[Cite as *State v. Seales*, 2011-Ohio-720.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94934

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LEE SEALES

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-530478

BEFORE: Cooney, J., Blackmon, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: February 17, 2011

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Lee Seales ("Seales"), appeals his convictions for kidnapping, aggravated robbery, robbery, and theft. Finding no merit to the appeal, we affirm.

{¶ 2} In November 2009, Seales was charged with kidnapping, aggravated robbery, robbery, and theft. The charges included firearm specifications, repeat violent offender specifications, notice of prior conviction specifications, and having a weapon under disability.

{¶ 3} The case proceeded to a jury trial in February 2010, at which the following evidence was adduced.

{¶ 4} On October 23, 2009, 14-year-old Tanisha Little ("Little") was walking home from choir practice when she heard a man behind her say "[e]xcuse me, Miss, you dropped your wallet." Little turned and saw Seales, wearing a hooded sweatshirt, dirty tennis shoes, and a ski mask pulled up just below his nose.

{¶ 5} Little bent down to pick up her wallet, and when she stood up, Seales grabbed her from behind and placed his hand over her mouth. Seales pushed something hard into her back, which she assumed was a gun, and threatened to shoot her if she "did anything crazy." He pushed her up the driveway and attempted to pull her into an abandoned house. Little fought with Seales, bit his hand, and eventually ran down the driveway and into the street. A passing car stopped, and Little pointed toward the house. She saw Seales bend down as if to pick up something, and then he fled the scene.

{¶ 6} Police found Seales in a nearby abandoned building shortly thereafter. The police performed a cold-stand at which Little identified Seales. Her five crumpled dollar bills, which had been in her wallet, were found on Seales. Her wallet and cell phone were never recovered.

{¶ 7} The jury found Seales guilty of kidnapping, aggravated robbery, robbery, and theft, and not guilty of the firearm specifications. The remaining counts were tried to the bench, which found Seales guilty of two repeat violent offender specifications and

two notice of prior conviction specifications, and not guilty of having a weapon under disability. Seales was sentenced to five years in prison.

{¶ 8} Seales appeals, raising two assignments of error.

Sufficiency and Manifest Weight of the Evidence

{¶ 9} In his first assignment of error, Seales argues that his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence.

{¶ 10} In *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶113, the Ohio Supreme Court explained the standard for sufficiency of the evidence:

{¶ 11} "Raising the question of whether the evidence is legally sufficient to support the jury verdict as a matter of law invokes a due process concern. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. In reviewing such a challenge, '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' *State v. Jenks* (1991), 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560."

{¶ 12} In a sufficiency exercise, however, this court does not make determinations of credibility. Rather, the court decides, based on the evidence presented if believed, whether any rational trier of fact could have found the defendant guilty of the crimes charged.

{¶ 13} Although the test for sufficiency requires a determination of whether the prosecution has met its burden of production at trial, a manifest weight challenge questions whether the prosecution has met its burden of persuasion. *Thompkins* at 390. When considering a manifest weight claim, a reviewing court must examine the entire record, weigh the evidence, and consider the credibility of witnesses. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80, 434 N.E.2d 1356. The court may reverse the judgment of conviction if it appears that 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.'" *Thompkins* at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 14} A judgment should be reversed as against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387.

{¶ 15} Seales was convicted of kidnapping, aggravated robbery, robbery, and theft. Kidnapping under R.C. 2905.01(A)(2) states: "No person, by force, threat, or deception, * * * 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: * * * (2) To facilitate the commission of any felony or flight thereafter." Aggravated robbery under R.C. 2911.01(A)(1) states: "No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the

attempt or offense, shall do any of the following: (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it." Robbery under R.C. 2911.02(A)(2) states: "No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following: (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another." Theft under R.C. 2913.02(A)(1) states: "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways: (1) Without the consent of the owner or person authorized to give consent."

{¶ 16} Seales argues that the evidence presented is insufficient and that his convictions are against the manifest weight of the evidence because the evidence was unreliable and the identification was tainted.

{¶ 17} When a witness has been confronted with a suspect before trial, a court is not required to suppress the identification of the suspect unless the confrontation was unnecessarily suggestive of the suspect's guilt and the identification was unreliable under all the circumstances. *In re Henderson*, Cuyahoga App. No. 79716, 2002-Ohio-483. This court has held that, even presuming a pretrial identification procedure is impermissibly suggestive, an in-court identification is permissible where the prosecution establishes by clear and convincing evidence that the witness had a reliable, independent

basis for the identification based on prior independent observations made at the scene of the crime. *State v. Tate*, Cuyahoga App. No. 81577, 2003-Ohio-1835, citing *In re Henderson*. Moreover, no due process violation will be found where an identification does not stem from an impermissibly suggestive confrontation but is instead the result of observations at the time of the crime. Id.

{¶ 18} In order to determine the reliability of the identification, a court must consider (1) the witness's opportunity to view the suspect at the time of the incident, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description, (4) the witness's certainty when identifying the suspect at the time of the confrontation, and (5) the length of time elapsed between the crime and the identification. *State v. Waddy* (1992), 63 Ohio St.3d 424, 439, 588 N.E.2d 819, citing *Neil v. Biggers* (1972), 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401.

{¶ 19} The record reflects that Little had time to observe Seales when she turned around to see who had spoken to her. Little was asked to do a cold-stand identification immediately after the attack and confidently identified Seales. Officer John Donitzen, who responded to the 911 call, testified that at no time did the police officers attempt to influence Little's identification during the cold stand. Just days later, Little identified Seales again in a photo array. Moreover, Little identified Seales during trial.

{¶ 20} Little testified in detail about Seales's physical appearance and his clothing at the time of the attack. Her testimony regarding his clothing, facial features, and

braids was corroborated by Seales's appearance when he was apprehended, and by his characteristics in the photo array. During the cold stand, Seales was no longer wearing a coat or a ski mask, but he had sufficient time after he fled the scene to dispose of those items before being apprehended. It follows that the State established by clear and convincing evidence that Little had a reliable independent basis for identifying Seales.

{¶ 21} Seales also argues that the evidence does not support a conviction because the East Cleveland police failed to conduct a proper investigation of the crime when they did not obtain fingerprint or DNA evidence from the house where the kidnapping and robbery took place. We disagree.

{¶ 22} In addition to Little's testimony, Romana Grayson ("Grayson") testified for the State. Grayson was walking nearby when she heard Little screaming and saw her running down the driveway and into the street. Grayson testified that other witnesses at the scene informed her that the suspect had fled to a nearby abandoned building and had removed some of his clothing. Grayson communicated this information to the police during her 911 call. These witnesses were no longer present when police arrived, but Seales was located in the specified building. DNA and fingerprint evidence were not required to prove Seales's guilt beyond a reasonable doubt.

{¶ 23} Having found Little's identification of Seales to be untainted and reliable, in conjunction with the additional evidence and testimony presented at trial, Seales's

convictions are supported by sufficient evidence and are not against the manifest weight of the evidence.

{¶ 24} Accordingly, the first assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 25} In his second assignment of error, Seales contends that he received ineffective assistance of counsel.

{¶ 26} To reverse a conviction for ineffective assistance of counsel, the defendant must prove "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 2000-Ohio-448, 721 N.E.2d 52, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 27} As to the second element of the test, the defendant must establish "that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus; *Strickland* at 686. In evaluating whether a petitioner has been denied effective assistance of counsel, the Ohio Supreme Court held that the test is "whether the accused, under all the circumstances, had a fair trial and substantial justice was done." *State v. Hester* (1976), 45 Ohio St.2d 71, 341 N.E.2d 304, paragraph four of the syllabus.

{¶ 28} This court must presume that a licensed attorney is competent and that the challenged action is the product of sound trial strategy and falls within the wide range of professional assistance. *Strickland* at 689. Courts must generally refrain from second-guessing trial counsel's strategy, even where that strategy is questionable, and appellate counsel claims that a different strategy would have been more effective. *State v. Jalowiec*, 91 Ohio St.3d 220, 237, 2001-Ohio-26, 744 N.E.2d 163.

{¶ 29} Seales argues that he received ineffective assistance of counsel because his counsel failed to file a motion to suppress Little's identification of Seales. We disagree.

{¶ 30} The failure to file a motion to suppress is not per se ineffective assistance of counsel. *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 on the record, the motion would have been granted. *State v. Robinson* (1996), 108 Ohio App.3d 428, 433, 670 N.E.2d 1077; see, also, *State v. Blagajevic* (1985), 21 Ohio App.3d 297, 299-300, 488 N.E.2d 495.

{¶ 31} Despite counsel's failure to file a motion to suppress, the record indicates that defense counsel immediately objected to the evidence of Little's identification at trial, and the objection was overruled. Moreover, counsel objected each time the issue of Little's identification arose during testimony, and yet the objections were consistently overruled. It follows that since the objections were overruled, it is unlikely that a motion

to suppress would have been granted. Thus, failing to file a motion to suppress does not constitute ineffective assistance of counsel in the instant case.

{¶ 32} After a thorough review of the record, we find that Seales has not established ineffective assistance of counsel. The record does not indicate that defense counsel failed in his essential duties or that his performance fell below an objective standard of reasonableness.

{¶ 33} Accordingly, the second assignment of error is overruled.

Judgment is 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 convictions 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.

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COLLEEN CONWAY COONEY, JUDGE

PATRICIA ANN BLACKMON, P.J., and
MARY J. BOYLE, J., CONCUR