

[Cite as *State v. Boles*, 2007-Ohio-6582.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 21845
Plaintiff-Appellee	:	
	:	Trial Court Case No. 00-CR-1576
v.	:	
	:	(Criminal Appeal from
SHAWN R. BOLES	:	Common Pleas Court)
	:	
Defendant-Appellant	:	

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OPINION

Rendered on the 7th day of December, 2007.

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Attorneys for Plaintiff-Appellee

SHAWN R. BOLES, #410-417, Madison Correctional Institution, P.O. Box 740, London, Ohio 43140-0740
Defendant-Appellant, *pro se*

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BROGAN, J.

{¶ 1} Shawn Boles appeals from the trial court’s denial of his post-conviction relief petition. Boles was convicted after a jury trial of improperly discharging a firearm at or into a habitation. We affirmed his conviction on August 19, 2005. *State v. Boles*, Montgomery App. No. 20730, 2005-Ohio-4490. The facts underlying Bole’s convictions

are set out in that opinion and are as follows:

{¶ 2} “On May 24, 2000, Shawn Boles allegedly raped his twelve year old daughter, V.H., prior to her running over to their neighbor’s house for help. On that day, Lola Smith was getting power steering fluid out of the trunk of her car when V.H. showed up and grabbed her around her legs pleading for help. V.H. told Smith that her daddy was going to kill them and that they needed to go inside her house. Smith brought V.H. into her house and called 911. When Smith heard a knock on her door, she peeked out and saw Boles leaving her front porch. Smith then heard a knock on the side window. Smith was still on the phone with the 911 dispatcher when she heard multiple gunshots being fired through her dining room window. Smith and V.H. took cover behind her bedroom door.

{¶ 3} “When the police arrived to the scene, Boles had barricaded himself in his home. Boles ultimately turned himself in to the police, and Detective Phillip Olinger interviewed him at the Dayton Police Department. Boles admitted to Detective Olinger that he went to Smith’s house with a gun. Boles stated that he did not point the gun at anyone, but that it discharged until it was empty when it fell from his hand. Boles stated that the gun was a black nine millimeter FEG from Hungary. Boles gave a written statement and also signed a consent to search his residence. A black nine millimeter FEG from Hungary was found in Boles’ fireplace in his home.” (Id. at ¶ 1-2.)

{¶ 4} The testimony of Chris Monturo, a Firearm and Tool Mark Examiner at the Miami Valley Regional Crime Laboratory, disputed Boles’ theory. Monturo testified that in order for the gun found in Boles’ fireplace to fire, the trigger must be pulled to the rear. He testified that without the trigger being pulled, the gun would not fire due to an

internal safety. Monturo testified that the internal safety would prevent the gun from firing accidentally by being dropped. Monturo also testified that the gun is a semiautomatic, which means that the trigger must be pulled each time to fire. He testified that a single trigger would not cause the gun to fire until it was empty. Monturo testified that the gun could not fall to the ground and fire until it was empty.

{¶ 5} Boles contends the trial court should have vacated his conviction because he says he was deprived of the effective assistance of counsel guaranteed him by the Sixth and Fourteenth Amendments of the United States Constitution. Specifically, he argues his trial counsel was ineffective in not impeaching Lola Smith's testimony that she saw him on her front porch before bullets were fired into her home with the transcript of her 911 call to the police. The State argues, and we agree, that Ms. Smith's testimony was consistent with her statements to the police dispatcher on the 911 tape. Ms. Smith testified that just prior to the shooting she heard a knock on her front door, peeked outside and saw Boles standing on her front porch. She testified he was wearing a blue shirt and either short blue pants or long shorts. On the 911 tape, Ms. Smith told the dispatcher "it looks like he's got on something blue * * * a blue shirt." Counsel instead chose to attack Ms. Smith's credibility with her prior statements to Officer Mason, in which she did not give a description of the shooter.

{¶ 6} In his second assignment, Boles argues his trial counsel was ineffective in not recalling Ms. Smith in the defense case to confront her with alleged contradictory statements on the redacted 911 tapes. Boles has failed to demonstrate that alleged discrepancies in Ms. Smith's statements to the dispatcher required his counsel to call her as Boles' witness after she had been extensively cross-examined during the State's

case. Ms. Smith was quite familiar with Boles, as he was her next-door neighbor. Also, Boles admitted he went to the victim's home and knocked on her door to retrieve V.H. and when he got no response, he went to the back door and again he got no response. Boles said as he was heading back to his house, the gun fell out of his pocket and discharged accidentally. Thus, it was clear that Boles' guilt or innocence at the trial turned on whether his explanation to Officer Olinger was credible. The firearm expert, Chris Monturo, testified that Boles' explanation was not credible in light of the gun's safety mechanisms.

{¶ 7} In his fifth and sixth assignments, Boles contends his trial counsel was ineffective because he did not hire an expert to counter Monturo's testimony. He contends his firearm was a .380 caliber weapon rather than the nine-millimeter handgun. The State counters that these assignments should be overruled because Boles himself told the police his handgun was a FEG nine-millimeter handgun.

{¶ 8} The failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel, generally. *State v. Thompson* (1987), 33 Ohio St.3d 1, 10-11, 514 N.E.2d 407. In any event, Boles has offered nothing in support of his petition to suggest that Monturo's testimony concerning the safety mechanisms on the black FEG nine-millimeter handgun recovered from Boles' fireplace was not accurate.

{¶ 9} In his last assignment, Boles contends the trial court abused its discretion in preventing him from recalling Ms. Smith in his defense case-in-chief. This issue should have been raised in the direct appeal and is barred by the doctrine of res judicata. In any event, Boles did not request that anyone other than Detective Lawson

be called in his defense. (T. 226.) The appellant's assignments of error are overruled.

{¶ 10} The judgment of the trial court is Affirmed.

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GRADY, J., and DONOVAN, J., concur.

Copies mailed to:

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Shawn R. Boles
Hon. Frances McGee