[Cite as *State v. Gaines*, 2016-Ohio-1312.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2015-T-0061**
- vs -	:	
KEVIN ANTHONY GAINES,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas.
Case No. 2014 CR 00999.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, 112 South Water Street, Suite C, Kent, OH 44240 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Kevin Anthony Gaines, appeals from the May 19, 2015 judgment of the Trumbull County Court of Common Pleas, convicting him on two counts of felonious assault with firearm specifications, following a bench trial. At issue is whether appellant's trial counsel was ineffective and whether the convictions were against the manifest weight of the evidence. For the reasons that follow, the judgment of the trial court is affirmed.

{¶2} This case stems from an incident that occurred at Highland Homes in Warren, Ohio around midnight on December 13, 2014. Appellant did not present a case in chief. The following relevant facts are taken from testimony presented by two police officers, the two victims, and one other witness in behalf of the prosecution.

{¶3} Marquel Baker was driving his vehicle, and Tegan Mason was in the front passenger seat. Earlier that day, they had attended the wedding of Marquel's brother and Tegan's best friend. Tegan is from the Cleveland area. Marquel grew up in Warren, but currently lives in Niles. They were now giving a ride to Desmond Coker, who was seated in the back seat, to an apartment complex in Highland Homes. Upon arriving, Desmond determined the people he wanted to visit were not home, and the trio attempted to leave the parking lot of the apartment complex. Marquel turned the wrong way out of the parking lot and soon realized they were approaching a dead-end. As Marquel maneuvered the car to turn around, a man approached the vehicle with a firearm. After the incident, the assailant was described by the victims as a black man with dreadlocks who was wearing a black hoodie with red lettering. The assailant opened the driver's door and began verbally harassing and threatening the occupants for approximately ten minutes: he questioned who they were and made derogatory references to Marquel, a black man, being with Tegan, a white woman. The assailant then recognized Desmond, who was in the back seat, and ordered him to get out of the car. After Desmond exited the vehicle, Marquel sped away, and the assailant opened fire on the vehicle. The rear window was shattered, and the left brake light was damaged. Marquel and Tegan were approaching a nearby intersection when they realized Marquel had been shot. Marquel parked the vehicle at the stop sign, and

Tegan called 911. Tegan tried to keep Marquel conscious and applied pressure to the badly bleeding wounds on Marquel's back. Marquel was transported to the hospital by ambulance.

{¶4} Shortly thereafter, friends and family met Tegan at the hospital while Marquel was treated for his gunshot wounds. Tegan described the assailant to those waiting with her and indicated the assailant knew Desmond. Marquel's brother looked through Desmond's "friends" on Facebook and showed Tegan a profile picture of a man with the name "Kjango Gaines." Tegan recognized him as the assailant and stated he was wearing the same black hoodie with red lettering in the picture. Marquel later recognized "Kjango" as the assailant, appellant herein, someone with whom he had attended middle school.

{¶5} Tegan voluntarily appeared at the Warren City Police Department with appellant's name and description; she told Detective Wayne Mackey that she had identified him from his Facebook profile picture. Detective Mackey viewed appellant's profile picture on Facebook; he also knew appellant as the victim of another shooting incident that had taken place at Highland Homes that previous summer. Detective Mackey obtained a photo of appellant from the department's internal system and assembled a photo array that included six, light-skinned black men with similar features as appellant but with various hairstyles. Another officer, Detective Mackey's sergeant, presented the photo array to the victims. Detective Mackey was not present in the room, and the sergeant did not know appellant was the suspect. Both Marquel and Tegan separately identified the photo of appellant as their assailant and indicated they were 100% certain of their identifications.

{¶6} Another resident of Highland Homes testified that he heard five to six gunshots on the night of December 13, 2014, and observed a black male run behind his apartment complex, disappear into the woods with a firearm, and then reappear without the firearm. He also testified the man was wearing a black hoodie with red lettering.

{¶7} At this time, appellant was staying with his girlfriend at her apartment in Warren. The U.S. Marshals had an active warrant out for appellant, which they acted upon before Detective Mackey arrived at the apartment. The U.S. Marshals had to remove appellant from the apartment because he was uncooperative and refused to speak with Warren Police about the December 13 incident. His girlfriend was present at the apartment, and Detective Mackey conducted a search. Among other items, he confiscated a hoodie that matched the description provided by Marquel and Tegan and matched the one appellant was wearing in his profile picture. The firearm was never recovered, and no physical evidence was found at the scene in Highland Homes. All physical evidence was obtained from Marquel's vehicle and the apartment at which appellant resided.

{¶8} On January 2, 2015, appellant was indicted on two counts of felonious assault in violation of R.C. 2903.11(A)(2). Both counts were second-degree felonies, as provided in R.C. 2903.11(D)(1)(a), with firearm specifications under R.C. 2941.145. Appellant pled not guilty, and the case was tried to the bench.

{¶9} Appellant was found guilty on both counts of felonious assault. He was sentenced to eight years in prison on each count, to be served concurrently with each other. The firearm specifications merged, for which appellant was sentenced to a mandatory prison term of three years. The three-year sentence on the firearm

specifications was to be served consecutive to the underlying eight-year sentence, resulting in an aggregate prison term of eleven years.

{¶10} Appellant timely appealed and assigns two errors for our review:

{¶11} "[1.] Appellant received ineffective assistance of trial counsel.

{¶12} "[2.] Appellant's convictions are against the manifest weight of the evidence."

{¶13} Under his first assignment of error, appellant argues he received ineffective assistance because his trial counsel failed to file a motion to suppress the out-of-court identifications made by the victims.

{¶14} In order to prevail on an ineffective assistance of counsel claim, an appellant must demonstrate that trial counsel's performance fell "below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance." *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus (adopting the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)). There is a general presumption that trial counsel's conduct is within the broad range of professional assistance, *id.* at 142, and debatable trial tactics do not generally constitute deficient performance. *State v. Phillips*, 74 Ohio St.3d 72, 85 (1995). In order to show prejudice, the appellant must demonstrate a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Bradley*, *supra*, at paragraph three of the syllabus.

{¶15} "The Sixth Amendment does not require counsel to pursue a motion to suppress in every case. However, the failure to file a motion to suppress can constitute ineffective assistance of counsel if the motion implicates matters critical to the defense

and if the failure results in prejudice." *State v. Bell*, 11th Dist. Lake No. 2015-L-017, 2015-Ohio-4775, ¶48 (internal citations omitted).

{¶16} Appellant first asserts that trial counsel should have filed a motion to suppress the out-of-court identifications because they were tainted by the victims initially identifying him from his Facebook profile picture.

{¶17} The United States Supreme Court has held that "the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances *arranged by law enforcement*." *Perry v. New Hampshire*, 132 S.Ct. 716, 730 (U.S. 2012) (emphasis added).

> In other words, if there is no showing that police employed an unduly suggestive procedure to obtain an identification, the unreliability of the identification alone will not preclude its use as evidence at trial. Instead, such unreliability should be exposed through the rigors of cross-examination.

State v. Mitchell, 5th Dist. Stark No. 2013CA00030, 2013-Ohio-3696, ¶26, citing *Perry*, *supra*, at 728-730. *See also Bell*, *supra*, at ¶44 (holding that when the facts do not reveal state action or police misconduct, the alleged suggestiveness of an identification goes to the weight and reliability of testimony rather than admissibility).

{¶18} Here, appellant's Facebook photo was not provided to the victims by law enforcement and was not used in the photo array. Thus, the identification of appellant through the Facebook photo was not subject to suppression. This argument is not well taken.

{¶19} Next, appellant asserts trial counsel should have filed a motion to suppress because appellant was the only man with dreadlocks in the photo array

presented to the victims. Thus, appellant argues, the photo array was unduly suggestive.

{¶20} "When a witness has been confronted with a suspect before trial, due process requires a court to suppress her identification of the suspect if the confrontation was unnecessarily suggestive of the suspect's guilt *and* the identification was unreliable *under all the circumstances*." *State v. Waddy*, 63 Ohio St.3d 424, 438 (1992) (emphasis added). "[T]he primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.'" *Neil v. Biggers*, 409 U.S. 188, 198 (1972), quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968).

{¶21} "Photographic displays have been held not unduly suggestive even when certain characteristics of the defendant or his photograph are set apart from others." *State v. Conroy*, 8th Dist. Cuyahoga No. 72987, 1998 Ohio App. LEXIS 4475, *10-11 (Sept. 24, 1998), citing, inter alia, *United States v. Maguire*, 918 F.2d 254, 265 (1st Cir.1990) (reviewing cases rejecting the argument of impermissible subjectivity in photo arrays because only the defendant had dreadlocks and hair covering; was wearing an earring; or had a beard and braids).

{¶22} Tegan provided a description of her assailant to Detective Mackey, which included that he had dreadlocks. Detective Mackey, a white man, testified that he believed all six photos in the array were of men with varying lengths of dreadlocks or braids. Appellant's trial counsel elicited testimony from Marquel, a black man, indicating the other five hairstyles in the photo array were not actually dreadlocks. Rather, one man had a short "afro," one had "twisties," and three had "braids." The defense tactic was to suggest the photo array was unduly suggestive due to the officer's lack of

knowledge regarding appropriate terminology for hairstyles in the African-American community.

{¶23} The photo array depicted six light-skinned males of roughly the same build and age. While only appellant had what some would consider "true" dreadlocks, that fact alone did not make the array unduly suggestive. Under the totality of the circumstances, appellant has failed to show that the identifications were inherently unreliable. The length of time the assailant spent taunting the victims at the open car door gave the witnesses ample time in which to identify appellant. Marquel testified that the interior light came on when the assailant opened the car door, and Tegan testified she focused on the assailant's face because she was afraid to look at the firearm. Both victims gave similar physical descriptions of the assailant, and both identified appellant's photo quickly, independently, and with 100% certainty. This argument is not well taken.

{¶24} Appellant further asserts that the out-of-court identification tainted the in-court identification. In determining whether a pretrial identification is unreasonably suggestive as to create a likelihood of in-court misidentification, the following factors should be considered: "(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 at the confrontation, and (5) the length of time between the crime and the confrontation." *State v. Broom*, 40 Ohio St.3d 277, 284 (1988), citing *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *see also Biggers*, *supra*, at 196. For the reasons stated above regarding the inherent reliability of the out-of-court identifications, this argument is not well taken.

{¶25} Finally, appellant asserts in his reply brief that trial counsel was ineffective for not filing a motion to suppress because the police officers did not comply with the statutory requirements of R.C. 2933.83.

{¶26} "R.C. 2933.83(B) requires any law enforcement agency or criminal justice entity that conducts live lineups and photo lineups to adopt specific procedures for conducting the lineups." *State v. Ruff*, 1st Dist. Hamilton No. C-110250, 2012-Ohio-1910, ¶5. At a minimum, unless impracticable, the procedures must include using "a blind or blinded administrator." R.C. 2933.83(B)(1). "'Blind administrator' means the administrator does not know the identity of the suspect." R.C. 2933.83(A)(2).

{¶27} Here, the officers did use a "blind administrator." Detective Mackey testified that he put together the photo array, which included appellant's photo. He then gave the array to his sergeant, did not indicate which photo was the suspect or even whether the suspect was included, and the sergeant administered the photo array to both victims outside of Detective Mackey's presence.

{¶28} Appellant has not directed us to anything else in support of his argument that the officers violated R.C. 2933.83. We further note that the remedy for a violation of R.C. 2933.83 is cross-examination at trial, not suppression of the identification. *Ruff*, *supra*, at ¶7-8, applying *Kettering v. Hollen*, 64 Ohio St.2d 232, 235 (1980). This argument is not well taken.

{¶29} We do not find trial counsel's failure to file a motion to suppress fell below an objective standard of reasonable representation. Further, appellant has not demonstrated a reasonable probability that the outcome of the trial would have been

different if a motion to suppress had been filed or that the trial court would have granted a motion to suppress.

{¶30} Appellant's first assignment of error is without merit.

{¶31} Under his second assignment of error, appellant argues his convictions were against the manifest weight of the evidence because the evidence presented against him was internally inconsistent and illogical and because there was no physical evidence found at the scene. We disagree.

{¶32} To determine whether a verdict is against the manifest weight of the evidence, a reviewing court must consider the weight of the evidence, including the credibility of the witnesses and all reasonable inferences, to determine whether the trier of fact "'lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). In weighing the evidence submitted at a criminal trial, an appellate court must defer to the factual findings of the trier of fact regarding the weight to be given to the evidence and credibility of the witnesses. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus.

{¶33} The state presented two eyewitnesses who both made a reliable identification of appellant as the assailant. Appellant did not present any evidence at trial, including an alibi for the time of the assault. He now relies on disputed facts, most of them irrelevant to the assault, that do not overcome the weight of the evidence presented against him at trial.

{¶34} Upon review of the evidence outlined above, we find that the trier of fact did not lose its way or create a manifest miscarriage of justice by finding appellant guilty of two counts of felonious assault. The convictions are supported by the manifest weight of the evidence.

{¶35} Appellant's second assignment of error is without merit.

{¶36} The judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.