[Cite as *State v. Day*, 2011-Ohio-334.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94760

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SEAN DAY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-514460

BEFORE: Cooney, J., Celebrezze, P.J., and Jones, J.

RELEASED AND JOURNALIZED: January 27, 2011

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Sean Day ("Day"), appeals his convictions for robbery and assault on a police officer. Finding no merit to the appeal, we affirm.

{¶ 2} In August 2008, Day was charged with two counts of robbery and one count of assault on a police officer. After a jury trial in December 2009 at

which he testified, he was found guilty of all three charges and sentenced to two years in prison.

{¶ 3} Day now appeals, raising two assignments of error.

Ineffective Counsel

{¶ 4} In the first assignment of error, Day contends that he received ineffective assistance of counsel.

{¶ 5} To reverse a conviction for ineffective assistance of counsel, the defendant must prove "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 2000-Ohio-448, 721 N.E.2d 52, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 6} As to the second element of the test, the defendant must establish "that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus; *Strickland* at 686. In evaluating whether a petitioner has been denied effective assistance of counsel, the Ohio Supreme Court held that the test is "whether the accused, under all the circumstances, had a fair trial and substantial justice was done." *State v. Hester* (1976), 45 Ohio St.2d 71, 341 N.E.2d 304, paragraph four of the syllabus.

{¶ 7} This court must presume that a licensed attorney is competent and that the challenged action is the product of sound trial strategy and falls within the wide range of professional assistance. *Strickland* at 689. Courts must generally refrain from second-guessing trial counsel's strategy, even where that strategy is questionable, and appellate counsel claims that a different strategy would have been more effective. *State v. Jalowiec*, 91 Ohio St.3d 220, 237, 2001-Ohio-26, 744 N.E.2d 163.

{¶ 8} Day claims that his counsel was ineffective because she (1) failed to request that all prior arrests and convictions be excluded from evidence, and (2) "opened the door to prosecutorial questions which inflamed the jury," referring to Day's prior experience with and convictions for shoplifting.

{¶ 9} "[A] trial court's decision to admit or exclude evidence 'will not be reversed unless there has been a clear and prejudicial abuse of discretion.'" *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, quoting *O'Brien v. Angley* (1980), 63 Ohio St.2d 159, 163, 407 N.E.2d 490. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 10} Evid.R. 404(B) states, in pertinent part:

{¶ 11} "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may,

however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶ 12} Furthermore, when an accused testifies at trial, Evid.R. 609 allows the state to impeach his credibility with evidence of prior felony convictions. Evid.R. 609(A)(2) states:

{¶ 13} "* * *[E]vidence that the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the accused was convicted and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice of confusion of the issues, or of misleading the jury."

{¶ 14} However, Evid.R. 609(B) places a time limit on the use of such information. It provides:

{¶ 15} "Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement, or the termination of probation, or shock probation * * * unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."

{¶ 16} In allowing the evidence of Day's past convictions, the trial court determined that the probative value of the evidence outweighed the danger of unfair prejudice. Having testified in his own defense, Day's prior convictions were

admissible for impeachment purposes. In addition, Day's counsel properly moved to have all convictions older than ten years stricken from the record.

{¶ 17} However, part of Day's testimony was aimed at illustrating his knowledge of shoplifting based on past crimes. It appears that his strategy was to illustrate that, based on his extensive knowledge of the minor consequences of shoplifting — having committed the crime multiple times before, he would have no motive to become violent with store security. Day testified that he knew from past experience that when you shoplift an item under a certain dollar amount you are simply required to sign some forms and promise not to return to that store again. Regardless of the persuasiveness of Day's argument, he offered testimony about past crimes and opened up this line of questioning for cross-examination.

{¶ 18} Despite Day's self-incriminating testimony, there is ample evidence in the record on which the jury could have relied to convict him.

{¶ 19} Day has not shown to a reasonable degree of probability that but for counsel's failure to request that all prior convictions be excluded from evidence, and but for her error in opening the door to all of his prior shoplifting convictions, the outcome of the trial would have been different. Counsel's performance did not fall below an objective standard of reasonableness, and Day's claim of ineffective assistance of counsel is meritless.

{¶ 20} Accordingly, the first assignment of error is overruled.

Manifest Weight of the Evidence

{¶ 21} In his second assignment of error, Day contends that his robbery conviction is against the manifest weight of the evidence.

{¶ 22} A challenge to the manifest weight of the evidence attacks the verdict in light of the State's burden of proof beyond a reasonable doubt. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386-87, 678 N.E.2d 541. When inquiring into the manifest weight of the evidence, the reviewing court sits as the "thirteenth juror and makes an independent review of the record." Id. at 387; *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652. The appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of all 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 judgment must be reversed and a new proceeding ordered. *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 23} Where a judgment is supported by competent, credible evidence going to all essential elements to be proven, the judgment will not be reversed as being against the manifest weight of the evidence. *State v. Mattison* (1985), 23 Ohio App.3d 10, 14, 490 N.E.2d 926. Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶ 24} Day was convicted of robbery under R.C. 2911.02(A)(2), which states: "[n]o person, in attempting or committing a theft offense * * *, shall * * * [i]nflict, attempt to inflict, or threaten to inflict physical harm on another[.]"

{¶ 25} The following evidence was adduced at trial.

{¶ 26} On the day in question, Cleveland Metropolitan Housing Authority police officer Thomas Hinkle ("Hinkle") was working as a security guard at Dave's Supermarket, wearing his police uniform. Hinkle observed Day place two or three oxtails in his pocket and walk toward the store exit without paying for the items. Hinkle approached Day and asked to see his identification. Hinkle testified that Day seemed agitated and intoxicated.

{¶ 27} Day then attacked Hinkle, punching him in the face and chest. The two wrestled in the entry and outside on the sidewalk. Hinkle threatened to deploy his taser if Day failed to comply. Day welcomed Hinkle's threat. Hinkle used his taser and was then assisted by an off-duty police officer who arrived on the scene. Hinkle sustained cuts and bruises.

{¶ 28} Day took the stand in his own defense and admitted the attempted shoplifting. However, he claimed that Hinkle had been the aggressor and had instigated the physical fight.

{¶ 29} In weighing the credibility of witnesses and the totality of evidence presented, this case is not the exceptional one requiring reversal. In finding Day

guilty of robbery, the jury did not lose its way and create a miscarriage of justice. Day's convictions are not against the manifest weight of the evidence.

{¶ 30} Therefore, the second assignment of error is overruled.

{¶ 31} Judgment is affirmed.

It is ordered that appellee recover of 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.

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COLLEEN CONWAY COONEY, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and
LARRY A. JONES, J., CONCUR