[Cite as *State v. McCoy*, 2006-Ohio-4745.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

DAVID C. MCCOY

Defendant-Appellant

JUDGES:
Hon. John W. Wise, P. J.
Hon. W. Scott Gwin, J.
Hon. Julie A. Edwards, J.

Case No. 05 CA 36

O P I N I O N

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. 05 CR 02 0024

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: September 11, 2006

APPEARANCES:

For Plaintiff-Appellee

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Wise, P. J.

{¶1} Appellant David McCoy ("appellant") appeals the verdict rendered in the Knox County Court of Common Pleas. Appellant raises issues regarding venue, ineffective assistance of counsel and rulings on evidentiary matters. The following facts give rise to this appeal.

{¶2} The incident that resulted in charges in this matter occurred on December 29, 2004. On this date, the victim, Justin Smith, was deer hunting with a group of men in Fredericktown, Knox County. Dean Sherman gave Mr. Smith permission to hunt on his property. However, at some point, Mr. Smith did not know whether he was still on Mr. Sherman's property as he did not see or cross any fences and did not observe any no trespassing signs.

{¶3} As he was hunting, Mr. Smith heard a chainsaw and yelling. Appellant approached Mr. Smith yelling that he wanted Mr. Smith's "fucking license and muzzle loader right now." Appellant twice stuck his finger in Mr. Smith's face and began shoving him. Mr. Smith apologized for being on appellant's property and told him he would leave. Appellant pushed Mr. Smith a third time. At that point, Mr. Smith dropped his gun and wrestled appellant to the ground. The two men struggled on the ground.

{¶4} During the struggle, and while appellant still had a hold of Mr. Smith, appellant grabbed the muzzle loader and began swinging it at Mr. Smith's face. Mr. Smith broke free from appellant and stood up. Appellant swung the muzzle loader against a tree causing it to break into pieces. Mr. Smith began to walk away from appellant toward the other members of his hunting party. As Mr. Smith was walking away, appellant struck him in the head with a piece of the muzzle loader. Mr. Smith

passed out for approximately twenty to twenty-five seconds. Mr. Smith was transported to Knox Community Hospital and life-flighted to Grant Medical Center where he remained hospitalized for three days due to head injuries.

{¶5} On February 8, 2005, the Knox County Grand Jury indicted appellant for one count of felonious assault. This matter proceeded to trial on September 20, 2005. Following deliberations, the jury found appellant guilty as charged in the indictment. On November 4, 2005, the trial court sentenced appellant to three years imprisonment and ordered him to make restitution, in the amount of $42,200.00, to Mr. Smith. Appellant timely filed a notice of appeal and sets forth the following assignment of error for our consideration:

{¶6} "I. THE CONVICTION IS UNLAWFUL AND VOIDABLE WHERE THE RECORD IS DEVOID OF EVIDENCE THAT THE CRIME CHARGED IN THE INDICTMENT IN FACT OCCURRED IN KNOX COUNTY, OHIO. THE VERDICT, CONVICTION AND SENTENCE ARE THUS CONTRARY TO LAW AND APPELLANT MUST BE DISCHARGED.

{¶7} "II. APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT WHERE HIS DEFENSE COUNSEL'S PERFORMANCE WAS SO DEFECTIVE THAT COUNSEL WAS NOT FUNCTIONING AS 'COUNSEL' AS INTENDED BY THE SIXTH AMENDMENT, RESULTING IN ACTUAL PREJUDICE TO APPELLANT'S FUNDAMENTAL RIGHT TO A FAIR TRIAL.

{¶8} "III. APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS WHERE

THE ACTIONS OF THE TRIAL COURT WERE ARBITRARY AND AN ABUSE OF DISCRETION IN EXCLUDING EVIDENCE OF THE ALLEGED VICTIM'S MOTIVE AND BIAS AGAINST THE ACCUSED IN LIGHT OF A PENDING CIVIL SUIT."

II

{¶9} We will address appellant's Second Assignment of Error first as it is dispositive of this matter on appeal. Appellant contends, in his Second Assignment of Error, that he was deprived of effective assistance of counsel. We agree.

{¶10} 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. *Strickland v. Washington* (1984), 466 U.S. 668; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶11} In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley* at 142. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists counsel's conduct fell within the wide range of reasonable, professional assistance. Id.

{¶12} In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. "Prejudice from defective representation sufficient to justify reversal of a conviction exists only where the result of the trial was unreliable or the proceeding fundamentally unfair because of the performance of trial

counsel." *State v. Carter* (1995), 72 Ohio St.3d 545, 558, citing *Lockhart v. Fretwell* (1993), 506 U.S. 364, 370.

{¶13} The United States Supreme Court and the Ohio Supreme Court have held a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley* at 143, quoting *Strickland* at 697. Accordingly, we will direct our attention to the second prong of the *Strickland* test.

{¶14} Appellant sets forth seven arguments in support of his claim that he received ineffective assistance of counsel. The argument we find pertinent to our decision concerns appellant's claim that defense counsel requested the wrong jury instruction for the affirmative defense of self-defense. Specifically, appellant argues defense counsel was ineffective for allowing the trial court to instruct the jury that there was a duty to retreat.

