

[Cite as *State v. Gordon*, 2011-Ohio-4208.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio, :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. : No. 10AP-1174  
 : (C.P.C. No. 09CR-11-6634)  
 Quintez D. Gordon, : (REGULAR CALENDAR)  
 :  
 Defendant-Appellant. :

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D E C I S I O N

Rendered on August 23, 2011

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*Ron O'Brien*, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

*Law Office of Thomas F. Hayes, LLC*, and *Thomas F. Hayes*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Quintez D. Gordon, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court found him guilty, pursuant to a jury verdict, of aggravated murder with specification, in violation of R.C. 2903.01, an unclassified degree of felony; and guilty, pursuant to a bench trial, of having a weapon while under disability, in violation of R.C. 2923.13, a felony of the third degree.

{¶2} At approximately 2:00 a.m. on September 17, 2009, appellant and the victim, Shawntay Allen, were at an after hours club in Columbus, Ohio. Allen and appellant were first involved in an altercation while waiting to enter the club. Once inside the club, appellant punched Allen, rendering him unconscious. At the time, the owner of the club, Kyle Parks, had left the club to purchase ice. Marcus Wallace, a bouncer at the club, escorted Allen from the club. Another bouncer, Cedric Pegram, decided to close the establishment because of the altercation, and he turned off the music and turned on the lights.

{¶3} Allen walked to his car, which was parked in an Auto Zone parking lot across the street. Pegram, Wallace, and Parks testified at trial that they saw appellant walk across the street, stop at a vehicle, and then walk to Allen's car carrying a gun. Appellant then shot Allen while Allen was getting into his vehicle. Appellant then fled in another vehicle.

{¶4} Appellant was subsequently arrested and indicted on charges of aggravated murder with specification and having a weapon while under disability with specification. A jury trial on the aggravated murder with specification charge commenced October 25, 2010, and the having a weapon while under disability charge was tried to the bench. The State of Ohio, plaintiff-appellee, and appellant both presented witnesses. The jury subsequently found appellant guilty of aggravated murder with specification, and the trial court found appellant guilty of having a weapon while under disability. On December 1, 2010, the trial court conducted a sentencing hearing, after which the court sentenced appellant to life in prison with eligibility for parole after 30 years on the aggravated murder count and a consecutive two-year sentence for having a weapon

while under disability. The firearm specifications merged for sentencing purposes, and the state elected to have the term imposed on the aggravated murder count. Therefore, appellant's total jail sentence was 35 years to life. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

- I. The Evidence was Insufficient to Support a Finding of Guilt.
- II. The Verdict was Against the Manifest Weight of the Evidence.
- III. Appellant was Denied a Fair Trial as Guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution Because the Defendant was Denied Effective Assistance of Counsel.

{¶5} Appellant argues in his first assignment of error that the trial court's judgment with regard to both of his convictions was based upon insufficient evidence. In reviewing a sufficiency of the evidence claim, the relevant inquiry is whether any rational fact finder, viewing the evidence in a light most favorable to the state, could have found all of the essential elements of the crime proven beyond a reasonable doubt. *State v. Jones*, 90 Ohio St.3d 403, 417, 2000-Ohio-187, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, and *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. On review for sufficiency, courts do not assess whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Id.* at 390. In determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."

*Jackson* at 319, 99 S.Ct. at 2789. Consequently, a verdict will not be disturbed based upon insufficient evidence unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4; *Jenks* at 273. Appellant here also contends that the trial court erred in denying his Crim.R. 29(A) motion for an acquittal, in which review is the same as a claim that the evidence was insufficient to support the conviction. *State v. Ritze*, 154 Ohio App.3d 133, 2003-Ohio-4580, ¶12.

{¶6} R.C. 2903.01 provides, in pertinent part:

(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

{¶7} R.C. 2923.13 provides, in pertinent part:

(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

\* \* \*

(2) The person is under indictment for or has been convicted of any felony offense of violence.

{¶8} R.C. 2901.22 provides, in pertinent part:

(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has

knowledge of circumstances when he is aware that such circumstances probably exist.

{¶9} Appellant argues that there was insufficient evidence that he purposely attempted to cause the death of Allen or that he possessed a weapon while under disability. Appellant contends there is no direct forensic evidence to indicate that he shot Allen. Appellant asserts that the witnesses that identified him as the shooter should be examined with considerable skepticism because their credibility is highly doubtful based upon conflicts in their testimony at trial. Appellant points out the following conflicts in testimony: Parks was able to identify appellant in a photo array but was unable to do so at trial; Pegram testified appellant entered a silver pickup after the shooting, but Parks testified appellant entered a red car; Pegram testified in court that he witnessed appellant shoot Allen but in his 911 call, Pegram stated he did not see the shooting; Wallace testified appellant walked to a small gold car before he shot Allen but he later testified that the vehicle was a truck after seeing surveillance tape from Auto Zone; Parks testified appellant walked to a white truck before the shooting, while Wallace said it was a gold car; Wallace testified that the bar sold liquor to its patrons, but Parks said it did not; and Wallace testified Parks did not know anything about the shooting until he called Parks afterwards, but Parks testified he saw the shooting.

{¶10} However, "the mere existence of conflicting evidence cannot make the evidence insufficient as a matter of law." *State v. Murphy*, 91 Ohio St.3d 516, 543, 2001-Ohio-112. While the fact finder may take note of the inconsistencies and resolve or discount them accordingly, such inconsistencies do not render defendant's conviction against the sufficiency of the evidence. *State v. Samatar*, 152 Ohio App.3d 311, 2003-

Ohio-1639, ¶113, citing *State v. Craig* (Mar. 23, 2000), 10th Dist. No. 99AP-739. Furthermore, a jury may believe or disbelieve all, part, or none of a witness's testimony. *State v. Antill* (1964), 176 Ohio St. 61, 67; *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. Thus, the inconsistencies cited by appellant here did not render the evidence insufficient. Rather, it was the duty of the jury and trial court to reconcile or discount these conflicts as the triers of fact.

{¶11} Furthermore, the inconsistencies appellant points out were largely minor and did not impact the essential elements of aggravated murder. Despite the inconsistencies in the testimonies, the evidence indicated that all of the witnesses to the incident who testified saw appellant raise a gun and shoot Allen while he was standing by his vehicle. We cannot say that the jury's and trial court's verdicts, despite the conflicts in the various witnesses' testimony, were legally insufficient. We find there was sufficient evidence presented by the state on all elements of aggravated murder and having a weapon while under disability. Therefore, appellant's first assignment of error is overruled.

{¶12} Appellant argues in his second assignment of error that both of his convictions were against the manifest weight of the evidence. This court's function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *Thompkins*. In order to undertake this review, we must sit as a "thirteenth juror" and review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. *Id.*, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. If we find that the fact finder clearly lost its way, we must reverse the conviction and order a new trial. *Id.* On the other hand, we

will not reverse a conviction so long as the state presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense were established beyond a reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193-94, 1998-Ohio-533.

{¶13} In addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. See *Martin* at 175. However, in conducting our review, we are guided by the presumption that the jury, or the trial court in a bench trial, is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Thus, a reviewing court must defer to the factual findings of the jury or judge in a bench trial regarding the credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Concerning the issue of assessing witness credibility, the general rule of law is that "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. Indeed, the fact finder is free to believe all, part, or none of the testimony of each witness appearing before it. *Hill v. Briggs* (1996), 111 Ohio App.3d 405, 412. If evidence is susceptible to more than one construction, reviewing courts must give it the interpretation that is consistent with the verdict and judgment. *White v. Euclid Square Mall* (1995), 107 Ohio App.3d 536, 539. Mere disagreement over the credibility of witnesses is not sufficient reason to reverse a judgment. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202.

{¶14} Here, appellant's argument with regard to manifest weight of the evidence is, again, based on witness credibility. Although this court, in conducting a manifest weight of the evidence review can engage in some limited credibility weighing, the triers of fact were in a much better position to adjudge the credibility of the witnesses given their ability to view the witnesses' live testimony.

{¶15} Appellant fails to specifically point out any credibility issues with any of the state's witnesses. Notwithstanding appellant's failure to provide this court with any specific argument, although we agree that, as referred to above, Pegram, Park, and Wallace gave testimony that conflicted with each other's and their own testimony, and we recognize Wallace was serving jail time for theft at the time of trial, all of these circumstances could raise credibility issues, appellant has failed to convince us that we should overturn the credibility determinations made by the jury and the trial court. The jury and trial court apparently chose to believe at least parts of their testimony, specifically that appellant shot Allen.

{¶16} As to the testimony provided by appellant's witnesses that appellant was actually standing with them at the time of the shooting and was not the shooter, the jury and trial court could have easily found them not credible. Allen, a convicted felon, was at the bar as part of appellant's group, was drinking and smoking pot that night and had never told anyone else that appellant was not the shooter until his trial testimony. Zaquioa Johnson, Allen's girlfriend at the time, had a prior felony record. Bryan Carmichael was also a part of appellant's group of friends at the bar, and he never spoke to police about the shooting. The trial court and jury apparently did not believe the testimony of these witnesses, and there existed good reason to disbelieve their versions

of the events. For these reasons, we find the jury's and trial court's verdicts were not against the manifest weight of the evidence. Appellant's second assignment of error is overruled.

{¶17} Appellant argues in his third assignment of error that he received ineffective assistance of counsel. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the effective assistance of counsel. *McMann v. Richardson* (1970), 397 U.S. 759, 771, 90 S.Ct. 1441, 1449. Courts employ a two-step process to determine whether the right to effective assistance of counsel has been violated. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.*

{¶18} An attorney properly licensed in the state of Ohio is presumed competent. *State v. Lott* (1990), 51 Ohio St.3d 160, 174. The defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. In demonstrating prejudice, the defendant must prove 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, paragraph three of the syllabus.

{¶19} In the present case, appellant argues that his counsel was ineffective in three respects. Appellant first argues that his trial counsel failed to object to the admission of improper hearsay testimony. Specifically, appellant contends that his counsel allowed Detective Dennison to testify that he received two anonymous calls to arrive at a potential suspect. "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C).

{¶20} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173. Absent an abuse of that discretion and a showing of material prejudice, an appellate court will not overturn a trial court's ruling. *State v. Martin* (1985), 19 Ohio St.3d 122, 129. The abuse of discretion standard is defined as "[a]n appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence." *State v. Boles*, 187 Ohio App.3d 345, 2010-Ohio-278, ¶18, quoting Black's Law Dictionary (8th Ed. 2004) 11.

{¶21} It is well-established that, where statements are offered into evidence to explain an officer's conduct during the course of investigating a crime, such statements are generally not hearsay. *State v. Thomas* (1980), 61 Ohio St.2d 223, 232. There are limits, however, to this general rule because of the great potential for abuse and potential confusion to the trier of fact. See *State v. Blevins* (1987), 36 Ohio App.3d 147, 149. For example, a prosecutor may attempt to use a police officer's testimony regarding his investigative activities as a pretext to introduce highly prejudicial out-of-court statements, while claiming the statements are being offered merely to explain the police officer's

conduct, rather than for their truth. Furthermore, when the statements connect the accused with the crime charged, they should generally be excluded. See *State v. Culley* (Aug. 31, 1989), 10th Dist. No. 89AP-153, citing *Blevins*. To limit the potential for abuse (1) the conduct to be explained must be relevant, equivocal, and contemporaneous with the out-of-court statements, and (2) the out-of-court statements must meet the standard of Evid.R. 403(A); that is, the evidence must be excluded if its probative value is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury, even if it is relevant. *Blevins* at 149.

{¶22} Initially, reading the whole of Dennison's testimony in its full context, the statements of the anonymous tipsters do not appear to have been offered to prove the truth of the matters asserted, i.e., that appellant was, in fact, the person who shot the victim. Rather, read in its full context, Dennison made the statement in question in the midst of his description of the steps he took after commencing the investigation. Furthermore, the testimony regarding the two anonymous callers was comprised of a single, short sentence, and Dennison immediately moved on to the subsequent steps he took during the investigation, and he never referred to the anonymous callers again. Also, the prosecutor did not specifically elicit the information regarding the tipsters. The prosecutor asked, "Ultimately after a few weeks did you arrive with a potential suspect?" The detective responded, "Yes, I received two anonymous calls." The prosecutor then asked, "as a result of that, did you go back and interview the witnesses who had said that they had seen the shooting?" Thus, despite appellant's contentions to the contrary, it does not appear the prosecutor elicited the testimony for purposes that might be deemed abusive.

{¶23} Appellant cites *State v. Faris* (Mar. 24, 1994), 10th Dist. No. 93APA08-1211, in support of his arguments. In *Faris*, a police detective testified that, pursuant to an anonymous tip, he began investigating the defendant. The trial court admitted the testimony, but on appeal, this court found that, while part of the testimony may be relevant for showing the course of the investigation, the probative value of the testimony was substantially outweighed by the danger of unfair prejudice. However, the facts in the present case are different than those in *Faris*. In *Faris*, the witness did not stop with the testimony establishing the course of the investigation but continued with clear hearsay, stating that he received information that the defendant was responsible for the crime. Here, Dennison never indicated that the two anonymous tipsters stated that appellant was responsible for the crime. He said merely that he had arrived at a potential suspect after receiving two anonymous tips, and, as a result, interviewed the eyewitnesses again. Furthermore, in *Faris*, there were no eyewitnesses to the crime, and the prosecution relied, in part, upon the testimony of the defendant's cell mate, who had at least five prior convictions and had used more than five aliases, four dates of birth, and eight different Social Security numbers. In the present case, the prosecution presented three eyewitnesses, as well as testimony that appellant had an altercation with the victim earlier in the night, thereby lessening the likelihood of any possible prejudice that might have resulted from Dennison's testimony. Therefore, for these reasons, we find appellant's trial counsel was not ineffective for failing to object to Dennison's testimony in this respect.

{¶24} Appellant next contends that his trial counsel was ineffective when he permitted, without objection, Wallace to read a prior consistent statement to the jury on direct examination. Specifically, on direct examination of Wallace, the state presented a

written statement Wallace had made to police that was consistent with his in-court testimony that he saw a small gold car or truck and a yellow and black Cutlass leaving the scene. Appellant claims that this written statement was hearsay elicited to bolster Wallace's testimony. Appellant also contends that his trial counsel should have objected to the state's questioning of Pegram as to whether he told police the same story the evening of the crime, the purpose of which was solely to bolster the credibility of Pegram with a hearsay statement.

{¶25} Evid.R. 801(D)(1) provides, in pertinent part:

**(D) Statements which are not hearsay.** A statement is not hearsay if:

**(1) *Prior statement by witness.*** The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is \* \* \* (b) consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive.

{¶26} We agree that, before Wallace read his prior consistent statement, defense counsel had not expressly or impliedly made a charge against him of recent fabrication or improper influence or motive. However, there is no reasonable probability that the result of the trial would have been different had Wallace not presented his prior statement. The statement appellant complains of related to the color and type of cars Wallace saw leaving the scene of the crime. This testimony did not affect Wallace's identification of appellant as the person he saw walk up to the victim's car and shoot him. Likewise, we fail to see any prejudicial impact from Pegram's testimony. In the portion of testimony cited by appellant, the prosecutor asked Pegram whether he told police the same thing he testified to the day before, to which he replied, "Correct." This testimony was non-specific,

vague, and fleeting. The prosecutor did not ask Pegram about any specific testimony or specific prior statements and did not ask any follow-up questions regarding what he said to police. We cannot say with any reasonable probability that the absence of this ambiguous testimony would have affected the outcome of the trial.

{¶27} Furthermore, defense counsel questioned Wallace regarding his prior statement to police on cross-examination, and specifically and effectively questioned him about one of the cars he saw at the scene of the crime. The state argues that defense counsel intentionally failed to object to the introduction of Wallace's prior statement so that he could cross-examine him regarding several discrepancies between his testimony and the statement. It is true that the failure to object to testimony is not necessarily an indicator of ineffective assistance of counsel, because the decision not to object may be for tactical reasons. *State v. Jackson*, 10th Dist. No. 02AP-867, 2003-Ohio-6183, ¶81, citing *State v. Gumm* (1995), 73 Ohio St.3d 413, 428. We agree with the state that trial counsel's tactical decision to expose the weaknesses in Wallace's testimony on cross-examination rather than objecting to his direct testimony was not deficient. See, e.g., *State v. Summerall*, 10th Dist. No. 03AP-1024, 2004-Ohio-6599, ¶24 (defense counsel's tactical decision to expose the weakness in witness's testimony on cross-examination rather than objecting to her hearsay testimony on direct examination was not deficient). For all the above reasons, we find appellant's counsel was not ineffective when he failed to object to Wallace's and Pegram's prior statements.

{¶28} Appellant next argues that his trial counsel was ineffective when he failed to file a motion to suppress the photographic array used by police, which was improperly suggestive. Appellant contends that he was easily distinguishable from other persons in

the array because he was the only one with a neck tattoo of "614." Appellant theorizes that Wallace was the only witness who testified that appellant had a "614" tattoo on his neck, and, because Wallace, Pegram, and Parks all were employed together, they had the opportunity to discuss the tattoo prior to viewing the array.

{¶29} Appellate review of a trial court's decision regarding a motion to suppress evidence involves mixed questions of law and fact. *State v. Vest*, 4th Dist. No. 00CA2576, 2001-Ohio-2394. Thus, an appellate court's standard of review of the trial court's decision granting the motion to suppress is two-fold. *State v. Reedy*, 10th Dist. No. 05AP-501, 2006-Ohio-1212, ¶5, citing *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100-01. Because the trial court is in the best position to weigh the credibility of the witnesses, we must uphold the trial court's findings of fact if competent, credible evidence supports them. *Id.*, citing *State v. Klein* (1991), 73 Ohio App.3d 486, 488. We nonetheless must independently determine, as a matter of law, whether the facts meet the applicable legal standard. *Id.*, citing *State v. Claytor* (1993), 85 Ohio App.3d 623, 627.

{¶30} A defendant's right to due process prohibits the use of identification procedures that are so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. *Neil v. Biggers* (1972), 409 U.S. 188, 198, 93 S.Ct. 375, 381. "[R]eliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite* (1977), 432 U.S. 98, 114, 97 S.Ct. 2243, 2253. A trial court considering whether to admit identification evidence must utilize a two-step analysis. Initially, the court must consider whether the procedure was impermissibly suggestive. Suggestiveness depends on several factors, including the size of the array, its manner of presentation, and its contents. *State v. Wills* (1997), 120 Ohio App.3d 320. Secondly, the

court must consider whether, despite the procedure's suggestiveness, the identification was reliable. *State v. Sharp*, 10th Dist. No. 09AP-408, 2009-Ohio-6847, ¶14. Defendant carries the burden of proving both an identification procedure was impermissibly suggestive and the identification was unreliable. *Id.* at ¶14.

{¶31} A photo array is suggestive if the picture of the accused, matching the descriptions given by the witness, so stood out from all of the other photographs as to suggest to an identifying witness that that person was more likely to be the culprit. *State v. Merriman*, 10th Dist. No. 04AP-463, 2005-Ohio-3376, ¶17, citing *Jarrett v. Headly* (C.A.2, 1986), 802 F.2d 34, 41. Where the other men depicted in the photo array with the defendant all appeared relatively similar in age, features, skin tone, facial hair, dress, and photo background, the photo array was not impermissibly suggestive. *State v. Jacobs*, 7th Dist. No. 99-CA-110, 2002-Ohio-5240, ¶18. In general, it is not a requirement for the use of photo arrays that all pictures shown must be of the same type. *State v. Green* (1990), 67 Ohio App.3d 72, 79, citing *Simmons v. United States* (1968), 390 U.S. 377, 384, 88 S.Ct. 967, 971. Neither is it required that they bear no differing marks or blemishes. *Id.* Therefore, whether each and every suspect included in the photo array exactly matched the descriptions of witnesses to the crime is immaterial, as long as the array itself was not impermissibly suggestive. *State v. McWhorter*, 8th Dist. No. 87443, 2006-Ohio-5438, ¶50.

{¶32} In this case, appellant's sole contention of suggestiveness went to the "614" tattoo on appellant's neck. Appellant argues that only Wallace described the suspect as having a "614" tattoo on his neck, and Wallace, Parks, and Pegram could have spoken about the tattoo prior to their photographic array identifications. However, Dennison

testified that all of the individuals in the photographic array had tattoos on their necks, and our own review of the photographs confirms that all six individuals had visible tattoos on their necks. Furthermore, based upon our own review of appellant's photograph, the numbers "614" are difficult, if not impossible, to discern due to their artistic styling, the position of appellant's chin, and the blurriness of the photograph. In addition, we note that all six photographs are of African-American men, of approximately the same age, with braided hair or cornrows, of approximately the same build, and of generally the same skin tone. Thus, we find that the photographic array was not unnecessarily suggestive. Therefore, appellant's counsel was not ineffective when he failed to seek suppression of the identifications based upon the photographic arrays. For all of these reasons, appellant's third assignment of error is overruled.

{¶33} Accordingly, appellant's first, second, and third assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

BRYANT, P.J., and KLATT, J., concur.

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