[Cite as *State v. Ward*, 2015-Ohio-2260.]

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

STATE OF OHIO,	:	APPEAL NO. C-140721 TRIAL NO. 12CRB-7329
Plaintiff-Appellee,	:	*O P I N I O N.*
vs.	:	
ANTONIO WARD,	:	
Defendant-Appellant,	:	

Criminal Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: June 12, 2015

Heidi Rosales, City Prosecutor, and *David Sturkey*, Assistant City Prosecutor, for Plaintiff-Appellee,

Raymond T. Faller, Hamilton County Public Defender, and *Christie M. Bebo*, Assistant Public Defender, for Defendant-Appellant.

Please note: we have removed this case from the accelerated calendar.

SYLVIA SIEVE HENDON, Presiding Judge.

{¶1} Defendant-appellant Antonio Ward appeals his conviction, following a jury trial, for assaulting Timothy James. Ward challenges the trial court's ruling on his suppression motion, the weight of the evidence, the court's remarks to the jury, and the performance of defense counsel. Finding no merit in these challenges, we affirm the trial court's judgment.

The Suppression Hearing

{¶2} At the hearing on Ward's motion to suppress James' eyewitness identification, James testified that he was walking to work on Paxton Avenue in the Oakley neighborhood of Cincinnati just before midnight. The area was well lit by street lights and by light emanating from nearby businesses. Four young black men approached and then passed James on the sidewalk. Just then, James was punched in the back of the head. As he turned around, he saw one of the four young men come at him with raised fists, just before the man "sucker-punched" him in the eye. When James ran to the other side of the street, he turned and saw the four young men "rushing up towards" him. At that point, the man who had punched him stepped forward and punched James again. James tripped over the sidewalk and fell. The four young men ran away towards Taylor Avenue.

{¶3} James called 911 and reported that he had been attacked by four black males, roughly 20 years of age, who were wearing dark or black clothing. Cincinnati Police Officer Kevin E. Hankerson arrived within about two minutes. James told Officer Hankerson that the one who punched him had been "rather on the short side," that he had been wearing a dark blue or black skullcap or a beanie cap, and

that he had had a little bit of facial hair. Officer Hankerson radioed for medical attention for James.

{¶4} At 12:07 a.m., Cincinnati Police Officer Betsey Haynes saw four young men matching the description given by James. The group was two or three blocks away from where the assault had occurred, walking quickly away from that area. She said that otherwise there were very few people out that night, and that it had been very quiet.

{¶5} Officer Haynes and other officers detained the four young men on Madison Road, in an area that was well lit by street lights. Ward, at 19, was the only adult of the four. He was five-feet-six-inches tall, and wore a black shirt and blue jeans. Ward had a name tattooed on his right hand. He had a mustache and a slight beard. The other three were juveniles, whose heights were five-feet-seven-inches, five-feet-eight-inches, and five-feet-nine-inches. One juvenile wore a white t-shirt and blue jeans; one wore a blue hoodie and blue jeans; and officers recalled the other as wearing dark clothing.

{¶6} Officer Haynes testified that Ward was handcuffed. She could not remember if any of the other three were handcuffed. She recalled that some of them were sitting, and that the four of them were "spread out."

{¶7} Within minutes, Officer Hankerson brought James to the scene and stopped his car about 15 to 20 feet from the four suspects. James testified that Ward was handcuffed and sitting on the ground, and that the other three young men may have been uncuffed and standing. Officer Hankerson asked if anybody looked familiar, and James immediately identified Ward as his attacker. James testified that Officer Hankerson had done nothing to draw his attention to any of the young men. With respect to the certainty of his identification, James testified that, during the attack, "because [Ward] was assaulting me, we were very, very close, so there's no doubt in my mind that I identified the correct individual, absolutely no doubt."

{¶8} In denying Ward's motion to suppress, the trial court noted both the quality of James' testimony as well as the "very short period of time" between the assault and the initial apprehension of Ward by police.

The Jury Trial

{¶9} The state's evidence during the jury trial was essentially the same evidence that had been presented at the suppression hearing.

{¶10} During the state's case-in-chief, defense counsel cross-examined the police officers about their familiarity with R.C. 2933.83, which sets forth procedures for live and photographic lineups.

{¶11} In the defense case, the defense called Dr. Dario Rodriguez, a professor of psychology, to testify as an expert in eyewitness identification. He testified that eyewitness memory "can be relatively reliable if it's treated appropriately," and listed factors that could influence its accuracy. His opinion was that the suggestiveness of the identification procedure in this case "may have artificially inflated the victim's confidence in that identification."

{¶12} On cross-examination, Dr. Rodriguez acknowledged that several factors weighed in favor of the reliability of James' identification. These included a relatively long exposure time of two to three minutes during which James was able to view the suspect, the lack of unusual or "eye-grabbing" details about the suspect, the lack of a weapon, and the very brief period between the assault and the identification.

{¶13} Ward testified in his own defense. He denied that he had attacked James. He testified that at the time that he was stopped by the police, he, a friend named Alex, and two other friends had been rushing to get to Alex's home located just four blocks away. He said that when the victim was brought to the scene, a

police officer shined a flashlight on Alex and then on him. He said that the officer shined the light back and forth between Alex and him, and that after the fourth time, he knew that the victim had identified him because the officer "shined the light right in my face."

{¶14} The jury returned a guilty verdict.

Motion to Suppress Identification

{¶15} In his first assignment of error, Ward argues that the trial court erred by overruling his motion to suppress James' out-of-court identification. Ward contends that the show-up identification procedure was so suggestive that it was unreliable and therefore inadmissible.

{¶16} Appellate review of a ruling on a motion to suppress involves mixed questions of law and fact. *See State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. A reviewing court must accept the trial court's findings of fact if they are supported by competent and credible evidence. *Id.* But the reviewing court must then determine, without any deference to the trial court, whether the facts satisfy the applicable legal standard. *Id.*; *State v. Williams*, 2011-Ohio-6032, 968 N.E.2d 1038 (1st Dist.).

{¶17} The Ohio Supreme Court has noted that:

> [t]here is no prohibition against a viewing of a suspect alone in what is called a 'one-man showup' when this occurs near the time of the alleged criminal act; such a course does not tend to bring about misidentification but rather tends under some circumstances to insure accuracy. * * * [P]olice action in returning the suspect to the vicinity of the crime for immediate identification in circumstances such as these fosters the desirable objectives of fresh, accurate identification which

> in some instances may lead to the immediate release of an innocent suspect and at the same time enable the police to resume the search for the fleeing culprit while the trail is fresh.

State v. Madison, 64 Ohio St.2d 322, 332, 415 N.E.2d 272 (1980), quoting *Bates v. United States*, 405 F.2d 1104, 1106 (D.C.Cir.1968); *State v. Foster*, 1st Dist. Hamilton No. C-080399, 2009-Ohio-1698.

{¶18} Due process requires courts to assess whether improper police conduct created a "substantial likelihood" that a witness misidentified a criminal defendant. *Neil v. Biggers*, 409 U.S. 188, 201, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). Even if a police-arranged identification procedure is unnecessarily suggestive, the resulting identification is admissible so long as it is reliable. *See Manson v. Brathwaite*, 432 U.S. 98, 116, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *Biggers* at 201.

{¶19} In evaluating the reliability of a witness's identification, courts should consider the totality of the circumstances, including the witness's opportunity to view the suspect at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the suspect, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Brathwaite* at 114, citing *Biggers* at 199-200.

{¶20} After reviewing the record, we hold that the trial court properly overruled the motion to suppress James' identification. Even if the showup procedure was arguably suggestive, James' identification of Ward as his attacker was reliable, and there was no substantial likelihood of misidentification. James had the opportunity to closely view Ward's face and clothing in a well-lit area before and during the assault. The description that James provided to 911 and the added details that he mentioned to Officer Hankerson proved to accurately describe Ward upon his stop and arrest. Within 20 minutes of the assault, James identified Ward with

certainty. Under these circumstances, we hold that the trial court did not err in denying Ward's motion to suppress. We overrule the first assignment of error.

Effective Assistance of Counsel

{¶21} In his second assignment of error, Ward argues that he was denied the effective assistance of counsel. Specifically, he contends that he was prejudiced by counsel's failure to timely file a notice of alibi.

{¶22} At trial, the state had rested its case-in-chief before it learned that Ward would testify in his defense. Because Ward had failed to file a notice of alibi at least seven days before trial as required by Crim.R. 12.1, the state moved to exclude any evidence offered by Ward to prove an alibi. Defense counsel argued that Ward should be allowed to testify that he had taken a bus from downtown Cincinnati to Oakley, where he had met up with friends and then was stopped by police. But the trial court determined that the lack of notice sharply limited the state's opportunity to investigate the matter and that admitting alibi evidence would prejudice the state. So the court granted the state's motion to exclude the evidence.

{¶23} Reversal of a conviction for ineffective assistance requires that the defendant show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the proceeding would have been different. *Strickland* at 694; *Bradley* at paragraph three of the syllabus.

{¶24} Trial counsel's representation is presumed effective. *Strickland* at 690. Generally, defense counsel will not be found to have been ineffective based upon debatable trial tactics. *See State v. Clayton*, 62 Ohio St.2d 45, 59, 402 N.E.2d 1189 (1980). Defense counsel's failure to provide a timely notice of alibi may be "an intended, self-serving trial tactic" where the record demonstrates "counsel's thorough understanding of trial tactics" and the law. *See State v. Smith*, 17 Ohio St.3d 98, 101, 477 N.E.2d 1128 (1985); *see also State v. Jamison*, 49 Ohio St.3d 182, 189, 552 N.E.2d 180 (1990).

{¶25} Failing to file a notice of alibi has potential advantages for the defense. If alibi evidence is allowed absent notice to the state, the strategy has "the potential concomitant effect of depriving the state of a fair trial." *Smith* at 101, fn. 1. And if alibi evidence is disallowed, the effect may be to contaminate the trial in anticipation of an appeal, as explained by defense counsel in *Smith*: "when the case goes up on appeal, and I can be cited for miswhatsoever -- ineffective assistance of counsel and the case is going to be reversed." *Smith* at 103. Under either scenario, the interests of justice are not served by the tactic.

{¶26} Our review of the record convinces us that defense counsel's failure to file a timely notice of alibi in this case was a trial strategy. Counsel waited until midway through trial to inform the state that Ward would claim to have been elsewhere at the time of the assault. Had counsel done so before the jury was sworn, the court could have continued the trial to allow the state a fair opportunity to rebut the alibi evidence. As the prosecutor argued to the trial court, the defense had more than a year to provide the notice of alibi, but had not done so until after the state had rested.

{¶27} Defense counsel's explanation for not filing a Crim.R. 12.1 notice was that, by entering a plea of not guilty, Ward had sufficiently put the state on notice that he was not at the scene of the crime. But that reasoning would nullify a Crim.R.

12.1 notice requirement in all cases. *See Jamison*, 49 Ohio St.3d at 188, 552 N.E.2d 180. In *Williams v. Florida*, 399 U.S. 78, 81-82, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), the United States Supreme Court, in upholding an alibi notice requirement, stated:

> Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate. Reflecting this interest, notice-of-alibi provisions, dating at least from 1927, are now in existence in a substantial number of States. The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.

(Footnotes omitted.) *Williams* at 81-82; *see Jamison* at 188.

{¶28} Moreover, even if we assumed that defense counsel's performance was deficient, Ward cannot show that he was prejudiced. We cannot say that but for counsel's failure to file a notice of alibi, the result of the trial would have been different. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *Bradley*, 42 Ohio St.3d at 141-142, 538 N.E.2d 373. Clearly the jury rejected Ward's testimony that he was not the person who had attacked James, so Ward cannot show that his proffered alibi testimony would have changed the outcome. Consequently, Ward's ineffective-assistance claim fails, and we overrule the second assignment of error.

Weight of the Evidence

{¶29} In his third assignment of error, Ward argues that his conviction was against the manifest weight of the evidence. When reviewing the manifest weight of the evidence, we must weigh the evidence and consider the credibility of the witnesses to determine whether the trier of fact lost its way and committed such a

manifest miscarriage of justice in finding the defendant guilty that the conviction must be reversed. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

{¶30} The jury was in the best position to determine the credibility of the witnesses. It was entitled to believe James' testimony and to reject Ward's claim that he had not assaulted James. Moreover, this is not "an exceptional case in which the evidence weighs heavily against the conviction." *See id.* Accordingly, we conclude that Ward's assault conviction was not against the manifest weight of the evidence, and we overrule the third assignment of error.

Admonitions to the Jury

{¶31} In his fourth assignment of error, Ward argues that he was prejudiced by remarks made by the trial court to the jury about the identification procedure used by police. Ward complains that the court's comments were made immediately following defense counsel's closing argument. However, the record demonstrates that the remarks were made after the state's final closing argument, at the beginning of the court's instructions to the jury.

{¶32} During the state's case-in-chief, defense counsel had cross-examined Officers Hankerson and Haynes extensively about their familiarity with R.C. 2933.83, which sets forth eyewitness-identification procedures for "live lineups" and "photo lineups." Prior to the defense case, the court ruled that no evidence or testimony with regard to R.C. 2933.83 was permitted because the procedure used by police in this case did not constitute a "live lineup" as defined by the statute. The court determined that the evidence supported a finding that police had used a "show-up" procedure, and that, therefore, the statute was not implicated.

{¶33} Despite the court's explicit ruling, defense counsel's primary argument in closing was that the police had failed to follow Ohio's eyewitness-identification procedures. Defense counsel also stated, "[W]hat the police officers did the night of this incident was bad police procedure, but police just keep doing this. They keep doing these suggestive show-ups because that's how they have always done it and to do otherwise would be inconvenient and it would be impractical."

{¶34} In its admonitions to the jury, the trial court said that the identification procedure used by the police was neither "inherently improper" nor "unconstitutional." The court stated, "Whether the features and the surrounding circumstances and the facts of that identification meet your judgment is up to you." The court further stated:

> [Y]ou are the exclusive judges of the facts. You determine what happened in this case. Do not infer from any ruling or statement that the Court has made during the course of the trial or any facial expression or anything else that the Court has any conclusion on any factual question. Factual questions are the sole province of the jury.

{¶35} Following our review of the record, we hold that the remarks made by the trial court about the identification procedure were proper. The question of whether the identification procedure used by police was constitutional is "only properly litigated in a motion to suppress evidence." *See State v. Berry*, 1st Dist. Hamilton No. C-880461, 1989 Ohio App. LEXIS 3931, *4 (Oct. 18, 1989). The court's statement simply clarified that the legality of the procedure was a matter for the trial court, and that the jury would have to decide whether the eyewitness identification was reliable. *See id.* These admonitions were a reasonable response to defense counsel's apparent defiance in continuing to impugn the procedures. We find no error in the court's admonitions, and we overrule the fourth assignment of error.

Conclusion

{¶36} Having overruled each of Ward's assignments of error, we affirm the trial court's judgment.

Judgment affirmed.

MOCK and **STAUTBERG**, **JJ.,** concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.