[Cite as *State v. Patterson*, 2010-Ohio-2988.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- BRANDON PATTERSON Defendant-Appellant	JUDGES: Hon. Julie A. Edwards, P.J. Hon. Sheila G. Farmer, J. Hon. Patricia A. Delaney, J. Case No. 2009CA00142 O P I N I O N
CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2009CR0136
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 28, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO Stark County Prosecutor By: RENEE M. WATSON Assistant Prosecuting Attorney 110 Central Plaza South Suite 510 Canton, OH 44702-1413	GEORGE URBAN 111 Second Street, NW Suite 302 Canton, OH 44702

Farmer, J.

{¶1} On March 11, 2009, the Stark County Grand Jury indicted appellant, Brandon Patterson, on one count of attempted murder in violation of R.C. 2923.02(A) and 2903.02(B) with a firearm specification, two counts of felonious assault in violation of R.C. 2903.11 with a firearm specification, and one count of having a weapon while under a disability in violation of R.C. 2923.13. Said charges arose from an altercation at a party wherein Dominic Maddox was grazed by a bullet and Arthur Alston was shot.

{¶2} On April 3, 2009, appellant filed a motion to suppress his identification via a photo array. A hearing was held on April 15, 2009. The trial court denied the motion.

{¶3} A jury trial commenced on April 29, 2009. The jury found appellant guilty as charged. By judgment entry filed May 19, 2009, the trial court sentenced appellant to an aggregate term of twenty years in prison.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE TRIAL COURT'S FINDING OF GUILT IS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

II

{¶6} "APPELLANT WAS DENIED HIS RIGHTS TO DUE PROCESS AND OF ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE."

III

{¶7} "THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE UNECESSARILY (SIC) SUGGESTIVE PHOTOGRAPH IDENTIFICATION LINE UP."

IV

{¶8} "THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL SUA SPONTE WHEN TESTIMONY WAS PRESENTED IN VIOLATION OF THE APPELLANT'S FIFTH AMENDMENT RIGHTS."

I

{¶9} Appellant claims his convictions were against the sufficiency and manifest weight of the evidence. We disagree.

{¶10} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. "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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307. On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, 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." *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be

exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶11} Appellant was convicted of attempted murder in violation of R.C. 2923.02(A) and R.C. 2903.02(B) which state the following:

{¶12} "[R.C. 2923.02(A)] No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.

{¶13} "[R.C. 2903.02(B)] No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code."

{¶14} Appellant was also convicted of felonious assault in violation of R.C. 2903.11(A)(1) and (A)(2) and having weapons under a disability in violation of R.C. 2923.13(A)(3) which state the following, respectively:

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

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

{¶17} "(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

{¶18} "(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

{¶19} "(3) The person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or

trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse."

{¶20} Appellant argues there was insufficient evidence to establish that he shot at Mr. Alston and Mr. Maddox, and the discrepancies in the testimony of the witnesses were of such a nature that the jury erred in finding him guilty.

{¶21} It is uncontested that during the party, Mr. Alston was shot in the back and was seriously injured resulting in paralysis, and Mr. Maddox was grazed by a bullet resulting in wounds and scars. T. at 138, 140, 188-189, 197. Both men were shot at the same time by the same person.

{¶22} Canton Police Detective Victor George interviewed the witnesses and determined a partygoer, Benjamin Blackwell, was not intoxicated, but the party host, Zachary Graham, was. T. at 325-326.

{¶23} The incident began at a party at Mr. Graham's residence where Mr. Maddox and Mr. Alston, along with another individual, Justin Flinger, arrived after midnight. T. at 133-134, 179. All three individuals were African-Americans, and the party was predominately young, Caucasian adults. T. at 134, 210, 212. Everyone became aware of a commotion in the kitchen and all went to the kitchen to see what was happening. T. at 136, 184, 212, 243. Mr. Blackwell testified the kitchen was "full to its capacity of people," and he observed Mr. Alston involved in a disturbance with appellant. T. at 244, 246-247. An attempt was made to break up the disturbance. T. at 137, 186, 213. Thereafter, shots rang out and Mr. Alston was shot in the back and fell

to the floor and Mr. Maddox was grazed by a bullet. T. at 138, 188. Of all the witnesses that testified, no one but Mr. Blackwell saw who the shooter was, and he identified appellant as the shooter. T. at 248, 256; State's Exhibit 1. Mr. Blackwell testified he observed appellant with a revolver, saw him pull it out, and shoot Mr. Alston. T. at 246-250. Mr. Blackwell stated he was within two feet of appellant, "I could have reached out and touched the gun." T at 250. Mr. Alston and Mr. Maddox identified appellant via a photo array as the person who had the firearm in the kitchen. T. at 142, 154-155, 199-200.

{¶24} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881. The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger,* 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶25} There was some testimony that was confusing regarding two firearms, one pointing at the ceiling, and the direction of the shots. T. at 213, 215, 217-218, 224, However, Mr. Blackwell's testimony was not inconsistent with this testimony, and his testimony had greater weight because he witnessed the entire incident and he was not intoxicated.

{¶26} Upon review, we find the testimony given by Mr. Blackwell, if believed, was sufficient to convict appellant. We find no manifest miscarriage of justice.

{¶27} Assignment of Error I is denied.

II, IV

{¶28} Appellant claims he was denied effective assistance of trial counsel for counsel's failure to file a motion to suppress his custodial statements made without the benefit of adequate *Miranda* warnings, and failure to move for a mistrial after Detective George commented on appellant's assertion of his right to remain silent. Appellant also claims the trial court erred in not sua sponte ordering a mistrial over the issue.

{¶29} The standard this issue must be measured against is set out in *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011. Appellant must establish the following:

{¶30} "2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

{¶31} "3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

{¶32} Appellant argues on cross-examination, Detective George erroneously commented on appellant's assertion of his right to remain silent as follows:

{¶33} "Q. Basically, Officer, was your investigation over about a week after this incident?

{¶34} "A. At that time when I issued the warrants, we had enough probable cause to believe that Mr. Patterson was the person who caused this incident, so we had enough at that time to issue warrants.

{¶35} "Now, I gave Mr. Patterson an opportunity to talk to me down in Texas and he declined." T. at 353-354.

{¶36} Appellant argues his trial counsel should have moved for a mistrial, and the trial court erred in not sua sponte declaring one. Defense counsel had filed a motion in limine on the issue which the trial court granted. Clearly defense counsel was correct in requesting the motion in limine and was successful in his request. Detective George's non-responsive answer cannot be attributed to defense counsel. However, defense counsel did not move for a mistrial or request a cautionary instruction. We acknowledge at times it's good trial strategy to not emphasize an error with objections and cautionary instructions.

{¶37} Under the second prong of *Bradley,* we fail to find the outcome of the trial would have been any different had the comment not been made. As we indicated in Assignment of Error I, there was sufficient credible evidence to support appellant's conviction via Mr. Blackwell's testimony.

{¶38} Appellant further argues his trial counsel should have filed a motion to suppress his statements made in route from Texas to Ohio while in police custody. Specifically, appellant complains of the following testimony elicited from Detective George:

{¶39} "Q. Finally, when you went down to Corpus Christy (sic), Texas, did you learn any information which led you to believe that this Defendant knew that there was an outstanding warrant for his arrest?

{¶40} "A. In speaking with him in general conversation on the way back, I had asked him why he chose to go to Texas, and he said he wanted to go down there and get a job to make enough money so he didn't have to have a Public Defender defend him." T. at 358.

{¶41} As stated by this court in *State v. Cline,* Licking App. No. 09CA52, 2009-Ohio-6208, at ¶19:

{¶42} "The failure to file a suppression motion does not constitute per se ineffective assistance of counsel. *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305. Failure to file a motion to suppress constitutes ineffective assistance of counsel only if, based on the record, the motion would have been granted. *State v. Butcher,* Holmes App.No. 03 CA 4, 2004-Ohio-5572, ¶ 26, citing *State v. Robinson* (1996), 108 Ohio App.3d 428, 433, 670 N.E.2d 1077."

{¶43} Appellant argues the statements "were made without benefit of an adequate waiver of Miranda warning." Appellant's Brief at 19. Appellant acknowledges the "record is devoid of testimony regarding this issue." Id. Based upon the record, there is no indication that the motion would have been granted.

{¶44} Assignment of Error II is denied. Assignment of Error IV is denied as there is sufficient evidence to substantiate the verdict and no indication of any under prejudice to appellant.

III

{¶45} Appellant claims the trial court erred in denying his motion to suppress the photo array because it was unnecessarily suggestive. We disagree.

{¶46} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19; *State v. Klein* (1991), 73 Ohio App.3d 485; *State v. Guysinger* (1993), 86 Ohio App.3d 592. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *State v. Williams* (1993), 86 Ohio App.3d 37. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93; *State v. Claytor* (1993), 85 Ohio App.3d 623; *Guysinger*. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 116 S.Ct. 1657, 1663, "…as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

{¶47} Appellant argues the photo identification process was unduly suggestive because Detective George, in conducting the photo array, advised the witnesses that

the suspect was in the array. April 15, 2009 T. at 16-17; 27. This is Detective George's standard protocol. Mr. Alston, Mr. Maddox, and Mr. Blackwell all identified appellant and did not know him prior to the incident. Id. at 18-21, 25, 39, 41. Right after surgery, Mr. Alston was shown the photo array and he was unable to identify anyone. Id. at 23. However, approximately five months later, Mr. Alston reviewed the same array and identified appellant. Id. at 24-25.

{¶48} "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.

{¶49} "***

{¶50} "Since the identification procedure used with Jackson was unnecessarily suggestive, we must apply the second part of the *Neil* [*v. Biggers* (1972), 409 U.S. 188] test. The question is whether, under all the circumstances, the identification was reliable, *i.e.,* whether suggestive procedures created 'a very substantial likelihood of irreparable misidentification.'***Key factors are the witness's opportunity to view (in the case of a voice identification, to hear) the defendant during the crime, the witness's degree of attention, the accuracy of the witness's prior description of the suspect, the witness's certainty, and the time elapsed between the crime and the identification." *State v. Waddy* (1992), 63 Ohio St.3d 424, 438-439.

{¶51} The trial court engaged in the following with Detective George:

{¶52} "THE COURT: All right. Now, as to the protocol. I think I have heard it a couple different ways, and I just want to make sure that the record is accurate.

{¶53} "Because I made a note of it in response to a question earlier, there was some I thought indication made by you that when the lineup was shown to these individuals, at least in the case of Ben Blackwell, that there was a statement that the suspect was in the lineup and could he pick him out.

{¶54} "WITNESS GEORGE: If I made that statement, that's not what I meant.

{¶55} "Whenever I show a photo lineup, usually the statement comes out of my mouth is see if you can see the person that you saw that night at the party that had the firearm.

{¶56} "THE COURT: All right. So you are saying that at least as a matter of protocol you do not affirmatively state that the individual is in fact in the photo lineup?

{¶57} "WITNESS GEORGE: No, I do not; but I have never showed a photo lineup that did not have a suspect in it. I don't see the purpose of that." April 15, 2009 T. at 41-42.

{¶58} At the conclusion of the hearing, the trial court denied the motion to suppress, stating the following:

{¶59} "This individual indicates that he normally indicates to them can you pick out the photograph of the suspect, but being an indication that the suspect would be there.

{¶60} "So the question is, is that in and of itself sufficient to taint the entire identification process?

{¶61} "This Court finds that, while it is preferable to do it as indicated, it is not something that violates his rights.

{¶62} "It is not so unnecessarily suggestive as to taint the process to exclude the identifications but goes to the weight of the identification which can be argued at the trial, that it is not an absolute requirement but something that certainly would be preferable." Id. at 49-50.

{¶63} Neither the trial court nor appellant can point to any definite case in point. It goes without saying that a photo array is always made up of potential suspects. It is not simply drawn out of the air, but is generally based on identification of a specific person or on a specific physical description; otherwise there would be no purpose.

{¶64} Upon review, we find the trial court did not err in denying appellant's motion to suppress.

{¶65} Assignment of Error III is denied.

{¶66} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, J.

Edwards, P.J. and

Delaney, J. concur.

_s/ Sheila G. Farmer_____

_s/ Julie A. Edwards_____

_s/ Patricia A. Delaney_____

JUDGES

SGF/sg 0518

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
BRANDON PATTERSON	:	
Defendant-Appellant	:	CASE NO. 2009CA00142

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed. Costs to appellant.

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ Patricia A. Delaney

JUDGES