[Cite as *State v. Milton*, 2009-Ohio-6312.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92914

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CALVIN MILTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-499867

BEFORE: Celebrezze, J., Kilbane, P.J., and Dyke, J.

RELEASED: December 3, 2009

JOURNALIZED:

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Calvin Milton, appeals his convictions for breaking and entering and petty theft. After a thorough review of the record and for the following reasons, we affirm.

{¶ 2} In the early morning hours between February 15 and February 16, 2007, someone broke into the Mt. Carmel Deli. The owner of the store, Tawfak Dari ("Dari"), discovered the break-in when he arrived to open for business that morning. Dari noticed that cigarettes and a change bucket had been taken along with $300 from the store's cash register. After reviewing a surveillance video from the night in question, which was unavailable at trial, Dari immediately recognized appellant as the individual who broke into his store. According to Dari, the video showed the suspect coming into the store through a trapdoor in the floor, meaning the perpetrator entered the building through one of the basement windows.

{¶ 3} Appellant was arrested and charged with one count of breaking and entering in violation of R.C. 2911.13(A), a fifth-degree felony, and one count of petty theft in violation of R.C. 2913.02(A)(1), a first degree misdemeanor. Appellant waived his right to a jury trial, and a bench trial commenced on February 18, 2009.

{¶ 4} The state presented two witnesses at trial. Dari testified that he recognized appellant immediately from the surveillance video because

appellant had performed wiring work in the store's basement and had been a frequent customer of the store. Officer David Butler testified that he had viewed the surveillance video and had seen a suspect in a hooded sweatshirt who, at one point, looked up at the surveillance camera. Officer Butler also testified that it appeared as if the suspect had entered the building through one of the basement windows and gained entry to the store through a trapdoor.

{¶ 5} Although the surveillance video itself was not available to be viewed at trial, a photograph of the video on a television screen was admitted into evidence. This image was hazy at best, but Dari and Detective Butler both testified that the man looked up at the video camera, and Dari immediately recognized appellant as the perpetrator.

{¶ 6} At the close of the state's case, appellant made a Crim.R. 29 motion for acquittal arguing that there was insufficient evidence to convict him of the crimes charged. The trial court denied this motion. Appellant rested without presenting any evidence and renewed his motion for acquittal, which was again denied. The trial court found appellant guilty of both breaking and entering and petty theft, sentenced him to an aggregate sentence of ten months, and ordered him to pay a fine of $300 to Dari. This appeal followed.

{¶ 7} Appellant presents two assignments of error for our review. In his first assignment of error, he argues that his conviction was based on insufficient evidence and was against the manifest weight of the evidence. In his second assignment of error, he argues that he was denied the effective assistance of counsel.

Sufficiency and Manifest Weight

{¶ 8} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 486, 124 N.E.2d 148. A conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 72 L.Ed.2d 652, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 9} The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. When reviewing a claim based on the sufficiency of the evidence, the appellate court must determine, after viewing the evidence in a light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492; *Jackson v. Virginia*, supra.

{¶ 10} Sufficiency of the evidence is subjected to a different standard than is manifest weight of the evidence. Article IV, Section 3(B)(3) of the Ohio Constitution authorizes appellate courts to assess the weight of the evidence independently of the fact-finder. Thus, when a claim is assigned concerning the manifest weight of the evidence, an appellate court "has the authority and duty to weigh the evidence and to determine whether the findings of * * * the trier of facts were so against the weight of the evidence as to require a reversal and a remanding of the case for retrial." *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, 345, 82 N.E.2d 709.

{¶ 11} The United States Supreme Court recognized the distinction in considering a claim based on the manifest weight of the evidence as opposed to sufficiency of that evidence. The Court held in *Tibbs v. Florida*, supra, that, unlike a reversal based upon the insufficiency of the evidence, an appellate court's disagreement with the jurors' weighing of the evidence does not require special deference accorded verdicts of acquittal, i.e., invocation of the double jeopardy clause as a bar to relitigation. Id. at 43. Upon application of the standards enunciated in *Tibbs*, the court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated:

{¶ 12} "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Id. at 720.

{¶ 13} Appellant's conviction was not based on insufficient evidence, nor was it against the manifest weight of the evidence. The state presented two witnesses, who both viewed the surveillance video and testified that the suspect looked up at the video camera. Dari testified that he immediately recognized appellant as the suspect and that appellant was familiar with the store's layout due to being a frequent customer and having done wiring work in the store's basement.

