[Cite as *State v. Broadnax*, 2007-Ohio-6584.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 21844
vs.	:	T.C. CASE NO. 06CR1661
TRACY S. BROADNAX, JR.	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 7th day of December, 2007.

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GRADY, J.:

{¶ 1} Defendant, Tracy Broadnax, appeals from his conviction and sentence for aggravated robbery.

{¶ 2} Between April 12 and 18, 2006, multiple aggravated robberies were committed in Harrison Township, Montgomery County, Ohio. The U.D.F. at 3905 North Main Street was robbed

on April 12th, the Swifty gas station at 5435 North Dixie Drive was robbed on April 14th, and the Speedway gas station at 2232 Needmore Road was robbed on April 18th. In each robbery, the suspect was described as a shorter, light complexioned African-American male, 5'5"-5'8", weighing between 130 and 180 pounds. A silver semi-automatic handgun was used in all three robberies. In the U.D.F. and Speedway robberies, the suspect wore a black ski mask. In the Speedway robbery, the suspect also wore a blue glove. No mask or glove was worn during the Swifty gas station robbery.

{¶ 3} On April 18, 2006, the Speedway gas station at 2001 Shiloh Springs Road in Trotwood was robbed. The suspect brandished a small silver handgun and wore a black ski mask, brown clothing, black shoes with red and white markings, and one glove. After the robbery the suspect ran to a black car in which another individual was waiting. In a call to police, the suspects were described as two African-American males who were seen driving a black, older model Buick Regal.

{¶ 4} Trotwood police officer Akshay Gyan was dispatched to the Speedway station. While driving to the Speedway station, Officer Gyan learned that other officers had stopped a suspect vehicle on Wolf Road, just one mile from the Speedway station. Officer Gyan drove to the location where

the suspect vehicle was stopped.

{¶ 5} By the time Officer Gyan arrived at the scene of the vehicle stop, Officer Davis had detained the driver of the vehicle, a black Buick Regal. The passenger, Defendant Broadnax, had fled on foot and was apprehended by Sergeant Beck, a short distance away. Defendant wore brown pants, black shoes with red and white markings, and had one glove in his pocket. Inside the suspect vehicle police found a blue glove, a black ski mask, a brown shirt, a silver handgun, and loose cash.

{¶ 6} Officer Gyan proceeded to the Speedway station on Shiloh Springs Road and he asked one of the store clerks, Brandy McLemore, to look at the two individuals police had detained and who matched the description of the robbers to learn whether she could identify either of them. McLemore went with Officer Gyan to the scene of the vehicle stop on Wolf Road. When she looked at the first suspect, the driver, McLemore did not recognize him at all. McLemore was then shown a black ski mask and some clothing, which she did recognize as being used in the robbery. When she then viewed Defendant Broadnax, McLemore immediately and positively identified him as the robber, recognizing him by his eyes.

{¶ 7} After Detective Saunders of the Montgomery County

Sheriff's office learned that Trotwood police had arrested a suspect in the Shiloh Springs Road Speedway robbery, Detective Saunders met with Trotwood officers and Defendant Broadnax. Detective Saunders then prepared a photospread consisting of a Montgomery County jail photo of Defendant Broadnax and five other photographs of men with similar features. The computer randomly placed Defendant's photo in the number two position. Detective Saunders also prepared a second photospread that did not contain a photograph of Defendant, and a third photospread that contained a photograph of the driver of the black Buick Regal.

{¶ 8} On April 20, 2006, Detective Saunders went to the North Dixie Drive Swifty gas station that had been robbed April 14th and showed store clerk Aaron Griffin the photospreads, after first reading him the prescribed instructions for viewing the photospreads. Griffin positively identified Defendant as the robber. The next day Detective Saunders went to the North Main Street U.D.F. that had been robbed April 12th and showed store clerk Jameelah Johnson the photospreads, first reading her the instructions for viewing the photospreads. Johnson positively identified Defendant as the robber, based upon recognizing his eyes. On April 26, 2006, Detective Saunders met with one of the store clerks at

the Needmore Road Speedway station that was robbed April 18th, Kristal Booker, and showed her the photospreads, after first reading her the instructions for viewing the photospreads. Booker positively identified Defendant as the robber, based upon recognizing his eyes.

{¶ 9} Defendant was indicted on five counts of aggravated robbery, R.C. 2911.01(A)(1), each with a three-year firearm specification, R.C. 2941.145, and five counts of having weapons while under a disability, R.C. 2923.13(A)(3). Defendant filed a motion to sever the charges, which the trial court overruled, and a motion to suppress the pretrial identifications, which the trial court also overruled following a hearing. Defendant subsequently entered into a plea agreement and entered pleas of no contest to the five aggravated robbery charges and three of the firearm specifications (Counts 1, 2, 4). In exchange, the State dismissed the remaining firearm specifications and the weapons under disability charges. The trial court sentenced Defendant to concurrent prison terms of ten years on each aggravated robbery charge, and three years on each firearm specification to be served concurrently with each other but consecutively to the aggravated robbery charges, for a total sentence of thirteen years.

{¶ 10} Defendant timely appealed to this court from his convictions and sentences.

FIRST ASSIGNMENT OF ERROR

{¶ 11} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS."

{¶ 12} Defendant argues that the pretrial identification procedures used by police in this case, a one man show-up and photographic lineups, were so impermissibly suggestive that it rendered the resulting identifications unreliable and therefore inadmissible. We disagree.

{¶ 13} In *State v. Lewis* (May 25, 2007), Montgomery App. No. 21592, 2007-Ohio-2601 at ¶ 15-17, this court stated:

{¶ 14} "{¶ 15} When a witness identifies a defendant prior to trial, due process requires a court to suppress evidence of the witness's prior identification upon the defendant's motion if the confrontation was unduly suggestive of the defendant's guilt to an extent that the identification was unreliable as a matter of law under the totality of the circumstances. *State v. Murphy,* 91 Ohio St.3d 516, 534, 2001-Ohio-112.

{¶ 15} "{¶ 16} The defendant has the initial burden to show that the identification procedure was somehow suggestive. If the defendant meets that burden, the court must then consider whether the identification, viewed under the totality of the

circumstances, is sufficiently reliable to be admitted in evidence despite its suggestive character. *State v. Wills* (1997), 120 Ohio App.3d 320, 324. If the pretrial confrontation procedure was not unduly suggestive, any remaining issues as to its reliability go to the weight of the evidence, not its admissibility, and no further inquiry by the court into the reliability of the identification is required. *Id.,* at 325; *State v. Beddow* (March 20, 1998), Montgomery App. Nos. 16197, 16198.

{¶ 16} "{¶ 17} A one man show-up identification procedure, unlike a well-conducted lineup, is inherently suggestive. *State v. Sherls* (February 22, 2002), Montgomery App. No. 18599, 2002-Ohio-939. Nevertheless, such identifications are not unduly suggestive if they are shown to have been reliable. *State v. Moody* (1978), 55 Ohio St.2d 64; *Sherls, supra.* We have repeatedly held that one man show-ups which occur shortly after the crime are not per se improper, *State v. Click* (May 9, 1989), Montgomery App. No. 11074, and that prompt on-the-scene show-ups tend to insure the accuracy of identification, involve a minimum intrusion, and support the prompt release of persons not identified. *State v. Gilreath* (June 19, 1992), Greene App. No. 91CA35. Accord: *State v. Madison* (1980), 64 Ohio St.2d 322, 332. Factors to be considered in evaluating

their reliability include the prior opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Moody, supra; Sherls, supra.*"

{¶ 17} **Defendant correctly points out that the trial court never reached the issue of whether the pretrial identifications in this case were reliable after the court had held that the show-up identification was not unduly suggestive, on a finding that police did not indicate to the victim that Defendant was involved in the crime. Regarding the photospread identifications, no evidence was presented to indicate that the photospreads themselves, or their manner of presentation, were in any way suggestive. Defendant argues that the trial court was wrong in concluding that these pretrial identification procedures were not unduly suggestive.**

<u>One Man Show-up</u>

{¶ 18} **This court has repeatedly recognized that one man show-ups are inherently suggestive. *Lewis*; *State v. Sherls* (Feb. 22, 2002), Montgomery App. No. 18599, 2002-Ohio-939. However, such identifications are not unduly suggestive and**

are admissible if they are reliable. *Id*; *State v. Moody* (1978), 55 Ohio St.2d 64. Defendant complains because Officer Gyan told McLemore that he had two possible individuals in custody who matched the description she provided and he asked her to stop by and identify one or both of them, if she could. Assuming that Officer Gyan's statements exacerbated the suggestiveness already inherent in one man show-up procedures, Officer Gyan testified that he did not indicate to McLemore that either suspect was in fact the man who committed the robbery. *Sherls, supra*. Gyan's statement amounted to nothing more than his reason for asking McLemore to look at the men being held in police custody. *State v. Parrish*, Montgomery App. No. 21206, 2006-Ohio-4161 at ¶ 16.

{¶ 19} **Defendant further complains because one of the officers showed McLemore a ski mask and some clothing that McLemore recognized as being used during the robbery, before she observed Defendant sitting in the police cruiser. McLemore's statements, upon seeing Defendant, demonstrate that her identification of Defendant was not based upon recognizing a mask and some clothing, but rather was based upon his facial features, specifically Defendant's eyes. McLemore testified that the mask worn by the robber did not conceal his eyes.**

{¶ 20} **McLemore's identification of Defendant was not**

unreliable. She immediately identified Defendant as the robber. Although the robber was not in the store for very long, McLemore had sufficient opportunity to view him in a well-lit room while standing only two or three feet from him. McLemore talked to the robber, and she provided a detailed and accurate description of his clothes. Less than thirty minutes had elapsed between the robbery and McLemore's identification of Defendant as the robber. The fact that Defendant was still wearing some of the clothing and shoes described by McLemore when he was apprehended, and the fact that other clothing described by McLemore was found by police inside the Buick Regal, along with a silver handgun and loose cash, reinforces the accuracy of McLemore's identification. *Lewis*.

{¶ 21} Based upon this evidence we conclude that McLemore's identification of Defendant was reliable and therefore was not inadmissible.

Photographic Line-Up

{¶ 22} With respect to the photographic line-up identifications, Defendant argues that the photospread itself is unduly suggestive because out of the six people pictured, Defendant is the only person wearing jail clothing.

{¶ 23} In creating the photospread, Detective Saunders used

photographs on file at the Montgomery County jail, and he selected five men that were similar to Defendant in race, age, complexion, and hairstyle. The computer randomly arranged the photos, placing Defendant's photo in the number two position. We have held that the computerized method of creating photospreads avoids most potential unfairness, and almost any claim that the line-up was suggestive. *Parrish*.

{¶ 24} Detective Saunder's method of displaying the photospread to the witnesses was not suggestive. Detective Saunders met with each witness separately. He read the instructions for viewing the photospread to the witness prior to showing them the photospread. Those instructions emphasize that the photospread may or may not contain a picture of the person who committed the crime. Detective Saunders did not indicate to any witness that the person who committed the robbery appeared in the photospread, nor did he indicate which photograph the witness should select.

{¶ 25} All of the men in the photospread are pictured from the neck up. Only Defendant's shirt collar and part of his shoulders are visible. Because all of the photos are black and white, Defendant's shirt appears gray. Under these circumstances it is not apparent or plain that Defendant is wearing jail clothing. Furthermore, two of the three

witnesses who identified Defendant from the photospread, Booker and Johnson, based their identifications specifically upon Defendant's distinctive eyes, not his clothing. There is no basis to find that the photospread and its manner of presentation to the witnesses was unduly suggestive. Therefore, there is no need to inquire further into the reliability of the photographic line-up identifications. *Lewis; Parrish; Beddow*. The trial court did not abuse its discretion when it denied Defendant's motion to suppress the pretrial identifications.

{¶ 26} Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 27} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR SEVERANCE OF CHARGES."

{¶ 28} Defendant argues that the trial court abused its discretion when it overruled his motion for severance of the charges.

{¶ 29} Defendant filed a motion to sever the charges for trial. Defendant claimed that he wished to testify on his own behalf with respect to the Trotwood Speedway robbery because of the amount of evidence against him and his desire to offer the jury the same explanation he gave to police in his statements to them. Defendant further claimed that he wished

to exercise his right to remain silent with respect to the Harrison Township robberies including the U.D.F., the Swifty gas station and the Speedway gas station, because he would present an alibi defense as to those offenses and he wanted to avoid impeachment with his prior criminal record.

{¶ 30} The trial court denied Defendant's motion to sever the charges, finding that Defendant had failed to meet his burden of affirmatively showing that he would be prejudiced by a joinder of the multiple aggravated robbery offenses for trial. The court concluded that the mere possibility that Defendant might want to testify as to some offenses but not others is too speculative to demonstrate prejudice.

{¶ 31} Crim.R. 8(A) provides:

{¶ 32} "Joinder of offenses. Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct."

{¶ 33} The law favors joinder to prevent successive trials, to minimize the possibility of incongruous results in

successive trials before different juries, to conserve judicial resources, and to diminish the inconvenience to witnesses. *State v. Schaim* (1992), 65 Ohio St.3d 51, 58; *State v. Torres* (1981), 66 Ohio St.2d 340, 343.

{¶ 34} Joinder was proper in this case because all of the offenses at issue were of the same or similar character, being aggravated robberies, all were committed within a six day period. All of the offenses involved a similar modus operandi and were committed the same way, and all of the offenses involved a common scheme, plan or course of criminal conduct. It was proper for the State to join these counts/charges in a single indictment per Crim.R. 8(A). *State v. Glass* (Mar. 9, 2001), Greene App. No. 2000CA74.

{¶ 35} Crim.R.14 provides:

{¶ 36} "If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, information or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires. In ruling on a motion by a defendant for severance, the court shall order the prosecuting attorney to deliver to the court for inspection pursuant to Rule

16(B)(1)(a) any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial."

{¶ 37} Even if offenses are properly joined pursuant to Crim.R. 8(A), a defendant may move to sever the charges pursuant to Crim.R. 14. To affirmatively show that his rights have been prejudiced by the joinder, the defendant must furnish the trial court information sufficient to allow the court to weigh the considerations favoring joinder against the defendant's right to a fair trial, and defendant must demonstrate that the court abused its discretion in refusing to separate the charges for trial. ***Glass; State v Lott*** **(1990), 57 Ohio St.3d 160.**

{¶ 38} One of the ways in which the State can negate a defendant's claim of prejudice is by showing that the evidence pertaining to each crime joined at trial is simple and direct, such that the trier of fact could segregate the proof on the multiple charges. ***Lott; Torres; State v. Rutledge*** **(June 1, 2001), Montgomery App. No. 18462. The purpose of this "joinder test" is to prevent the jury from confusing the offenses or improperly cumulating the evidence of the various crimes.** ***Lott; Rutledge.***

{¶ 39} To show that he was prejudiced by the joinder of

these aggravated robbery offenses for trial, Defendant complains that he wanted to testify as to the Trotwood Speedway robbery while remaining silent as to the Harrison Township robberies. Defendant claims that, as to the Trotwood robbery, he wanted to provide the jury with the same explanation he gave to police for why he was in the Buick Regal they stopped just five minutes after the Speedway station was robbed, and why he ran from police. Defendant further claims that as to the Harrison Township robberies, he intended to present an alibi defense for those offenses, and he wanted to avoid exposing his prior criminal record to the jury.

{¶ 40} Defendant has not made a convincing showing that he had important testimony to give concerning one charge and a strong need to refrain from testifying concerning the others. ***State v. Roberts*** **(1980), 62 Ohio St.2d 170, 176. The mere possibility that a defendant might desire to testify on one count and not the other is insubstantial, speculative, and insufficient to show prejudice.** ***Torres*** **at 344. Further, the prejudice Defendant suggests is not in the jury's confusion of the facts concerning the multiple alleged offenses, but in disbelieving his alibi defenses if his testimony concerning other offenses caused the jury to reject his credibility.**

That is merely a tactical concern, not one relating to the fairness of Defendant's trial.

{¶ 41} More importantly, Defendant was not prejudiced by the joinder of these robbery offenses for trial because the evidence pertaining to each offense is simple and direct. *Torres*. All of the robberies involve different stores and different witnesses. Witnesses in each of the robberies independently identified Defendant as the robber. We find the evidence as to each offense is straight-forward and uncomplicated. Under those circumstances, it is improbable that the trier of facts would confuse the evidence or improperly consider the testimony concerning one offense as corroborative of the other offenses. *Torres* at 343. Defendant fails to affirmatively demonstrate prejudice resulting from the joinder of these offenses for trial. We cannot find that the trial court abused its discretion when it denied Defendant's motion to sever the charges.

{¶ 42} Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 43} "APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 44} Defendant argues that his trial counsel performed in a deficient manner when he failed to use the reports submitted

by various agencies at the plea hearing to support his motion to suppress the pretrial identifications and his motion to sever the charges for trial.

{¶ 45} Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. ***Strickland v. Washington*** **(1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must demonstrate that were it not for counsel's errors, the result of the trial would have been different.** ***Id.***, ***State v. Bradley*** **(1989), 42 Ohio St.3d 136.**

{¶ 46} A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. ***Strickland***, **at 697;** ***Bradley*** **at 143. If an ineffective assistance of counsel claim is more readily rejected for lack of sufficient prejudice, that alternative should be followed.** ***Id; State v. Winterbotham*** **(Aug. 14, 2006), Greene App. No. 05CA100, 2006-Ohio-3989.**

{¶ 47} With respect to his motion to suppress the pretrial identifications and his claim that the one man show-up procedure used by Trotwood police was unduly suggestive,

Defendant argues that his trial counsel should have utilized McLemore's written statement, which is part of the Trotwood police report, State's Exhibit 5, because it more strongly demonstrates the suggestiveness of that show-up procedure than does Officer Gyan's testimony at the suppression hearing. In her written statement, McLemore said:

{¶ 48} "Once the police arrived we were informed that the people had been caught. An officer came and picked me up and took me to identify the suspects. Once we arrived I saw one of the officers holding the brown shirt and identified it as one that the person was wearing. The officer held up the black ski mask and I identified it as the one that I saw him wearing. They also showed me the gun which I identified as silver in color. The officer then took me to identify the suspect inside of the car. I identified him as the one that I saw enter the store."

{¶ 49} McLemore's statement that "we were informed the people had been caught" reflects the inherent suggestiveness of a one-person "show-up." A request to look at a suspect creates an inference that the suspect is the person who committed the crime. However, the particular issue is whether, in failing to exploit McLemore's statement to support the contention that her identification of Defendant was

tainted by an unduly suggestive procedure, Defendant's counsel was constitutionally ineffective.

{¶ 50} McLemore's written statement is largely consistent with Officer Gyan's testimony with respect to the fact that McLemore was shown and identified some clothing and the ski mask the robber wore before she was shown and identified Defendant. More importantly, McLemore's identification of Defendant was reliable, and therefore admissible, despite the suggestiveness inherent in this type of identification procedure, which is exemplified by her explanation that she recognized Defendant because his eyes were a distinctive feature of the robber. In that regard, his clothing and the ski mask are immaterial. Under those circumstances, there is no reasonable probability that the show-up identification would have been suppressed had defense counsel supported his claim of suggestiveness with McLemore's written statement to police. Therefore, Defendant has failed to demonstrate that he suffered any prejudice as a result of his counsel's performance. Ineffective assistance of counsel has not been demonstrated.

{¶ 51} Defendant further argues that his counsel performed deficiently by not using two photospreads that are part of the Trotwood police report, which have the picture of Defendant

located in position number six on the photospreads, to impeach the testimony of Detective Saunders that he did not have any control over where the computer placed Defendant's picture in the photospread he created, which was in the number two position on the photospread. Those photospreads were generated by Trotwood police, not by Detective Saunders using the Montgomery County Sheriff's Office computerized system that utilizes Montgomery County jail photos. The Trotwood photospreads simply have no relevance or bearing on the photospread Detective Saunders created and presented to the witnesses, and counsel did not perform in a deficient manner by failing to use the Trotwood photospreads. Ineffective assistance of counsel has not been demonstrated.

{¶ 52} With respect to his motion to sever the Trotwood and Harrison Township robbery charges, Defendant argues that his trial counsel performed deficiently by failing to use the statement he made to police and Detective Saunders' report to support his claim that he was prejudiced by the joinder of these robbery offenses for trial because he wished to testify in his own defense as to some offenses but not others. As we pointed out in overruling Defendant's second assignment of error, Defendant was not prejudiced by the joinder of these offenses for trial because the evidence pertaining to each

offense is simple and direct, and therefore it is unlikely that the jury would confuse the evidence or improperly cumulate the evidence of the various crimes. *Torres; Lott*. Accordingly, Defendant was not prejudiced by his counsel's failure to use the evidence concerned as support for his motion to sever the robbery charges, because there is no reasonable probability that had counsel used that information the trial court would have granted that motion for severance. Ineffective assistance of counsel has not been demonstrated.

{¶ 53} Defendant's third assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, J. And DONOVAN, J., concur.

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