[Cite as *State v. Branham*, 2009-Ohio-2563.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 08-CA-0089
DEREK R. BRANHAM	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas Court Case Nos. 08-CR-228 and 08-CR-322
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	June 1, 2009

APPEARANCES:

For Plaintiff-Appellee:

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Assistant Prosecuting Attorney
Licking County Prosecutor's Office
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For Defendant-Appellant:

THOMAS G. WIDMAN 0059259
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Delaney, J.

{¶1} Defendant-Appellant, Derek Branham, appeals from his jury trial and conviction of one count of robbery, a felony of the second degree, in violation of R.C. 2911.02(A)(2) and one count of attempted tampering with evidence, a felony of the fourth degree, in violation of R.C. 2923.02(A) as it relates to R.C. 2921.12(A)(1). The State of Ohio is Plaintiff-Appellee.

{¶2} On February 16, 2008, Benjamin Manning was at the Cherry Valley Lodge in Newark, Ohio, with his wife and children. He and his wife had been having a disagreement and he began consuming alcohol. He stated that he drank a half a bottle of wine and several shots of Patron tequila. While sitting at the bar area near the pool at the Lodge, he began displaying approximately $450 in cash and flashing his credit cards and wallet around.

{¶3} While sitting at the bar, Manning met Appellant, who was at the bar with one other man and two women. Several employees at the Lodge became concerned because Manning was becoming quite boisterous and also because they overheard Appellant and his friends discussing potentially robbing Manning. Specifically, the bartenders overheard Appellant, while Manning had gone to the bathroom, state, "We need to hurry up. He's headed out." Appellant also commented on the amount of money that Manning was displaying, stating, "Look at all that money," and "Get his address, get his phone number. Let's get him."

{¶4} When Manning returned from the bathroom, he and Appellant discussed going to Olive Garden. Appellant offered to drive Manning there. Appellant, his male companion, and Manning then left the Lodge, ostensibly to go to Olive Garden.

{¶5} The three men walked to the parking lot and got into Appellant's white Lincoln Towncar, with Appellant driving, Manning in the front passenger seat, and Appellant's male friend in the back seat. While on their way to the restaurant, Appellant stated that he needed to stop for gas. The group stopped at the Duke and Duchess service station at 1175 W. Church Street, in Newark, Ohio, and Manning offered to pay for the gas. Images of Appellant and his companion were caught on video surveillance at the gas station. After they fueled the vehicle, they continued towards Olive Garden.

{¶6} Manning stated that instead of going to Olive Garden, Appellant told him that he needed to stop at his grandmother's house. They pulled into a parking lot at Hopewell Commons, in Heath, Ohio, where Appellant exited the vehicle, then quickly entered the vehicle again. Appellant then punched Manning in the face while the back seat passenger put Manning in a headlock. The two men wrestled Manning's jacket off of him and pushed him out of the car. They then drove off with Manning's leather jacket, his money clip with the $450 in it, and his wallet with his credit cards.

{¶7} Patrolman Bruce Ramage of the Heath Police Department responded to the scene and observed Manning with dried blood on his lips. Ramage stated that Manning appeared to be intoxicated, but he was able to explain to him what had happened. Manning told Ramage that two men had beaten him up and robbed him. He was able to describe the two suspects, including the tattoos that Appellant had on his body. He described the money clip as being a gold money clip that had the words "Easy come, easy go" on it.

{¶8} After Appellant had been positively identified as the perpetrator by employees at the Lodge and by Manning, Detective Jaimee Coulter of the Heath Police

Department interviewed Appellant. He gave a different version of events, stating that he talked to Manning at the Lodge and offered to drive him to Olive Garden. Appellant stated that he and Manning were alone in the car and that on the way to Olive Garden, Manning became increasingly belligerent and obnoxious. Because of Manning's behavior, Appellant stated that he pulled the car over near Hopewell Commons and demanded that Manning get out of the car.

{¶9} While Appellant was in jail for these offenses, a conversation between he and his mother was recorded where Appellant called his mother and asked her to dispose of the money clip. Both Appellant's and his mother's voices were identified by police officers who were familiar with both Appellant and his mother. During the conversation, Appellant asked his mother to go into his bedroom and get into the top drawer of his dresser. He said, "see that gold clip," and then stated, "you know what I mean, for money," and then once she found it, he stated, "Throw that away. Get rid of it." His mom replied, "No problem. Gone."

{¶10} Appellant was indicted on one count of robbery and one count of attempted tampering with evidence. He pled not guilty and exercised his right to a jury trial, where he was convicted of both offenses.

{¶11} Appellant now appeals, raising one Assignment of Error:

{¶12} "I. THE DEFENDANT/APPELLANT DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL DURING TRIAL, AND WAS THEREBY DEPRIVED OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION.

I.

{¶13} In his sole assignment of error, Appellant claims that counsel was ineffective for failing to take various measures at trial.

{¶14} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that his trial counsel acted incompetently. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. In assessing such claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164.

{¶15} "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." Id. at 690.

{¶16} Even if a defendant shows that his counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

{¶17} When counsel's alleged ineffectiveness involves the failure to pursue a motion or legal defense, this actual prejudice prong of *Strickland* breaks down into two components. First, the defendant must show that the motion or defense "is

meritorious," and, second, the defendant must show that there is a reasonable probability that the outcome would have been different if the motion had been granted or the defense pursued. See *Kimmelman v. Morrison* (1986), 477 U.S. 365, 375, 106 S.Ct. 2574, 2583; see, also, *State v. Santana* (2001), 90 Ohio St.3d 513, 739 N.E.2d 798 citing *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293.

{¶18} A claim of trial counsel ineffectiveness usually will be unreviewable on appeal where the appellate record is inadequate to determine whether the omitted objection or motion really had merit and/or because the possible reasons for counsel's actions appear outside the appellate record. *United States v. Galloway* (C.A.10, 1995), 56 F.3d 1239, 1240 ("Such claims brought on direct appeal are presumptively dismissible, and virtually all will be dismissed."; "A factual record must be developed in and addressed by the district court in the first instance for effective review."). No interlocutory remand will be allowed to develop the record. Id.

{¶19} Ohio law similarly recognizes that error cannot be recognized on appeal unless the appellate record actually supports a finding of error. A defendant claiming error has the burden of proving that error by reference to matters in the appellate record. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384. "[T]here must be sufficient basis in the record * * * upon which the court can decide that error." *Hungler v. Cincinnati* (1986), 25 Ohio St.3d 338, 342, 496 N.E.2d 912.

{¶20} In *Massaro v. United States* (2003), 538 U.S. 500, 123 S.Ct. 1690, 155 L.Ed.2d 714, the United States Supreme Court emphasized the general unreviewability of trial counsel ineffectiveness claims on direct appeal. Specifically, the court held,

"When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose."

{¶21} Moreover, they found that "[t]he evidence introduced at trial * * * will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis."

{¶22} "If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse. * * * The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them." Id. See also *State v. Templeton*, 5th Dist. No. 2006-CA-33, 2007-Ohio-1148. ¶91. Although there are rare cases where claims of trial counsel ineffectiveness can be legitimately argued on appeal, see id., the present case is not one of those cases.

{¶23} Appellant first argues that counsel was ineffective for failing to call certain witnesses, named Peggy Wells, Gabriel Newell, and Officer Stacy Coe, to testify on his behalf. Appellant attempts to argue what these witnesses would have testified to and goes so far as to attach witness statements from these potential witnesses to his brief. These statements are not part of the appellate record, and as such, are not appropriate to attach to a brief for appellate review.

{¶24} Moreover, we can only speculate as to the effect such testimony would have had at trial and such speculation cannot establish a reasonable probability that the outcome of the trial would have been different. Such a claim is inappropriately considered on direct appeal. See *Massaro*, supra; see also *State v. Combs*, 2nd Dist. No. 22712, 2009-Ohio-1943, citing *State v. Madrigal* (2000), 87 Ohio St.3d 378, 390-392, 2000-Ohio-448, 721 N.E.2d 52.

{¶25} Appellant also argues that counsel was deficient for failing to object to photographs admitted of Appellant and his companion taken at the Duke and Duchess gas station, and that counsel should have objected to the admission of surveillance footage taken from the Duke and Duchess surveillance system. Again, the essential facts upon which these claims rely are clearly outside the record presently before this court, as we cannot determine from a silent record why counsel did not object to certain exhibits. Accordingly, we cannot determine in this direct appeal whether trial counsel was ineffective in any of those particulars. *State v. Flowers*, 2nd Dist. No. 22751, 2009-Ohio-1945, citing *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 448 N.E.2d 452.

{¶26} We would note, however, that these exhibits were all properly admitted at trial. The State properly authenticated the exhibits, witnesses testified that the pictures and footage were fair and accurate depictions of the events captured on camera, and the footage of Appellant and his companion, both of whom were identified by multiple witnesses, corroborates the testimony of witnesses who testified at trial. As such, it was not prejudicial to fail to object to these exhibits being admitted.

{¶27} Appellant next argues that counsel was deficient in that counsel failed to effectively cross-examine Benjamin Manning, Patrolman Ramage, and the two Lodge

employees who testified. This court has previously held, "The extent and scope of cross-examination clearly fall within the ambit of trial strategy and debatable trial tactics does not establish ineffective assistance of counsel." *State v. Mills*, 5th Dist. No. 2007AP07-0039, 2009-Ohio-1849,, at ¶189, citing *State v. Leonard*, 104 Ohio St.3d 54, 82, 2004-Ohio-6235, 818 N.E.2d 229. Counsel could have had a reason for a particular trial strategy and in fact, did cross examine these witnesses regarding some of the matters of which Appellant complains about.

{¶28} Regarding Appellant's specific allegations that trial counsel should have cross examined witnesses as to why Appellant would rob Manning in broad daylight where witnesses might see him and why Appellant did not take Manning's cell phone, but only took $450 in cash and a wallet full of credit cards, such matters call for speculation and are clearly objectionable. Appellant's arguments are not well taken.

{¶29} For the foregoing reasons, Appellant's assignment of error is overruled and the judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J.

Gwin, P.J. and

Edwards, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

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IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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-vs-	:	JUDGMENT ENTRY
	:	
DEREK R. BRANHAM	:	
	:	
Defendant-Appellant	:	Case No. 08-CA-0089
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to appellant.

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HON. PATRICIA A. DELANEY

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS