[Cite as *State v. Wright*, 2009-Ohio-5229.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92344

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RONALD WRIGHT

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-513661

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

RELEASED: October 1, 2009

JOURNALIZED:

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MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Ronald Wright ("Wright"), appeals his convictions for drug possession, drug trafficking, possession of criminal tools, kidnapping, and resisting arrest. Wright challenges the manifest weight of the evidence supporting the above convictions, as well as the sufficiency of the evidence supporting his kidnapping conviction, and further argues that he was denied effective assistance of counsel when his trial counsel failed to object to the trial court's jury instructions. After reviewing the pertinent law and facts, we affirm.

{¶ 2} On July 24, 2008, a Cuyahoga County Grand Jury returned a seven-count indictment against Wright in Case No. CR-513661. Counts 1 and 2 charged Wright with robbery, in violation of R.C. 2911.02, a felony of the second degree; Count 3 charged Wright with kidnapping, in violation of R.C. 2905.01, a felony of the first degree; Count 4 charged Wright with resisting arrest, in violation of R.C. 2921.33, a misdemeanor of the first degree; Count 5 charged Wright with possession of drugs, in violation of R.C. 2925.11, a felony of the second degree; Count 6 charged Wright with drug trafficking, in violation of R.C. 2925.03(A)(2), a felony of the second degree; and Count 7 charged Wright with possessing criminal tools, in violation of R.C. 2923.24, a felony of the fifth degree.

{¶ 3} On September 16, 2008, a jury trial commenced, and on September 18, 2008, a jury found Wright not guilty of Counts 1 and 2, but guilty of Counts 3 through 7 as indicted.

{¶ 4} On September 29, 2008, Wright was sentenced to 7 years of incarceration on the charge of drug possession, 7 years on the charge of drug trafficking, 6 months on the charge of possession of criminal tools, 6 years of incarceration on the charge of kidnapping, and sixty days on the charge of resisting arrest. All counts were to be served concurrent with each other, but consecutive to a seventeen-month sentence imposed in another case, Case No. CR-504279.

{¶ 5} On October 31, 2008, this appeal followed.

{¶ 6} At trial, the victim, Amber Jones ("Jones"), testified as follows. On the night of March 6, 2008, she and Wright had known each other for about 3 weeks. At 9:30 p.m. or 10:00 p.m. on the night of the incident, Jones received a call from Wright asking for a ride. He agreed to meet Jones at her brother's establishment, Christine's Bar, on East 147th Street, Cleveland, Ohio.

{¶ 7} Once they met, Wright agreed to put $20 worth of gas in Jones's car. Afterward, Wright asked Jones if she could take him to sell some drugs. Jones refused, at which point Wright asked that she drop him off. As Jones continued to drive, she observed Wright reach into her glove box and remove money. She told Wright that he could have $20 to reimburse him for the cost of the gas he had bought her, but that the remainder of the money was hers.

{¶ 8} Jones next testified that Wright started to beat her about the head and face while she was driving, and continued to do so until Jones felt her jaw

swelling. She described the blows, testifying that it felt like a car was hitting her "from out of nowhere." (Tr. 148.)

{¶ 9} At some point, the victim mistakenly believed she was nearing the Cleveland Police Department's Sixth District station, at which point she stated "watch this" while pulling into a parking lot, thus signaling to Wright that she was going to report him to the police. Once the car came to a stop, Wright opened the passenger's side door. He held onto the door handle on the passenger's side of the car with one hand while simultaneously holding on to Jones. He opened the door briefly, then got back in the car and said "what is you sitting here for * * * pull off." (Tr. 148.)

{¶ 10} Jones testified that she was in fear for her life, that she felt she had to keep driving. After turning onto East 152nd Street at Wright's order, she realized that they were driving from Cleveland into East Cleveland. Jones testified that she believed her life was going to end that night in Forrest Hills Park. (Tr. 153.) After driving around aimlessly, Jones came to an intersection and observed an East Cleveland Police cruiser at a light. She drove toward the vehicle in order to flag down the police, at which point Wright fled from her vehicle.

{¶ 11} Jones testified that Wright wore a multicolored, striped hooded sweatshirt or jacket that night. She identified in court the jacket and testified that she observed Wright drop the jacket when he was running from her car. Jones

admitted that she is a daily marijuana user, and that she and Wright had smoked marijuana together in the car that night.

{¶ 12} Officer Dee Brown of the East Cleveland Police Department testified that she noticed Jones and Wright while they were stopped at the corner of Taylor Road and Terrace Road in East Cleveland. Officer Brown observed Wright wearing the striped hooded jacket that was later found in the area where Wright was apprehended. Officer Brown noticed that Jones was looking at her, and that she had her hands over her head while Wright swung and punched her in the head. At this, Officer Brown pulled up beside Jones's vehicle. When Wright noticed the police, he exited the vehicle and began running northbound on Taylor Road. Officer Brown's partner, Officer Jeffrey Groves, pursued him on foot.

{¶ 13} Eventually, Officers Brown and Groves lost sight of Wright when he hid behind some buildings. The officers did find Wright's striped jacket, which he had dropped while fleeing. Once the police recovered this jacket, they continued their search of the surrounding area, and Wright was eventually apprehended at gunpoint after the police found him hiding under parked cars in an apartment building garage.

{¶ 14} East Cleveland Police Officer John Bectho testified that he was on patrol in the area on March 6, 2008, and heard that other units were chasing a male suspect. He arrived on the scene and was advised by Officers Groves and Brown that they gave chase to the suspect, but lost him. After recovering

Wright's jacket, the officers all went to the parking garage, where they found Wright hiding under one of the cars parked there. Officer Bectho and other East Cleveland police officers testified that there was a struggle during Wright's arrest and that Officer Bectho eventually employed an arm bar technique to restrain Wright. The officers' accounts differed in relation to the length and severity of the struggle, but no one refuted that in fact a struggle took place.

{¶ 15} When the contents of Wright's jacket were inventoried, police recovered suspected crack cocaine inside plastic sandwich bags that they concluded were prepared for sale. Police also recovered another plastic bag containing suspected marijuana. When Wright was booked, East Cleveland police officers recovered $574 in U.S. currency, a digital scale, and two cell phones from the pockets of Wright's pants.

{¶ 16} The State also presented testimony from Keith Taggart, a chemist from the Ohio Attorney General's Bureau of Criminal Identification and Investigation (BCI), who testified that he received for testing one plastic bag with vegetation, a digital scale, and three plastic bags containing a white substance. He tested the items and opined to a reasonable degree of scientific certainty that those items tested positive for the presence of marijuana in the amount of 1.8 grams and controlled substances, specifically crack cocaine, in the amount of 13.9 grams.

{¶ 17} The defense called no witnesses.

{¶ 18} Wright's first assignment of error states as follows:

"THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT A FINDING BEYOND A REASONABLE DOUBT THAT THE APPELLANT WAS GUILTY OF KIDNAPPING."

{¶ 19} In his first assignment of error, Wright argues that the evidence was insufficient as a matter of law to support a finding beyond a reasonable doubt that he was guilty of kidnapping because he did not restrain Jones's liberty at any time. We disagree.

{¶ 20} Our function when reviewing the sufficiency of the evidence to support a criminal conviction 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. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact would have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph two of the syllabus.

{¶ 21} "A challenge to the sufficiency of the 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, 678 N.E.2d 541. "[S]ufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 124 N.E.2d 148. In addition, a conviction based upon legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 2220, 72 L.Ed.2d 652, 663, citing

Jackson v. Virginia (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560." *Thompkins* at 387.

{¶ 22} In the present case, the evidence elicited at trial was sufficient to support a conviction of kidnapping, in violation of R.C. 2905.01(A)(2) and (3). This statute states:

> **"No person, by force, threat or deception, * * * by any means, shall remove another from the place where the person is found or restrain the liberty of the other person, for any of the following purposes:**
>
> *** ***
>
> **(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 * * *."**

{¶ 23} This court has previously defined the element of "restrain the liberty of the other person" to mean "to limit one's freedom of movement in any fashion for any period of time." *State v. Wingfield* (Mar. 7, 1996), Cuyahoga App. No. 69229. See, also, *State v. Walker* (Sept. 2, 1998), Medina App. No. 2750-M (restraint of liberty does not require prolonged detainment); *State v. Messineo* (Jan. 6, 1993), Athens App. Nos. 1488 and 1493 (grabbing victim's arm and shaking her constituted restraint).

{¶ 24} Ohio law is clear that "[a]n offense under R.C. 2905.01 does not depend on the manner in which an individual is restrained. * * * Rather, it depends on whether the restraint 'is such as to place the victim in the offender's

power and beyond immediate help, even though temporarily.' * * * The restraint 'need not be actual confinement, but may be merely compelling the victim to stay where he is.'" *State v. Mosley*, 178 Ohio App.3d 631, 2008-Ohio-5483, 899 N.E.2d 1021, citing *State v. Wilson* (Nov. 2, 2000), Franklin App. No. 99AP-1259. (Internal citations omitted.) Ohio courts have also held that whether a kidnapping victim was the driver of the vehicle involved in the crime is immaterial. See, e.g., *State v. Conklin* (Jun 23, 1977), Tuscarawas App. No. 1241. What is material is that in *Conklin*, as here, the perpetrator caused the victim to move the vehicle from place to place while under the his control.

{¶ 25} Finally, we note that in *State v. Swearingen* (Aug. 20, 2001), Clinton App. No. CA2001-01-005, the court found sufficient evidence establishing the element of restraint for an abduction conviction where the defendant briefly detained the victim. Id. In that case, the defendant grabbed the victim by her shoulders and sat her on the ground. Id. After the two sat next to each other for a few moments, the defendant pushed the victim back and pinned her to the ground by her wrists for about ten to twenty seconds before releasing her. Id. In finding that the evidence sufficiently established that the victim was restrained, the court reasoned that "[t]he fact that the restraint was brief, fifteen to twenty seconds at most, is immaterial, as even a momentary restraint may constitute an abduction." Id.

{¶ 26} Likewise, in the instant matter, we find the restraint of Jones sufficient to constitute a kidnapping. Wright restrained Jones's liberty while

physically assaulting her in such a manner that she could not defend herself, while she attempted to operate a motor vehicle. When Jones attempted to escape, she pulled into a parking lot, erroneously thinking she was pulling into the Cleveland Police Sixth District Station. Wright held on to her, briefly attempted to get out of the car himself, then forcefully reentered the car and ordered her to continue to drive. Jones further testified that throughout the ordeal, she was afraid for her life.

{¶ 27} When asked why she let Wright back into her car, Jones responded:

> **"I didn't have no choice. I didn't – I couldn't tell this man no. I was still in my seat. This man got out and got back in so fast, it was nothing I could do. It was nothing I could do. If I had a gun I would have shot that man that night because that man jumped on me, and I feared for my life that night. I told the detectives as far as I'm concerned, my life would have ended that night at Forest Hill[s] Park." (Tr. 152.)**

{¶ 28} When asked why she kept driving with Wright in the car, Jones responded: "What was I supposed to do? This man sitting in here, yelling in my ear. I'm already scared. He just jumped on me." (Tr. 153.)

{¶ 29} Jones further testified that Wright continued to hit her as she pulled off and they continued to drive.

{¶ 30} Considering the foregoing, we find sufficient evidence establishing that Wright restrained Jones's liberty or to terrorize or inflict physical harm on her. Wright's first assignment of error is overruled.

{¶ 31} Wright's second assignment of error states as follows:

"APPELLANT'S CONVICTIONS FOR KIDNAPPING RESISTING ARREST, POSSESSION OF DRUGS, DRUG TRAFFICKING AND POSSESSION OF CRIMINAL TOOLS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 32} In *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, the court illuminated its test for manifest weight of the evidence as follows:

> **"Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other.' It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*." Id., quoting Black's Law Dictionary (6 Ed. 1990) 1594. (Emphasis in original.)**

{¶ 33} The court, reviewing the entire record, essentially sits as a "thirteenth juror," weighing the evidence and all reasonable inferences. See *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721. In so doing, we consider the credibility of witnesses and determine 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." Id. 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.

{¶ 34} In this matter, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice in convicting defendant of the offenses. After reviewing Wright's arguments, we are not persuaded that the evidence in this matter weighs heavily against conviction.

{¶ 35} The thrust of Wright's argument is that Jones was not a credible witness, given her inconsistent statements on the witness stand, her status as a daily marijuana user, and her background, which included a prior conviction for shoplifting, and giving false information to the police.

{¶ 36} Wright also points to inconsistencies with the testimony of the police officers, in the incident report, and Jones's testimony. Wright points to typographical errors regarding the amount of money Wright took from Jones, the date of the report in relation to the date of the incident, and the fact that Jones testified she never read her statement. He also points out some minor factual discrepancies regarding the testimony of the officers as to the whereabouts of Wright's jacket in relation to the crime scene. However, Wright fails to point out that the State clarified those typographical errors through testimonial evidence on the witness stand. He also fails to mention the medical records, all of which

support Jones's claim of injury at the hand of Wright. We find that the distinctions between the police report and her testimony are limited, not necessarily inconsistent, and that the medical records support Jones's testimony. Taken together, this evidence does not show that the jury lost its way in convicting Wright.

{¶ 37} We note that when assessing witness credibility "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123, 489 N.E.2d 547. The fact-finder is free to believe all, part, or none of the testimony of each witness appearing before it. *Hill v. Briggs* (1996), 111 Ohio App.3d 405, 412, 676 N.E.2d 547. Indeed, the court below is in a much better position than an appellate court "to view the witnesses, to observe their demeanor, gestures and voice inflections, and to weigh their credibility." *Briggs*, citing *Seasons Coal Co. v. Cleveland*, (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶ 38} Here, the jury, as the trier of fact, weighed the evidence, considered the facts and the credibility of the witnesses, and found Wright guilty.

{¶ 39} Because the evidence does not weigh heavily against conviction, we will not order a new trial. Wright's second assignment of error is overruled.

{¶ 40} Wright's third and final assignment of error states as follows:

> **"APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN TRIAL COUNSEL FAILED TO OBJECT TO THE TRIAL COURT'S INCOMPLETE FLIGHT INSTRUCTION."**

{¶ 41} Within this assignment of error, Wright argues that his counsel fell below an objectively reasonable standard of representation by failing to object to the court's jury instructions on flight, which states as follows:

> **"There may be evidence in this case to indicate that the defendant fled from the scene of the crime. Flight does not in and of itself raise a presumption of guilt, but it may show consciousness of guilt or a guilty connection with a crime. If you find that the defendant did flee from the scene of the crime. You may consider this circumstance in your consideration of the guilt or innocence of the defendant." (Tr. 369.)**

{¶ 42} Wright argues that this instruction included limiting language that advocated a particular finding by the jury. He argues that trial court omitted the

following crucial language which, if included, would have further instructed the jury:

> **"If you find that the facts do not support that the defendant fled the scene, or if you find that some other motive prompted the defendant's conduct, or if you are unable to decide what the defendant's motivation was, then you should not consider this evidence for any purpose. You alone will determine what weight, if any, to give to this evidence." Ohio Jury Instruction 405.25.**

{¶ 43} If the trial court would have included this language in its instructions to the jury, Wright argues that it would have nullified the limiting language already included regarding his flight. Wright further argues that his trial counsel's failure to object to the omission of this language constitutes ineffective assistance. If such language were included in the jury instructions, Wright argues that the outcome of the trial would have been different. Based upon the record before use, we cannot agree.

{¶ 44} To prevail on a claim of ineffective assistance of defense counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness and (2) that counsel's deficient performance resulted in real prejudice. See *Strickland v. Washington* (1984), 466 U.S. 668, 694; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland* at 689. A

strong presumption exists that a licensed attorney is competent and that the challenged action is the product of sound trial strategy and falls within the wide range of professional assistance. Id. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 687.

{¶ 45} However, outside of the blanket assertion that his counsel failed to object to this instruction, Wright offers nothing to rebut the presumption that his counsel's actions were the product of a sound trial strategy. The failure to object is not a per se indicator of ineffective assistance of counsel because counsel may refuse to object for tactical reasons. *State v. Gumm* (1995), 73 Ohio St.3d 418, 428, 653 N.E.2d 253. There are numerous ways to provide effective assistance of counsel, and debatable trial tactics and strategies do not constitute a denial of that assistance. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 402 N.E.2d 1189. "A reviewing court may not second-guess decisions of counsel which can be considered matters of trial strategy." *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128.

{¶ 46} "A properly licensed attorney in Ohio is presumed competent. Thus, the burden of proving ineffectiveness is on the defendant." Id. at 100. Outside of suggesting additional jury instructions, Wright has not shown that the failure of his counsel to object to the jury instructions, and to request a curative instruction, constituted ineffective assistance of counsel.

{¶ 47} Finally, we note that even assuming arguendo that Wright's counsel's representation of him fell below the objective standard of reasonableness found in *Strickland* – which it does not – we find that Wright's argument still fails under the second prong of *Strickland* because he has not shown that his counsel's performance at trial resulted in any demonstrable prejudice, or that the outcome of the trial would have been different. As it stands, the jury found Wright not guilty of two counts of robbery, based solely upon the work of his trial counsel.

{¶ 48} Wright's third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

MELODY J. STEWART, J., and
JAMES J. SWEENEY, J., CONCUR