STATE OF OHIO, PLAINTIFF-APPELLEE v. CONSTANCE REIF-HILL, DEFENDANT-APPELLANT

NO. 72864

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

1998 Ohio App. LEXIS 5404

November 12, 1998, Date of Announcement of Decision

PRIOR HISTORY: [*1] CHARACTER OF PROCEEDING: Criminal appeal from Court of Common Pleas. Case No. CR-332658.

DISPOSITION: JUDGMENT: AFFIRMED IN PART, REVERSED IN PART, CONVICTION VACATED.

COUNSEL: For Plaintff-appellee: Stephanie Tubbs Jones, Cuyahoga County Prosecutor, Rebecca J. Maleckar, Assistant County Prosecutor, Cleveland, Ohio.

For Defendant-appellant: Nicholas K. Thomas, Esq., Cleveland, Ohio.

JUDGES: JAMES D. SWEENEY, JUDGE. TERRENCE O'DONNELL, P.J., and TIMOTHY E. McMONAGLE, J., CONCUR.

OPINION BY: JAMES D. SWEENEY

OPINION

JOURNAL ENTRY AND OPINION

SWEENEY, JAMES D., J.:

Defendant-appellant Constance Reif-Hill [1] appeals from her jury trial conviction of Attempted Felonious Assault (*R.C. 2903.11[A][1]* [2], 2923.02) on the victim, Mr. Joseph Zanghi. For the reasons adduced below, we affirm in part and reverse in part, and vacate the conviction.

1 The case information form prepared by the police department described appellant as a thirty-nine-year-old female, who is sixty-five inches tall and weighs 220 pounds.

2 The offense of Felonious Assault is defined as:

"(A) No person shall knowingly:

(1) Cause serious physical harm to another;"

[*2] A review of the record on appeal indicates that in October of 1995, appellant, a resident of Pittsburgh, Pennsylvania, was contemplating killing her sister because that sister had given appellant a bad check and still owed money to her for the debt. Appellant had purchased a .38-caliber revolver for the purpose and traveled to Cleveland. Appellant's plan was to kill her sister and then commit suicide. After some thought, appellant concluded that she could not bring herself to kill her sister, so she gave the firearm to her brother and informed the Cleveland Police Department of the situation on October 12, 1995. The police responded to the location where appellant was staying and confiscated the firearm and transported appellant to St. Vincent Charity Hospital for psychiatric evaluation and treatment at appellant's request. [3] The appellant knew that by going to the psychiatric hospital she would be evaluated and there was the possibility that she could be kept there. (R. 253.) In fact, her intention in going was to "make sure I wasn't released." (R. 254.)

3 When a patient is brought to that hospital by the police, the patient is not free to leave until the staff makes an assessment and determines that the patient is not a danger to themselves or the public. Thus, to properly assess the patient's mental state, the patient who is brought in by the police does not have a right in such a case to refuse treatment at that point. (R. 219.)

[*3] While at the emergency room of the psychiatric ward at the hospital, the appellant, who stated that she saw the patients' rights form on the wall of the emergency room (R. 246, 248), expressed a desire to be admitted. The medical staff attempted to obtain from appellant a routine blood sample so as to determine her alcohol and medication levels, which information would be needed to properly diagnose appellant and accurately determine any medication and/or treatment regimen. The sample was to be drawn in a separate examining room adjacent to the emergency room. Appellant, who was in a highly agitated state, initially resisted this attempt to obtain the blood sample (claiming she was not a child, had AIDS, and would not voluntarily give consent for a blood sample to be taken by the technician since she considered him to be unqualified to perform the procedure or considered him to not be a member of the hospital staff because he allegedly was not wearing his employee identification card) or go into the examining room, but then voluntarily proceeded to the examining room. Appellant was persuaded to sit upon the examination bed in that room, but she then got off the bed and resumed her [*4] agitated state as she retreated to a corner of the room. The staff, all of whom, including the technician who initially attempted to draw the blood sample, were dressed in customary hospital garb and wore their identification cards in plain view, attempted to calm her fears but appellant appeared to be ready to physically strike an attending female staff member (who is approximately one-half appellant's size) with clenched fists. At that moment, a male staff member grabbed the appellant by the left arm and a struggle ensued with appellant screaming, scratching, kicking and attempting to strike the persons restraining her. Another male staff member, the victim herein, then grabbed appellant's right arm and appellant responded by savagely biting the victim on the side of his upper right arm through the victim's uniform shirt, the security guard patch affixed to the uniform shirt and undershirt, tearing these garments in the process. The biting episode was described by the victim as follows:

> "A. *** the first sensation I had was this tremendous shooting pain going up my spine. It was severe, it was a very severe pain, it went from my back all the way up to my neck. I wasn't quite [*5] sure what happened until I looked over and I saw her teeth in my flesh.
>
> "Q. And what did you do?
>
> "A. ***, I pulled back and she still had her, she still had my arm in her teeth, and I yanked it out." (R. 148.)

The appellant admitted that she bit the victim pretty hard. (R. 257.)

Within minutes, the staff, with the assistance of two uniformed Cleveland police officers, restrained appellant on the bed and the victim's wound was treated at the emergency room. The victim was given antibiotics and, over the next several weeks, a series of tests to determine the presence of HIV. The tests for HIV were negative. A short time after being treated, the victim returned to the psychiatric room area and overheard the appellant, who was speaking to someone, proclaim, "I don't care, that's how I got the disease and I'm going to give it to somebody else." (R. 154; also see 166.) The appellant denied making that statement. (R. 250.) The victim never heard the appellant protest the drawing of her blood. After the scuffle, the appellant consented to having her blood drawn so the hospital could test for the presence of HIV. [4] (R. 249, 259-260.) Later that day, appellant was transferred [*6] to the Cleveland Psychiatric Institute, an institution specializing in the care and treatment of mentally disturbed persons.

> 4 The hospital posts a list of clients' rights on the wall of the emergency room. (R. 211.)

The jury returned a verdict of guilty and appellant was sentenced on April 30, 1997 to the minimum term available, 2 to 10 years imprisonment. A subsequent motion for shock probation was filed by appellant, but there is no record of it being ruled on by the trial court.

This delayed appeal, which followed the filing of the motion for shock probation, presents two assignments of error.

I

> THE APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AS TRIAL COUNSEL FAILED TO REQUEST AN INSTRUCTION OF AGGRAVATED ASSAULT AND THE TRIAL COURT ERRED WHEN IT FAILED TO GIVE SUCH AN INSTRUCTION.

Appellant argues in this assignment that trial counsel was ineffective in not seeking, and the trial court erred in not giving, an instruction on the lesser offense of Aggravated Assault pursuant to *R.C.* [*7] *2903.12*. Appellant believes that such an instruction was warranted because she presented sufficient evidence of serious provocation

as a cause for her sudden rage which resulted in her biting the victim.

The standard of review for an allegation of ineffective assistance of trial counsel was stated by this court in *State v. Robinson* (June 1, 1995), Cuyahoga App. No. 67363, unreported, *1995 Ohio App. LEXIS 2339*, at *11-12:

> "The standard of review for ineffective assistance of counsel requires a two-part test and is set forth in *Strickland v. Washington (1994), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052*. See, also, *State v. Bradley (1989), 42 Ohio St. 3d 136, 538 N.E.2d 373*. '*** The defendant must show that counsel's representation fell below an objective standard of reasonableness.' *466 U.S. at 687-688*. The defendant must also prove '*** 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." *Strickland, 466 U.S. at 694*.

To answer the question of whether the court erred in not giving the instruction on [*8] the lesser offense of Aggravated Assault, we turn to *State v. Deem (1988), 40 Ohio St. 3d 205, 533 N.E.2d 294*, paragraph one of the syllabus, which instructs that a trial court must charge a jury on inferior degrees of the indicted offense if the inferior degree is supported by the evidence. The *Deem* court also addressed the term "provocation," as follows:

> "5. Provocation, to be serious, must be reasonably sufficient to bring on extreme stress and the provocation must be reasonably sufficient to incite or to arouse the defendant into using deadly force. In determining whether the provocation was reasonably sufficient to incite the defendant into using deadly force, the court must consider the emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time. (*State v. Mabry [1982], 5 Ohio App. 3d 13, 5 Ohio B. Rep. 14, 449 N.E.2d 16*, paragraph five of the syllabus, approved.)"

Reviewing the evidence at the trial, we do not conclude that such evidence was sufficient to provoke appellant into savagely biting the victim. Even in appellant's agitated mental state at the hospital, which ebbed and flowed according to the presence [*9] of the technician who initially sought to obtain her blood sample, she was aware that she wanted to be confined and that the hospital would be conducting routine tests on her person as part of the admission process. The hospital staff were attired in uniforms commonly observed in hospital settings and they all were displaying their identification cards in plain view. Appellant's belief, that the technician who initially sought to obtain her blood sample was not competent or qualified to perform the procedure, was not reasonably based or sufficient to incite her into using deadly force. Lacking the element of serious provocation, the appellant's trial counsel was not ineffective in not seeking, and the trial court did not err in not giving, the instruction on Aggravated Assault.

The first assignment of error is without merit.

II

> THE STATE FAILED TO PROVE THE ELEMENTS OF ATTEMPTED FELONIOUS ASSAULT BEYOND A REASONABLE DOUBT.

In this assignment, appellant argues that the prosecution did not (1) sufficiently demonstrate that appellant acted "knowingly" and (2) there was no evidence demonstrating that HIV could be transmitted via appellant's saliva sufficient to demonstrate [*10] the deadly weapon element of division (A)(2) of the offense.

In addressing a claim based on insufficiency of the evidence, the appellate court's function is to review the evidence and determine whether the evidence, if believed, would convince the average mind that defendant was guilty beyond a reasonable doubt. Also, the relevant inquiry for the court is whether, after viewing the evidence in a light most favorable to the prosecution, the 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, 574 N.E.2d 492*, paragraph two of the syllabus; also see *State v. Thompkins (1997), 78 Ohio St. 3d 380, 386, 678 N.E.2d 541* (sufficiency and manifest weight of the evidence explained and contrasted).

The record in this case does not demonstrate that appellant "knowingly" caused, and/or attempted to cause, serious physical harm to the victim by biting him with the intent to pass onto him her HIV infection. The appellant never had an HIV infection and the victim never

contracted HIV from this episode. Absent the disease being demonstrated, the knowledge element of the offense is lacking. Thus, the first [*11] subargument is with merit.

As to the second subargument, the prosecution proceeded under division (A)(1) of the statute, which does not contain the element of a deadly weapon. The deadly weapon element is contained in division (A)(2) of the statute. Accordingly, this subargument is irrelevant to the facts of this case.

The second assignment of error is affirmed.

Judgment affirmed in part and reversed in part, conviction vacated and defendant-appellant ordered discharged.

This cause is affirmed in part and reversed in part, conviction vacated and defendant-appellant ordered discharged.

The court finds there were reasonable grounds for this appeal. It is, therefore, considered that said appellant(s) and appellee(s) each pay one-half of the costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been reversed and vacated, appellant is ordered discharged. The trial court is ordered to take all necessary steps to effect the immediate release of the appellant from prison.

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

[*12] TERRENCE O'DONNELL, P.J., and

TIMOTHY E. McMONAGLE, J., CONCUR.

JAMES D. SWEENEY

JUDGE

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B)*, *22(D)* and *26(A)*; Loc.App.R. 27. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, *S. Ct. Prac.R. II, Section 2(A)(1)*.