

[Cite as *State v. Witherspoon*, 2011-Ohio-704.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94475

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JERMAINE WITHERSPOON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-531387

BEFORE: Kilbane, A.J., Jones, J., and Rocco, J.

RELEASED AND JOURNALIZED: February 17, 2011

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MARY EILEEN KILBANE, A.J.:

{¶ 1} Defendant-appellant, Jermaine Witherspoon, appeals from his convictions for aggravated robbery, kidnapping, and having weapons while under disability. For the reasons set forth below, we affirm.

{¶ 2} On November 23, 2009, defendant was indicted on two counts of aggravated robbery, two counts of kidnapping, each with one- and three-year firearm specifications, and having weapons while under disability. This matter is a reindictment following the dismissal of identical charges in Case No. CR-520182. The defendant

pled not guilty to all charges, waived his right to a jury trial on Count 5, having weapons while under disability, and the matter proceeded to a jury trial on November 30, 2009.

{¶ 3} The State presented the testimony of Matthew Gabriel (“Matthew”), Heather Charo (“Charo”), Sara Gabriel (“Sara”), and Cleveland Police Officers Humphrey Caswell, Louis Kitko, and Detective Todd Staimpel.

{¶ 4} Matthew testified that he lives with his mother and two children at 3447 W. 90th Street. On December 21, 2008, between 8:00 p.m. and 10:00 p.m., he and his girlfriend, Heather, were going Christmas shopping. Matthew got into his mother’s van, which had been parked across the street, drove it into the driveway, and left it idling. He then went back inside and waited for Heather. While exiting the house a short time later, two armed men emerged from the back of the house and instructed them to put their hands up and freeze. According to Matthew, one of the men pointed his weapon at Heather’s head and shouted orders to the other man who had a gun to Matthew’s back, instructing him to check Matthew’s pockets and take his shoes.

{¶ 5} Matthew then removed \$300-\$350 from his pocket and handed it his assailant. The men then wanted Matthew to let them into the house. Matthew indicated that he did not have keys and then knocked on the door. When his mother briefly opened it, Matthew pulled the door shut so they could not get inside. At this point, the man who had accosted Heather fled in the van that had been idling in the driveway, while the other man ran toward a sport utility vehicle that had been parked across the street.

{¶ 6} Heather and Matthew ran inside. The man who ran toward the sport utility vehicle entered the vehicle, sat for a short period of time, then exited the vehicle. Matthew then heard gunfire and watched as the man fled on foot. A short time later, the other assailant crashed the van into a guardrail a short distance from Matthew's home and abandoned the vehicle. The keys to the sport utility vehicle were later found in a nearby yard.

{¶ 7} Matthew further testified that detectives showed him a photo array a few days after the incident. He identified the defendant as the man who had a gun to Heather's head, and he signed his name by the photo of the person he had selected. He further testified that the area was well lit. He admitted that he did not notice the clothing that the men were wearing, and did not notice whether they had on any jewelry, hoods, or gloves. He also admitted that he was uncertain of the height of the man who had a gun to Heather, and did not see this assailant actually take money from her.

{¶ 8} Heather testified that, as she and Matthew exited the house, two men with guns approached them. According to Heather, one man had a revolver and the other had a pistol. One of the men grabbed Matthew, went through his pockets, and led him to the front door of the house. The other man held a gun to Heather's neck. He took \$6 from her pocket and shouted out orders to the other assailant. Heather stated that she turned around to get a look at her assailant so that she could remember his face. At this point, the man told her to turn around.

{¶ 9} The men unsuccessfully tried to get into the house, then the man who had a gun to Heather fled in Sara Gabriel's van. The other man ran across the street.

{¶ 10} Heather next testified that a detective showed her a photo array a few days later. She identified the man who had a gun to her and signed her name on the array. She also identified defendant in court.

{¶ 11} On cross-examination, Heather acknowledged that it was dark outside, but she also stated that the porch light was on. She believed that the man who had a gun to her was about five feet ten inches tall. She stated that he wore a black hat, and did not know if he was wearing gloves. She stated that she did not get a good look at the other man, but noticed that both men were wearing cargo jump suits. She did not see either of the men discharge a weapon.

{¶ 12} Sara Gabriel testified that she had given her son about \$300 and list of Christmas presents to purchase for the children. Her son left the van running in the driveway, then came inside to get a heavier coat. He then left with Heather. A few minutes later, her grandson informed her that his father was at the door with another man.

When she opened the door, she observed that her son looked frightened, and a man was standing behind him. She and her son forced the door shut, and she called 911. She looked out her front window and observed at least two suspects. She saw a man with a gun to Heather, but did not get a good look at his face. She testified that she got a better look at the man who had a gun to her son. When the detective arrived with photo arrays,

she picked out two individuals; however, she stated that she was not 100 percent certain and, therefore, did not make an identification.

{¶ 13} Officer Caswell testified that he was one of the officers who processed the crime scene. He took photographs of the vehicles and unsuccessfully attempted to obtain fingerprints from them and the keys that were recovered nearby.

{¶ 14} Officer Kitko testified that a bullet fragment was recovered from the door of 3440 West 90th Street, the residence across the street from the Gabriels. He also testified that he obtained descriptions of two suspects. The suspect who had a gun to Heather was described as being in his mid-twenties, African-American, approximately six feet two inches tall, and weighing about 230 pounds. He had a mustache and goatee. The other suspect was approximately five feet eight inches tall and weighing about 160 pounds. Finally, Officer Kitko testified that he tracked footprints in the snow and determined that they led from the driver's side of the abandoned sport utility vehicle back towards the Gabriels' house.

{¶ 15} Detective Staimpel testified that he spoke to Matthew and Heather several times after the robbery. He also determined that the sport utility vehicle that was abandoned at the scene was titled to Theresa McCullum ("Theresa"), who lived on East 115th Street. According to Detective Staimpel, Theresa reported the vehicle stolen about 25 minutes after the Gabriels' initial 911 call. On four separate occasions, he asked Theresa to give him a statement, but she refused to do so.

{¶ 16} Detective Staimpel learned that defendant resided with Theresa and that he matched the description of the man who had held a gun to Heather. He prepared two photo arrays that included defendant's photograph, as well as photos of five other men of similar race, age, and facial hair. The different arrays were then presented to Heather and Matthew, independently of one another. In separate identification procedures, both witnesses identified the defendant as the man who held a gun to Heather, and both indicated that they were 100 percent certain of the identifications they had made. The detective circled their selections and had them sign near each photo that they had chosen. No additional information was ever obtained about the second assailant.

{¶ 17} On April 15, 2009, defendant filed a notice of alibi. Defendant also presented an alibi defense. He presented the testimony of Theresa, who provided an alibi for his whereabouts at the time of the robbery, and Mary McCullum ("Mary"), who testified about the theft of Theresa's vehicle.

{¶ 18} Theresa, a caretaker with the Cuyahoga County Board of Mental Retardation, testified that on December 21, 2008, she, her sister (Mary), and her husband (the defendant) had gone Christmas shopping. They returned to her home at around 6:00 p.m., and Mary then asked if she could use the car to do additional shopping. Theresa agreed. She then watched television while defendant played video games with their son.

Later that night, Mary called and said that the car had been stolen from the parking lot of a department store. Theresa called police and reported the car stolen, but she denied that

the police asked her to come to the station to make a report. She retrieved the vehicle on February 3, 2009.

{¶ 19} Mary testified that she borrowed her sister's car so that she could ride around and get high. She smoked marijuana in the vehicle, and as she reached East 55th Street, she met a man who wanted to smoke with her. She let him into the car and learned that he was known as "D." She agreed to have sex with him for \$100, at a location on the west side. Mary began to drive to the west side and took an ecstasy tablet. She pulled into a Shell gas station near the freeway to buy cigarettes. When she returned to where the vehicle was parked, it was gone. She initially lied to Theresa about what had happened to the car because she was afraid.

{¶ 20} Defendant was convicted of all charges and specifications. The trial court subsequently merged the convictions for the firearm specifications, and also merged the convictions for aggravated robbery and kidnapping pertaining to each victim. The court then sentenced defendant to a total of eight years of imprisonment, plus five years of mandatory postrelease control.¹ Defendant now appeals and assigns three errors for our review.

Assignment of Error One:

"The trial court permitted plain error by failing to give jury instructions on evaluating eyewitness testimony."

¹ The trial court additionally ordered that the sentence in this matter run concurrently with the sentence in an unrelated matter, Case No. CR-521772.

{¶ 21} In this assignment of error, defendant maintains that the trial court committed plain error by failing to give the eyewitness identification instruction set forth in *United States v. Telfaire* (C.A.D.C. 1972), 469 F.2d 552.

{¶ 22} With regard to procedure, we note that notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus.

{¶ 23} With regard to the substantive law, we note that the *Telfaire* instruction instructs the jury to consider, inter alia, “the capacity and opportunity of the witness to observe the defendant; the identification being or not being the product of the witness’s own recollection, given the strength of the identification and the circumstances under which it was made; the inconsistent identifications that may have been made by the witness; and the general credibility of the witness.” See *State v. Guster* (1981), 66 Ohio St.2d 266, 268, 421 N.E.2d 157, fn. 1.

{¶ 24} In *Guster*, the Supreme Court approved the substance of the *Telfaire* instruction, but did not mandate the use of a special instruction regarding eyewitness identification. Rather, the court determined that the decision to give such an instruction was within the sound discretion of the trial court. *Id.*, at syllabus.

{¶ 25} In this matter, the trial court did not give a special instruction regarding identification, but it did instruct the jury that it was to consider “the reasonableness of the testimony; the opportunity the person had to see, or hear or know the truth of the facts and

circumstances concerning the things to which the witness has testified; and any other facts and circumstances surrounding the testimony, which, in your judgment, would add or detract from the credibility and weight of the testimony.”

{¶ 26} Therefore, the court’s charge as given adequately informed the jury of its duty to carefully consider opportunity of the witness to observe the defendant, the reasonableness of the identification, and the credibility of the witnesses. We therefore find no plain error in connection with the court’s failure to give a special eyewitness identification in this matter. Accord *State v. Caldwell* (1984), 19 Ohio App.3d 104, 107, 483 N.E.2d 187.

{¶ 27} This assignment of error is overruled.

Assignment of Error Two:

{¶ 28} **“Appellant was denied effective assistance of counsel.”**

{¶ 29} Within this assignment of error, defendant complains that his trial counsel was ineffective for (1) failing to move for voir dire examination of the eyewitnesses and for order disclosing other evidence used in identification procedure; (2) failing to file a motion to suppress the identifications; (3) failing to request an expert on the issue of identification; (4) failing to properly cross-examine the eyewitnesses and present evidence on the issue of identification; and (5) failing to request special jury instructions on the issue of eyewitness identification. He additionally complains that his trial counsel was ineffective due to cumulative error.

{¶ 30} We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. In order to prevail on an ineffective assistance of counsel claim, an appellant must demonstrate that his counsel's performance fell below an objective standard of reasonable representation; and if so, show there was a reasonable probability that his counsel's errors affected the outcome of the proceedings. *Id.* Further, judicial scrutiny of a lawyer's performance must be highly deferential. *State v. Sallie*, 81 Ohio St.3d 673, 674, 1998-Ohio-343, 693 N.E.2d 267. Therefore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland* at 2065. Debatable trial tactics do not establish ineffective assistance of counsel. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810.

1. Failure to Voir Dire Eyewitnesses and the Failure to Seek Disclosure of Evidence Regarding Identification

{¶ 31} In this matter, the record indicates that defendant had retained trial counsel who represented him both on the original indictment filed in Case No. CR-520182, and in the instant reindictment of the same offenses. The record further indicates that on April 15, 2009, in the original proceedings, defendant's retained counsel filed a motion for voir dire of identification witnesses, motion for disclosure of other evidence used in the identification procedure, and a notice of alibi. The record further indicates that the instant matter was reindicted on November 23, 2009, under Case No. CR-531387. It

appears that the parties were under the assumption that the motions filed under the original case number remained pending in the reindicted case, and on December 1, 2009, defendant's counsel withdrew the motion for voir dire of identification witnesses, and motion for disclosure of other evidence used in the identification procedure.

{¶ 32} The record does not indicate the reason for counsel's decision to withdraw those motions. The State strenuously argues, however, that defendant's trial counsel had the record from a parole revocation hearing in which one of the victims identified defendant and was subject to cross-examination. Therefore, according to the State, defendant's trial counsel could determine, based upon his knowledge from the record from this prior identification, that further challenge to the identification would not succeed. We cannot be certain of the exact reasoning behind defendant's trial counsel's decision to withdraw the motion for voir dire of the identification witnesses and the motion for disclosure of other evidence used in the identification procedure. Nonetheless, the record clearly demonstrates that defendant's trial counsel considered the issues raised in these motions throughout the pendency of this matter, both as originally charged and in the reindicted action.

{¶ 33} We further note that in *State v. Logan*, Cuyahoga App. No. 88472, 2007-Ohio-2636, this court rejected a claim of ineffective assistance of counsel that was premised upon counsel's failure to file a motion to suppress or conduct a voir dire of the complaining witness. This court held that counsel could, within the scope of providing effective representation, decide as a trial tactic that it would be more advantageous to

conduct a thorough cross-examination of the victim rather than file a motion to suppress or conduct a voir dire. We further note that the failure to do a futile act cannot be the basis for claims of ineffective assistance of counsel and is not prejudicial. *State v. Henderson*, Cuyahoga App. No. 88185, 2007-Ohio-2372; *Defiance v. Cannon* (1990), 70 Ohio App.3d 821, 826-827, 592 N.E.2d 884.

{¶ 34} In accordance with the foregoing, we conclude that counsel made a debatable tactical decision and was not ineffective, where he clearly considered the issues of the voir dire of the eyewitnesses, and the evidence of the identifications, but ultimately decided not to pursue those challenges. Counsel could have determined, as a debatable trial decision, that these motions would have been futile, and decided, as a trial tactic, to extensively cross-examine the eyewitness as to various factors that may have rendered the identification unreliable. We find no deficient performance.

2. Suppression of Eyewitness Testimony

{¶ 35} Again, we note, and defendant's appellate counsel acknowledges, that on April 15, 2009, in the original proceedings, defendant's retained counsel filed a motion for voir dire of identification witnesses, motion for disclosure of other evidence used in the identification procedure, and a notice of alibi. Counsel withdrew these motions following the reindictment in the instant matter. The State indicates that the motions were withdrawn after defendant's trial counsel obtained the record from a parole revocation hearing in which one of the victims identified defendant and was subject to cross-examination. The State therefore argues that counsel determined that the motions

were futile. Although counsel did not explain the reason behind his decision, the record clearly demonstrates that defendant's trial counsel considered the issues raised in these motions throughout the pendency of this matter, both as originally charged and in the reindicted action.

{¶ 36} Moreover, the decision to forego suppression of eyewitness identification does not necessarily constitute ineffective assistance of counsel. *State v. Madrigal* (2000), 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52. In order to establish ineffective assistance of counsel from such claim, the defendant bears the initial burden of establishing that the photographic identification procedure was unnecessarily suggestive. *State v. Wills* (1997), 120 Ohio App.3d 320, 324-325, 697 N.E.2d 1072. If the defendant meets this burden, the court must consider whether the procedure was so unduly suggestive as to give rise to irreparable mistaken identification. *Id.*, citing *Manson v. Brathwaite* (1977), 432 U.S. 98, 116, 97 S.Ct. 2243, 53 L.Ed.2d 140.

{¶ 37} In applying the totality of the circumstances test, the court must consider, to determine if the record suggests a possible misidentification: "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 * * *." *Neil v. Biggers* (1972), 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401. However, even if the "identification procedure may have

contained notable flaws, this factor does not, per se, preclude the admissibility of the identification.” *State v. Merrill* (1984), 22 Ohio App.3d 119, 121, 489 N.E.2d 1057.

{¶ 38} In this matter, the evidence demonstrated that there is a street light outside the Gabriel home and that the porch light was on. Both witnesses stated that they got a good look at Heather’s assailant. Immediately following the incident, Matthew and Heather described Heather’s assailant as African-American, with a medium color complexion, and was of medium height with short hair. Matthew described the man as having a little bit of facial hair and not a full beard, but Heather thought he was clean shaven.

{¶ 39} Approximately three days later, they were each separately shown six-person photo arrays, from which they identified the attacker with 100 percent certainty. All of the foregoing strongly suggests that these witnesses identified defendant based upon their observations at the time of the crime. Moreover, there is nothing to indicate that the identification procedure was unnecessarily suggestive. The men depicted in the photo array were of similar age, weight, race, and complexion. All of the men had short hair and similar hair styles. All of the men appeared to have either a thin, closely trimmed mustache or a small, closely trimmed goatee. Two of the men had an earring in their left ear. The men were also comparably dressed, with two men wearing yellow shirts and the other men wearing hooded sweatshirts or layers of clothing. We therefore conclude that the photo arrays were well constituted and not impermissibly suggestive, and did create a substantial likelihood of irreparable misidentification. Accordingly, we find no

deficient performance in connection with counsel's withdrawal of the motion for suppression of the eyewitness identifications. *State v. Hayes*, Cuyahoga App. No. 93785, 2010-Ohio-5234.

3. Failure to Retain Eyewitness Identification Expert

{¶ 40} With regard to counsel's failure to retain an expert witness on the issue of eyewitness identification, the *Hayes* Court stated:

“[T]he Ohio Supreme Court has held ‘the failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel.’ *State v. Nicholas* (1993), 66 Ohio St.3d 431, 436, 613 N.E.2d 225. Furthermore, in *State v. Day* (Feb. 21, 2002), Cuyahoga App. No. 79368, this court held that failure to call ‘an expert in eyewitness identification was well within the standard of reasonable trial tactics’ and did not amount to ineffective assistance of counsel. Counsel’s decision to not call an expert on eyewitness identification was not flawed or deficient, as the testimony may not have been admissible. See *State v. Buell* (1986), 22 Ohio St.3d 124, 489 N.E.2d 795. Additionally, Hayes did not show that he would have been found not guilty had an expert witness been called to testify.” *Id.* at ¶32.

{¶ 41} Likewise, in this matter, we conclude that the decision to not call an expert on eyewitness identification was well within the standard of reasonable trial tactics and was not flawed or deficient.

4. Failure to Properly Cross-Examine the Eyewitnesses

{¶ 42} The extent and scope of cross-examination clearly fall within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229.

{¶ 43} In this matter, the record indicates that defendant extensively cross-examined Matthew and Heather regarding their identifications of defendant, and

sought to discredit their observations, their reliability, and their own abilities to observe the gunman. Therefore, we do not find the cross-examination deficient. Failure to make other specific inquiries are of a tactical matter and not subject to second-guessing on appeal.

5. Failure to Request Special Jury Instructions

{¶ 44} With regard to counsel's failure to request a special jury instruction on the issue of eyewitness identification, we have previously determined, in the first assignment of error, that the failure to give such instruction was not plain error. Accordingly, in the absence of error, this claim of ineffective assistance of counsel must fail. See *State v. Henderson* (1988), 39 Ohio St.3d 24, 528 N.E.2d 1237.

6. Cumulative Error

{¶ 45} Finally, as to the claim of cumulative error, we have rejected the individual claims of error and conclude that defendant received a fair trial. We therefore reject the "cumulative error" argument. Cf. *State v. Dobson*, Cuyahoga App. No. 92669, 2010-Ohio-2339 (concluding that defendant was deprived of his right to a fair trial because of the accumulated instances of his counsel's ineffectiveness).

{¶ 46} The second assignment of error is overruled.

Assignment of Error Three:

"Appellant's convictions are against the manifest weight of the evidence."

{¶ 47} In *State v. Thompkins*, 78 Ohio St.3d 380, 388, 1997-Ohio-52, 678 N.E.2d 541, the court described a manifest weight of the evidence analysis as follows:

“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 jury that the party having the burden of proof will be entitled to their verdict if, on weighing the evidence in their minds, they 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.’ Black’s [Law Dictionary (6 Ed.1990)], at 1594.”

{¶ 48} 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.*, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 72 L.Ed.2d 652. 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 court clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. See *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, citing *Tibbs*.

{¶ 49} 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. *Id.*

{¶ 50} In this matter, Matthew and Heather both identified defendant as the man who held a gun to Heather and called out orders to the other assailant. In compliance with these orders, the other assailant took money from Matthew at gunpoint, and also led Matthew to the front door of his home and attempted to gain entry. Matthew and Heather were completely certain of their identifications. Further, one of the assailants

attempted to flee in a vehicle belonging to defendant's wife, Theresa, and fired a shot before abandoning this plan. Keys to the vehicle were recovered near the Gabriels' home. Although defendant presented evidence that he was at home watching television with his family at the time of the robberies, and that Mary had the sport utility that was later stolen by "D," this evidence was self-serving, lacking in detail, and inconsistent with Mary's previous claim that the vehicle had been stolen from a department store. Moreover, the record clearly suggests that Theresa did not cooperate with Detective Staimpel's requests to obtain more information about the claimed theft of the vehicle. Based upon all of the foregoing, we cannot say that the jury lost its way in convicting defendant of the offenses of aggravated robbery, kidnapping, and having weapons while under disability, or that the convictions are against the manifest weight of the evidence.

{¶ 51} This assignment of error is overruled.

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.

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

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

LARRY A. JONES, J., and
KENNETH A. ROCCO, J., CONCUR