[Cite as *State v. Rogers*, 2009-Ohio-5490.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92380

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ERIC L. ROGERS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-508454

BEFORE: Jones, J., Rocco, P.J., and Sweeney, J.

RELEASED: October 15, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

LARRY A. JONES, J.:

{¶ 1} Appellant-defendant, Eric Rogers ("Rogers"), appeals the decision of the lower court. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the lower court.

STATEMENT OF THE CASE AND THE FACTS

{¶ 2} On March 25, 2008, the grand jury returned a six-count indictment against Rogers in criminal case number CR-508454. Counts 1, 2, and 3 charged Rogers with aggravated burglary, in violation of R.C. 2911.11(A)(2), a felony of the first degree. These three counts also contained one- and three-year firearm specifications. Counts 4, 5, and 6 charged Rogers with kidnapping, in violation of R.C. 2905.01(A)(2), a felony of the first degree. These three counts also contained one- and three-year firearm specifications. Two co-defendants, Wahid Brooks ("Brooks") and Robin Edwards ("Edwards") were charged with the same six counts.

{¶ 3} On August 27, 2008, a jury trial commenced with Brooks as a co-defendant. At the close of the state's case, the defense made a motion for a Rule 29 judgment of acquittal. The motion was denied by the trial court. At the close of all the evidence, the Rule 29 motion was renewed, and again denied by the trial court. On September 4, 2008, the jury returned its verdict. Rogers was found guilty on all six counts as charged. Following the verdict, the defense renewed its Rule 29 motion that was again denied by the trial court. On September 11, 2008, the defense filed a motion for a new trial that was denied by the court.

{¶ 4} Rogers was sentenced on October 6, 2008. He received three years on the underlying charges in Counts 1 through 6, and 3 years for the firearm specifications. All counts were ordered to run concurrent with each other for a total aggregate sentence of six years. Rogers was also sentenced in criminal case number CR-480134. He received a one-year sentence to run consecutive to the sentence imposed in this case. Rogers was advised that he would be subject to a period of postrelease control upon his release from the institution. On November 6, 2008, Rogers filed a timely notice of appeal from his conviction and sentence.

{¶ 5} According to the record, Jan Alan Moss, Jr., a named victim in this case, resided at 4944 East 141st Street, in apartment 303-A, located in Garfield Heights, Ohio. Moss's residence was the scene of the aggravated burglary. On the evening of March 2, 2008, Moss invited some of his friends over to celebrate his upcoming birthday. Co-defendant Robin Edwards called to wish him a happy birthday and borrow $20.00 from him. Moss testified that Edwards was always calling him wanting to borrow money.

{¶ 6} Moss told Edwards that he would give her $20.00 if she would pick up his friend Robert Vickers and bring him to Moss's apartment. Robin agreed and brought Vickers to the apartment. Edwards observed Moss pull money out of his pocket and she then asked for more money. Moss told her it was his rent money and she could not have it. She became loud with him and he asked her to leave his apartment. Later, Edwards called Moss four times apologizing and stated that

she wanted to come back to the apartment to play cards. Edwards made the calls sometime between 1:00 and 2:00 in the morning and indicated that she was at a bar. Moss did not believe Edwards would come back to the apartment that night. Later, she called him from the apartment parking lot and asked to be buzzed into the building.

{¶ 7} Moss buzzed open the main door, and when he opened the apartment door two men walked into the apartment. One male had a sawed-off shotgun and the other male had a handgun. The men told him to lay down on the floor. Vickers, Ken Curry ("Curry"), a third victim, and Moss all laid down on the floor. The men took money from Moss's pocket. Moss later testified that the robbers also stole his cell phone, medicine, and jewelry. Moss testified that altogether $627.00 was stolen from him. After the men left, Moss went to his neighbor's apartment for help, and stayed in the hallway until the police arrived. He gave the police Edwards's phone number.

Assignments of Error

{¶ 8} Rogers assigns four assignments of error on appeal:

{¶ 9} "[1.] Appellant has been denied of his liberty without due process of law by his convictions for aggravated burglary and kidnapping with firearm specifications which were not supported by sufficient evidence to prove his guilt beyond a reasonable doubt.

{¶ 10} "[2.] Appellant's convictions for aggravated burglary and kidnapping with firearm enhancement specifications were against the manifest weight of the evidence.

{¶ 11} "[3.] Appellant was denied his right to effective assistance of counsel guaranteed by Article I, Section 10 of the Ohio Constitution and the Sixth and Fourteenth Amendment to the Untied States Constitution when trial counsel's failure to file a motion to suppress photo identification evidence caused him prejudice.

{¶ 12} "[4.] The trial court erred and abused its discretion in denying appellant's motion for a mistrial."

LEGAL ANALYSIS

{¶ 13} Rogers first two assignments of error claim that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. Due to the substantial interrelation between appellant's first and second assignments of error, we shall address them together.

Sufficient Evidence and Manifest Weight

{¶ 14} "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. With respect to sufficiency of the evidence, sufficiency is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law. In essence, sufficiency is a test of adequacy. Whether the evidence is legally

sufficient to sustain a verdict is a question of law. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process." *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 15} "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may, nevertheless, conclude that the judgment is against the weight of the evidence. Weight of the evidence concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jurors that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, their verdict shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief. When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the fact finder's resolution of the conflicting testimony." Id.

{¶ 16} "As to a claim that a judgment is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial

should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 20 Ohio B. 215, 485 N.E.2d 717. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212.

Kidnapping and Aggravated Burglary

{¶ 17} R.C. 2905.01 Kidnapping, provides the following:

> "(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:
>
> "(1) To hold for ransom, or as a shield or hostage;
>
> "(2) *To facilitate the commission of any felony or flight thereafter*;
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> * *."

(Emphasis added.)

{¶ 18} R.C. 2911.11(A)(2) Aggravated Burglary, provides the following:

> "(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:
>
> "(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;
>
> "(2) *The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control*."

(Emphasis added.)

{¶ 19} Rogers argues that Moss put his head down and did not get a good look at the robbers. Rogers also argues that although Vickers made an out-of-court identification, he testified that the attackers were wearing black ski masks. Rogers further argues that there was no weapon recovered, no fingerprint evidence, and no DNA evidence linking Rogers to the crime.

{¶ 20} However, we find Rogers's arguments to be unpersuasive. Significant evidence was presented to the trial court. Moss, Curry, and Vickers all provided testimony that they were robbed by two men who entered Moss's apartment in the early morning hours of March 3, 2008. Moss's and Curry's testimony revealed that each defendant brandished a firearm and ordered the men to get on the floor.[1] The attackers went through the victims's pockets and Moss's bedroom. Moss stated that there were two defendants, a tall one in a blue and tan jacket and a short one in an orange hoodie. Curry identified Brooks as one of the defendants.[2] Mr. Vickers provided a positive identification of both Brooks and Rogers.[3]

{¶ 21} Although Vickers was either unable or unwilling to make an in-court identification, testimony revealed that Vickers observed Brooks and Rogers in the vehicle with Edwards shortly before the burglary took place. Moreover, a

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[1]Tr. 216, 228, 271, 282.

[2]Tr. 274, 279, 284, 288.

[3]Tr. 407, 411-12, 434-36.

neighbor, Ms. Stewart, was able to testify that she observed two men standing outside of Moss's apartment around 2:30 a.m. on March 3, 2008 wearing clothing that matched Moss's previous description.

{¶ 22} In addition, Edwards testified that she facilitated Rogers's crime. Rogers told Edwards he was going to "hit a lick."[4] Edwards testified that she then called Moss and informed him that she was coming over. Edwards stated that after her call, Rogers and Brooks left the bar and returned approximately fifteen minutes later. Edwards further testified that Rogers provided her with a detailed account of what he and Brooks did.

{¶ 23} Moss, Curry, and Vickers all testified that Rogers and Brooks entered Moss's home with firearms, forced them to the floor, and removed belongings from each individual. Curry testified that while one defendant would go through the victim's pockets, the other would hold the firearm over them. This testimony is corroborated by Edwards, who admittedly facilitated the crime, and Stewart, who viewed two unknown males in front of Moss's home just moments before the burglary.

Firearm Specifications

{¶ 24} Rogers argues that the victims' testimony alone is not enough to support the firearms specifications in this case. We do not find merit in Rogers's

[4]Tr. 338-339.

argument. Moss and Curry both testified that each defendant had a firearm.[5] The tall defendant was carrying a sawed-off shotgun, while the shorter defendant had a handgun.[6] The defendants then used these weapons to intimidate the victims into complying with their demands. Although Rogers notes that two of the witnesses did not see the defendants with firearms, testimony revealed that the defendants concealed the weapons in their clothing until Moss opened the door to his apartment.

{¶ 25} Although not visible, defendant's threat of the use of a firearm was enough for a jury to find that defendant did, in fact, have an operable firearm, as would support gun specification attendant to an aggravated robbery conviction. *State v. Haskins,* Erie App. No. E-01-016, 2003-Ohio-70.

{¶ 26} "The State may use circumstantial evidence to establish that the defendant possessed an operable firearm, as required to prove firearm specification." *State v. Dickess* (2008), 174 Ohio App.3d 658, 884 N.E.2d 92.

{¶ 27} Accordingly, we find the evidence legally sufficient to sustain the trial court's convictions for aggravated burglary, kidnapping, and both one- and three-year firearm specifications. In addition, when the evidence is viewed in a light most favorable to the state, we find that all essential elements of appellant's convictions were proven beyond a reasonable doubt. Moreover, nothing in the record demonstrates that the trial court lost its way in convicting appellant.

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[5]Tr. 228, 250-51, 282.

{¶ 28} Accordingly, appellant's first and second assignments of error are overruled.

Assistance of Counsel - Standards

{¶ 29} Rogers argues in his third assignment of error that he was denied his right to effective assistance of counsel when his trial attorney failed to file a motion to suppress photo identification evidence.

{¶ 30} In order to successfully assert ineffective assistance of counsel under the Sixth Amendment, the dual prongs of the test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, must be satisfied. A defendant must show not only that the attorney made errors so serious that he was not functioning as "counsel," as guaranteed by the Sixth Amendment, but also that the deficient performance was so serious as to deprive him of a fair and reliable trial. Id. at 687.

{¶ 31} The Ohio Supreme Court set forth a similar two-part test:

> "First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness."

State v. Bradley (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373.

{¶ 32} Because there are countless ways to provide effective assistance in any given case, the scrutiny of counsel's performance must be highly deferential,

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[6]Tr. 228, 250-51.

and there will be a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland,* supra; accord *State v. Bradley,* supra. In sum, it must be proven that counsel's performance fell below an objective standard of reasonable representation, and that prejudice arose from his performance. Id.

{¶ 33} In reviewing a claim of ineffective assistance of counsel, it must be presumed that a properly licensed attorney executes his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98, 17 Ohio B. 219, 477 N.E.2d 1128; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164. "Judicial scrutiny of counsel's performance must be highly deferential * * *," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance * * *." *Strickland,* supra, at 689.

Assistance of Counsel - Analysis

{¶ 34} Rogers argues that the outcome of his trial was prejudiced by trial counsel's failure to file a motion to suppress the identification testimony. Failure to file a motion to suppress is not per se ineffective assistance of counsel." *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52, quoting *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305. "Failure to file a motion to suppress constitutes ineffective assistance of counsel only if, based upon the record, the motion would have been granted." *State v. Kuhn*, 9th Dist. No. 05CA008859, 2006-Ohio-4416, at ¶11, citing *State v. Robinson* (1996), 108 Ohio App.3d 428, 433, 670 N.E.2d 1077.

{¶ 35} Rogers argues that the identification procedure used by the Garfield Heights police was unduly suggestive and led to an unreliable identification that should have been excluded. Rogers argues that the robbers were wearing black ski masks and Vickers never saw their faces. He further argues that this created a substantial likelihood of irreparable misidentification. Rogers also contends that if defense counsel had moved to suppress the identification, the trial court would have granted it. We disagree.

{¶ 36} The United States Supreme Court approved the use of photo arrays in initial identifications as "used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs." *Simmons v. United States* (1968), 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247. The Court held that "each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Id.

{¶ 37} In *Neil v. Biggers* (1972), 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401, the United States Supreme Court stated that when reviewing suggestive identification procedures, the crucial inquiry is "whether under the 'totality of the circumstances' the identification was reliable even though the

confrontation procedure was suggestive. * * * The factors to be considered in evaluating the likelihood of misidentification include the 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." See, also, *State v. Williams*, 73 Ohio St.3d 153, 163, 1995-Ohio-275, 652 N.E.2d 721.

{¶ 38} Here, Vickers testified that he identified the defendant because "that's the guy I picked out that robbed me."[7] During cross-examination, testimony indicated that the police asked Vickers if he "recognized" any of the individuals in the photo array.[8] Vickers later testified that he recognized the individuals as the men that were in Edwards's vehicle.[9] Vickers satisfies the two-pronged test set forth in *Neil v. Biggers,* supra.

{¶ 39} Vickers testified that he was able to get a good look at the suspects, he made both identifications within two days of the burglary, and there is no evidence that Vickers was influenced or led to pick a certain individual out of the photo arrays. A review of the record does not demonstrate that counsel was deficient for failing to file a motion to suppress identification in this case.

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[7]Tr. 435.

[8]Tr. 449.

[9]Tr. 458.

{¶ 40} But even if we agreed that the photo array was suggestive, this alone does not require a trial court to suppress an eyewitness's identification. "An unneccessarily suggestive identification process does not violate due process if the identification possesses sufficient indicia of reliability." *State v. Keith*, 79 Ohio St.3d 514, 526, 1997-Ohio-367, 684 N.E.2d 47. To suppress the identification, the defendant must produce evidence that the identification was unreliable under the totality of the circumstances. *State v. Sims* (1984), 13 Ohio App.3d 287, 288, 469 N.E.2d 554. Thus, a suggestive identification process does not preclude the admission of identification testimony when the challenged identification is determined to be reliable. *State v. Price*, 8th Dist. No. 90308, 2008-Ohio-3454; *State v. Carey*, 8th Dist. No. 88487, 2007-Ohio-3073; *State v. Morrison*, 8th Dist. No. 86967, 2006-Ohio-3352, ¶23, citing *State v. Bates*, 8th Dist. No. 84654, 2005-Ohio-3411.

{¶ 41} Indeed, even in cases where only one or two photographs were presented as part of a pretrial identification, this court has repeatedly held that a motion to suppress would have been futile when the totality of the circumstances revealed that the challenged identification was reliable. See, e.g., *Price,* supra; *State v. Keck*, 8th Dist. No. 89637, 2008-Ohio-3794; *Morrison,* supra.

{¶ 42} Accordingly, our review of the record demonstrates that counsel was not deficient in failing to file a motion to suppress identification. Counsel was not deficient and our analysis ends at this point; however, we note that Rogers failed to demonstrate he was prejudiced by counsel's failure to request a mistrial.

Although counsel did not formally file a motion to suppress identification, counsel did in fact argue that Vickers's identification should not be admissible.[10]

{¶ 43} We find nothing in the record to demonstrate ineffective assistance of counsel on the part of Rogers's trial counsel. The conduct in this case did not constitute a substantial violation of any of defense counsel's essential duties to the client. Furthermore, we note Rogers was not prejudiced by counsel.

{¶ 44} Accordingly, Rogers's third assignment of error is overruled.

Mistrial

{¶ 45} Rogers argues in his fourth assignment of error that the trial court erred and abused its discretion in denying his motion for a mistrial. We do not find merit in Rogers's argument.

> "The granting or denial of a motion for mistrial rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Crim.R. 33; *State v. Sage* (1987), 31 Ohio St.3d 173, 182, 31 OBR 375, 382, 510 N.E.2d 343, 349-350. 'A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened * * *.' *State v. Reynolds* (1988), 49 Ohio App.3d 27, 33, 550 N.E.2d 490, 497. The granting of a mistrial is necessary only when a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, 580 N.E.2d 1, 9."

State v. Treesch (2001), 90 Ohio St.3d 460, 480.

{¶ 46} Rogers argues that the lower court erred when it failed to grant a mistrial following the testimony of Ms. Stewart, the neighbor who observed the assailants in the hallway. On direct examination, Stewart made an in-court

[10]Tr. 439-40, 463-67.

identification of Rogers as the individual she saw outside Moss's apartment the night of the robbery. During cross-examination, Stewart testified that she was shown a single photo of both Rogers and co-defendant, Brooks, in preparation of her testimony. Rogers argues that defense counsel was not informed by the prosecuting attorney that Stewart had been shown a single photo of Rogers or that Stewart was able to identify Rogers as the perpetrator. Rogers frames his argument as a discovery issue.

{¶ 47} Crim.R. 16(E)(3), Regulation of Discovery, provides the following:

> "(3) Failure to comply. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court *may* order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, *or it may make such other order as it deems just under the circumstances*."

{¶ 48} It is generally accepted that, in deciding how to resolve a discovery violation, the trial court "*must impose the least severe sanction* that is consistent with the purpose of the rules of discovery." *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, paragraph two of the syllabus. "The overall purpose is to produce a fair trial." Id. at 3. See, also, *State v. Saucedo* (July 17, 2008), Cuyahoga App. No. 90327.

{¶ 49} In the case at bar, Brooks's attorney moved for a mistrial based on the identification testimony of Stewart. Brooks's trial counsel argued that he was never informed that Stewart was going to make an in-court identification and that showing a single photo to a witness was highly prejudicial. Rogers's trial attorney

joined in the motion. The trial court denied the motion for a mistrial, but decided to issue a curative instruction on the matter.

{¶ 50} The jury was instructed as follows:

> "* * * to disregard the in-court identification that was done by [Stewart]. Apparently somewhere prior to her testimony she saw a picture, and it wasn't coming from her mind necessarily but possibly from her having seen a photograph within a couple days of the testimony. You may however, consider her other testimony relative to identification, including any inconsistencies therein that were made closer to the time of the incident. So I'm only asking you to disregard that portion of the testimony about identifying the defendant, Mr. Brooks, as I recall, from her in-court identification. The rest of her testimony is fair game."[11]

{¶ 51} The court then went on to expand the instruction to include disregarding Ms. Stewart's identification of Rogers.[12]

{¶ 52} A curative instruction is an appropriate remedy, rather than a mistrial, for inadvertent answers given by a witness to an otherwise innocent question. *State v. Mobley* (April 5, 2002), Montgomery App. No. 18878. The proper remedy in this case is to offer a curative instruction to disregard the improper testimony given, that is exactly what occurred in this case.

{¶ 53} In addition, the totality of the circumstances showed that the identification of Stewart was reliable. Therefore, as we stated earlier in Rogers's third assignment of error, a motion to suppress the identification would have been

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[11]Tr. 385-86.

[12]Tr. 386.

futile.[13] Accordingly, we find no error on the part of the trial court, the court did not abuse its discretion when it denied Rogers's motion for a mistrial.

{¶ 54} Rogers's fourth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule

27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

KENNETH A. ROCCO, P.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE OPINION;

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[13]See the previous discussion of the third assignment of error stating that even in cases where only *one* or two photographs were presented as part of a pretrial identification, this court has repeatedly held that a motion to suppress would have been futile when the totality of the circumstances revealed that the challenged identification was reliable. See, e.g., *Price,* supra; *State v. Keck*, 8th Dist. No. 89637, 2008-Ohio-3794; *Morrison,* supra.

JAMES J. SWEENEY, J., CONCURS

KENNETH A. ROCCO, P.J., CONCURRING IN PART AND DISSENTING IN PART:

{¶ 55} I agree with my colleagues' analysis, as far as it goes. However, I must disagree with their decision to affirm all three of appellant's convictions for aggravated burglary, because all were based on a single act of trespass.

{¶ 56} "When an offense is defined in terms of conduct toward another, then there is a dissimilar import for each person affected by the conduct. *State v. Phillips* (1991), 75 Ohio App.3d 785, 790, citing *State v. Jones* (1985), 18 Ohio St.3d 116, 118, 480 N.E.2d 408. R.C. 2911.12(A)(2), however, is not defined in terms of conduct toward another person. Instead, this provision examines the defendant's entrance into an occupied structure-that is a permanent or temporary habitation when another person is present-that defines the prohibited conduct. There is no language in R.C. 2911.12(A)(2) that proscribes any conduct toward the person or persons present in the structure. It is the mere presence of another individual after an unlawful entrance that is an element of the offense of burglary, not any harm toward that individual." *State v. Powers*, Cuyahoga App. No. 86365, 2006-Ohio-2458, ¶12. A single trespass does not blossom into three separate aggravated burglaries because three persons are present in the structure.

{¶ 57} I would vacate two of the aggravated burglary convictions, but affirm the other convictions. Accordingly, I concur in part and dissent in part.