

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-180057
	:	TRIAL NO. B-1501368
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
LAWRENCE DANGERFIELD,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar. This judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Following a jury trial, defendant-appellant Lawrence Dangerfield challenges his convictions for the aggravated vehicular homicide of Asia Denson, in violation of R.C. 2903.06(A)(2), and for failure to stop, in violation of R.C. 4549.02(A). Dangerfield struck and killed the 17-year-old as she crossed Reading Road on the evening of January 18, 2015.

Just before 11:00 p.m., Dangerfield was driving his sister's silver BMW sedan north on Reading Road in the Bond Hill neighborhood of Cincinnati. While the posted speed limit was 30 m.p.h., Dangerfield was traveling at between 59 and 72 m.p.h. His driver's license was suspended at the time.

Denson and two friends had just exited from a Metro bus and were attempting to cross Reading Road. Dangerfield struck Denson, tossing her into the air. The impact was

captured on surveillance video from the bus and from a nearby apartment building. Her body was thrown 250 feet. She died within minutes.

Dennis Medley, Jr., the owner of an auto repair shop, was driving south on Reading Road at the same time and observed a heavily damaged silver BMW, streaming coolant from its radiator, driving north. The front windshield was heavily cracked. Medley observed the driver as the cars passed. Medley called 911 and described the driver as “a black male with a beanie on his head * * * [h]air on his face,” and distinctive eyes and nose. Medley subsequently picked Dangerfield’s photo out of an eight-image police photo lineup and identified Dangerfield as the driver during trial.

The bumper of the BMW, bearing the front license plate, was torn off of the vehicle by the impact with Denson’s body. In response to a radio call which included the make and model of the car, its license number, and a description of the driver as a “Male black with a light-colored head covering, like a beanie-type covering,” Cincinnati police officers quickly located the vehicle at 1663 Rose Place, about two miles from where Denson had been killed. Dangerfield lived there with his sister. Dangerfield and several others were standing in front of the vehicle. The group retreated to the house. Dangerfield was coaxed from the house and taken for questioning. Police took a photo of him showing his wide nose and graying beard. He was wearing a cream-colored kufi, or brimless, rounded cap, and had a cut on the center of his forehead. Dangerfield asked for an attorney and questioning ceased.

Denson’s blood was found on the silver BMW in Dangerfield’s driveway.

In his first assignment of error, Dangerfield claims that the trial court erred in denying his motion to suppress Medley’s photo-lineup identification of Dangerfield as the driver of the BMW. He claims the photo lineup was suggestive and tainted Medley’s

identification, and that, in denying the motion, the trial court did not consider the state's failure to fully comply with the provisions of R.C. 2933.83 during the photo lineup.

Our review of a trial court's ruling on a motion to suppress presents a mixed question of law and fact. We must accept the trial court's findings of fact if they are supported by competent and credible evidence, but we review de novo the trial court's application of the law to the relevant facts. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. A two-part test is utilized to determine whether an eyewitness identification must be suppressed. *See State v. Neal*, 1st Dist. Hamilton No. C-140667, 2015-Ohio-4705, ¶ 28; *see also Neil v. Biggers*, 409 U.S. 188, 196-197, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). First, the reviewing court must determine whether the lineup procedure utilized was suggestive and unnecessary. Second, if the lineup is found to be suggestive and unnecessary, the court must determine whether the identification was reliable under the totality of the circumstances. *Neal* at ¶ 28; *see State v. Brand*, 1st Dist. Hamilton No. C-150590, 2016-Ohio-7456, ¶ 44-45.

Within a few days of the accident, Medley identified Dangerfield as the driver of the BMW from a photo lineup of eight photos of African-American men shown to him by a blind administrator, an officer not involved in the investigation. Each photo showed an African-American male with a beard and roughly similar features. The other seven photos had been selected from a computer database to match Dangerfield's characteristics. Medley was not told that the suspect's photo was in the lineup. The skin tone of the subjects varied, but the instructions had cautioned that "Photographs may not always depict the true complexion of a person. It may appear lighter or darker in the photograph." The photo of Dangerfield showed him wearing a dark brown or black cap, very similar in shade to his hair color, and much darker than the cap he had worn the night that he struck Denson.

Medley observed the photos for about ten minutes and ultimately picked the photo of Dangerfield. He continued to look at all the remaining photos after seeing Dangerfield. He initialed that photo and then wrote a brief description of his identification: “eyes and face and beard also nose.” Medley testified that he had discarded the other photos “for the simple fact [that] none of them had any [similarity to] the wide nose, the eyes, or nothing really clicked in their facial expressions or the face.” Medley stated at the suppression hearing that he was “positive” that Dangerfield was the driver.

We agree with the trial court’s conclusion that the lineup was not unduly suggestive. *See Neal*, 1st Dist. Hamilton No. C-140667, 2015-Ohio-4705, at ¶ 36. Thus we need not determine whether Medley’s identification was reliable under the totality of the circumstances. *See Brand*, 1st Dist. Hamilton No. C-150590, 2016-Ohio-7456, at ¶ 47.

Finally, the blind administrator admitted handing all eight photos to Medley at once, contrary to the admonition in R.C. 2933.83(B) to show a witness the photos sequentially. But noncompliance with R.C. 2933.83(B) alone does not render a pretrial identification procedure per se impermissibly suggestive and does not warrant suppression of the identification evidence. *See State v. Ruff*, 1st Dist. Hamilton No. C-110250, 2012-Ohio-1910, ¶ 8; *see also State v. Young*, 2017-Ohio-9028, 101 N.E.3d 1056, ¶ 35 (10th Dist.). The remedy for a failure to comply with R.C. 2933.83 is that “the jury shall be instructed that it may consider credible evidence of noncompliance in determining the reliability of any eyewitness identification.” R.C. 2933.83(C)(3). *See State v. Stevenson*, 2d Dist. Montgomery No. 24821, 2012-Ohio-3396, ¶ 16.

Here, the trial court did not state in its decision overruling the motion to suppress that it had considered noncompliance with R.C. 2933.83(B). But we cannot say that Dangerfield was prejudiced by this omission. The jury heard extensive testimony and cross-examination regarding the photo-lineup identification procedure. And the trial

court instructed the jury to consider whether Medley, the single identification witness, had had the opportunity to make a reliable observation, and specified that the jury could take into account the circumstances under which the identification was made, “including [the] photo lineup.” This credibility instruction encouraged the jury to assess the value of Medley’s photo-identification testimony much as an R.C. 2933.83(C)(3) instruction would have done. *See Young*, 2017-Ohio-9028, 101 N.E.3d 1056, at ¶ 36. Dangerfield was not prejudiced by the court’s instruction or by its denial of his motion to suppress. The first assignment of error is overruled.

Dangerfield next argues that his conviction for aggravated vehicular homicide was not supported by sufficient evidence. R.C. 2903.06(A)(2)(a) provides that no person, while operating a motor vehicle, shall cause the death of another “recklessly.” Dangerfield contends that his conduct was negligent at worst and that, as a matter of law, excessive speed alone was insufficient to prove recklessness.

The test for the sufficiency of the evidence required to sustain a conviction is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See State v. Waddy*, 63 Ohio St.3d 424, 430, 588 N.E.2d 819 (1992). A “driver’s grossly excessive speed, particularly when combined with other factors, will * * * support a finding of recklessness.” *State v. Moore*, 2d Dist. Montgomery No. 22904, 2009-Ohio-3766, ¶ 8; *see State v. Napier*, 1st Dist. Hamilton No. C-970383, 1998 WL 542715, *4 (Aug. 28, 1998); *see also State v. Nguyen*, 10th Dist. Franklin No. 02AP-1138, 2003-Ohio-2328, ¶ 37 (holding that excessive speeding alone can be sufficient to demonstrate recklessness).

The state’s accident reconstructionist testified that Dangerfield was traveling between 59 and 72 m.p.h. when he struck and killed Denson—twice the posted speed

limit. He struck Denson with force sufficient to cause major damage to his vehicle and to throw her 250 feet down Reading Road. Dangerfield struck Denson while passing a Metro bus just leaving a bus stop in a residential neighborhood. It was dark. Denson's companions did not hear any sounds indicating that Dangerfield had attempted to brake before hitting Denson.

Dangerfield's excessive speed, when combined with the circumstances surrounding the incident, showed a "heedless indifference to the consequences" of and disregard for a known risk that his conduct was likely to cause. *Napier* at *4. Thus the record reflects substantial, credible evidence from which the jury could have reasonably concluded that the state had proved all elements of aggravated vehicular homicide beyond a reasonable doubt, including that Dangerfield had killed Denson recklessly. *See Waddy*, 63 Ohio St.3d at 430, 588 N.E.2d 819; *see also Moore* at ¶ 8. The second assignment of error is overruled.

In his third assignment of error, Dangerfield challenges the weight of the evidence to support his convictions because the evidence at trial did not prove that he was the driver of the silver BMW that struck Denson.

But our review of the record fails to persuade us that the jury clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541. (1997). The jury was entitled to reject Dangerfield's theory that there was no credible evidence that he was the driver. The state, however, adduced ample evidence that Dangerfield was the driver. Medley testified that he had observed the driver of the damaged BMW at close range. He called 911 and gave a detailed description of the driver. Police officers observed a man matching that description standing in front of the damaged BMW on Rose Place. Medley picked Dangerfield's image from the photo lineup, and he

identified Dangerfield as the driver during the trial. Dangerfield's DNA was found on the interior driver side door handle and the steering wheel. He had brought the undamaged vehicle to a repair shop three days before he struck Denson. And he had been cited for numerous traffic offenses while driving the BMW.

As the weight to be given the evidence and the credibility of the witnesses was primarily for the triers of fact to determine, the jury, in resolving conflicts in the testimony, could properly have found that Dangerfield was the driver of the vehicle. *See State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The third assignment of error is overruled.

Dangerfield next argues that the trial court erred in failing to grant his motion for a new trial, made out of time, on grounds that the jury was never definitely told to disregard an investigating police officer's references at trial to Dangerfield getting "lawyered up" and not giving a statement to police. Dangerfield did not contemporaneously object to the references or to the trial court's curative instruction given to the jury before closing argument.

While Dangerfield cites to *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335, ¶ 38, holding that "the admission of the defendant's pre-arrest, pre-Miranda silence was clearly prejudicial," on appeal, he argues only that the curative instruction as given, that "every individual has the right to remain silent at any time [and] the fact that there was no statement given [by Dangerfield] is not to be inferred by you as probative of anything," failed to attenuate adequately the impact of the comments.

Under Crim.R. 33(A)(2), a new trial may be granted when the misconduct of a state's witness materially affects the defendant's substantial rights. *See State v. Finnell*, 2018-Ohio-564, 106 N.E.3d 285, ¶ 3 (1st Dist.). We review the trial court's ruling on the

motion only for an abuse of its discretion. *See State v. Seal*, 2017-Ohio-116, 75 N.E.3d 1035, ¶ 9 (4th Dist.).

Dangerfield's reliance on *Leach* is misplaced. The record is silent as to whether Dangerfield was under arrest or had been informed of his right to remain silent at the time that he "lawyered up." Moreover, the trial court's curative instruction directly addressed Dangerfield's right to silence and the inappropriateness of inquiry about it—the crux of any constitutional claim. The trial court's decision to limit the impact of the "lawyered up" comments with a curative instruction was supported by a sound reasoning process and thus does not demonstrate an abuse of its discretion. *See AAAA Ents., Inc. v. River Place Community Urban Redev. Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *see also Seal* at ¶ 9. The fourth assignment of error is overruled.

In his final assignment of error, Dangerfield argues that his trial counsel was ineffective for failing to object to the "lawyered up" comments and the trial court's curative instruction, to the state's suggestion in voir dire that alcohol was involved in the case, and to the nonsequential presentation of the photo array to Medley.

Judicial scrutiny of trial counsel's performance must be highly deferential; this court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. A reviewing court will not second-guess decisions made by trial counsel to pursue one course of defense over another. *See State v. Mason*, 82 Ohio St.3d 144, 157-158, 694 N.E.2d 932 (1998).

Here, Dangerfield's experienced trial counsel had a clear strategy, expressed in opening argument, to contest only that Dangerfield was the driver of the BMW that struck and killed Denson. The critical step in that strategy was to discredit the testimony of

Medley, the state's identification witness. Counsel effectively highlighted inconsistencies in Medley's testimony and in the photo-lineup procedures.

None of counsel's alleged failures to object to the "lawyered up" comments or instructions undermined that strategy or were so egregious as to deny Dangerfield a reliable and fair proceeding. This is particularly so in light of counsel's statement in open argument that "it's not my client's job to present alternative persons that could have been driving that night. He solely said, I don't want to talk to you, gentlemen, I'm going to invoke my Fifth Amendment right and ask for an attorney, and that's where we're at."

The mention of alcohol use in voir dire was minimal and did not affect the fundamental fairness of the trial. Finally, in light of our overruling of the first assignment of error, any failure to object to the nonsequential presentation of the photos did not amount to deficient performance, much less fundamental unfairness towards Dangerfield.

We hold that there were no acts or omissions by trial counsel that deprived Dangerfield of a substantive or procedural right, or that rendered the trial fundamentally unfair. *See Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The fifth assignment of error is overruled.

Therefore, we affirm the trial court's judgment.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., BERGERON and WINKLER, JJ.

To the clerk:

Enter upon the journal of the court on June 26, 2019
per order of the court _____.
Presiding Judge