

[Cite as *State v. Cole*, 2010-Ohio-5114.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93192

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JASON COLE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-499143

BEFORE: Jones, J., Rocco, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: October 21, 2010

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Jason Cole (“Cole”), appeals the judgment of the trial court sentencing him to four years for felonious assault and three years on a firearm specification for a total of seven years. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the trial court.

STATEMENT OF THE CASE

{¶ 2} The Cuyahoga County Grand Jury indicted Cole on August 1, 2007. Cole was charged with felonious assault, a felony of the second degree, with one-

and three-year firearm specifications; having a weapon while under a disability, a felony of the third degree; and criminal damaging, a misdemeanor of the second degree.

{¶ 3} Cole reached a plea agreement with the state and pled guilty to an amended indictment. He pled guilty to felonious assault with a one-year firearm specification. The three-year firearm specification and other charges were nolleed at the request of the prosecutor.

{¶ 4} Cole, however, sought to withdraw his guilty plea before he was sentenced. The trial court denied Cole's motion and proceeded to sentencing. Cole was subsequently sentenced to four years on the felonious assault charge, with the one-year firearm specification to run prior to, and consecutive to, that sentence, for a total of five years. Cole appealed the denial of his motion to withdraw his guilty plea. Cole was successful in his appeal. This court noted that the trial court had not read the indictment to Cole, and he may not have understood that he was pleading guilty to felonious assault with a one-year firearm specification.

{¶ 5} The case was remanded to the trial court and scheduled for trial. Cole again reached a plea agreement with the state. The state agreed to recommend a three-year sentence, two years less than the previously agreed-upon five years. However, during the negotiations, the court would not promise Cole the three-year sentence, so he exercised his right to a jury trial. The jury found Cole guilty of all charges and the court sentenced Cole to four

years on the felonious assault. However, this time, because the jury had returned a verdict of guilt as to the three-year firearm specification, the total sentence was seven years. Cole now appeals.

STATEMENT OF THE FACTS

{¶ 6} On July 20, 2007, Ramona Huertas, a 43-year-old Spanish-speaking grandmother who resided on Bridge Avenue in Cleveland, Ohio, left her house to buy hair dye. On the way to the store, she picked up her son. As Huertas was driving, she saw her nephew standing in front of a barber shop. Huertas pulled over to speak with her nephew. Also parked at the barber shop was a red truck. The passenger of the truck, later identified as Cole, began to threaten and mock her.

{¶ 7} Cole told Huertas, “I like this bitch ass, I want to take her out with me.” Huertas described Cole as “angry, yelling.”¹ Huertas’s son, Luis, did not appreciate Cole yelling at his mother and got out of the passenger’s side door of his mother’s car with a baseball bat. Huertas then got out of the car, grabbed her son, put him back inside the car and drove away. Huertas dropped her son off at a friend’s house. Later, Huertas pulled up to a red light and the red truck pulled up next to her. She recognized the passenger in the red truck as the man that had previously threatened her at the barber shop.

{¶ 8} The red truck pulled up in such a way as to block Huertas’s driver’s side door. Cole who was sitting in the passenger seat of the red truck, took out a

¹Tr. 232.

gun, leaned out of the passenger side window of the truck, and pointed the gun at Huertas's head. Cole's finger was on the trigger when he looked at her and said, "I'm going to kill you." Both Cole's window and Huertas's window were down at the time. Huertas testified that she believed Cole was going to kill her, so she ran the red light. The red truck continued to follow Huertas down the street. Huertas tried to lose them; however, she was unable to do so.

{¶ 9} At one point during the chase, Huertas tried to call 911 from her cell phone, but the red truck rear-ended her vehicle and her cell phone fell to the floor of the car. The collision caused damage to the back of Huertas's car. Within five minutes of running the red light, Huertas approached another stop light and was blocked by traffic from moving forward. Huertas could see that Cole still had the gun. A Spanish-speaking person was in the car next to her, so Huertas yelled out to them to call the police and to move out of the way so she could get her car through. The driver of that car moved enough out of the way that Huertas could drive through by going left of center.

{¶ 10} Huertas sped away and drove onto her street honking her horn and screaming. She jumped out of her car with its engine still running and ran screaming into the apartment house. Huertas could see Annette Garcia ("Garcia"), her son's fiancée, on the balcony. Huertas saw the red truck pull up right in front of the apartment building and saw Cole get out of the truck. Garcia testified that from her vantage point on the balcony she could see the red truck,

and she also saw the passenger get out, look at Garcia and say “That’s not her.”²
The driver and the passenger then left.

{¶ 11} Garcia called 911 and the police arrived. The police were told what happened. The police received a radio communication of a vehicle fitting the description of the truck involved. The police transported Huertas and Garcia to the location of that truck to see if an identification could be made. Upon viewing the truck and passengers, Huertas advised the police that it was a similar truck, but the individuals in that particular truck were not the people that chased her. Later, a second dispatch of another truck fitting the description came over the radio. Again, Huertas and Garcia were transported; however, this time they made a positive identification.

{¶ 12} Detective Valentino (“Valentino”), an officer who responded to the second cold stand, discovered a firearm under the passenger seat of the red truck. Valentino testified that at the time of its discovery, the gun was loaded and the hammer was cocked. The recovered firearm was a .357 caliber Smith & Wesson revolver, blue steel with a brown handle. Huertas later testified that this was the same gun Cole pointed at her.

ASSIGNMENTS OF ERROR

{¶ 13} Cole assigns six assignments of error on appeal for our review:

²Tr. 334.

{¶ 14} “[1.] Trial counsel was ineffective for not challenging the ‘cold stand’ identifications of Jason Cole that were made by Huertas and Garcia and their resulting in-court identifications.

{¶ 15} “[2.] The eyewitness identifications of Jason Cole were the product of unconstitutionally suggestive identification procedures and, accordingly, should have been suppressed. The failure of the trial court to suppress the eyewitness identifications was plain error in the circumstances of this case.

{¶ 16} “[3.] Prosecutorial misconduct deprived Cole of his constitutionally guaranteed right to a fair trial, in violation of the fifth and fourteenth amendments to the United States Constitution and Section 10, Article I, of the Ohio Constitution.

{¶ 17} “[4.] Cole was denied due process of law, and the trial court abused its discretion when the court failed to consider in mitigation of Cole’s sentence the fact that he had previously been identified as a mentally retarded offender.

{¶ 18} “[5.] Trial counsel was ineffective for not requesting and presenting at sentencing a mitigation report that addressed the impact of Cole’s impaired intellectual functioning and MRO status.

{¶ 19} “[6.] Cole was denied due process of law when the court failed to follow the statutory guidelines in imposing a sentence for [an] F-2 felonious assault.”

LEGAL ANALYSIS

{¶ 20} Due to the substantial interrelation between appellant’s first two assignments of error, we shall address them together. Cole argues in his first

assignment of error that his trial attorney was ineffective for not challenging the “cold stand” and in-court identifications made by Huertas and Garcia. Cole argues in his second assignment of error that the eyewitness identifications were the product of unconstitutionally suggestive identification procedures and should have been suppressed. Cole further argues that the failure of the trial court to suppress the eyewitness identifications was plain error.

{¶ 21} A failure to object at trial waives all but plain error. *State v. Campbell* (1994), 69 Ohio St.3d 38, 630 N.E.2d 339. Plain error occurs when, “but for the error, the outcome of the trial clearly would have been otherwise.” *State v. Underwood* (1983), 3 Ohio St.3d 12, 14, 444 N.E.2d 1332; *State v. Coleman* (1999), 85 Ohio St.3d 129, 141, 707 N.E.2d 476.

{¶ 22} This court has previously explained the conditions necessary for a proper “cold stand.” “A cold stand or one-on-one show-up identification is permissible as long as the trial court considers the following factors: 1. The opportunity of the witness to view the criminal at the time of the crime; 2. the witness’ degree of attention; 3. the accuracy of the witness’ prior description of the criminal; 4. the level of certainty demonstrated by the witness; 5. the length of time between the crime and the confrontation.” *State v. Patton*, Cuyahoga App. No. 88119, 2007-Ohio-990, ¶17, quoting *State v. Thompson*, Cuyahoga App. No. 79938, 2002-Ohio-2390.

{¶ 23} In the case at bar, Huertas actually participated in two cold stand identifications. While the police were at Huertas’s apartment, a dispatch was

received that a truck with a similar description had been located in the neighborhood. The police transported Huertas and Garcia to see if an identification could be made. Upon viewing the truck and passengers, Huertas advised the police that it was a similar truck; however, these were not the people who had chased her earlier that day.

{¶ 24} The police then returned to the apartment with Huertas and Garcia to finish their report. A second dispatch was received that another truck fitting the description had been seen. Again, Huertas and Garcia were transported; however, this time Huertas and Garcia made a positive identification. The driver was still in the car when the police arrived and the passenger was in close proximity. The driver and passenger were lined up and Huertas identified the driver and passenger as being the two individuals who were involved in this crime.

{¶ 25} Huertas testified that it was a nice afternoon and the sun was out when the incident occurred. Huertas further testified that she first saw Cole at the barber shop, when he came right up to her driver's side window and began to talk to her. She was at the barber shop for about ten minutes.

{¶ 26} Huertas got a good look at Cole because she was able to observe Cole while he was right next to her at the stop light, looking directly at her face when he told her he was going to kill her. Cole was sitting directly inside the passenger side door, flush with Huertas's driver's side door. Both Cole's and Huertas's windows were down. In addition, none of the testimony indicated any obstruction to Huertas's view of Cole.

{¶ 27} Cole continued to make eye contact with Huertas as the two vehicles sped down the street. Within five minutes, Huertas saw Cole again when she was stuck in traffic, and she observed Cole holding the gun. She again fled and Cole continued to chase her. At one point during the case, she looked over and observed Cole holding a bottle and attempting to throw it at her car. Huertas again observed Cole when she was running from her car.

{¶ 28} Garcia witnessed Cole while he was chasing Huertas down the street and when Huertas pulled her car into Garcia's yard. Garcia testified that she could see the red truck and the passenger getting out of the truck from her location on the balcony. Garcia further testified that the passenger of the red truck got out, looked at her, Garcia, and said, "That's not her."

{¶ 29} Accordingly, the basis of the cold stand identification of Cole was reliable. Huertas had sufficient opportunity to view her attacker at the time of the crime, and Garcia had enough time to view Cole when he pulled up to the house, the attention of the women was not diverted, the description of Cole as the attacker was consistent with the appearance of Cole at the cold stand, and both women were certain Cole and the attacker were one and the same person.

{¶ 30} Assuming arguendo that defense counsel had filed the motion to suppress, it would have been denied. Review of the record demonstrates that the identification procedure was not suggestive. Accordingly, defense counsel was under no duty to file the motion to suppress, and even if we assume for the sake

of argument that it had been granted, there is no reasonable probability that the results of the proceedings would have been different.

{¶ 31} There was independent evidence supporting Cole's conviction. Cole's vehicle was located quickly after the crime. The driver was still in the car and was identified as the person who drove the car during the car chase. Cole was in the driveway or nearby. Moreover, a loaded gun fitting the description provided by Huertas was found in the vehicle, right under the passenger seat where Cole was sitting. Huertas identified the handgun as the same gun that was pointed at her head by Cole.

{¶ 32} We conclude from the record before this court that Huertas's and Garcia's cold stand identification of Cole satisfies the conditions established in *Thompson* and is therefore reliable. Because the out-of-court-identification is reliable, Cole's further claim that his counsel was ineffective for not attempting to suppress that identification is not supported by the evidence.

{¶ 33} Accordingly, Cole's first and second assignments of error are without merit.

{¶ 34} Cole argues in his third assignment of error that prosecutorial misconduct deprived him of his right to a fair trial in violation of the Constitution. The test for prosecutorial misconduct is whether the prosecutor's remarks were improper and, if so, whether they prejudicially affected the substantial rights of the accused. *State v. Bey* (1999), 85 Ohio St.3d 487, 493, 709 N.E.2d 484. The

focus of that inquiry is on the fairness of the trial, not the culpability of the prosecutor. *Id.*

{¶ 35} Cole argues that the prosecutor essentially vouched for the victim, improperly argued to the jury, misstated the facts, and argued improperly at closing argument. However, contrary to Cole's assertions, we find no error on the part of the lower court.

{¶ 36} A review of the evidence demonstrates that the prosecutor's comments did not prejudice the jury. Defense counsel objected to the prosecutor's comment that the "witness was not credible." Moreover, it appears from the record that the prosecutor attempted to correct any potential problem with the comments by reminding the jury that they decide credibility and asking the jury to consider several factors in determining the victim's credibility, including how she presented at trial and whether she was consistent.³

{¶ 37} Even though the prosecutor commented that the witness was credible, additional review demonstrates that the prosecutor could simply have been commenting on what the evidence showed. Nothing in the record demonstrates that the prosecutor was referring to personal knowledge rather than what the evidence showed.

{¶ 38} Cole also argued that he was prejudiced when the prosecutor asked the jury to hold him responsible for what he did. However, the record demonstrates that defense counsel objected to the statement and agreed to the

³Tr. 508-09.

curative statement that was provided by the court.⁴ The curative statement provided that the jury should not be concerned with punishment.

{¶ 39} Assuming arguendo there was error, it was harmless. Review of the prosecutor's statements, as well as the trial as a whole, demonstrates that Cole failed to show that the outcome of the trial would have been different. Any comments made by the prosecutor were harmless in light of the overwhelming evidence of Cole's guilt. Accordingly, Cole was not prejudiced by the comments made by the prosecutor.

{¶ 40} Cole's third assignment of error is overruled.

{¶ 41} Cole argues in his fourth and fifth assignments of error that the court erred when it did not consider that he was previously identified as a mentally retarded offender and that his trial counsel was ineffective for not requesting a mitigation report addressing his intellectual functioning. Due to the substantial interrelation between these two assignments of error we shall address them together.

{¶ 42} Review of the evidence demonstrates that there is nothing in the record to indicate that Cole had a mental impairment that would have changed the outcome of the sentencing hearing.

{¶ 43} Cole argues in his appeal that, immediately before sentencing, defense counsel informed the lower court that Cole had been supervised as a mentally retarded offender ("MRO") by the MRO unit of the probation office.

⁴Tr. 514.

Defense counsel further stated that Cole may be at or near the IQ levels for being mentally retarded. Cole goes on to argue that the trial court should have considered defense counsel's statement about Cole's intellectual function as a request for a psychological report for purposes of mitigation.

{¶ 44} A review of the record demonstrates that the lower court had already procured a presentence investigation report. The lower court reviewed the information prior to sentencing Cole. In addition, trial counsel conceded that ordering a new PSI would be futile because there would be no new information.⁵ Moreover, defense counsel had already advised the trial court at the sentencing hearing that Cole may be borderline mentally retarded or at least functioning at a low level IQ, thereby allowing the lower court to consider that information prior to sentencing. There is nothing in the evidence demonstrating that Cole had a mental impairment that would have changed the outcome of the sentencing hearing.

{¶ 45} We find no error concerning defense counsel's decision not to request a mitigation report. Accordingly, we find no error on the part of the lower court concerning Cole's mental functioning as it pertains to mitigation, nor do we find any error regarding any alleged ineffective assistance of counsel.

{¶ 46} Appellant's fourth and fifth assignments of error are overruled.

{¶ 47} Cole argues in his sixth assignment of error that he was denied due process when the court failed to follow the statutory guidelines in imposing a

⁵Tr. 534.

sentence for felonious assault, a second-degree felony. Specifically, Cole argues that his sentence was inconsistent with sentences imposed for similar crimes committed by similar offenders.

{¶ 48} R.C. 2929.11(B) states that a felony sentence must be “consistent with sentences imposed for similar crimes committed by similar offenders.” However, the goal of felony sentencing is to achieve “consistency” not “uniformity.”

See *State v. Marshall*, Cuyahoga App. No. 89551, 2008-Ohio-1632; *State v. Kepatzki*, Cuyahoga App. No. 81676, 2003-Ohio-1529; *State v. Richards*, Cuyahoga App. No. 83696, 2004-Ohio-4633; *State v. Harris*, Cuyahoga App. No. 83288, 2004-Ohio-2854; *State v. Dawson*, Cuyahoga App. No. 86417, 2006-Ohio-1083 (although an offense may be similar, distinguishing factors may justify dissimilar treatment).

{¶ 49} This court has previously determined that in order to support a claim that a sentence is disproportionate to sentences imposed upon other offenders, a defendant must raise the issue before the trial court and present some evidence, however minimal, in order to provide a starting point for analysis and to preserve the issue for appeal. *Marshall*, supra at ¶20; see, also, *State v. Woods*, Cuyahoga App. No. 82789, 2004-Ohio-2700.

{¶ 50} Here, Cole failed to present any evidence to the trial court or to this court to indicate that his sentence is disproportionate to sentences given to other offenders who have committed these same offenses. Accordingly, there is

nothing in the record to demonstrate Cole's sentence is impermissible or disproportionate to sentences imposed on similar offenders with similar offenses.

{¶ 51} Accordingly, appellant's sixth assignment of error is overruled.

Judgment 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 conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

LARRY A. JONES, JUDGE

KENNETH A. ROCCO, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR