[Cite as *State v. Young*, 2002-Ohio-406.]

COURT OF APPEALS
THIRD APPELLATE DISTRICT
DEFIANCE COUNTY

STATE OF OHIO

PLAINTIFF-APPELLEE **CASE NUMBER 4-01-18**

v.

JAMES W. YOUNG, II **O P I N I O N**

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: February 1, 2002.

ATTORNEYS:

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For Appellee.

HADLEY, J.

{¶1} Defendant-appellant, James W. Young, II, appeals from a judgment of conviction of the Defiance County Court of Common Pleas. For the following reasons, we affirm the judgment of the trial court.

{¶2} The pertinent facts and procedural history of the case are as follows. At approximately 1:45 a.m. on September 17, 2000, appellant James W. Young, II fired a gun into a vehicle parked in front of a duplex located at 210/212 Hopkins Street in the City of Defiance, Ohio. One of the bullets fired by the appellant struck Tory Clay, a back seat passenger of the vehicle, in the back of the head. Clay survived the shooting.

{¶3} The shooting arose from a series of disputes between the appellant and Joseph Robinson. The precipitating clash occurred on the evening of September 16, 2000, at Slim's barbecue and birthday party attended by the appellant, Robinson, and Robinson's friends. Later that night, Robinson received a telephone call on a cell phone from Michael Scott Coleman (aka "Face") who resides at 210/212 Hopkins Street. Face advised the occupants of Robinson's vehicle to come to his residence to settle their dispute, to fight, with the appellant. They agreed. In the car with Robinson were Tory Clay, the victim, who was seated in the back seat, and Oscar James Young, no relation to the appellant, who sat in the front passenger seat.

{¶4} Before proceeding to Face's duplex, Robinson and his friends stopped in the parking lot of Nila's, a Defiance bar, where they met Cornelius Hester (aka "Corn") and his passenger Dennis Howard. Robinson and his friends asked Hester and Howard to follow them to Face's residence. The two vehicles proceeded down Hopkins Street with Robinson's Monte Carlo in front and Hester's Lincoln Navigator roughly a car length behind. As the vehicles approached 210/212 Hopkins Street, the occupants of Robinson's vehicle saw a small group of people standing in front of the duplex. Among them and closest to the street stood the appellant. As Robinson pulled towards the curb, the appellant opened fire. One bullet struck the vehicle's trunk lid, and a second shot shattered the rear window. The bullet entering the window lodged in the back of Clay's head. The Robinson vehicle left the scene of the shooting and departed for the Defiance Hospital.

{¶5} While the shooting occurred, Corn, with his passenger Howard, pulled up to the scene, their headlights highlighting the appellant as he fired upon Robinson's vehicle. Corn made a u-turn to avoid the gun fire at which point the appellant aimed his gun toward Corn's vehicle and began firing.

{¶6} At the Defiance Hospital, a bullet was removed from the back of Clay's head and the bullet's jacket was removed from his left ear. The emergency room physician who removed the bullet and treated Clay for the injury testified

that the size of the bullet was capable of inflicting death. He surmised that the window slowed the bullet's velocity enough to prevent it from penetrating the skull.

{¶7} Following the shooting, the appellant fled the Defiance, Ohio area. He was later arrested by the FBI in Danville, Illinois, approximately three months after the shooting and returned to Defiance County to stand trial.

{¶8} The Defiance County Grand Jury indicted the appellant on two counts. Count One of the indictment alleged the crime of Attempted Murder, a felony of the first degree, in violation of R.C. 2903.02(A) and 2923.02, with a firearm specification pursuant to R.C. 2942.145. Count Two alleged the offense of Felonious Assault, a felony of the second degree, in violation of R.C. 2903.11(A)(2), with a firearm specification pursuant to R.C. 2941.145. A jury trial was commenced on April 2, 2001. Following the state's case, the appellant moved for judgment of acquittal which the court denied following arguments by counsel. The appellant then presented his case in chief followed by the state's evidence in rebuttal. After closing arguments by counsel and instructions of law from the court, the jury retired for deliberation. The jury returned unanimous verdicts at the conclusion of the trial finding the appellant guilty on both counts. The court entered judgment on the verdicts and imposed a sentence on the attempted murder charge and the accompanying firearm specification.

{¶9} The appellant now appeals asserting the following three assignments of error for our review.

ASSIGNMENT OF ERROR NO. I

{¶10} The defendant was deprived of effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution.

{¶11} The appellant asserts that he was denied the right to a fair trial based upon the ineffective assistance of trial counsel. The standard of review for a claim of ineffective assistance of counsel is well-settled. In *Strickland v. Washington*,[1] the United States Supreme Court set forth a two-prong test that a defendant must meet in order to prevail on a claim of ineffective assistance of counsel.[2] First, the defendant must show that the counsel's performance was deficient and, second, the defendant must also show that counsel's deficient performance resulted in prejudice at trial.[3] A claim of ineffective assistance of counsel may be dismissed for failure to satisfy either prong.[4]

{¶12} The defendant/appellant first argues that his trial counsel's assistance was legally ineffective because he failed to call an expert on eyewitness identification. To our befuddlement, appellant relies upon *State v. Madrigal*[5] to

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[1] (1984), 466 U.S. 668.
[2] See, also, *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus; and, *State v. Murphy* (2001), 91 Ohio St.3d 516.
[3] *Ohio v. Jones* (2000), 90 Ohio St.3d 403, 407, citing *Strickland*, 466 U.S. 668. Accord *Bradley*, 42 Ohio St.3d 136, paragraph two of the syllabus.
[4] *Strickland*, 466 U.S. 668.
[5] (2000), 87 Ohio St.3d 378.

bolster his argument. In *Madrigal*, the defendant argued that had an expert testified about the problems inherent in eyewitness identification, there was a reasonable probability that the trial's outcome would have been different.[6] The Court disagreed finding that Madrigal was represented by two experienced trial attorneys who chose to rely on the cross-examination of witnesses, rather than requesting an appointment of an eyewitness identification expert.[7] The Court stated that resolving the issue in Madrigal's favor would have been purely speculative.[8]

{¶13} This court has previously stated that "an attorney's selection of witnesses to call at trial falls within the purview of trial tactics and generally will not constitute ineffective assistance of counsel."[9] Nothing in the record indicates how an expert witness would have testified or how such testimony would have affected the outcome of the trial. Four different eyewitnesses, who knew appellant prior to the shooting, identified the appellant as the person who fired the gun at Clay. Accordingly, we find this argument to be not well taken.

{¶14} In a "subassignment of issue," appellant contends that the trial court abused its discretion in admitting the testimony of Detective Williamson. Before addressing this "issue," we feel inclined to point out that the appellant has failed to

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[6] *Id.*
[7] *Id.*
[8] *Id.*

follow the guidelines of App.R. 16 which sets forth the format of an Appellant's Brief. App.R. 16(A)(3) requires a statement of the Assignments of Error presented for review. Such a statement does not exist in this appellant's brief. Further, an appellant's argument should consist of the appellant's contentions as to each assignment of error.[10] Appellant has failed to convey how this particular "subassignment of issue" relates to the above ineffective assistance argument. Nevertheless, in the interest of justice, we will consider the appellant's argument pertaining to Detective Williamson's testimony.

{¶15} The appellant argues that the trial court abused its discretion in admitting the testimony of Detective Williamson. The appellant has failed to elaborate upon specifically which testimony of the detective's he objects to, so we are left to review the entirety of the detective's testimony to test whether it comported with the applicable Rules of Evidence. From our reading of the record, we note that this detective was not called to testify as an expert witness.

{¶16} Evid.R. 701 governs opinion testimony by lay witnesses:

{¶17} If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue.

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[9] *State v. Yarbrough* (April 30, 2001), Shelby App. No. 17-2000-10, unreported, citing *State v. Coulter* (1992), 75 Ohio App.3d 219, 229; *State v. Hunt* (1984), 20 Ohio App.3d 310.
[10] App.R. 16(A)(7).

{¶18} Evid.R. 701 grants the trial court wide latitude in its decision to allow or control lay witness opinion testimony.[11] An appellate court reviews the trial court's decisions concerning lay witness testimony for an abuse of discretion.[12] The party challenging the testimony must demonstrate that, if the trial court did abuse its discretion, the abuse materially prejudiced the objecting party.[13]

{¶19} Detective Williamson described his observations of the crime scene and his perception of the evidence as a lay witness with over nine years of experience as a police officer. His statements regarding the bullet fragments were based upon his experience and observations and conclusions. These statements aided the triers of fact in understanding his testimony.[14] Accordingly, the trial court did not abuse its discretion for failing to disallow his statements *sua sponte*.

{¶20} Appellant's first assignment of error is overruled.

<u>ASSIGNMENT OF ERROR NO. II</u>

{¶21} The trial court erred by overruling defendant/appellant Young's Criminal Rule 29 Motion for Acquital, thereby denying Mr. Young his rights as guaranteed to him by the Fifth and Fourteenth Amendments to the Constitution and Article I of the Ohio Constitution.

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[11] *State v. Kehoe* (1999) 133 Ohio App.3d 591.
[12] *Id.*; *Urbana ex re. Newlin v. Downing* (1989), 43 Ohio St.3d 109, 113; *State v. Brumback* (1996), 109 Ohio App.3d 65, 77.
[13] *Id.*
[14] See, *e.g.*, *State v. Norman*, 7 Ohio App.3d 17, 18-19.

{¶22} Pursuant to Crim.R. 29(A), appellant's trial counsel moved for acquittal at the conclusion of the state's case. The trial court overruled the motion. The appellant now asserts that the trial court's decision was erroneous and that the state presented insufficient evidence to justify his conviction for attempted murder and felonious assault.

{¶23} This court has recognized that "Crim.R. 29(A) requires the court, upon motion of the defendant, to enter a judgment of acquittal of one or more offenses charged in an indictment if the evidence is insufficient to sustain a conviction of the offense or offenses."[15] However, such an acquittal may not be granted "if the record demonstrates that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt."[16]

{¶24} When ruling on a motion for judgment of acquittal pursuant to Crim.R. 29, the trial court is required to construe the evidence most strongly in favor of the state, the party against whom the motion has been directed.[17] The inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.[18]

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[15] *State v. Adkins* (2000), 136 Ohio App.3d 765, quoting *State v. Pickett* (1996), 108 Ohio App.3d 312, 314.
[16] *Id.*
[17] *State v. Fyffe* (1990), 67 Ohio App.3d 608.
[18] *State v. Jenks* (1991), 61 Ohio St.3d 259.

{¶25} The appellant offers two reasons to support its assertion that the state failed to prove its case beyond a reasonable doubt. First, the appellant argues that the state failed to establish any background or expertise in the area of firearms regarding Detective Williamson's testimony. Second, the appellant maintains that the state unsuccessfully proved its case because the victim was unable to identify the defendant/appellant.

{¶26} Viewing the evidence in a light most favorable to the prosecution, we find that any rational juror could have found the essential elements of the crime to be proven beyond a reasonable doubt. Regardless of Detective Williamson's background or expertise, the evidence introduced at the trial leaves no room for doubt that the bullet which struck the victim came from the appellant's weapon. Although the victim could not identify his assailant, four other eyewitnesses testified that the assailant was the appellant. Therefore, the appellant's second assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. III

{¶27} The appellant's conviction for attempted murder upon Tory Clay was against the manifest weight of the evidence.

{¶28} The appellant contends that his conviction was against the manifest weight of the evidence. When considering an argument that a conviction was against the manifest weight of the evidence, "'[t]he [appellate] court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the

credibility of the witnesses and determines whether in resolving conflicts in the evidence, the [factfinder] clearly lost its way * * *.'"[19] A judgment supported by some competent, credible evidence which goes to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.[20] Manifest weight arguments are to be sustained only in the most extraordinary cases.[21]

{¶29} The appellant notes that there is a discrepancy among the eyewitnesses over the number of individuals present in the front yard of 210/212 Hopkins in the early morning hours of September 17, 2000. This inconsistency, however, does not tilt the scales enough for us to conclude that the jury clearly lost its way. All four eyewitnesses saw the appellant with the weapon in his hand. With bullets flying, their concern rested in preserving their lives, not in counting the shadows of other individuals standing in Face's front yard. As Corn testified:

{¶30} When I saw shots, the last thing on my mind was looking for other people. I was just getting out of there. I was just frantic and got out of there.

{¶31} The appellant's final contention that there was the potential of collusion among the witnesses and victim as to testimony given to the court is an unsubstantiated allegation and without merit.

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[19] *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.
[20] *State v. Paxton* (2000), 139 Ohio App.3d 48, 50.
[21] *Thompkins,*78 Ohio St.3d at 387.

{¶32} Accordingly, the appellant's third assignment of error is overruled.

Judgment affirmed.

SHAW and BRYANT, JJ., concur.

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