

[Cite as *State v. Hayes*, 2010-Ohio-5234.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93785

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JASON HAYES

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-523425

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

RELEASED AND JOURNALIZED: October 28, 2010

ATTORNEY FOR APPELLANT

Kimberly K. Yoder
Kimberly K. Yoder., LPA
1236 Smith Court
Rocky River, Ohio 44116

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: John Hanley
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Jason Hayes (“Hayes”), appeals his convictions for aggravated robbery and having weapons while under disability. Finding no merit to the appeal, we affirm.

{¶ 2} In 2009, Hayes was charged with aggravated robbery with one- and three-year firearm specifications, having weapons while under disability, and possession of criminal tools. He pled not guilty and the matter proceeded to a jury trial.

{¶ 3} The following pertinent evidence was adduced at trial.

{¶ 4} In April 2009, Emily Lipham (“Lipham”) was walking home from Johnny Malloy’s bar in Cleveland Heights at 11:20 p.m. While cutting through a parking lot, she noticed a man walking with a hood on. After walking a little further, Lipham looked back towards the man and saw him crossing the street towards her. The man, later identified by Lipham as Hayes, started to jog towards her. Lipham had reached her apartment building and tried to open the door. Hayes flung the door to the building open, put a gun to Lipham’s head, and told her to give him her purse. Lipham complied and Hayes fled towards Mayfield Road.

{¶ 5} Lipham called 911 and the police responded to the scene. Lipham was able to describe Hayes as 5'10" or 5'11", 160 to 170 pounds, a black male with a medium complexion, slanted eyes that were “taut,” and in his early 20’s. She stated he was wearing a gray coat with a fur-lined collar. She further testified that she had grown up with an art background and draws people’s faces as a hobby, so she is used to taking special notice of facial characteristics.

{¶ 6} The next day, the police recovered Lipham’s purse behind an apartment building on Mayfield Road. The police detained Hayes in connection with the robbery and put together a photo array. A few days after the robbery, Lipham went to the police station to see if she could identify her assailant from a photo array. Lipham looked at the pictures and then took two pieces of paper to cover up the parts of the faces in the array that she testified the gunman had covered the night of the robbery. She immediately picked out Hayes. She also

chose him out of a lineup at the police station, noting that Hayes had the same “stoop” in the way he turned as the man who attacked her.

{¶ 7} The investigating detective interviewed Hayes, who denied involvement in the robbery. Hayes told police he was staying at a local motel. Police verified that Hayes had rented a room at the motel for that evening and Hayes’s girlfriend testified that she picked Hayes up from the hotel between 6 and 8 p.m. and that Hayes was with her the entire evening. Defense also called the manager of a local pizza place who contradicted the girlfriend’s testimony by testifying that a pizza was delivered to Hayes’s room about 9:45 or 10 p.m. that evening.

{¶ 8} The jury convicted Hayes of aggravated robbery with the firearm specifications and the court convicted Hayes of having weapons while under disability. The court also merged the possession of criminal tools charge into the weapons charge. The court sentenced Hayes to a total of ten years in prison.

{¶ 9} Hayes now appeals, raising the following three assignments of error for our review:

“I. The trial court erred in denying the defendant’s motion for acquittal pursuant to Criminal Rule 29, as the record did not contain sufficient evidence to support defendant’s conviction.

“II. Defendant’s conviction was against the manifest weight of the evidence.

“III. Defendant was denied the effective assistance of counsel.”

Sufficiency and Manifest Weight of the Evidence

{¶ 10} We address these first two assignments of error together because, although the standards of review differ, they involve the same evidence.

{¶ 11} When an appellate court reviews a record upon a sufficiency challenge, “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. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶77, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 12} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether “there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” (Internal quotes and citations omitted.) *Leonard* at ¶81.

{¶ 13} Hayes asserts that there was insufficient evidence to show that he committed the robbery or that he used an operable gun during the robbery. He further argues that the victim’s identification that he was the perpetrator is unreliable, that there was no physical evidence linking him to the crime, and that the lineup was unduly suggestive and prejudicial.

{¶ 14} Hayes was convicted of aggravated robbery, in violation of R.C. 2911.01(A)(1), which states, in pertinent part:

“(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:

“(1) Have a deadly weapon on or about the offender’s person or under the offender’s control and either display the weapon, brandish it, indicate that the offender possesses it, or use it; * * *.”

{¶ 15} The jury also convicted Hayes of the one- and three-year firearm specifications pursuant to R.C. 2941.141(A) and R.C. 2941.145(A), respectively. R.C. 2941.141(A) mandates a court to sentence an offender to an additional year in prison if he is found to have a firearm on or about his person or under his control while committing the offense. R.C. 2941.145(A) mandates a court to sentence an offender to an additional three years in prison if an offender violates R.C. 2941.141(A) and displays, brandishes, indicates he possesses the firearm, or uses it to facilitate the offense.

{¶ 16} Hayes argues that there was insufficient evidence that he was the gunman because the only testimony to substantiate the state’s claims was the victim’s testimony. In addition, he claims the state failed to show the gun was operable. We disagree.

{¶ 17} A firearm is “any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant.” R.C. 2923.11(B)(1). It includes “an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable.” *Id.* Concerning

operability, “the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm.” R.C. 2923.11(B)(2).

{¶ 18} “The [s]tate can prove that the weapon was operable or could readily have been rendered operable at the time of the offense in a variety of ways without admitting the firearm allegedly employed in the crime into evidence.” *State v. Gains* (1989), 46 Ohio St.3d 65, 545 N.E.2d 68, syllabus. In *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, the Ohio Supreme Court held that “the trier of fact may consider all relevant facts and circumstances surrounding the crime, which include any implicit threat made by the individual in control of the firearm” when determining whether a weapon was operable. *Id.* at paragraph one of the syllabus. The *Thompkins* court found a defendant could be convicted of a firearm specification when he told a clerk that he was committing a “holdup,” pointed a gun at the clerk, and told the clerk to be “quick, quick,” finding that these actions contained an implicit threat to discharge the weapon. *Id.* at 383-384, 678 N.E.2d 541.

{¶ 19} Since *Thompkins*, Ohio courts have routinely found sufficient evidence to support a firearm specification when the defendant brandished a firearm and implicitly threatened to fire it by pointing it at the victim. See *State v. Brooks*, Cuyahoga App. No. 92389, 2009-Ohio-5559; *State v. Robinson*, Cuyahoga App. No. 80718, 2003-Ohio-0156; *State v. Pierce*, Franklin App. Nos. 02AP-1133 and 02AP-1134, 2003-Ohio-4179; *State v. Macias*, Montgomery App. No. 1562, 2003-Ohio-1565.

{¶ 20} Lipham testified that she is familiar with guns because she grew up shooting them. She was able to describe the gun as a semiautomatic that was mostly black with a silver tip that protruded from the barrel. She further testified that she knew it was a semiautomatic gun versus a revolver because revolvers are all black. She testified that Hayes pointed the gun about six inches from her face and demanded her purse. Her testimony was corroborated by the police who recovered a gun matching that description in Hayes's flight path. Therefore, we find sufficient evidence that the gun Hayes used to facilitate the robbery was operable.

{¶ 21} We also find no merit to Hayes's argument that Lipham's testimony was not credible.¹ It was within the province of the jury to determine whether the eyewitness identification was sufficiently reliable and accurate to be worthy of belief. We do not find that there was insufficient evidence to support Hayes's convictions or that the jury lost their way in convicting Hayes.

{¶ 22} Therefore, we overrule the first and second assignments of error.

Ineffective Assistance of Counsel

{¶ 23} In the third assignment of error, Hayes argues that he received ineffective assistance of counsel. In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of the appellant's trial or legal proceeding would have been different had

¹Hayes specifically argues that the lineup was unduly suggestive. This claim is discussed under the third assignment of error.

defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407. “Judicial scrutiny of counsel’s performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel.” *State v. Carter*, 72 Ohio St.3d 545, 558, 1995-Ohio-104, 651 N.E.2d 965. Further, “trial counsel is entitled to a strong presumption that all decisions fell within the wide range of reasonable, professional assistance.” *State v. Sallie*, 81 Ohio St.3d 673, 675, 1998-Ohio-343, 693 N.E.2d 267, citing *State v. Thompson* (1987), 33 Ohio St.3d 1, 10, 514 N.E.2d 407; *State v. Mondie*, Cuyahoga App. No. 91668, 2009-Ohio-3070.

{¶ 24} Hayes argues that trial counsel was ineffective for failing to move to suppress eyewitness identification and for not hiring an expert to testify as to the “pitfalls” of eyewitness identification.

{¶ 25} As to the motion to suppress, “[f]ailing to file a motion to suppress does not constitute ineffective assistance of counsel per se. To establish ineffective assistance of counsel for failure to file a motion to suppress, a defendant must prove that there was a basis to suppress the evidence in question.” (Internal citations omitted.) *State v. Brown*, 115 Ohio St.3d 55, 68, 69, 2007-Ohio-4837, 873 N.E.2d 858.

{¶ 26} 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. Thompson*, Cuyahoga App. No. 90606, 2009-Ohio-615, ¶32, citing *State v. Page*, Cuyahoga App. 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.

{¶ 27} 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.*

{¶ 28} Lipham testified that she saw Hayes for approximately thirty seconds while he was robbing her. It was dark outside, but she testified the vestibule of her building where the robbery occurred was lit by three lights. She stated she got a good look at him and was paying attention to his facial characteristics. Lipham gave police a very detailed description of Hayes and identified him in a lineup three days after the crime. Lipham testified that she was sure he was her assailant based on his eyes when she viewed the photo lineup.

{¶ 29} Lipham testified that she wanted to make sure that her identification was correct so she asked to see another picture of Hayes because she thought her assailant's skin tone looked lighter in the photo array than the man who assailed her. Once Lipham saw the other photo, she was further convinced Hayes was the man who robbed her. She then asked if she could see him in person "so I could look at his stature and see if he was the same height and overall size." Lipham then chose Hayes out of a in-person lineup and was able to describe his stature.

{¶ 30} The police detective testified how the department's data processing department created the photo lineup for him based on his request for five similar photographs and that he reviewed the photos before he showed them to Lipham to ensure the men were similar looking.

{¶ 31} Based on the foregoing evidence, we find that Hayes is unable to show that the identification procedures were unduly suggestive; therefore, we will not find that counsel was ineffective for failing to file a motion to suppress.

{¶ 32} As to his second claim, that counsel should have called an expert in the field of eyewitness identification, the Ohio Supreme Court has held "the failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel." *State v. Nicholas* (1993), 66 Ohio St.3d 431, 436, 613 N.E.2d 225. Furthermore, in *State v. Day* (Feb. 21, 2002), Cuyahoga App. No. 79368, this court held that failure to call "an expert in eyewitness identification was well within the standard of reasonable trial tactics" and did not amount to ineffective assistance of counsel. Counsel's decision to not call an

expert on eyewitness identification was not flawed or deficient, as the testimony may not have been admissible. See *State v. Buell* (1986), 22 Ohio St.3d, 124, 489 N.E.2d 795. Additionally, Hayes did not show that he would have been found not guilty had an expert witness been called to testify.

{¶ 33} Finally, Hayes maintains that counsel failed to call a witness to corroborate his alibi. But defense counsel called two witnesses in an attempt to bolster Hayes's alibi. Defense counsel cannot be faulted because two witnesses' testimony contradicted one another.

{¶ 34} We find that Hayes fails both prongs of the *Strickland* test. Therefore, the third assignment of error is overruled.

Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's 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
MELODY J. STEWART, J., CONCUR