

[Cite as *State v. Haas*, 2011-Ohio-2676.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 10AP-35
 : (C.P.C. No. 08CR-12-8486)
 Michael Haas, :
 : (REGULAR CALENDAR)
 Defendant-Appellant. :

D E C I S I O N

Rendered on June 2, 2011

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for
appellee.

Michael Haas, pro se.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Michael Haas, appeals from the judgment rendered by the Franklin County Court of Common Pleas after a jury convicted him of the offenses of breaking and entering, safecracking, and multiple counts of theft and burglary. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} During the later part of 2007, Franklin County saw an unusually large number of seemingly related burglaries. One occurred at a business named Spinsect, which was located at 1520 Harmon Avenue, Suite 699 in Columbus, Ohio. The burglary was discovered on December 3, 2007 when the business owner, Matt Leukart, arrived for

work. Upon his arrival, he discovered that windows and doors had been broken and a crossbow, a number of tools, a generator, and Christmas gifts had been taken. In total, Mr. Leukart estimated his loss was approximately \$10,000.

{¶3} Another set of victims, Gary and Jan Wulf, left their residence located at 4117 Delancy Park Drive in Dublin, Ohio, for a vacation during the days of December 12 through December 15, 2007. When they returned home, they found that their front door had been kicked in and many items had been taken, including: a white Lexus, a plasma television, a pair of binoculars, a camera, two guns, a coin collection, checks, and \$2,000 in cash. Their car was recovered days later and had extensive damage.

{¶4} On December 14, 2007, the residence of Bernard Helmick, located at 3001 Kropp Road in Grove City, Ohio, was the subject of a break-in. On that date, Mr. Helmick was out-of-town, but his niece, Amanda Pennington, was staying at his house. When she arrived home, she noticed a man there. At approximately the same time, Mr. Helmick's ex-brother-in-law, Dale Thum, was driving on Kropp Road. As he drove by Mr. Helmick's residence, he noticed two men walking through a field near the house. He believed this was unusual because nothing besides the house was in the area. He also noticed two vehicles in the driveway; one was a red minivan. Mr. Thum drove by the residence before deciding to turn around and inquire further. Mr. Thum stopped and briefly searched through the house. At that point, the red minivan had just left. It was clear that the front door had been kicked in, and many items had been gathered in the kitchen apparently in preparation to be taken. The items included coins, guns, and a set of night-vision binoculars. He then drove after the red minivan to attempt to retrieve its license plate number. During the ensuing chase, Mr. Thum and the red minivan approached speeds of

100 miles per hour. When the red minivan ran through the stop sign of a busy intersection, Mr. Thum decided it was too dangerous to proceed.

{¶5} The residence of Robert Talbott, located at 4252 Shire Cove in Hilliard, Ohio, was the subject of a break-in on the night of December 20, 2007. That night, Mr. Talbott left his residence at approximately 5:30 p.m. to attend a Christmas party. When he returned home at approximately 3:00 a.m., he found that his home had been burglarized. He noticed muddy shoeprints on his carpet and severe damage to his staircase. A collection of three or four guns, including commemorative Army pistols and Colt .45s from World War II were taken from a display case. Nearly all of his 25,000 Silver Eagle coins, which were packaged in green cases from the United States Mint and were valued at approximately \$16 each, were taken from a closet. A safe was taken from his master bedroom. The safe contained diamonds, watches, silver bars, rare coins, and approximately \$180,000 in cash. Mr. Talbott estimated his total loss was approximately \$2 million. Some of Mr. Talbott's items were recovered in April 2009 from Kenneth Koon ("Kenny").

{¶6} Also in late 2007, an ATM was taken from a recreational complex known as "The Barn." After having received a call from an individual who saw an ATM in a dumpster, investigators recovered the ATM and noticed blood on it. They analyzed the blood and linked it to Scott Keaveney ("Scott").

{¶7} Based upon the blood and other tips, Scott was arrested on December 22, 2007. On that date, he spoke to detectives and described in detail a series of burglaries he had committed with James Richesson ("Jamie"), Aaron Eiland ("Aaron"), Todd Fischer ("Todd"), Mark Mayle ("Mark"), Bruce Manahan ("Bruce"), and appellant. At that point, he

turned over a Cartier watch that had been taken from the Shire Cove burglary. Scott also indicated that Kenny purchased most of the stolen goods after the burglaries.

{¶8} On January 4, 2008, an arrest warrant was issued for appellant with regard to the Spinsect property break-in. He voluntarily turned himself in on January 7, 2008 and was released on bond the next day. On January 11, 2008, appellant waived his preliminary hearing and was bound over to the Franklin County Court of Common Pleas for indictment. On February 25, 2008, the Franklin County Grand Jury issued a no bill.

{¶9} On December 1, 2008, the Franklin County Grand Jury issued a 25 count indictment. Eight counts pertained to appellant. Specifically, Count 9 of the indictment charged appellant with breaking and entering, in violation of R.C. 2911.13 and a felony of the fifth degree, Count 10 of the indictment charged appellant with theft, in violation of R.C. 2913.02 and a felony of the fourth degree, Counts 12, 16, and 17 of the indictment charged appellant with 3 counts of burglary, in violation of R.C. 2911.12 and felonies of the second degree, Count 18 of the indictment charged appellant with theft, in violation of R.C. 2913.02 and a felony of the first degree, Count 19 of the indictment charged appellant with theft, in violation of R.C. 2913.02 and a felony of the third degree, and Count 21 of the indictment charged appellant with safecracking, in violation of R.C. 2911.31 and a felony of the fourth degree. After a jury convicted him on all 8 counts, appellant was sentenced to be incarcerated for 20 years and 6 months. It is from this conviction and judgment that appellant appeals and raises the following four assignments of error:

1. THE JUDGMENTS OF CONVICTION ARE CONTRARY TO LAW AND TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT THERE WAS

INSUFFICIENT EVIDENCE ADDUCED TO ESTABLISH EACH AND EVERY ELEMENT OF EACH OFFENSE BEYOND A REASONABLE DOUBT.

2. THE JUDGMENT(S) OF CONVICTION ARE CONTRARY TO [THE] WEIGHT OF THE EVIDENCE.

3. APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE STATE COMMITTED PROSECUTORIAL MISCONDUCT IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

4. THE JUDGMENT OF CONVICTION IS CONTRARY TO LAW AND TO THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT THE APPELLANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL.

{¶10} In his first assignment of error, appellant argues that the evidence adduced at trial was insufficient to support his convictions. We disagree.

{¶11} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved, beyond a reasonable doubt, all of the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶178; *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396.

{¶12} In determining whether a conviction is based on sufficient evidence, an appellate court does not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See *Jenks*, paragraph two of the syllabus; *Thompkins* at 390 (Cook, J., concurring); *Yarbrough* at ¶179

(noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim). We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4; *Jenks* at 273. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386.

{¶13} Appellant presents three arguments in support of his sufficiency of the evidence challenge. First, he argues that one witness, Jamie, admitted that he lied to detectives during their investigation of the burglaries. Consequently, appellant contends that Jamie's trial testimony should not have been believed. Second, appellant argues that the state's case relied on the trial testimony of Jamie and Scott. Appellant notes that he had a highly contentious relationship with these individuals, who apparently had previously tried to kill him. As a result, appellant contends that these individuals' trial testimony should not have been believed because they had a motive to lie. Lastly, appellant notes that Jamie had made a deal with the state to have him transferred to another prison if he testified during appellant's trial. Accordingly, appellant contends that his testimony should not have been believed for this additional reason.

{¶14} It is clear that all of appellant's arguments in support of his first assignment of error challenge the credibility of the testimony offered during the trial. However, because courts do not evaluate witness credibility when reviewing a sufficiency of the evidence challenge, we reject appellant's arguments in this regard. See *Jenks* at syllabus; *Thompkins* at 390; and *Yarbrough* at ¶79. Appellant's convictions are supported by sufficient evidence.

{¶15} By way of appellant's second assignment of error, he argues that his convictions were not supported by the manifest weight of the evidence. Again, after our review, we disagree.

{¶16} While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶25, citing *Thompkins* at 386. Under the manifest weight of the evidence standard, a reviewing court must ask the following question: whose evidence is more persuasive - the state's or the defendant's? *Id.* at ¶25. Although there may be legally sufficient evidence to support a judgment, it may nevertheless be against the manifest weight of the evidence. *Thompkins* at 387; See also *State v. Robinson* (1955), 162 Ohio St. 486 (although there is sufficient evidence to sustain a guilty verdict, a court of appeals has the authority to determine that such a verdict is against the weight of the evidence); *State v. Johnson*, 88 Ohio St.3d 95, 2000-Ohio-276.

{¶17} "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.' " *Thompkins* at 387, citing *Black's Law Dictionary* (6 Ed.1990), 1594.

{¶18} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Wilson* at ¶25, quoting *Thompkins* at 387. In determining whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving any conflicts in the evidence, the jury clearly lost its way and thereby created such a manifest miscarriage of justice that the conviction must be reversed and a new trial must be ordered. *Thompkins* at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶19} A conviction should be reversed on manifest weight grounds only in the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. "The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve." *State v. Radcliff*, 2d Dist. No. 09CA0089, 2010-Ohio-6109, ¶21, citing *State v. DeHass* (1967), 10 Ohio St.2d 230. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶20} Appellant argues his convictions are against the manifest weight of the evidence because he was not apprehended on any of the premises where the crimes occurred. He also notes that none of the stolen items were found in his possession at the

time he was apprehended. He then challenges the credibility of the testimony of Jamie and Scott.

{¶21} The evidence demonstrated that none of the subjects who committed the crimes were apprehended on the premises. However, the break-ins and burglaries clearly occurred. The record further reflects that appellant was not arrested immediately after any of the burglaries. He had ample time to rid himself of any incriminating evidence. Appellant's arguments in this regard are unpersuasive. Finally, we address appellant's credibility challenges.

{¶22} During the trial, the state offered testimony from property owners, patrol officers, evidence technicians, detectives, and fingerprint examiners about the details of each crime scene, what property was taken from each, and the evidence obtained from each. The state also offered testimony from Jamie and Scott about what happened during each of the four crimes at issue herein. The state also offered the testimony of Mr. Thum, who had witnessed some of the events related to the Kropp Road burglary.

{¶23} The testimony showed that Jamie and Scott were involved in a series of 20 or more burglaries in late 2007. According to their testimony, different groups of men were involved in different jobs. With regard to this case, they testified about appellant's specific involvement in four of these jobs.

{¶24} With respect to the Spinsect property, the testimony showed that Todd, Jamie, and appellant were riding around in Jamie's red minivan and came upon Spinsect. They broke a window at the business and then left. They retrieved appellant's car and came back to the Spinsect property. After noticing that no police responded to the broken

window, they broke down the door and took tools, a bin of Christmas presents, and a crossbow. They took the items to Mark's house and sold them to Kenny.

{¶25} With respect to the Kropp Road property, the testimony showed that Scott, Jamie, and appellant were again riding around in Jamie's red minivan. Jamie parked the minivan in the driveway before he and Scott kicked in the door. Appellant joined Jamie and Scott inside and began gathering items to take. At that time, a woman pulled into the driveway. Appellant and Scott fled through the back of the house and ran through a field. Jamie began to flee, but then realized his minivan was still in the driveway. He then went back and spoke with the woman. He told her that he was driving by the house when he noticed two men burglarizing it, so he stopped to check things out. He then told her that he would chase the men down in his minivan. At that point, Jamie drove off and stopped to pick up Scott and appellant. A black Dodge truck then began chasing them. During the chase, the vehicles were driving at speeds in excess of 100 miles per hour. Jamie drove through stop signs and ignored other traffic signals. The only item taken from the Kropp Road property was a blue lockbox with around \$50 in it. Based upon that which Mr. Thum perceived, his testimony corroborated this recitation of the events.

{¶26} With respect to the Delancy Park property, Scott and Jamie had noticed packages on the front porch of the condo. The next night, Scott, Jamie and appellant returned, and the packages were still there. Jamie broke down the door with his shoulder, and the three men went inside. Scott found a couple thousand dollars in cash, and appellant found two lockbox-type safes. The men took those items and left. Jamie and Todd then returned and took a few guns, a television, and a white Lexus.

{¶27} With respect to the Shire Cove property, Scott had previously been inside the house while performing work on it. As a result, he knew that there was a Ferrari on display in the living room. The testimony showed that Scott and Jamie drove by the house at around noon on December 20, 2007, at which point Scott showed Jamie the Ferrari. Scott, Jamie, Bruce and Todd drove by the house a second time at around 4:00 p.m. The same four men returned at around 7:30 p.m. and noticed that a sliding glass door in the back of the house was open. They then left to go to Meijer to buy ski masks and gloves. Upon their return, they went inside and broke into a closet where they found green cases with coins in them. They took around 12 of the green cases and went to Mark's house, where they called Kenny. Shortly thereafter, Kenny and appellant arrived, and Kenny paid \$10,000 for the green cases of coins. He also informed the men that he would purchase more of the cases if they went back to retrieve them.

{¶28} Scott then took appellant to get his car, and those two men returned to the Shire Cove property. Jamie and Todd also returned to the property in Jamie's minivan. Upon their return, Jamie, Todd, Scott and appellant retrieved more of the green cases. They also found a few guns and took those. They then found a safe in another bedroom and spent approximately two hours getting it into the minivan. They returned to Kenny's garage and spent approximately an hour and one-half trying to open the safe with sledgehammers, grinders, and crowbars. When they finally opened it, appellant, Scott, Todd, and Jamie all emptied the contents of the safe into buckets. Scott and Aaron then took the emptied safe and dumped it on the side of the road in a wooded area.

{¶29} Upon receiving a tip, the safe was recovered a few days later. Investigators found and retrieved a fingerprint from the recovered safe. Analysis of the fingerprint indicated that it belonged to appellant.

{¶30} During cross-examination, defense counsel challenged the credibility of Jamie and Scott. Questions regarded the deals they reached in exchange for their testimony. Counsel also inquired about the contentious relationships amongst appellant, Jamie, and Scott, based upon their cooperation with the ongoing investigations. Further, the jury was provided with instructions, which included a caution about the credibility of accomplice testimony. Based upon the record, the jury was well aware of the credibility challenges to the testimony of Jamie and Scott. It nevertheless chose to believe the versions of the events provided by Jamie and Scott, including appellant's involvement with 4 of the more than 20 burglaries that occurred.

{¶31} The jury did not lose its way simply because it believed the state's witnesses. There are no conflicts in the evidence; rather, there are only challenges to credibility. See *State v. Coleman*, 10th Dist. No. 10AP-265, 2011-Ohio-1889, ¶28, citing *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037 ("when considering the manifest weight of the evidence, [an appellate court] must give great deference to the fact finder's determination of the witnesses' credibility"); see also *State v. Jenkins*, 5th Dist. No. 2008 CA 00191, 2009-Ohio-6254, ¶38. Reviewing the record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the trier of facts lost its way, or that a manifest miscarriage of justice has occurred. Appellant's convictions are not against the manifest weight of the evidence.

{¶32} By way of his third assignment of error, appellant argues that the prosecutor engaged in misconduct that encroached upon his due process rights and denied him a fair trial. Again, we disagree.

{¶33} The test for prosecutorial misconduct is whether the conduct complained of deprived the accused of a fair trial. *State v. Jackson*, 92 Ohio St.3d 436, 442, 2001-Ohio-1266, citing *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 24. The relevant analysis concerns the fairness of the trial rather than the culpability of the prosecutor. *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940.

{¶34} Appellant presents two arguments in support of his third assignment of error. First, he argues that Jamie was coerced into testifying. Second, he notes that one of the victims in this matter knew one of the prosecutors representing the state.

{¶35} The record clearly demonstrates that Jamie entered a plea agreement, under which he agreed to testify truthfully for the prosecution. The day before Jamie was set to testify, however, he began having second thoughts about testifying. His reluctance was based upon threats he had apparently received from prison inmates. One inmate told him that a price was on his head, while another told him that his house would be burned down with his children inside of it. When Jamie informed prosecutors of his apprehension, prosecutors visited him several times to explain what would happen if he chose not to testify. Jamie was given the choice: he could testify truthfully and uphold his side of his plea agreement, or he could face prosecution for all of the crimes he committed.

{¶36} We note that Jamie's testimony merely corroborated Scott's. Nothing in the record suggests that his testimony was anything but truthful. In any event, the jury was informed about Jamie's apprehension in testifying and could assess his credibility in light

of that information. See *State v. Sanders*, 92 Ohio St.3d 245, 271, 2001-Ohio-189. The reason Jamie ultimately chose to testify did not affect the fairness of appellant's trial. Accordingly, there was no violation of appellant's due process rights. *Id.*, citing *Overton v. United States* (C.A.5, 1971), 450 F.2d 919, 920.

{¶37} The record also demonstrates that the victim of the Shire Cove burglary knew one of the prosecutors in this matter. Appellant argues that certain favors were granted to this victim in exchange for his testimony. However, the record is completely devoid of anything supporting such an argument. The victim's testimony had no relation to appellant, but, instead, merely regarded his residence and what items were missing following the burglary. Based upon the record before us, in no way was appellant deprived of his right to a fair trial because a victim knew a prosecutor. As a result, we find no prosecutorial misconduct in the instant matter.

{¶38} By way of his fourth assignment of error, appellant argues that he received ineffective assistance of counsel. Again, we disagree.

{¶39} In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301. Therefore, the burden of showing ineffective assistance of counsel is on the party asserting it. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675. Additionally, in fairly assessing counsel's performance, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶101.

{¶40} Trial strategy and even debatable trial tactics do not establish ineffective assistance of counsel. *Id.* A reviewing court must be "highly deferential to counsel's performance and will not second-guess trial strategy decisions." *State v. Tibbetts*, 92 Ohio St.3d 146, 166-67, 2001-Ohio-132. Strategic choices made after substantial investigation "will seldom if ever" be found wanting. *Strickland v. Washington* (1984), 466 U.S. 686, 681, 104 S.Ct. 2052, 2061. "Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment." *Id.*

{¶41} "[T]he 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 court cannot be relied on as having produced a just result." *Id.* at 686, 104 S.Ct. at 2064. In order to succeed on a claim of ineffective assistance of counsel, appellant must satisfy a two-prong test. First, he must demonstrate that his trial counsel's performance was deficient. *Id.* at 687, 104 S.Ct. at 2064. This requires a showing that his counsel committed errors which were "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* If he can show deficient performance, he must next demonstrate that he was prejudiced by the deficient performance. *Id.* To show prejudice, he must establish there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is one sufficient to erode confidence in the outcome. *Id.* at 694, 104 S.Ct. at 2068.

{¶42} In this appeal, appellant notes that his trial counsel filed a motion to dismiss Counts 9 and 10 of the indictment in the trial court based upon purported speedy trial violations. However, according to appellant, his trial counsel should have requested oral argument on the issue. Instead of doing so, counsel merely asserted an objection for the record when his written motion was denied.

{¶43} This is precisely the type of trial strategy that we may not second-guess when presented with a claim of ineffectiveness. Indeed, based upon the record, trial counsel specifically set forth appellant's arguments by filing a written motion. He also raised the issue on the record before the trial commenced. When the trial judge denied appellant's motion, counsel noted an objection for purposes of appeal. In this appeal, appellant does not challenge the substance of the ruling on the issue but, instead, only argues that counsel should have done more in presenting it to the court. We disagree because appellant's trial counsel employed a trial strategy based upon his professional judgment. Appellant did not receive ineffective assistance of counsel in this regard.

{¶44} Appellant next argues that his trial counsel should have filed a motion to suppress statements made by Scott during the investigation. He contends that Scott was under the influence of cocaine when he gave statements to investigators. However, the record indicates otherwise. Indeed, although Scott testified that he had used cocaine early in the morning on December 22, 2007, he also testified that he was not interviewed until approximately 3:20 p.m. Investigators testified that he was alert, coherent, and responsive to questioning. The testimony also undisputedly showed that he did not appear to be under the influence of any drugs at the time of the investigation.

{¶45} "When claiming ineffective assistance due to failure to file or pursue a motion to suppress, an appellant must point to evidence in the record showing there was a reasonable probability the result of trial would have differed if the motion had been filed or pursued." *State v. Gaines*, 11th Dist. No. 2006-L-059, 2007-Ohio-1375, ¶17, citing *State v. Clark*, 11th Dist. No. 2002-A-0056, 2003-Ohio-6689, ¶28. Moreover, the failure to file a motion to suppress constitutes ineffective assistance of counsel only if, based upon the record, the motion would have been granted. *State v. Robinson* (1996), 108 Ohio App.3d 428, 433; see also *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶29-32 (failure to file motion to suppress pretrial statements constitutes "tactical judgment" and not ineffective assistance of counsel). The failure to file a futile motion to suppress does not amount to ineffective assistance of counsel. See *Robinson* at 433.

{¶46} Appellant has failed to point to any evidence demonstrating that the trial would have yielded different results had a motion to suppress been filed. Instead, appellant merely makes the conclusory statement that Scott was under the influence of drugs at the time he provided statements. See *State v. Woodard*, 11th Dist. No. 2009-A-0047, 2010-Ohio-2949, ¶15. Accordingly, based upon the record before us, appellant did not receive ineffective assistance of counsel based upon the failure to file a motion to suppress.

{¶47} Appellant's final argument in support of his ineffectiveness claim is that counsel should have dismissed a juror when she expressed concern over her own safety. According to the record, in the middle of trial, one juror left a voicemail with the court expressing concern over the fact that her place of employment was discussed during voir dire. The trial judge conducted a conference with counsel outside the presence of all

jurors and then inquired further of the juror as to whether she could deliberate fairly and freely despite her concerns. Upon further inquiry, the juror indicated that she no longer had such concerns and could discharge her duties as a juror. Neither side raised any objection to her continued service as a member of the jury.

{¶48} Again, it was a tactical decision based upon professional judgment as to whether trial counsel should have objected to the juror's continued involvement in the case. We must not second-guess such trial tactics and instead must defer to counsel's professional judgment when presented with an ineffective assistance claim. Appellant did not receive ineffective assistance in this regard.

{¶49} Based upon the foregoing, we overrule each of appellant's four assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, P.J., and TYACK, J., concur.
