

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. John F. Boggins, J.
-vs-	:	
	:	Case No. 2004 CA 00047
LARRY GENE GRIMES, JR.	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Criminal Appeal from Stark County Court of Common Pleas, Case No. 2003 CR 1410

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: OCTOBER 12, 2004

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Boggins, J.

{¶1} This is an appeal from a jury finding Appellant guilty of discharging a firearm at or into a habitation or in a school safety zone with a firearm specification.

STATEMENT OF THE FACTS AND CASE

{¶2} The facts indicate that on September 14, 2003, Thomas Bethel went out on the porch of his residence. Across the street, a male was sitting on a wall with two girls present.

{¶3} An Oldsmobile arrived shortly thereafter driven by someone Bethel recognized. Its radio was playing loudly. A noise complaint was made to the police.

{¶4} Bethel's girlfriend, Candace Cochran, heard a threat made by someone of the group across the street.

{¶5} Bethel was subsequently confronted by a man who pointed a gun at him. Bethel turned and entered his home.

{¶6} Three gunshots were heard by Bethel shortly thereafter.

{¶7} Both Bethel and his girlfriend noted the physical appearance and clothing of the one who had the gun.

{¶8} While calling 911, Cochran saw the male fire the gun toward their residence.

{¶9} After the police arrived and located the Oldsmobile, Bethel identified it, but the shooter was absent and two black females were the only occupants.

{¶10} A neighbor, Lacey Dalton, also had observed the male with the gun and heard shots.

{¶11} Bullet holes were found in the home in addition to spent shell casings.

{¶12} Bethel examined a photo lineup three days later at the police station. He identified both the driver of the car and the shooter, Appellant, Larry Grimes.

{¶13} At trial, the photo lineup was referred to as “mug shots”. No objection was raised.

{¶14} Also, on cross, Officer Sedares testified that one of the female occupants in the car told him Appellant had been its driver. The State on redirect explored this answer further, over objection.

{¶15} Appellant raises two Assignments of Error:

ASSIGNMENTS OF ERROR

{¶16} I. “APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO OBJECT TO THE REFERENCE OF PHOTOS USED IN A PHOTO LINE-UP AS ‘MUG SHOTS’.”

{¶17} II. “APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL OPENED THE DOOR TO IMPROPER HEARSAY.”

I., II.

{¶18} A claim of ineffective assistance of counsel requires a two prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell* (1993), 113 S.Ct. 838, 122 L.Ed. 2d 180; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶19} In determining whether counsel=s representation fell below an objective standard of reasonableness, judicial scrutiny of counsel=s performance must be highly

deferential. *Bradley*, 42 Ohio St.3d at 142. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel=s conduct fell within the wide range of reasonable, professional assistance. *Id.*

{¶20} In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel=s ineffectiveness. This requires a showing that there is a reasonable probability that but for counsel=s unprofessional errors, the result of the proceeding would have been different. *Bradley, supra* at syllabus paragraph three. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* It is with this framework in mind that we address the instances of alleged ineffectiveness of counsel raised by appellant in the instant case.

{¶21} In examining the First Assignment of Error, we must determine whether the reference to the police photos being identified as “mug shots” was sufficiently suggestive of prior criminal activity to violate Evidence Rule 404(B) which provides:

{¶22} “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.”

{¶23} This issue was addressed by this Court in *State v. Robinson* (July 2, 1990), Fifth District App. No. CA-8065, CA-8193, in which it was held:

{¶24} “In the case sub judice, trial counsel did not object to references to mug shots as stated supra and also chose not to request a limited instruction. This election falls ‘within the wide range of reasonable professional assistance’ which does not trigger

ineffective representation. *Bradley*, cited supra at 143-44. We have reviewed the trial transcript (filed January 31, 1990) and see nothing approaching the ineffective representation which might constitute reversible error. See *State v. Martin* (1987), 37 Ohio App.3d 213.”

{¶25} While the Ohio Supreme Court reviewed and reversed a reference to mug shot photos in *State v. Breedlove* (1971), 26 Ohio St.2d 178, the reference was far in excess of that in the case sub judice. In *Breedlove*, supra, the officer specifically referred to the photos as “they were photographs of guys that have committed crimes.”

{¶26} The Eight Appellate District Court in *State v. Wills* (1997), 120 Ohio App.3d 320, held:

{¶27} “Statement by prosecution witness that he had selected defendant’s photograph from lineup containing head shots or ‘mug shots’ did not create impermissible inference that defendant had engaged in criminal activity, as would violate rule excluding evidence of other crimes; fleeting characterization of photographs as mug shots did not emphasize any prior criminal involvement by defendant****”.

{¶28} Also in *State v. Miller* (1988), the Sixth Appellate Court found:

{¶29} “Defendant in rape case was not denied effective counsel when his attorney did not object to improperly admitted evidence that police officer had victim pick out defendant from a number of ‘mug shots,’ indicating that defendant had been engaged in prior criminal activity, as objection might have simply highlighted testimony in minds of jury.”

{¶30} We therefore determine that the failure to object to the reference to the line-up photos as “mug shots” did not rise to ineffective representation as this

spontaneous slight reference to such term by objection could easily have emphasized such in the minds of the jury and therefore was an appropriate trial tactic.

{¶31} The First Assignment of Error is rejected.

{¶32} The Second Assignment of Error asserts ineffective representation due to the fact that defense counsel received an impermissible hearsay statement as to Appellant being the driver of the Oldsmobile, thus, opening the door to further stale questioning in this area.

{¶33} We find that notwithstanding this unanticipated response on cross-examination, Strickland's second prong, is whether the Appellant has been prejudiced thereby. We conclude that ample other evidence was produced not only as to identification but as to guilt so as to make the result of such question not prejudicial even if we were to conclude that such was ineffective representations.

{¶34} The Second Assignment is denied.

{¶35} This cause is affirmed.

By: Boggins, J.

Gwin, P.J. and

Wise, J. concurs.

JUDGES

