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

STATE OF OHIO,	:	APPEAL NO. C-090645 TRIAL NO. B-0708978
Plaintiff-Appellee,	:	*JUDGMENT ENTRY.*
vs.	:	
CHRISTOPHER SMITH,	:	
Defendant-Appellant.	:	

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

Defendant-appellant, Christopher Smith, appeals the judgment of the Hamilton County Court of Common Pleas convicting him of aggravated robbery, robbery, and having a weapon while under a disability, with firearm specifications. He was convicted after a bench trial.

One afternoon, a man wearing a wig and sunglasses entered a Cincinnati Bell Wireless store brandishing a gun. He ordered the patrons to the floor and demanded money from the store manager. The manager opened the cash register, and the gunman fled with the store's till.

Thomas Moore was driving by the store immediately before the robbery. He saw the man put on the wig and sunglasses and enter the store. With his suspicion aroused, Moore stopped his car and observed the store. He saw the man emerge from the store and get into a blue Ford Expedition. Moore followed the Expedition

---

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

and saw the man whom he would ultimately identify as Smith sitting in the passenger side of the vehicle. When Moore saw Smith, he was no longer wearing the disguise.

Soon after the robbery, police found the Expedition in the vicinity of Smith's residence. Near the vehicle, they found a wig, sunglasses and a black T-shirt. The Expedition's license plate led the police to one of Smith's girlfriends, who testified that she had given the vehicle to Smith.

On the afternoon of the robbery, Smith, a parolee, cut off his electronic-monitoring ankle bracelet and absconded. Cellular telephone records established that he had told another girlfriend to report that the Expedition had been stolen.

The theory of the defense was that Charles Allen had borrowed the car and had committed the robbery without Smith's participation. Deoxyribonucleic acid (DNA) taken from the wig, sunglasses, and T-shirt revealed a match with Allen's DNA, whereas none of Smith's DNA was discovered. The defense also offered the out-of-court statements of Allen suggesting that Smith had not been involved.

In rebuttal, the state presented the testimony of Allen, who testified that he had driven Smith from the crime scene in the Expedition. The trial court found Smith guilty and sentenced him to an aggregate term of 27 years and 107 days in prison.

In his first assignment of error, Smith now argues that the trial court erred in relying on its personal knowledge in determining his guilt. Specifically, he cites the trial court's comments that it was familiar with the area in which the robbery had occurred and that it could visualize where various events had taken place.

As a general rule, the trier of fact may not rely on its own knowledge in determining the facts of a case.[2] But in the case at bar, Smith has failed to

---

[2] See, generally, *State v. Trimble,* 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, certiorari denied (2009), __ U.S. __, 103 S.Ct. 752.

demonstrate any prejudice. Although the trial court stated that it was familiar with the area, its comments were based on evidence that was properly admitted at trial. And the facts upon which the court commented were not disputed; they simply reflected street names, distances, and other objectively verifiable facts.[3]

Smith also argues that he was deprived of a fair trial when the court admitted evidence that he had been stopped in a vehicle while carrying a loaded gun approximately eight months before the robbery in question. Although we agree that the trial court violated the prohibition against admitting "other acts" evidence as set forth in Evid.R. 404(B), the court indicated that it was giving little weight to the prior incident. In light of the strength of the state's case, we hold that the error was harmless.

Smith also argues that he was prejudiced when the trial court considered a prior conviction for robbery. This argument is not well taken. The conviction was admissible to prove the legal disability, and we are not persuaded that the trial court found Smith guilty based on an improper inference. We overrule the first assignment of error.

In his second assignment of error, Smith argues that the trial court erred in sentencing him for both aggravated robbery and robbery, contending that the crimes were allied offenses of similar import. The state concedes that the trial court erred, and we accordingly sustain the second assignment of error.

In his third assignment of error, Smith argues that he was denied the effective assistance of trial counsel. To establish ineffective assistance of counsel, the defendant must demonstrate that counsel's performance fell below an objective standard of reasonable performance and that prejudice arose from counsel's performance.[4]

---

[3] See id. at ¶86.
[4] *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraphs two and three of the syllabus.

Smith argues that trial counsel was deficient in failing to argue that aggravated robbery and robbery were allied offenses of similar import. But because we have already recognized that error, counsel's failure to raise the issue at trial was harmless.

Smith also contends that counsel was remiss in not filing a motion to dismiss the indictment on the basis that it did not contain mens rea allegations. This argument is without merit. The state amended the indictment as it was entitled to do under Crim.R. 7(D), and any alleged defects were cured by that amendment.

Next, Smith argues that counsel was ineffective in not calling him to testify on his own behalf. This court will not question decisions of counsel that can be characterized as sound trial strategy,[5] and we are not persuaded that Smith's testimony would have altered the outcome of the proceedings.

Finally, Smith makes the general arguments that counsel was ineffective in failing to call an expert witness on the issue of identification testimony, in failing to file motions to compel discovery, and in failing to present available evidence in support of his defense. Having reviewed the entire record, we cannot say that counsel's alleged failures deprived Smith of a fair trial, and we overrule the third assignment of error.

In his fourth and final assignment of error, Smith argues that his convictions were based on insufficient evidence and were against the manifest weight of the evidence.

In the review of the sufficiency of the evidence to support a conviction, the relevant inquiry for the appellate court "is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[6] To reverse a conviction

---

[5] See *State v. McCrary,* 1st Dist. No. C-080860, 2009-Ohio-4390, ¶16, jurisdictional motion overruled, 123 Ohio St.3d 1524, 2009-Ohio-6487, 918 N.E.2d 526.
[6] *State v. Waddy* (1992), 63 Ohio St.3d 424, 430, 588 N.E.2d 819.

on the manifest weight of the evidence, a reviewing court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and conclude that, in resolving the conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice.[7]

The aggravated-robbery statute, R.C. 2911.01(A)(1), states that "[n]o person, in attempting or committing a theft offense * * * or in fleeing immediately after the attempt or offense, shall * * * [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it." R.C. 2911.02(A)(2), governing robbery, states that "[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall * * * "[i]nflict, attempt to inflict, or threaten to inflict physical harm on another."

In this case, the convictions were in accordance with the evidence. The eyewitness testimony, Smith's ownership of the Expedition, and his dismantling of the electronic-monitoring device all indicated that he had been the culprit of the armed robbery. It was undisputed that he was under a disability.

Although only Allen's DNA was found on the items recovered by police, there was expert testimony that a person could handle or wear an item without leaving behind DNA. And in light of the inconsistent statements given by Allen, the trial court could have reasonably given little weight to the defense's insistence that Allen's out-of-court statements had exculpated Smith. The trial court did not lose its way in finding Smith guilty, and we overrule the fourth assignment of error.

We hereby vacate the trial court's separate sentences for aggravated robbery and robbery and remand the case for sentencing on only one of the offenses. In all other respects, we affirm the judgment of the trial court.

---

[7] *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

Further, a certified copy of this judgment entry shall constitute 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., HILDEBRANDT and **MALLORY, JJ.**

To the Clerk:

Enter upon the Journal of the Court on May 5, 2010

per order of the Court _____.
Presiding Judge