[Cite as *State v. Stuart*, 2012-Ohio-2961.]

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

State of Ohio — Court of Appeals No. L-10-1118

Appellee — Trial Court No. CR0200903086

v.

Kevin Stuart — **DECISION AND JUDGMENT**

Appellant — Decided: June 29, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Timothy W. Longacre, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Kevin Stuart appeals a March 26, 2010 judgment of the Lucas County Court of Common Pleas convicting him of two counts of aggravated robbery and imposing sentence. Stuart was found guilty by jury at trial on all counts of a four-count indictment. The indictment charged Stuart with two counts of aggravated robbery, violations of R.C.

2911.01(A)(1) and first degree felonies and with two counts of robbery, violations of R.C. 2911.02(A)(2) and second degree felonies. The state contended at trial that Stuart beat and robbed Tamarrio Hawkins and Nicholas Christiansen at gunpoint on September 22, 2009.

{¶ 2} Under the judgment, the trial court also merged the aggravated robbery and robbery convictions on the first two counts of the indictment (as allied offenses) and sentenced Stuart on the merged conviction to imprisonment for four years. The court also merged the aggravated robbery and robbery convictions under the other two counts and imposed a four-year sentence on that conviction. The court ordered the sentences to run concurrently, for a total term of imprisonment of four years.

{¶ 3} Stuart asserts three assignments of error on appeal:

> Assignments of Error
>
> I. The defendant-appellant's convictions are supported by insufficient evidence and are therefore a denial of due process.
>
> II. The defendant-appellant was denied the effective assistance of counsel in that he was irreparably harmed by the failure of counsel to call witnesses to corroborate the testimony of alibi witness Alicia Garcia.
>
> III. The defendant-appellant's convictions are against the manifest weight of the evidence.

Sufficiency of the Evidence

{¶ 4} Under Assignment of Error No. I, appellant argues that the evidence at trial was insufficient to support his convictions. Sufficiency of the evidence is a "test of adequacy" and a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "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. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 5} There was evidence at trial, which if believed, demonstrated that a man followed Tamarrio Hawkins and Nicholas Christiansen to their car after the two left the Rainbow Market carryout on the night of September 22, 2009, and, at gunpoint, forced them to empty their pockets of anything of value and took the property. Both victims testified that the gunman threatened to kill them if they did not comply with his demands. They testified that the gunman also struck both of them in the face with the gun and injured them during the incident. Christiansen testified he was struck in the mouth and that his injuries included three chipped teeth, a busted lip, and a bruised chin. Both Hawkins and Christiansen testified that appellant was the man who committed these acts against them. A neighbor to the store testified that he saw appellant approach a car that night with a gun and lean inside pointing the weapon.

{¶ 6} Appellant was convicted of two counts of aggravated robbery, violations of R.C. R.C. 2911.01(A)(1). The statute states the elements of the offense:

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

{¶ 7} R.C. 2913.01(K) defines the term "theft offense" to include violations of listed statutory offenses including R.C. 2913.02. R.C. 2913.02(A)(4) provides:

2913.02 Theft; aggravated theft

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

* * *

(4) By threat;

* * *

(B)(1) Whoever violates this section is guilty of theft.

{¶ 8} In arguing insufficiency of the evidence to support the convictions of aggravated robbery, appellant asserts that the witness identification testimony was unreliable and that the testimony of an alibi witness made it impossible for him to have committed the crimes. The state argues that neither disputes as to the reliability of

eyewitness testimony nor conflicts in the evidence raised by alibi evidence are grounds to challenge a conviction based upon a claim of insufficiency of the evidence. We agree.

{¶ 9} The relevant inquiry in a challenge to a conviction on the basis of insufficiency of the evidence "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. Jenks* at paragraph two of the syllabus. Under such an analysis, a court does not evaluate the credibility of the evidence. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 79.

{¶ 10} In our view, there is ample evidence from which a rational trier of fact could have found that Hawkins and Christiansen were victims of aggravated robbery. There was evidence of a theft offense in which the perpetrator brandished a gun and threatened the victims with the weapon to accomplish the theft. Hawkins and Christiansen testified at trial that appellant was the man who committed the robberies. Mansfield testified that he lived two houses away from the carryout and from his front stoop saw appellant approach a car with a gun and lean inside the car while pointing the gun at the car's two occupants.

{¶ 11} We find Assignment of Error No. I not well-taken.

{¶ 12} We consider Assignment of Error No. III out of turn. Under the assignment of error, appellant asserts that the jury verdicts are against the manifest weight of the evidence at trial.

{¶ 13} A claim that a jury verdict in a criminal case is against the manifest weight of the evidence requires an appellate court to act as a "thirteenth juror." *Thompkins,* 78 Ohio St.3d at 387. An appellate court, "'reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against conviction.'" *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1983).

{¶ 14} Appellant argues that there was no physical evidence tying him to the robberies. He argues that eyewitness identification testimony was unreliable. The incident occurred outside at night. Lighting in the area, including the dome light in the car, was poor. Appellant also contends that the fact that Hawkins, Christiansen and Mansfield each recognized appellant from prior encounters at the carryout weakens the reliability of their identification testimony.

{¶ 15} Appellant argues that there were inconsistencies in testimony by the victims over whether two other accomplices were involved in the robberies and as to the color of the gun. At trial, Mansfield was unable to provide specifics concerning the gun or Hawkins' car. There was an alibi witness who testified that appellant was with her on the evening and night when the robberies occurred.

{¶ 16} Both victims testified that they saw appellant in the carryout immediately before the robberies occurred. Christiansen testified that appellant asked whether he wanted to buy marijuana while in the carryout and asked again when appellant came up from behind Christiansen with a gun at the car. Mansfield, a neighbor of the carryout, not only recognized appellant as the gunman, he also knew appellant by his nickname. We agree with the state that the prior contacts these witnesses had with appellant strengthened, not weakened, their identification testimony.

{¶ 17} We find no manifest injustice in the jury verdicts. It was for the jury to resolve conflicts in evidence and particularly a conflict between alibi evidence and the testimony of Hawkins, Christiansen, and Mansfield. We find Assignment of Error No. III not well-taken.

{¶ 18} Under Assignment of Error No. II, appellant asserts ineffective assistance of trial counsel. Appellant argues that trial counsel was deficient in failing to call as witnesses at trial other witnesses who could corroborate the testimony of Alicia Garcia that appellant was with her at the time of the robberies and not at the carryout. Appellant argues that Garcia's cousin, Raelene Rosas, and her brother, should have been called as witnesses at trial to support appellant's alibi defense. The state argues in response that the record does not include any evidence to demonstrate whether Rosas or Garcia's brother would have corroborated Garcia's alibi testimony.

{¶ 19} To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "First, the defendant must show that counsel's performance was

deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Proof of prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus.

{¶ 20} We agree with the state that to consider appellant's claim of ineffective assistance of counsel in this appeal would require consideration of evidence outside the record. As neither Raelene Rosas nor Alicia Garcia's brother testified at trial, the record is silent on whether they would have corroborated Alicia Garcia's alibi testimony.

{¶ 21} A claim of ineffective assistance of counsel that requires consideration of evidence outside the record of trial court proceedings cannot be considered on direct appeal. *State v. Hartman*, 93 Ohio St.3d 274, 299, 754 N.E.2d 1150 (2001); *State v. Carter*, 89 Ohio St.3d 593, 606, 734 N.E.2d 345 (2000). Accordingly, we find appellant's Assignment of Error No. II not well-taken.

{¶ 22} Justice having been afforded the party complaining, we affirm the judgment of the Lucas County Court of Common Pleas. We order appellant 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE