

[Cite as *Brooklyn v. Woods*, 2016-Ohio-7603.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION  
No. 103120

**CITY OF BROOKLYN**

PLAINTIFF-APPELLEE

vs.

**WILLIAM WOODS**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
APPLICATION DENIED

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Parma Municipal Court  
Case No. 14CRB03624  
Application for Reopening  
Motion No. 497562

**RELEASE DATE:** October 28, 2016

**FOR APPELLANT**

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**ATTORNEY FOR APPELLEE**

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EILEEN T. GALLAGHER, J.:

{¶1} William Woods has filed an application pursuant to App.R. 26(B) to reopen his direct appeal in *State v. Woods*, 8th Dist. Cuyahoga No. 103120, 2016-Ohio-1223. For the reasons that follow, the application to reopen is denied.

{¶2} “To succeed on an App.R. 26(B) application, a petitioner must establish that counsel’s performance fell below an objective standard of reasonable representation and that he was prejudiced by the deficient performance.” *State v. Adams*, 146 Ohio St.3d 232, 2016-Ohio-3043, 54 N.E.3d 1227, ¶ 2, citing *State v. Dillon*, 74 Ohio St.3d 166, 171, 1995-Ohio-169, 657 N.E.2d 273 ; *see also Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768.

{¶3} In *Strickland*, the United States Supreme Court held that a court’s scrutiny of an attorney’s work must be highly deferential. The court further stated that it is all too tempting for a defendant to second-guess his attorney after conviction and that it would be too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Thus, a court must indulge in a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*.

{¶4} Woods contends that his appellate counsel was ineffective for failing to raise the following assignments of error: (1) failure to separate witnesses constituted trial court error and ineffective assistance of counsel; (2) failure to properly authenticate evidence constituted substantial error and ineffective assistance of counsel; (3) failure to properly identify video evidence constituted substantial error and ineffective assistance of counsel; (4) non-disclosure of exculpatory evidence constituted prosecutorial misconduct and ineffective assistance of counsel; (5) failure to confront and impeach witness with video and effective cross-examination constituted ineffective assistance of counsel; (6) failure to enlist an expert witness to assist with video evidence constituted ineffective assistance of counsel; (7) the cumulative effect of ineffective assistance of counsel is grounds for reversal; and (8) the decision was against the manifest weight of the evidence.

{¶5} Proposed assignments of error 1-7 allege that appellate counsel should have presented an assignment of error alleging ineffective assistance of trial counsel in the various respects.

{¶6} We summarily reject proposed assignment of error 8 because appellate counsel did argue that the convictions were against the manifest weight of the evidence, which we addressed. *Woods*, 8th Dist. Cuyahoga No. 103120, 2016-Ohio-1223, ¶ 23-39. Woods cannot establish an ineffective assistance of appellate counsel claim based on an argument that appellate counsel actually raised.

{¶7} Woods has not established even a colorable claim for ineffective assistance of appellate counsel's decision not to raise an assignment of error regarding trial counsel's failure to allege a violation of the court-ordered separation of witnesses. "The separation of witnesses is a matter within the discretion of the trial court." *Cleveland v. Wirtz*, 8th Dist. Cuyahoga No. 62751, 1993 Ohio App. LEXIS 3735, at \*19 (July 29, 1993), citing *Oakwood v. Makar*, 11 Ohio App.3d 46, 463 N.E.2d 61 (8th Dist.1983), citing *Euclid v. Fitzthum*, 48 Ohio App.2d 297, 357 N.E.2d 402 (8th Dist.1976).

{¶8} Evid.R. 615 permits "an officer or employee of a party which is not a natural person designated as its representative by its attorney" or "a person whose presence is shown by a party to be essential to the presentation of his cause" to remain at the trial during the testimony of other witnesses. Here, the city designated one of the loss prevention officers who was involved in the investigation, Dela Cruz, as the representative. It appears from the record that Dela Cruz was present during the testimony of the other witness. However, there is no indication that this impacted his testimony. In fact, Dela Cruz's testimony was different in some respects from the other witness's testimony. There is no arguable claim that trial counsel was deficient by not challenging Dela Cruz's presence during the trial or that his presence resulted in any prejudice to the defense. *Accord State v. Exon*, 2d Dist. Clark No. 2014-CA-106, 2016-Ohio-600, ¶ 35. Therefore, Woods's claim of ineffective assistance of appellate counsel premised upon this issue also lacks merit.

{¶9} Appellate counsel did raise assignments of error challenging the effectiveness of counsel with regard to the video surveillance evidence, which this court overruled. Further, Woods has not established a colorable claim of ineffective assistance of trial counsel based on the failure to properly authenticate the video disc. Trial counsel admitted the video disc into evidence. Further, Woods argued that the video provided exculpatory evidence and has not established how its admission resulted in any prejudice to him.

{¶10} There is no support for the contention that trial counsel was ineffective for not objecting or requesting sanctions regarding discovery. Woods maintains that the city failed to produce video from the other cameras in the store. He maintains that this would further prove he did not place two electronic items in his cart nor did he place any items in a different department. The eyewitnesses testified that the cameras do not cover every part of the store, and they both said they saw him remove the sticker from the less expensive item and put it on the more expensive item. The trial court said the verdict was based on the testimony of the two eyewitnesses even though Woods presented video evidence and argued that it showed him with only one item in his cart. Further, Woods's contention requires speculation. Woods has not established that any other video footage relevant to this matter existed or that it contained any exculpatory material that would be subject to production.

{¶11} Woods's argument regarding the city's failure to produce the inventory control sticker or the less expensive electronic product and his trial counsel's failure to

request sanctions or a continuance to obtain these items does not support an ineffective assistance of appellate counsel claim. The witnesses both testified that they did not recover or retain the subject sticker or the less expensive electronic product. It is axiomatic that the city could not produce evidence that it did not have. Trial counsel effectively and thoroughly questioned the witnesses about the absence of these items from the evidence. Counsel also examined the witnesses about the differences between the inventory stickers and the UPC labels. It was within the province of the trier of fact to resolve the conflicts in the evidence and to weigh the evidence produced by the city in determining whether the city satisfied its burden of proof. Appellate counsel argued that the evidence did not support the conviction, which this court has already addressed.

{¶12} Woods’s argument that the trial counsel was ineffective for failing to cross-examine the witnesses with the video also lacks merit. The record demonstrates that the video was introduced into evidence and that the court reviewed it. Further, “[t]he extent and scope of cross-examination clearly fall within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel.” *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 146. Even if counsel’s inability to play the video during trial could be deemed deficient, Woods cannot establish the prejudice required to sustain an ineffective assistance of counsel claim. The court was able to consider and resolve any conflicts between the testimony and the video and to assess the credibility of the witnesses’ testimony in comparison to the video evidence. Woods has not established a colorable claim of ineffective assistance of

appellate counsel premised upon this argument. Woods's argument that trial counsel was ineffective for failing to employ an expert to operate and play the video at trial is without merit based on the same rationale.

{¶13} Finally, Woods argues cumulative error based on the foregoing alleged instances of ineffective assistance of trial counsel. Because his other proposed assignments of error are not well founded, this argument is necessarily unpersuasive. Woods has not established a genuine issue as to whether he was deprived of the effective assistance of appellate counsel.

{¶14} The application to reopen is denied.

EILEEN T. GALLAGHER, JUDGE

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EILEEN A. GALLAGHER, P.J., and  
PATRICIA ANN BLACKMON, J., CONCUR