[Cite as *State v. Foster,* 2010-Ohio-3186.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93391

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT FOSTER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART,
REVERSED IN PART AND REMANDED
FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-517474

BEFORE: Stewart, J., Gallagher, A.J., and Boyle, J.
RELEASED: July 8, 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).

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Robert Foster, appeals his robbery convictions from the Cuyahoga County Court of Common Pleas. Appellant raises challenges to the manifest weight of the state's evidence and the effectiveness of his appointed counsel. For the reasons set forth below, we affirm in part, reverse in part and remand for resentencing.

{¶ 2} The Cuyahoga County Grand Jury indicted appellant on one count of robbery in violation of R.C. 2911.02(A)(2), a second degree felony, and one count of robbery in violation of R.C. 2911.02(A)(3), a third degree felony. The charges arose out of a purse snatching in downtown Cleveland. Appellant entered a plea of not guilty and the matter proceeded to a jury trial.

{¶ 3} The victim, Anne Blanchard, testified to the events that occurred on October 28, 2008. Ms. Blanchard said that she worked downtown until about 7 p.m. She then left work to go meet some friends for a drink at the Winking Lizard Tavern on Prospect Avenue. She parked her car in a parking lot off Prospect and started walking toward the Winking Lizard. She saw a man standing nearby. She began to walk faster. She noticed the man was approaching her quickly, and she started to run. The man pushed her from behind. She hit the wall of a building and fell to the ground,

striking her head and her knee. She looked up at the man, who was hovering over her. She threw her purse at him. The man grabbed her purse and ran down the street toward East 9th Street. She described her assailant as being a tall, African-American male, medium to dark-skinned, with scruffy facial hair, wearing dark clothes and a dark purple hat.

{¶ 4} A woman witnessed the attack from across the street. She started to run after the assailant but then came to Ms. Blanchard's aid and called 911. She relayed the details of the robbery, as well as the description of the perpetrator, to the police dispatcher. She testified that she saw the man only from the side and back and was unable to give the police a description of the man's face. She described him as wearing a hooded sweatshirt and dark pants.

{¶ 5} Cleveland police responded within minutes. Ms. Blanchard gave them a description of the man who robbed her as well as of her purse and its contents. About ten minutes after the report of the robbery, the police brought two different suspects to the Winking Lizard to see if the victim could identify her attacker in a cold stand identification. Ms. Blanchard immediately identified appellant as the man who had robbed her. She said he was wearing the same clothes as her attacker, including the purple hat. She testified that the other suspect was clean shaven, was wearing nicer clothes than her attacker, and looked nothing like him.

{¶ 6} Cleveland police sergeant Mark Medwid testified that he responded to a call that officers had stopped two men at the BP gas station located at East 9th Street and Carnegie Avenue, one of whom was wearing a purple knit hat and a dark hoodie and matched the description of the robber. Sergeant Medwid identified appellant in court as the individual picked up from the gas station and later identified as the robber by Ms. Blanchard. Medwid said he also spoke with Louis Bello, the man stopped at the gas station with appellant. Bello told him he had just picked appellant up and brought him to the BP gas station. But, after Bello saw appellant in the back of the police car, he changed his story and told Medwid that appellant had been with him all day. While Medwid was at the BP gas station, a second suspect, Aaron Jewell, was picked up from a bus stop on Prospect Avenue and brought over to the Winking Lizard.

{¶ 7} Officer Christopher Ereg testified that he was with Ms. Blanchard during both cold stands. He said he stood with her inside the vestibule of the Winking Lizard as each suspect was separately brought out of the police car for her to see. He said Ms. Blanchard indicated that Jewell was not the man who robbed her. When appellant was brought out, Ms. Blanchard identified him as the robber and specifically noted that he was wearing the hat he had on when he robbed her.

{¶ 8} The defense called Bello and Jewell as defense witnesses.

{¶ 9} The jury found appellant guilty of both counts of robbery. The court sentenced appellant to prison terms of five years on the first count and three years on the second, to be served concurrently. Appellant timely appeals raising two assignments of error for our review.

{¶ 10} In the first assigned error, appellant argues that his conviction is against the manifest weight of the evidence. In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court recently addressed the standard of review for a criminal manifest weight challenge, as follows:

{¶ 11} "The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive — the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the

evidence. Id. at 387, 678 N.E.2d 541. '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 factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."

{¶ 12} Still, determinations of witness credibility, conflicting testimony, and evidence weight are primarily for the trier of the facts. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

{¶ 13} Appellant challenges the evidence used to identify him as the perpetrator. He argues that the police work was shoddy, the cold stand was suspect, and the victim's testimony was unreliable. He points to inconsistencies in the description of the perpetrator as compared to him, and to Bello's alibi testimony. Finally, he contends that the state's entire case is based upon a single piece of evidence, the hat he was wearing when arrested, which he argues is maroon and not purple.

{¶ 14} We recognize the dangers inherent in the use of eyewitness identification. We are also aware that "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." *State v. Broom* (1988), 40 Ohio St.3d 277, 284, 533 N.E.2d 682.

{¶ 15} However, even if the use of a cold stand identification was suggestive, that does not necessarily invalidate the witness's identification. 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.

{¶ 16} "The focus, under the 'totality of the circumstances' approach, is upon the reliability of the identification, *not* the identification procedures." *State v. Jells* (1990), 53 Ohio St.3d 22, 27, 559 N.E.2d 464, 470. In this case, Ms. Blanchard testified that after knocking her down, the attacker stood hunched over her. She saw his face and described him to police as a tall, African-American male, medium to dark-skinned, with scruffy facial hair, wearing dark clothes and a dark purple hat. Within minutes of the attack,

she was presented with two possible suspects. Both she and Officer Ereg testified that she "immediately" recognized appellant as her attacker.

{¶ 17} Officer Ereg testified that he was with Ms. Blanchard throughout the identification process. Both he and Ms. Blanchard testified that they stood just inside the vestibule of the Winking Lizard and had the opportunity to view the two suspects separately. They testified that the two suspects were in different police cars and were taken out of the cars, one at a time, for Ms. Blanchard to identify. There is nothing in the record to indicate that Ms. Blanchard's identification was not reliable or that the identification methods used by the police were so suggestive that they created a risk of misidentification.

{¶ 18} Appellant argues that he does not match the description of the perpetrator. He contends the witnesses described the perpetrator as tall, possibly as tall as 6'3". He alleges that he is not "tall," only approximately 5'9" in height. Ms. Blanchard testified that she did not tell the police that her attacker was 6'3". She said she told police, "he was a tall man. I'd say at least six feet tall." Appellant offered no evidence of his actual height, and the police booking report from his arrest on October 28, 2008 shows his height as 6'0".

{¶ 19} Appellant also argues that his hat is really maroon, and not purple. However, the jury heard the victim's testimony and was presented

with the hat worn by appellant when he was arrested. The jury is in the best position to judge whether at night, under streetlights, the hat could be viewed as "purple."

{¶ 20} Finally, we agree with the jury's decision to afford no credibility to Bello's alibi testimony. Sergeant Medwid testified that during their conversation the night appellant was arrested, Bello changed his story. At trial, Bello changed his story multiple times between direct testimony and cross-examination. Bello's trial testimony was rambling, disjointed, and simply not credible.

{¶ 21} After reviewing the record, weighing the evidence, and considering the credibility of the witnesses, we find that the jury did not lose its way in finding appellant guilty. The convictions are not against the manifest weight of the evidence. Accordingly, the first assignment of error is overruled.

{¶ 22} In the second assignment of error, appellant claims he was denied effective assistance of counsel. In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that (1) the performance of defense counsel was seriously flawed and deficient and (2) the result of the trial would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104

S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 23} The burden is on appellant to prove ineffectiveness of counsel. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128. Trial counsel is strongly presumed to have rendered adequate assistance. Id. Trial strategy or tactical decisions cannot form the basis for a claim of ineffective counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 402 N.E.2d 1189.

{¶ 24} Appellant argues that his trial counsel was deficient for allowing him to go to trial in jail attire, rather than in street clothes. Appellant bases his argument primarily upon *Estelle v. Williams* (1976), 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126. In that case, the United States Supreme Court recognized that a juror's judgment might be affected by a defendant's appearance in prison clothing. However, the court refused to establish a bright-line rule that a conviction must be overturned when an accused wore jail clothing at trial. Instead, the court stated that the inquiry must focus on whether the accused's appearance before the jury in jail clothes was compelled. Id. at 507; see, also, *State v. Dorsey* (Apr. 23, 1998), Cuyahoga No. 72177. "The reason for this judicial focus upon compulsion is simple; instances frequently arise where a defendant prefers to stand trial before his peers in prison garments. The cases show, for example, that it is not an

uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury." Id. at 508.

{¶ 25} The *Estelle* court further stated that, "[u]nder our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system." Id. at 512.

{¶ 26} Appellant does not argue that he was compelled to wear jail clothing at trial and our review of the record finds nothing to indicate that he was compelled to wear jail clothing during the trial. As such, the wearing of jail attire could be considered a trial strategy. Appellant maintained throughout the case that he was the victim of mistaken identity. Appellant's counsel may have been attempting to invoke a sense of sympathy from the jury for appellant's plight. This court will not second-guess what could be considered a matter of trial strategy. *State v. Stone*, 8th Dist. Nos. 91679 and 91680, 2009-Ohio-2262. Accordingly, the second assignment of error is overruled.

{¶ 27} Finally, although not raised by appellant, the state raises the issue of merger. Appellant was indicted and convicted of two counts of robbery under different subsections of R.C. 2911.02(A). The two robbery counts charged appellant with different forms of that offense. Count 1

charged, pursuant to R.C. 2911.02(A)(2), that appellant committed or attempted to commit a theft offense and in doing so did "inflict, attempt to inflict, or threaten to inflict physical harm" on the victim, while Count 2 charged, pursuant to R.C. 2911.02(A)(3), that appellant committed or attempted to commit a theft offense and in doing so did "use or threaten the immediate use of force."

{¶ 28} There was only one victim and one robbery in this case. The state acknowledges that the two robbery counts are allied offenses of similar import and therefore, pursuant to R.C. 2941.25, should merge at sentencing. While appellant was found guilty of both offenses, he may be sentenced for only one. The state retains the right to elect which allied offense to pursue on a sentencing remand to the trial court after appeal. *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, paragraph three of the syllabus; *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, paragraph one of the syllabus. Accordingly, the determinations of appellant's guilt under both subsections of R.C. 2911.02(A) remain intact, but we remand to the trial court for a new sentencing hearing consistent with the holding in *Whitfield*.

{¶ 29} This cause is affirmed in part, reversed in part and remanded for resentencing.

It is ordered that the parties bear their own 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 Cuyahoga County Court of Common Pleas 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 resentencing.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

SEAN C. GALLAGHER, A.J., and
MARY J. BOYLE, J., CONCUR