because the trial court did not fully explain postrelease control to him during his sentencing hearing.

{¶ 7} The Ohio Supreme Court set forth the applicable standard of appellate review of a felony sentence in *State v. Kalish*, 120 Ohio St.3d 23, 2008- Ohio-4912, 896 N.E.2d 124, ¶4:

“In applying [*State v.*] *Foster* [109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470] to the existing statutes, appellate courts must apply a two-step approach. First, they must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. *If this first prong is satisfied, the trial court’s decision shall be reviewed under an abuse-of-discretion standard.*”² (Emphasis added.)

{¶ 8} Samilton argues that the trial court failed to advise him of the consequences for violating postrelease control. Specifically, he claims that the trial court failed to inform him what additional prison time he faced for a postrelease control violation. The State concedes this issue, requesting that we remand the matter for a resentencing hearing under *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568. However, the Ohio Supreme Court recently held that for sentences imposed after July 11, 2006, the trial court shall apply the procedures set forth in R.C. 2929.191 to correct the court’s failure to properly impose postrelease control. *Singleton*, paragraph two of the syllabus.

² We recognize *Kalish* is merely persuasive and not necessarily controlling because it has no majority. The Supreme Court split over whether we review sentences under an abuse-of-discretion standard in some instances.

{¶ 9} In the instant case, a review of the record reveals that the trial court imposed a four-year prison term and advised Samilton that he “will come out on three years of post-release control, with a new parole officer. I hope you treat that parole officer with a little respect, or you will end up back in prison again.”

{¶ 10} Under R.C. 2929.19(B)(3), the trial court was required to notify Samilton at sentencing that if he violated a condition of postrelease control, the parole board may impose a prison term for as much as one-half of the stated prison term originally imposed upon the defendant. See *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶2; *State v. Williams*, Cuyahoga App. No. 92351, 2009-Ohio-6303, ¶21. Because the trial court did not advise Samilton that he could be subject to up to two years in prison (one-half of the stated prison term) if he violated postrelease control, we find that the trial court’s explanation of the penalties for violating postrelease control was not adequate.

{¶ 11} Therefore, the first assignment of error is sustained, necessitating that we remand for the trial court to employ the “sentence-correction mechanism” of R.C. 2929.191. *Singleton*, paragraph two of syllabus, ¶27.

“Other Acts” Evidence

{¶ 12} In the second assignment of error, Samilton argues that he was deprived of his constitutional right to a fair trial when the trial court allowed improper other acts evidence. In the third assignment of error, he argues that he was deprived of his constitutional right to the effective assistance counsel when trial counsel failed to preserve a vital issue for appeal and failed to request a limiting instruction on other acts evidence.

{¶ 13} Samilton argues that when the jury learned that he was a gang member, the jury was deprived of its ability to judge him in a fair and impartial manner because it assumed that he stayed true to character and threatened Shorts. He claims that the gang member testimony constituted improper “other acts” evidence under Evid.R. 404(B).

{¶ 14} However, we note that Samilton did not object to this testimony at trial, so he waives all but plain error. *State v. Coles*, Cuyahoga App. No. 90330, 2008-Ohio-5129. “Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Crim.R. 52(B). Plain error exists when it can be said that, but for the error, the outcome of the trial would clearly have been otherwise. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240; *State v. Nicholas* (1993), 66 Ohio St.3d 431, 613 N.E.2d 225. We invoke the plain error rule

only if we find that the circumstances in the instant case are exceptional, and that reversal of the judgment is necessary to prevent a manifest miscarriage of justice. *State v. Landrum* (1990), 53 Ohio St.3d 107, 559 N.E.2d 710.

{¶ 15} Evid.R. 404(B) provides: “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.”

{¶ 16} In the instant case, Shorts testified that her job requires her to review the offender’s file. Samilton’s file contained information that he is a gang member. When Shorts met with Samilton to discuss his postrelease control violation, Samilton told Shorts, “[d]o you know who I am? I can call out anything.” Having read Samilton’s file, Shorts asked him if he was threatening her and he replied, “[t]ake it at my word.” Shorts testified that she believed Samilton’s threats because of his gang affiliation.

{¶ 17} Here, the State made no attempt to use the gang evidence as proof of Samilton’s character. Rather, the evidence was offered to demonstrate that, as a gang member, Samilton had the opportunity to carry out his threats, despite being in jail. Because Samilton failed to establish

that the outcome of the trial clearly would have been different, but for the admission of this testimony, we find that plain error does not exist.

Ineffective Assistance of Counsel

{¶ 18} Samilton also argues that counsel was ineffective for failing to object to the gang member testimony and failing to request a limiting jury instruction on the “other acts” evidence.

{¶ 19} In a claim of ineffective assistance of counsel, the burden is on the defendant to establish that counsel's performance fell below an objective standard of reasonable representation and prejudiced the defense. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.3d 373, paragraph two of the syllabus; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 20} Hence, to determine whether counsel was ineffective, Samilton must show that: (1) “counsel’s performance was deficient,” in that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment,” and (2) counsel’s “deficient performance prejudiced the defense” in that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Strickland*.

{¶ 21} In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164. In evaluating whether a petitioner has been denied the effective assistance of counsel, the

Ohio Supreme Court held that the test is “whether the accused, under all the circumstances, * * * had a fair trial and substantial justice was done.” *State v. Hester* (1976), 45 Ohio St.2d 71, 341 N.E.2d 304, paragraph four of the syllabus.

When making that evaluation, a court must determine “whether there has been a substantial violation of any of defense counsel’s essential duties to his client” and “whether the defense was prejudiced by counsel’s ineffectiveness.” *State v. Lytle* (1976), 48 Ohio St.2d 391, 358 N.E.2d 623; *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905. To show that a defendant has been prejudiced, the defendant must prove “that there exists a reasonable probability that, were it not for counsel’s errors, the result of the trial would have been different.” *Bradley*, paragraph three of the syllabus; *Strickland*.

{¶ 22} Samilton claims that counsel should have objected to the gang affiliation testimony to preserve the issue for appeal. He further claims that once the jury heard the testimony that he was a gang member, it needed to be instructed that under Ohio law it could not assume his guilt because of the propensity for violence and threats that gang members routinely display.

{¶ 23} Here, defense counsel’s failure to object to the gang member testimony or request a limiting instruction cannot be the basis of a claim of ineffective assistance of counsel because we found that this evidence was admissible. Furthermore, defense counsel’s performance did not fall below an objective standard of reasonable representation and did not violate any of

his essential duties to Samilton. Therefore, Samilton's ineffective assistance of counsel claim must fail.

{¶ 24} Accordingly, the second and third assignments of error are overruled.

{¶ 25} Judgment is affirmed in part, reversed in part, and case is remanded for further proceedings under R.C. 2929.191.

It is ordered that appellant and appellee share the 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.

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

COLLEEN CONWAY COONEY, JUDGE

PATRICIA ANN BLACKMON, P.J., and
ANN DYKE, J., CONCUR