

ORIGINAL

**IN THE SUPREME COURT OF OHIO
2010**

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

LARUE MONFORD,

Defendant-Appellant.

Case No. 2010-1949

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 09AP-274

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
SETH L. GILBERT 0072929
Assistant Prosecuting Attorney
(Counsel of Record)
373 South High Street-13th Fl.
Columbus, Ohio 43215
Phone: 614-462-3555
Fax: 614-462-6012
Email: slgilber@franklincountyohio.gov

COUNSEL FOR PLAINTIFF-APPELLEE

YEURA R. VENTERS 0014879
Franklin County Public Defender
ALLEN V. ADAIR 0014851
Assistant Public Defender
(Counsel of Record)
373 South High Street-12th Fl.
Columbus, Ohio 43215
Phone: 614-462-3960

COUNSEL FOR DEFENDANT-APPELLANT

FILED
DEC 08 2010
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION..... 1

STATEMENT OF THE CASE AND FACTS 3

ARGUMENT..... 4

Response to First Proposition of Law: When the defense presents no evidence of NGRI and never requests an NGRI instruction, it is not structural error for the trial court not to instruct the jury on NGRI. 4

Response to Second Proposition of Law: Once a defendant pleads NGRI, trial counsel is not ineffective in choosing not to actively pursue the NGRI defense at trial, and nothing requires a defendant who abandons an NGRI defense to formally withdraw the NGRI plea. 4

Response to Third Proposition of Law: The touchstone of any prosecutorial-misconduct claim is not the culpability of the prosecutor but rather the fairness of the trial. 6

Response to Fourth Proposition of Law: An identification will be suppressed only if the pretrial identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification and the identification itself was unreliable under the totality of the circumstances. 7

Response to Fifth Proposition of Law: To prevail on an ineffective-assistance claim, a defendant must show deficient performance and prejudice..... 9

Response to Sixth Proposition of Law: Convictions based on reliable eyewitness testimony are supported by sufficient evidence and are not against the manifest weight of the evidence. 11

CONCLUSION..... 12

CERTIFICATE OF SERVICE unnumbered

EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

None of defendant Larue Monford's six propositions of law warrants further review by this Court. Relying on the Third District's opinion in *State v. Cihonski*, 178 Ohio App.3d 713, 2008-Ohio-5191, defendant's first proposition of law asks this Court to identify a new category of "structural error." In particular, defendant argues that when a plea of not guilty by reason of insanity (NGRI) is entered prior to trial but never formally withdrawn, the trial court commits structural error by not instructing the jury on NGRI or otherwise notifying the jury of the NGRI plea—even though the defense presented no evidence of NGRI and never requested an NGRI instruction. In a related vein, defendant's second proposition of law argues that when a defendant enters an NGRI plea, trial counsel is ineffective by not either formally withdrawing the NGRI plea or actively pursuing an NGRI defense at trial—even though there is no evidence in the record that defendant insisted on an NGRI defense or that an NGRI defense would have had any probability of success.

But this Court need not review these issues. To start, there is no conflict between the Tenth District's decision in this case and *Cihonski*. The Tenth District distinguished *Cihonski* on factual grounds. *State v. Monford*, 10th Dist. No. 09AP-274, 2010-Ohio-4732, ¶¶71-76 (*Monford I*). Indeed, the Tenth District has overruled defendant's motion to certify a conflict, finding that "the unique facts and circumstances present in *Cihonski* are not present here." *State v. Monford*, 10th Dist. No. 09AP-274, 2010-Ohio-5624, ¶8 (*Monford II*):

* * * However, unlike *Cihonski*, appellant neither presented evidence demonstrating that his actions were not voluntary, nor presented any evidence in support of an NGRI defense. In fact, appellant advanced a completely different theory (misidentification) throughout the trial and there was nothing within this misidentification defense that even remotely suggested a theory of insanity.

Id. In other words, the Tenth District did not take a different legal approach from *Cihonski*, but rather declined to follow *Cihonski* because the two cases are “factually different.” Id.

Defendant’s legal arguments are without merit anyway. Courts recognize structural error only in a “very limited class of cases,” *Neder v. United States* (1999), 527 U.S. 1, 8, quoting *Johnson v. United States* (1997), 520 U.S. 461, 468, and the present case is not one of them. “The defense of not guilty by reason of insanity is an affirmative defense that must be proved by the accused.” *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, ¶64, citing R.C. 2901.05(A), and R.C. 2901.01(A)(14). So when a defendant offers no evidence of NGRI and does not request an NGRI instruction, the trial court commits no error at all—let alone structural error—by not instructing the jury on NGRI.

Defendant’s ineffective-assistance argument is equally unpersuasive. Trial counsel’s decisions not to formally withdraw the NGRI plea or actively pursue an NGRI defense at trial are presumed to fall “within the wide range of reasonable professional assistance.” *Strickland v. Washington* (1984), 466 U.S. 668, 689. Importantly, the record shows no indication that defendant insisted on pursuing an NGRI defense but rather was fully on board with pursuing a misidentification defense. And given the complete lack of any evidence in the record supporting an NGRI defense, defendant fails to show that pursuing an NGRI defense would have created a reasonable probability of a different outcome. *Strickland*, 466 U.S. at 689.

In short, the Tenth District correctly held that the absence of any NGRI instruction was neither structural error nor the result of ineffective assistance. These issues therefore deserve no further review.

Defendant’s third proposition of law—alleging that the prosecutor committed misconduct by having witnesses identify defendant at the pre-trial suppression hearing—is equally unworthy

of review. As the Tenth District found, the witnesses' identifications, despite being made in-court, were reliable and did not taint their later identifications of defendant during the trial.

Monford I, at ¶¶57-65.

Nor do defendant's other three propositions of law warrant any further review. These propositions of law do not seek to overrule, extend, or modify any existing law, but rather claim that the Tenth District misapplied well-settled legal standards to the specific facts of this case. Thus, any ruling on these propositions of law would have minimal impact in future cases.

In the end, the present case presents no questions of such constitutional substance or of such great public interest that would justify this Court's review. The State respectfully requests that jurisdiction be declined.

STATEMENT OF THE CASE AND FACTS

After a jury trial, defendant was convicted of murder, attempted murder, and felonious assault (all with firearm specifications) in the killing of Eugene Brown and shooting of Alicia Brown (no apparent relation). The shooting occurred on the afternoon of February 7, 2008, at the Happy Family Bar in Columbus. Five witnesses—Alicia, Latayia Cummings, Lenora Edwards, Antoinette Lee, and Cornell Rhodes—saw the shooting and identified defendant as the shooter. A sixth witness—Frank McKnight—saw defendant drive away from the bar immediately after the shooting.

For a full description of the factual and procedural histories of this case, see *Monford I*, at ¶¶1-33.

ARGUMENT

Response to First Proposition of Law: When the defense presents no evidence of NGRI and never requests an NGRI instruction, it is not structural error for the trial court not to instruct the jury on NGRI.

Response to Second Proposition of Law: Once a defendant pleads NGRI, trial counsel is not ineffective in choosing not to actively pursue the NGRI defense at trial, and nothing requires a defendant who abandons an NGRI defense to formally withdraw the NGRI plea.

Defendant's first proposition of law claims that the trial court committed structural error by not instructing the jury on NGRI. NGRI is an affirmative defense, and "[t]he burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused." R.C. 2901.05(A); see, also, *Taylor*, at ¶64.

Here, the defense presented no evidence of NGRI and never requested an NGRI instruction. Rather, the defense's theory throughout the trial was misidentification by the State's witnesses. In other words, rather than admitting to the shooting and offering evidence that defendant did not know right from wrong due to a severe mental disease or defect, the defense denied that defendant was the shooter at all. Given the lack of any evidence to support an NGRI defense, the trial court committed no error at all—let alone structural error—in not instructing the jury on NGRI.

Equally without merit is defendant's second proposition of law, which claims that trial counsel was ineffective by not either formally withdrawing the NGRI plea or actively pursuing an NGRI defense at trial. Defendant improperly speculates that, because there was no mention of the NGRI plea during the trial and because the NGRI plea was never formally withdrawn, the plea was "forgotten" by trial counsel. (MSJ, 3) The non-mention of the NGRI plea during the

trial could just as easily have been—and under *Strickland* is presumed to be—the result of trial counsel strategically concluding that an NGRI defense had no reasonable chance of success and that the better trial strategy was to pursue a misidentification defense (a defense that that defendant himself appeared to approve). Compare, *State v. Tenace* (1997), 121 Ohio App.3d 702 (defendant received ineffective assistance of counsel when trial counsel withdrew NGRI plea against defendant's wishes). And having made this decision, trial counsel could have further decided that there was no need to formally withdraw the NGRI plea—indeed, no statute or rule required the defense to do so.

In addition, the record shows no indication that there was any viable evidence that would have supported an NGRI defense. As defendant notes, Dr. Haskin's report is not in the record, and there is no other evidence that suggests that defendant suffered from any severe mental disease or defect—let alone that one that affected defendant's ability to know right from wrong. Thus, it is purely speculative that pursuing an NGRI defense would have had any effect on the outcome of the trial.

As the Tenth District recognized, the Third District's opinion in *Cihonski* is factually distinguishable. In that case, the defendant admitted to the conduct with which he was charged but testified that his actions were the product of a "reflex action." *Cihonski*, at ¶7. Because the defendant "presented evidence that his actions were not voluntary," *id.* at ¶12, the Third District apparently believed that the defendant's testimony was sufficient to raise the NGRI defense. In the present case, however, the defense presented no evidence to support an NGRI defense.

Moreover, the Third District appeared to conclude that trial counsel in *Cihonski* abandoned the NGRI defense without consulting with the defendant and against the defendant's wishes. In the present case, however, the record does not show that defendant insisted he was

insane, but rather shows that he denied being the shooter at all. The record also shows that defendant fully approved of trial counsel abandoning the NGRI defense and pursuing a misidentification defense instead.

For the foregoing reasons, defendant's first and second propositions of law warrant no further review.

Response to Third Proposition of Law: The touchstone of any prosecutorial-misconduct claim is not the culpability of the prosecutor but rather the fairness of the trial.

Defendant's third proposition of law claims that the prosecutor committed misconduct by having Edwards, McKnight, Cummings, and Alicia identify defendant at the pre-trial suppression hearing. The test for prosecutorial misconduct is whether the prosecutor's conduct was improper and, if so, whether it prejudicially affected the accused's substantial rights. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. The touchstone of the analysis "is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips* (1982), 455 U.S. 209, 219.

After discussing the due-process admissibility standards, the Tenth District found that all four witnesses' identifications of defendant at the suppression hearing were reliable and that the prosecutor committed no misconduct:

[W]e find the identifications made at the suppression hearing were not unreliable and did not cause the witnesses' identifications at trial to be inadmissible. These identifications did not affect the fairness of defendant's trial and defendant has not demonstrated how they constituted prosecutorial misconduct.

Monford I, at ¶65.

It is also significant that the defense did not object when these witnesses identified defendant during the trial itself, and that Rhodes and Lee identified defendant for the first time during the trial, and defendant has not challenged either of these identifications.

In short, defendant has failed to show that the suppression-hearing identifications resulted in an unfair trial.

For the foregoing reasons, defendant's third proposition of law warrants no further review.

Response to Fourth Proposition of Law: An identification will be suppressed only if the pretrial identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification and the identification itself was unreliable under the totality of the circumstances.

Defendant's fourth proposition of law claims that the trial court improperly overruled defendant's motion to suppress Alicia's and Cummings' identifications. "[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States* (1968), 390 U.S. 377, 387.

"[R]eliability is the linchpin in determining the admissibility of identification testimony * * *." *Manson v. Brathwaite* (1977), 432 U.S. 98, 114. In assessing the likelihood of misidentification, courts review the totality of the circumstances, including: (1) the opportunity of the witness to view the suspect at the time of the crime; (2) the witness' attentiveness; (3) the accuracy of the witness' prior description of the suspect; (4) the level of certainty demonstrated

at the confrontation; and (5) the time between the crime and the confrontation. *Biggers*, 409 U.S. at 199-200.

The Tenth District correctly rejected defendant's argument that the variances in backgrounds in the photo arrays made the identification procedures impermissibly suggestive. "[A] photo array is not unfairly suggestive due solely to different backgrounds." *Monford I*, at ¶48 (quoting Second District case and citing other cases).

That the photo arrays were not impermissibly suggestive was reason enough to require the trial court to overrule defendant's motion to suppress. In reviewing this issue, the Tenth District therefore did not address whether Alicia's and Cummings' identifications were reliable under the totality of the circumstances. *Id.* at ¶56. However, in reviewing defendant's prosecutorial-misconduct argument, the Tenth District explained that the *Biggers* reliability factors weighed in favor of reliability:

Regarding Alicia and Latayia, both women had a significant opportunity to observe defendant at close range during the time they were all at the bar. Latayia was within a few feet of him when she served him drinks on more than one occasion and was only feet away when the confrontation occurred. Alicia greeted him upon her initial arrival and was also only a few feet away when the confrontation occurred. Their attention was obviously directed to defendant during his confrontation with Eugene. In addition, the bar was well-lit on the afternoon of the shooting. While it appears that neither woman provided much of a description of the suspect, and while the in-court identification admittedly occurred approximately one and one-half years after the event, both women were very certain in their identifications and both had previously identified him from a photo array within a few weeks of the shooting. Furthermore, their identifications were corroborated by additional witnesses.

Id. at ¶63. The Tenth District also correctly held that Cummings' seeing defendant's photograph on television prior to identifying him from the photo array did not require suppression because

no State action was involved. *Id.* at ¶55; see, also, *State v. Brown* (1988), 38 Ohio St.3d 305, 310.

For the foregoing reasons, defendant's fourth proposition of law warrants no further review.

Response to Fifth Proposition of Law: To prevail on an ineffective-assistance claim, a defendant must show deficient performance and prejudice.

Defendant's second proposition of law claims that trial counsel was ineffective vis-à-vis the NGRI plea. Defendant's fifth proposition of law raises additional ineffective-assistance claims. To prevail on an ineffective-assistance claim, a defendant must show that defense counsel's performance fell below an objective level of reasonable representation, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 87. Applying this test, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101. The question is whether counsel acted "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690.

Defendant's arguments that trial counsel was ineffective during voir dire are without merit. As a general matter, "[t]he conduct of voir dire by defense counsel does not have to take a particular form, nor do specific questions have to be asked." *State v. Smith* (2000), 87 Ohio St.3d 424, 440, quoting *State v. Evans* (1992), 63 Ohio St.3d 231, 247. This Court has "consistently declined to 'second-guess trial strategy decision' or impose 'hindsight views about how current counsel might have voir dired the jury differently.'" *State v. Mundt*, 115 Ohio St.3d

22, 2007-Ohio-4836, ¶63, quoting *State v. Mason* (1998), 82 Ohio St.3d 144, 157. This Court in *Mundt* emphasized the inherent strategic nature of voir dire:

“Few decisions at trial are as subjective or prone to individual attorney strategy as juror *voir dire*, where decisions are often made on the basis of intangible factors.” * * * “The selection of a jury is inevitably a call upon experience and intuition. The trial lawyer must draw upon his own insights and empathetic abilities. Written records give us only shadows for measuring the quality of such efforts. * * * [T]he selection process is more an art than a science, and more about people than about rules.” * * * For these reasons, we have recognized that “counsel is in the best position to determine whether any potential juror should be questioned and to what extent. * * *

Mundt, at ¶64 (internal citations omitted).

Nor was trial counsel ineffective in not filing a notice of alibi. As the Tenth District recognized, the trial court allowed the defense to present alibi evidence, despite the failure to comply with Crim.R. 12.1. *Monford I*, at ¶96. Several appellate courts have held that if a defendant is allowed to present alibi testimony, the defendant cannot show prejudice as a result of a failure to file a notice of alibi. *Id.* (citing cases).

Defendant was not prejudiced by trial counsel not moving for a Crim.R. 29 acquittal either. The evidence was easily sufficient to support defendant’s guilt, and any such motion would have been summarily overruled. And trial counsel was not ineffective in arguing for merger.

For the foregoing reasons, defendant’s fifth proposition of law warrants no further review.

Response to Sixth Proposition of Law: Convictions based on reliable eyewitness testimony are supported by sufficient evidence and are not against the manifest weight of the evidence.

Defendant's sixth proposition of law claims that his convictions are supported by insufficient evidence and are against the manifest weight of the evidence. In judging the sufficiency of the evidence, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307.

Under a manifest-weight review, a court of appeals sits as a "thirteenth juror" and, after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

Under these highly deferential standards, the Tenth District properly affirmed defendant's convictions. Again, five witnesses identified defendant as the shooter, and a sixth witness saw defendant drive away from the scene immediately after the shooting. These multiple eyewitnesses corroborate each other. And beyond the cross-corroboration of the eyewitnesses, the police found at defendant's residence an SUV with temporary tags matching the description of the vehicle the shooter was driving when he left the bar. The jury therefore could have placed no significance in the lack of clarity in the still photographs, the lack of any incriminating statements by defendant, or the lack of any physical evidence.

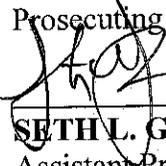
For the foregoing reasons, defendant's sixth proposition of law warrants no further review.

CONCLUSION

For the foregoing reasons, the State submits that the within appeal presents no questions of such constitutional substance or of such great public interest as would warrant further review by this Court. The State respectfully submits that jurisdiction should be declined.

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney



SETH L. GILBERT 0072929
Assistant Prosecuting Attorney
373 South High Street-13th Fl.
Columbus, Ohio 43215
614/462-3555
slgilber@franklincountyohio.gov

Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand-delivered this day,
December 06, 2010, to ALLEN V. ADAIR, 373 South High Street-12th Fl., Columbus,
Ohio 43215; Counsel for Defendant-Appellant.



SETH L. GILBERT 0072929
Assistant Prosecuting Attorney