[Cite as *State v. Hawley*, 2010-Ohio-838.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 22019

22053

v. : T.C. NO. 2006 CR 348

JAMIE HAWLEY : (Criminal appeal from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 5th day of March, 2010.

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Defendant-Appellant

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FROELICH, J.

{¶ 1} Jamie Hawley was convicted after a jury trial in the Montgomery County Court of Common Pleas of aggravated burglary, attempted felonious

assault, kidnapping, and grand theft of a motor vehicle. The trial court imposed a sentence of ten years for aggravated burglary, five years for attempted felonious assault, six years for kidnapping, and twelve months for grand theft. All counts were to be served consecutively to each other and consecutively to a sentence imposed in Geauga County. Hawley appeals from his convictions.

{¶ 2} In December 2008, Hawley's appointed appellate counsel filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, wherein counsel represented that, after a thorough examination of the record, he was unable to discover any errors by the trial court that were prejudicial to Hawley. By magistrate's order of December 10, 2008, we informed Hawley that his counsel had filed an *Anders* brief and of the significance of such a brief. We invited Hawley to file a pro se brief assigning errors for review. In response, Hawley sent a three-page letter, which we construed as a pro se brief, although it failed to contain any specific assignments of error.

{¶ 3} Although appointed appellate counsel concluded there were no arguably meritorious assignments of error, he suggested several issues for review. Specifically, he noted that the trial court had denied Hawley's motion to suppress the victim's photographic show-up identification of Hawley and certain statements that Hawley had made after his arrest. Counsel stated that Hawley believed that the indictment was defective for failing to specify recklessness as the mental state for attempted felonious assault and for kidnapping. Counsel had also considered and rejected the potential error that Hawley was sentenced for offenses that were allied offenses of similar import. He found no indication that Hawley's sentence

was improper or that Hawley's trial counsel had been ineffective.

{¶ 4} In his pro se brief, Hawley claimed that "false" evidence should have been suppressed, and he argued that the victim's photographic identification was unreliable. Hawley further asserted, in essence, that his convictions for aggravated burglary, attempted felonious assault, and kidnapping were against the manifest weight of the evidence.

{¶ 5} On May 4, 2009, after an initial independent review, we found that an appeal of the denial of Hawley's motion to suppress the show-up identification would not be frivolous. We stated:

{¶ 6} "*** The fact that there was a six or seven hour delay between the offense and Clark's identification and that Clark's estimation of Hawley's height may not have matched his actual height render the issue of the reliability of Clark's identification, at least, not frivolous. Accordingly, we find that this issue warrants further briefing by appellate counsel.

{¶ 7} "It is arguable that, even if Clark's identification of Hawley should have been suppressed, the admission of the identification at trial was harmless beyond a reasonable doubt, in light of the State's additional evidence of Hawley's guilt. However, we believe that this issue is also more properly raised in briefing by appellate counsel than by the Court in conducting an *Anders* review." *State v. Hawley* (May 4, 2009), Montgomery App. Nos. 22019 & 22053.

{¶ 8} We found no other arguably meritorious issues for appeal. We subsequently appointed new appellate counsel for Hawley to brief the issues we identified in our May 4, 2009, decision.

{¶ 9} On November 25, 2009, Hawley's current appellate counsel also filed an *Anders* brief. Although counsel argues that the trial court should have suppressed Clark's photographic show-up identification of Hawley on the grounds that the police procedures were unduly suggestive and the identification was unreliable, counsel concludes that any error in failing to suppress the identification was harmless beyond a reasonable doubt. He states that the evidence against Hawley was overwhelming and that, even if Clark's photographic identification should have been suppressed, Hawley cannot reasonably argue that the jury "lost its way" when it found him guilty of aggravated burglary, attempted felonious assault, kidnapping, and grand theft of a motor vehicle.

