

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2009-02-052
 :
 - vs - : OPINION
 : 1/19/2010
 :
 DEMETRIUS ALEXANDER ANDREWS, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-09-1610

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HENDRICKSON, J.

{¶1} Defendant-appellant, Demetrius Alexander Andrews, appeals his conviction for aggravated robbery with a gun specification and aggravated burglary with a gun specification, in the Butler County Court of Common Pleas. We affirm appellant's conviction.

{¶2} On July 5, 2008, Rufus Lee Mitchell, Jr. was entertaining friends and family at his sister's home at 2222 Albemarle Drive, apartment 202, in Fairfield, Ohio. During

the earlier part of the evening, Mitchell had played cards for a few hours with some friends, including Jason Bradford. Mitchell's 15-year-old son Demante Mitchell (Demante), and Demante's 14-year-old cousin Domonic Sawyers arrived at the apartment between 6:00 and 7:00 p.m. that evening. Deciding they wanted some snacks, Demante and Sawyers left the apartment a couple of hours later to walk about ten minutes to a local store. The boys headed back to the apartment at approximately 8:45 – 9:00 p.m.

{¶3} Upon returning to the apartment, Demante saw two men outside who were later identified as appellant and Domico Andrews (Domico). Sawyers preceded Demante into the apartment. As Demante entered the apartment, appellant and Domico followed him into the residence. Appellant brandished a weapon, and the men ordered Bradford to the floor and instructed the boys to sit on the couch. Two additional men, later identified as Tremel Jones (Tremel) and Deandre Andrews (Deandre), also came into the apartment. The men took \$600 from Bradford; and \$1,700, a gold ring and a gold necklace from Mitchell. During the robbery, a relative, Jack Clark, entered the apartment and was subsequently ordered to the floor. Tremel and Deandre took Mitchell into the kitchen; and after an exchange forced Mitchell to take them to get more money. Appellant and Domico stayed behind with Bradford, Clark, and the children.

{¶4} Mitchell drove to his cousin's home in Forest Park. While Tremel and Deandre waited outside, Mitchell walked into his cousin's home, borrowed a cellular telephone and contacted the police.¹ The police arrived at the Albemarle Drive apartment at approximately 9:40 p.m., set up a perimeter, and asked other residents to remain in their homes. Realizing the police had been called, appellant and Domico left

1. The police were also dispatched to the Forest Park residence. However, both Tremel and Deandre escaped after being pursued by the police.

the apartment. They forced their way into a neighboring apartment; and escaped through a sliding glass door leading onto a patio adjacent to a grassy slope. As appellant and Domico ran to get away, Aaron Jones, who had been checking on his sleeping daughter, saw the two men run from the back of the neighboring building and get into a white conversion van. A later search of the area yielded a .40 caliber handgun in the grass behind apartment 202's building.

{15} Mitchell and Bradford, who had known appellant and the three others from their old neighborhood in Lincoln Park, identified the four robbers via photographic lineups. Jones also identified appellant from a photographic lineup, as one of the men he saw running from the neighboring apartment building.² At trial, Mitchell, Bradford, Jones and Demante were all called as witnesses, and all identified appellant, in court, as one of the robbers. Both Mitchell and his son testified appellant had a weapon; while Bradford testified he saw a weapon, but could not state for certainty which of the intruders was holding the weapon.

{16} Appellant took the stand in his defense and stated that he had been at the Albemarle Drive apartment until approximately 6:30 playing cards, but then left. He further testified that he drove home, changed his clothes, and drove to work in downtown Cincinnati. Appellant presented four co-workers, as alibi witnesses, who all testified that appellant was at his place of employment around the same time as the robbery. The jury found appellant guilty of all charges and the trial court sentenced appellant to a total of eight years in prison. Appellant filed a timely appeal arguing three assignments of error.

{17} Assignment of Error No. 1:

2. Jones was unable to clearly see the other man he saw running, since the man was moving too quickly for Jones to make a positive identification.

{¶8} "THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS BY FAILING TO SUPPRESS IDENTIFICATION TESTIMONY."

{¶9} In his first assignment of error, appellant argues the trial court improperly permitted admission of unreliable identification testimony from two witnesses. We disagree.

{¶10} A motion to suppress identification testimony must be filed prior to trial on the grounds that the testimony was illegally obtained. Crim.R. 12(C). Where a motion to suppress identification testimony is not filed, or where no objections are raised regarding the court room identification, "[a]ny error in the admission of the evidence is waived unless there was plain error." *State v. Curtis* (1978), 54 Ohio St.2d 128, 134-135. See, also, *State v. Green* (1990), 67 Ohio App.3d 72, 78; *State v. Terry*, Hamilton App. No. No. C-040261, 2005-Ohio-4140, ¶21, reversed on other grounds, *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109.³

{¶11} In order to find plain error (1) "there must be an error * * * a deviation from a legal rule;" (2) "the error must be plain" that is "an obvious defect in the trial proceedings;" and (3) "the error must have affected 'substantial rights' * * * mean[ing] that the trial court's error must have affected the outcome of the trial." *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68 (internal quotations omitted). "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *State v. Moreland*, (1990), 50 Ohio St.3d 58, 62.

{¶12} "When a witness has been confronted with a suspect before trial, due process requires a court to suppress [] identification of the suspect if the confrontation

3. We note that appellant's trial counsel renewed her request for a continuance – which was initially based on late receipt of discovery – in order to file a motion to suppress, after she learned about Demante viewing a photographic lineup. Appellant's trial counsel also moved for a mistrial and a motion to suppress after Jones testified he was given more than one photographic lineup for each suspect. Exercising its discretion pursuant to Crim.R. 12(D), the trial court denied both motions.

was unnecessarily suggestive of the suspect's guilt and the identification was unreliable under all the circumstances." *State v. Waddy* (1992), 63 Ohio St.3d 424, 438 (superseded on other grounds by Constitutional Amendment), citing *Neil v. Biggers* (1972), 409 U.S. 188, 93 S.Ct. 375, and *Manson v. Brathwaite* (1977), 432 U.S. 98, 97 S.Ct. 2243. However, this is a two-pronged test, where the party challenging the identification must first show that the procedure exercised by the state during the pretrial identification was "unnecessarily suggestive." *Waddy* at 438. *After the first part of the test is met*, the second part of the test is applied to determine "whether, under all the circumstances, the identification was reliable, *i.e.*, whether suggestive procedures created 'a very substantial likelihood of irreparable misidentification.'"⁴ *Waddy* at 439, quoting *Simmons v. United States* (1968), 390 U.S. 377, 384, 88 S.Ct. 967. See, also, *State v. Murphy* (2001), 91 Ohio St.3d 516, 534 2001-Ohio-112, ¶19 (emphasizing the two-step process outlined in *Waddy*); *State v. Williams*, 172 Ohio App.3d 646, 2007-Ohio-3266, ¶9 (explaining the two-step process courts employ to determine admissibility of identification testimony). If no suggestive procedure has been employed by the state, we need not reach the second step of the process regarding the reliability of the identification. See *Murphy* at 534; *State v. Wills* (1997), 120 Ohio App.3d 320, 325; *State v. Martin* (Aug. 24, 1994), Hamilton App. No. No. C-930253, 1994 WL 456350, at *2-3; *State v. Douglas* (Jan. 28, 1988), Cuyahoga App. No. 53283, 1988 WL 8445, at *4; *United States v. Donaldson* (C.A.7, 1992), 978 F.2d 381, 385.

{¶13} In his brief, appellant cites to the correct law regarding pretrial identification, but only argues that the identifications by Jones and Demante were

4. In order to determine reliability courts must look to certain "key factors" which are: "the witness's opportunity to view * * * 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." *Waddy* at 439, citing *Neil*, 409 U.S. at 199-200.

unreliable based upon the *Neil* factors. See fn. 4. However, appellant has failed to demonstrate how the photographic lineup procedures employed by the state were unnecessarily suggestive.

{¶14} Even upon an independent review of the record we do not find police procedure suggestive in Jones' pretrial identification of appellant. Although Jones testified he viewed four photographic lineups, two lineups per suspect, Officer Ryan Fleenor testified that Jones was only shown two photographic lineups – one containing appellant and one containing Domico, the other fleeing subject. Officer Fleenor further testified as to the procedure he employed when offering a photographic lineup:

{¶15} "I basically explain to them that I'm going to show them a lineup; that there are six photographs that are on the lineup; that a person may or may not be on the lineup that they can identify. If they can identify one of the offenders, there are to circle the number that is posted on the photograph, put their initials and date."

{¶16} The photographic lineup, which contained appellant's picture, is made up of six pictures of African-American men of similar physical appearance, including eyeglasses, with no noticeable differences in hair length, complexion, age, or features; and is not itself suggestive. See *Murphy* at 534. Compare with *State v. Merrill* (1984), 22 Ohio App.3d 119, 122 (photographic lineup found suggestive where suspect was the only one with a full head of curly brown hair and most of the other photographs contained older and heavier men). Although it appears as though four of the men, including appellant, have facial hair, "[a] defendant in a lineup need not be surrounded by people nearly identical in appearance." *State v. Davis* (1996), 76 Ohio St.3d 107, 112, citing *New York v. Chipp* (1990), 75 N.Y.2d 327, 336. In addition, although appellant appears to be the only person in the photographic lineup in a particular pattern of clothing, "[e]ven * * * significant dissimilarities of appearance or dress' will not

necessarily deny due process." *Davis* at 112, quoting 1 LaFave & Israel, *Criminal Procedure* (1984) 587, Section 7.4.

{¶17} Because there was nothing unnecessarily suggestive in the photographic lineup itself or the procedures employed by the police, there was no error in Jones' pretrial identification of appellant. Where no error occurs in a pretrial identification, there can necessarily be no plain error in the admission of the identification testimony.

{¶18} Although Demante was shown a photographic lineup approximately one week before the trial – which arguably may have been suggestive because it was viewed almost five months after the incident – there was no testimony regarding Demante's "possible" pretrial identification of appellant before the trier of fact.⁵ The state did not examine Demante on the subject of a pretrial identification; the state did not offer the photographic lineup shown to Demante into evidence; and the state did not question any police officer on the lineup shown to Demante, or the procedures he or she employed in presenting the lineup to Demante. In fact, the only reference to the lineup was brief and instigated by appellant's own trial counsel:

{¶19} "[APPELLANT'S TRIAL COUNSEL]: At what point did you use photographs to possibly identify Mr. Andrews?

{¶20} "[DEMANTE]: I believe it was last Wednesday.

{¶21} "[APPELLANT'S TRIAL COUNSEL]: You said last Wednesday?

{¶22} "[DEMANTE]: When I seen the pictures?

{¶23} "[APPELLANT'S TRIAL COUNSEL]: Yes.

{¶24} "[DEMANTE]: Yes."

{¶25} After this exchange, appellant's trial counsel and the prosecution went

5. Because no testimony from Demante was elicited as to pretrial identification, and because the photographic lineup was not admitted; we are unable to determine whether Demante actually identified

before the bench and the prosecutor explained:

{¶26} "He's been shown a photo lineup. I did not give it because I did not intend on using it. It was done so late. I did not disclose it, so I'm not introducing it as evidence."

{¶27} Because the state did not offer any evidence of a pretrial identification of appellant by Demante, we need not determine whether the pretrial identification violated appellant's rights under due process. See *State v. Brown* (Dec. 14, 1993), Ross App. No. 93-CA1938, 1993 WL 525000, at *3 (choosing not to address whether a pretrial identification

was suggestive because the state did not introduce the pretrial identification against the defendant); *State v. Kimmel*, Marion App. No. 9-03-53, 2004-Ohio-1207, ¶ (finding a trial court was not required to suppress evidence of a conversation where it was not offered as evidence by the state). See, also, *State v. Tingler* (1972), 31 Ohio St.2d 100, 101-03 (noting that prejudice resulting from an illegal pretrial confrontation was invited by the defense, as "the state did not attempt to introduce any testimony relating to the illegal confrontation at the trial").

{¶28} Because appellant is unable to demonstrate that plain error was committed in Jones' pretrial identification, and because Demante's pretrial identification was not submitted as evidence during the trial; appellant's first assignment of error is overruled.

{¶29} Assignment of Error No. 2:

{¶30} "APPELLANT'S DUE PROCESS RIGHT TO LEGAL COUNSEL WAS PREJUDICED BY THE INEFFECTIVE ASSISTANCE OF COUNSEL."

{¶31} In his second assignment of error, appellant argues that his trial counsel was ineffective for failing to file a motion to suppress the eyewitness identification

testimony, and because his trial counsel failed to present expert testimony in regard to the inherent unreliability of eyewitness testimony. We do not agree.

{¶32} In order to prevail on an ineffective assistance of counsel claim, an appellant must demonstrate that his counsel's performance fell below an objective standard of reasonable representation; and if so, show there was a reasonable probability that his counsel's errors affected the outcome of the proceedings. *Strickland v. Washington* (1984), 466 U.S. 668, 690, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, at paragraph two of the syllabus.

{¶33} A failure to file a motion to suppress does not necessarily constitute ineffective assistance of counsel. *State v. Madrigal* (2000), 87 Ohio St.3d 378, 389, 2000-Ohio-448, citing *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384, 106 S.Ct. 2574. "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." *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, ¶65, citing *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶35. See, also, *State v. Gibson* (1980), 69 Ohio App.2d 91, 95 (finding where there is no justification for filing a suppression motion, appellant has not met the burden of showing his counsel's performance was deficient). As previously discussed, suppression of a pretrial identification requires an "unnecessarily suggestive" confrontation, and an unreliable identification. *Waddy*, 63 Ohio St.3d at 438.

{¶34} Appellant maintains his trial counsel should have moved to suppress the pretrial identifications by Jones and Demante. He further cites counsel's efforts to obtain leave from the court to file a suppression motion as further evidence that she erred. See fn. 3. Finally, appellant suggests that had Jones' and Demante's identifications been suppressed, the state's case would have solely relied on

identification testimony by Mitchell and Bradford – who appellant contends were both convicted felons and motivated to prevaricate. This, coupled with the lack of corroborating physical evidence, and his alibi, argues appellant, would have affected the outcome of the proceedings.

{¶35} After reviewing the record, we cannot say that appellant's trial counsel's actions fell below an objective standard of reasonable representation, because there was no basis to suppress the pretrial identifications of Jones or Demante. As we stated in the first assignment of error, there was no unnecessarily suggestive police procedures utilized during the photographic lineup identification by Jones. In addition, the pretrial identification, or failure thereof, by Demante was never even submitted by the state as evidence. Because there was no basis to suppress the pretrial identifications, trial counsel was not ineffective by failing to file a motion to suppress.

{¶36} Appellant also argues that his trial counsel was ineffective for failing to call an expert witness to testify regarding the inherent unreliability of eyewitness testimony. Appellant maintains that an expert was needed to place the state's identification evidence in perspective. This in turn prejudiced his defense, contends appellant, because his conviction was based on unreliable witness identification and testimony.

{¶37} "The decision to forego an eyewitness-identification expert is a recognized trial strategy." *State v. Keeling*, Hamilton App. No. C-010610, 2002-Ohio-3299, ¶8. Indeed, relying on cross-examination to impeach witnesses, rather than an expert in eyewitness identification, has not been found to constitute ineffective assistance of counsel. *Madrigal*, 87 Ohio St.3d at 390; *Keeling* at ¶8. See, also, *State v. Glover*, Clermont App. No. CA2001-12-102, 2002-Ohio-6392, ¶25 (noting the tactical considerations behind choosing not to use an expert witness). Furthermore, "resolving this issue in [appellant's] favor would be purely speculative" as "[n]othing in the record

indicates what kind of testimony an eyewitness identification expert could have provided.

* * * Such a claim is not appropriately considered on a direct appeal." *Madrigal* at 390.

{¶38} In this case, appellant's trial counsel utilized cross-examination to attack the credibility and reliability of each identification by the state's witnesses. In particular, appellant's trial counsel questioned Bradford on the length of the time between the incident and the pretrial identification; whether Bradford had personal problems with appellant; and on his ability to view appellant, because he was laying face forward on the ground with his eyes focused on the floor during the entire incident. With regard to Mitchell, appellant's trial counsel cross-examined him about his inconsistent statements before the grand jury and trial jury regarding chronological time and appellant's statements, and his ability to view appellant during the incident. During cross-examination of Demante, appellant's trial counsel focused on his lack of prior contact with, or knowledge of appellant; his ability to identify the weapon used by the intruders; his ability to view appellant during the incident; and the possible bias Demante had because Mitchell was his father. Finally, appellant's trial counsel cross-examined Jones regarding the "seven to eight seconds" Jones had to observe appellant; the lighting conditions at the time; the chronological time Jones claimed he saw/heard the police and appellant; the 23-day time span between the incident and the pretrial identification; Jones' testimony regarding the number of photographic lineups he was shown; and his description of the white conversion van.

{¶39} In addition, appellant's trial counsel cross-examined the state's law enforcement witnesses who were on the scene, all of whom testified as to the lighting conditions, the chronological time as to when they arrived, and when the intruders escaped. We also observe that appellant's trial counsel cross-examined Officer Fleenor on the accuracy of eyewitness identification and the measures utilized to decrease the

likelihood of misidentification.

{¶40} Appellant's trial counsel was not ineffective for using cross-examination rather than an expert in eyewitness identification to discredit the identification testimony. In addition, we cannot speculate as to what the expert's testimony would have provided. See *Madrigal* at 390.

{¶41} In conclusion, because appellant cannot show that his counsel's performance fell below an objective standard of reasonable representation, his second assignment of error is overruled.

{¶42} Assignment of Error No. 3:

{¶43} "[THE] JURY'S VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶44} Appellant's final assignment of error asserts the jury lost its way in finding appellant guilty because: (1) he had an alibi which placed him in Cincinnati at the time of the robbery; (2) two of the eyewitnesses were motivated to lie, one eyewitness was biased because he was the one of the victim's son, and the last eyewitness only had a cursory observation under questionable lighting conditions; and (3) the police had no physical evidence linking appellant to the crime. We do not agree.

{¶45} "An appellate court may only reverse a jury verdict as against the manifest weight of the evidence where there is a unanimous disagreement with the verdict of the jury." *State v. Harry*, Butler App. No. CA2008-01-013, 2008-Ohio-6380, ¶45, citing *State v. Gibbs* (1999), 134 Ohio App.3d 247, 255-56. "Under the manifest weight of the evidence standard, a reviewing court must examine the entire record, weigh all of the evidence and 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Harry* at ¶45, quoting *State v. Martin* (1993), 20 Ohio App.3d 172, 175. See, also, *Gibbs* at 256; *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52.

{¶46} Determinations of witness credibility, conflicting testimony, and the weight to be given to such evidence are primarily for the trier of fact. See *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. "Because the factfinder * * * has the opportunity to see and hear the witnesses * * * substantial deference [must] be extended to the factfinder's determinations of credibility." *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288, 1997 WL 476684, at *4. Thus, "[t]he decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *Id.*

{¶47} The jury did not lose its way simply because it chose to believe the testimony of Mitchell, Bradford, Demante and Jones over that of appellant's four co-workers, and alibi witnesses, or because the state presented no physical evidence against appellant. The jury heard testimony from the two victim eyewitnesses, who had known appellant for several years, and stated with certainty that appellant was one of the four men who broke into the apartment and robbed them at gunpoint. The jury also listened to testimony from Demante, who was threatened and held at gunpoint by appellant for approximately half of an hour, and stated that appellant broke into the apartment and robbed his father and Bradford at gunpoint. In addition, the jury heard testimony from Jones who saw the police surrounding the apartment building and watched appellant run from 2222 Albemarle Drive down the grassy slope to a parked van. Furthermore, all of the state's witnesses were subjected to cross-examination by appellant's trial counsel.

{¶48} In appellant's defense, the jury listened to appellant's co-workers Nina Curry and Natetha Shepherd who both testified appellant was at Club Seven in downtown Cincinnati at 9:30 p.m. on July 5, 2008; Bridgette Jones who stated appellant was in Club Seven's parking lot at 9:00 p.m.; and John Easley who testified that he normally arrived between 8:00 and 8:30 p.m., and appellant was first to arrive that evening. Finally, the jury heard testimony from appellant who testified that he normally arrived to work at Club Seven between 7:45 and 8:15 p.m. and that the victims lied about his involvement in the robbery because they were covering up the fact they had cheated him out of money earlier in the evening.

{¶49} The jury was also made aware of the lack of physical evidence tying appellant to the crime. Although fingerprints were taken from the crime scene(s) and from the weapon, none of the prints were matched to appellant according to the state's witness from the regional crime lab.

{¶50} Lastly, we note the trial court gave the jury extensive instructions regarding appellant's alibi defense, witness credibility, and the weight to be given to such testimony. We presume that the jury followed the court's instructions. *Pang v. Minch* (1990), 53 Ohio St.3d 186, 195.

{¶51} At the conclusion of all of the testimony, the jury weighed the evidence and found beyond a reasonable doubt that the state proved each of the elements of the crimes for which appellant was charged and determined appellant was guilty of aggravated burglary and aggravated robbery along with firearm specifications for each crime.⁶ We have reviewed the entire record, and do not find the jury clearly lost its way

6. R.C. 2911.01(A)(1) prohibits an offender "in attempting or committing a theft offense * * * [from] have[ing] a deadly weapon on or about the offender's person or under the offender's control and either display[ing] the weapon, brandish[ing] it, indicat[ing] that the offender possesses it, or use it." R.C. 2911.(A)(2) prohibits an offender "by force, stealth, or deception, [to] trespass in an occupied structure * * * when another person * * * is present, with purpose to commit in the structure * * * any criminal offense, if * *

in resolving conflicts between the testimonial evidence such that a manifest miscarriage of justice occurred. "[T]his is not 'the exceptional case in which the evidence weighs heavily against the conviction'" * * * where there must be a reversal on the grounds that the verdict is against the manifest weight of the evidence. *State v. Group*, 98 Ohio St.3d 248, 2002-Ohio-7247, ¶86, quoting *Martin*, 20 Ohio App.3d at 175. As such, we overrule appellant's third assignment of error.

{¶152} Judgment affirmed.

POWELL, P.J., and YOUNG, J., concur.

* [t]he offender has a deadly weapon * * * on or about the offender's person or under the offender's control." Finally, R.C. 2941.141 is a "penalty enhancement statute" which imposes a one-year mandatory term upon any offender who "had a firearm on or about the offender's person or under the offender's control while committing the offense." *State v. Ervin* (1994), 93 Ohio App.3d 178,179-80.