[Cite as *State v. Lofton*, 2009-Ohio-3732.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91330

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DWAYNE LOFTON

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTION AFFIRMED; REMANDED FOR CORRECTION OF ENTRY OF CONVICTION

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-499717

BEFORE: McMonagle, P.J., Blackmon, J., and Stewart, J.

RELEASED: July 30, 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).

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant, Dwayne Lofton, appeals his aggravated burglary, kidnapping, aggravated robbery, and felonious assault convictions. We affirm the findings of guilt, but remand for correction of the entry of conviction.

{¶ 2} In August 2007, Lofton was charged with one count each of the above crimes, all with notice of prior conviction and repeat violent offender specifications. Trial was set for November 26, 2007, but was continued on that date at defense counsel's behest so that he could investigate a new witness; counsel filed a notice of alibi the following day, November 27. That same day (November 27), defense counsel also filed a motion to withdraw and appoint new counsel, citing "an irreparable breakdown in the attorney/client relationship."

{¶ 3} On the new trial date, January 10, 2008, Lofton indicated that he wished to have his attorney stay on the case and counsel indicated that he was prepared to continue his representation of Lofton. The court continued the trial, however, because of lack of jurors.

{¶ 4} A jury trial started on January 15. The parties stipulated to the notice of prior convictions and repeat violent offender specifications and they were bifurcated from the trial.[1] At the conclusion of the State's case, the defense made a Crim.R. 29 motion for acquittal, which was denied. The defense rested.

[1] The court's January 23, 2008 entry states that the jury found Lofton guilty of the

{¶ 5} Lofton was found guilty of all counts and the trial court sentenced him to seven years in prison.

I. TRIAL TESTIMONY

{¶ 6} The victim, Joseph Jackson, testified that on the evening of June 3, 2007, someone knocked on the door to his home. Jackson asked who was there, and the individual responded "Dwayne." "Dwayne" was Lofton, who lived in the neighborhood, and with whom Jackson had been acquainted for five or six years. Jackson, who only knew Lofton by his first name, described him as a "drifter" who did odd jobs for him around his house for money because he was "always in need." Jackson further testified that he and Lofton had interacted in a friendly, neighborly way at Jackson's house on several prior occasions. According to Jackson, because of his prior interactions with Lofton, he was aware that Lofton was afraid of dogs; Jackson owned a dog.

{¶ 7} On the evening of the incident, Jackson allowed Lofton to come into his house, and the two had drinks, smoked cigarettes, and talked. Lofton told Jackson about a difficult family situation he was experiencing and asked Jackson for money. Jackson responded "[e]very time I see you, you never have any money." Lofton then let the dog out of the house, locked the door, pulled out "a knife of sorts," and threatened Jackson. When Jackson did not give Lofton

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notice of prior convictions and repeat violent offender specifications. We remand for the limited purpose of correcting the record to reflect that the specifications were stipulated to and bifurcated from the jury trial.

any money, Lofton assaulted Jackson, hitting him with his fist, a glass bottle, and a hammer, as he dragged him through various parts of the house demanding money. Jackson testified that he had a difficult time getting away from Lofton because of an injury that had occurred a few weeks before.

{¶ 8} Eventually, however, Jackson was able to free himself from Lofton and locked himself in the upstairs bathroom. While in the bathroom, he heard a lot of commotion in the house. Jackson remained in the bathroom until the following morning, when he crawled to a bedroom and yelled out a window for help.

{¶ 9} Jackson described his house in the aftermath as looking "like a cyclone had gone through it." The responding paramedic and police officer corroborated Jackson's description, describing "big puddles of blood on the floor in different spots," blood on the sofa and walls, overturned furniture, and broken items throughout the house. Both also testified to seeing a hammer with blood on it. The crime scene pictures, which were admitted into evidence, depicted the scene as testified to, as well as the injuries sustained by Jackson.

{¶ 10} Jackson was transported to the hospital, where he was treated overnight for his injuries. He testified that approximately $700 in cash he had in his home was missing after the attack.

{¶ 11} Jackson admitted that when first questioned by the police on the scene, he did not identify Lofton as his assailant because he could not remember

his name. Later, however, at the hospital, he remembered that his assailant's name was "Dwayne," and so informed the police.

{¶ 12} During the investigation, two photo arrays were shown to Jackson. The first one contained a photo of an individual named "Dwayne," but who was not "Dwayne Lofton." Jackson selected an individual as his assailant (not the "Dwayne"), but testified that he had "doubt" about the identification. Similarly, the investigating detective testified that Jackson "reviewed the page for a few minutes * * * [and] [n]othing really jumped out at him right away. Eventually [Jackson] settled on number 5 and he told [the detective] that that looks like him[,] * * * [but he could not] 'be a hundred percent sure[.]'"

{¶ 13} After further investigation the detective presented a second photo array to Jackson. Lofton's photo was in that array, and Jackson, according to the detective, "almost immediately" selected Lofton as his assailant. Jackson testified that he was "100 percent sure" he had picked the right person.

{¶ 14} For ease of discussion, we will address the assignments of error out of order.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

{¶ 15} In his third assignment of error, Lofton contends that his trial counsel was ineffective.

{¶ 16} Under the Sixth Amendment to the United States Constitution, a criminal defendant has a right to effective assistance of counsel. Counsel is

ineffective if: (1) his or her performance is deficient; and (2) prejudice arose from counsel's performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of syllabus, following *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. In order to show deficient performance, a defendant must prove that his counsel's performance fell below an objective level of reasonable representation. *Bradley* at 142. In other words, the court must determine if "there has been a substantial violation of any of defense counsel's essential duties to his client." *State v. Lytle* (1976), 48 Ohio St.2d 391, 396, 358 N.E.2d 623, vacated on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154.

{¶ 17} To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 694.

{¶ 18} Failure to file a motion to suppress does not constitute ineffective assistance of counsel per se. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52. The Sixth Amendment's guarantee of assistance of counsel does not require trial counsel to file a motion to suppress in every case. *State v. Carey*, Cuyahoga App. No. 88487, 2007-Ohio-3073, ¶25.

{¶ 19} To establish ineffective assistance of counsel for failure to file a motion to suppress, a defendant must prove that there was a basis to suppress the evidence in question. *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶35. However, even when some evidence in the record supports a motion to suppress, we presume that defense counsel was effective if "'counsel could reasonably have decided that the filing of a motion to suppress would have been a futile act.'" *State v. Chandler*, Cuyahoga App. No. 81817, 2003-Ohio-6037, ¶37, quoting *State v. Edwards* (July 11, 1996), Cuyahoga App. No. 69077, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717. Trial counsel is not required to file a motion to suppress when its success is not a given, and filing it is not without risks. *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, ¶69, citing to *Madrigal* at 389.

{¶ 20} Lofton argues that his trial counsel should have attempted to suppress Jackson's out-of-court identification of him because "[t]he circumstances surrounding the entire photo array selection process rendered the process 'unduly suggestive.'" In particular, Lofton contends that he was the only individual in the second photo array fitting the same description as the individual Jackson identified from the first photo array. We disagree.

{¶ 21} In *Neil v. Biggers* (1972), 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401, the United States Supreme Court held that a determination as to whether pretrial identification procedures violate due process of law must be derived from

the totality of the circumstances, including such factors as " * * * (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. * * * " Id. at 199-200. Within the context of these factors, the identification procedures are scrutinized to determine if they are so unnecessarily suggestive and conducive to irreparable mistaken identification that the accused is denied due process of law.

{¶ 22} We have carefully examined the photo array used to identify Lofton and have considered, in particular, how it compares to the first photo array. It is our conclusion that the second photo array was not unnecessarily or impermissibly suggestive.

{¶ 23} Moreover, Lofton's attempts to equate Jackson's error with the first identification to suggestiveness is unpersuasive. Jackson testified that he had "doubt" when he made the first identification, as opposed to when he made the second identification and was "100 percent sure." The investigating detective corroborated Jackson's testimony on his identifications.

{¶ 24} We are also not persuaded by Lofton's arguments that Jackson's identification of him as his assailant was unreliable because Jackson had been drinking that evening and was under stress, fearful, and anxious. Jackson had

known Lofton for five or six years and the two had occasionally "socialized." Jackson also had the opportunity to view Lofton on the evening of the incident, before the assault, as the two "socialized." Jackson "almost immediately" identified Lofton as his assailant and was "100 percent sure" about his identification.

{¶ 25} In light of the above, counsel was not ineffective for not filing a motion to suppress.

{¶ 26} Lofton also argues that counsel was ineffective because he did not file a notice of alibi. Counsel, however, did file a notice of alibi on November 27, 2007, the day after the trial date was continued, so that counsel could investigate the claimed alibi. The witness did not testify, but, generally, counsel's decision whether to call a particular witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court. *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶125. We do not second-guess here.

{¶ 27} Finally, Lofton claims that his counsel was ineffective because he failed to properly communicate with him. The record, however, reflects that Lofton declined the court's offer of new counsel on January 10, 2008, just days prior to trial. In particular, Lofton told the court: "I'm pretty confident with [counsel]. I know he can do his job real good. * * * I'm pretty sure he's good enough to fight my case for me." After a recess so that Lofton and counsel could

confer, Lofton indicated that he was prepared to proceed to trial with counsel, and counsel likewise indicated that he was ready to so proceed.

{¶ 28} On this record, counsel was not ineffective, and the third assignment of error is overruled.

III. MANIFEST WEIGHT OF THE EVIDENCE

{¶ 29} In his first assignment of error, Lofton contends that his convictions were against the manifest weight of the evidence. In his second assignment of error, he presents a manifest weight challenge, in particular to the aggravated burglary conviction.

{¶ 30} A manifest weight challenge questions whether the prosecution has met its burden of persuasion. *State v. Thompkins,* 78 Ohio St.3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541. When considering a manifest weight claim, a reviewing court must examine the entire record, weigh the evidence, and consider the credibility of witnesses. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80, 434 N.E.2d 1356. The court may reverse the judgment of conviction if it appears that the factfinder "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins* at 387, quoting *Martin*, supra at 175. A judgment should be reversed as against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387.

A. Reliability of Identification and Inconsistencies in Jackson's Testimony

{¶ 31} Lofton contends that his convictions were against the manifest weight of the evidence because Jackson's identification of him was unreliable and his testimony was inconsistent. We disagree.

{¶ 32} As already discussed, the identification was neither suggestive nor unreliable. In sum, the photo array from which Lofton was identified did not single him out, and Jackson's identification of him — a man he had known for five or six years, had previously interacted with, and had interacted with on the evening of the incident — was reliable.

{¶ 33} In regard to Jackson's credibility, Lofton first argues that it was undermined because Jackson initially could not remember his assailant's name, despite the fact that his assailant had announced himself at Jackson's door that evening, Jackson had known him for several years, and previously "socialized" with him. The gist of Jackson's testimony, however, was that he was only casually acquainted with Lofton; he knew Lofton from the neighborhood (only by first name), and because he was "always in need," Jackson would help him by allowing him to do odd jobs in exchange for money, and the two would drink, talk, and smoke cigarettes. In light of that testimony, it was not so incredible that Jackson initially "could not remember" Lofton's name, particularly after having suffered a traumatic and brutal beating.

{¶ 34} Lofton next cites inconsistencies in Jackson's testimony about the details of the attack. Again, there is nothing incredible about Jackson's testimony on this point that would undermine his credibility such that a "manifest miscarriage of justice" was created. The sum of Jackson's testimony as to the assault was that Lofton asked him for money, Jackson made a comment about Lofton being needy, Jackson did not give him any money, and Lofton beat and dragged Jackson through the house demanding money. Other trial witnesses and the physical evidence corroborated the attack.

{¶ 35} Lofton also contends that the medical records confused Jackson's testimony because a nurse's note stated that Jackson indicated that four people assaulted him and he did not know who they were or if they were male or female. Jackson, however, clarified during his trial testimony that the note referred to the attack he suffered three or four weeks before the attack in this case. Further, the previous attack was noted elsewhere in the medical records.

{¶ 36} In sum, although this court considers the credibility of witnesses when engaging in a manifest weight of the evidence review, generally, the weight to be given to the evidence and the credibility of the witnesses is primarily for the trier of fact to resolve. *Thomas*, supra. With that in mind, we find that there was nothing so incredible about Jackson's testimony that undermined his credibility such that a "manifest miscarriage of justice" was created.

{¶ 37} Accordingly, the first assignment of error is overruled.

B. Aggravated Burglary

{¶ 38} R.C. 2911.11(A)(1), governing aggravated burglary, provides:

{¶ 39} "(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if * * *: "(1) The offender inflicts, or attempts or threatens to inflict physical harm on another[.]"

{¶ 40} Lofton contends that the evidence demonstrates that he did not trespass in Jackson's home because Jackson allowed him to enter his home. He cites *State v. Barksdale* (1983), 2 Ohio St.3d 126, 443 N.E.2d 501, in support of his contention. In that case, the accused entered an automobile dealer's car lot that was open to the public, and broke into a locked car. The Ohio Supreme Court reversed the accused's conviction for breaking and entering on the basis that the State had failed to prove the essential element of trespass. In so holding, the Court reasoned that the automobile dealer's tacit invitation to the general public to enter the lot was a grant of privilege and that one who entered the lot with the purpose of committing a felony thereon did not relinquish that privilege and, therefore, no trespass had been demonstrated.

{¶ 41} This case is readily distinguishable from *Barksdale*. In particular, a private home is involved here while *Barksdale* involved a used car lot open to the general public. "The interest of a private person in the inviolability of his home is materially greater than that of a business owner in his business premises, particularly where the business premises are open to the public." *State v. Steffen* (1987), 31 Ohio St.3d 111, 115, 509 N.E.2d 383.

{¶ 42} In *Steffen*, the victim allegedly invited the defendant into her home so that he could demonstrate a product he was attempting to sell. Once in the residence, the defendant assaulted and ultimately murdered the victim. The Court upheld the defendant's aggravated burglary conviction, focusing on the fact that although the victim initially allegedly gave the defendant permission to enter her home, that permission was terminated. The Court reasoned that, by the assault, a strong inference arose that the privilege was terminated and, further, the defendant knew so.

{¶ 43} Support for the Court's reasoning is found in R.C. 2911.21(A), setting forth criminal trespass. The statute provides: "No person, without privilege to do so, shall * * *: "(1) Knowingly enter *or remain* on the land or premises of another * * *." (Emphasis added.) (See, also, *State v. Morton*, 147 Ohio App.3d 43, 2002-Ohio-813, 768 N.E.2d 730, wherein this court upheld an aggravated burglary conviction where the victim initially gave the defendant permission to enter his home.)

{¶ 44} *State v. Greer* (Apr. 6, 1994), Hamilton App. No. C-930313, cited by Lofton, is distinguishable from this case. In *Greer*, the First Appellate District reversed the defendant's aggravated burglary conviction. The victim in that case invited the defendant and his friend to her apartment for a drink. During the defendant's visit, he took property belonging to the victim. The victim was not physically injured by the defendant and she did not ask the defendant to leave prior to the theft.

{¶ 45} Here, however, as in *Steffen*, the evidence indicated that Lofton's privilege to be in Jackson's house terminated, and Lofton knew so, when he began his assault on Jackson. Jackson specifically testified that when the assault began, he wanted Lofton to leave his home. Lofton, unlike the victim in *Greer*, was physically injured. Thus, Jackson revoked his initial consent, and therefore, the weight of the evidence demonstrated that Lofton trespassed in Jackson's home.

{¶ 46} Accordingly, the second assignment of error is overruled.

{¶ 47} Conviction affirmed; case remanded for correction of entry of conviction as set forth in footnote one.

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. 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.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
MELODY J. STEWART, J., CONCUR