

[Cite as *State v. Davis*, 2009-Ohio-2881.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91911

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

JASPER DAVIS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-509890

BEFORE: Stewart, J., Kilbane, P.J., and Jones, J.

RELEASED: June 18, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Jasper Davis, appeals his conviction, challenging the effectiveness of his defense counsel and the weight and sufficiency of the evidence supporting the conviction. Finding no error, we affirm.

{¶ 2} In a multi-count indictment, Davis was charged with two counts of aggravated robbery, one count of kidnapping, and one count of carrying a concealed weapon. Counts one through three carried one and three year firearm specifications. A jury found Davis guilty of one count of aggravated robbery, kidnapping, and carrying a concealed weapon. The trial court sentenced Davis to an aggregate sentence of eight years.

{¶ 3} The charges stemmed from an incident that occurred on October 27, 2007. On that date, at approximately 9:45 p.m., John Sung, the manager of the Benihana Restaurant in Beachwood, was robbed at gunpoint in the restaurant's office by an assailant wearing a black face mask. Sung testified that the assailant pointed a gun at his head and ordered him to open the safe and put the money in a black garbage bag the assailant handed him. After he placed the money from the safe, including a tray full of coins, into the black bag, he handed the bag to the assailant who ordered Sung to turn around and face the wall. While facing the wall, Sung heard three gunshots. He ducked under his desk and, when he heard the door close, called 911.

{¶ 4} Two units from the Beachwood Police Department responded to the call. Officer Kevin Owens went inside to speak to Sung. Sung described the

assailant as being male, five foot six or seven inches tall, between 160 and 170 pounds, and wearing a black jacket with red stripes and a black mask. Officer Owens relayed that information to Officer Richard Kemer who was patrolling the area to see if he could find the assailant.

{¶ 5} Officer Kemer observed Davis standing at an RTA bus stop on Chagrin Boulevard, approximately 100 feet from the restaurant driveway. Davis fit the general physical description of the assailant, but was wearing jeans and a light-colored sweatshirt. Officer Kemer thought Davis looked suspicious. Davis was rocking back and forth, looked out of breath, and appeared nervous. Officer Kemer turned his car around and drove past the bus stop a second time. He noticed a duffle bag on the grass behind Davis. He and another police unit pulled up to the bus stop. Officer Kemer asked Davis where he was coming from and asked him his name. Davis replied that he was coming from Benihana. He said he went there to visit his friend Marvin, had a drink, and left the restaurant five minutes earlier. Davis gave Officer Kemer his name.

{¶ 6} After learning the suspect's name, Sung informed Officer Owens that Davis was a former employee. Sung told him the assailant's voice had sounded familiar to him and he thought Davis could be the assailant.

{¶ 7} Officer Kemer asked Davis what was in the duffle bag. Davis replied that his jacket and personal things were in the bag. When the officers asked him if they could look in the bag, he said no. The duffle bag was partially unzipped and Officer Kemer could see part of a black jacket with a red stripe hanging out of the

bag. He removed the jacket from the bag and saw a black semiautomatic pistol. He placed appellant under arrest. In addition to the jacket and gun, he found a black plastic bag that contained paper money and coins, a black mask, rubber gloves, and a pink backpack inside the duffle bag. Sung was brought to the scene and identified the jacket and the gun as belonging to the person who robbed him.

{¶ 8} Detective Richard Curtiss investigated the robbery and spoke to Davis, Davis's friend Marvin, and Davis's mother and stepfather. He also interviewed Sung and viewed a videotape from the restaurant that showed Davis walking out of the restaurant at 9:18 p.m. with Marvin, who was working at the restaurant that night. The video showed Marvin re-entering the restaurant alone.

{¶ 9} Davis told the detective that after walking out with Marvin, he left the restaurant and went directly to the bus stop. He said he got there at about 9:24 p.m. He saw a duffle bag in the grass at the bus stop. He looked inside and saw money and other stuff in the bag. He heard police sirens and moved away from the bag. He said the reason he told the police that the bag was his was because he did not want them to look inside and find the money; he wanted to keep the money.

{¶ 10} Detective Curtiss showed photographs of the duffle bag and its contents to Davis's stepfather who identified the jacket and pink backpack as being Davis's property. At trial, the stepfather offered conflicting testimony. He stated that he told the detective that he thought the pink backpack looked like one Davis's girlfriend owned, and that the jacket in the photograph resembled one he had purchased for

his stepson. But, when shown the actual jacket at trial, he stated he had never seen the jacket before and had never seen appellant wear it.

{¶ 11} The state also presented evidence that showed that tests of Davis's hands and the rubber gloves found in the duffle bag were negative for gunshot residue, DNA tests on the jacket and mask found in the duffle bag matched Davis's DNA, and the gun found in the duffle bag was loaded and operational.

{¶ 12} Davis testified at trial in his defense. He said he left the restaurant after walking outside with Marvin. He walked directly to the bus stop and got there five minutes after leaving the restaurant. He found the duffle bag at the bus stop and looked inside. He saw the jacket and the money, but not the gun. He touched the jacket and something "spongy," which he later realized must have been the ski mask. He did not put the jacket completely back into the bag and left the sleeve hanging out of the bag.

{¶ 13} Upon being convicted, Davis timely filed this appeal, raising three assignments of error for our review.

{¶ 14} In his first assignment of error, appellant contends that he was denied his right to effective assistance of counsel due to his trial counsel's failure to file a motion to suppress evidence. He argues that the initial search of the duffle bag by police at the bus stop was illegal and, therefore, any evidence recovered from the duffle bag should have been suppressed as fruit of the illegal search. He asserts that any reasonably effective counsel would have filed a motion to suppress based upon the circumstances of the stop and search. We disagree.

{¶ 15} Under the two-pronged test for ineffective assistance of counsel pronounced in *Strickland v. Washington* (1984), 466 U.S. 668, to obtain a reversal of a conviction on the basis of ineffective assistance of counsel, “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 the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* at 693. Counsel is “strongly presumed” to have rendered adequate assistance, and the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98.

{¶ 16} “Failure to file a suppression motion does not constitute per se ineffective assistance of counsel.” *State v. Madrigal*, 87 Ohio St.3d 378, 388, 2000-Ohio-448, quoting *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384. “Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Moreover, ‘a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’” *State v. Adams*, 103 Ohio St.3d 508, 514, quoting *Strickland*, 466 U.S. at 689.

{¶ 17} The Fourth Amendment protects persons from “unreasonable searches and seizures” by the government. *State v. Jackson*, 102 Ohio St.3d 380, 2004-

Ohio-380. Under the exclusionary rule, evidence seized in violation of the Fourth Amendment will result in its suppression. *Id.* In order to have standing to challenge a search or seizure, the defendant must have a reasonable expectation of privacy in the evidence seized. *Id.* at 380, citing *Alderman v. United States* (1969), 394 U.S. 165, 171-172. “[I]t is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy.” *Alderman* at 187.

{¶ 18} Davis testified at trial that the duffle bag was not his; that he found it at the bus stop. He stated that he opened the bag up and found a jacket and a black plastic bag with money in it. He testified that he lied to the first policeman at the bus stop when he told him that the bag was his. He said he did so because he thought the police would leave and he could keep the money. Except for that one statement at the bus stop, which he testified was a lie, Davis consistently maintained in later statements to the police and at trial, that the bag was not his.

{¶ 19} It appears that as part of his trial strategy, Davis’s counsel made the tactical decision that the best way to defend Davis was to present his claim of innocence and his denial of ownership of the duffle bag into evidence. As a result of that strategy, and by denying any ownership or possessory interest in the duffle bag, Davis could not claim a legitimate expectation of privacy in the bag and thus had no recognizable Fourth Amendment challenge to the search.

{¶ 20} Given the facts of this case, Davis has not demonstrated that his counsel's failure to file a motion to suppress fell outside the range of reasonable professional representation. Accordingly, the first assignment of error is overruled.

{¶ 21} In his second and third assignments of error, Davis argues that there was insufficient evidence to support his convictions and that the convictions are against the manifest weight of the evidence. Although these arguments involve different standards of review, because they are substantially interrelated, we will consider them together.

{¶ 22} A challenge to the sufficiency of evidence supporting a conviction requires a court to determine whether the state has met its burden of production at trial. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52. The challenge raises a question of law. On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Id.* 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* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. A conviction based on insufficient evidence violates a defendant's Fifth Amendment right to due process. *Thompkins* at 386.

{¶ 23} The test for a claim that the judgment is against the manifest weight of the evidence is much broader. *State v. Martin* (1983), 20 Ohio App.3d 172. "The court, 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 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 the conviction.” *Id.* at paragraph three of the syllabus.

{¶ 24} A judgment will not be reversed upon insufficient or conflicting evidence if it is supported by competent, credible evidence that goes to all the essential elements of the case. *Cohen v. Lamko* (1984), 10 Ohio St.3d 167.

{¶ 25} Davis was convicted of aggravated robbery, kidnapping, and carrying a concealed weapon. The elements of these offenses are provided by statute as follows.

{¶ 26} R.C. 2911.01(A)(1), the statute defining aggravated robbery, provides in pertinent part that no person, in attempting or committing a theft offense, or in fleeing immediately after the attempt or offense, shall 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.

{¶ 27} The elements of the offense of kidnapping pertinent to this case are found at R.C. 2905.01(A)(2) which provides that no person, by force, threat, or deception, shall restrain the liberty of the other person, to facilitate the commission of any felony or flight thereafter.

{¶ 28} The elements of carrying a concealed weapon are found at R.C. 2923.12 which provides that no person shall knowingly carry or have concealed on his person or ready at hand, a deadly weapon or dangerous ordnance.

{¶ 29} Davis was a former employee of the Benihana restaurant. He was apprehended outside of the restaurant minutes after the armed robbery occurred. He had next to him a duffle bag containing a jacket, ski mask, money, and a loaded gun. The victim of the robbery testified that he recognized Davis as the assailant by his voice. He said Davis held a gun to his head, forced him to open the office safe and put the money from the safe into a black plastic bag, and then fired three shots as he was leaving the office. The victim identified the jacket, mask, and gun from the duffle bag as those used by the robber. Davis's DNA was found on the jacket and the ski mask.

{¶ 30} This evidence, when viewed in a light most favorable to the state, would permit a reasonable trier of fact to conclude that Davis committed the offenses charged. Accordingly, Davis's challenge to the sufficiency of the evidence fails.

{¶ 31} In his argument that the convictions are against the manifest weight of the evidence, Davis contends that the state's evidence was of such a poor and unreliable quality that it cannot support a guilty verdict. He argues that it would be unusual behavior for the robber to wait at the bus stop in front of the establishment that was just robbed. He challenges the victim's credibility and points out that the victim did not tell police that he recognized the assailant's voice until after the police asked him if he knew Davis and whether Davis fit the description of the assailant.

He argues that the DNA evidence is inconclusive because, even though his DNA was found on the ski mask and jacket, the expert testified that the test cannot determine whether Davis actually wore the items. Finally, he offers his own testimony that the bag was already at the bus stop when he got there.

{¶ 32} We do not agree with Davis's argument that the physical evidence linking him to the crime is weak. The DNA expert testified that she took samples from inside the cuff of the jacket and inside the face mask because she wanted to swab the areas where the skin of a person wearing the items would touch. In her opinion, a person touching the jacket and mask while rifling through the duffle bag would not have left the DNA samples she found. Also, even accounting for his lack of a watch, Davis's account of his actions that night is not credible. His testimony places the duffle bag at the bus stop 20 minutes before the crime was committed. Our review of the entire record and consideration of all of the evidence leaves us to conclude that the jury did not lose its way. Because there was sufficient evidence to take the case to the jury, and the convictions are not against the manifest weight of the evidence, Davis's second and third assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
LARRY A. JONES, J., CONCUR