

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 10AP-1001
	:	(M.C. No. 2010CRB-002170)
Howard Bartlett, Jr.,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 21, 2011

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, City Prosecutor, and *Melanie R. Tobias*, for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Municipal Court

TYACK, J.

{¶1} Howard Bartlett, Jr., is appealing from his convictions for domestic violence and assault. He assigns four errors for our consideration:

ASSIGNMENT OF ERROR NUMBER ONE

THE DEFENDANT WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW WHEN A POLICE OFFICER WAS ALLOWED TO PRESENT, OVER OBJECTION, OPINION TESTIMONY INDICATING THAT

HE BELIEVED THAT THE COMPLAINANT, WHO WAS THE KEY WITNESS FOR THE STATE, WAS TELLING TRUTH ABOUT THE INCIDENT.

ASSIGNMENT OF ERROR NUMBER TWO

THE DEFENDANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S SENSELESS INEPTNESS IN ELICITING EVIDENCE OF OTHER CRIMES AND BAD ACTS ALLEGEDLY COMMITTED BY THE DEFENDANT WHICH SHOULD NOT HAVE COME TO THE ATTENTION OF THE JURORS.

ASSIGNMENT OF ERROR NUMBER THREE

THE TRIAL COURT ERRED WHEN IT ALLOWED THE EXECUTIVE DIRECTOR OF CHOICES TO TESTIFY, AS AN EXPERT WITNESS ON DOMESTIC VIOLENCE, OVER OBJECTION BY THE DEFENDANT, WHEN THE WITNESS HAD NO PERSONAL KNOWLEDGE OF ANY FACTS OF THE CASE AND WHEN HER TESTIMONY WAS NOT AT ALL RELEVANT AND WAS MERELY DESIGNED TO PORTRAY BATTERS [sic] AS DANGEROUS AND VIOLENT INDIVIDUALS WHO CAUSE GREAT HARM TO WOMEN AND THEIR FAMILIES AND FRIENDS.

ASSIGNMENT OF ERROR NUMBER FOUR

THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT UNDER THE SIXTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO BE AFFORDED A MEANINGFUL OPPORTUNITY TO PRESENT A COMPLETE DEFENSE BY EVIDENTIARY RULINGS THAT EXCLUDED FAVORABLE EVIDENCE.

{¶2} In the first assignment of error, appellate counsel argues that it was reversible error for the trial court judge to allow one witness for the state, Officer Stephen Franchini, to express his opinion that the woman who was alleging that she was a victim

of domestic violence was telling the truth. The woman, Bartlett's wife, also testified at Bartlett's trial.

{¶3} Bartlett's whole defense at trial was that his wife, who claimed to be a victim, was lying and had actually attacked him after he refused her sexual advances. The whole trial turned upon a jury's ability to determine which one, Bartlett or his wife, was telling the truth.

{¶4} Normally it would be error for a trial court to allow one witness to testify before the jury that another witness was telling the truth about the key issue in the case. This has been the clear case law in Ohio at least since the Ohio Supreme Court decided *State v. Boston* (1989), 46 Ohio St.3d 108 over 20 years ago. The syllabus for the *Boston* case reads:

An expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant.

{¶5} In Bartlett's case, the state of Ohio tried to qualify the Columbus Police Officer who responded to the police run as an expert of sorts and then asked him if he believed what Bartlett's wife told him about Bartlett assaulting her, as opposed to her assaulting Bartlett.

{¶6} What complicates this normally straightforward situation is the conduct of defense counsel early in the trial. Early on in opening statements, defense counsel stated:

The prosecution is going to offer you smoke and mirrors, ghosts and shadows, spectral evidence; that's all. The evidence is going to show you that the professionals who were called to the scene did not, themselves, believe that there was any domestic violence and handled the

investigation in a very cursory manner, not because they are slobs and don't know their job, but precisely because they do know their job and precisely because they know that these accusations are made for any number of reasons, not always because the truth is going on.

(Vol. I, Tr. 14.)

{¶7} Thus, defense counsel asserted to the jury that the police and firefighter personnel who responded to the claims of domestic violence did not believe that Bartlett's wife had been a victim of domestic violence.

{¶8} Having made that assertion in opening statement as to what the evidence would show, defense counsel was not in a position to ask the trial judge to block the jury from hearing evidence that part of counsel's opening statement was simply false. Counsel had clearly opened the door to this inquiry.

{¶9} Because defense counsel had raised this particular issue, the subjective belief of other witnesses that Bartlett's wife was or was not telling the truth when she claimed she was a victim of domestic violence, central to the case early on in opening statement, the trial judge was within her discretion to allow testimony as to what was the actual subjective belief of the other witnesses.

{¶10} Appellate counsel has argued on Bartlett's behalf that trial counsel could not open the door for Officer Franchini's testimony by stating in opening statement what the evidence would show. Appellate counsel asserts trial counsel can only open the door for normally inadmissible evidence by pursuing similar or related evidence during the trial. At oral argument, counsel cited to *State v. Smith* (1992), 84 Ohio App.3d 647, as supporting this assertion.

{¶11} The *Smith* case involved testimony about the sexual abuse of a child and this was directly controlled by the Supreme Court of Ohio's ruling in *Boston*, supra. The primary testimony offered in the *Smith* case was primarily that of a Dr. Barbara Bergman, "a licensed criminal psychologist." Dr. Bergman testified about the methodology typical of pedophilia. A second level of evidence dealt with testimony about prior similar acts or pedophilia by *Smith*.

{¶12} A concurring judge felt that Dr. Bergman's testimony was admissible to rebut an inference offered by counsel on behalf of Smith in opening statements. A second concurring judge felt Dr. Bergman's testimony was admissible because pedophilia is an area outside the expertise of the ordinary juror. The *Smith* case clearly does not stand for the proposition that defense counsel cannot open the door to otherwise inadmissible testimony by stating inaccurately what an expert believed or what an expert's testimony would be.

{¶13} The first assignment of error is overruled.

{¶14} The harder question is whether or not defense counsel at trial rendered ineffective assistance under the Sixth Amendment to the United States Constitution.

{¶15} The principle criteria for an appellate court to apply in assessing whether trial counsel rendered ineffective assistance are set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. *Strickland* held that the benchmark for judging any claim of ineffective assistance must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Once defense counsel's deficient performance has been

demonstrated, an appellate court must find that, but for counsel's unprofessional errors, the result of the trial would have been different for the appellate court to vacate the convictions.

{¶16} Defense counsel was on notice before the trial began that Officer Franchini, who responded to the scene, believed that Bartlett's wife had been assaulted. Officer Franchini filed the criminal charges against Bartlett and swore under oath at that time that Bartlett had knowingly caused or attempted to cause physical harm to his wife.

{¶17} Assuming that defense counsel interviewed his own witnesses before the trial started, counsel was on notice that one of his own witnesses, James S. Dole, would testify that on the night of the claimed assault, Dole spoke to Officer Franchini and Franchini told Dole that he believed Bartlett's wife was assaulted because of the way she looked and the way she was acting.

{¶18} To make an allegation in opening statement that is simply not true and known to be untrue is a professional error. The error was compounded by the fact it opened the door to the prosecutor proving the allegation was false, as noted earlier.

{¶19} Trial counsel did not stop there. Counsel elicited testimony about other bad acts. Bartlett's wife testified, in response to defense counsel's questions, that Bartlett had beaten the family dog with a belt and that Bartlett had choked her on two prior occasions. In case any juror had somehow missed that testimony, defense counsel followed it with the question "So you'd had incidents of Howard being physically violent with you in the past, is that right? (Tr. 40.)

{¶20} These inquiries led to the state being permitted to call Gail Heller, the retired director of a shelter for battered women, as a witness to testify about battered women's syndrome generally.

{¶21} Strengthening the prosecution's case in the ways defense counsel did in representing Bartlett certainly constitutes the kind of unprofessional errors required for purposes of analysis under *Strickland*. However, for this appellate court to reverse Bartlett's conviction, we must find that, but for counsel's errors, the outcome of the trial would have been different. We cannot so find.

{¶22} Bartlett's wife testified at trial and was subjected to a vigorous cross-examination. Based upon her testimony alone, we cannot say that the jury reached the wrong verdict. As a result, the second assignment of error must be overruled.

{¶23} In the third assignment of error, appellate counsel alleges that Gail Heller, the retired director of a battered women's shelter, should not have been permitted to testify about battered women's syndrome and related topics without specific reference to Bartlett or his wife.

{¶24} Given the testimony about repeated battering elicited by defense counsel at trial, the question could naturally arise in a juror's mind as to why a woman would stay married to a man for even awhile after being so battered. Heller's testimony was relevant to that issue. Further, battered women's syndrome is not a syndrome easily understood by the average juror. Heller's testimony dealt with the syndrome generally so the jury could have a frame of reference for allegations such as those presented by Bartlett's wife. Heller's testimony did not directly address the allegations in Bartlett's case. The

testimony is consistent with that sanctioned by the Ohio Supreme Court in *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711.

{¶25} Under the circumstances, we cannot say that the trial court abused its discretion in allowing Heller to testify.

{¶26} The third assignment of error is overruled.

{¶27} Under the fourth assignment of error, appellate counsel alleges that evidence was kept from the jury which was favorable to the defense. Specifically, defense counsel attempted to elicit testimony that Bartlett and his wife continued to communicate with each other, despite divorce proceedings, both before and after the incident which was the subject of the trial. Such a history of telephone calls was not relevant to the issues at trial.

{¶28} Defense counsel was prevented from presenting a demonstration of how Bartlett's wife was walking when she appeared to be walking while feeling pain after the incident. The demonstration was not important and could actually have harmed Bartlett's case, not helped it.

{¶29} Finally, defense counsel was prevented from presenting all the testimony desired with respect to why the couple separated before the incident, specifically if the wife had been unfaithful to her spouse. Defense counsel asked that particular question and was told by Bartlett's wife that they had not separated due to any unfaithfulness on Bartlett's wife's part. There is no basis in the record before us to believe that asking her that question repeatedly would have changed her testimony.

{¶30} No reversible error is presented by this assignment of error. It is therefore overruled.

{¶31} All four assignments of error having been overruled, the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.
