[Cite as *State v. Lampkin*, 2010-Ohio-4934.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-09-1270

Appellee — Trial Court No. CR0200601214

v.

Terry Lee Lampkin, Jr. — **DECISION AND JUDGMENT**

Appellant — Decided: October 8, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Kevin A. Pituch and Robert A. Miller, Assistant Prosecuting Attorneys,
for appellee.

Kenneth J. Rexford, for appellant.

* * * * *

SINGER, J.

{¶ 1} This is an appeal from a judgment issued by the Lucas County Court of Common Pleas, following a jury verdict finding appellant guilty of two counts of aggravated robbery and two counts of felonious assault. Because we conclude that the trial court did not err in denying appellant's motions to suppress and the verdict was neither based on insufficient evidence nor against the manifest weight of the evidence, we affirm.

{¶ 2} This case was previously appealed and decided in 2008. See *State v. Lampkin*, 6th Dist. No. L-07-1005, 2008-Ohio-2378. Pursuant to the Ohio Supreme Court's ruling in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio, 330, finding that certain criminal case judgment entries failed to comply with Crim.R.32(C) and were void, appellant, Terry Lee Lampkin, moved for resentencing. The court granted appellant's motion, conducted a sentencing hearing, and resentenced him by a judgment entry issued on September 21, 2009. Although the trial court labeled its decision a "nunc pro tunc" judgment entry, for the purposes of this appeal, it is the final, original judgment.[1]

{¶ 3} In January 2006, appellant was indicted on two counts of aggravated robbery, in violation of R.C. 2911.01(A)(3) and two counts of felonious assault, in violation of R.C. 2903.11(A)(1). The charges stemmed from incidents that occurred during a robbery and assault committed by four men at a car wash.

{¶ 4} Appellant filed two motions to suppress, one based on a photo array identification and the second on consent to search the house where he allegedly was living. Both motions were denied. At trial, the following evidence was presented.

{¶ 5} On December 11, 2005, at approximately 2:00 p.m., three young women, Tyra Slaughter, Charlene Redmond, and Shinina Webb, were vacuuming a car at the car wash on the corner of Detroit Avenue and Council Street in Toledo, Ohio. Slaughter and

[1]Since the first judgment was deemed to be void under *Baker*, the second judgment is not actually a "nunc pro tunc" entry, which is used to fix mere clerical mistakes, not substantive omissions. Regardless of its designation, the September 9, 2009 judgment is the final, appealable order. See *State v. Mitchell*, 187 Ohio App.3d 315, 2010-Ohio-1766.

Redmond testified that they saw four "black" males walk into the car wash through the car wash vehicle exit door. Slaughter thought the men were going to work. Approximately 15 minutes later, the four men left the building, walked to the stop sign at the corner of Detroit, then began to run. After the four men started to run, Slaughter, Redmond and Webb then saw a white man, Michael Clarkson, exit the car wash office door. He was bleeding profusely from a wound on his forehead.

{¶ 6} Redmond testified that, a moment later, she also saw George Hart, whose unrecognizable face was badly injured and covered in blood, leave the building and immediately collapse. Redmond and Slaughter called 911 from a cell phone and reported that someone had been shot, based on the blood from Hart's and Clarkson's injuries. Slaughter, Redmond and Webb all described the men as African-American, despite their clothing and masks. In their 911 call, Slaughter and Redmond characterized the assailants as "boys," based on their body types, but testified at trial that they could not actually discern if they were teenagers or young men.

{¶ 7} George Hart, the car wash manager, testified that about 15 minutes before the assault and robbery, appellant had been at the car wash as a front seat passenger in a car driven by a woman Hart did not know. Hart said he knew appellant from previous visits to the car wash and had sold appellant a car several years before. Hart said that prior to the incident, he had talked to appellant about six or seven times and seen him ten times during the previous few years. While Hart was preparing the car to go through the

car wash, appellant asked Hart "where everybody was at," and "where the owner was." Hart told appellant that he was working alone. Appellant and the driver then left.

{¶ 8} Clarkson, the car wash owner, and Hart testified that they were both inside the car wash prior to the assailants entering the building. Hart had been working alone when Clarkson came into the office to pick up a cash bank deposit from the safe. At trial, both testified that four men, dressed mostly in black and wearing ski masks, forcefully entered the office door. Two men grabbed and began beating Clarkson; the other two men grabbed and started beating Hart. The men searched Clarkson's and Hart's pockets, taking approximately $1,500 in cash from Clarkson and $350 from Hart.

{¶ 9} During the attack, one of the assailants right next to Hart told him to give up his money. Hart said he recognized the assailant's voice as appellant's, and asked "Terry, why are you beating me like this?" The assailant increased the beating, and began to hit Hart with something hard, like a pipe, in the eyes, face and jaw. Clarkson testified that at the beginning he was punched and kicked, but at the end he was hit in the face with a pipe or other hard object. The men eventually left and Hart said he went outside the building and fell on the pavement, bleeding.

{¶ 10} Clarkson felt stunned by the final blows, but, after the men left, he was able to stand and walk out of the building and called 911 from his cell phone. He said he then got into his car to follow the men so he could tell police where they had gone, but could not find them. Clarkson identified a black ski mask, Exhibit 10, as looking like the mask he saw on the assailants.

{¶ 11} Clarkson and Hart described the four men as wearing black knit ski masks, with three holes cut out for the eyes and mouth. Clarkson testified that one man was tall and the others were medium height, around five feet ten inches tall. Hart described the men as being five feet and six to seven inches tall, and the first man, who rushed in, as being short and stocky or fat. Because of the masks, Hart could not tell from their faces or body types if the assailants were teenagers. Hart was certain, however, that the man who spoke to him and beat him was appellant.

{¶ 12} Toledo Police Department ("TPD") Sergeant Mark Fry testified that, on the day of the robbery, he was first dispatched to the car wash and then to an nearby residence on Rosewood Avenue, Toledo, to secure the scene of discovered evidence. At the Rosewood address, an officer had found footprints in the snow, two pairs of blood-stained gloves, and blood drops in the snow. Two sets of shoe tracks were observed in the snow near the gloves. Fry arrived at the Rosewood location approximately 20 minutes after his initial arrival at the car wash. Fry identified gloves offered into evidence as those found at the Rosewood address.

{¶ 13} TPD Officer Robert Britt testified that he and Officer Andre Bills were on patrol and received a dispatch to the car wash, arriving there at 1:58 p.m. As the first officers on the scene, they secured the office area which was "covered in blood." Bills interviewed the three women witnesses who described the four assailants as 13 to 14 years old and wearing all black clothing and black ski masks. Britt's report indicated that during his interview, Clarkson had said the assailants had taken $1,400 in cash.

{¶ 14} TPD Officer Katrina Welch testified that she and her partner, Officer Powell, arrived at the car wash soon after Britt and Bills. Welch and Powell surveyed the area and saw footprints in the snow leading from the car wash into the adjoining neighborhood. They followed the footprints for close to an hour, traveling two to three blocks and eventually to a nearby expressway overpass, where they lost the trail. Welch observed one or two sets of footprints and did not remember seeing any blood on the ground. She also acknowledged that she had no idea when the footprints were made.

{¶ 15} The next witness, Mary Faris, testified that she was the manager of Monroe Carry-out, located approximately one-half mile from the car wash, at the corner of Monroe and Bancroft Streets, Toledo, Ohio. Faris said that she recognized appellant who was a regular customer at the carry-out and identified him in court. She was working on the day of the robbery and remembered that appellant entered the carry out that day, wearing a dark sweater. He said hello and bought some cigarettes, and left. She did not notice anything unusual, but said police entered the carry-out a few minutes after appellant left.

{¶ 16} Anthony Jordan, who was previously employed as a clerk, was also working behind the carry-out counter that day. He said he had personally known appellant for a long time prior to the incident and as a regular store customer and identified him in court. Jordan said that when appellant came into the store on the day of the robbery, the only unusual thing he noticed was that appellant was not wearing a coat or jacket in the cold weather. Jordan spoke briefly with appellant, who said that his car

"just went down" and asked two nearby women for a ride. Appellant then bought cigarettes and asked Jordan for a paper towel. Jordan testified that appellant's clothes were clean, he was not sweating or breathing heavily, and he did not seem nervous or hurried. The two spoke briefly and then appellant left. Shortly thereafter, police came into the store and asked Jordan and the other employee if they had just seen a man with "long dreds" come into the store. Jordan and the employee said no, because the description did not fit appellant.

{¶ 17} Monroe Carry-Out owner, Ann Riebe, testified that the store had a surveillance camera which video taped the inside of the store and parking lot. Riebe also knew appellant as a regular customer in the store. The state introduced into evidence a video surveillance camera recording taken while appellant was in the carry-out. It showed appellant in the store at 2:08 p.m. on the day of the car wash robbery, not wearing a coat, hat, or gloves. While in the store, and after Jordan gave him the paper towels, appellant blew his nose and wiped his face and hands repeatedly.

{¶ 18} TPD Officer George Roush testified that he also was dispatched to the Rosewood area, which was about 200 yards from the car wash. He said Monroe Carry-Out was within walking distance, i.e., a "couple blocks," from the Rosewood address. Roush said he discovered the gloves, footprints, and blood in the snow and secured the scene until Sergeant Fry arrived. At trial, Roush also identified the gloves presented as those found at the scene.

{¶ 19} Lisa Glanz, a Toledo resident, testified that on the day of the incident, she was driving home and had exited the expressway at Detroit Avenue near Monroe Street. She saw police cars with their overhead lights on at the car wash. She drove down Monroe Street and had just turned onto Bancroft Street, when she noticed a man running from a side street, Hollywood Avenue, across Bancroft, and then across a snow covered field on the other side of Bancroft. Glanz described the person as a "black male," wearing no coat, dark pants, and a dark sweater. She said she first saw him at 2:07 p.m.

{¶ 20} Aware of the police presence at the car wash, Glanz decided to see where the man she had seen had gone and drove around the block. While stopped at a traffic light, she saw the man up ahead, crossing Monroe Street. About three to four minutes after she first saw him crossing Bancroft, Glanz again saw the man crossing Monroe Street. As she drove ahead, she was eventually next to him. Thinking that she might call police, Glanz specifically noted his profile and that he had "kind of like ringlets in his hair." She drove past appellant who was heading toward the Monroe Carry-Out.

{¶ 21} Within 10 minutes after she got home, Glanz called police and reported what she had seen. Later that evening, when she saw appellant's picture on the evening news, Glanz told her husband that it depicted the same man she saw running across the street. Three days later at the police station, Glanz viewed six pictures in a photo array and identified appellant as the man she saw, because of his hair. At trial, she acknowledged that she told police she could not recall the man's face, just the hair ringlets. Glanz said that she was not one hundred percent sure that appellant was the

same man, but only that the man she saw was definitely a black man with ringlets in his hair.

{¶ 22} TPD Detective Terry Cousino testified to the recovery of a bloodstained quilted coat liner found the day after the robbery behind a garbage can in the alley between Whitney Avenue and Rosewood Avenue. The coat was discovered in an area which was located 150 to 200 yards from the car wash. Cousino also testified to the recovery of a black knit face mask and hat, a pair of gray sweat pants, and a maroon hooded sweatshirt, found stuffed underneath a tree stump in the backyard of a Hollywood Avenue residence. The tree stump was located 150 yards in a straight line from where the coat liner had been found. Cousino also took and processed for evidence two DNA swabs and a hair sample from appellant, as well as two DNA swabs from Hart.

{¶ 23} TPD Detective William Seymour testified that, at the hospital, Hart identified appellant as his assailant. After speaking with Hart, Seymour and another detective looked for appellant at an address on Kimball Street, approximately one and one-half miles from the car wash. Appellant's wife answered their knock, and she gave permission for the detectives to search their residence, the garage and a vehicle. In what appeared to be the main bedroom, officers found a black face mask in a dresser drawer. The detectives also found the face mask package wrap in a garbage can in the garage.

{¶ 24} Detective Chad Culpert, an expert in crime scene investigation, testified that he was also called to the Rosewood area, arriving around 3:00 p.m. He collected two pair of gloves and blood samples found in the snow at 2237 and 2241 Rosewood. He

also photographed footprints from two sets of tracks near the gloves. Culpert also testified that he inspected the office area and recovered a metal ratchet wrench, but which did not appear to have blood on it. Finally, he said he collected the discovered mask and wrapper from the Kimball Street address.

{¶ 25} Lindsey Hale, BCI forensic scientist and expert witness, testified that the two pair of gloves, the black ski mask, and the coat were submitted for DNA analysis. Testing of the inside of one glove from the pair in state's Exhibit 6, showed that appellant could not be excluded as the major DNA contributor out of a mixture of DNA from three individuals. A bloodstain on the outside of that same glove, also a mixture of DNA from three individuals, showed Hart, the victim, could not be excluded as the major contributor. On the basis of her testing and within a reasonable degree of scientific certainty, Hale opined that the DNA found on the right-hand glove belonged to appellant and that Hart's DNA was found on both gloves.

{¶ 26} Stains on the other gloves, Exhibit 7, showed Hart could not be excluded as the major contributor, along with DNA mixtures of two other unknown individuals. DNA taken from the inside of both gloves was a mixture of at least two unknown individuals. The DNA from bloodstains on the outsides of the gloves showed Hart could not be excluded as the major contributor. Swabs from the two black ski masks yielded only Hart's DNA. Swabs from the cuffs and collar of the coat liner, Exhibit 9, were a mixture of DNA from three individuals. Hale said tests results could not exclude appellant and Hart as sources of the DNA found on the coat liner.

{¶ 27} Detective Liz Kantura then testified that on the day after the robbery, she and another detective went back to the areas involved with the investigation. The detectives drove near the car wash and then decided to search in the area leading away from the scene. They saw four sets of footprints further apart in the snow, indicating that the persons were running. They followed the tracks which continued into an empty field and then to an alley, with three garbage cans off to the side. Looking inside one of the cans, Kantura found a gray coat liner, with a visible bloodstain. The detectives showed Detective Cousino where the coat was recovered and he collected it into evidence. Kantura identified Exhibit 9 as the coat she found in the garbage can.

{¶ 28} The detectives continued to search through the neighborhood, projecting where they thought the assailants may have run. Close to a fence on one property was a tree stump, which was where they found clothing stuffed behind it. Included in the rolled up clothing was a mask, pants that were inside out, and a sweatshirt. They continued to follow tracks which were eventually lost on Hollywood by Bancroft. Kantura stated that the items found behind the stump were not, to her knowledge, tested for DNA.

{¶ 29} Finally, Detective Kermit Quinn, testified that he arrived at the car wash soon after the initial officers responded to the 911 call. He spoke with Clarkson and Hart, who immediately said appellant's name. At a little after 4:00 p.m., Quinn and Seymour arrived together at the Kimball Street residence, to try to find appellant. That address is within walking distance from the car wash. When they knocked on the door, they could hear a male voice inside. Mrs. Lampkin answered the door, and permitted them to come

into the home. Mrs. Lampkin indicated that the house was hers, but appellant was heard in the background telling her not to let them in. Appellant came downstairs, yelling at his wife that it was her house and she did not have to let them search.

{¶ 30} When appellant would not stop yelling at his wife, Quinn had him removed from the home and arrested. Seymour had taken Mrs. Lampkin into the kitchen to talk and she signed a consent to search the home. Quinn found a half-cover mask in a dresser in a closet in what appeared to be the master bedroom. Culpert found the plastic wrapper that went with the mask, in the garage. Quinn acknowledged that, as the lead detective, he was in charge of determining which items were to be tested. The mask found in the home appeared to be new and was not tested. The clothing found by the tree stump was also not tested because it did not appear to have blood on it.

{¶ 31} Quinn indicated on an aerial map all the areas where the crime had occurred, where evidence was found, and where appellant had been found at his wife's residence. He also testified that, after receiving the call from Lisa Glanz, he put together the photo array and showed it to her. Quinn said he constructed the array from photos available at the time. He denied suggesting to Glanz that the suspect was among the photos. Glanz identified appellant's photo as the man she reportedly saw running. After admission of exhibits, the state then rested.

{¶ 32} Appellant then testified that he and his wife had gone to the gas station and car wash earlier that morning and had spoken briefly to Hart. Appellant said he knew Hart only through brief encounters at the car wash. Appellant then said he and his wife,

who was driving, went home to the Kimball Street address. Appellant stated that he had four nephews living with them in the basement. Appellant said his nephew and friends left, along with his wife who was going to pick up one of their children from an aunt's house.

{¶ 33} At the time relevant to the robbery and identifications, appellant said he went to the area of the robbery after one of his nephews called him. Although he did not have a driver's license, after his wife returned home, he left in the car.

{¶ 34} Seeing police around the gas station, appellant claimed he parked his car at the U-Haul lot for his nephew to enter the trunk, which he left ajar. He also popped the hood of the car slightly. Appellant then walked to the Monroe Carry-Out and stalled for time to give his nephew time to hide in his car. Appellant said he then pretended that his car broke down and got a ride back to his car from a woman at the carry-out. Appellant said he saw police walking into the carry-out as he exited, but did not tell them about his nephew.

{¶ 35} Seeing that his nephew had not hidden in his car, appellant closed the car hood and trunk and drove to where he thought his nephew might be. Eventually, the nephew and his friends came back and appellant brought them to the Kimball residence. Appellant said he became "hyped up" after the young men told him about the crime. He then left to take videos back to the local library and stopped to pick up fast food for his family. Appellant said he was up in the bedroom with his wife when the police knocked on the door.

{¶ 36} Appellant said he asked Quinn why they wanted to come and if they had a warrant. He testified that he told the officers they could not search, but his wife was taken into the kitchen to talk to police. Appellant denied becoming abusive or belligerent, stating that, when he did not want officers to touch his children, appellant was cuffed, taken outside, and placed in a patrol car. At trial, appellant voluntarily testified as to his multiple prior convictions, including aggravated robbery, but said he had been working two jobs since he had been released from prison in January 2005. He stated that he knew Hart initially from talking to him about the car he purchased from Clarkson in 2001. Later, appellant said he only talked with Hart when he went to the car wash. He denied having any kind of close relationship with him and had only spoken with him two or three times.

{¶ 37} Appellant explained the presence of his DNA on the gloves found by police. Appellant said he occasionally wore the gloves to shovel snow or work in the yard, but the gloves actually belonged to a nephew living with him. He acknowledged that he was 5 feet 9 inches tall and weighed 180 pounds. He stated that he would not hurt anyone and his prior convictions did not involve physical harm to his victims. Appellant claimed that he had tried to provide information to the prosecutor's office as to who the four young males were that had committed the crime, but was never contacted. Appellant then rested his case.

{¶ 38} The state brought Detective Quinn back on rebuttal. Quinn testified that when he was at the Kimball Street address, appellant acted very hostile, yelled

obscenities and told his wife not to let officers come into the house. Quinn noted, however, he had not written that into the report he had made of the search and accompanying search.

{¶ 39} The jury found appellant guilty as to all four counts. At sentencing, the count found that the convictions for felonious assault merged with the convictions for aggravated robbery as allied offenses. The court imposed a term of ten years incarceration for each of the aggravated robbery convictions, to run consecutively, for a total of 20 years incarceration.

{¶ 40} Appellant now appeals, arguing the following thirteen assignments of error:

{¶ 41} "I. The conviction for Count I was against the manifest weight of the evidence.

{¶ 42} "II. The conviction for Count II was against the manifest weight of the evidence.

{¶ 43} "III. The conviction for Count III was against the manifest weight of the evidence.

{¶ 44} "IV. The conviction for Count IV was against the manifest weight of the evidence.

{¶ 45} "V. The conviction for Count I was not supported by sufficient evidence.

{¶ 46} "VI. The conviction for Count II was not supported by sufficient evidence.

{¶ 47} "VII. The conviction for Count III was not supported by sufficient evidence.

{¶ 48} "VII. The conviction for Count IV was not supported by sufficient evidence.

{¶ 49} "IX. Mr. Lampkin was denied the effective assistance of counsel.

{¶ 50} "X. Mr. Lampkin was denied Due Process of Law when the Trial Court conducted a trial as to a defective indictment as to the counts alleging Aggravated Robbery, as the defect resulted in structural error.

{¶ 51} "XI. The Trial court committed plain error by allowing the trial as to two counts of Aggravated Robbery, in light of the defective indictment.

{¶ 52} "XII. The Trial Court erred by denying the defense motion to suppress identification, in violation of the Ohio Constitution and the United States Constitution.

{¶ 53} "XIII. The Trial Court erred by denying the defense motion to suppress the fruits of a warrantless search, in violation of the Ohio Constitution and the United States Constitution."

{¶ 54} We will address appellant's assignments of error out of order.

I.

{¶ 55} In his tenth and eleventh assignments of error, appellant argues that, pursuant to *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, the indictment was constitutionally defective and the trial court erred in proceeding to trial on the two counts of aggravated robbery.

{¶ 56} Pursuant to *State v. Horner*, ___ Ohio St.3d ___, 2010-Ohio-3830, which overruled *Colon*, we conclude that appellant's arguments are without merit.

{¶ 57} Accordingly, appellant's tenth and eleventh assignments of error are not well-taken.

II.

{¶ 58} In his twelfth assignment of error, appellant claims that the trial court erred in denying his motion to suppress identification evidence. Appellant argues that the photo array shown to a witness was overly suggestive because of the photos used and a comment made by the detective.

{¶ 59} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. In deciding a motion to suppress, the trial court assumes the role of trier of fact. Id. A reviewing court is bound to accept those findings of fact if they are supported by competent, credible evidence. Id. But the trial court's conclusion of law is reviewed under a de novo standard to determine whether the facts satisfy the applicable legal standard. Id., citing *State v. McNamara* (1997), 124 Ohio App.3d 706.

{¶ 60} We initially note that the trial court did not make *any* findings of fact or conclusions of law, either on the record or in its judgment entry prior to denying this motion. The judgment entry, filed on November 28, 2006, the day after trial began, simply stated, "For the reasons set forth in the record on November 27, 2006, this Court finds Defendant's motion not well-taken and it is denied." The record related to November 27, 2006, however, is bereft of any "reasons" for the trial court's ruling. Although such findings and conclusions are not required on the denial of a motion to

suppress evidence where the record is sufficient to allow full review of the suppression issues, *State v. Waddy* (1992), 63 Ohio St.3d 424, 443, (superseded by constitutional amendment on other grounds), the better practice is for the trial court to clearly indicate its findings and reasons for its rulings. See Crim.R. 12(E).

{¶ 61} In this case, the trial court conducted an extensive discussion of the facts and law regarding the photo array with trial counsel at the suppression hearing held on November 9, 2006. Based on that interchange and the court's statements made, we will proceed with our review.

{¶ 62} Due process requires suppression of an out-of-court identification, as well as any tainted in-court identification, if the confrontation procedure was "unnecessarily suggestive of the suspect's guilt and the identification was unreliable under all the circumstances." *Waddy*, supra, at 438, citing *Neil v. Biggers* (1972), 409 U.S. 188 and *Manson v. Brathwaite* (1977), 432 U.S. 98. Convictions "based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States* (1968), 390 U.S. 377, 384.

{¶ 63} A witness's pretrial photo identification of a defendant will be suppressed only if the photo array was unnecessarily suggestive of the suspect's guilt and the identification was not reliable. *Waddy*, supra, at 438. The defendant has the burden to show that the identification procedure was unduly suggestive. *State v. Harris*, 2d Dist.

No. 19796, 2004-Ohio-3570, ¶ 19. If the pretrial confrontation procedure was not unduly suggestive, any remaining questions as to reliability go to the weight of the identification, not its admissibility, and no further inquiry into the reliability of the identification is required. *State v. Wills* (1997), 120 Ohio App.3d 320, 325.

{¶ 64} If the defendant meets his or her burden, the court must then consider whether the identification, viewed under the totality of the circumstances, is reliable despite its suggestive character. *Harris*, supra. To assess the reliability of the identification, the court must consider: (1) the witness's opportunity to view the defendant 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. Davis* (1996), 76 Ohio St.3d 107, 113. See, also, *Manson*, supra, at 114, citing *Neil*, supra, at 199-200.

{¶ 65} A photo array, "created by police prior to the victim giving a description of the suspect, * * * is not unreasonably suggestive, as long as the array contains individuals with features similar to the suspect." *State v. Jones*, 8th Dist. No. 85025, 2005-Ohio-2620, ¶ 15. 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.

{¶ 66} In this case, defense counsel's primary contention of suggestiveness at the suppression hearing went to the hair styles of the men shown in the photo array. In essence, defense counsel argued that Glanz described the man she saw running as having "ringlets" of hair. Counsel argued that because appellant's photo was the only one showing such a hairstyle, the photo array was suggestive. Defense counsel conceded that other features appeared to be similar and did not claim that the police procedure itself was faulty. The trial court stated that:

{¶ 67} "If the process itself was done in a fair and reasonable manner and all other characteristics other than the hair are not impermissibly suggestive and the Court applies the law looking at the totality of the circumstances, aren't we left with the sole issue as [Glanz's] credibility before the trier of fact?"

{¶ 68} The court's statement and later discussion implies that the trial court did not find the array to be unnecessarily suggestive. Therefore, no further analysis under the totality of the circumstances was needed, and the array and identification were admissible, with the jury to judge credibility of the witness and weight to be given to her testimony.

{¶ 69} After reviewing the photo array, we agree that appellant's photo is similar in size and the skin tones of the men and facial features appear similar, including mouth, nose, eyebrows, facial hair, and eye shape. The hair of the men in the photos varies in length and style, with appellant's appearing to be the longest and most pronounced. Nevertheless, we agree that the array is not *unnecessarily* suggestive and that any

credibility issues were addressed by cross-examination and questions submitted by the jury. Therefore, we conclude that the trial court did not err in denying appellant's motion to suppress the photo array and subsequent identification by Glanz.

{¶ 70} Accordingly, appellant's twelfth assignment of error is not well-taken.

III.

{¶ 71} In his thirteenth assignment of error, appellant argues that the trial court erred in denying his motion to suppress evidence discovered in his home as the fruits of an allegedly illegal warrantless search. Even though his wife consented to the search conducted by police, appellant claims his statement to her, "Don't let them search your home" as he was being arrested invalidated that consent.

{¶ 72} Warrantless searches are "per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well delineated exceptions." *City of Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 218, citing *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 454-455 and *Katz v. United States* (1967), 389 U.S. 347, 357. One of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 219,

{¶ 73} The general rule regarding inter-spousal consent to a search of the marital residence is that a warrantless search is permissible if consent is obtained from a person having common authority or other sufficient relationship to the premises. See *United States v. Matlock* (1974), 415 U.S. 164; *State v. Gavin* (1977), 51 Ohio App.2d 49.

However, a "warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by a another resident." *Georgia v. Randolph* (2006), 547 U.S. 103, 122-123.

{¶ 74} Under the doctrine of inevitable discovery, evidence that was obtained illegally is admissible, nonetheless, if it inevitably would have been obtained lawfully. See *Nix v. Williams* (1984), 467 U.S. 431; *State v. Perkins* (1985), 18 Ohio St.3d 193, syllabus. Even when a defendant refuses consent to search his house, where police have probable cause to enter an area and could have gotten a warrant, the evidence seized without a warrant will be admissible. See *State v. Kuhn*, 9th Dist. No. 05CA008859, 2006-Ohio-4416, ¶ 14, citing to *State v. Mitchell* (Nov. 15, 1995), 9th Dist. No. 17029 (wife who consented to search basement over husband's objection constituted 4th Amendment violation but evidence admissible under inevitable discovery doctrine).

{¶ 75} In this case, evidence was presented at the suppression hearing that appellant's wife and three children were the only residents listed on the application and approved to occupy the government subsidized home where the mask was found. Therefore, appellant was neither on the lease nor listed as a resident. As a result, his wife would have had the authority to give consent to the search, regardless of appellant's objections. Moreover, the detective testified that appellant repeatedly stated to his wife, it's "your home" and "you don't have to let them search." These statements indicate that appellant did not view the home as his own, even though he may have been staying there.

{¶ 76} Even presuming, arguendo, that appellant was living with his wife and did have authority as a co-tenant, we conclude that the evidence was still admissible. Appellant was physically present at the residence and his comments could be construed as an objection to the search consented to by his wife. Thus, under *Georgia v. Randolph*, supra, it is arguable that his Fourth Amendment rights were violated by the subsequent warrantless search and seizure of the mask from the bedroom. Nevertheless, prior to the search, appellant had been identified as one of the assailants by the victim and was placed under arrest shortly after the police entered the home. Since the police had probable cause and could have gotten a warrant and conducted the search of the home without appellant's consent, the evidence was admissible under the inevitable discovery doctrine. Therefore, appellant's motion to suppress the mask and its wrapper was properly denied.

{¶ 77} Accordingly, appellant's thirteenth assignment of error is not well-taken.

IV.

{¶ 78} We will now address appellant's fifth, sixth, seventh, and eighth assignments of error together. Appellant argues that his convictions for aggravated robbery and felonious assault were not supported by sufficient evidence.

{¶ 79} "Sufficiency of the evidence" refers to whether the evidence is legally adequate to support a jury verdict as to all elements of a crime. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Upon review of the sufficiency of the evidence to support a criminal conviction, an appellate court must examine:

{¶ 80} "the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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), 61 Ohio St.3d 259, paragraph two of the syllabus, (superseded by statute and constitutional amendment on other grounds).

{¶ 81} "Relevant inquiry " does not include interpretation of evidence or determination of credibility of witnesses by the appellate court. Id. at 273. Thus, the verdict will not be overturned unless reasonable minds could not reach the conclusion reached by the trier of fact. Id. If a defendant's conviction is reversed based upon the sufficiency of the evidence, the defendant goes free. *Thompkins*, supra, at 388.

{¶ 82} With this standard in mind, we will now examine each of the convictions to determine whether the verdicts were supported by sufficient evidence.

Aggravated Robbery Convictions

{¶ 83} Counts 1 and 2 charged appellant with aggravated robbery, a violation of R.C. 2911.01(A)(3) which states:

{¶ 84} "(A) 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:

{¶ 85} "* * *

{¶ 86} "(3) Inflict, or attempt to inflict, serious physical harm on another."

{¶ 87} In this case, testimony and evidence was presented as to Counts 1 and 2 of the indictment that demonstrated the men who came into the car wash office were there to steal money and that the men inflicted serious physical harm on the two victims. There was also direct evidence that, at the time of the offense, one of the victims recognized appellant's voice despite the mask. That recognition, as well as the circumstantial evidence which linked appellant to the crime, provided some evidence that appellant was one of the masked attackers. Therefore, we conclude that sufficient evidence was presented, that, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt.

Felonious Assault Convictions

{¶ 88} Counts 3 and 4 charged appellant with felonious assault, in violation of R.C. 2903.11(A)(1) which provides:

{¶ 89} "(A) No person shall knowingly do either of the following:

{¶ 90} "(1) Cause serious physical harm to another or to another's unborn; * * *."

{¶ 91} In the present case, testimony from one victim demonstrated that serious physical harm was caused by someone in a mask, who was identified as appellant, by the witness, by DNA evidence on the glove and coat liner, and by other circumstantial evidence. Therefore, again, the verdict regarding Counts 3 and 4 was supported by sufficient evidence that, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt.

{¶ 92} Accordingly, appellant's fifth, sixth, seventh, and eighth assignments of error are not well-taken.

V.

{¶ 93} We will now address appellant's first four assignments of error together. Appellant argues that his convictions for aggravated robbery and felonious assault were against the manifest weight of the evidence.

{¶ 94} Under a manifest weight standard, an appellate court sits as a "thirteenth juror" and may disagree with the fact finder's resolution of the conflicting testimony. *Thompkins*, supra, at 387.

{¶ 95} The appellate 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 jury clearly lost its way and created such a miscarriage of justice that the conviction must be reversed and a new trial ordered. 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., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Additionally, the reversal must be by concurrence of all three judges and the defendant is then granted a new trial. *Thompkins*, supra, at 389.

{¶ 96} Upon consideration of the testimony and evidence, as discussed previously, we cannot say that the jury lost its way in finding appellant guilty of two counts of

aggravated robbery and two counts of felonious assault. Therefore, appellant's convictions were not against the manifest weight of the evidence.

{¶ 97} Accordingly, assignments of error one, two, three, and four are not well-taken.

VI.

{¶ 98} In his ninth assignment of error, appellant argues that he was denied effective assistance of trial counsel.

{¶ 99} In order to prove ineffective assistance of counsel, a defendant must show (1) that defense counsel's representation fell below an objective standard of reasonableness and (2) that counsel's deficient representation was prejudicial to defendant's case. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. See also *Strickland v. Washington* (1984), 466 U.S. 668, 694. Trial tactics and strategies do not constitute ineffective assistance of counsel. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶ 146, citations omitted. Even "debatable trial tactics do not establish ineffective assistance of counsel." *State v. Hoffner*, 102 Ohio St.3d 358, 365, 2004-Ohio-3430, ¶ 45.

{¶ 100} In this case, the basis for appellant's argument is that: (1), trial counsel had insufficient time to prepare for trial and (2), trial counsel failed to subpoena three witnesses, i.e., an independent DNA analyst, appellant's wife, and a "third person." Appellant labels this argument as either failure to investigate or failure to file a notice of

alibi or present an alibi defense. In other words, appellant argues that evidence and testimony which could have been presented was not offered by trial counsel.

{¶ 101} At least twice, appellant's trial counsel specifically put on the record why he did not want to present the evidence listed above. Trial counsel noted that the independent DNA expert's testing was also unable to exclude appellant's DNA from the evidence found. In other words, appellant's expert would have testified to the same results as the state's expert. Next, trial counsel noted that although appellant wanted his wife to testify, her proposed testimony was likely to contradict her prior statements to police. Finally, the third undisclosed person, was incarcerated and not likely to appear credible. Although he acknowledged the conflict between him and appellant regarding presentation of these witnesses, trial counsel, nonetheless, thoroughly explained why calling them was not in appellant's best interest and would likely harm his case. In our view, trial counsel was exercising his best judgment in representing appellant, and the decision not to call the witnesses was based upon logical, sound trial tactics.

{¶ 102} We also note that since the witnesses' exact testimony and other evidence constitutes matters outside the record, such evidence is not a matter to be considered by this court on direct appeal. See *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus (appellate review on direct appeal is strictly limited to the record; court may not consider matters "dehors the record" which were not part of the trial court proceedings). Therefore, appellant has failed to establish a claim of ineffective assistance of counsel.

{¶ 103} Accordingly, appellant's ninth assignment of error is not well-taken.

{¶ 104} The judgment of the Lucas County Court of Common Pleas is affirmed.

Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE