

[Cite as *State v. Hall*, 2011-Ohio-635.]

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

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STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 10-CA-23
vs.	:	T.C. CASE NO. 09-CR-938
	:	(Criminal Appeal from
MARK A. HALL	:	Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 11th day of February, 2011.

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GRADY, P.J.:

{¶ 1} Defendant, Mark Hall, appeals from his conviction and sentence for felonious assault.

{¶ 2} In October 2009, Holden Lingrell, Richard Robinson, and Cole Bader lived together at 120 N. Western Avenue in Springfield,

Ohio. In the early morning hours of October 15, 2009, after the three men had gone to a local bar, Robinson and Bader dropped Lingrell off at the home of his friend, Kelly Halpin, who lived at 145 Cassilly Street in Springfield. Defendant Hall, whom Halpin knew through a friend, arrived at Halpin's residence shortly after Lingrell arrived. Defendant and Lingrell immediately got into an argument, and Lingrell called Robinson and asked him to come and pick him up. Robinson and Bader arrived at Halpin's residence to pick Lingrell up. Before those three men left, Robinson hit Defendant Hall because Hall was choking one of the females who were present. Defendant Hall left Halpin's residence about fifteen minutes after Lingrell, Robinson, and Bader left.

{¶3} Lingrell had a phone conversation with Defendant, wherein the two men continued their earlier argument. Defendant indicated that he wanted to fight, and Lingrell gave Defendant his address so they could fight. A short time later Defendant Hall arrived at Lingrell's residence at 120 N. Western Avenue. Defendant wore a gray hooded sweatshirt that partially covered his face, and had his hands in his pockets. Defendant approached Lingrell, pulled out a gun, pointed it at Lingrell's face, and pulled the trigger twice, but the gun jammed. Lingrell ran back toward his house. Robinson and Bader were standing on the porch of their residence. Defendant cleared the gun and fired one shot,

which struck Robinson in his right hip.

{¶ 4} Defendant was indicted on two counts of felonious assault, R.C. 2903.11(A)(2), with a firearm specification, R.C. 2941.145, attached to each count. Following a jury trial Defendant was found guilty of all charges and specifications. The trial court sentenced Defendant on each count of felonious assault to eight years in prison to be served concurrently, plus an additional and consecutive three years on the merged firearm specifications, for a total sentence of eleven years.

{¶ 5} Defendant appealed to this court from his conviction and sentence.

FIRST ASSIGNMENT OF ERROR

{¶ 6} "DEFENDANT-APPELLANT MARK HALL WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF MR. HALL'S CONSTITUTIONAL RIGHTS."

{¶ 7} Defendant argues that he was denied the effective assistance of counsel as a result of his trial counsel's failure to file a motion to suppress Defendant's pretrial identifications by Lingrell and Robinson. Defendant claims that those pretrial identifications were unreliable and tainted by an unduly suggestive photo lineup.

{¶ 8} 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. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must affirmatively demonstrate to a reasonable probability that were it not for counsel's errors, the result of the trial would have been different. *Id.*; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶ 9} In *State v. Garrett*, Montgomery App. No. 22262, 2008-Ohio-3710, at ¶13, we stated:

{¶ 10} "To warrant suppression of identification testimony, the accused bears the burden of showing that the identification procedure was so suggestive as to create a substantial likelihood of misidentification, and that the identification itself was unreliable under the totality of the circumstances. *State v. Poindexter*, Montgomery App. No. 21036, 2007-Ohio-3461, ¶11. If a defendant shows that an identification procedure was unduly suggestive, the trial court must then 'consider whether the identification, viewed under the totality of the circumstances, is reliable despite the suggestive procedure.' *State v. Wills* (1997), 120 Ohio App.3d 320, 324. 'If the pretrial confrontation procedure was not unduly suggestive, any remaining questions as to reliability go to the weight of the identification, not its

admissibility, and no further inquiry into the reliability of the identification is required.' Id."

{¶ 11} With respect to the photo lineup itself, Defendant claims that it was impermissibly suggestive because he was the only person shown in it who lacked facial hair, and the other persons depicted in the photographs have different skin color and facial features.

{¶ 12} We have examined the photo lineups Detective Hicks created and showed to the eyewitnesses to this shooting. Detective Hicks put Defendant's age, height, weight, and other physical characteristics into a police computer, which generated photographs of persons similar in appearance to Defendant. Detective Hicks then selected photographs of five people who are similar in their appearance to Defendant.

{¶ 13} Each of the six individuals depicted in the photo lineup is an African-American male with long curly/frizzy hair, of a similar color. Three of the individuals have similar, though not identical, light complexions, while the other three have slightly darker complexions. Two of the six individuals depicted have noticeable facial hair, two others exhibit only slight, if any, facial hair, and the other two lack facial hair. The backgrounds in all six photographs are the same.

{¶ 14} Five of the six individuals depicted in the photospread are shown wearing white or light colored T-shirts, while one

individual is wearing a red T-shirt with a gold chain. The individual wearing the red shirt is not Defendant. In short, the only individual who in any way stands out in this photo lineup is the individual wearing the red shirt, not Defendant. This photo lineup itself is neither unduly suggestive of Defendant nor does it emphasize him in any way.

{¶ 15} With respect to the procedures used by Detective Hicks in presenting this photo lineup to the witnesses, all of the witnesses were shown the photo lineup separately, and before showing the lineup to each witness Detective Hicks moved Defendant's photograph to a different position in the lineup. While Detective Hicks asked Lingrell when showing him the lineup "if there was anything he could get out of these pictures to maybe match any kind of facial structure to someone," Detective Hicks did not tell Lingrell or any of the other witnesses that the suspect's photograph was included in the lineup before the witness viewed the lineup. Neither did Detective Hicks in any way suggest which photograph the witness should choose. The procedure used by Detective Hicks in showing the photo lineup to the witnesses was not suggestive.

{¶ 16} Defendant has failed to demonstrate that the photo lineup itself or the manner in which it was presented to the witnesses was unfairly suggestive. Accordingly, we need not determine

whether the pretrial identifications were reliable under the totality of the circumstances, because that issue goes to the weight rather than the admissibility of the evidence. *State v. Beddow* (March 20, 1998), Montgomery App. No. 16197, 16198; *State v. Beckham*, Montgomery App. No. 19544, 2003-Ohio-3837; *Garrett*. We conclude that this record does not support a claim that a motion to suppress the pretrial identifications, had one been filed by defense counsel, would have had any reasonable chance of success.

Counsel does not perform deficiently by failing to file a motion that has no reasonable chance of success. *State v. Ratliff*, Montgomery App. No. 19684, 2003-Ohio-6905; *State v. Garrett* (1991), 76 Ohio App.3d 57. Therefore, ineffective assistance of counsel has not been demonstrated.

{¶ 17} Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 18} "THE TRIAL COURT ERRED WHEN IT EXCLUDED RELEVANT EVIDENCE REGARDING THE CRIMINAL ACTIVITIES OF THE WITNESSES CALLED BY THE STATE OF OHIO."

{¶ 19} Defendant argues that the trial court abused its discretion by excluding evidence showing that State's witnesses Lingrell and Robinson have sold drugs. Defendant contends that this evidence was relevant and admissible to attack the credibility of those witnesses.

{¶ 20} The admission or exclusion of evidence rests within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *State v. Sage* (1987), 31 Ohio St.3d 173.

{¶ 21} "'Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

{¶ 22} "A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *AAAA Enterprises, Inc v. River Place Community Redevelopment* (1990), 50 Ohio St.3d 157, 161.

{¶ 23} Evid.R. 401 defines relevant evidence: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence which is relevant is generally admissible. Evidence which is not relevant is not admissible.

Evid.R. 402.

{¶ 24} Evid.R. 608(B), which governs specific instances of a witness's conduct, provides:

{¶ 25} "(B) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Evid. R. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

{¶ 26} During cross-examination of State's witness Cole Bader, Defendant's counsel asked Bader if Holden Lingrell sells drugs.

The State objected that this question was totally irrelevant to this case. Defense counsel responded that Lingrell and Robinson have pending multiple count indictments for drug trafficking, and that defense counsel has witnesses available who would testify that the two men sell drugs. Defense counsel acknowledged, however, that Lingrell and Robinson did not have any convictions for drug trafficking, and that counsel had no information that

this event/shooting arose out of a sale of drugs. The trial court refused to permit Defendant's counsel to ask the State's witness, Bader, whether Lingrell and Robinson sell drugs, finding that evidence was not relevant.

{¶ 27} Defendant argues that specific instances of criminal conduct by Lingrell and Robinson was relevant and admissible to attack their credibility. We disagree. The issue in this case was whether Defendant shot Robinson and attempted to shoot Lingrell. Evidence that Lingrell and Robinson sell drugs does not have any tendency to make the existence of any fact that is of consequence to the determination of this action more probable or less probable. Evid.R. 401. In the absence of any evidence that this shooting arose out of a drug transaction, that evidence is simply not relevant to this case.

{¶ 28} Furthermore, specific instances of the conduct of a witness, for the purpose of attacking that witness's character for truthfulness, other than conviction of a crime as provided for in Evid.R. 609, may not be proved by extrinsic evidence, and may inquired into during cross-examination of another witness only if clearly probative of truthfulness or untruthfulness of the other witness, and the witness to whom the question is posed on cross-examination has testified concerning the character for truthfulness or untruthfulness of the other witness the question

concerns. Evid.R. 608(B)(2); Weissenberger, Ohio Evidence (2010), Section 608.8. The question of whether Lingrell and/or Robinson sell drugs is not clearly probative of their truthfulness or untruthfulness and Bader had not testified concerning their truthfulness or untruthfulness. Evid.R. 608(B)(2). Finally, Lingrell's and Robinson's pending indictments for drug trafficking, as opposed to a conviction, is not a sufficient basis for impeachment. Evid.R. 609. The trial court did not abuse its discretion by excluding evidence of Lingrell's and Robinson's drug activities.

{¶ 29} Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 30} "THE CONVICTION OF DEFENDANT-APPELLANT MARK HALL WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 31} Defendant argues that his convictions for felonious assault are against the manifest weight of the evidence because of the inconsistencies in the testimony of the State's witnesses.

{¶ 32} A weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 33} "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 lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52.

{¶ 34} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230. In *State v. Lawson* (Aug. 22, 1997), Montgomery App.No. 16288, we observed:

{¶ 35} "Because the factfinder . . . has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The 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."

{¶ 36} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in

arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 37} Holden Lingrell and Richard Robinson identified Defendant both at trial and prior to trial, via a photo lineup, as the perpetrator who attempted to shoot Lingrell in the face and did shoot Robinson in the right thigh. Defendant argues that the State's witnesses are all friends and should not be believed because of their conflicting stories, and that the State has not proven his identity as the perpetrator. In support, Defendant points to one witness, Keisha Longo, who testified that she saw Defendant come to the apartment at 145 Cassilly Street before police arrived there to investigate the shooting, and that he left after police left. Longo further testified that Defendant had his hair in cornrow braids, which contradicts the testimony of the eye witnesses as to the shooter's hairstyle.

{¶ 38} The credibility of the witnesses and the weight to be given to their testimony were matters for the trier of facts, the jury here, to determine. *DeHass*. The jury did not lose its way in this case simply because it chose to believe the testimony of the State's witnesses, rather than Defendant's, which it had a right to do. *Id.*

{¶ 39} Reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the trier

of facts lost its way in choosing to believe the State's witnesses, or that a manifest miscarriage of justice has occurred. Defendant's conviction is not against the manifest weight of the evidence.

{¶ 40} Defendant's third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

{¶ 41} "THE TRIAL COURT COMMITTED ERROR AND VIOLATED DEFENDANT-APPELLANT MARK HALL'S CONSTITUTIONAL DUE PROCESS RIGHTS BY SENTENCING MR. HALL TO THE MAXIMUM TERM OF INCARCERATION."

{¶ 42} Defendant argues that the maximum sentences the trial court imposed upon him, a first time felony offender, are contrary to law, an abuse of discretion, and inconsistent with the sentences imposed by other trial courts on similar offenders.

{¶ 43} With respect to Defendant's contention that the trial court violated R.C. 2929.11(B) by failing to impose a sentence that was consistent with sentences imposed for similar crimes committed by similar offenders, in *State v. Miller*, Clark App. No. 09CA28, 2010-Ohio-2138, at ¶51-52, this court observed:

{¶ 44} "We have addressed the issue of sentencing consistency before, recognizing "that trial courts are limited in their ability to address the consistency mandate, and appellate courts are hampered in their review of this issue, by the lack of a reliable body of data upon which they can rely."" *State v. York*, Champaign

App. No. 2009-CA-03, 2009-Ohio-6263, ¶13 (internal citations omitted). “[A]lthough a defendant cannot be expected to produce his or her own database to demonstrate the alleged inconsistency, the issue must at least be raised in the trial court and some evidence, however minimal, must be presented to the trial court to provide a starting point for analysis and to preserve the issue for appeal.” Id.

{¶ 45} “When the consistency issue is not raised in the trial court, a defendant cannot argue on appeal “that the sentence imposed by the trial court was inconsistent with those imposed on similar offenders.” Id. In the present case, Miller failed to raise the consistency issue at sentencing and did not present any evidence below about similar offenders and their sentences.

As a result, he has forfeited his ability to raise the issue on appeal. Id.; see, also, *State v. Cantrell*, Champaign App. No. 2006 CA 35, 2007-Ohio-6585, ¶10-14; *Rollins*, supra, at ¶16.”

{¶ 46} A review of the sentencing hearing in this case reveals that Defendant did not raise the consistency issue and did not present any evidence about similar offenders and their sentences.

As a result, Defendant has forfeited his ability to raise the consistency issue on direct appeal. *Miller*.

{¶ 47} In *State v. Jeffrey Barker*, Montgomery App. No. 22779, 2009-Ohio-3511, at ¶36-37, we wrote:

{¶ 48} "The trial court has full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any findings or give its reasons for imposing maximum, consecutive, or more than minimum sentences. *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, at paragraph 7 of the syllabus. Nevertheless, in exercising its discretion the trial court must consider the statutory policies that apply to every felony offense, including those set out in R.C. 2929.11 and 2929.12. *State v. Mathis*, 109 Ohio St.3d 54, 846 11 N.E.2d 1, 2006-Ohio-855, at ¶37.

{¶ 49} "When reviewing felony sentences, an appellate court must first determine whether the sentencing court complied with all applicable rules and statutes in imposing the sentence, including R.C. 2929.11 and 2929.12, in order to find whether the sentence is contrary to law. *State v. Kalish*, 120 Ohio St.3d 23, 896 N.E.2d 124, 2008-Ohio-4912. If the sentence is not clearly and convincingly contrary to law, the trial court's decision in imposing the term of imprisonment must be reviewed under an abuse of discretion standard. *Id.*"

{¶ 50} Defendant contends that his sentence is contrary to law because the trial court failed to consider the principles and purposes of felony sentencing, R.C. 2929.11, and the seriousness and recidivism factors, R.C. 2929.12. In *Miller*, at ¶43, we

observed:

{¶ 51} “Although the trial court did not specifically cite either statute during the sentencing hearing, its judgment entry stated that it had ‘considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and [had] balanced the seriousness and recidivism factors [under] Ohio Revised Code Section 2929.12.’ Because a trial court speaks only through its journal entries, Miller’s sentence is not contrary to law merely because the trial court failed to cite either statute during the sentencing hearing.

State v. Cave, Clark App. No. 09-CA-6, 2010-Ohio-1237, ¶10. ‘Furthermore, even if there is no specific mention of those statutes in the record, “it is presumed that the trial court gave proper consideration to those statutes.”’ *Id.*, quoting *Kalish*, *supra*, at n.4. We note too that Miller’s five-year sentence is within the statutory range for a third-degree felony. See R.C. 2929.14(A)(3). Therefore, we have no basis for concluding that the sentence is contrary to law.”

{¶ 52} In its journalized Judgement Entry of Conviction, the trial court indicated that it had considered the record, oral statements by counsel and Defendant, Defendant’s prior criminal record, the principles and purposes of sentencing, R.C. 2929.11,

and the seriousness and recidivism factors, R.C. 2929.12. The court also informed Defendant during sentencing about post-release control requirements. The court complied with the applicable rules and statutes in imposing its sentence. Furthermore, the eight year sentence the trial court imposed on each count of felonious assault, while the maximum sentences for those offenses, are nevertheless within the authorized range of available punishments for felonies of the second degree. R.C. 2929.14(A)(2). The trial court ordered that the eight year prison terms be served concurrently, and it merged the two firearm specifications and imposed an additional and consecutive three year term, for a total sentence of eleven years. Defendant's sentence is not clearly and convincingly contrary to law. *Kalish*.

{¶ 53} Finally, Defendant's maximum sentence is supported by this record. Defendant pointed a gun at Lingrell's face and, at close range, pulled the trigger twice, but the weapon jammed and Lingrell was able to run away and escape what otherwise certainly would have been serious physical harm or perhaps even death. Defendant immediately cleared the gun and fired one shot, which struck Robinson in the right hip. No explanation was ever offered for Defendant's conduct, and he expressed no remorse. The record supports the eight year sentence imposed by the trial court. No abuse of discretion on the part of the trial court has been

demonstrated.

{¶ 54} Defendant's fourth assignment of error is overruled.

The judgment of the trial court will be affirmed.

DONOVAN, J. and FROELICH, J. concur.

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