{¶ 14} Although the surveillance video itself was not available at trial and the photo that was presented was of poor quality, we do not find this to be dispositive. Dari testified that he immediately recognized appellant as the perpetrator when he viewed the surveillance video. Dari also provided Detective Butler with appellant's name as the man who broke into the store when Detective Butler made his initial report. At no point did Dari contradict himself in his testimony, nor did he waiver from his claim that appellant was the man portrayed in the surveillance video. Viewing the

evidence in a light most favorable to the prosecution, appellant's conviction was not based on insufficient evidence.

{¶ 15} We must utilize the standard enunciated in *Martin*, supra, when considering appellant's claim that his conviction was against the manifest weight of the evidence. This requires us to review and weigh all evidence presented, consider all reasonable inferences, and determine whether the trial court lost its way in finding appellant guilty of breaking and entering and petty theft.

{¶ 16} A review of the evidence presented at trial, as outlined above, shows that appellant's conviction was not against the manifest weight of the evidence. Dari's identification of appellant as the man in the surveillance video, coupled with the fact that appellant was familiar with the store's basement (which is significant because the perpetrator entered the building through a basement window and came into the store through a trapdoor), could lead a rational juror to find appellant guilty of the crimes charged. At no point in the trial testimony was the credibility of Dari or Detective Butler called into question.

{¶ 17} After reviewing and weighing all of the evidence presented at trial, we find that the trial court did not lose its way in finding appellant guilty of breaking and entering and petty theft. Accordingly, appellant's first assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 18} In order to substantiate a claim of ineffective assistance of counsel, appellant is required to demonstrate that: 1) the performance of defense counsel was seriously flawed and deficient; and 2) the result of appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 102 S.Ct. 2211, 72 L.Ed.2d 652; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 19} In reviewing a claim of ineffective assistance of counsel, it *must* be presumed that a properly licensed attorney executes his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

{¶ 20} The Ohio Supreme Court held in *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373, that "'[w]hen considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.' *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, 2 O.O.3d 495, 498, 358 N.E.2d 623,

627, vacated in part on other grounds [*State v. Lytle*] (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154. This standard is essentially the same as the one enunciated by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674."

{¶ 21} The *Bradley* court went on to say that "[e]ven assuming that counsel's performance was ineffective, this is not sufficient to warrant reversal of a conviction. 'An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. * * *' To warrant reversal, '[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.' In adopting this standard, it is important to note that the court specifically rejected lesser standards for demonstrating prejudice." (Internal citations omitted.) Id. at 142.

{¶ 22} Appellant argues that he was denied his constitutionally guaranteed right to the effective assistance of counsel. Specifically, appellant argues that his trial counsel was ineffective when he failed to object to hearsay evidence. At trial, the state asked Dari about a series of conversations Dari had with appellant's brother. Dari testified as follows: "I

tried to call his cousin. They gave me his brother's number, and I called him. I told him to bring what he took. We don't have to go through court or any problem. He said he's going to talk to his brother, and he was telling me every day I'm going to talk to him, I'm going to talk to him, and then he said, I can't control my brother, I can't talk with him anymore."

{¶ 23} Appellant argues that his trial counsel should have raised a hearsay objection to the foregoing testimony and that failure to do so denied appellant the effective assistance of counsel. This argument is flawed. It is well established that trial tactics are within the sound discretion of trial counsel and, even if the most effective tactics are not employed, will not constitute ineffective assistance of counsel. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶146 ("debatable trial tactics do not establish ineffective assistance of counsel"). Although appellant's trial counsel did not object to the line of questioning described above, he did question Dari on these conversations during cross-examination. As such, this was a strategic decision made at trial that was within the sound discretion of appellant's trial counsel.

{¶ 24} Appellant also failed to demonstrate how trial counsel's failure to object affected the outcome of his trial. It is axiomatic that, for an appellant to succeed on a claim of ineffective assistance of counsel, he must be able to prove that there is a reasonable probability that he would have been found

not guilty had it not been for trial counsel's actions or failure to act. The hearsay testimony on which appellant bases his claim of ineffective assistance of counsel did not affect the evidence presented against him in any manner. In fact, appellant has not pointed to one scintilla of proof that the outcome of his trial would have been different had his trial attorney objected to the hearsay statements. As such, appellant is unable to show that he was denied the effective assistance of counsel. Accordingly, appellant's second assignment of error is overruled.

Conclusion

{¶ 25} After reviewing the record in its entirety, we find that appellant's convictions for breaking and entering and petty theft were not based on insufficient evidence nor were they against the manifest weight of the evidence. Likewise, appellant was not denied the effective assistance of trial counsel. As such, both of appellant's assignments of error are 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. 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.

FRANK D. CELEBREZZE, JR., JUDGE

MARY EILEEN KILBANE, P.J., and
ANN DYKE, J., CONCUR