[Cite as *State v. Marcoff*, 2010-Ohio-5610.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94646

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

PETER MARCOFF, III

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED, VACATED, AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-511283

BEFORE: Kilbane, J., Gallagher, A.J., and Jones, J.

RELEASED AND JOURNALIZED: November 18, 2010

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MARY EILEEN KILBANE, J.:

{¶ 1} Appellant, Peter Marcoff, III ("Marcoff"), appeals his conviction on one count of aggravated riot. Marcoff argues that his conviction was not supported by sufficient evidence, that his counsel was ineffective, and the trial court erred in failing to produce the grand jury transcript. After a review of the record and pertinent law, we reverse the decision of the trial court, vacate Marcoff's conviction, and remand.

{¶ 2} On June 12, 2008, a five-count indictment was issued against Marcoff and four codefendants, Wendy Hinzman ("Hinzman"), Shane Linnan

("Linnan"), [1] Eugina Chidsey ("Chidsey"), and Jason Dillon ("Dillon"). Counts 1 and 5 pertained to all five defendants, charging them with felonious assault, in violation of R.C. 2903.11(A)(1), and aggravated riot, in violation of R.C. 2917.02(A)(1). Hinzman was charged in Count 2 with felonious assault, in violation of R.C. 2903.11. Chidsey was charged in Count 3 with assault, in violation of R.C. 2903.13(A), Chidsey was also charged in Count 4 with intimidation, in violation of R.C. 2921.03(A).

{¶ 3} On November 11, 2008, Marcoff, Hinzman, Linnan, and Chidsey all proceeded to trial before a jury. Prior to their trial, Dillon was tried separately and acquitted.

{¶ 4} The following testimony was elicited at trial.

{¶ 5} Susan Addleman ("Addleman") testified that on the evening of August 16, 2007, she was working as a bartender at Sheehan's Pub, located at 13560 Lorain Avenue in Cleveland, Ohio. At approximately 10:00 p.m., Chidsey, also an employee at Sheehan's Pub, arrived with Marcoff, her boyfriend. Later that night, Chidsey and Marcoff were joined by Hinzman, Dillon, and Linnan. According to Addleman, the group drank heavily all evening.

{¶ 6} In the early morning of August 17, 2007, Addleman's boyfriend, Jim Graziolli ("Graziolli"), arrived at Sheehan's to help Addleman clean and

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[1] A.k.a. "Linnean," see *State v. Linnan*, 8th Dist. No. 94620, 2010-Ohio-5145.

close down the bar. Addleman testified that at 2:15 a.m., she informed the remaining customers that they needed to finish their drinks and leave. Addleman stated that all of the customers left shortly thereafter, except Chidsey, Dillon, Hinzman, Linnan, and Marcoff. Addleman then asked Graziolli to help her remove the group.

{¶ 7} Graziolli testified that instead of leaving the bar, Chidsey went behind the bar and began pouring drinks for the group. He then approached the group and asked them to leave, but they refused. Graziolli stated that he then went outside, at which point Hinzman approached him and began arguing with him. As Graziolli walked away, Hinzman allegedly struck him in the back of the head with her high-heeled shoe. Graziolli stated that he then punched Hinzman in the face with a closed fist and she fell down.

{¶ 8} Graziolli stated that Dillon then came out of the bar and jumped on his back, while Hinzman continued to strike him in the head with her shoe, and others joined in the melee. Addleman came outside, saw that Graziolli was bleeding and contacted police. Several minutes later the Cleveland Police and EMS arrived. Graziolli was taken to Fairview Hospital where he stayed for two days. He received sutures in his head, a splint for his broken finger, and was fitted with a neck brace.

{¶ 9} At the conclusion of the trial, Marcoff was found not guilty of felonious assault, but guilty of aggravated riot.

{¶ 10} On November 26, 2008, before his sentencing hearing, Marcoff filed a motion for a new trial arguing that the verdict was not supported by sufficient evidence and that a jury instruction contained an improper statement of the law. On December 15, 2008, the State filed its brief in opposition.

{¶ 11} On December 16, 2008, the trial court sentenced Marcoff to one year of community control sanctions, three years of postrelease control, and advised him that the failure to abide by the terms and conditions of those sanctions would subject him to a one-year prison sentence.

{¶ 12} On January 20, 2009, Marcoff appealed.

{¶ 13} On January 14, 2010, in App. No. 92698, this court dismissed Marcoff's appeal for lack of a final appealable order because the trial court had not ruled on Marcoff's motion for a new trial.

{¶ 14} On January 19, 2010, the trial court denied Marcoff's motion for a new trial.

{¶ 15} On February 9, 2010, Marcoff filed the instant appeal, raising five assignments of error for our review.

ASSIGNMENT OF ERROR NUMBER ONE

"THE TRIAL COURT ERRED IN DENYING APPELLANT'S CRIMINAL RULE 29 MOTION FOR ACQUITTAL WHEN THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE ELEMENTS OF AGGRAVATED RIOT."

{¶ 16} Marcoff argues that the trial court erred in denying his Crim.R. 29 motion because the State failed to prove the essential elements of aggravated riot. The standard of review for a challenge to the sufficiency of the evidence was set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184. "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." Id. at syllabus.

{¶ 17} In *State v. Bradley*, 8th Dist. No. 87024, 2006-Ohio-4589, we stated:

> **"*Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, in which the Ohio Supreme Court held: 'An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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.'" *Bradley* at ¶12, quoting *Jenks*, at paragraph two of the syllabus, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 18} R.C. 2917.02 defines aggravated riot as follows:

"(A) No person shall participate with four or more others in a course of disorderly conduct in violation of section 2917.11 of the Revised Code:

(1) With purpose to commit or facilitate the commission of a felony;

(2) With purpose to commit or facilitate the commission of any offense of violence;

(3) When the offender or any participant to the knowledge of the offender has on or about the offender's or participant's person or under the offender's or participant's control, uses, or intends to use a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code."

{¶ 19} In order to violate R.C. 2917.02(A)(1) or (A)(2), an individual must engage in the behavior prohibited above with the purpose to commit or facilitate the commission of a felony or offense of violence. "A person acts purposely when it is his specific intention to cause a certain result, or, when

the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." R.C. 2901.22(A).

{¶ 20} Specifically, Marcoff argues that the in-court identification and testimony regarding his involvement was nonexistent. He also argues that the State did not prove that a total of five individuals engaged in the requisite statutory conduct to constitute aggravated riot.

I. Lack of Identification Evidence

{¶ 21} At trial, Graziolli testified on direct examination that while he was outside Sheehan's Pub fighting Jason Dillon, "three other patrons came out and they were on top of me." (Tr. 311.) Graziolli stated that "Jason, Shane and Peter" all punched him and kicked him, yet notably, he did not identify Marcoff, who was sitting at the trial table with all the other defendants. At trial, the following exchange took place between Graziolli and the state:

"Q: Do you see Peter here at all?

A: No. (Tr. 311.)"

{¶ 22} Earlier in direct examination, Graziolli testified that "just three or four" people were in the bar. (Tr. 298.) Thus, despite multiple opportunities, Graziolli never identified Marcoff as even being present in the

bar on the night of the fight, let alone as an attacker. Instead, he mentioned someone named "Peter," but could not connect that name with Marcoff.

{¶ 23} When asked to identify who was in the bar prior to the fight outside, Graziolli never identified Marcoff, and instead identified only Linnan, Chidsey, and Hinzman:

> **"Q: Do you see any people in the courtroom today that you saw earlier at the bar that night?**
>
> **A: Yes.**
>
> **Q: Could you point to — one by one, could you point of there's only one or none? Who do you see?**
>
> **A: There's three sitting right there. Shane and the two sisters." (Tr. 301.)**

Finally, Graziolli testified that Addleman was inside the bar when the fight was going on and therefore did not see the fight. (Tr. 314.)

{¶ 24} For her part, Addleman did identify Marcoff in court as someone she saw in the bar that night, and also listed him as a member of the group who was hitting and punching Graziolli. However Graziolli testified on both direct and cross-examination that hostilities had ceased by the time Addleman arrived outside the bar:

> **"Q: When did it stop?**
>
> **A: After I quit fighting.**
> *** * ***
>
> **Q: What happened after that?**

A: Susan came out and she called the police and the ambulance.

*** * ***

Q: You testified on your direct examination that when Susan came outside, the fight was over; do you remember saying that?

A: Yes.

Q: You testified that when Susan came outside, you had stopped fighting; do you remember those words?

A: Yes.

Q: When you stopped fighting, the fight was over; do you remember that testimony?

A: Yes.

*** * ***

Q: You're not aware if Susan saw any altercation, are you?

A: I don't know.

*** * ***

Q: Well, then she didn't see, right?

A: She saw it through the window.

*** * ***

Q: But she didn't come outside until it was over?

A: Yes." (Tr. 314, 349, 350.)

{¶ 25} Further, while Addleman stated that she heard or saw a commotion outside the bar while she was still in the bar, she admitted that her view was obstructed by a sign in the window. (Tr. 468.) On this point, Addleman testified that she could only see peoples' hands, not the actual participants. (Tr. 467-468.)

II. Failure to Meet the Elements of Aggravated Riot

{¶ 26} Perhaps most importantly, Graziolli testified on cross-examination that only four people were involved in the altercation, not five as required by the aggravated riot statute. When cross-examined about a report he gave to the Cleveland police following the incident, Graziolli testified as follows:

> **"Q: Why don't you take a minute and review that and come up with the number of people that you indicated there were.**
>
> **A: All right.**
>
> **Q: How many people did you describe to the police department on August 25th?**
>
> **A: Four." (Tr. 358.)**

{¶ 27} Graziolli therefore admitted that only four people were involved in the fight, not the requisite five as required by the aggravated riot statute. (Tr. 358.) When viewed in a light most favorable to the State, Graziolli's and Addleman's testimony do not present sufficient evidence for the jury to find Marcoff guilty of aggravated riot. Their testimony shows that the State

cannot prove the elements of the crime of aggravated riot beyond a reasonable doubt because that offense requires five participants in addition to the victim, regardless of whether Marcoff was properly identified or not. R.C. 2917.02(A).

{¶ 28} In so holding, we distinguish this case on its facts from this court's recent decisions affirming the convictions of three of Marcoff's codefendants: Hinzman, Chidsey, and Linnan. All of their convictions were affirmed in *State v. Hinzman*, 8th Dist. No. 92767, 2010-Ohio-771,[2] *State v. Chidsey*, 8th Dist. No. 92593, 2009-Ohio-6638,[3] and *State v. Linnan*, 8th Dist. No. 94620, 2010-Ohio-5145,[4] respectively. All three individuals were clearly identified in court by Graziolli and Addleman as participants in the disturbance at the bar.

{¶ 29} Marcoff's first assignment of error is sustained. We find that the trial court erred in failing to grant the Crim.R. 29 motion for acquittal against him at the close of evidence. Accordingly, we reverse the judgment of the

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[2]Hinzman was convicted of aggravated assault, the lesser-included offense of Count 1 of the indictment, and aggravated riot as charged in Count 5 of the indictment.

[3]Chidsey was convicted of aggravated riot as charged in Count 5 of the indictment, but acquitted of felonious assault as charged in Count 1 of the indictment.

[4]Linnan was convicted of aggravated riot as charged in Count 5 of the indictment, but acquitted of felonious assault as charged in Count 1 of the indictment.

trial court and vacate Marcoff's conviction. Marcoff's remaining four assignments of error are moot.

Judgment reversed, conviction vacated, and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee 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 common pleas court to carry this judgment into execution.

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

MARY EILEEN KILBANE, JUDGE

SEAN C. GALLAGHER, A.J., and
LARRY A. JONES, J., CONCUR