[Cite as *State v. Davis*, 2010-Ohio-4734.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-869 (C.P.C. No. 08CR12-8547)
Ernest Davis, Jr.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 30, 2010

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

John Sherrod and *Roger Soroka*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Ernest Davis, Jr. ("defendant"), appeals from a judgment of the Franklin County Court of Common Pleas entered upon a jury verdict convicting defendant of one count of aggravated burglary, one count of aggravated robbery, and seven counts of kidnapping, along with nine firearm specifications. For the following reasons, we affirm that judgment.

{¶2} On Thanksgiving day 2008, three men unexpectedly stormed into the home of Angela Williams, located at 2296 Hamilton Avenue, in Franklin County, Ohio. Inside the home were Angela Williams, Passion Williams, Michael Williams, Latasha Williams,

Henry Chapman, Antoinette Sutton, Steve Mix, and three small children. The men held Angela and her family at gunpoint and demanded money. The men tied up the adults and forced everyone into the back of a van. One of the men, later identified by witnesses as the defendant, drove the seven adults and three small children around in the van for several hours, threatening them and demanding money before eventually releasing them in an alley near Angela's home.

{¶3} On December 4, 2008, defendant was indicted by the grand jury on a 30-count indictment involving various counts of aggravated burglary, aggravated robbery, robbery, kidnapping, and having a weapon while under disability. The charges arose out of the Thanksgiving day incident. The matter proceeded to trial on July 14, 2009.

{¶4} At trial, the State of Ohio introduced the testimony of all seven adult witnesses, as well as two Columbus police officers and one detective. Defendant did not present any witnesses. The testimony presented at trial established the following.

{¶5} Two unidentified armed men ran into the Williams' home on Thanksgiving day, followed by defendant, who was also armed. Defendant was not wearing a mask and did not have his face covered in any way. Passion recognized defendant. She had become acquainted with defendant about one month prior to the incident and knew defendant as "E." At a later point in time, Passion informed her family that she knew defendant.

{¶6} Defendant demanded money from the family and threatened to shoot them if they did not cooperate. The two other men assisted defendant in tying up all of the adults using gray duct tape, red tape, and rope. The children were not bound. However, everyone was forced outside into a white work van. The other men left, but defendant

drove the family around in the van for several hours. Defendant took them on the freeway as well as to a wooded area and may have driven as far as Delaware, Ohio. Defendant stopped twice for gas, during which time he talked on his cell phone. Defendant continued to threaten the family and to demand that the family give him $5,000.

{¶7} Eventually, after instructing the family not to contact the police, defendant un-tied and/or un-taped the family members and released them one at a time into an alley near Angela's home. The family quickly returned home but was unable to locate a cell phone inside the house, so Passion called the police using a nearby pay phone. The police responded to investigate, interview the witnesses and present a photo array containing a photo of defendant. All seven adults identified defendant as the man who stormed into their home, threatened them, demanded money from them, held them at gunpoint, and drove them around in a van for several hours. All seven witnesses also made an in-court identification of defendant. In addition, Antoinette testified she recognized defendant as a friend of Passion's named "E." Passion testified she had previously ridden in defendant's van and recognized it as his van.

{¶8} The testimony further established that during the investigation, the police recovered from the alley some of the red tape, rope, and a cord used to bind the kidnapping victims. In the hours after the incident, police located defendant's white work van outside his residence, located at 1157 Fair Avenue. Upon searching the van, police located a small child's camouflaged jacket which Passion identified as the jacket her son Philip had with him on the day of the kidnapping. Inside the van, police also located some duct tape and some red tape which looked like the red tape used to restrain the Williams

family members, along with several live .40 caliber rounds. Photos were taken of the crime scenes and the victims. A few photos depicted the tape residue that remained on the hands of some of the adult victims.

{¶9} At the close of the State's evidence, the State requested to dismiss 21 of the 30 counts in the indictment, thereby requesting to send only nine counts to the jury. Those nine counts included one aggravated burglary, one aggravated robbery, and seven kidnapping charges, all with firearm specifications. The trial court then overruled defendant's Crim.R. 29 motion with respect to those nine counts.

{¶10} Prior to the defense resting its case, the trial court granted defense counsel's request to consult with defendant to confirm that defendant did not wish to testify. After a recess, defendant informed the trial court that he wished to exercise his right to remain silent. The case was then submitted to the jury.

{¶11} Defendant was convicted on one count of aggravated burglary, one count of aggravated robbery, and seven counts of kidnapping, as well as the corresponding firearm specifications. The trial court sentenced appellant to 37 years of incarceration. Defendant filed a timely appeal asserting a single assignment of error for our review:

> **ASSIGNMENT OF ERROR 1**: 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 AMENDMENTS TO THE UNITED STATES CONSTITUTION.

{¶12} 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.

{¶13} 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.

{¶14} "[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.

{¶15} In his sole assignment of error, defendant argues he was denied the effective assistance of counsel. Specifically, he argues his counsel erred by: (1) failing to subpoena several witnesses to testify at trial and failing to "put on a case" or present any witnesses to corroborate defendant's alibi; (2) denying defendant the right to testify at trial; (3) failing to effectively cross-examine the State's witnesses as to their criminal backgrounds and as to the factual background surrounding this particular case; and (4) failing to investigate an alleged robbery of defendant, which occurred the day prior to the Thanksgiving day event, and allegedly involved two of the State's witnesses.

{¶16} First, to the extent defendant asserts that his counsel was ineffective in failing to investigate, subpoena witnesses, and develop an alibi defense, this assertion is not supported by the record. Mid-way through trial, defendant informed the court that he had complaints about counsel and felt he would not receive a fair trial. During that discussion on the record, the trial court addressed the issue of an alibi defense and whether defense counsel had looked into it or found any evidence to support the idea that defendant was at another location when the Thanksgiving day events occurred. In response, defense counsel stated:

> MR. JUNGA: Well, Your Honor, without going into details about that, I can assure the Court that we have had that discussion numerous times. We've met numerous times. There's a lot of unknowns. And we were just not able to come up with anything concrete that we could present to the Court.

(Tr. 216.) Defendant did not dispute this statement from counsel.

{¶17} Furthermore, counsel's decision on whether to call a particular witness generally falls within the purview of trial strategy and a reviewing court will not second guess that decision. *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, and *State v. Reddy*, 10th Dist. No. 09AP-868, 2010-Ohio-3892. See also *State v. Jordan*, 10th Dist. No. 08AP-1074, 2009-Ohio-2161 (counsel's decision on the calling of witnesses is part of trial strategy and the failure to subpoena witnesses for trial does not violate counsel's duties, absent a showing of prejudice).

{¶18} Regarding alibi witnesses, the mere failure to subpoena witnesses is not itself a substantial violation of an essential duty without a showing that their testimony would have assisted the defense. *Middleton v. Allen* (1989), 63 Ohio App.3d 443, citing *State v. Reese* (1982), 8 Ohio App.3d 202. Instead, to constitute ineffective assistance of counsel, it must be clear that the failure materially prejudiced the defense. Id.

{¶19} Here, defendant has not pointed to anything in the record which would reveal what, if anything, appellant's alleged alibi witnesses, who are not named, would have said if they had been called to testify. Defendant only made a general assertion that "people at the Kroger's" saw him "that particular day at a certain time." (Tr. 215.) Also, the record does not establish that these alleged potential alibi witnesses were actually known by name or that their names could have been discovered.

{¶20} In addition, defendant did not provide any more specific information about the location of this Kroger's, such as its proximity or lack thereof to the route of travel of the van during the kidnapping, or the time at which he allegedly would have been seen. It is unknown whether these alleged witnesses would in fact rebut the testimony of the State's witnesses. Since there is insufficient information concerning the alleged proposed

testimony, we cannot determine whether trial counsel's apparent decision not to call these "Kroger" witnesses, assuming they could even be identified, constituted deficient performance or whether defendant was prejudiced as a result. See generally *State v. O'Neil*, 11th Dist. No. 2008-P-0090, 2009-Ohio-7000.

{¶21} Moreover, as cited above, the record establishes that counsel did make an effort to investigate any leads provided by defendant, but was apparently unable to develop witnesses who could assist defendant with an alibi defense. In light of this, it appears defendant and his counsel chose to abandon the alibi defense and attempted to pursue a different trial strategy by arguing that Passion and her family fabricated the event because of a grudge Passion had against defendant. We cannot find counsel to be ineffective in making this choice.

{¶22} Next, defendant argues his trial counsel was ineffective in denying him the right to testify on his own behalf at trial. However, this assertion is refuted by the record.

{¶23} Following the close of the State's evidence, counsel for defendant requested that the trial court ask defendant to acknowledge that he did not wish to testify. At that point, the trial court informed defendant that he had a right not to testify and that the assertion of said right could not be used against him. In addition, the trial court informed defendant that he also had the right to testify if he chose to do so. Upon asking defendant if he had the chance to discuss that issue with his attorney, the following exchange took place:

> THE DEFENDANT: We've gone back and forth on that issue. And I'd like to have just a moment to go over it now that a number of things [have] been overruled to decide whether or not I should.

> THE COURT: I need a decision because I got to bring this jury out. I will give you a few moments.
>
> THE DEFENDANT: Just few moments.

(Tr. 251.)

{¶24} After a recess, the court then made the following inquiry:

> THE COURT: Back on the record with Mr. Davis. Mr. Davis, have you had enough time now to discuss this matter, further discuss this matter with your attorney?
>
> THE DEFENDANT: I have.
>
> THE COURT: And is it your desire to testify or is it your desire to exercise your right to remain silent.
>
> THE DEFENDANT: Remain silent.

(Tr. 251-52.)

{¶25} The record does not support the assertion that defendant was not afforded the right to testify at his own trial. Nor does the record support defendant's assertion that he "firmly believed that his testimony would have made a serious difference in the way the Jury perceived the circumstances surrounding the case." (Appellant's brief, at 4.) Moreover, " 'it is difficult to imagine a better example of trial strategy than a decision of whether a defendant should testify on his own behalf.' " *State v. Hoop*, 12th Dist. No. CA2004-02-003, 2005-Ohio-1407, ¶20 (quoting *State v. Mabry* (Oct. 9, 1996), 9th Dist. No. 2514-M); *Reddy* at ¶37. We note the record reflects that defendant has a previous conviction for a similar crime (burglary), for which he served a period of incarceration, as well as other convictions.

{¶26} Defendant also argues his counsel was ineffective in his cross-examination of witnesses Michael Williams and Steve Mix, both of whom are convicted felons, because

counsel failed to properly make the jury aware of their criminal records, to impeach them, or to argue to the jury that their testimony should not be believed or relied upon.

{¶27} The scope of cross-examination falls within the realm of trial strategy and therefore, debatable trial tactics do not establish ineffective assistance of counsel. *Conway* at ¶101, citing *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, ¶45; *State v. Campbell*, 90 Ohio St.3d 320, 339, 2000-Ohio-183. Furthermore, in the instant case, the trial prosecutor established early during witness testimony that these two witnesses had criminal histories.

{¶28} Steve Mix admitted that he was currently incarcerated and serving a sentence for breaking and entering. Mix also admitted that he had previously pled guilty to additional charges for receiving stolen property, breaking and entering, and non-support of dependents, and that he previously served a prison term for those offenses as well.

{¶29} Michael Williams admitted that he had been arrested on a warrant and was spending time in the local jail as a result of a weapons charge. He further acknowledged that he had previously been charged with falsification but that the charge had been dismissed.

{¶30} Given that the prosecution elicited this testimony from its own witnesses and thus the jury was already aware of the criminal backgrounds of these witnesses, and given that Evid.R. 609 would have likely restricted counsel from probing further into issues involving the witnesses' criminal histories and convictions, counsel was not ineffective in failing to further explore these issues. Furthermore, the record indicates that defense counsel did remind the jurors, during closing arguments, of the witnesses' criminal backgrounds and thus questioned their credibility. Moreover, the jury instructions

contained language instructing the jury that they were permitted to consider a witness' prior convictions in assessing the credibility and truthfulness of the witness' testimony. Thus, we do not find counsel to have been ineffective with respect to his cross-examination and impeachment efforts.

{¶31} Finally, defendant argues his trial counsel was ineffective because he failed to subpoena a surveillance DVD which purportedly recorded an alleged robbery committed by Steve Mix and Michael Williams against defendant one day prior to the Thanksgiving day home invasion and kidnapping. Defendant further contends there is a 911 call placed by defendant which corroborates this event. Defendant generally argues that his trial counsel's failure to investigate this demonstrates his performance was deficient and that he was prejudiced as a result. We disagree.

{¶32} "[S]ince a reviewing court can only reverse the judgment of a trial court if it finds error in the proceedings of such court, it follows that a reviewing court should be limited to what transpired in the trial court as reflected by the record made of the proceedings." *Hungler v. Cincinnati* (1986), 25 Ohio St.3d 338, 342, quoting *State v. Ishmail* (1978), 54 Ohio St.2d 402, 405-06.

{¶33} Although defendant's brief refers to a prior robbery by State witnesses Steve Mix and Michael Williams, defendant has pointed to nothing in the record which references this. In conducting our own independent review, we note that when defendant addressed the trial court mid-way through trial about his counsel's perceived short-comings, he complained, "He won't send any of the detectives out to retrieve evidence on my behalf. I have videos of myself and some of those so-called witnesses at places that would be important to the jury." (Tr. 214.) Perhaps this is what defendant meant.

However, we will not speculate. Nor can we address matters not in the record. And furthermore, even assuming, for the sake of argument, that this allegation is true, this event would not change the testimony presented by the State's witnesses as to what occurred on Thanksgiving day. Moreover, defendant has failed to demonstrate how he was prejudiced by this.

{¶34} In conclusion, we find the evidence against defendant to be quite significant. This evidence includes the distinctive red tape found in his van that appeared to match the tape described by the victims and also found in the alley; the identifications made by seven witnesses who spent several hours with the un-masked defendant and confidently identified him as the perpetrator of the crimes; the fact that at least one or more family members were familiar with defendant; the witnesses' description of the white work van, which was found parked in front of defendant's residence and which Passion identified as the van she had previously ridden in with defendant; and the discovery of a small child's coat in the back of the work van which was later identified as the coat possessed by Passion's son on the day of the kidnapping. Together, all of this evidence was quite compelling and virtually overwhelming. Defendant has failed to demonstrate that his counsel's performance was deficient and that there was a reasonable probability that the outcome of the trial would have been different, but for the errors. We believe the proceedings in the trial court can be relied upon as having produced a just result.

{¶35} Accordingly, we overrule defendant's sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and KLATT, JJ., concur.

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