[Cite as *State v. Mitchell*, 2009-Ohio-5006.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2008CA00290
O'BRYAN MITCHELL	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas Court Case No. 2008CR1304(A)
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	September 21, 2009

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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Delaney, J.

{¶1} Defendant-Appellant O'Bryan Mitchell appeals his conviction and sentence for one count of kidnapping, a felony of the first degree in violation of R.C. 2905.01(A)(2) and/or (A)(3) and/or (A)(4); one count of aggravated robbery, a felony of the first degree in violation of R.C. 2911.01(A)(3); and one count of felonious assault, a felony of the second degree in violation of R.C. 2903.11(A)(1). Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND THE CASE

{¶2} J.G., an adult male, met Jennifer Gardner on a social networking website, where she indicated that she would offer sex in exchange for money. J.G. and Gardner spoke on the telephone and arranged to meet in Canton, Ohio on July 11, 2008. Prior to her meeting with J.G., Gardner and her boyfriend, Anthony Bankston, planned to rob J.G. instead of providing him sexual favors. Ashley Croft and Appellant were also brought in on the plan.

{¶3} J.G. arrived in Canton at about 9:00 p.m. on July 11, 2008 and Gardner directed J.G. by cell phone to the 704 Club. In the meantime, Croft and Gardner arrived earlier at the 704 Club with Bankston and Appellant. When J.G. arrived, Croft and Gardner left their companions inside and went outside to meet J.G. The three of them walked into the club together and J.G. gave Gardner $20.00 to buy drinks. Gardner told J.G. she would credit him the $20.00 towards the planned sexual encounter.

{¶4} After an hour at the 704 Club, J.G. suggested that they leave to engage in sexual activity. J.G. agreed that both women, Gardner and Croft, would participate for

an increased price. The women instructed J.G. to drive to Wampler Park in Massillon, Ohio. Bankston and Appellant followed the car.

{¶5} J.G., Gardner and Croft arrived at the Wampler Park picnic pavilion where J.G. and Croft began to engage in sexual conduct. There were no lights at the park pavilion and it was very dark. J.G. and Croft then left to use the restroom in the wooded area adjacent to the park. J.G. waited for the women to return for approximately thirty minutes and when they did not return, he left.

{¶6} J.G. was traveling north on Interstate 77 when he received a cell phone call from Gardner asking him to return. She stated the women were ready to meet their contractual obligations. Gardner called J.G. after Bankston pressured her to call J.G. and to get J.G. to return because Bankston wanted to "whip someone's ass."

{¶7} At approximately 2:00 a.m. on July 12, 2008, J.G. returned to Wampler Park. J.G. saw a car approaching and park in the back of Wampler Park. Croft and Gardner came to the park pavilion, told J.G. to wait there and walked back into the woods to use the restroom again.

{¶8} While J.G. waited, Bankston came out of the woods and hit J.G. in the head. J.G. attempted to run to his car, but he slipped and fell in the mud. Bankston chased J.G. to the car and Bankston gained control of the car. Bankston steered the car in some underbrush and continued to strike J.G. in the head.

{¶9} As Bankston forced J.G. from his vehicle, Bankston made a motion and three more men came from the woods. Bankston and Appellant pulled J.G. out of his car, and the men continued to beat and kick J.G in the head, ribs and back. J.G. kept falling and his pants were pulled down from the force of hitting the ground. After beating

J.G., the four males took J.G.'s cell phone, the contents of the glove compartment and $20.00 from his wallet. While walking away, one of the assailants stuck his finger into J.G.'s rectum. One of the assailants broke off the key in the lock so J.G.'s car could not be turned on.

{¶10} When the men returned to Gardner's vehicle parked at Wampler Park, Gardner saw that Appellant had the victim's broken cell phone.

{¶11} J.G. laid on the ground for a few hours and then crawled to a neighbor's house where help was summoned. J.G. was taken to Doctor's Hospital by ambulance. He was examined by Dr. Scott Fuller around 7:00 a.m. on July 12, 2008. His face was swollen and he had multiple bruises and abrasions. A CAT scan was taken of J.G.'s head and it showed a lateral orbit fracture and a fracture of the floor of the orbit. He was released from the emergency room and continued treating with his private physician.

{¶12} Detective Bobby Grizzard and Detective Kenneth Hendricks of the Massillon Police Department were assigned to investigate the case. The victim was interviewed a few days later and shown a police lineup of potential assailants. J.G. was able to identify Gardner and Croft, but was unable to identify any of the males until trial when J.G. identified Appellant as one of his assailants.

{¶13} Det. Grizzard interviewed Gardner and Bankston, who identified the three other male participants as Juan Mery, Appellant and Gerald Duncan. Appellant was arrested and interviewed by Det. Hendricks. Appellant admitted that he was with Gardner, Croft, and Bankston at the 704 Club on the evening of the assault, but denied being involved in the assault. When Det. Hendricks told Appellant that his cell phone

was traced to the Wampler Park area, Appellant admitted that he was in the area but selling drugs.

{¶14} Based upon the investigation, Appellant was arrested on July 19, 2008. On September 3, 2008, Appellant was indicted by the Stark County Grand Jury on charges of one count of kidnapping, a felony of the first degree in violation of R.C. 2905.01(A)(2) and/or (A)(3) and/or (A)(4); one count of rape, a felony of the first degree in violation of R.C. 2907/02(A)(2); one count of aggravated robbery, a felony of the first degree in violation of R.C. 2911.01(A)(3); one count of felonious assault, a felony of the second degree in violation of R.C. 2903.11(A)(1); and one count of possession of cocaine, a felony of the fifth degree in violation of R.C. 2925.11(A)(C)(4)(a). Appellant entered a plea of not guilty to the charges.

{¶15} Prior to trial, Appellee dismissed the rape charge and Appellant pleaded guilty to one count of possession of cocaine. On November 3, 2008, a jury trial was held on the remaining charges. Appellant called eight witnesses, including J.G., the other participants in the crime, the investigating officers and J.G.'s emergency room physician.

{¶16} Juan Mery, a juvenile, testified that he met Bankston, Gardner and Croft and drove to Wampler Park. Mery testified that Bankston started hitting J.G. and then the other men, including Appellant, began to hitting and kicking J.G. Mery's police statement and grand jury testimony accused Appellant of hanging on to the door of J.G.'s vehicle and forcing J.G. from his car. Mery testified at trial that Bankston hung on to the vehicle door and Bankston forced J.G. out of the car. Mery provided a written statement that he saw Appellant take J.G.'s credit card and money. Mery pled true in

juvenile court to complicity to robbery and felonious assault based on his participation in the crime. His charges were reduced in exchange for his testimony.

{¶17} Gardner testified that she did not see the assault, but she was in the car after the men returned from assaulting J.G. Gardner saw Appellant with a broken cell phone and two plastic cards. Gardner saw Appellant dispose of the items at Shriver Park. Gardner pleaded guilty to offenses related to the incident and received a four year prison term with the possibility of judicial release in two years – a better deal she stated for agreeing to testify against Appellant.

{¶18} Croft testified that Mery and Bankston jumped onto J.G. in the vehicle.

{¶19} Bankston initially testified that he drove Appellant home after the 704 Club. After declaring Bankston a hostile witness, Bankston testified that he told the police that Appellant was with him and he testified at trial that he saw Appellant punch and kick J.G.

{¶20} At the conclusion of the trial, counsel for Appellant asked that the trial court instruct the jury on the lesser included offenses of assault and robbery. The trial court denied the request, finding that the evidence constituted serious physical harm.

{¶21} The jury returned with a verdict of guilty to the charges of kidnapping, aggravated robbery, and felonious assault.

{¶22} The trial court sentenced Appellant on November 19, 2008. The trial court sentenced Appellant to nine years on the charges of kidnapping and aggravated robbery, eight years on the charge of felonious assault, and twelve months on the charge of possession of cocaine, to be served concurrently.

{¶23} It is from this judgment Appellant now appeals. Appellant raises three Assignments of Error:

{¶24} "I. THE TRIAL COURT'S FINDING OF GUILT IS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

{¶25} "II. THE APPELLANT WAS DENIED HIS RIGHTS TO DUE PROCESS AND OF ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

{¶26} "III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY ON THE LESSER OFFENSES OF ASSAULT AND ROBBERY."

I.

{¶27} Appellant argues in his first Assignment of Error that his convictions for kidnapping, aggravated robbery, and felonious assault are not supported by sufficient evidence and are against the manifest weight of the evidence. We disagree.

{¶28} When reviewing a claim of sufficiency of the evidence, an appellate court's role is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. Contrary to a manifest weight argument, a sufficiency analysis raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, "any rational trier of fact could have found the

essential elements of the crime proven beyond a reasonable doubt." *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶29} Conversely, when analyzing a manifest weight claim, this court sits as a "thirteenth juror" and in reviewing the entire record, "weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 548, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶30} The elements of kidnapping are, "[n]o person, by force, threat or deception * * * shall remove another from the place where the other person is found or restrain the liberty of the other person, * * * (2) to facilitate the commission of any felony or flight thereafter; (3) to terrorize, or to inflict serious physical harm on the victim or another; * * *." R.C. 2905.01(A). R.C. 2911.01(A)(3), which defines aggravated robbery, states that, "[n]o person, in attempting or committing a theft offense, * * * shall * * * inflict, or attempt to inflict, serious physical harm on another." Felonious assault is defined by R.C. 2903.11(A)(1) which states, "[n]o person shall knowingly * * * cause serious physical harm to another * * *."

{¶31} The crux of Appellant's arguments that his convictions were not supported by the sufficiency of the evidence and against the manifest weight of the evidence is that the evidence presented through witness testimony was insufficient to identify Appellant as one of the individuals who committed the crimes against J.G.

{¶32} Appellant first argues that J.G. was unable to identify Appellant or any of the other attackers. The testimony demonstrated that there was no lighting at the park pavilion and it was dark out when Appellant was attacked. (T. 219). J.G. testified that he was kicked in the head and seeing double. (T. 223). J.G. could not identify his attackers in a photo lineup, but he did identify Appellant during the trial as one of the men who attacked him. (T. 214, 199).

{¶33} Appellant's identity as one of the persons who attacked and robbed J.G. was based on the testimony of four of the accomplices to the crime: Bankston, Gardner, Croft and Mery. Appellant refers this Court to the inconsistencies in the witnesses' testimony regarding Appellant's involvement in the crimes. Evidence was presented that Mery, Bankston, Croft, and Gardner gave differing stories as to Appellant's involvement in the crimes to the police, grand jury, and during their testimony at trial.

{¶34} The issue of witness credibility is a matter within the province of the jury. *State v. Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180. Further, the jury was instructed on the testimony of Mery, Bankston, Gardner and Croft:

{¶35} "You have heard the testimony from Juan Mery, Anthony Bankston, Jennifer Gardner and Ashley Croft, individuals who either pleaded guilty to or were found guilty of the same crime charged in this case and are said to be accomplices. An accomplice is one who knowingly assists another in the commission of a crime. Whether these individuals were accomplices and the weight to be given to their testimony are matters for you to determine.

{¶36} "Testimony of a person who you find to be an accomplice should be viewed with grave suspicion and weighed with great caution."

{¶37} The testimony was consistent that Appellant was at the 704 Club with Croft, Gardner and Bankston at the beginning of the scheme to rob J.G. Mery and Gardner testified that they saw Appellant with a broken cell phone and two plastic cards when the men returned to the vehicle after assaulting and robbing the victim. Bankston testified that he saw Appellant punch and kick J.G. Appellant admitted to Det. Hendricks that he was at the 704 Club earlier in the evening with the other parties and he was also in the location of Wampler Park on July 12, 2008.

{¶38} Construing the evidence in a light most favorable to the State, we find a reasonable jury could have found Appellant guilty beyond a reasonable doubt of kidnapping, aggravated robbery, and felonious assault. The record demonstrates the jury was made aware of the witnesses' inconsistent statements and they were instructed to view their testimony with grave suspicion. Ultimately, the jury chose to believe the accomplices and to find that the evidence met the burden of persuasion.

{¶39} Appellant's first Assignment of Error is overruled.

II.

{¶40} Appellant argues in his second Assignment of Error that his trial counsel provided ineffective assistance of counsel by failing to file a notice of alibi, thereby precluding this defense at trial and resulting in the exclusion of his defense witness, Michelle Brown. We disagree.

{¶41} Crim.R. 12.1 governs notice of alibi and provides that:

{¶42} "Whenever a defendant in a criminal case proposes to offer testimony to establish an alibi on his behalf, he shall, not less than seven days before trial, file and serve upon the prosecuting attorney a notice in writing of his intention to claim alibi.

The notice shall include specific information as to the place at which the defendant claims to have been at the time of the alleged offense. If the defendant fails to file such written notice, the court may exclude evidence offered by the defendant for the purpose of proving such alibi, unless the court determines that in the interest of justice such evidence should be admitted."

{¶43} On the day of trial, the State questioned whether Michelle Brown, a person named on Appellant's witness list, was an alibi witness and if so, whether a notice of alibi was filed. Appellant's trial counsel explained that he was not sure if Brown was an alibi or not. (T. 7). He stated that he believed that she would be a witness to Appellant's health condition at the time of the offense, but was not certain if she would testify as to where he was during the time of the offense because the "time line [was] kind of nebulous." Id.

{¶44} The trial court determined that if Brown was with Appellant when he was sick, the trial court would allow it. (T. 8). However, if Brown was going to put Appellant in a specific location at the time of the alleged offense, he would allow her to be voir dired but would not allow her to testify because no notice of alibi was filed. Id.

{¶45} After the jury was charged, Appellant's trial counsel proffered that Brown was available and he was going to call Brown as an alibi witness, but did not because he did not file a notice of alibi due to the nature of the timing of the offense. (T.195). Appellant argues trial counsel's failure to file a notice of alibi was prejudicial to his defense, thereby demonstrating ineffectiveness of counsel.

{¶46} 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, 80 L.Ed.2d 674. 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, 100 L.Ed. 83.

{¶47} "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.

{¶48} 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.

{¶49} 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, 91 L.Ed.2d 305; 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.

{¶50} Based on the record, we find that trial counsel's decision to not file a notice of alibi does not demonstrate ineffectiveness of counsel because it fails to meet both prongs of the *Strickland* test.

{¶51} Requiring the defendant to give notice of an alibi defense to the state insures a fair trial for all parties. *State v. Smith* (1977), 50 Ohio St.2d 51, 53, 362 N.E.2d 988; *Williams v. Florida* (1970), 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446. While Crim.R. 12.1 requires a defendant to file timely notice of an alibi defense, it also gives the trial court the discretion to waive the notice requirement. If the testimony of an alibi does not surprise or otherwise prejudice the state and the defendant did not file a Crim.R. 12.1 notice in good faith, the interest of justice may require admission of the alibi testimony. *Smith,* supra*,* 53.

{¶52} When reviewing a trial court's decision to exclude alibi evidence, we determine whether the trial court abused its discretion. *State v. Jones* (Apr. 14, 1998), Adams App. No. 97CA648, 1998 WL 177573; citing, *State v. Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180; *State v. Hutton* (Mar. 26, 1992), Meigs App. No. 456, 1992 WL 79581.

{¶53} The record shows that trial counsel for Appellant stated that he was not sure if Brown was an alibi witness and that is why he did not file a notice of alibi. It was unknown whether Brown would testify as to Appellant's location at the time of the crimes or whether she would testify to Appellant's health condition. Trial counsel presented the issue to the trial court under Crim.R. 12.1 and the trial court in its discretion determined it would not waive the notice requirement. It excluded the evidence because it was not in the interest of justice that such evidence be presented.

Trial counsel followed the requirements of Crim.R. 12.1 when a notice of alibi is not filed and there is no evidence that the outcome of the trial would have been different if Brown had testified.

{¶54} Appellant's second Assignment of Error is overruled.

III.

{¶55} Appellant argues in his third Assignment of Error that the trial court erred when it denied Appellant's request to give jury instructions on the lesser included offenses of assault and robbery. We disagree.

{¶56} Trial counsel for Appellant requested that the jury be instructed on the lesser included offenses of assault and robbery because the evidence presented at trial was sufficient to show the victim suffered physical harm, as opposed to serious physical harm. Serious physical harm is the predicate to the crimes of aggravated robbery and felonious assault. Serious physical harm means any of the following:

{¶57} "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶58} "(b) Any physical harm that carries a substantial risk of death;

{¶59} "(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶60} "(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶61} "(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain." R.C. 2901.01(A)(5).

{¶62} The trial court denied Appellant's request, finding that the testimony, exhibits and photographs of the victim demonstrated that it was not appropriate to consider the injuries to be physical harm as opposed to serious physical harm as defined by the statute. (T. 142).

{¶63} An instruction on a lesser included offense needs to be provided "only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *State v. Thomas* (1988), 40 Ohio St.3d 213, 216, 533 N.E.2d 286.

{¶64} Trial courts have broad discretion in determining whether the evidence adduced at trial was sufficient to warrant a jury instruction. *State v. Morris,* Guernsey App. No. 03CA29, 2004-Ohio-6988, reversed on other grounds, 109 Ohio St.3d 313, 847 N .E.2d 1174, 2006-Ohio-2109; *State v. Mitts* (1998), 81 Ohio St.3d 223, 228, 690 N.E.2d 522. "When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested instruction constituted an abuse of discretion under the facts and circumstances of the case." *State v. Sims,* Cuyahoga App. No. 85608, 2005-Ohio-5846, ¶ 12, citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. A trial court does not abuse its discretion by not giving a jury instruction if the evidence is insufficient to warrant the requested instruction. *State v. Lessin* (l993), 67 Ohio St.3d 487, 494, 620 N.E.2d 72. An "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144, (internal citations omitted.)

{¶65} Upon our review of the record, we find the trial court did not abuse its discretion by not giving a jury instruction on the lesser included offenses of assault and robbery. We agree that the testimony, exhibits and photographs show that Appellant suffered serious physical harm, as opposed to physical harm.

{¶66} Appellant's third Assignment of Error is overruled.

{¶67} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J.

Farmer, P.J. and

Edwards, J. concur.

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HON. PATRICIA A. DELANEY

_____

HON. SHEILA G. FARMER

_____

HON. JULIE A. EDWARDS

PAD:kgb

[Cite as *State v. Mitchell*, 2009-Ohio-5006.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
O'BRYAN MITCHELL	:	
	:	
Defendant-Appellant	:	Case No. 2008CA00290
	:	

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

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HON. PATRICIA A. DELANEY

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HON. SHEILA G. FARMER

_____
HON. JULIE A. EDWARDS