

[Cite as *State v. Davis*, 2011-Ohio-1023.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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

DECISION

Rendered on March 8, 2011

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

Ernest Davis, Jr., pro se.

ON APPLICATION FOR REOPENING

CONNOR, J.

{¶1} Defendant-appellant, Ernest Davis, Jr. ("appellant"), has filed a pro se application pursuant to App.R. 26(B) seeking to reopen his appeal resolved in this court's decision in *State v. Davis*, 10th Dist. No. 09AP-869, 2010-Ohio-4734, claiming ineffective assistance of appellate counsel. The State of Ohio filed a memorandum in opposition to defendant's application. Because appellant's application fails to present a genuine issue of whether he was deprived of effective assistance of appellate counsel, we deny his application to reopen.

{¶2} Appellant was indicted on December 4, 2008 on a 30-count indictment involving various counts of aggravated burglary, aggravated robbery, robbery, kidnapping, and having a weapon while under disability following a home invasion that occurred on Thanksgiving Day, 2008. During the incident, Angela Williams and several family members were held at gunpoint while appellant and two other men demanded money. Angela and her family were eventually tied up or bound and forced to ride around in the back of a van for several hours while appellant continued to demand money. Appellant eventually released Angela and her family in an alley near her home.

{¶3} The matter proceeded to jury trial on July 14, 2009. At the end of the State's case, the prosecution requested that nine counts be submitted to the jury. Appellant was convicted of all nine counts, which included one count of aggravated burglary, one count of aggravated robbery, and seven counts of kidnapping. He was sentenced to 37 years of incarceration.

{¶4} In his direct appeal, appellant, through counsel, argued he was denied the effective assistance of counsel during the trial. Appellant argued his trial counsel erred by: (1) failing to subpoena witnesses to testify and failing to present a case or any witnesses to corroborate his alibi; (2) denying appellant his constitutional right to testify at trial; (3) failing to conduct an effective cross-examination of the State's witnesses regarding their criminal history and the unique factual background surrounding this incident; and (4) failing to investigate an alleged robbery against appellant, which occurred one day prior to the crimes at issue and which allegedly involved two of the State's witnesses. This court disagreed and affirmed appellant's convictions. The Ohio

Supreme Court declined to review appellant's appeal of our decision. See *State v. Davis*, 127 Ohio St.3d 1535, 2011-Ohio-376.

{¶5} App.R. 26(B) allows applications to reopen an appeal from a judgment of conviction and sentence based upon a claim of ineffective assistance of appellate counsel. App.R. 26(B)(1) provides that an application for reopening shall be filed within 90 days from the journalization of the appellate judgment. Here, appellant has filed a timely application.

{¶6} An application for reopening must set forth "[o]ne or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation[.]" App.R. 26(B)(2)(c). The application "shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5).

{¶7} To prevail on an application to reopen, defendant must make "a colorable claim" of ineffective assistance of appellate counsel under the standard established in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. See *State v. Lee*, 10th Dist. No. 06AP-226, 2007-Ohio-1594, ¶2, citing *State v. Sanders*, 75 Ohio St.3d 607, 1996-Ohio-38. Under *Strickland*, defendant must demonstrate the following: (1) counsel was deficient in failing to raise the issues defendant now presents; and (2) defendant had a reasonable probability of success if the issue had been presented on appeal. *Lee* at ¶2, citing *State v. Timmons*, 10th Dist. No. 04AP-840, 2005-Ohio-3991.

{¶8} An appellate attorney has wide latitude and the discretion to decide which issues and arguments will prove most useful on appeal. Furthermore, appellate counsel

is not required to argue assignments of error that are meritless. *Lee* at ¶3, citing *State v. Lowe*, 8th Dist. No. 82997, 2005-Ohio-5986, ¶17.

{¶9} In his application, appellant alleges appellate counsel rendered ineffective assistance of counsel for failing to raise the following eleven assignments of error in the direct appeal:

ASSIGNMENT OF ERROR NO. 1: IT IS INEFFECTIVE ASSISTANCE OF COUNSEL FOR EITHER TRIAL OR APPELLATE COUNSEL TO FAIL TO SUBMIT ALIBI WITNESSES['] NAMES, AND AFFIDAVITS TESTIMONY, AND CRUCIAL SURVEILLANCE VIDEO WHEN ALIBI DEFENSE WAS THE ONLY DEFENSE DEFENDANT HAD.

ASSIGNMENT OF ERROR NO. 2: APPELL[ATE] COUNSEL FAILED TO CITE CONTRADICTED TESTIMONY MADE BY STATE'S WITNESS, AND RAISE THE JUDGMENT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED AND WAS INSUFFICIENT TO SUSTAIN THE FINDING BY PROOF BEYOND A REASONABLE DOUBT.

ASSIGNMENT OF ERROR NO. 3: A CRIMINAL DEFENDANT IS DENIED DUE PROCESS AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHEN APPELLATE COUNSEL FAILED TO [RAISE] THE ISSUE THAT THE TRIAL ATTORNEY VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHT BY NOT CONFRONTING THE WITNESSES IN CROSS EXAMINING THE STATE'S WITNESSES REGARDING THEIR MOTIVES TO FALSELY ACCUSE THE DEFENDANT.

ASSIGNMENT OF ERROR NO. 4: DUE PROCESS WAS VIOLATED WHEN APPELL[ATE] COUNSEL FAILED TO RAISE THE TRIAL COURT ERRED WHEN IT DID NOT INQUIRE INTO THE DEFENDANT'S REQUEST TO DISCHARGE PUBLIC DEFENDER JUNGA AND REQUEST FOR A NEW COUNSEL OR MAKE ANY SUCH INQUIRY PART OF THE RECORD.

ASSIGNMENT OF ERROR NO. 5: DUE PROCESS WAS VIOLATED WHEN APPELL[ATE] COUNSEL FAILED TO [RAISE] THAT IT WAS PLAIN ERROR TO PR[E]CLUDE THE DEFENDANT FROM SUBMITTING BAD ACT

EVIDENCE ASSOCIATED WITH THE WITNESSES FOR THE STATE BY NOT BEING ABLE TO SUBPOENA THE SURVEILLANCE VIDEO OR ALIBI WITNESS.

ASSIGNMENT OF ERROR NO. 6: DUE PROCESS WAS VIOLATED WHEN APPELLANT[‘S] ATTORNEY FAILED TO RAISE THE COURT PREJUDICE[D] DEFENDANT BY FINDING HIM GUILTY OF AGGRAVATED ROBBERY, AGGRAVATED BURGLARY, AND 7 KIDNAPPING[S] WITH FIREARM SPECIFICATION[S] AS THOSE FINDINGS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE.

ASSIGNMENT OF ERROR NO. 7: DUE PROCESS WAS VIOLATED WHEN APPELL[ATE] COUNSEL FAILED TO RAISE THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT BY IMPOSING A SENTENCE THAT IS AN ABUSE OF DISCRETION.

ASSIGNMENT OF ERROR NO. 8: DUE PROCESS AND THE RIGHT TO EFFECT[IVE] COUNSEL WAS VIOLATED WHEN APPELLANT[‘S] COUNSEL FAILED TO RAISE THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT IN SENTENCING HIM ON COUNTS 3 THROUGH 9.

ASSIGNMENT OF ERROR NO. 9: DUE PROCESS WAS VIOLATED WHEN APPELL[ATE COUNSEL] FAILED TO RAISE THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-A[PPELLANT] BY OVERRULING HIS MOTION FOR ACQUITTAL UNDER OHIO CRIMINAL PROCEDURE RULE 29.

ASSIGNMENT OF ERROR NO. 10: DUE PROCESS WAS VIOLATED WHEN APPELLANT[‘S] COUNSEL FAILED TO RAISE ACTUAL INNOCENCE CLAIM.

ASSIGNMENT OF ERROR NO. 11: A CRIMINAL DEFENDANT IS DENIED DUE PROCESS AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL WHEN APPELLATE COUNSEL FAILED TO [RAISE] PROSECUTOR’S MISCONDUCT, BRADY VIOLATION.

{¶10} In his first and fifth proposed assignments of error, appellant argues his appellate counsel was ineffective in failing to submit the names of his alibi witnesses, as

well as their affidavit testimony and several surveillance videos and in failing to argue that appellant was prejudiced when he was precluded from arguing about the "bad acts" of the State's witnesses.

{¶11} Counsel for appellant raised these issues with respect to his trial counsel's purported failures on direct appeal. We rejected his arguments, finding that the decision to call a particular witness was within the purview of trial strategy, which we would not second guess, and cited to *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, *State v. Reddy*, 10th Dist. No. 09AP-868, 2010-Ohio-3892, and *State v. Jordan*, 10th Dist. No. 08AP-1074, 2009-Ohio-2161. We also rejected appellant's arguments with respect to the alleged surveillance video and the purported acts of the State's witnesses, as there was not sufficient evidence in the record to support those claims.

{¶12} Furthermore, in these proposed assignments of error, appellant attempts to rely, in part, upon materials which are not a part of the trial record, such as the affidavits of his alleged alibi witnesses. We cannot consider those materials in his application for reopening. See *State v. Alsip*, 8th Dist. No. 93105, 2011-Ohio-303 (matters which are outside the record do not provide a basis for reopening an appeal), and *State v. Coleman*, 85 Ohio St.3d 129, 1999-Ohio-258 (allegations of ineffectiveness based upon facts which are not in the trial record should be reviewed through post-conviction remedies).

{¶13} Thus, we find the arguments in these two assignments of error fail to establish a colorable claim of ineffective assistance of counsel.

{¶14} In his second and sixth proposed assignments of error, appellant argues his counsel was ineffective in failing to argue that the evidence presented against him is insufficient to support his convictions and furthermore, the judgment against him is

against the manifest weight of the evidence. Appellant further argues the testimony of the State's witnesses was contradictory and inherently unreliable and that the State failed to link him to the crime.

{¶15} Appellate counsel did not make sufficiency or manifest weight arguments on appellant's behalf in his direct appeal. However, had those arguments been made, those challenges would have failed, as they are without merit. There is more than sufficient evidence to convict appellant and much of the evidence was quite compelling. Multiple witnesses described a home invasion that resulted in removal from their home as they were forced, at gunpoint, into a van and driven around for several hours. Equally compelling was the evidence and testimony regarding the distinctive red tape found in appellant's van, which appeared to match the tape described by the victims and which was also located in the alley where the victims were released. In addition, seven separate witnesses identified appellant as the perpetrator of the crime. The evidence was clearly legally sufficient to support the convictions for aggravated burglary, aggravated robbery and kidnapping.

{¶16} As to appellant's credibility arguments, the jury was free to consider the credibility of the witnesses. The issues of credibility and the weight to be assigned to the evidence are primarily issues for the jury as the trier of the facts. *State v. Wiley*, 10th Dist. No. 03AP-340, 2004-Ohio-1008. We could not say, based upon all of the evidence presented here, and, considering the corroborating testimony of several witnesses, that reasonable minds would not have arrived at the conclusion that appellant was one of the perpetrators, nor could we say that the jury clearly lost its way in reaching that determination.

{¶17} In his third proposed assignment of error, appellant submits his appellate counsel was ineffective for failing to challenge trial counsel's failure to properly confront the State's witnesses during cross-examination regarding bias, motive, and various pending charges and their surrounding facts.

{¶18} We note that in his direct appeal, counsel for appellant argued trial counsel was ineffective in his cross-examination because he failed to properly make the jury aware of the criminal records of the State's witnesses. However, we rejected those arguments, finding that the criminal backgrounds had been established on direct, and that Evid.R. 609 would have likely restricted counsel from probing further into issues involving the witnesses' criminal histories and convictions. We further note there is nothing in the record to support appellant's claims that additional pending charges existed. Moreover, as we previously found, the scope of cross-examination falls within the realm of trial strategy and thus, debatable trial tactics do not establish ineffective assistance of counsel. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶101, citing *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, ¶45.

{¶19} In his fourth proposed assignment of error, appellant contends his appellate counsel was ineffective in failing to challenge the trial court's failure to properly inquire into appellant's dissatisfaction with his trial counsel and his request for new counsel.

{¶20} We previously addressed this general issue in appellant's direct appeal. In the direct appeal, counsel for appellant argued that trial counsel had been ineffective in failing to investigate, subpoena witnesses, and develop an alibi defense. We found this contention was not supported by the record. We also noted that appellant had informed

the trial court mid-way through trial, that he had certain complaints about his trial counsel and the trial court addressed and resolved those issues on the record.

{¶21} Furthermore, appellant again relies upon materials here which are not a part of the trial record. We cannot consider those materials in his application for reopening. See *Alsip* and *Coleman*.

{¶22} Appellant's seventh and eighth proposed assignments of error assert that appellate counsel was ineffective for failing to challenge the 37-year sentence imposed by the trial court, which was an abuse of discretion. Appellant complains his appellate counsel should have argued his sentence was excessive. Appellant also contends counsel should have argued that the seven kidnapping counts should have been merged as offenses of similar import and that there was no separate animus for the kidnapping(s).

{¶23} Although not previously raised, these two proposed assignments of error are without merit and any challenge on these grounds would have been unsuccessful. The trial court imposed a sentence which was within the statutory range and consecutive terms could be justified by the fact that appellant held multiple victims at gunpoint and drove them around the Columbus area, tied up in a van for several hours before releasing them. Furthermore, the facts as presented support a separate animus for the kidnapping charges and the aggravated robbery and/or aggravated burglary charge, and therefore merger is not required.

{¶24} In his ninth proposed assignment of error, appellant submits appellate counsel should have argued the trial court erred in overruling his Crim.R. 29 motion.

{¶25} We have previously stated that the evidence presented was more than sufficient to establish the elements of the crimes of aggravated burglary, aggravated

robbery, and kidnapping. "A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence." *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶37. In addition, in order to prevail, appellant must show that his motion had a reasonable probability of success. See *State v. Barbour* (May 6, 2008), 10th Dist. No. 07AP-841, ¶14. Based upon the compelling and overwhelming evidence presented at trial, appellant cannot show that such a motion would have been granted and therefore counsel was not ineffective in failing to raise this argument on appeal.

{¶26} Appellant's tenth proposed assignment of error asserts he was denied due process when his appellate counsel failed to raise a claim of actual innocence.

{¶27} Appellant again appears to argue new evidence which is outside of the trial record, and thus is not proper for consideration here as previously stated above. Such an argument could be proper for consideration in a post-conviction petition or perhaps a habeas corpus petition, but not in the instant application to reopen.

{¶28} In his eleventh proposed assignment of error, appellant claims he was denied due process because his appellate counsel failed to raise the issue of prosecutorial misconduct, specifically a *Brady*¹ violation. Appellant submits the prosecutor had previously viewed the DVD evidence showing the State's witnesses robbing appellant the day prior to the home invasion, yet the prosecutor failed to correct the State's witnesses when they denied knowledge of the robbery against appellant. Appellant further argues the prosecutor misrepresented evidence that was recovered

¹ *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194.

from his van and from the crime scene and also delayed the filing of charges against one of its witnesses until after appellant's trial was completed.

{¶29} This proposed assignment of error also relies on purported evidence which is not in the trial record. Appellant has failed to point to anything specific in the record which supports his assertions or demonstrates how he was deprived of a fair trial or prejudiced. Also, we note that the conduct of the prosecuting attorney during trial is not grounds for error unless it deprives the accused of a fair trial. See *State v. Maurer* (1984), 15 Ohio St.3d 239, 266. Furthermore, even if there were prosecutorial misconduct, such misconduct is not treated as reversible error except in rare circumstances. *State v. Banks*, 10th Dist. No. 03AP-1286, 2005-Ohio-1943, ¶6.

{¶30} In conclusion, with respect to several of appellant's proposed assignments of error, we point out that appellate counsel is not required to raise every possible issue on appeal in order to render the effective assistance of counsel. *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, ¶7, citing *Jones v. Barnes* (1983), 463 U.S. 745, 103 S.Ct. 3308. A competent attorney can discount the chances of success on certain issues and instead elect to spend time on other issues. *State v. Allen* (1996), 77 Ohio St.3d 172. Appellate counsel's refusal to raise weak arguments does not create a genuine issue of ineffective assistance. *Id.*

{¶31} Appellant has failed to prove that his counsel was deficient in failing to raise the issues he now presents and in failing to demonstrate that, had counsel presented these issues on appeal, there was a reasonable probability that, but for counsel's deficiencies, the result of the proceeding would have been different. See *Banks* at ¶5. We find appellant has failed to establish there is a genuine issue as to whether there was

a colorable claim of ineffective assistance of counsel. Therefore, we deny appellant's application for reopening.

Application for reopening denied.

BRYANT, P.J., and KLATT, J., concur.
