

COURT OF APPEALS  
RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
Plaintiff-Appellee	:	Hon William B. Hoffman, P.J.
	:	Hon. Julie A. Edwards, J.
-vs-	:	Hon. John F. Boggins, J.
	:	
IVORY PERDUE	:	
	:	Case No. 04-CA-46
Defendant-Appellant	:	
	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Richland County Court of Common Pleas, Case No. 03-CR-618D And Case No. 03-CR-617D

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: MARCH 2, 2005

APPEARANCES:

For Plaintiff-Appellee

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Mansfield, OH 44902  
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For Defendant-Appellant

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Attorney for Appellant Ivory Perdue

[Cite as *State v. Perdue*, 2005-Ohio-1051.]

{¶1} This appeal is from a conviction for attempted murder, robbery and two counts of assault in Richland County Court of Common Pleas.

STATEMENT OF THE FACTS AND CASE

{¶2} On September 13, 2003, at about 2:30 a.m., Appellant Ivory Perdue, James Shifferly, Deon Cornelius and Trumeyne Rodgers went to the vicinity of Mr. P's Bar. At such time, the State asserted that Appellant entered into a conspiracy to rob the first person exiting the bar.

{¶3} Craig Smith exited the bar and the evidence was to the effect that he was robbed. He then ran back into Mr. P's and several other patrons came out to assist. James Ferris was then robbed and Jeremy Yankovich was knocked down and kicked in the head, suffering severe injuries.

{¶4} As a result, Perdue, Shifferly, Cornelius and Rodgers were all charged.

{¶5} Deon Cornelius was acquitted of the charges.

{¶6} Trumeyne Rodgers pled in exchange for his testimony.

{¶7} Both Ivory Perdue and James Shifferly were found guilty on charges of attempted murder, robbery and assault.

{¶8} James Shifferly separately appeals his conviction in Case No. 04-CA-45.

{¶9} Appellant Perdue herein appeals his convictions and asserts three Assignments of Error:

ASSIGNMENT OF ERROR OF DEFENDANT-APPELLANT PERDUE

{¶10} "I. THE TRIAL COURT COMMITTED PLAIN AND PREJUDICIAL ERROR BY PERMITTING THE INTRODUCTION OF HEARSAY STATEMENTS INTO EVIDENCE WHICH INCRIMINATED THE DEFENDANT-APPELLANT AND MORE SPECIFICALLY

ADMITTED INTO EVIDENCE STATEMENTS OF CO-DEFENDANTS, ALL IN VIOLATION OF *BRUTON V. UNITED STATES*, THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED CONSTITUTION AND THE OHIO RULES OF EVIDENCE.

{¶11} “II. THE TRIAL COURT COMMITTED PLAIN AND PREJUDICIAL ERROR BY PERMITTING INTO EVIDENCE TESTIMONY CONCERNING A FIGHT AT MR. P’S LOUNGE BETWEEN OTHER INDIVIDUALS AND THE CO-DEFENDANTS, SHIFFERLY AND PERDUE, ONE WEEK BEFORE THE INCIDENTS ALLEGED IN THE INDICTMENT, IN VIOLATION OF EVIDENCE RULE 404(B).

{¶12} “III. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL PROVIDED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1 SECTION 10 OF THE OHIO CONSTITUTION, AS WELL AS THE DUE PROCESS PROTECTION UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND IN ARTICLE 1 SECTION 16 OF THE OHIO CONSTITUTION.”

I.

{¶13} Appellant’s First Assignment asserts a violation of *Bruton v. United States* (1968), 391 U.S. 123.

{¶14} The facts in *Bruton v. United States*, Id., were significantly different from the facts sub judice as in such case, the confession of a co-defendant who did not testify was admitted, thereby denying Bruton the Constitutional right to confrontation.

{¶15} In the instant case, the statements were made with appropriate identification of the speakers and actors and while not all of the witnesses as to these statements, witnesses Rapp, Layne and Henry, were complete in their testimony as to who made the various statements, there was overall sufficient identification and each witness was subject

to cross examination. As this was a joint trial, each accused was observable by the jury as to identity in accordance with the witnesses' statements.

{¶16} We, therefore, reject the First Assignment of Error.

## II.

{¶17} Appellant's Second Assignment addresses prior acts as to an earlier fight at the bar.

{¶18} Evidence Rule 404(B) states:

{¶19} "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."

{¶20} R.C. 2945.59 states:

{¶21} "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

{¶22} Specifically, Appellant Perdue references the introduction of testimony by Candice Layne and Jeff Henry.

{¶23} The testimony of Ms. Layne was:

{¶24} "Can you tell the jury what happened when Jeremy got outside the bar?"

{¶25} “He walked out the door and next thing I know he was punched, knocked out cold.” (T. at 745).

{¶26} “And were you shown a photo array with Mr. Shifferly’s picture in it?”

{¶27} “Yes.”

{¶28} “And were you able to identify his picture?”

{¶29} “Yes.”

{¶30} “How sure were you that he was the one that punched Jeremy and knocked him out cold?”

{¶31} “A hundred percent.” (t. at 747).

{¶32} “My question was: How were you able to tell the police, and how were you so sure that it was James Shifferly that was the one that hit Jeremy Yankovich and punched him and knocked him out old [SIC]?”

{¶33} “Because the weekend before that he got me and my friend Gary walking out the door.”

{¶34} “Tell the Jury about that.”

{¶35} “It was bar closing time, and we were leaving the bar to go home—” (T. at 748-749).

{¶36} “And I walked out the door, this time I walked out the right side to the parking lot. And he just walked up to me, and he hit me on the right side of my jaw, I fell and hit the ground. The next thing I know him and my friend Gary was fighting.”

{¶37} “That was the week before—”

{¶38} “The weekend before this.”

{¶39} “Before what happened to Jeremy?”

{¶40} “Yes.”

{¶41} “And when you saw him, when he hit Jeremy, did you recognize him immediately that that’s the same guy that hit me out here the week before?”

{¶42} “Yes.” (T. at 749).

{¶43} The testimony of Jeff Henry to which this Assignment is directed is:

{¶44} “As we were pulling in, I noticed to my left there were some gentlemen on the other side of the street. One in particular that I recognized from a few days before doing the same thing that happened that night.

{¶45} “Did you get a good look at him a couple days before?”

{¶46} “Yes.

{¶47} “And what was he doing a couple days before that drew your attention to his face?”

{¶48} “Same thing that happened that night.

{¶49} “By the same thing, let them know—

{¶50} “Jumped somebody that come out the door.” (T. at 797).

{¶51} And again in reference to the earlier event of Appellant Shifferly attacking someone as he came out of the bar at Page 814:

{¶52} “I just happened to be looking over to my left as we were coming up the street, and seen him standing over there.”

{¶53} “\*\*\*\*Did you see him earlier, before that night, doing something?”

{¶54} “Yeah, when they were up there before doing the same thing.”

{¶55} “\*\*\*\*How long ago was that?”

{¶56} “I believe that was the weekend before.”

{¶57} These statements by both witnesses were primarily used not only to identify Appellant Shifferly as one of the persons involved in the incident forming the basis of the

facts underlying Appellant Shifferly's trial and this appeal but also to indicate a similar plan or scheme to attack patrons exiting from this bar.

{¶58} As correctly stated by Appellant Shifferly, the Ohio Supreme Court has held that the standard as to admissibility of other act evidence is very strict and are to be construed against admissibility. *State v. Broom* (1988), 40 Ohio St.3d 277.

{¶59} In this case the identity of Appellant Shifferly as the perpetrator of the acts leading to the charges was, as always, necessary for conviction. However, contrary to Appellant Shifferly's assertions that the admission was to buttress the memory of the witnesses, we find, as stated above, that the record indicates a scheme or plan of the same type of activity at the same bar previously and the witnesses' memories were not necessarily enforced or "buttressed", but that they clearly connected Appellant Shifferly to both events. Such testimony under the evidence rule and statute was clearly probative.

{¶60} The Second Assignment is rejected.

### III.

{¶61} Appellant raises ineffective assistance of counsel as error in his Third Assignment.

{¶62} 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.

{¶63} 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.*

{¶64} 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.

{¶65} An attorney is not ineffective for failing to raise an objection which would have been denied. *State v. Gibson* (1980), 69 Ohio App.2d 91, 95.

{¶66} Also if a counsel’s decision not to object was clearly a matter of trial strategy , cannot be regarded as ineffective assistance of counsel. See: *State v. Coleman* (1989), 45 Ohio St.3d 298, 308.

{¶67} We find no ineffective representation. The Third Assignment is denied.

{¶68} This cause is affirmed at Appellant’s costs.

By: Boggins, J.

Hoffman, P.J. concurs separately

Edwards, J. concurs separately

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JUDGES

*Hoffman, P.J., concurring*

{¶70} I concur in the majority's analysis and disposition of appellant's second assignment of error.

{¶71} With respect to appellant's first and third assignments of error, I concur in judgment only.

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JUDGE WILLIAM B. HOFFMAN

EDWARDS, J., CONCURRING OPINION

{¶72} I concur with Judge Boggins as to the analysis and disposition of the second assignment of error.

{¶73} I concur in judgment only with Judge Boggins as to the first and third assignment of error.

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Judge Julie A. Edwards

JAE/mec

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	:	
IVORY PERDUE	:	
	:	CASE NO. 04-CA-46
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For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to appellant.

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JUDGES