

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-090319
		C-090320
Plaintiff-Appellee,	:	TRIAL NOS. 09TRD-7047A
		09TRD-7047B
vs.	:	
		<i>JUDGMENT ENTRY.</i>
DARYL DAVIS,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Following a bench trial, defendant-appellant, Daryl Davis, was convicted of leaving the scene of an accident under R.C. 4549.02 and operating a motor vehicle without reasonable control under R.C. 4511.202. He has filed a timely appeal from those convictions. We find no merit in his three assignments of error, and we affirm the trial court's judgment.

The record shows that at approximately 12:35 a.m., Kokei Hall was in her house on Chestnut Street when she heard a crash and people screaming in the street. When she went outside, she saw that a dark blue or dark purple SUV had come down the street the wrong way and had crashed into several cars on the street, including hers. From approximately 75 feet away, she saw the driver get out of the car and leave the scene on foot.

Hall testified that the driver was gone when the police arrived on the scene. A police officer pulled up a photograph of Davis on his car monitor and told her that he

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

was the owner of the vehicle that had hit her car. Hall said that she had identified Davis as the driver of the dark-colored SUV.

Derrick Glaze, another resident of Chestnut Street, heard a loud crash and looked outside his window. He saw an SUV hit his own car. He went outside and observed the driver from approximately five feet away. He saw the driver get out of the SUV and leave the scene on foot. Glaze followed him for about 20 feet until the driver reached the corner of Chestnut and John Streets.

Glaze described the driver to the police as short and stocky and wearing dark clothing and glasses. A police officer showed him a photograph of Davis, who was the owner of the SUV, and Glaze identified Davis as the driver.

Officer Andrew Fussellman arrived at the scene minutes after the crash and found a blue Ford Explorer blocking the street. He testified that witnesses had described the driver as male, black, heavysset, and about five-foot-five to five-foot-nine inches tall. Fussellman retrieved Davis's driver's license photograph after checking the license plates of the car on his computer. He testified that he showed the photograph to the witnesses and told them that the person depicted was the owner of the vehicle. According to Fussellman, Glaze and another eyewitness had identified Davis, but Hall could not identify Davis from the photograph.

Davis presented an alibi defense. He and his sister testified that he had been at his sister's house at the time of the accident. Davis testified that, the following morning, he had reported to police that his SUV had been stolen. When he went to retrieve it from the Cincinnati Police Department's impound lot, he was told that it had been involved in an accident.

In his first assignment of error, Davis contends that he was denied the effective assistance of counsel. He argues that his counsel should have filed a pretrial

motion to suppress the identification testimony. This assignment of error is not well taken.

A court will presume that a properly licensed attorney is competent, and the defendant bears the burden to show ineffective assistance of counsel.² To sustain a claim for ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense.³ Counsel's failure to file a motion to suppress would have been prejudicial only if Davis had had a reasonable probability of success on that motion.⁴

A trial court should suppress a pretrial identification of a suspect if the confrontation was unnecessarily suggestive of the suspect's guilt and the identification was unreliable under the circumstances.⁵ The defendant bears the burden of proving both prongs of this test.⁶ Suggestive identification procedures are unreliable if they create a substantial likelihood of misidentification.⁷

No prohibition exists against viewing a suspect alone in a "one-man showup" when it occurs near the time of the alleged criminal offense. "Such a course does not tend to bring about misidentification but rather tends under some circumstances to insure accuracy."⁸

Fussellman testified that he checked the Ford Explorer's license plates and found that Davis was the owner of the vehicle. He retrieved Davis's driver's license

² *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-156, 524 N.E.2d 476; *State v. McCrary*, 1st Dist. No. C-080860, 2009-Ohio-4390, ¶12.

³ *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052; *McCrary*, supra, at ¶12.

⁴ *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, ¶65; *McCrary*, supra, at ¶13.

⁵ *State v. Waddy* (1992), 63 Ohio St.3d 424, 438, 588 N.E.2d 819; *State v. Bell*, 1st Dist. No. C-030726, 2004-Ohio-3621, ¶16.

⁶ *Manson v. Brathwaite* (1977), 432 U.S. 98, 114, 97 S.Ct. 2243; *State v. Smith*, 1st Dist. Nos. C-080712 and C-090505, 2009-Ohio-6932, ¶16.

⁷ *Waddy*, supra, at 439; *Smith*, supra, at ¶16.

⁸ *State v. Richards*, 1st Dist. No. C-050938, 2007-Ohio-172, ¶14, quoting *State v. Madison* (1980), 64 Ohio St.2d 322, 332, 415 N.E.2d 272.

photograph and showed it to the witnesses. Both Hall and Glaze testified at trial that they had identified Davis as the driver of the SUV who had left the scene of the accident. Fusselman testified that Glaze and another witness had identified Davis from the photograph, but that Hall had not.

Even if we were to hold that the identification procedure was unnecessarily suggestive, Davis has still failed to show that the witnesses' identifications were unreliable. Since the trial court can believe some, all, or none of any witness's testimony, it could have believed Hall's in-court identification of Davis.⁹ Further, Glaze saw the driver from a close distance and identified him as Davis from the photograph minutes after he had seen him. The trial court specifically stated that Glaze's testimony was "very credible." Also, according to Fusselman, another witness, who did not testify, had identified Davis.

Under the circumstances, no substantial likelihood of misidentification existed, and Davis has not shown that he would have prevailed on a motion to suppress. Consequently, he has failed to demonstrate that his counsel was ineffective, and we overrule his first assignment of error.

In his second assignment of error, Davis contends that the evidence was insufficient to support his convictions. Our review of the record shows that a rational trier of fact, after viewing the evidence in a light most favorable to the prosecution, could have found that the state had proved beyond a reasonable doubt all the elements of leaving the scene of an accident under R.C. 4549.02 and operating a motor vehicle without reasonable control under R.C. 4511.202. Therefore, the evidence was sufficient to support Davis's convictions.¹⁰

⁹ See *State v. Williams*, 1st Dist. Nos. C-060631 and C-060668, 2007-Ohio-5577, ¶45.

¹⁰ See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus; *Willoughby v. Lyons*, 11th Dist. Nos. 2005-L-043 and 2005-L-044, 2006-Ohio-1005, ¶11-19.

Davis's main contention is that the identification testimony was flawed, but the issue came down to credibility. The trial court specifically stated that it found the eyewitnesses' testimony to be more credible than Davis's. Matters as to the credibility of evidence are for the trier of fact to decide.¹¹

Davis also contends that his convictions were against the manifest weight of the evidence. After reviewing the record, we cannot say that the trier of fact lost its way and created such a manifest miscarriage of justice that we must reverse Davis's convictions and order a new trial. Therefore, the convictions were not against the manifest weight of the evidence.¹² We overrule Davis's second assignment of error.

In his third assignment of error, Davis contends that the trial court erred by ordering restitution in an unspecified amount. He argues that the court failed to determine the specific amount of restitution. This assignment of error is not well taken.

The court must determine the specific amount of restitution, which must be based on the victim's economic loss.¹³ R.C. 2929.28(A) provides that a court may base restitution on an amount recommended by the victim, the offender, a presentence-investigation report, estimates or receipts indicating the cost of repairing or replacing the property, or other information.¹⁴ An order in which the court failed to establish the amount of restitution would not be a final, appealable order under R.C. 2505.02(B).¹⁵

¹¹ *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433; *Williams*, supra, at ¶45.

¹² *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541; *State v. Baldwin*, 1st Dist. No. C-081237, 2009-Ohio-5348, ¶27; *Lyons*, supra, at ¶21-22.

¹³ *State v. Anderson*, 1st Dist. Nos. C-050785 and C-050786, 2006-Ohio-4602, ¶6; *State v. Collins*, 2nd Dist. No. 21182, 2006-Ohio-3036, ¶4.

¹⁴ *Anderson*, supra, at ¶6.

¹⁵ *In re Holmes* (1980), 70 Ohio App.3d 75, 77, 434 N.E.2d 747.

Davis claimed to have insurance, and the court told him that he would have to produce proof of insurance or he would have to make restitution. Glaze stated to the court that while his insurance company had paid for his car repairs, he had to pay the \$750 deductible. Hall stated that while she had not yet involved her insurance company, her loss was approximately \$3,000, and she, too, had a \$750 deductible.

Davis has only attached the journal order for the reasonable-control charge to his brief. That order does not make any reference to restitution. The final order for the failure-to-stop charge ordered him to pay restitution. It specifically stated, “Restitution \$750 deductible Mr. Glaze. \$750 deductible Ms. Hall.”

Consequently, the record shows that the court did determine the amount of restitution, which was based on the victims’ economic loss. We overrule Davis’s third assignment of error and affirm the trial court’s judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., DINKELACKER and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on February 17, 2010

per order of the Court _____.

Presiding Judge