[Cite as *State v. Jennings*, 2009-Ohio-6536.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	
V.	)	CASE NO. 08-MA-181
	)	
RODERIC JENNINGS,	)	OPINION
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 06CR32
JUDGMENT:	Affirmed in Part Reversed and Remanded in Part
APPEARANCES: For Plaintiff-Appellee	Paul Gains Prosecutor Ralph M. Rivera Assistant Prosecutor 21 W. Boardman St., 6th Floor Youngstown, Ohio 44503-1426
For Defendant-Appellant	Attorney Mark I. Verkhlin 839 Southwestern Run Youngstown, Ohio 44514

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: December 7, 2009

[Cite as *State v. Jennings*, 2009-Ohio-6536.]
DONOFRIO, J.

{¶1} Defendant-appellant, Roderic Jennings, appeals from a Mahoning County Common Pleas Court judgment convicting him of robbery following a jury trial and the sentence that followed.

{¶2} On the evening of January 5, 2006, Joyce Polovischak Coleman was visiting her mother at St. Elizabeth Hospital in Youngstown. She left at approximately 9:45 p.m. and walked into the parking lot towards her car. She heard a low voice tell her several times, "give me your purse." Coleman kept walking. Finally, she felt something against her shoulder and a man told her to give up her purse or he would shoot her. Coleman turned around to face the man. The man grabbed for her purse, but Coleman would not let it go. The two struggled. Eventually, the man hit Coleman in the shoulder and she slipped and fell on the black ice that covered the parking lot. The man was then able to grab her purse and took off running. Coleman fractured her hip from the fall.

{¶3} Coleman was not able to get up for a few minutes. When she was able to get up, she went to the hospital police station and told the dispatcher what had happened. Coleman, whose previous work experience included working as a sheriff's deputy, a police officer, and for the FBI, instructed the dispatcher to give a detailed description of her assailant.

{¶4} Coleman described her robber's clothing in detail. She stated that two things in particular stuck out to her. First, the man wore faded black jeans with a reddish-orange logo above the right knee. Second, he wore old-fashioned, red and white tennis shoes. Additionally, Coleman stated that the man was wearing a dark ball cap and a tan/beige coat. And Coleman stated that she is six-foot tall. She stated that the man was African American and at least six-foot-four or six-foot-five. Coleman stated that she was able to gather this information while she struggled with him.

{¶5} While Coleman was still at the hospital police office completing her statement, she was told that police had found a subject and they were holding him. She stated that she went with one of the security officers to the location where police

were holding the man a few blocks away. There, she identified appellant as the man who robbed her. He did not have her purse at that time.

{¶6} A Mahoning County grand jury indicted appellant on one count of robbery, a second-degree felony in violation of R.C. 2911.02(A)(2)(B). The matter proceeded to a jury trial. The jury found appellant guilty as charged. The trial court subsequently sentenced appellant to six years in prison.

{¶7} Appellant filed a timely notice of appeal on September 10, 2008.

{¶8} Appellant raises six assignments of error. The first of which states:

{¶9} "DEFENDANT-APPELLANT, RODERIC JENNINGS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO THE TEST IN STATE V. MADRIGAL, 87 OHIO ST.3D 378, 388-389, 2000-OHIO-448, 721 N.E.2D 52, AND STRICKLAND V. WASHINGTON (1984), 466 U.S. 668, 687-688, 104 S.CT. 2052, 80 L.E.2D 674."

{¶10} Appellant argues here that his counsel was ineffective in two ways. We will address each allegation in turn.

{¶11} To prove an allegation of ineffective assistance of counsel, the appellant must satisfy a two-prong test. First, appellant must establish that counsel's performance has fallen below an objective standard of reasonable representation. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. Second, appellant must demonstrate that he was prejudiced by counsel's performance. Id. To show that he has been prejudiced by counsel's deficient performance, appellant must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley,* 42 Ohio St.3d at paragraph three of the syllabus.

{¶12} Appellant bears the burden of proof on the issue of counsel's effectiveness. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 289. In Ohio, a licensed attorney is presumed competent. Id.

{¶13} First, appellant argues that his counsel should have filed a motion to suppress Coleman's show-up identification of him.

{¶14} Counsel's failure to file a motion to suppress does not necessarily constitute ineffective assistance of counsel. *State v. Madrigal* (2000), 87 Ohio St.3d 378, 389. However, the failure to file a motion to suppress may constitute ineffective assistance of counsel when the record demonstrates that the motion would have been granted. *State v. Conkright,* 6th Dist. No. L-06-1107, 2007-Ohio-5313, at ¶50.

{¶15} Appellant asserts that a motion to suppress would have been granted. He contends that the show up was impermissibly suggestive because he was the only suspect present and the only person at the show up who was not a uniformed police officer. He further contends that Coleman's identification of him was not reliable. He points out that Coleman's assailant approached her from behind, grabbed her purse, and a fight ensued. Appellant argues that Coleman was under the stress of the altercation and could not get a good look at him. He points out that after the incident, Coleman was very upset and hostile. Appellant points to Deputy Jeffrey Lewis's testimony that when he brought Coleman to the show up, she was hostile and demanding to know where her purse was. Appellant asserts that this demonstrates that Coleman made up her mind before even viewing him that he was the one who robbed her.

{¶16} When determining whether an out-of-court identification is admissible, a trial court uses a two-step approach. *Neil v. Biggers* (1972), 409 U.S. 188, 196-200, 93 S.Ct. 375. The court first determines whether the identification procedure was impermissibly suggestive. Id. at 196-97. Then, if the procedure was impermissibly suggestive, the court must determine if the identification was reliable despite being suggestive. Id. at 199. In determining whether the identification was reliable, the court should consider (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the witness's level of certainty at the confrontation, and (5) the length of time between the crime and the confrontation. Id.

{¶17} A "show up" is an identification procedure where the victim, shortly after the incident, is shown only one person and is asked whether the victim can identify

the perpetrator of the crime. *State v. Tanksley,* 10 Dist. No. 07AP-262, 2007-Ohio-6596, at ¶9. While this one-man show-up identification procedure is inherently suggestive, a witness's identification from such a show up is admissible if the identification is reliable. *State v. Sutton,* 10th Dist. No. 06AP-708, 2007-Ohio-3792, at ¶38.

{¶18} Because the identification procedure here was a one-man show up, it was inherently suggestive. When Coleman arrived, appellant was the only person present who was not a uniformed police officer. This procedure suggested that he was the perpetrator. But simply because the show up was suggestive does not mean that Coleman's identification was unreliable.

{¶19} The other facts surrounding Coleman's identification of appellant indicate that her identification of appellant was reliable.

{¶20} Significantly, going to the third *Biggers* reliability factor, Coleman gave a detailed description of her attacker to the dispatcher. She described her robber as a black male who was six-foot-four or six-foot five. She stated that he was wearing faded, black jeans with a reddish-orange logo above the right knee; red and white, old-fashioned, tennis shoes; a dark-colored ball cap, and a tan or beige coat. (Tr. 214-16; 302) Appellant fit this specific description when he was stopped by police, just 30 minutes after the robbery. (Tr. 301-302). He had on all of the specific clothing items that Coleman described and also matched the physical characteristics she gave. (Tr. 302).

{¶21} Also significant is the fact that Coleman is a former police officer/sheriff's deputy/FBI employee. This contributes to the degree of attention Coleman would have paid to her attacker, which is the second *Biggers* factor to consider. One would expect a former police officer to be able to better focus her attention during a robbery and remain calmer than a lay person so that she could identify her attacker. Police officers are trained in handling stressful, crime situations. A former officer would likely instinctively pay close attention to the appearance of her attacker so that she could later identify him.

{¶22} Finally, when Coleman went to the show up, she immediately identified appellant as her attacker. Officer Troy Fares testified that Coleman "instantly" identified appellant upon exiting the cruiser she was riding in. (Tr. 263). And Deputy Jeffrey Lewis stated that Coleman identified appellant before she even got out of the cruiser. (Tr. 303). Coleman was upset at the time, as appellant points out. Deputy Lewis stated that Coleman was "hostile, very upset, mad" and was yelling and demanding to know where her purse was. (Tr. 303). Yet she identified appellant without hesitation. This could likely have been due to the fact that appellant was wearing all of the specific clothing items that Coleman observed her assailant wearing when she was robbed. Additionally, police located appellant only 30 minutes after the robbery and Coleman immediately went to view him. (Tr. 301-302). Coleman's level of certainty here as well as the short time that had elapsed since the robbery were both appropriate considerations here under the fourth and fifth *Biggers* factors.

{¶23} Given all of the circumstances and considering the *Biggers* factors, Coleman's identification of appellant was reliable even though the show up was inherently suggestive. Because the identification was reliable, the trial court would have denied a motion to suppress this identification. Therefore, appellant's counsel was not ineffective for failing to file such a motion. Second, appellant argues that his counsel was ineffective for failing to object to the photograph taken from the hospital's video surveillance video. He claims that under the best evidence rule, the state should have produced the original video. Appellant asserts that no explanation was provided as to why the original videotape was not available.

{¶24} A trial court has broad discretion in determining whether to admit or exclude evidence and its decision will not be reversed absent an abuse of discretion. *State v. Mays* (1996), 108 Ohio App.3d 598, 617. Abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶25} Appellant takes issue with State's Exhibit 5, a photo of a person in the hospital lobby at 21:28:33 military time, or 9:28 p.m. and 33 seconds. Deputy Lewis testified that in the video from which the photo was taken, the person depicted has writing above his right knee on his pants. (Tr. 307).

{¶26} Officer Fares testified that the hospital's video surveillance system is a digital system that captures real-time images, which can be displayed as video from the system or printed out as still pictures. (Tr. 265). Officer Fares stated that these recordings are taken in the course of hospital business. (Tr. 265). He stated that one of the hospital's cameras monitors the main lobby that leads out into the A parking lot. (Tr. 265). Officer Fares stated that his office pulled still images from the video. (Tr. 265-66). He identified State's Exhibit 5 as a still image of the video taken on the night of the robbery. (Tr. 266).

{¶27} Deputy Lewis also testified regarding State's Exhibit 5. He described the hospital's video surveillance system as a computer-generated system. (Tr. 306). Deputy Lewis stated: "We can print still photos off it, but we can't actually play the actual recording, record that. If you were sitting in the office, you could play it back, but we were never able to transcribe that to have an actual video when I was there." (Tr. 306). On cross-examination, Deputy Lewis stated that the video was a little clearer than the photograph. (Tr. 310). He also stated that he had "no idea" where the video was now. (Tr. 310).

{¶28} In order to prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required. Evid.R. 1002. "An 'original' of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original'." Evid.R. 1001(3).

{¶29} "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Evid.R. 1003. "A 'duplicate' is a counterpart produced by the same impression as the

original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original." Evid.R. 1001(4).

{¶30} The photograph was printed directly from the digital computer system on which it was recorded. It was not a copy or a duplicate. It was not copied, re-recorded, or reproduced by any other means. Photograph prints from a digital program qualify as "originals" under Evid.R. 1001(3). *State v. Gregory*, 12th Dist. No. CA2006-05-016, 2006-Ohio-7037, at ¶4.

{¶31} Because the trial court would have likely overruled any objection lodged by appellant's counsel, counsel was not ineffective for failing to make such an objection.

{¶32} Alternatively, appellant argues that the videotape was exculpatory evidence because it showed Coleman's attacker as wearing an article of clothing with a collar. He asserts that the evidence demonstrated that he was not wearing a collar on the evening in question. Appellant assumes, arguendo, that the videotape was lost or destroyed and that is why the state used the photographs instead. He contends that the state failed to preserve this exculpatory evidence. Thus, appellant concludes that his counsel should have also objected on this basis.

{¶33} State's Exhibit 5 shows a person in the hospital lobby at 21:28:33 military time. Defendant's Exhibit 12 shows the same person in the hospital lobby at 21:28:34, just one second later. Both photographs show what appears to be some sort of collar or hood with a stripe sticking up on the left side of the person's neck. There were no photographs or videos of the parking lot where the robbery took place.

{¶34} The only testimony that the person depicted in these pictures might be appellant was that of Deputy Lewis. Deputy Lewis stated that he viewed the video from which the still photographs were taken. (Tr. 307). He stated that he remembered in viewing the video that the person depicted had writing above his right knee on his pants. (Tr. 307). This writing is not visible in the admitted photographs.

There was no other testimony that the person in the photographs was appellant or that the person in the photographs was Coleman's attacker.

{¶35} The pictures of appellant and his clothing when he was arrested were admitted into evidence. His coat had a hood that stuck up. (State Ex. 6, 7). His shirt was striped and had a collar on it. (State Ex. 6, 7). Because the security photographs are blurry, it is difficult to tell whether appellant's clothes match those of the person in the picture. However, appellant's assertion that his clothing did not have a collar, are untrue. His shirt had a collar and his coat had a hood. Furthermore, there was no testimony that the person in this video went out and robbed Coleman. And there are no photographs or video tapes of the parking lot where the robbery occurred or of Coleman with her attacker. Thus, appellant's contention that the surveillance video of the lobby was somehow exculpatory is unfounded.

{¶36} Accordingly, appellant's first assignment of error is without merit.

{¶37} Appellant's second assignment of error states:

{¶38} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED EVIDENCE STEMMING FROM A 'SHOW-UP' IDENTIFICATION THAT WAS (1) UNDULY SUGGESTIVE AND (2) UNRELIABLE PURSUANT TO THE SUPREME COURT'S OPINION IN STATE V. GROSS, 97 OHIO ST.3D 121, 2002-OHIO-5524, 776 N.E.2D 1061."

{¶39} Appellant's argument here closely mirrors that discussed above. However, appellant now argues that because the show-up identification was unduly suggestive and unreliable, the court should not have allowed Coleman to testify at trial about her pre-trial identification of him.

{¶40} As discussed in detail in appellant's first assignment of error, while Coleman's show-up identification of appellant was inherently suggestive, it nonetheless was reliable. Consequently, there was no reason for the court to have disallowed Coleman's testimony regarding the show up and her pretrial identification of appellant.

{¶41} Accordingly, appellant's second assignment of error is without merit.

{¶42} Appellant's third assignment of error states:

{¶43} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED PHOTOGRAPHIC STILLS THAT WERE TAKEN FROM A VIDEO WHEN THE BEST EVIDENCE OF THE CONTENTS OF THE VIDEO WOULD BE THE VIDEO ITSELF AND APPELLANT'S DUE PROCESS RIGHTS GUARANTEED BY ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE STATE'S FAILURE TO PRESERVE MATERIALLY EXCULPATORY EVIDENCE."

{¶44} Appellant's argument here likewise closely mirrors that discussed in his first assignment of error. He simply argues that the trial court should not have allowed the photograph from the video surveillance because the video itself was the best evidence.

{¶45} As discussed in appellant's first assignment of error, the photograph taken from the video surveillance was admissible. As such, the trial court did not err in admitting it into evidence.

{¶46} Accordingly, appellant's third assignment of error is without merit.

{¶47} Appellant's fourth and fifth assignments of error share a common basis in fact. Therefore, we will address them together.

{¶48} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT OVERRULED DEFENDANT-APPELLANT, RODERIC JENNINGS' CRIM.R. 29 MOTION TO DISMISS SINCE THE STATE HAD NOT MET ITS BURDEN OF SHOWING ALL OF THE ELEMENTS OF THE OFFENSE BEYOND A REASONABLE DOUBT AND THE EVIDENCE WAS INSUFFICIENT TO SHOW A FINDING OF GUILT BEYOND A REASONABLE DOUBT."

{¶49} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN, AFTER A JURY TRIAL, IT FOUND DEFENDANT-APPELLANT, RODERIC JENNINGS GUILTY OF ROBBERY IN VIOLATION OF R.C. 2911.02(A)(3) [sic.]

BEYOND A REASONABLE DOUBT, WHEN SUCH A CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶50} Appellant first argues here that the trial court should have granted his Crim.R. 29 motion for acquittal because the evidence was insufficient to sustain a conviction. Specifically, he asserts that the state failed to present evidence that positively identified him as the man who robbed Coleman. He points out that (1) none of the stolen items were found on his person; (2) Coleman's stolen credit cards were used the following day, while he was in jail; and (3) one of the photographs of a man in the hospital lobby shows a man wearing a collar, which he claims he was not wearing.

{¶51} An appellate court reviews a denial of a motion to acquit under Crim.R. 29 using the same standard it uses to review a sufficiency of the evidence claim. *State v. Rhodes,* 7th Dist. No. 99-BA-62, 2002-Ohio-1572, at ¶9; *State v. Carter* (1995), 72 Ohio St.3d 545, 553.

{¶52} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the jury verdict. *State v. Smith* (1997), 80 Ohio St.3d 89, 113. In essence, sufficiency is a test of adequacy. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Whether the evidence is legally sufficient to sustain a verdict is a question of law. Id. In reviewing the record for sufficiency, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Smith*, 80 Ohio St.3d at 113.

{¶53} The jury convicted appellant of robbery in violation of R.C. 2911.02(A)(2), which provides:

{¶54} "(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶55} "* * *

{¶56} "(2) Inflict, attempt to inflict, or threaten to inflict physical harm on

another."

{¶57} In this case, there was no question that a robbery in violation of R.C. 2911.02(A)(2) was committed against Coleman. The only question was whether appellant was the perpetrator of that robbery. The jury determined that he was. In order to determine whether sufficient evidence existed to support the jury's verdict and the trial court's denial of appellant's motion for acquittal, we must examine the evidence.

{¶58} Coleman was the first to testify. She stated that as she walked into the parking lot at St. Elizabeth Hospital she heard a low voice say, "give me your purse." (Tr. 211). Coleman kept walking. (Tr. 212). As she approached her car, Coleman felt something in her shoulder and heard a man tell her to give him her purse or he would shoot her. (Tr. 212). Coleman turned around, still holding her purse. (Tr. 212). She looked at the man, who had his hand in his jacket as if he was holding a gun. (Tr. 212). The man tried to grab her purse with his other hand but was unsuccessful. (Tr. 213). The man finally took his hand out of his jacket and attempted to grab Coleman's purse. (Tr. 213). He grabbed Coleman's purse, but she did not let go. (Tr. 213). The man began to hit Coleman and she eventually slipped on the icy parking lot and fell to the ground, fracturing her hip. (Tr. 213). The man then took her purse and fled. (Tr. 217).

{¶59} Once she was able to stand, Coleman went to the hospital police station where she reported the robbery. (Tr. 218). She gave a detailed description of her robber to the dispatcher who put a call out on the police radio. (Tr. 219). She stated that the man's clothing "stuck out like a sore thumb." (Tr. 214). She stated that he had on faded black jeans with a reddish-orange logo above the right knee; red and white, old-fashioned, Converse-type tennis shoes, a dark ball cap, and a tan or beige coat. (Tr. 214-15). Coleman also testified that the man was at least six-feet-four or six-feet-five. (Tr. 215).

{¶60} Coleman identified appellant in court as her attacker. (Tr. 213).

{¶61} On cross-examination, Coleman described the show up. She stated

that when she arrived at the location where appellant was waiting with the officers, she got out of the car screaming about her purse. (Tr. 228). She stated that she saw appellant standing with several officers. (Tr. 229). Coleman also stated that her credit cards were used "all over town" between midnight that night and the following afternoon when she canceled them. (Tr. 230).

{¶62} Officer Fares testified next. He stated that Coleman gave a description of her robber when he came into the hospital police office. (Tr. 258). He stated that Coleman described a black male, over six feet tall, wearing a tan coat, blue jeans with an orange-red design on the right leg, red and white shoes, and a blue cap. (Tr. 259). Officer Fares stated that he then broadcasted this description over the radio and went out to search for the suspect. (Tr. 259). After about 25 to 30 minutes of searching, Officer Fares stated that he encountered appellant standing on Covington Street within three blocks of the hospital. (Tr. 260-62). He stated that appellant, a black male, was wearing a tan coat, blue jeans, and red and white tennis shoes. (Tr. 261). Officer Fares detained appellant. (Tr. 263). He stated that another officer brought Coleman to the scene and she instantly identified appellant as the man who robbed her. (Tr. 263).

{¶63} On cross-examination, Officer Fares stated that he later searched the area for Coleman's purse but found nothing. (Tr. 286). Officer Fares also testified that after appellant was arrested, he was taken to the county jail where Officer Fares believed appellant was located the following day. (Tr. 287).

{¶64} Deputy Lewis testified next. He stated that he heard over the radio that a woman had been robbed and heard the robber's description. (Tr. 298-300). Based on this information, he began searching the area on foot. (Tr. 300). He followed footprints that led from the hospital parking lot A, northbound on Park Avenue to Covington. (Tr. 300-301). He then heard that Officer Fares had located a suspect. (Tr. 301). Deputy Lewis stated that appellant matched the description of the robber, both in his physical attributes and in the clothing he was wearing. (Tr. 301-302). Deputy Lewis stated that when Coleman arrived at the scene, she identified appellant

before she even got out of the car. (Tr. 303). He stated that she was "hostile, very upset, mad." (Tr. 303).

{¶65} Additionally, Deputy Lewis viewed State's Exhibit 5, the surveillance photograph. He stated that he had watched the surveillance video from which the photo was taken. (Tr. 307). He stated that in the video he was able to notice that the person depicted had writing above the right knee on his pants. (Tr. 307).

{¶66} And Deputy Lewis identified two other photographs, State's Exhibits 6 and 7. (Tr. 304-305). These photographs were of appellant and his clothes just after he was arrested. They show that appellant is a tall, black man and that he was wearing faded, dark, blue jeans with a red-orange logo above the right knee, red and white tennis shoes, a tan coat, and a dark ball cap. (State's Ex. 6, 7).

{¶67} Given this evidence, the court properly overruled appellant's Crim.R. 29 motion. Coleman clearly identified appellant in court as the man who robbed her. She also testified that she identified appellant at the show up. Additionally, Coleman described the clothes her assailant was wearing when he robbed her. This was the same description she gave just minutes after the robbery. Pictures of appellant taken after his arrest, show that his clothing matched Coleman's specific description. And Officer Fares testified that when he first saw appellant just three blocks from the hospital, appellant matched Coleman's description. Appellant had on dark blue jeans with a red-orange logo above the right knee, red and white tennis shoes, a tan coat, and a dark hat. Additionally, appellant met the physical description Coleman gave; meaning, he is a tall, black male. And police found appellant just three blocks from the hospital approximately 30 minutes after the robbery. It seems highly unlikely that there would be someone other than Coleman's robber wearing the same unique, particular clothing in such close proximity to the hospital just 30 minutes after the robbery. Viewing the evidence in the light most favorable to the state, as we are required to do, there was sufficient evidence to support the jury's finding that appellant was the man who robbed Coleman.

{¶68} Second, appellant argues that his conviction was against the manifest

weight of the evidence. In addition to again arguing that nothing identified him as Coleman's robber, appellant points to his alibi that he was at his mother's house when Coleman was robbed.

{¶69} In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins,* 78 Ohio St.3d at 387. "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.'" Id. (Emphasis sic.) In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence produced at trial. Id. at 390.

{¶70} Still, determinations of witness credibility, conflicting testimony, and evidence weight are primarily for the trier of the facts. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶71} In addition to the state's evidence, we must also consider appellant's evidence when determining whether his conviction was against the manifest weight of the evidence.

{¶72} Appellant took the stand in his own defense and described his alibi. He first admitted, however, that he had a prior conviction for possession of drugs and that he had participated in marijuana and cocaine activities. (Tr. 339).

{¶73} Appellant stated that on the night in question, he arrived at his mother's house on Martin Luther King Boulevard in Youngstown between 7:00 and 7:30 p.m. (Tr. 340). He stated that he stayed at his mother's house drinking beer and watching television until approximately 10:00 p.m. when he left on foot to go home to his grandmother's house. (Tr. 340, 343). He stated that he always walks the same route from his mother's house back to his grandmother's house. (Tr. 340, 343). This route involves walking up Covington. (Tr. 340). He stated that he noticed the police on

Covington and continued to walk towards his home. (Tr. 343). Appellant stated that Officer Fares stopped him and he was eventually handcuffed. (Tr. 344, 346). Appellant stated that officers brought the victim to see him and that she tried to attack him. (Tr. 346-47). He stated that she was screaming and yelling at him and that she identified him as the man who robbed her. (Tr. 347). Finally, appellant testified that he was taken to jail after he was arrested and questioned. (Tr. 348). He testified that he remained in jail for the next 90 days. (Tr. 348).

{¶74} On cross-examination, appellant changed his story slightly. He stated that he left his mother's house at approximately 8:45 p.m. to walk his girlfriend back to the Rescue Mission where she was staying. (Tr. 351-52). He stated that he then went back to his mother's house. (Tr. 351).

{¶75} Appellant's alibi was a credibility issue for the jury to determine. They concluded that appellant was not telling the truth when he gave his alibi. Several factors could have brought them to this determination. First, Coleman unequivocally identified appellant in court as her attacker. Second, on the night of the robbery appellant was found just blocks from the hospital, shortly after the robbery occurred, and matched Coleman's unique and specific description of her attacker. Third, appellant admitted to a prior conviction and to drug activity. Finally, appellant changed his story on cross examination as to what he did on the night of the robbery. The first two factors weigh in favor of Coleman's credibility. The last two factors weigh against appellant's credibility.

{¶76} Although an appellate court is permitted to independently weigh the credibility of the witnesses when determining whether a conviction is against the manifest weight of the evidence, we must give great deference to the fact finders' determination of witnesses' credibility. *State v. Wright,* 10th Dist. No. 03AP-470, 2004-Ohio-677, at ¶11. The policy underlying this presumption is that the trier of fact is in the best position to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony. Id. Here we will defer to the jury's determination that appellant

was not telling the truth when he testified that he was at his mother's house when Coleman was robbed.

{¶77} Additionally, appellant testified that he was in jail for 90 days after his arrest. And Officer Fares also testified that he believed appellant was in jail the day after his arrest. Coleman testified that her credit cards were used "all over town" the day after her purse was stolen. Thus, appellant could not have been the one using Coleman's credit cards because he was in jail at the time they were used. One could argue that someone else stole Coleman's purse and used her credit cards. However, there is a flaw with this argument. Police did not apprehend appellant until at least 30 minutes after Coleman's purse was stolen and he did not have the purse on him at that time. Appellant had sufficient time to dispose of the purse and its contents or to give them to someone else during those 30 minutes.

{¶78} Consequently, the jury's verdict was not against the manifest weight of the evidence.

{¶79} Accordingly, appellant's fourth and fifth assignments of error are without merit.

{¶80} Appellant's sixth assignment of error states:

{¶81} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT INCORRECTLY ADVISED APPELLANT THAT HE WOULD BE SUBJECT TO A PERIOD OF FIVE YEARS OF POST RELEASE CONTROL, WHEN THE CORRECT PERIOD OF POST RELEASE CONTROL IS THREE YEARS FOR A FELONY OF THE SECOND DEGREE THAT IS NOT A SEX OFFENSE PURSUANT TO R.C. 2967.28(B)(2), MAKING APPELLANT'S SENTENCE VOID."

{¶82} At appellant's sentencing hearing, the trial court informed appellant that upon completion of his sentence, he would be subject to a five-year period of postrelease control. (Sentencing Tr. 17). Additionally, in its judgment entry of sentence, the court specifically stated, appellant "will be subject to five (5) years post release control pursuant to ORC §2967.28."

{¶83} Appellant argues that since he was convicted of a second-degree

felony, the proper period of postrelease control is three years. He contends that because the trial court did not inform him of the correct postrelease control term, his sentence is void and we must remand this matter for a new sentencing hearing.

{¶84} Our review of felony sentences is now a limited, two-fold approach, as outlined in the plurality opinion in *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. First, we must examine the sentence to determine if it is "clearly and convincingly contrary to law." Id. (O'Conner, J., plurality opinion). In examining "all applicable rules and statutes," the sentencing court must consider R.C. 2929.11 and R.C. 2929.12. Id. at ¶¶13-14. (O'Conner, J., plurality opinion). If the sentence is clearly and convincingly not contrary to law, the court's discretion in selecting a sentence within the permissible statutory range is subject to review for abuse of discretion. Id. at ¶ 17. (O'Conner, J., plurality opinion).

{¶85} Appellant was convicted of a second-degree felony. When sentencing an offender on a first or second-degree felony, certain third-degree felonies, and felony sex offenses, the trial court is required to impose a period of postrelease control. R.C. 2967.28(B). For a second-degree felony, the postrelease control period is three years. R.C. 2967.28(B)(2).

{¶86} Thus, the trial court clearly imposed the incorrect postrelease control period on appellant when it stated that he was subject to five years of postrelease control.

{¶87} When sentencing a felony offender, the trial court must notify the offender at the sentencing hearing about postrelease control and must incorporate that notice into its journal entry imposing sentence. *State v. Jordan,* 104 Ohio St.3d 21, 2004-Ohio-6085, at paragraph one of the syllabus. When postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void and the offender is entitled to a new sentencing hearing for that offense. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at the syllabus.

{¶88} The fact that the sentence is void "stems from 'the fundamental understanding that no court has the authority to substitute a different sentence for

that which is required by law.' [*State v.*] *Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197,] at ¶ 20, citing *Colegrove v. Burns* (1964), 175 Ohio St. 437, 438, 25 O.O.2d 447, 195 N.E.2d 811. A sentence that does not comport with statutory requirements is contrary to law, and the trial judge is acting without authority in imposing it. Id. at ¶ 21. 'Because a sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void, it must be vacated. The effect of vacating the sentence places the parties in the same position they would have been in had there been no sentence.' Id. at ¶ 22, citing *Bezak,* 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, at ¶ 13." *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, at ¶8.

{¶89} At oral argument, appellee conceded error and agreed that appellant's sentence is void and should be remanded.

{¶90} Because the trial court in this case did not impose the correct period of postrelease control, we must vacate appellant's sentence and remand the matter for resentencing. The trial court acted outside of its sentencing authority when it imposed a period of postrelease control that was more than that allowed by statute. Therefore, appellant's sentence is void and contrary to law.

{¶91} Accordingly, appellant's sixth assignment of error has merit.

{¶92} For the reasons stated above, appellant's convictions are hereby affirmed. Appellant's sentence is reversed and the matter is remanded for resentencing.

Waite, J., concurs.
DeGenaro, J., concurs.