{¶15} We have reviewed the transcript regarding the discussion of jury instructions. During this discussion, defense counsel requested a jury instruction, pursuant to O.J.I., Section 411.33, which concerns self-defense against danger of bodily harm. The trial court's original draft of the proposed jury instructions contained language pursuant to O.J.I., Section 411.31, dealing with self-defense against danger of death or great bodily harm. See Tr. Vol. II at 460. This section of O.J.I. contains "duty to retreat" language. However, Section 411.33 does not contain any such language.

{¶16} Upon defense counsel's urging, the trial court agreed to change the language from that contained in Section 411.31 to the language contained in Section 411.33. Id. In doing so, the trial court inadvertently, or otherwise, failed to delete the

language regarding a duty to retreat, which is contained in Section 411.31. Because the jury may have focused on the fact that appellant failed to retreat before resorting to physical force, we conclude this error by the trial court was not harmless and may have impacted the outcome of the trial.

{¶17} Accordingly, we sustain appellant's Second Assignment of Error. In doing so, we do not find defense counsel was ineffective as counsel requested a jury instruction that did not contain language concerning a duty to retreat. However, the duty-to-retreat language was not deleted from the jury instructions given to the jury. We will not address appellant's First and Third Assignments of Error as they are moot based upon our disposition of appellant's Second Assignment of Error.

{¶18} For the foregoing reasons, the judgment of the Court of Common Pleas, Knox County, Ohio, is hereby reversed and remanded for proceedings consistent with this opinion.

By: Wise, P. J.

Gwin, J., concurs.

Edwards, J., concurs separately.

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HON. JOHN W. WISE

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

JWW/d 713

EDWARDS, J., CONCURRING

{¶19} I respectfully concur with the majority's analysis and disposition of appellant's second assignment of error. I also concur with the majority as to the disposition of the case. However, I disagree with the majority's determination that appellant's first assignment of error is moot.

{¶20} Appellant, in his first assignment of error, argues that the record is devoid of evidence that the felonious assault charged in the indictment occurred in Knox County, Ohio. Because, in all criminal prosecutions, dismissal is the appropriate remedy where the State fails to prove venue at trial (See *State v. Pausch* (Jan. 28, 1991), Franklin App. No. 98 AP 1096, 1999 WL 35352 citing, *State v. Headley*, (1983), 6 Ohio St.3d 475, 435 N.E.2d 716), I would find that appellant's first assignment of error is not moot.

{¶21} Appellant, in his first assignment, specifically maintains that appellee failed to prove that the offense in this matter occurred in Knox County, in the State of Ohio, as opposed to Knox County in another State.

{¶22} It is well established that, in criminal prosecutions, the State is required to establish venue beyond a reasonable doubt. See *State v. Headley* (1983), 6 Ohio St.3d 475, 453 N.E.2d 716; *State v. Dickerson* (1907), 77 Ohio St. 34, 82 N.E. 969. However, the Ohio Supreme Court has held that "[i]t is not essential that venue ... be proven in express terms, provided it be established by all the facts and circumstances in the case, beyond a reasonable doubt, that the crime was committed in the county and state as alleged in the indictment." *Dickerson*, supra, at syllabus paragraph one. In *Dickerson*, the State produced evidence regarding the township and county in which the offense

took place, but did not elicit specific testimony that said offense occurred within the State of Ohio. Id. at 56. The Supreme Court upheld the conviction, finding that venue was sufficiently established without specific mention of the State of Ohio.

{¶23} In the case sub judice there was no specific mention of the State of Ohio at trial. However, appellant testified that the incident took place on his property and that his property was located in Knox County. In addition, Deputy David Light testified on direct examination that he was employed by the Knox County Sheriff's Office and that all of the locations that he marked on an aerial map from the Knox County Map Department were in Knox County. The deputy had used such map to mark the location of the felonious assault in this case. Deputy Light further testified that, on the date in question, he was dispatched to a residence in the Village of Fredericktown. As noted by appellee, "[a]ppellee produced sufficient evidence that the incident in question took place near the Village of Fredericktown and in Knox County, both of which are found in the State of Ohio."

{¶24} In light of the above, I would find that, under the totality of the circumstances, the State had proven venue beyond a reasonable doubt.[1]

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Judge Julie A. Edwards

JAE/dr/rmn

[1] See In re *Heater* (Feb. 10, 1997), Stark App. No. 1996 CA 00208, 1997 WL 117136. In *Heater*, the appellant alleged that the State had failed to prove venue. In rejecting the appellant's argument, this court held, in relevant part, as follows: "In the instant case, the record reflects Officer Morrison testified that the shooting incident occurred in the 300 block of West Summit and that said block was located in Stark County. (Tr. at 6-7.) In addition, Officer Morrison testified he is a police officer with the City of Alliance and that Bevington and the other occupants of the vehicle reported the shooting incident to the Alliance Police Department. (Tr. at 16.) In light of the above, we find the trial court did not err in determining that, under the totality of the circumstances, the State had proven venue beyond a reasonable doubt." Id. at 2.

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DAVID C. MCCOY	:	
Defendant-Appellant	:	Case No. 05 CA 36

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Knox County, Ohio, is reversed and remanded for further proceedings consistent with this opinion.

Costs assessed to Appellee State of Ohio.

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HON. JOHN W. WISE

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS