[Cite as *State v. Johnstone*, 2010-Ohio-1854.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92885

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHARLES JOHNSTONE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-511246

BEFORE: Boyle, J., Dyke, P.J., and Jones, J.

RELEASED: April 29, 2010

JOURNALIZED:

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MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant Charles Johnstone appeals his convictions for aggravated robbery, kidnapping, and felonious assault. He raises seven assignments of error for our review:

{¶ 2} "[I.] The trial court erred in denying appellant's motion to suppress eyewitness identification and permitting a fundamentally unreliable identification in violation of due process.

{¶ 3} "[II.] The trial court erred by not granting the appellant a new trial.

{¶ 4} "[III.] Appellant was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution when his counsel failed to offer expert testimony on eyewitness identification.

{¶ 5} "[IV.] The appellant's conviction for aggravated robbery was against the manifest weight of the evidence.

{¶ 6} "[V.] The appellant's conviction for kidnapping was against the manifest weight of the evidence.

{¶ 7} "[VI.] The appellant's conviction for felonious assault in count four was against the manifest weight of the evidence.

{¶ 8} "[VII.] The appellant's conviction for felonious assault in count five was against the manifest weight of the evidence."

{¶ 9} After reviewing the record and pertinent law, we affirm.

Procedural History and Facts

{¶ 10} In June 2008, the grand jury indicted Johnstone on five counts: (1) aggravated robbery, in violation of R.C. 2911.01(A)(1); (2) aggravated robbery, in violation of R.C. 2911.01(A)(3); (3) kidnapping, in violation of R.C. 2905.01(A)(2); (4) felonious assault, in violation of R.C. 2903.11(A)(1); and (5) felonious assault, in violation of R.C. 2903.11(A)(2). All five counts carried one- and three-year firearm specifications, in violation of R.C. 2941.141(A) and 2941.145(A). The charges giving rise to the indictment alleged that, on April 23, 2006, Johnstone, along with one other unknown male, rode in the victim's taxicab, held the victim at gunpoint, and ultimately robbed and severely beat him. Johnstone pled not guilty to all the charges.

{¶ 11} Prior to trial, Johnstone moved to suppress the police's photo array of him and the victim's identification testimony on the grounds that the photo array was unduly suggestive. The court held a hearing and ultimately denied the motion. (The facts adduced at the suppression hearing are discussed within our disposition of the assignment of error related to same.) The matter proceeded to a jury trial where the following evidence was presented.

Jury Trial

{¶ 12} The victim, Issa Chbani, testified (through a translator)[1] that on April 22, 2006, around 9:30 a.m., he had just entered his taxicab that was parked near his home on Clifton Boulevard in Cleveland when two men flagged him down. This was Chbani's "first run of the day," and his cab was clean. (Chbani testified

that he cleaned his cab every night.) He picked up the two men and headed toward downtown with both men sitting in the back. The man seated behind the front passenger seat (who Chbani later identified as Johnstone) asked if he could smoke a cigarette; Chbani gave him an empty coffee cup to use for his cigarette ashes.

{¶ 13} The men told Chbani to exit at West 45th Street. Once they reached the corner of Franklin and Detroit, the men told him to hand over "all his money." With a gun pointed to the back of his head, Chbani complied, giving the $55 that he had on him. But according to Chbani, that was not enough money to satisfy them. The man seated behind the front passenger seat stated: "I want your money, your wallet, and everything that you got." Chbani responded, "I have no money. I have nothing. I'm only a taxi driver. And that's all I have on me." Chbani testified that the man then hit him in the back of his head with a sharp metal object — either a knife or a gun; the man also struck his right ear, exploding his eardrum and causing permanent hearing loss. The attack lasted one to two minutes, during which he saw the assailant face-to-face. The other man sitting directly behind him also had a weapon — a gun, but Chbani never saw his face.

{¶ 14} Following the attack, Chbani called the police and later went to the hospital where he received stitches on the top of his head, his forehead, and his right ear.

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[1]Chbani indicated that Arabic is his first language.

{¶ 15} Immediately following the incident, the police recovered a single cigarette butt from the taxi. The police submitted the cigarette butt and the coffee cup that Chbani had in his taxi for DNA testing. The police further photographed Chbani's taxi and his visible injuries.

{¶ 16} Two years later, the police contacted Chbani and notified him that they had a suspect based on DNA evidence collected from the cigarette butt recovered in the taxi. Presented with a photo array of six individuals, Chbani immediately identified Johnstone as the man who attacked and robbed him. At trial, Chbani also identified Johnstone as the assailant.

{¶ 17} Cleveland detective James Kiefer testified that he was assigned the case in March 2008 after the police obtained a match on the DNA evidence collected from the taxi. Kiefer further testified that he ordered a photo array, which the photo lab compiled using profiles similar to Johnstone's. He then called the victim and arranged an interview. Prior to asking Chbani to identify the suspect, Kiefer told Chbani that DNA testing had been conducted on the cigarette butt. Kiefer also testified that he did not have any difficulty communicating with Chbani because he was "used to dealing with people with heavy accents."

{¶ 18} On cross-examination Kiefer acknowledged that the lighting in Johnstone's photo was different than the other five photos. He attributed it to a "color correction problem."

{¶ 19} Russell Edelheit, a forensic scientist with BCI, testified that he conducted the DNA testing on the cigarette butt and the cup recovered from the taxicab. He testified that the DNA profile from the cup was from an unknown male. He further testified that the DNA profile from the cigarette butt was a mixture consistent with contributions from Johnstone and the same unknown male. Edelheit also indicated that it is not uncommon to find a mixture of DNA on cigarette butts.

{¶ 20} The state rested, and Johnstone moved for a Crim.R. 29 acquittal, which the trial court denied.

Verdict and Sentence

{¶ 21} The trial court charged the jury on the five counts of the indictment and also included an instruction on aiding and abetting. The jury found Johnstone not guilty on count one but guilty of the four remaining counts (aggravated robbery, kidnapping, and two counts of felonious assault). The jury also acquitted Johnstone on all the firearm specifications. At sentencing, the trial court merged the aggravated robbery and kidnapping counts and sentenced him to eight years in prison. The court also merged the two felonious assault counts and sentenced Johnstone to eight years, to run concurrently with the other counts.

Suppression of Pre-Trial Identification

{¶ 22} In his first assignment of error, Johnstone argues that the trial court erred in denying his motion to suppress the photo array and the victim's identification testimony.

{¶ 23} A motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8. Consequently, we give deference to the trial judge's factual findings, but we review the application of law to fact de novo. Id.; see, also, *State v. Davis*, 8th Dist. No. 83033, 2004-Ohio-1908. In determining the admissibility of challenged identification testimony, a reviewing court applies a two-prong test: (1) did the defendant demonstrate that the identification procedure was unduly suggestive; and, if so, (2) whether the identification, viewed under the totality of the circumstances, is reliable despite its suggestive character. *State v. Harris*, 2d Dist. No. 19796, 2004-Ohio-3570, ¶19; see, also, *State v. Thompson*, 8th Dist. No. 90606, 2009-Ohio-615, ¶32, citing *State v. Page*, 8th Dist. No. 84341, 2005-Ohio-1493. "Stated differently, the issue is whether the identification, viewed under the totality of the circumstances, is reliable despite the suggestive procedure." *State v. Willis* (1997), 120 Ohio App.3d 320, 324-325, 696 N.E.2d 1072.

{¶ 24} To determine reliability, the United States Supreme Court instructs courts to consider the following factors: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated

by the witness at the confrontation, and the length of time between the crime and the confrontation * * *." *Neil v. Biggers* (1972), 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401. The court must review these factors under the totality of the circumstances. Id.

{¶ 25} Here, we are troubled by the procedure employed in obtaining the photo array identification and find it to be unduly suggestive. First, immediately prior to presenting the photo array to the victim, Det. Kiefer told him that the police received a match on the DNA collected, thereby informing him that the suspect's photo was in the array. This court has previously held that telling a victim that the suspect's photo is in the array may render the identification procedure unduly suggestive. See *State v. Jones*, 8th Dist. No. 85025, 2005-Ohio-2620. As we recognized in *Jones*, such a statement pressures a victim to choose someone, regardless of certainty, because the victim was told that the suspect was in the array. Id. at ¶17.

{¶ 26} Second, the record reveals that there was no translator present at the time of the identification. Although Det. Kiefer testified that he had no trouble communicating with the victim, the same cannot be said about the victim. Indeed, halfway through the suppression hearing, the court had to order a translator because the victim could not answer the defense counsel's basic questions. It was abundantly clear that the victim did not understand what counsel was asking.

{¶ 27} Finally, the array immediately draws the viewer's attention to Johnstone's photo. As Det. Kiefer conceded at the suppression hearing, Johnstone appears to have a light shining on him. He attributed the difference as a "color correction problem." Further, whereas the other five all appear to have the same darker- green background, his is the only light-gray background. And while we recognize that generally a photo array is not unduly suggestive due solely to different backgrounds, see *State v. Carter*, 2d Dist. No. 21145, 2006-Ohio-2823, ¶33, citing *State v. Nelson*, 8th Dist. No. 81558, 2003-Ohio-3219, the flaws in the instant identification procedure were not limited solely to the differing background.

{¶ 28} Based on these combined circumstances, we find that Johnstone satisfied his burden of demonstrating that the identification procedure was unduly suggestive.

{¶ 29} We now turn to the issue of whether the identification may still be considered reliable. We find that it cannot. Applying the *Biggers* factors, and based on the totality of the circumstances, we find that the following facts render the identification unreliable: (1) the photo array was presented two years after the crime; (2) Chbani's only description of the suspects was very general (i.e., skin color and approximate height, weight, and age) — he provided no description regarding hair or facial features; (3) Chbani was unable to identify Johnstone on direct examination during the suppression hearing; and (4) the entire encounter where Chbani viewed Johnstone face-to-face lasted a short amount of time, i.e.,

"one to two minutes." And although Chbani was certain in his identification of Johnstone at the time of the photo array, we find this fact insignificant given the suggestiveness of the identification procedure; nor does this single factor outweigh the others under the *Biggers* test. Finally, we note that the absence of a translator during the identification procedure further undermines the reliability of the identification.

{¶ 30} Nonetheless, although we find that the trial court erred in denying the motion to suppress the identification, we find that error to be harmless. Under Crim.R. 52(A), harmless error is "[a]ny error, defect, irregularity, or variance which does not affect substantial rights." The Ohio Supreme Court has recognized that the trial court's failure to suppress unreliable identification testimony is harmless when it is clear that the defendant would be convicted even without the victim's identification. See *State v. Keene* (1998), 81 Ohio St.3d 646, 658, 693 N.E.2d 246. Here, we find that the record contains overwhelming evidence of Johnstone's guilt notwithstanding the identification testimony.

{¶ 31} Chbani's testimony established that the first and only trip he made on the day of the incident was with the two perpetrators, where one of the perpetrators was smoking. He further testified that he cleaned his taxi every evening. (And the photos submitted into evidence corroborated this testimony — apart from the blood spots caused by Chbani's injuries, the taxi appeared clean.) Immediately following the incident, the police recovered a single cigarette butt from the back floor of the taxi that Chbani indicated was dropped by one of the

perpetrators. Significantly, the police later determined that the single cigarette butt contained Johnstone's DNA. Moreover, Chbani's general description of Johnstone immediately following the incident was accurate and further corroborated the other evidence linking Johnstone. Therefore, based on this evidence, we find that the jury would have found Johnstone guilty even without the identification testimony.

App.R. 12 and 16

{¶ 32} In his second assignment of error, Johnstone argues that the trial court erred by not granting him a new trial. Johnstone, however, fails to comply with App.R. 16(A)(7) and cite any legal authority in support of his argument. And although he orally moved for a new trial at sentencing on the basis of unreliable DNA results, his only support for the assignment of error on appeal is excerpts from the suppression hearing. Accordingly, because we cannot discern the basis for Johnstone's assignment of error, we summarily overrule it. See *Meerhoff v. Huntington Mtge. Co.* (1995), 103 Ohio App.3d 164, 169, 658 N.E.2d 1109 (failure to cite case law or statutes in support of an argument, as required by App.R. 16(A)(7), constitutes grounds to disregard the assigned error pursuant to App.R. 12(A)(2)).

Ineffective Assistance of Counsel

{¶ 33} In his third assignment of error, Johnstone argues that his trial counsel was ineffective for failing to offer expert testimony on eyewitness identification. But having already found that the jury would have convicted

Johnstone absent the identification testimony, we cannot say that his counsel was either deficient for not having an expert or that Johnstone was prejudiced by the same. Thus, Johnstone fails to satisfy either prong of *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, to establish a claim for ineffective assistance of counsel. The third assignment of error is overruled.

Manifest Weight of the Evidence

{¶ 34} In his remaining four assignments of error, Johnstone challenges his convictions as being against the manifest weight of the evidence. We disagree.

{¶ 35} "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541. When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Id. at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

{¶ 36} Johnstone challenges his first three convictions, i.e., aggravated robbery, kidnapping, and felonious assault, as being against the manifest weight of the evidence on the grounds that the victim's identification testimony was not reliable or believable. But, as discussed under the first assignment of error, even without the identification testimony, we find that

the jury would have still convicted Johnstone. And we cannot say that such convictions are against the weight of the evidence. Indeed, Chbani's testimony established that both perpetrators pulled out weapons and threatened him. The DNA evidence recovered from the cigarette butt directly placed Johnstone in the taxicab at the time of the incident.

{¶ 37} As for Johnstone's claim that the absence of his DNA on the empty coffee cup exonerates him, we disagree. At best, an argument could be made that Johnstone was not the one that Chbani handed the empty coffee cup to; instead, Johnstone was the one seated directly behind him. But the DNA of the unknown male further corroborates Chbani's story that there were two perpetrators in the taxi. And even if Johnstone was not the principal offender, Chbani's testimony established that the two perpetrators, both armed with weapons, schemed and worked together in the commission of the offenses. Therefore, the jury could have found him guilty under the complicity charge given for aiding and abetting.

{¶ 38} In his last assignment of error, Johnstone argues that the victim contradicted himself as to whether Johnstone possessed a firearm or a knife and therefore his conviction for felonious assault under R.C. 2903.11(A)(2), specifying a firearm, cannot stand. Here, Chbani testified that he was "hit with the back of a gun," which the jury obviously found to be credible. And the photographs of

Chbani's injuries support this assertion. Therefore, based on the evidence in the record, we cannot say that the jury lost its way.

{¶ 39} The final four assignments of error are 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.

MARY J. BOYLE, JUDGE

ANN DYKE, P.J., and
LARRY A. JONES, J., CONCUR IN JUDGMENT ONLY