

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 11AP-750
v.	:	(C.P.C. No. 10CR-08-4929)
	:	
Andre T. Ealy, Jr.,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on July 24, 2012

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*Ron O'Brien*, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

*Yavitch & Palmer Co., L.P.A.*, and *Nicholas Siniff*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Defendant-appellant, Andre T. Ealy, Jr. ("appellant"), appeals from his convictions in the Franklin County Court of Common Pleas on charges of aggravated robbery, felonious assault, kidnapping, and firearm specifications. Because we conclude that the trial court did not err by admitting evidence of the victim's pretrial identification of appellant, nor by denying appellant's motion for acquittal, and because we find that the verdicts were not against the manifest weight of the evidence, we affirm.

{¶ 2} On June 23, 2009, Steven Frank ("Frank") was working as a pizza deliveryman and made a delivery to an apartment at the Hidden Bridge apartment

complex. After completing the delivery, Frank was approached by two men whom he had noticed walking nearby. One of the men pointed a gun at Frank and instructed him to empty his pockets. The men took Frank's cell phone and wallet. The men then forced Frank to lead them to his car. The man holding the gun entered Frank's car to look for additional items to steal. As the man exited the car, Frank slammed the car door on his hand. The man nearly dropped the gun, then Frank began to wrestle with him for control of it. During the struggle for the gun, Frank knocked off the man's baseball cap. As they continued to struggle over the gun, which was pointed downward, it discharged multiple times. Both men then fell to the ground. The assailant jumped up and grabbed the gun, then ran away. The second assailant also fled the scene.

{¶ 3} Frank was struck in the elbow by one of the shots fired when the gun discharged. Emergency services responded to the scene and transported Frank to Mt. Carmel East hospital, where he was treated for the gunshot wound. Shortly thereafter, paramedics from the Columbus Division of Fire responded to a report of a drive-by shooting at the corner of Livingston Avenue and Lonsdale Road. The paramedics found appellant, who was suffering from a laceration wound to his thigh from a gunshot, and transported him to Mt. Carmel East hospital.

{¶ 4} While Frank and appellant were being treated at the hospital, a Columbus police detective asked Frank whether he would look at appellant and determine whether appellant was his assailant. After seeing appellant and hearing him speak, Frank indicated that appellant was the individual who robbed him at gunpoint earlier that day. Appellant was tried before a jury on charges of aggravated robbery, felonious assault, and kidnapping, with firearm specifications attached to each charge. The jury convicted

appellant on all charges and specifications. The trial court sentenced appellant to a total of 11 years of imprisonment on all charges and specifications.

{¶ 5} Appellant appeals from the jury verdicts, assigning four errors for this court's review:

**Assignment of Error No. 1:**

The trial court erred by permitting the introduction of Frank's unnecessarily suggestive and unreliable identification of Appellant when Detective Atwood only presented Appellant as a face to face suspect thereby violating Appellant's right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution.

**Assignment of Error No. 2:**

Appellant's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution was violated when trial counsel failed to raise the issue of the unnecessarily suggestive and unreliable identification performed by Detective Atwood.

**Assignment of Error No. 3:**

The trial court erred in denying Appellant's Crim. R. 29 Motion because the victim could not definitively identify Appellant, Paul Ellis's testimony was unreliable, Appellant's injury did not mean he was connected to the robbery, and the DNA evidence did not prove Appellant was at the scene thereby violating Appellant's right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution.

**Assignment of Error No. 4:**

The Trial Court violated Appellant's right to Due Process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution by entering verdicts of guilty, as the jury's verdict was against the manifest weight of the evidence.

{¶ 6} In his first assignment of error, appellant asserts that the trial court erred by allowing the introduction of Frank's pretrial identification of appellant as his assailant. At trial, appellant did not object to the testimony regarding the pretrial identification; therefore, he forfeited all but plain error. *State v. Humberto*, 196 Ohio App.3d 230, 2011-Ohio-3080, ¶ 54 (10th Dist.), citing *State v. Smith*, 80 Ohio St.3d 89, 115 (1997). Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." To find plain error, we must find that there was an error, that the error was plain, constituting an obvious defect in the trial proceedings, and that the error affected the appellant's substantial rights—i.e., that it affected the outcome of the trial. *State v. Carter*, 10th Dist. No. 03AP-778, 2005-Ohio-291, ¶ 22. Moreover, notice of plain error is taken only in exceptional circumstances to prevent a manifest miscarriage of justice. *State v. Sneed*, 63 Ohio St.3d 3, 10 (1992).

{¶ 7} The pretrial identification occurred after Frank and appellant had each been transported to the hospital. Frank testified that, while he was being treated for his gunshot wound, police detectives told him that there was another individual in the hospital with a gunshot wound and asked whether Frank would attempt to identify whether that individual was Frank's assailant. The detectives conducted a "show-up" identification, by taking Frank to where appellant was being treated and asking whether appellant was the man who robbed him. Frank later testified that, when he saw appellant, he thought appellant was his assailant because appellant was "the same height and build and hair." (Tr. Vol. I, 50.) However, Frank testified that, although he believed appellant was his assailant after seeing him, he "wasn't as sure as [the detectives] would have liked [him] to be." (Tr. Vol. I, 49.) Frank then asked to hear appellant speak. The detectives

asked appellant to speak and, after hearing appellant's voice, Frank indicated that he was completely certain that appellant was his assailant.

{¶ 8} In determining whether to admit pretrial identification evidence, a trial court must determine whether the identification procedure was unnecessarily suggestive and, if so, whether the identification was reliable despite the suggestive nature of the procedure. *State v. Sharp*, 10th Dist. No. 09AP-408, 2009-Ohio-6847, ¶ 14. We have previously held that a one-person "show-up" identification is inherently suggestive. *State v. Gonzalez*, 10th Dist. No. 10AP-628, 2011-Ohio-1193, ¶ 9; *Sharp* at ¶ 15. However, a show-up identification may still be admissible where the circumstances demonstrate that the identification is reliable. *Id.* "In determining the reliability of the identification, a court considers factors such as '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.'" *Id.* at ¶ 16, quoting *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). " 'Against these factors is to be weighed the corrupting effect of the suggestive identification itself.' " *Sharp* at ¶ 16, quoting *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

{¶ 9} Appellant argues that Frank could not positively identify him on sight and that Frank only identified appellant after hearing his voice. Appellant asserts that this voice identification was unnecessarily suggestive, arguing that the police should have used a "voice lineup," citing *State v. Waddy*, 63 Ohio St.3d 424 (1992). We disagree with appellant's characterization of the trial testimony. Both Frank and Columbus Police Detective Kimberly Atwood ("Detective Atwood") testified that Frank indicated that he

believed appellant was his assailant after seeing him. Hearing appellant's voice served as confirmation of this identification, not the sole basis for making the identification as appellant contends. Moreover, in *Waddy*, the Supreme Court of Ohio acknowledged that a voice lineup is not always required when relying on a voice identification. *See id.* at 439. Further, even where the *Waddy* court found that a voice lineup should have been used, the court also held that the identification was still reliable under the totality of the circumstances. *Id.* at 440.

{¶ 10} In this case, we find that, whether the identification was based on seeing appellant or hearing his voice, the reliability factors weigh in favor of the trial court's decision to admit the identification testimony. The robbery occurred in the early afternoon and Frank testified that it was a bright, sunny day. Frank testified that he noticed appellant and his accomplice approaching as he completed the pizza delivery. Appellant confronted Frank with a gun, took Frank's wallet and cell phone, and forced Frank to lead them to his car. Frank testified that, after he slammed the car door on appellant's hand and they began wrestling for control of the gun, they were "chest to chest, like looking right at each other." (Tr. Vol. I, 35.) During the course of the robbery, Frank heard appellant speak the equivalent of "six or seven paragraphs" of dialogue, speaking both to his accomplice and directly to Frank. (Tr. Vol. I, 50.) Frank testified that the entire incident lasted five to ten minutes. This evidence demonstrates that Frank had a good opportunity to view appellant at the time of the crime and a high degree of attention, especially when he was face-to-face with appellant as they wrestled for control of the gun.

{¶ 11} Frank also demonstrated a high level of certainty when he identified appellant as his assailant after seeing appellant in the hospital and hearing him speak. As explained above, Frank's testimony indicated that he recognized appellant as his assailant when he saw appellant in the hospital and that once he heard appellant's voice he said "yes, that is him." (Tr. Vol. I, 49.) Detective Atwood similarly testified that Frank recognized appellant as his assailant when he saw appellant and that hearing appellant's voice served as confirmation of that identification.

{¶ 12} There was also a relatively short time between the robbery and the identification, which weighs in favor of reliability. Paramedics from the Columbus Division of Fire were dispatched to the apartment complex at 1:32 p.m. Based on Frank's testimony that the robbery lasted five to ten minutes and that it took some time after the robbery ended to get anyone to open the door and call 911 for him, it appears that the robbery occurred shortly after 1:00 p.m. Frank arrived at the hospital at 2:01 p.m., and appellant arrived at the hospital at 2:28 p.m. Although the evidence presented at trial did not provide the precise time that Frank was asked to identify appellant, Frank testified that it occurred while he was still being treated. Thus, it appears that the identification occurred within a few hours of the robbery. Finally, we cannot determine how the accuracy of any prior description affects the reliability of the show-up identification because there was no evidence presented at trial regarding any description of his assailant that Frank may have given the police prior to identifying appellant in the hospital.

{¶ 13} Appellant asserts that the identification procedure was unduly suggestive because Frank was only shown a single suspect and because he heard only appellant's voice. Further, appellant argues that the identification was unnecessarily suggestive

based on Frank's testimony that he identified appellant "because it was, you know, same place, same time, and with the wound and everything." (Tr. Vol. I 50.) However, we conclude that the identification procedure was not so suggestive as to outweigh the reliability of the identification. We have previously held that the fact that an individual is in handcuffs during a show-up identification, "while suggestive, does not invalidate the identification." *State v. Ashley*, 10th Dist. No. 91AP-910 (Mar. 17, 1992). *See also State v. Higgins*, 11th Dist. No. 2005-L-215, 2006-Ohio-5372, ¶ 48 (citing cases where appellate courts held that the use of handcuffs in a show-up identification was not unduly suggestive). Similarly, although the fact that appellant was being treated for a gunshot wound shortly after the time of the robbery may have been suggestive of guilt, this is insufficient to overcome the multiple factors outlined above weighing in favor of the reliability of the identification.

{¶ 14} We conclude that the trial court did not commit plain error in admitting testimony regarding Frank's pretrial identification of appellant as his assailant. Appellant has failed to establish that the show-up identification procedure was unnecessarily suggestive or unreliable under the totality of the circumstances. Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶ 15} In appellant's second assignment of error, he asserts that he was denied effective assistance of counsel because his trial counsel failed to object to or move to suppress the pretrial identification.

{¶ 16} The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the effective assistance of counsel. *State v. Banks*, 10th Dist. No. 10AP-1065, 2011-Ohio-2749, ¶ 12, citing *McMann v. Richardson*, 397 U.S. 759,



771 (1970). Courts use a two-part test to evaluate claims of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 141-42 (1989). "First, the defendant must show that counsel's performance was deficient." *Strickland* at 687. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* "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." *Bradley* at paragraph three of the syllabus.

{¶ 17} Generally, a trial attorney is not required to file futile motions. *State v. Hillman*, 10th Dist. No. 06AP-1230, 2008-Ohio-2341, ¶ 46. Failure to file a motion to suppress constitutes ineffective assistance of counsel only if, based on the record, the motion would have been granted. *Id.* Because we conclude that the identification was not unnecessarily suggestive and was reliable under the circumstances, a motion to suppress would have been denied. Thus, appellant's trial counsel was not ineffective for failing to file such a motion or otherwise object to the identification evidence.

{¶ 18} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶ 19} In his third assignment of error, appellant argues that the trial court erred in denying his motion for acquittal under Crim.R. 29(A). Appellant asserts that the trial court should have granted his motion for acquittal because the evidence was insufficient to sustain convictions on the charges against him.

{¶ 20} "Because a Crim.R. 29 motion questions the sufficiency of the evidence, '[w]e apply the same standard of review to Crim.R. 29 motions as we use in reviewing the

sufficiency of the evidence.' " *State v. Walburg*, 10th Dist. No. 10AP-1087, 2011-Ohio-4762, ¶ 11, quoting *State v. Hernandez*, 10th Dist. No. 09AP-125, 2009-Ohio-5128, ¶ 6. "Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict." *State v. Cassell*, 10th Dist. No. 08AP-1093, 2010-Ohio-1881, ¶ 36, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In reviewing a challenge to the sufficiency of the evidence, an appellate court must determine "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. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, superseded by constitutional amendment on other grounds as recognized in *State v. Smith*, 80 Ohio St.3d 89, 102 (1997).

{¶ 21} Although appellant purports to challenge the sufficiency of the evidence, the arguments he offers on appeal address whether the evidence was credible, which goes to the issue of the weight of the evidence, not whether it was sufficient to establish the essential elements of the charged crimes. At trial, appellant's counsel did not dispute that the crimes had occurred but argued that the evidence was insufficient to establish that appellant was the individual who committed the crimes.

{¶ 22} With respect to the general issue of identity, we conclude that the evidence was sufficient to establish that appellant was the assailant who confronted Frank with a gun on June 23, 2009. Frank identified appellant as his assailant after seeing appellant in the hospital and hearing his voice. Frank also identified appellant again in the courtroom during the trial. Frank testified that during the course of the robbery, he knocked off

appellant's baseball cap. He also testified that during the struggle over the gun, the gun discharged until it was empty.

{¶ 23} In addition to Frank's testimony, the state called Paul Ellis ("Ellis") as a witness. Ellis testified that he knew appellant from the neighborhood where they both lived. Ellis stated that he spoke with appellant after appellant had been released from the hospital. Ellis testified that appellant admitted to robbing a pizza deliveryman, admitted that there was a struggle during the robbery, and also admitted that both he and the deliveryman were shot during the robbery.

{¶ 24} Other evidence presented at trial also supported the testimony from Frank and Ellis. Appellant was treated for a gunshot wound to his leg, and the paramedic who transported appellant to the hospital testified that the wound was inconsistent with a drive-by shooting, which is how appellant claimed he was injured. Further, DNA tests were performed on the baseball cap recovered from the scene of the robbery. The results identified a mixture of DNA on the cap and indicated that appellant could not be excluded as a contributor to the DNA mixture. Although neither the gunshot wound nor the baseball cap conclusively link appellant to the robbery, they constitute circumstantial evidence in support of the testimony from Frank and Ellis. Viewing this evidence in a light most favorable to the prosecution, the jury could have found that appellant was the individual who committed the crimes charged.

{¶ 25} Further, we conclude that the evidence was also sufficient to establish the essential elements of each of the crimes charged.

{¶ 26} Appellant was charged with aggravated robbery under R.C. 2911.01(A)(1) and (3), which provide, in relevant part, that no person, in attempting or committing a

theft offense, or in fleeing immediately thereafter, shall have a deadly weapon on or about his person or under his control and brandish or use the weapon, or inflict or attempt to inflict serious physical harm on another. Frank testified that appellant pointed a gun at him while appellant and his accomplice took Frank's wallet and cell phone. This testimony is sufficient to establish that appellant had a deadly weapon on his person and brandished that weapon while committing a theft offense by depriving Frank of his property. Frank also testified that, as he wrestled with appellant over the gun, they both had their fingers on the trigger when the gun discharged. Likewise, Ellis testified that appellant stated that "he ended up shooting the pizza man and shooting himself." (Tr. Vol. II, 11.) The paramedic who transported Frank to the hospital testified that Frank had a bullet wound to his left elbow, and Frank testified that he continued to suffer from the effects of the injury two years later at the time of the trial. This evidence was sufficient to establish that appellant inflicted serious physical harm on Frank while committing a theft offense.

{¶ 27} The evidence regarding the injury to Frank's elbow was also sufficient to sustain appellant's conviction on the charge of felonious assault. The statute defining felonious assault provides, in relevant part, that no person shall knowingly cause serious physical harm to another or cause physical harm to another by means of a deadly weapon. R.C. 2903.11(A). The law provides that "[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will be of a certain nature." R.C. 2901.22(B); *State v. Beatty*, 10th Dist. No. 08AP-52, 2008-Ohio-5063, ¶ 12. "The shooting of a gun in a place where there is a risk of injury to one or more person supports the inference that appellant acted knowingly." *State v. Grant*,

8th Dist. No. 90465, 2008-Ohio-3970, ¶ 18, quoting *State v. Gregory*, 90 Ohio App.3d 124, 131 (12th Dist.1993). Although Frank testified that both he and appellant had their fingers on the trigger of the gun as it discharged, Ellis testified that appellant admitted to shooting himself and Frank. Viewed in a light most favorable to the prosecution, this testimony was sufficient to establish the essential elements of felonious assault.

{¶ 28} Appellant was also charged with kidnapping under R.C. 2905.01(A)(2), which provides that "[n]o person, by force, threat, or deception \* \* \* shall remove another from the place where the other person is found or restrain the liberty of the other person \* \* \* [t]o facilitate the commission of any felony or flight thereafter." Frank testified that appellant pointed a gun at him and that, after taking his wallet and cell phone, appellant and his accomplice forced Frank to lead them to where his car was parked. Appellant then searched through Frank's car looking for additional items to take. This testimony was sufficient to establish that appellant restrained Frank's liberty through force or threat of force, by holding him at gunpoint, and removed him from the place where he was found through force or threat of force, by compelling Frank to lead appellant to his car. These actions were taken to facilitate the felony crime of aggravated robbery. Thus, the evidence was sufficient to establish that appellant committed the crime of kidnapping.

{¶ 29} Finally, appellant was charged with firearm specifications for each count. Under R.C. 2941.145(A), an additional prison term may be imposed if an indictment specifies that "the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense." Frank testified that appellant pointed a gun at him during the robbery, and Ellis

similarly testified that appellant stated that he held Frank at gunpoint while his accomplice went through Frank's pockets. This evidence would permit a reasonable jury to find that appellant had a firearm in his possession during the robbery and brandished the firearm during the course of the robbery. Thus, it was sufficient to sustain the convictions on the firearm specifications associated with each charge.

{¶ 30} We find that the evidence presented at trial was sufficient to establish the essential elements of each of the crimes and specifications charged against appellant. Accordingly, the third assignment of error is without merit and is overruled.

{¶ 31} In his fourth assignment of error, appellant claims that the jury verdicts were against the manifest weight of the evidence. "While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief." *Cassell* at ¶ 38, citing *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, citing *Thompkins* at 386. "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." *Thompkins* at 387, citing *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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.'" *Thompkins*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). This

discretionary authority " 'should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*

{¶ 32} Appellant argues that the jury verdicts were against the manifest weight of the evidence because Frank's identification of appellant as his assailant was not reliable. However, as explained above, we find that the identification was reliable under the totality of the circumstances presented in this case. Appellant also claims that Frank's testimony was not credible because he initially told the police that his rent money was included in the amount the robbers stole from him but later retracted this statement. On cross-examination, Frank testified that he initially told the police that he probably had several hundred dollars in the wallet that appellant had stolen, including his personal rent money. Frank further testified that he later realized that he had not withdrawn his rent money from the bank and that it was not in his wallet at the time of the robbery. Frank testified that, following this realization, he told Detective Atwood that the stolen money did not include his personal rent money. Detective Atwood similarly testified that Frank initially stated that the stolen items included his rent money and that he subsequently contacted her to notify her that his rent money had not been stolen. Although appellant suggests that this issue casts doubt on Frank's testimony, we note that the jury was made aware of any inconsistency in Frank's account of the robbery. We cannot conclude that the jury clearly lost its way in determining that Frank's testimony was credible.

{¶ 33} Appellant further argues that the verdicts were against the manifest weight of the evidence because Ellis's testimony was inconsistent and contradictory and because Ellis received a reduced sentence in exchange for testifying. We acknowledge that Ellis's trial testimony was convoluted, particularly with regard to the issue of when Ellis first saw

appellant after the robbery. This appears to have resulted, in part, from the fact that Ellis testified that both appellant and appellant's accomplice told him about the robbery at different times. However, on the whole we find that although Ellis's testimony was difficult to follow, it was not so contradictory as to be inherently non-credible.

{¶ 34} Ellis also testified that he entered a guilty plea on three counts of aggravated robbery in an unrelated case and that he received a reduced sentence in that case after agreeing to testify against appellant. Thus, the jury was made aware of the details of the plea agreement that Ellis made, and Ellis testified directly that he understood he would receive a favorable sentencing recommendation in exchange for testifying truthfully in this case. The jury members were free to determine whether Ellis's testimony was credible in light of the consideration he received for testifying. *See State v. Rankin*, 10th Dist. No. 10AP-1118, 2011-Ohio-5131, ¶ 30; *State v. Thompson*, 10th Dist. No. 07AP-491, 2008-Ohio-2017, ¶ 35.

{¶ 35} Appellant also argues that the DNA evidence from the baseball cap did not prove he was at the crime scene, only that he could not be excluded as someone who wore the cap at some point in time. However, a lack of physical evidence alone does not render a conviction against the manifest weight of the evidence. *State v. Berry*, 10th Dist. No. 10AP-1187, 2011-Ohio-6452, ¶ 20. Moreover, even if the jury disregarded the DNA evidence, it could still convict appellant on the basis of the testimony from Frank and Ellis.

{¶ 36} Finally, appellant argues that the verdicts were against the manifest weight of the evidence because his alibi for his injury was credible. Appellant claimed that he was the victim of a drive-by shooting. However, the state presented testimony casting doubt



on appellant's claim. Ellis testified that appellant told him that appellant was injured during the robbery but reported the injury as a result of a drive-by shooting. Further, the paramedic who responded to the drive-by shooting call and transported appellant to the hospital testified that the nature of the wound was unusual for a drive-by shooting because it was a laceration, and the bullet had not entered appellant's body. The paramedic's report also indicated that appellant said he was running away and was shot from behind. The jury was presented with three photographs of the appellant and the leg wound, which demonstrated that the wound was essentially vertical, running along appellant's inner left thigh. The jury was therefore able to weigh whether the wound appeared to be more consistent with appellant's account of being struck by a shot from behind while running away, or with Frank's testimony that the gun was pointed downward when it discharged as he and appellant wrestled for control of it. Columbus Police Officer Charles Miller, who responded to the drive-by shooting call, testified that he and other officers searched the area where appellant reported he was shot and found no evidence of a shooting, such as shell casings, a gun, or blood.

{¶ 37} Finally, Detective Atwood testified that she was assigned to follow-up on the drive-by shooting report. She stated that appellant refused to respond to her attempts to contact him and that the case was closed for lack of cooperation. The jury was in the best position to weigh the credibility of these various witnesses and determine whether to believe appellant's claim that his injury resulted from a drive-by shooting, rather than from the robbery. In light of the conflicting evidence, we cannot conclude that the jury clearly lost its way in concluding that appellant's claim was not credible.

{¶ 38} Accordingly, appellant's fourth assignment of error is without merit and is overruled.

{¶ 39} For the foregoing reasons, appellant's four assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

BRYANT and TYACK, JJ., concur.

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