[Cite as *State v. Thompson*, 2013-Ohio-1597.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-11-1184

Appellee — Trial Court No. CR0201003283

v.

Eric Thompson — **DECISION AND JUDGMENT**

Appellant — Decided: April 19, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Lindsay D. Navarre, Assistant Prosecuting Attorney, for appellee.

Michael E. Bryant, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that found appellant guilty of one count of attempt to commit murder and one count of felonious assault, both counts with firearm specifications. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} On January 5, 2011, appellant Eric Thompson and co-defendant Nathaniel Lee were indicted on five counts of felonious assault and one count of attempt to commit murder in connection with the shooting of Mohammed Abaza on December 15, 2010, while Abaza worked in the carryout he owns in Toledo, Ohio. The two co-defendants were tried separately and, following a jury trial on May 23 and 24, 2011, appellant was convicted of one count of attempt to commit murder in violation of R.C. 2903.02 and 2923.02 with a firearm specification, and one count of felonious assault in violation of R.C. 2903.11(A)(2) with a firearm specification. On June 15, 2011, the trial court granted the defense motion for merger and sentenced appellant to ten years for the attempted murder conviction and three years on the firearm specification.

{¶ 3} Appellant sets forth the following assignments of error:

> First Assignment of Error: Trial counsel was ineffective because she did not complete a reasonable and prudent investigation, and committed other errors, and thus deprived appellant of his right to counsel.
>
> Second Assignment of Error: Appellant's conviction was against the manifest weight of the evidence and should be reversed and remanded for a new trial.

{¶ 4} In support of his first assignment of error, appellant asserts that trial counsel was ineffective for failing to adequately investigate the case. Appellant also argues that counsel should have called alibi witnesses, should have filed a motion to suppress the

victim's in-person lineup identification of appellant, and should have objected to a hearsay statement.

{¶ 5} *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674 (1984), sets forth the standard for judging ineffective assistance claims: "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id*. at 687-688. Furthermore, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

{¶ 6} As to trial counsel's investigation of the case, appellant asserts that counsel should have obtained the services of an expert on eyewitness identification. The record reflects that after an expert witness counsel had contacted died, counsel did not renew her motion for funds to hire a different expert. The record further reflects, however, that the victim had seen appellant in his store many times before the shooting. The victim identified appellant by in-person lineup and in court. Further, Ohio courts have declined to find ineffective assistance based on trial counsel's failure to employ an eyewitness identification expert where, as here, there was no indication in the record as to what kind of testimony an eyewitness identification expert could have provided. *See State v. Madrigal*, 87 Ohio St.3d 378, 390-391, 721 N.E. 2d 52 (2000); *State v. Gross*, 97 Ohio

St.3d 121, 150, 776 N.E.2d 1061 (2002). A ruling in appellant's favor would be "purely speculative." *Madrigal, supra*, at 390. This argument has no merit.

{¶ 7} Appellant also argues that trial counsel should have called alibi witnesses. However, appellant does not identify any potential alibi witnesses or explain how their testimony might have assisted in his defense. This argument is without merit.

{¶ 8} Next, appellant asserts that trial counsel should have moved the court to suppress the lineup as being unconstitutionally suggestive because a photo array was shown to the victim two weeks before the lineup at the jail. To demonstrate ineffective assistance for failing to file a motion to suppress, a defendant must show: (1) a basis for the motion to suppress; (2) that the motion had a reasonable probability of success; and (3) a reasonable probability that suppression of the challenged evidence would have changed the outcome at trial. *Madrigal, supra*. Appellant fails to establish a prejudicial connection between the photo array and the lineup or support this claim with any relevant legal authority. This argument is without merit.

