*1994 Ohio App. LEXIS 1139, **

State of Ohio, Plaintiff-Appellee, v. Patty Sue Brewster, Defendant-Appellant.

No. 93 CA 503

COURT OF APPEALS OF OHIO, FOURTH APPELLATE DISTRICT, PIKE COUNTY

1994 Ohio App. LEXIS 1139

March 16, 1994, Filed

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed from a judgment of the Common Pleas Court of Pike County (Ohio), which convicted defendant, on a jury verdict, of murder under Ohio Rev. Code Ann. § 2903.02(A) with a firearm specification. Defendant cited ineffective assistance of counsel and self defense.

OVERVIEW: Defendant and her boyfriend had been drinking and got into an argument. Defendant left and went to her uncle's trailer. The uncle and defendant's estranged husband were at the trailer. When the boyfriend came over, defendant fatally shot him. At trial, defendant alleged self defense as a result of battered woman syndrome. She alleged that her boyfriend had charged her with a knife. The State alleged that the boyfriend's fingerprints were not on the knife and that defendant or the others present had planted the knife. The court affirmed the judgment. It was proper to admit defendant's expert's answer on cross examination as to how much she was charging defendant because defense counsel had opened the door to this issue. Consequently, any error on this issue was invited error, not plain error. It was not ineffective assistance of counsel for defense counsel not to call the two eyewitnesses because their testimony would have been unfavorable to defendant. Further, there were no allegations that defense counsel failed to investigate or was unaware that the eyewitnesses existed.

OUTCOME: The court affirmed the judgment that convicted defendant of murder.

CORE TERMS: knife, trailer, eyewitnesses, shot, defense counsel, expert witness, ineffective, uncle, corn, specification, murder, assignment of error, deficient performance, plain error, gun, ineffective assistance of counsel, trial strategy, fingerprint, prejudiced, hindsight, notice of appeal, burden of proof, alibi evidence, enunciated, violating, indicted, duty, Sixth Amendment, reasonable probability, assignments of error

LexisNexis(R) Headnotes Hide Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Definitions

HN1 Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. Ohio R. Crim. P. 52(B). Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise. The Ohio Supreme Court frequently limits the application of the plain error rule. Notice of plain error under Rule 52(B) is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. More Like This Headnote

Criminal Law & Procedure > Counsel > Costs & Attorney Fees

HN2 Asking an expert witness how much they are being paid is improper. More Like This Headnote

Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Invited Errors Doctrine

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > General Overview

HN3 A party is not entitled to take advantage of an error which he or she invited or induced the trial court to make. More Like This Headnote

Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor

Evidence > Relevance > Relevant Evidence

Evidence > Testimony > Experts > General Overview

HN4 The amount of an expert's fee is usually not admissible or relevant. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

HN5 To establish a claim of ineffective assistance of counsel a party must meet the two-prong test first enunciated by the United States Supreme Court in Strickland. First, a defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is

reliable. More Like This Headnote

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

HN6 The first prong of Strickland is that there is a strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. To prevail on an assertion of ineffective assistance of counsel, a defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. In the second prong of the Strickland test, the defendant must demonstrate more than mere hindsight. He must prove that because of trial counsel's failure he has been prejudiced and that prejudice caused an outcome different than that which would have resulted had there been no failure. More Like This Headnote

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

HN7 On the issue of counsel's effectiveness, an appellant has the burden of proof, since in Ohio a properly licensed attorney is presumably competent. More Like This Headnote

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

HN8 An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. To warrant reversal, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. More Like This Headnote

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

HN9 When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness. This standard is essentially the same as the one enunciated by the United States Supreme Court in Strickland. More Like This Headnote

Criminal Law & Procedure > Counsel > Effective Assistance > Trials

Criminal Law & Procedure > Defenses > Alibi

HN10 Deciding which witnesses to call is within the purview of defense counsel. Failure to call any particular witness, by itself, does not constitute ineffective assistance of counsel. Exclusion of alibi evidence is not always a violation of an essential duty. Counsel is not ineffective if he excludes alibi evidence because he believes it is perjurious, or if the witnesses appear to be not credible and calling them might harm the case for the defense. More Like This Headnote

Criminal Law & Procedure > Counsel > Effective Assistance > Trials

HN11 A reviewing court may not second guess trial counsel where his performance can be construed as a reasonable trial tactic. More Like This Headnote

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Counsel > Effective Assistance

HN12 A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, a defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. More Like This Headnote

COUNSEL: COUNSEL FOR APPELLANT: **Paul Croushore,** 601 South High Street, Columbus, Ohio 43215.

COUNSEL FOR APPELLEE: Robert Junk, ASSISTANT PROSECUTOR, Pike County Prosecutor's Office, 108 Market Street, Waverly, Ohio 45690.

JUDGES: Grey, Harsha, Abele

OPINIONBY: FOR THE COURT; LAWRENCE GREY

OPINION: DECISION AND JUDGMENT ENTRY

GREY, J.:

This is an appeal from the Common Pleas Court of Pike County. Brewster was indicted for violating R.C. 2903.02(A), murder. The charge carried a firearm specification. After a trial to a jury, she was found guilty. We affirm.

On August 31, 1992, Richard and Gertrude Wireman went to visit her sister, Patty Brewster, and her live-in boyfriend, Omar Ingram, the victim. During the visit, the

four people consumed a substantial amount of alcohol. After they had been drinking for a while, Ingram and Brewster began arguing. The argument escalated when Ingram threw a pop bottle at Brewster, and she, in retaliation, began hitting Ingram with a cane. She then left and went to a nearby trailer belonging to her uncle.

Brewster, her uncle Dudley, and **[*2]** her estranged husband, Charlie were present in the trailer when shortly thereafter Ingram came to the trailer in search of Brewster. When he entered the trailer, Brewster shot him. The shot proved fatal. Brewster was indicted for murder with a gun specification.

On January 19, 1993, the case came on for trial to a jury. The state's theory of the case was that it was a simple murder arising out of the argument, i.e., that after Ingram entered Dudley's trailer, Brewster got her uncle's gun and shot Ingram. Brewster asserted the affirmative defense of self defense, based on a battered woman syndrome. She argued that Ingram was abusive when he drank, which was most of the time. She contended that Ingram entered the trailer with a corn knife, a large knife similar to a machete, threatened to kill her and came after her with the knife. She asserted that, in self defense, she picked up a rifle and shot him.

The state contended that since neither Ingram's fingerprints nor his blood were found on the knife, that Brewster or one of the other people in the trailer placed the corn knife at his feet after he was shot to enhance the claim of self defense.

At the conclusion of the evidence, **[*3]** the jury found Brewster guilty of murder with a gun specification. She was sentenced to fifteen years to life for violating R.C. 2903.02(A), murder, with an additional term of three years for the gun specification. She timely filed a notice of appeal and assigns the following three claims of error.
FIRST ASSIGNMENT OF ERROR
"The record supports a finding that trial counsel were ineffective in failing to object to the prosecutor's questioning of the defense psychologist expert witness as to her fees, and that the court plainly erred in permitting the question even without objection."

During cross examination of Brewster's expert witness, Dr. Jill Blyth, the state asked how much she charged for Brewster's psychological evaluation and for testifying at trial. This question was not objected to, but, in her first assignment of error, Brewster argues that questions about the amount paid to an expert witness constitute plain error.

HN1 Plain error 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 does not exist unless it can be said that but for the error, the outcome of the trial would **[*4]** clearly have been otherwise. State v. Nicholas (1993), 66 Ohio St.3d 431, 436, 613 N.E.2d 225; State v. Watson (1991), 61 Ohio St.3d 1, 6, 572 N.E.2d 97; State v. Moreland (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894.

The Ohio Supreme Court has frequently limited the application of the plain error rule. In State v. Landrum (1990), 53 Ohio St.3d 107, 111, 559 N.E.2d 710, the court quoted and followed State v. Long (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, as follows:

"Notice of plain error under Crim. R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."

While we agree that HN2 asking an expert witness how much they are being paid is improper, Ohio Dept. of Mental Health v. Milligan (1988), 39 Ohio App.3d 178, 530 N.E.2d 965, we are not persuaded that this line of questioning amounts to plain error.

During the case-in-chief, on direct examination, counsel for Brewster asked the expert witness, Dr. Blyth, to tell the jury how much she was being paid. Dr. Blyth said that she charged $ 120 per hour for evaluation and $ 250 per hour to testify. On cross examination, the **[*5]** state also questioned Dr. Blyth about how much she was being paid.

If error exists, it is invited error. HN3 A party is not entitled to take advantage of an error which he or she invited or induced the trial court to make. Center Ridge Ganley, Inc. v. Stinn (1987), 31 Ohio St.3d 310, 313, 511 N.E.2d 106; State v. Barnett (1990), 67 Ohio App.3d 760, 769, 588 N.E.2d 887. See, also, State v. Combs (1991), 62 Ohio St.3d 278, 287, 581 N.E.2d 1071. While HN4 the amount of the expert's fee is usually not admissible or relevant, once the matter was raised on direct examination, it was entirely proper for the court to permit the state to cross examine on that issue. We find no error, plain or otherwise.

Brewster's first assignment of error is not well taken and is overruled.
SECOND ASSIGNMENT OF ERROR
"The record supports a finding that trial counsel were ineffective in failing to present evidence that the defendant was defending herself even if the knife was planted after the killing."

THIRD ASSIGNMENT OF ERROR
"The record supports a finding that the trial counsel were ineffective in failing to call the two eyewitnesses to the event at trial when their grand jury testimony **[*6]** supported the defense theory presented at trial."

In her second assignment of error, Brewster argues that she was denied effective assistance of counsel because her trial counsel failed to rebut the state's contention that she placed the corn knife near Ingram's feet after she shot him. In her third assignment of error, Brewster argues that trial counsel was ineffective because they did not call Charlie Brewster or Dudley Nichols, the two eyewitnesses, to testify. We will review these assignments of error together.

HN5 To establish a claim of ineffective assistance of counsel a party must meet the two-prong test first enunciated by the United States Supreme Court in Strickland v. Washington (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052. In Strickland, the court held:

"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive defendant **[*7]** of a fair trial, a trial whose result is reliable."

HN6 The first prong of Strickland is that there is a strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. To prevail on an assertion of ineffective assistance of counsel, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

In the second prong of the Strickland test, the defendant must demonstrate more than mere hindsight. He must prove that because of trial counsel's failure he has been prejudiced and that prejudice caused an outcome different than that which would have resulted had there been no failure.

In State v. Lytle (1976), 48 Ohio St.2d 391, 358 N.E.2d 623, the Ohio Supreme Court held, at 397:

HN7 "On the issue of counsel's effectiveness, the appellant has the burden of proof, since in Ohio a properly licensed attorney is presumably competent. See Vaughn v. Maxwell (1965), 2 Ohio St.2d 299, 209 N.E.2d 164; State v. Williams (1969), 19 Ohio App.2d 234, 250 N.E.2d 907."

In State v. Bradley (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373, which cited **[*8]** Strickland, the Ohio Supreme Court set the standard for what has to be established to meet that burden of proof:

HN8 "'An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. United States v. Morrison, 449 U.S. 361, 364-365, 66 L. Ed. 2d 564, 101 S. Ct. 665 (1981).' Strickland, supra at 691.

"To warrant reversal, 'the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"

Most recently, in State v. Nicholas (1993), 66 Ohio St.3d 431, 613 N.E.2d 225, the Supreme Court of Ohio followed the Bradley standard concerning ineffectiveness of counsel and reiterated the Strickland standard:

HN9 "'When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties **[*9]** to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's

ineffectiveness.' State v. Lytle (1976), 48 Ohio St.2d 391, 396-397, 358 N.E.2d 623 * * *. This standard is essentially the same as the one enunciated by the United States Supreme Court in Strickland v. Washington (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 * * *."

A reviewing court must first consider whether defense counsel's performance was deficient, such as here, where the issue is: Was it deficient performance by trial counsel to fail to call the two eyewitnesses?

HN10 Deciding which witnesses to call is within the purview of defense counsel. State v. Coulter (1992), 75 Ohio App.3d 219, 598 N.E.2d 1324. Failure to call any particular witness, by itself, does not constitute ineffective assistance of counsel. For example, in State v. Whittaker (Jan. 23, 1986), Cuyahoga App. No. 49982, unreported, the court noted that exclusion of alibi evidence is not always a violation of an essential duty. Counsel is not ineffective if he excludes alibi **[*10]** evidence because he believes it is perjurious, or if the witnesses appear to be not credible and calling them might harm the case for the defense.

The record shows that, throughout the trial, defense counsel argued that Ingram attacked Brewster with the corn knife. Brewster's sister, Gertrude Wireman, testified that Brewster told her the corn knife was locked in a car trunk, implying that Ingram stopped to get it on his way to the Dudley trailer. Brewster says that her estranged husband and uncle would have testified that Ingram attacked her with a knife and she shot him in self defense.

In answer, the state introduced evidence that neither Ingram's fingerprints nor his blood (he was bleeding from prior injuries) were found on the knife. The state also argued that although the knife was large and the ceiling of the trailer quite low, there were no marks in the ceiling to corroborate the claim that Ingram was waving or brandishing the knife. The State attempted to convince the jury that the knife was placed next to the body as an afterthought, perhaps by Brewster or perhaps by someone else. In response, Brewster's attorney adduced testimony to show Brewster's fingerprints were not **[*11]** on the knife either and that, at best, the fingerprint evidence was inconclusive.

The testimony of the eyewitnesses who were in the trailer at the time might have added credibility to the self defense claim, or it might have added credibility to the cover-up theory and created the clear inference of defendant's guilty knowledge. Even if the eyewitnesses would have testified that it was they who placed the knife near the body, the clear implication of that testimony is that they did so because they thought Brewster had not acted in self defense - not the sort of thing defense counsel wants the jury to hear.

One can only speculate about what their testimony might have been. Brewster was represented by different counsel at trial and, while it may be tempting to apply judicial hindsight, to envision a different scenario had Brewster's uncle and husband testified, the Supreme Court has held that HN11 a reviewing court may not second guess trial counsel where his performance can be construed as a reasonable trial tactic.

In State v. Johnson (1986), 24 Ohio St.3d 87, 494 N.E.2d 1061, although the Supreme Court split as to the application of the Strickland test, even the dissenting

opinion, **[*12]** written by Justice Douglas, quoted from the Strickland case, stating:

"'* * * HN12 A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' * * *' (Citation omitted.) See, also, State v. Clayton (1980), 62 Ohio St.2d 45, 49 [16 O.O.3d 35, 402 N.E.2d 1189]."

There is no allegation that defense counsel did not investigate, did not know about the existence of the eyewitnesses, or did not know what they would testify to. The only allegation is that they were not called. This does not meet the first part of the Strickland test because it does not establish a failure on the part of defense counsel. The decision not to call the eyewitnesses **[*13]** is not any indication of deficient performance by trial counsel, and appears to be a reasonable trial strategy decision.

The first part of the Strickland test, deficient performance, not having been established, we do not need to reach the second, "but for," part of the test.

Based on the foregoing, Brewster's second and third assignments of error are not well taken and are overruled. The judgment of the trial court is affirmed.

JUDGMENT ENTRY

It is ordered that the judgment of the Pike County Common Pleas Court is affirmed. Appellee shall recover of appellant its 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 Pike County Common Pleas Court to carry this judgment into execution subject to the limited stay hereinafter granted.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is continued for a period of thirty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court a memorandum in support of jurisdiction accompanied by a motion **[*14]** for a further stay from that court during the pendency of proceedings in that court. The stay as herein continued will terminate at the expiration of the thirty day period. The stay will also terminate if the Supreme Court refuses to hear the appeal prior to the expiration of the thirty days. This stay is conditioned upon the filing of a notice of appeal to the Supreme Court within seven days of entry of this judgment.

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

Harsha, P.J. & Abele, J. Concur
in Judgment and Opinion

FOR THE COURT

By: Lawrence Grey, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 11, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.