[Cite as *State v. Isbell*, 2011-Ohio-2082.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio	Court of Appeals No. WD-10-005
Appellee	Trial Court No. 09 CR 420
v.	
Garry Isbell	**DECISION AND JUDGMENT**
Appellant	Decided: April 29, 2011

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Melissa A. Schiffel and David E. Romaker, Jr., Assistant Prosecuting Attorneys, for appellee.

Jeffrey P. Nunnari, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Garry Isbell, appeals from his conviction entered by the Wood County Court of Common Pleas in the above-captioned case. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} On September 3, 2009, appellant was indicted on two counts of robbery: one, a violation of R.C. 2911.02(A)(2), a felony of the second degree; and the other, a violation of R.C. 2911.02(A)(3), a felony of the third degree.

{¶ 3} A jury trial was held in the matter, beginning on October 14, 2009 and ending on October 15, 2009. At trial, evidence of the following facts was adduced.

{¶ 4} On the night of June 19, 2009, appellant, after waiting for several hours outside a Toledo bar, angrily confronted his ex-wife Debra as she was leaving the establishment and demanded money from her. At some point during the confrontation, appellant told Debra that he had a gun. Debra, afraid for her safety, because she was "sure" that he would use the gun, gave appellant a small amount of money. Unsatisfied with the amount he was given, appellant demanded that Debra return to the bar to get more money from her sister. Debra did as she was told. Appellant took the additional money and then ordered Debra to "get her ass home right now."

{¶ 5} Appellant got in his car and began following Debra as she was driving home. Eventually, he stopped following her, but only because he was stopped by a stop light. Shortly after Debra arrived home, she saw appellant pull up in her driveway. Debra met him at the door, at which point appellant pulled out what was later determined to be a BB gun, pointed it at Debra, and told her that he would blow her head off if he caught her going out again. He then turned and left the residence.

{¶ 6} Some minutes later, appellant returned. This time, when Debra opened the door, appellant pointed the gun at her and demanded more money. Also present in the

home was appellant and Debra's adult daughter, Nicki. At some point during the confrontation, Nicki joined her mother at the door, and appellant asked her for money, too. After being told by Debra and Nicki that they had no money to give him, appellant walked away, stating that if he ran out of gas, they "would pay."

{¶ 7} Following the trial, the jury found appellant guilty of a single count of robbery, in violation of R.C. 2911.02(A)(3). For this offense, appellant was sentenced to serve three years in prison. On the sentencing date, December 14, 2009, appellant was given jail time credit of 101 days.

{¶ 8} Appellant timely filed an appeal, raising the following assignments of error:

{¶ 9} I. "Isbell was denied the effective assistance of counsel due to his counsel's failure to move to dismiss count one of the indictment on the basis of Ohio's statutory former jeopardy provision."

{¶ 10} II. "The trial court erred to the prejudice of appellant by permitting the state of Ohio to indiscriminately introduce irrelevant prior acts of misconduct; alternatively, if relevant, the probative value of the prior acts evidence was substantially outweighed by its prejudicial effect and should have been excluded."

{¶ 11} III. "The trial court committed plain error in failing to give appellant proper credit for all jail time served."

{¶ 12} Appellant argues in his first assignment of error that he was denied the effective assistance of counsel, because his trial counsel failed to move the court to dismiss Count 1 of the indictment, charging him with robbery in violation of R.C.

2911.02(A)(3). In support of this argument, appellant refers to the fact that appellant, on the basis of the same facts and circumstances, had been previously charged with, and tried for, a single count of robbery, in violation of R.C. 2911.02(A)(3), in case No. 09 CR 325. According to appellant, such circumstance placed him in jeopardy, thereby triggering double jeopardy protection, which his counsel was wrong not to invoke. We disagree.

{¶ 13} Critical to our analysis of this assignment of error is the fact that the trial in case No. 09 CR 325 ended in a mistrial due to the jury's inability to reach a verdict. The United States Supreme Court has consistently held that a retrial following a mistrial due to a deadlocked jury does not violate double jeopardy principles. *State v. Crago* (1994), 93 Ohio App.3d 621, 633, citing *Richardson v. United States* (1984), 468 U.S. 317. As stated by the court in *Richardson*, supra:

{¶ 14} "[T]he protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy. * * * Since jeopardy attached here when the jury was sworn, * * * petitioner's argument necessarily assumes that the judicial declaration of a mistrial was an event which terminated jeopardy in his case and which allowed him to assert a valid claim of double jeopardy.

{¶ 15} "* * * [W]e reaffirm the proposition that a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which the petitioner was subjected. The Government, like the defendant, is entitled to

resolution of the case by verdict from the jury, and the jeopardy does not terminate when the jury is discharged because it is unable to agree. Regardless of the sufficiency of the evidence at petitioner's first trial, he has no valid double jeopardy claim to prevent his retrial." (Citations and footnotes omitted.) Id. at 325-326.

{¶ 16} Applying *Richardson*, supra, to the circumstances of case No. 09 CR 325, where appellant's trial ended in a mistrial due to the jury's inability to reach a verdict, we conclude that there was no event to terminate the original jeopardy and, thus, there was no event to trigger double jeopardy protection.

{¶ 17} Returning to the question of ineffective assistance of counsel, we recall the two-prong test that was devised by the United States Supreme Court to determine ineffective assistance of counsel. *Strickland v. Washington* (1984), 466 U.S. 668. Under this test, a defendant must first show that his trial counsel's performance was so deficient that the attorney was not functioning as the counsel guaranteed by the Sixth Amendment. Id. In addition, he must establish that the constitutionally deficient performance actually prejudiced his defense. Id. In order to demonstrate ineffective assistance of counsel, an accused must satisfy both prongs of the test. Id.

{¶ 18} As indicated above, double jeopardy protection was simply not available to appellant in connection with this case. As such, appellant's trial counsel did not err—nor did any unfair prejudice to the defense occur—as a result of appellant's trial counsel's failure to raise a double jeopardy defense in this case. Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 19} Appellant argues in his second assignment of error that the trial court erred, in violation of Evid.R. 404(B), by permitting the state to introduce prior bad acts committed by appellant. Evid.R. 404(B) pertinently provides:

{¶ 20} "Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident * * *."

{¶ 21} Here, the trial court admitted evidence demonstrating that for more than six years, beginning approximately at the time of appellant's separation from Debra and continuing to the date of the offense, appellant had trouble controlling his temper. Specifically, the evidence showed that appellant: (1) since the time of the dissolution, "stalked" Debra by constantly driving by her apartment, noting what she was wearing when she left home, and going to the places she would go with her friends and family; (2) had at one time taken an ax to the interior of his former marital residence; (3) had had one or more physical altercations with his daughter; and (4) had resisted arrest and committed an assault on a peace officer.

{¶ 22} According to the state, such evidence was admissible to show appellant's motive, opportunity, and intent in this case. In *State v. Curry* (1975), 43 Ohio St.2d 66, 73, the Ohio Supreme Court determined that scheme, plan or system evidence is relevant when the other acts form part of the immediate background of the alleged act which

forms the basis of the crime charged. To be admissible in this circumstance, the "other acts" testimony must concern events which are inextricably related to the crime charged. Id.

{¶ 23} In the instant case, we are not persuaded that the evidence of appellant's prior bad acts is admissible pursuant to Evid.R. 404(B), because the bad acts are simply not "inextricably related" to the June 2009 robbery. Instead, those acts are chronologically and factually separate occurrences.

{¶ 24} Our conclusion as to the inadmissibility of the evidence under Evid.R. 404(B) does not end our analysis, however, because irrespective of Evid.R. 404(B), evidence of appellant's previous actions were, in fact, relevant to prove an element of the offense of robbery.

{¶ 25} In this case, appellant was convicted of robbery, in violation of R.C. 2911.02(A)(3), which relevantly provides:

{¶ 26} "(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶ 27} "* * *

{¶ 28} "(3) Use or threaten the immediate use of force against another."

{¶ 29} Evidence of appellant's prior acts of violence was relevant to prove the element of force or threat of force against appellant's victim, Debra Isbell. Stated otherwise, such evidence could be viewed as tending to make it more probable that appellant's actions and demeanor during the June 2009 encounter conveyed a threat of

force. See *State v. Bush* (1997), 119 Ohio App.3d 146, 149-150 (holding that defendant's previous encounter with victim was relevant to the threat-of-force element during second encounter, when robbery took place); see, also, *State v. Moore*, 2d Dist. No. 2010 CA 13, 2011-Ohio-636, ¶ 18-19 (holding that defendant's four-year history of physical and verbal abuse of victim was relevant, and gave context, to victim's fear in abduction case). Because evidence of appellant's bad acts is admissible in this case, to the extent that it bears directly upon the element of "force" inherent to the charge of robbery, appellant's second assignment of error is found not well-taken.

{¶ 30} In his third, and final, assignment of error, appellant argues that the trial court committed plain error in failing to give him proper credit for jail time served up to the date of his sentencing. The state, in its appellate brief, concedes that a mistake was made in calculating that time. In fact, although appellant requests that he receive credit for 151 days served, the state goes further and admits that appellant is entitled to receive credit for 177 days served.

{¶ 31} Review of the record reveals that the trial court, on September 22, 2010, issued a nunc pro tunc order correcting its error and crediting appellant with having served, as of the sentencing date, 177 days. Inasmuch as the record has been corrected, and appellant has received credit for time served, even beyond his request on appeal, we find that appellant's third assignment of error is moot and is, therefore, found not well-taken.

{¶ 32} The judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE