

[Cite as *State v. Davis*, 2009-Ohio-3894.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91943

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOVAN DAVIS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART;
AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-511218

BEFORE: Rocco, J., Cooney, A.J., and Kilbane, J.

RELEASED: August 6, 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).

KENNETH A. ROCCO, J.:

{¶ 1} Defendant-appellant Jovan Davis appeals from his convictions after a jury found him guilty of two counts of robbery.

{¶ 2} Davis presents three assignments of error. He first argues the trial court improperly permitted the state to introduce certain evidence, i.e., that he committed “other acts” of a similar nature, and that a woman who was observed in a videotape to have accompanied him one month before the incident carried the same purse into the courtroom on the day of his trial. He further argues his trial counsel provided ineffective assistance in several respects. Finally, he contends his convictions are against the manifest weight of the evidence.

{¶ 3} Upon a review of the record, this court finds the trial court committed no error with respect to the admission of evidence, trial counsel’s performance fell within a reasonable standard of effective representation, and Davis’s conviction for robbery in violation of R.C. 2911.02(A)(3) is supported by the weight of the evidence. His conviction on that count, therefore, is affirmed.

{¶ 4} However, the trial court erred in entering a conviction against Davis on count one. His conviction for violation of R.C. 2911.02(A)(2), accordingly, is reversed, and this case is remanded to the trial court to enter an order dismissing that count.

{¶ 5} Davis’s convictions result from an incident that occurred on the evening of September 13, 2007 at an “Old Navy” clothing store located in the “Steelyard Commons”¹ shopping center. According to the evidence presented by the state at trial, Davis’s movements inside the store were recorded on the store’s surveillance cameras.²

{¶ 6} Two of the store’s female loss prevention (“LP”) agents, Nicole Lewis and Shelaine Larson were watching Davis as he proceeded through the store. Although both LP agents pretended to be shoppers, Larson thought Davis would recognize her, so she moved away from him after she became aware of his presence.

{¶ 7} Lewis testified that, after Larson alerted her to Davis’s presence in the store, Lewis observed Davis as he “rolled” up some merchandise and “shoved it into his pants,” thus concealing some clothing items. She saw him subsequently walk out of the store without paying for those items.

{¶ 8} Lewis testified that, as Davis passed through the store’s “alarm towers” situated on each side of the exit, they were activated, indicating

¹Quotes indicate testimony given at trial.

²The videotape of the store portion of the incident, although the jury watched it at Davis’s trial, was not introduced into evidence as an exhibit. Consequently, it is not included in the record on appeal.

something had not yet been purchased. Lewis contacted Larson for assistance, then proceeded to confront Davis.

{¶ 9} Lewis approached Davis in the vestibule, just before he stepped outside the store. She identified herself and told him she “needed to talk to him about the concealed merchandise.” Davis replied that he did not know what she was talking about, and continued toward the parking lot.

{¶ 10} Larson moved in front of Lewis and Davis just as they reached the curb. When Davis saw Larson, but before she could turn around to block him, he “pushed her off” and away from him by shoving her at her shoulder area, propelling Larson into the parking lot. This act formed the basis for Davis’s indictment on count one. Lewis indicated the lot was busy at that time, and she, at that point, called the police.

{¶ 11} Larson regained her footing and followed Davis as he went to a car in the lot. She sought to “get either the license plate or * * * to try to get him to come back with us.” As she “was looking inside the window, that’s when he grabbed both of [her] arms and pushed [her] away * * *.” His female companion urged him to get inside; when he did, she drove away. Larson relayed what she could of the license plate number to Lewis.

{¶ 12} Larson reported the incident to the police. In addition, she investigated the identity of the perpetrator on her own. Larson testified that,

since she had seen the same man on a previous occasion in her store wearing a hat that bore the “Chipotle” restaurant logo, she approached the manager of that nearby establishment to inquire if one of the employees matched that man’s description. In this way, she obtained Davis’s name.

{¶ 13} Davis subsequently was indicted on two counts of robbery.³ His case proceeded to a jury trial. After considering the state’s evidence, the jury found Davis guilty on both counts. The trial court immediately sentenced Davis to concurrent prison terms of five years for each of his convictions.

{¶ 14} Davis presents the following assignments of error for review.

“I. Appellant was deprived of his constitutional right to a fair trial and due process of law when the trial court allowed unfairly prejudicial and not relevant evidence to be seen and heard by the jury.

“II. Defense counsel was ineffective thereby denying Appellant effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution.

“III. Appellant’s convictions for Robbery are against the manifest weight of the evidence.”

³Count one charged Davis with violating R.C. 2911.02(A)(2), i.e, that he inflicted or attempted to inflict “physical harm on another.” Count two charged Davis with violating R.C. 2911.02(A)(3), using force in committing a theft offense.

{¶ 15} In his first assignment of error, Davis argues that the trial court abused its discretion in certain evidentiary matters. Davis acknowledges, however, that the admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Robb*, 88 Ohio St.3d 59, 68, 2000-Ohio-275. Thus, absent an abuse of discretion, as well as a showing that the accused suffered material prejudice, an appellate court will not disturb the ruling of the trial court as to the admissibility of evidence. *State v. Martin* (1985), 19 Ohio St.3d 122, 129.

{¶ 16} An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68. In applying this standard of review, an appellate court may not substitute its judgment for that of the trial court. *State v. Yeager*, Summit App. No. 21510, 2005-Ohio-4932, ¶29.

{¶ 17} First, Davis challenges the trial court's decision to permit the state to present the testimony of Old Navy's LP supervisor, Jeremiah Hruschak. Hruschak described his observations of Davis on previous occasions in other Old Navy clothing stores. Davis contends this evidence contravened Evid.R. 404(B), since it did not describe a discernible "pattern of behavior" sufficient to comply with the rule.

{¶ 18} Evid.R. 404(B) prohibits evidence “of other crimes, wrongs or acts* *
*to prove the character of a person in order to show that he acted in conformity
therewith.” (Emphasis added.) Thus, generally, evidence of the defendant’s
other activities is “inadmissible to prove the accused has a propensity to commit
crimes.” *State v. Ogletree*, Cuyahoga App. No. 87483, 2006-Ohio-6167, ¶25.

{¶ 19} It may, however, be admissible for other purposes. These include
“proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or
absence of mistake or accident.” Evid.R. 404(B). (Emphasis added.)

{¶ 20} Identity is in issue when, while the fact of the crime is open and
evident, the perpetrator is not personally known, and the accused denies that he
committed the crime. *State v. Smith* (1992), 84 Ohio App.3d 647, 666. The
testimony Davis challenges thus fit within this exception, since it was offered to
explain how Hruschak and the other store LP agents came to identify Davis.
State v. Simpson, Cuyahoga App. No. 89158, 2008-Ohio-3817, ¶41; *State v. Lee*,
Cuyahoga App. No. 87972, 2007-Ohio-288. Under these circumstances, the trial
court did not abuse its discretion.

{¶ 21} Davis additionally challenges the trial court’s decision to permit a
woman’s purse into evidence. He presents mutually exclusive contentions with
respect to this item, i.e., it was either irrelevant, or it was relevant but too highly
prejudicial. Evid.R. 402; 403(A).

{¶ 22} The record reflects Larson notified the prosecutor on the day of Davis’s trial that she had observed something in the courtroom that might be significant, viz., a woman’s purse. According to the prosecutor, Larson had seen the same purse on a prior occasion, when a woman carrying it accompanied Davis into the store. At defense counsel’s insistence, the trial court reviewed a videotape that depicted the occasion to which Larson referred.

{¶ 23} Thereafter, during trial, the court permitted Larson to testify she had seen Davis in the store in August 2007, the month prior to the incident; Davis was with a female companion. Larson further testified she had seen the woman carrying a distinctive purse. Larson identified the purse at trial, and it became “State’s Exhibit 5.” This court cannot fault the trial court’s decision on this matter for two reasons.

{¶ 24} First, the record reflects Davis raised no objection to Larson’s testimony regarding the purse at the time the prosecutor elicited that testimony. Davis, instead, at the conclusion of the state’s case, objected to the admission into evidence of the purse itself. He thus waived his argument for purposes of appeal. *State v. Williams* (1977), 51 Ohio St.2d 112. Second, Davis did not include “State’s Exhibit 5” in the record on appeal; therefore, this court cannot entertain argument with respect to it. App.R. 12(A)(1)(b).

{¶ 25} For the foregoing reasons, Davis’s first assignment of error is overruled.

{¶ 26} Davis argues in his second assignment of error that his retained trial counsel rendered constitutionally inadequate assistance by: 1) misspeaking during opening statement; 2) failing to present expert testimony regarding the unreliability of eyewitness identification; 3) “opening the door” to incriminating testimony; 4) failing to object to a jury instruction regarding “flight”; and, 5) failing to request a jury instruction on the “shortcomings” of eyewitness identification.

{¶ 27} To sustain a constitutional claim of ineffective assistance of trial counsel, an appellant has the burden to demonstrate not only that counsel substantially violated an essential duty he owed to his client, but, additionally, that the violation prejudiced him. *State v. Bradley* (1989), 42 Ohio St.3d 136, citing *Strickland v. Washington* (1984), 466 U.S. 688. Trial counsel is strongly presumed to have rendered adequate assistance, and this court will not second-guess what can be considered a matter of trial strategy. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299. A review of the record in this case demonstrates Davis’s trial counsel violated none of his essential duties.

{¶ 28} As to trial counsel's "slip of the tongue" during opening statement, he immediately corrected it. A simple faux pas cannot be deemed to have constituted ineffective assistance.

{¶ 29} As to the decision to forego expert testimony, this was a matter of trial strategy. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶118. The record reflects counsel deliberately kept his defense of Davis simple in order to appeal to the "common sense" of the jurors.

{¶ 30} The record reflects that defense counsel could have been more careful in his cross-examination of the state's witnesses. Nevertheless, he clearly sought to cast doubt on their identifications of Davis as the man involved in the incident that led to this case.

{¶ 31} In view of the witnesses' familiarity with Davis, and thus the overwhelming evidence of his client's guilt, counsel's efforts in this regard cannot be deemed to have fallen below an acceptable standard of reasonable representation. *Id.*, ¶100-102. Trial counsel was well-prepared and diligent. Simply put, counsel expended great effort to put the state to its burden of proof.

{¶ 32} Davis's challenge to trial counsel's acquiescence to the jury instructions also lacks merit, since the court provided instructions that were both properly phrased and warranted by the evidence. *State v. Hambrick* (Feb. 1, 2001), Cuyahoga App. No. 77686; cf., *State v. Wolf*, Cuyahoga App. No. 83673,

2004-Ohio-4500. Under these circumstances, counsel had no basis upon which to object.

{¶ 33} Since the record fails to reflect defense counsel violated an essential duty owed to his client, Davis's second assignment of error also is overruled.

{¶ 34} In his third assignment of error, Davis argues that neither of his convictions is supported by the manifest weight of the evidence. Prior to addressing his argument, although Davis thus does not raise the issue of the sufficiency of the evidence, this court finds it necessary to consider that issue as to count one.

{¶ 35} At the conclusion of the state's case and at the close of the evidence, Davis moved for acquittal of the charges against him. His trial counsel asserted the state's evidence did not prove his guilt on both counts. Although the trial court denied Davis's motion, the court committed plain error in failing to grant the motion with respect to count one.

{¶ 36} The plain error doctrine permits correction of judicial proceedings when error is clearly apparent on the face of the record and is prejudicial to the appellant. See *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68.

{¶ 37} When ruling on a defendant's motion for acquittal, the trial court is required to view the evidence in a light most favorable to the prosecution, and to determine if reasonable minds could reach different conclusions as to whether

each material element of an offense is proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 1997-Ohio-372; *State v. Martin* (1983), 20 Ohio App.3d 172. The trial court must grant the motion if this test is not met.

{¶ 38} Davis was charged in count one with violating R.C. 2911.02(A)(2), which involves the element of inflicting or attempting to inflict “physical harm.” This court previously has observed that this element requires different proof than proof of “force,” otherwise, “there would be no need for the distinction between robbery offenses in R.C. 2911.02(A)(2) and (3).” *State v. Wolf*, supra, ¶21, quoting *State v. Frunza*, Cuyahoga App. No. 82053, 2003-Ohio-4809, ¶8. The act of “pushing” someone thus may constitute force, but it does not necessarily satisfy the element of attempting to cause physical harm. *Id.* at ¶22.

{¶ 39} In this case, when the prosecutor asked Lewis if the parking lot was “busy” at the moment Davis pushed Larson off the curb, Lewis merely agreed. For her part, Larson testified only that Davis pushed her into the lot; she never stated whether any vehicles were traveling near her, and she indicated she felt surprised, not physically threatened or injured in any way.

{¶ 40} On these facts, the trial court should have granted Davis’s motion for acquittal on count one. Its failure to do so constitutes error. *Id.* The matter of Davis’s conviction on count two now must be addressed.

{¶ 41} In determining whether a verdict is against the manifest weight of the evidence, an appellate court reviews the entire record, examines the evidence and all reasonable inferences, 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. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52.

{¶ 42} Weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *Id.* In making a determination on the weight of the evidence, a reviewing court is not required to view the evidence in a light most favorable to the prosecution. *Id.* at 390. The court must be mindful, however, that credibility is a matter primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶ 43} The jury convicted Davis of violating R.C. 2911.02(A)(3) in count two, finding that, “in attempting or committing a theft offense, * * *, or in fleeing immediately after * * *, [he] recklessly use[d] or threaten[ed] the immediate use of force” against Larson. “Force” is defined as “any violence, compulsion or constraint physically exerted by any means upon or against a person * * *.” R.C. 2901.01(A).

{¶ 44} Lewis testified Davis rolled up some items, placed them under his shirt, then left the store. Lewis followed and asked him to return with her. Larson testified that, when she came to assist Lewis, Davis pushed her off the curb and proceeded into the parking lot. Larson indicated she followed him. She stated that a car stopped for Davis, she looked into it and, “that’s when he grabbed both of [her] arms and pushed her away * * *.” Lewis’s testimony corroborated Larson’s description of the incident.

{¶ 45} Since the jury was entitled to believe the LP agents’ testimony, Davis’s conviction on count two is supported by the manifest weight of the evidence. *State v. Hughes*, Cuyahoga App. No. 81768, 2003-Ohio-2307; *State v. Calhoun* (Nov. 14, 1991), Cuyahoga App. No. 59370.

{¶ 46} Accordingly, Davis’s third assignment of error is sustained in part, and denied in part.

{¶ 47} Davis’s conviction on count two is affirmed. His conviction on count one is reversed, and this case is remanded to the trial court to vacate Davis’s conviction and sentence on that count.

It is ordered that appellant and appellee share the 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 common pleas court 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.

KENNETH A. ROCCO, JUDGE

COLLEEN CONWAY COONEY, A.J., and
MARY EILEEN KILBANE, J., CONCUR