{¶ 10} Pursuant to our responsibilities under *Anders*, we have independently reviewed the record, and we agree with current counsel's assessment that, even assuming that Clark's show-up identification of Hawley should have been suppressed, the trial court's failure to do so was harmless beyond a reasonable doubt and that there is no potentially meritorious argument that Hawley's convictions were against the manifest weight of the evidence.

{¶ 11} "[A] weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive." *State v. Wilson*, Montgomery App. No. 22581, 2009-Ohio-525, ¶12. When evaluating whether a conviction is contrary to the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of

fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 12} Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288. However, we may determine which of several competing inferences suggested by the evidence should be preferred. Id.

{¶ 13} The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence. *Wilson* at ¶14. A judgment of conviction should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *Martin,* 20 Ohio App.3d at 175.

{¶ 14} In our May 4, 2009, decision and entry, we summarized the State's evidence at trial, and we repeat it herein.

{¶ 15} In January 2006, Vina Parrett-Baldwin and Deborah Clark both resided in a mobile home park called H&M Harmony Mobile Homes, commonly referred to as "H&M," located in West Carrollton, Ohio.[1] Parrett-Baldwin lived at 12

[1] Upon reviewing the trial transcript, it appears that the transcript consistently, and mistakenly, refers to "H&M" as "H&H." The photograph of the mobile home office (State's Ex. 1) shows the name to be "H&M Harmony Mobile Homes." Parrett-Baldwin's handwritten note (discussed infra), which was admitted as State's Exhibit 31a, reads "H&M," despite the transcript's indication that it reads "H&H." Contrary to what is written on the exhibit, according to the

Bella Costa Drive. Clark resided at 11 Palace Drive. The backyards of their homes abutted, but Clark and Parrett-Baldwin did not know each other.

{¶ 16} At approximately 2:00 p.m. on January 25, 2006, a man wearing a dark blue hooded sweatshirt and with stubble on his face knocked on the door of Parrett-Baldwin's residence. Parrett-Baldwin answered her door, keeping the glass screen door locked. The man asked Parrett-Baldwin to whom he needed to talk regarding obtaining a residence in the mobile home park. Parrett-Baldwin told him that he needed to talk to H&M, and she wrote the phone number and "H&M" on a sheet of paper. Parrett-Baldwin unlocked the screen door, handed the man the sheet of paper through a crack, and closed the door again. The man attempted to reach for the door, but Parrett-Baldwin quickly locked it. Parrett-Baldwin was uncomfortable about this encounter, and she contacted her husband and the property manager. When she looked out the window of her home, she did not see anyone or any vehicle.

{¶ 17} Shortly thereafter, Clark was awakened by a knock on her door. When Clark went to her door, she observed a man, whom she later identified as Hawley, wearing dark pants, a zip-up hooded sweatshirt, a winter coat, and leather gloves. Clark also noticed he had stubble on his face. Hawley told Clark that he wanted information about the mobile home park, and he asked for the office telephone number. Clark asked Hawley to wait by the door while she wrote down

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transcript, Parrett-Baldwin testified that State's Exhibit 31a "is the phone number that I wrote down myself, with *H&H*, and the telephone number of the park." (Emphasis added.) (Trial Tr. at 224.) Because the references to "H&H" are clearly a typographical error, we will refer to the mobile home park as H&M.

the telephone number for him. When Hawley requested permission to use her telephone, Clark stated that she did not have one for him to use.

{¶ 18} Clark then walked onto her front patio to show Hawley the location of the H&M office, which could be seen from her home. As she did so, Hawley grabbed Clark around the neck from behind, placed her in a chokehold, and dragged her back into the home. Hawley repeatedly told Clark not to yell or he would kill her. Once in the home, Hawley pushed Clark onto her knees, facing her loveseat; he tied her hands behind her back with ribbon from a decorative wreath and took off Clark's glasses. Hawley looked through Clark's purse, asked her about her credit cards, and turned on various appliances to see if they worked. Hawley then forced Clark onto the bed in her bedroom. He tied Clark's ankles with another ribbon. Hawley asked about the keys to the trunk of her car, and he came in and out of the room. Eventually, Hawley told Clark he was leaving, he tried to apologize, and he told her not to move.

{¶ 19} After a few minutes, Clark heard her car start in the drive in front of her house. When it sounded as though Hawley had left the park, Clark untied herself and looked around. She noticed that her television, microwave oven, and vacuum cleaner were missing. Her car, a white 1992 Saturn four-door sedan, was gone. Clark walked to the H&M office and told the manager that she had been robbed. The manager contacted the police. Several West Carrollton police officers responded to the call. Officer Brian Brodbeck recovered the ribbons from Clark's residence, and Clark's vehicle was listed in the police computer system as stolen.

{¶ 20} At approximately 3:32 p.m. that day, Hawley sold two items to Don's Pawn Shop for $35: a Bissel vacuum cleaner and a Magic Chef microwave oven. Terry Carolu, manager of Don's Pawn Shop, testified that Hawley was required to show a state-issued identification card or a driver's license to complete the sale. The completed purchase ticket listed the seller as Hawley, and it included Hawley's address, birth date, social security number, height, weight, and state identification number. Carolu identified Hawley as the individual who sold the items. (The following day, Don's Pawn Shop released the property to Clark for $35.)

{¶ 21} At approximately 4:35 p.m. on the same day, Dayton Police Officer Alan Parker, driving a marked police vehicle, observed a white Saturn sedan matching the description of Clark's vehicle. The driver, Hawley, parked the car in front of 115 East Foraker Street, near Miami Valley Hospital in Dayton, and got out of the vehicle. When Parker pulled up behind the Saturn, Hawley "took off running." As Hawley ran across Main Street, he was apprehended by another Dayton police officer. Hawley was detained in Parker's vehicle. When Parker checked the Saturn's license plates, he learned that the vehicle belonged to Clark.

{¶ 22} Officer Nathan Biggs and Detective Mark Allison of the West Carrollton Police Department met the Dayton officers, and Allison spoke with Hawley inside Parker's police vehicle. According to Allison, Hawley was informed of and waived his *Miranda* rights, and he admitted to having committed the offenses. Later, at the West Carrollton police station, Hawley made additional written statements, admitting to being in Clark's home, tying her up, and selling her belongings. At the time of his arrest, Hawley had several documents in his

possession, including an RTA bus schedule, a bus pass, and a piece of paper reading “H&M” and “859-3368,” which Parrett-Baldwin identified as the slip of paper that she had handed to the man at her door that day.

{¶ 23} Later that evening, Biggs showed Clark a photograph of Hawley. Clark immediately identified Hawley as the individual who had committed the offenses.

{¶ 24} At trial, Hawley testified on his own behalf, claiming that, around 2:00 p.m. on January 25, 2006, David Bruner had given him a ride to a medical health building near Stewart Street and Patterson Boulevard in Dayton. Hawley claimed that he saw the Saturn in the parking lot, with the keys, the vacuum, and the microwave oven inside. Hawley asserted that he was merely guilty of taking the car and selling the items inside it. Hawley denied having been at the mobile home park, and he claimed that his written statement was made in response to promises made by Allison. Bruner also testified on Hawley’s behalf, but he was unable to specify the exact date or time that he had given Hawley a ride.

{¶ 25} We noted in our previous decision that the order for further briefing was reflective of a determination that an argument concerning the show-up identification was not “frivolous”; however, we emphasized that this did not mean the assignment had merit.

{¶ 26} Allison’s and Biggs’s testimony at the suppression hearing established that Clark told Allison that the robber’s face was uncovered and that she “saw him plainly and when he came to the door and inside the apartment.” Clark described the man as approximately 5'10", mid 30's to early 40's, with a couple day’s of beard

growth, and wearing a dark blue or black knit cap or black leather zip-up coat with collar and gloves. At approximately 8:30 p.m., Allison took a Polaroid photograph of Hawley and gave it to Biggs to show to the victim "just for confirmation." Biggs's sergeant called Clark to inform her that Biggs was coming with a photograph, and Biggs immediately drove to the home of Clark's son, where Clark was staying. Biggs said to Clark, "I have a photograph" and "Does this guy look familiar?" Biggs denied that he informed Clark that the man in the photograph was in custody. Clark identified Hawley as the man who had robbed her. In reviewing the record and the arguments of counsel and Hawley, we cannot say that the trial court erred in finding that Hawley did not meet his burden of showing that the identification by Clark was the result of police actions that were "unnecessarily suggestive and conducive to irreparable mistaken identification" to the extent that the challenged show-up was not reliable.

{¶ 27} Moreover, even disregarding evidence of Clark's show-up identification of Hawley, there was overwhelming evidence to support Hawley's convictions, and it is apparent that the admission of Clark's show-up identification of Hawley, if erroneous, was harmless beyond a reasonable doubt.

{¶ 28} On the same afternoon, a man came to the homes of Clark and Parrett-Baldwin, asking for information about how to contact H&M. Both women described the man similarly. Although the man reached for Parrett-Baldwin's door, she locked it before the man could enter. In Clark's case, however, the man grabbed her, tied her hands and ankles, took appliances from her home, and drove away in her car.

{¶ 29} According to the State's evidence, Hawley sold two items belonging to Clark to Don's Pawn Shop; the shop's manager identified Hawley as the man who had sold the items, and Hawley had provided state-issued identification during the transaction. Hawley was later apprehended driving Clark's car. Hawley had several documents in his possession when he was arrested, including the piece of paper on which Parrett-Baldwin had written "H&M" and "859-3368" and which she had handed to the man who came to her door. Hawley confessed to being in Clark's home, tying her up, and selling her belongings. The State thus presented substantial evidence that Hawley assaulted Clark, tied her up, burglarized her home, and stole her car. Hawley's convictions were not against the manifest weight of the evidence, and such an argument would be frivolous.

{¶ 30} Clark's show-up identification of Hawley provided additional evidence that Hawley committed the offenses at Clark's residence. However, Clark's show-up identification merely supplemented the already overwhelming evidence presented by the State that Hawley had committed those offenses. Assuming for sake of argument that Clark's show-up identification should have been suppressed, the inclusion of that evidence had no significant effect on the State's case against him and was harmless beyond a reasonable doubt.

{¶ 31} Upon review of the entire record, we agree with appellate counsel that, even assuming that Clark's show-up identification should have been suppressed, there is no potentially meritorious claim that his convictions were against the manifest weight of the evidence.

{¶ 32} The judgment of the trial court will be affirmed.

{¶ 33} On February 4, 2010, Hawley, acting pro se, filed a hand-written "Motion to Investigate New Evidence." In his motion, Hawley states that the real perpetrator of the crimes against Clark is in the Warren Correctional Institution and is willing to sign an affidavit on Hawley's behalf. Hawley asks for an extension of 40 days to "investigate new evidence" and requests that his original court-appointed attorney be re-appointed to investigate Hawley's "allegations of the real perpetrator who has done these charges ***." Hawley, again acting pro se, has also filed a separate motion for new counsel, raising similar issues.

{¶ 34} We reject Hawley's request for an extension of time in order to launch a criminal investigation into the alleged "real perpetrator." In addition, we will not conduct an independent investigation of Hawley's allegations, nor will we re-appoint Hawley's original counsel to assist in such an investigation. The role of an appellate court is to review alleged errors by the trial court, and, in addressing an appeal, the appellate court is limited to the record created in the trial court. See *Folck v. Henry*, Montgomery App. No. 19984, 2004-Ohio-3772, ¶11. It is beyond the authority of this Court to conduct a criminal investigation. If Hawley has discovered new evidence that bears on his convictions, his recourse, if he meets certain statutory requirements, is to file a motion for a new trial and/or a petition for post-conviction relief in the trial court. Hawley's motions are overruled.

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DONOVAN, P.J. and FAIN, J., concur.

Copies mailed to:

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Jamie Hawley
Hon. Dennis J. Langer