

HALL, J.

{¶ 1} Shawn D. Smith appeals from his conviction and sentence on one count of aggravated robbery (deadly weapon), one count of robbery (physical harm), and one count of engaging in a pattern of corrupt activity.

{¶ 2} Smith advances four assignments of error. First, he contends his robbery conviction must be reversed pursuant to *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917. Second, he asserts that the trial court erred in failing to timely rule on his motion to suppress photo-identification evidence or, alternatively, that his attorney provided ineffective assistance by failing to object to trial testimony about the identification. Third, he claims the trial court erred when it ultimately did overrule his motion to suppress the photo-identification evidence. Fourth, he argues that his conviction for engaging in a pattern of corrupt activity cannot stand if we reverse his robbery or aggravated robbery conviction.

{¶ 3} The present case has an atypical history. Smith originally was indicted on one count of aggravated robbery (deadly weapon) and one count of robbery. He subsequently was re-indicted on two additional counts of aggravated robbery (deadly weapon), one count of identity fraud, one count of engaging in a pattern of corrupt activity, and firearm specifications. The above-captioned case then was consolidated with another case against Smith (case number 2006-CR-2300) for trial. The charges against him in case number 2006-CR-2300 included two counts of aggravated robbery, one count of felonious assault, and one count of receiving stolen property. The jury found Smith guilty of all charges in case number 2006-CR-2300. In the above-captioned case (case number 2006-CR-2323), the jury found Smith guilty of robbery and aggravated robbery, as

charged in the original indictment, and engaging in a pattern of corrupt activity, as charged in the second indictment. With regard to the other three charges, the trial court declared a mistrial as to an aggravated-robbery charge, and no disposition was journalized for the other two charges, which were aggravated robbery and identity fraud. After Smith was sentenced, he filed a direct appeal in both cases.

{¶ 4} This court consolidated the appeals and reversed Smith's robbery conviction in case number 2006-CR-2323. We remanded for resentencing in that case. We implicitly affirmed Smith's convictions in case number 2006-CR-2300. *See State v. Smith*, 2d Dist. Montgomery Nos. 22041, 22042, 2009-Ohio-5047. The trial court held a new sentencing hearing in case number 2006-CR-2323 and resentedenced Smith, who again appealed. In *State v. Smith*, 2d Dist. Montgomery No. 24553, 2012-Ohio-5920, we affirmed the new judgment in case number 2006-CR-2323. Thereafter, Smith moved to vacate all of our opinions and appellate judgments in case numbers 2006-CR-2300 and 2006-CR-2323 on the basis that the trial court's underlying judgments of conviction were not final, appealable orders because the mistrial charge and others in case 2006-CR-2323 were not addressed in that case's sentencing entry.

{¶ 5} In a November 14, 2016 decision and entry, we overruled Smith's motion as it pertained to case number 2006-CR-2300. We granted the motion, however, with regard to case number 2006-CR-2323. We noted the absence of any indication that a retrial or dismissal had occurred on the charge for which a mistrial had been granted. We also found no entry indicating disposition of an aggravated robbery charge or an identity-fraud charge. Because three counts of the indictment in the above-captioned case remained pending, we held that the trial court's original January 2007 judgment entry remained

interlocutory and was not appealable. As a result, we found our prior appellate judgments in Smith's case void insofar as they pertained to case number 2006-CR-2323. The trial court subsequently filed a judgment entry disposing of all counts and re-imposing sentence. In particular, the trial court reinstated the original convictions and sentences for aggravated robbery, robbery, and engaging in a pattern of corrupt activity. A nolle prosequi was entered for the other three counts. This appeal followed.

{¶ 6} In his first assignment of error, Smith argues that the robbery charge in his indictment lacked a required mens rea element. Specifically, he contends it failed to state that he *recklessly* inflicted, attempted to inflict, or threatened to inflict physical harm to the victim. Smith maintains that this omission constituted structural error under *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, requiring reversal of his robbery conviction under R.C. 2911.02(A)(2).

{¶ 7} Upon review, we find Smith's argument to be unpersuasive for at least two reasons. First, the Ohio Supreme Court overruled the *Colon* case upon which he relies in *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, ¶ 45. Second, the Ohio Supreme Court subsequently made clear in *State v. Tolliver*, 140 Ohio St.3d 420, 2014-Ohio-3744, 19 N.E.3d 870, that the robbery charge in Smith's indictment is not defective at all. The *Horner* majority explained that there is no justification for reading a mens rea of recklessness into the robbery statute because it is not silent with respect to a culpable mental state. Rather, division (A) of the statute "predicates every robbery on the elements of a completed or attempted 'theft offense,' including all culpable mental states." *Id.* at ¶ 8. Because the statute incorporates the mental state required for commission of the underlying theft offense, no additional mens rea is required. *Id.* at ¶

18-23. In short, “[t]he mens rea element of [a] [r]obbery offense is satisfied if the State proves the culpable mental state of the theft offense.” *State v. Campbell*, 2d Dist. Montgomery No. 26575, 2016-Ohio-598, ¶ 10. That being so, Smith’s indictment was not defective for failing to allege that he recklessly inflicted, attempted to inflict, or threatened to inflict physical harm. Under *Tolliver*, the prosecution was not required to prove the culpable mental state of “recklessness” in connection with the physical-harm element of robbery. The first assignment of error is overruled.

{¶ 8} In his second assignment of error, Smith contends the trial court erred in failing to timely rule on his motion to suppress photo-identification evidence. Alternatively, he claims his attorney provided ineffective assistance by failing to object to witnesses’ trial testimony about the photo identification.

{¶ 9} This assignment of error concerns Smith’s suppression motion challenging a pretrial photo array as unduly suggestive. The trial court commenced a hearing on the motion before trial. On August 16, 2006, it heard testimony from six witnesses, including two victims from the multiple robbery counts who testified about identifying Smith’s picture in a photospread. Smith’s trial subsequently commenced on January 8, 2007. The two victims who had previously testified at the suppression hearing both testified as prosecution witnesses on that day at the trial and discussed their identification of Smith in the photospread. The trial court then continued the suppression hearing, out of the jury’s presence, on January 9-10, 2007, taking testimony from three additional victims who had identified Smith’s picture in a photospread. The court indicated this procedure was used “because witnesses were out of state.” (Trial Tr. Vol. I at 90). At the conclusion of their testimony, the trial court orally overruled the suppression motion. Those three

witnesses then testified against Smith at trial. The trial court later supplemented its oral ruling with journalized entries denying the suppression motion. (Doc. #48, 65).

{¶ 10} On appeal, Smith contends the trial court erred in failing to rule on his suppression motion before trial. He also claims the trial court erred in allowing trial testimony from two of the victim witnesses concerning their photo identification of him prior to ruling on his motion and without a completed suppression hearing. Smith asserts that he was prejudiced by the trial court permitting “the prosecution to introduce evidence at trial that was the subject of the motion to suppress that had yet to be ruled upon.” Alternatively, Smith raises an ineffective-assistance-of-counsel claim. He argues that his attorney should have objected to the trial testimony of the victim witnesses about their photo identification prior to the trial court’s ruling on his suppression motion.

{¶ 11} Upon review, we find the foregoing arguments to be unpersuasive. Smith asserts that he brought his motion under Crim.R. 12(C)(3) and, therefore, that Crim.R. 12(F) obligated the trial court to rule on it before trial. Assuming, *arguendo*, that he is correct,¹ any error in the trial court’s failure to rule on the motion before trial was harmless. As set forth above, the trial court *did* hold a pretrial hearing on the portion of the motion dealing with the photo-identification testimony of the first two witnesses. In its appellate brief, the State contends the trial court overruled that portion of the motion prior to these witnesses’ trial testimony. The State acknowledges, however, that no ruling

¹ Under Crim.R. 12(C)(3) a motion to suppress evidence “on the ground that it was illegally obtained” must be raised before trial. Under Crim.R. 12(F), a motion made under Crim.R. 12(C) “shall be determined before trial.” Other pretrial motions not made under Crim.R. 12(C)(1) through (5) “shall be determined before trial whenever possible.” Here it does not appear that Smith sought suppression on the basis that the photo-identification evidence was “illegally obtained.” He simply argued that the photo array was suggestive. Therefore, it is not apparent that Crim.R. 12(F)’s mandate about a pretrial ruling applied.

appears in the record. Regardless, the fact remains that the trial court held a pretrial hearing regarding the photo-identification testimony of these victim witnesses and, after that hearing, it overruled Smith's suppression motion regarding these witnesses. Smith has failed to demonstrate how he was prejudiced by the timing and sequence of these events, which is the basis for his first argument. Because the trial court found the photospread identifications admissible after a hearing, he has not shown that the jury heard any inadmissible testimony from the first two victims.

{¶ 12} In arguing to the contrary, Smith relies primarily on *State v. Litten*, 174 Ohio App.3d 743, 2008-Ohio-313, 884 N.E.2d 654 (8th Dist.). Although *Litten* contains little analysis of the issue, the trial court there stated that it would hear suppression motions during trial but apparently never provided any independent or separate hearing on the motions. Under those circumstances, the Eighth District held that the defendant had been deprived of "a meaningful opportunity to present his argument that the police searches * * * violated his constitutional rights." *Id.* at ¶ 31. Unlike *Litten*, the trial court here did not deprive Smith of a meaningful opportunity to challenge the photo-identification testimony of the first two victim witnesses. The trial court held a pretrial hearing during which Smith had an opportunity to challenge the admissibility of their testimony. Therefore, *Litten* is distinguishable.

{¶ 13} In a final argument under his second assignment of error, Smith alleges ineffective assistance of counsel based on his attorney's failure to object to the trial testimony of the first two victim witnesses. A defendant is deprived of effective assistance of counsel when (1) counsel's performance is deficient and (2) that deficient performance prejudices the defendant. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80

L.Ed.2d 674 (1984). In support of his claim, Smith maintains that his attorney provided deficient representation by filing a suppression motion and then not objecting to the victim witnesses testifying at trial prior to a ruling on the motion. With regard to prejudice, he simply asserts that “[i]f counsel had made an objection to these errors, the result of the proceeding would have been different.”

{¶ 14} Upon review, we find no ineffective assistance of counsel. Even assuming, arguendo, that counsel provided deficient representation by failing to object to the identifying witnesses testifying prior to a ruling on the suppression motion, Smith has not established prejudice. As we have explained, the court held a pretrial hearing on their photo-identification testimony and ultimately overruled the motion to suppress. In his second assignment of error, Smith makes no effort to establish error in the trial court’s ruling as it pertained to those witnesses. But if the photo identifications made by these two witnesses were admissible, then Smith could not have been prejudiced by the delay in the trial court’s ruling.

{¶ 15} Although Smith’s second assignment of error does not specifically argue the admissibility of the photo identifications made by the two witnesses in question, we have examined the photospread that they viewed. (See Trial Tr. at 390, 392, identifying State’s Exhibits 1 and 19 as the pertinent photospread). Nothing about the pictures in the array or the identification procedure is unduly suggestive of Smith’s guilt. The six photographs in the array depict subjects of similar age and appearance. We see nothing distinguishing about any of them. That being so, the trial court properly declined to suppress the photo identifications. See *State v. Simpson*, 2d Dist. Montgomery No. 25163, 2013-Ohio-1696, ¶ 10 (recognizing that where the photo-identification procedure

is not unduly suggestive any remaining issues go to the weight of the identification, not its admissibility). The second assignment of error is overruled.

{¶ 16} In his third assignment of error, Smith makes a different challenge to the trial court's denial of his motion to suppress the photo-identification evidence. Specifically, he argues that a photo array shown to two additional victims was unduly suggestive of his guilt and that their identifications of him were unreliable.

{¶ 17} We reject Smith's argument for at least two reasons. First, the present appeal is from his conviction on charges of robbery, aggravated robbery, and engaging in a pattern of corrupt activity in trial court case number 2006-CR-2323. The two later witnesses who identified Smith were in connection with a different case. In particular, one was a victim in trial court case number 2006-CR-2300, which involved separate aggravated robbery charges. Both of those identification witnesses testified in connection with a charge against Smith in that case. Although the two cases were tried together, the present appeal involves only case number 2006-CR-2323. The photo-identification testimony from those witnesses was not related to the charges against Smith in case number 2006-CR-2323. Therefore, Smith's challenge to the photo-identification testimony in that case cannot support reversal in this case.

{¶ 18} Second, having reviewed the challenged photo arrays, we believe the trial court correctly concluded that they were not unduly suggestive in any event. Smith claims the array reviewed by one of the witnesses was unduly suggestive because the witness described the perpetrator as "lanky" whereas, according to Smith, three of the six men depicted in the array were overweight. With regard to a different array that the victim had reviewed, Smith deems it unduly suggestive because of "differences in the sizes of the

pictures.” Specifically, he claims his picture “appeared smaller than the five others in the photo array.”²

{¶ 19} We are unpersuaded that weight differences in the men depicted in the photographs rendered the two independent witnesses’ arrays unduly suggestive. Although one of the witnesses did describe the perpetrator as “lanky,” it can be difficult to ascertain the physique of subjects based on headshots in a photospread. *Compare State v. Wills*, 120 Ohio App. 3d 320, 325, 697 N.E.2d 1072 (8th Dist.1997) (“Although both witnesses described defendant as ‘pot-bellied,’ midsections were not shown in the photo array.”). None of the men depicted were so overweight that they necessarily should have been excluded from the array. (See Trial Tr. at 396, identifying State’s Exh. 32 as the photospread that witness reviewed). As for the size of the photographs in the array the victim viewed, the pictures were the same size. Smith’s image appeared slightly smaller because of his distance from the camera. (See Trial Tr. at 397, identifying State’s Exh. 44 as the referenced photospread). Nevertheless, a defendant’s relative proximity to the camera has been found not to render a photospread unduly suggestive. *State v. O’Neil*, 11th Dist. Portage No. 2008-P-0090, 2009-Ohio-7000, ¶ 39-41, citing *State v. Buggs*, 7th Dist. Mahoning No. 87 CA 75, 1988 WL 120800, *1-2 (Nov. 8, 1988). Here the fact that Smith’s image was slightly smaller than the others was not unduly suggestive. We may not even have noticed the difference if it had not been pointed out. The third assignment

² Most of Smith’s argument under his third assignment of error addresses whether the identifications made by two of the witnesses were reliable under the totality of the circumstances. We need not reach that issue, however, absent a finding that the photo arrays were unduly suggestive. *State v. Frazier*, 2016-Ohio-727, 60 N.E.3d 633, ¶ 47 (2d Dist.) (recognizing that “when the identification procedure is not unduly suggestive, the question of reliability concerns the weight to be given to the identification, not its admissibility”).

of error is overruled.

{¶ 20} In his fourth assignment of error, Smith asserts that his conviction for engaging in a pattern of corrupt activity cannot stand if we reverse his conviction for robbery or aggravated robbery. This is so, Smith argues, because a conviction for engaging in a pattern or corrupt activity requires proof of two or more predicate offenses. In our analysis of the preceding assignments of error, however, we have found no basis for reversing any of Smith's convictions. Therefore, his conviction for engaging in a pattern of corrupt activity remains proper. The fourth assignment of error is overruled.

{¶ 21} The judgment of the Montgomery County Common Pleas Court is affirmed.

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WELBAUM, P. J., concurs

DONOVAN, J., concurring:

{¶ 22} The majority suggests the following in a footnote: "it does not appear that Smith sought suppression on the basis that the photo-identification evidence was 'illegally obtained.' He simply argued that the photo array was suggestive. Therefore, it is not apparent that Crim.R. 12(F)'s mandate about a pretrial ruling applied." I disagree with this conclusion due to the fact that a pre-trial motion filed on Smith's behalf by his original attorney on July 19, 2006, argues that "[d]efendant has reason to believe the photo array was impermissibly suggestive in violation of Defendant's due process rights. Defendant avers that the identification procedure used in the case was so highly suggestive as to give rise to a very substantial likelihood of misidentification." This motion was set for an August 16, 2006 suppression hearing and in fact, six witnesses testified on behalf of the

State. At the conclusion, no oral or written findings were made.

{¶ 23} On September 12, 2006, Smith filed a pro se motion for new counsel. New counsel was appointed on September 21, 2006. The motion hearing was reset for November 8, 2006, as the victim who identified Smith in the State's Exhibit 44 photospread had not yet testified. At that time, the only motion to suppress pending was the one quoted above which was filed by original counsel. Again, the hearing on the only pending motion to suppress was reset for January 3, 2007. This scheduling entry was filed on November 9, 2006. On December 12, 2006, an "Amended Motion to Suppress" was filed pro se by Smith (albeit he was represented by appointed counsel at the time.) In relevant part, the pro se motion sought to suppress "any and all statements made by the Victims, witnesses, and Defendant"; "Any, and All photograph made, or taken"; and "Amend to the motion to suppress Identification of the Defendant."³

{¶ 24} This procedural history is all the more curious in that the original motion upon which eyewitness identification testimony was taken both pre-trial and in part, post-trial (in companion case 2006 CR 2300) was arguably never ruled on as the court's written order(s) which deny Smith's motion to exclude eyewitness identification dated January 11, 2007 and January 24, 2007, reference only Smith's pro se Amended Motion to Suppress. Furthermore, the record is clear that the only decision, either oral or written, was entered after the jury was empaneled.

{¶ 25} Furthermore, in contravention of Crim.R. 12(F), the written rulings make no finding of facts nor conclusion of law regarding the testimony of the first two testifying eyewitnesses. They were victims of a jewelry store robbery in this case. The ruling only

³ Quote is taken verbatim from defendant's pro se motion.

addresses eyewitnesses to a distinct set of Holiday Inn robberies. Notably, in an entry dated January 11, 2007, the judge indicated “[t]he Court will make findings of fact and conclusions of law at a later date.”

{¶ 26} Accordingly, I would find that the trial court’s procedure utilized herein was error. “A trial court’s failure to rule upon a motion to suppress prior to trial constitutes error. *State v. Tolbert*, 70 Ohio App.3d 372, 388, 591 N.E.2d 325 (1st Dist. 1990). However, such error is harmless ‘unless it adversely affects the substantial rights of the defendant.’” *Id.* See also *State v. Johnson*, 12th Dist. Warren No. CA2015-09-086, 2016-Ohio-7266, ¶ 64.

{¶ 27} However, on this record, as noted by the majority, Smith has not established prejudice. The identifications were neither suggestive nor unreliable. All eyewitnesses were fully examined before opening statements took place. Nevertheless, the manner in which these motion(s) were considered is both unorthodox and surely with different facts may lead to reversal.

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