{¶ 9} Appellant argues that trial counsel should have objected to what he believes to have been a leading question followed by a hearsay statement by one of the detectives. During the state's case in chief, the prosecutor asked a detective who had interviewed the co-defendant, "Did [the co-defendant] admit to being in the store with Eric Thompson that day?" The detective answered, "Yes." We first note that appellant does not explain how the foregoing testimony may have constituted hearsay. Further, it is well-established that a competent trial attorney may decide not to object to a statement so as not to draw

the jury's attention to potentially damaging testimony. The decision to object or not object is a tactical decision to be made by trial counsel. Issues which are arguably a matter of counsel's trial tactics and strategies do not constitute ineffective assistance. *State v. Clayton*, 62 Ohio St.2d 45, 49, 402 N.E.2d 1189 (1980), citing *State v. Lytle*, 48 Ohio St.2d 391, 396, 358 N.E.2d 623 (1976). In this case, the information gleaned from the detective placed appellant at the scene of the shooting. The testimony at issue was very brief (one word), but an objection may have emphasized to the jury that someone else saw appellant in the store at the time of the shooting. Appellant's arguments on this issue have no merit.

{¶ 10} Based on all of the foregoing, applying the first prong of *Strickland* to the above, we find that appellant has not shown that counsel's representation fell below an objective standard of reasonableness. Further, we have reviewed the trial record in its entirety and find that there is no evidence that, but for any of counsel's perceived missteps, appellant would not have been convicted. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 11} In support of his second assignment of error, appellant asserts that his conviction was against the manifest weight of the evidence because it was supported by only one eyewitness with no other corroborating evidence. Appellant also challenges the lineup identification two weeks later, claiming that the victim had two weeks to listen to allegations in the community, listen to news reports, and formulate a biased opinion about who shot him.

{¶ 12} In determining whether a verdict is against the manifest weight of the evidence, the appellate court "weighs the evidence and all reasonable inferences, and considers the credibility of witnesses." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). This court then makes a determination as to whether, in resolving conflicts in the evidence, the factfinder "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id.* Under this manifest weight standard, the appellate court sits as a "thirteenth juror" and may disagree with the factfinder's resolution of the conflicting testimony. *Id*.

{¶ 13} R.C. 2903.02(A), murder, provides that "No person shall purposely cause the death of another * * *." R.C. 2923.02(A), attempt, provides that "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

{¶ 14} R.C. 2903.11(A)(2), felonious assault, provides that "No person shall knowingly do either of the following: * * * Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶ 15} We note at the outset that, while the conviction may have been supported by "only one eyewitness," that eyewitness was the victim, who had seen appellant in his store dozens of times before the shooting. Further, contrary to appellant's claim, the state

did in fact provide corroborating evidence in the form of the surveillance video which depicted the shooting from beginning to end.

{¶ 16} Abaza testified that on the night of the shooting, two men entered the store. Co-defendant Nate Lee, whom Abaza knew by name, ordered some lottery tickets. As Abaza turned to get the tickets, a second man pulled out a gun, pointed it at Abaza's head and started shooting. Abaza was hit at least three times in the face. All three men then ran toward the door; before the third man left, he fired two more shots, hitting Abaza again in the chest and arm. Neither of the suspects wore masks. When Abaza was asked at trial whether the shooter was somebody he recognized, Abaza answered, "Yes, of course I recognized him, yeah." Abaza stated that in the three weeks before the accident, the shooter had come into the store at least 50 times, sometimes four or five times a day. Further, Abaza identified appellant in court as the person who shot him and stated, "he have the gun, the other one no."

{¶ 17} Police officers and emergency medical responders testified that Abaza was alert and lucid when they arrived and began treating him. Sergeant Patrick Skinner testified that he went to the hospital and was permitted in the emergency room while Abaza was initially treated. Skinner asked Abaza who shot him and Abaza responded that it was two black men. Abaza told Skinner that one was named Nate. When Skinner asked Abaza if Nate was the shooter, Abaza said he was not, that it was the other man, someone whose name he did not know. Sergeant Tim Noble, who was present for the in-

person lineup several weeks after the shooting, testified that Abaza entered the viewing room and immediately identified appellant as the man who had shot him.

{¶ 18} This court has carefully reviewed the record in its entirety. We find no indication that the finder of fact lost its way or created a manifest miscarriage of justice by finding appellant guilty of one count of attempted murder and one count of felonious assault, both with firearm specifications. To the contrary, the jury was presented with significant and compelling evidence of guilt. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 19} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE