

[Cite as *State v. Deal*, 2010-Ohio-153.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92642

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RANDY DEAL

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-512006

BEFORE: Gallagher, A.J., Stewart, J., and Celebrezze, J.

RELEASED: January 21, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Defendant-appellant, Randy Deal, appeals his conviction from the Cuyahoga County Court of Common Pleas after a jury trial. Finding no error in the proceedings below, we affirm.

{¶ 2} Deal was charged with one count of carrying a concealed weapon and one count of having a weapon while under disability. Deal pled not guilty and opted for a jury trial. Both the state and Deal stipulated to the operability of the gun and to Deal's prior conviction.

{¶ 3} At trial, Officer Eric Williams from the Cuyahoga Metropolitan Housing Authority ("CMHA") testified that on March 31, 2008, he responded to 2539 East 49th Street, in Cleveland, Ohio, for a report of property damage. The call came in at approximately 6:20 a.m. He arrived at 6:30 a.m., and noticed damage to a rental unit. He was then alerted to a male leaving the area. Officer Williams identified himself and asked the male, later identified as Deal, to stop. Deal kept walking.

{¶ 4} Officer Williams began to chase Deal as he ran away. After a few blocks, Deal stopped. Officer Williams asked him what happened at the apartment and asked him to come back to the apartment with him. Deal said he did not do anything and would not go with him. He began to run away again.

{¶ 5} Officer Williams chased after Deal and saw him remove something from his waistband and throw it into some bushes. He testified that he stopped chasing Deal, checked out the bushes, and recovered a loaded .357 Magnum revolver. Officer Williams returned to the apartment complex to talk with the woman who reported the damage to her property.

{¶ 6} Officer Williams obtained Deal's name, date of birth, and social security number from the woman. He gave the information to dispatch, and he received a LEADS report with a photo. Officer Williams recognized Deal as the same male he had chased and had seen discard the gun.

{¶ 7} Deal testified on his own behalf. He stated that he and his children's mother argued earlier that day. He testified that he called his cousin, who picked him up at 5:30 a.m. He stated that his children's mother told him that she was calling the police. Deal testified that he was not there when Officer Williams arrived and that he was not the person Officer Williams had chased.

{¶ 8} Deal was found guilty of carrying a concealed weapon and having a weapon while under disability. He was sentenced to a total of two years in prison. Deal appeals, advancing two assignments of error for our review.

{¶ 9} "I. Appellant's conviction for carrying concealed weapon and weapon under disability is against the manifest weight of the evidence."

{¶ 10} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether “there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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.” (Internal citations and quotations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 68, 2004-Ohio-6235, 818 N.E.2d 229.

{¶ 11} Deal argues that Officer Williams’s identification of him as the person who ran from him and discarded the gun was not credible. The identity of a perpetrator may be established by the use of direct or circumstantial evidence. *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046; *State v. Reed*, Franklin App. No. 08AP-20, 2008-Ohio-6082. “While identity is an element that must be proven by the state beyond a reasonable doubt, the credibility of witnesses and their degree of certainty in identification are matters affecting the weight of the evidence.” (Citations omitted.) *Reed*, at ¶48. The jury is free to believe all, part, or none of a witness’s testimony. *State v. Colvin*, Franklin App. No. 04AP-421, 2005-Ohio-1448, at ¶34. “Juries are not so susceptible that they cannot

measure intelligently the weight of identification testimony that has some questionable feature.” *State v. Coleman* (Nov. 21, 2000), Franklin App. No. 99AP-1387, citing *Manson v. Brathwaite* (1977), 432 U.S. 98, 116, 97 S.Ct. 2243.

{¶ 12} Further, an appellate court may not substitute its judgment for that of the trier of fact on the issue of witness credibility unless it is manifestly clear that the fact-finder lost its way. *State v. Green*, Franklin App. No. 03AP-813, 2004-Ohio-3697, at ¶25. See, also, *State v. Covington*, Franklin App. No. 02AP-245, 2002-Ohio-7037, at ¶28.

{¶ 13} In this case, the officer testified that he and Deal were standing within 15 to 20 feet of each other in a well lit area and that he was able to get a good look at Deal’s face. He testified that he viewed Deal’s picture just after the incident and was able to identify him. Officer Williams identified Deal in court and indicated that he was 100 percent positive Deal was the same person he chased on the day in question.

{¶ 14} Upon the record before us, we find the jury’s verdict was supported by the manifest weight of the evidence. Accordingly, this assignment of error is overruled.

{¶ 15} “II. Appellant was denied his Sixth Amendment right to effective assistance of counsel.”

{¶ 16} In order to substantiate a claim of ineffective assistance of counsel, the appellant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *State v. Trimble*, 122 Ohio St.3d 297, 310, 2009-Ohio-2961, 911 N.E.2d 242, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland*, 104 S.Ct. at 2065. In Ohio, there is a presumption that a properly licensed attorney is competent. *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905.

{¶ 17} Deal contends that his counsel was ineffective for failing to call his cousin as a witness, for failing to object to the testimony that Deal was the alleged defendant in the case, and for stipulating to Deal's prior conviction.

{¶ 18} The failure to call a witness to testify ordinarily is a matter of trial strategy that will not be second-guessed by a reviewing court. *State v. Treesh*, 90 Ohio St.3d 460, 490, 2001-Ohio-4. The defendant has the burden to show that the witness's testimony would have significantly assisted the defense and would have affected the outcome of the case. *State v. Dennis*, Franklin App. No. 04AP-595, 2005-Ohio-1530, at ¶22, citing *State v. Reese* (1982), 8 Ohio App.3d 202, 203. Otherwise, counsel's failure to call a witness does not establish ineffective assistance. Deal's claim that his cousin would

have corroborated that he picked up Deal prior to the arrival of the police is speculative and unsubstantiated by anything in the record other than Deal's self-serving testimony. Therefore, we cannot say that Deal's counsel was ineffective.

{¶ 19} With regard to the testimony that Officer Williams received Deal's name, date of birth, and social security number from the person who called the police regarding the damage to her property, a review of the record indicates that trial counsel did object, but the court overruled the objection. Consequently, the alleged failure to object cannot serve as the factual basis for a claim of ineffective assistance of counsel. Further, Deal suffered no prejudice since there is no reasonable probability that the objection would have altered the outcome of the trial. See, also, *State v. Lawson* (Dec. 12, 1996), Cuyahoga App. No. 69899.

{¶ 20} Finally, the stipulation to Deal's prior conviction was not ineffective assistance of counsel, but rather trial strategy because it avoided inevitable testimony about another incident when Deal had a gun. See, also, *State v. Blackburn*, Trumbull App. No. 2001-T-0052, 2003-Ohio-605.

{¶ 21} Since we cannot say that Deal's counsel was ineffective, we overrule his second assignment of error.

Judgment affirmed.

It is ordered that appellee recover from 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.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

MELODY J. STEWART, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR