

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

STATE OF OHIO,	:	APPEAL NO. C-170571
	:	TRIAL NO. B-1503314
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
DAYSMEN LATHAM,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and 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, Daysmen Latham was found guilty of murder with specifications for causing the death of Nake'land Williams as a result of committing a felonious assault, and felonious assault with specifications. He raises eight assignments of error. For the reasons that follow, we overrule each assignment of error and affirm his convictions.

First, Latham claims the trial court erred in overruling his motion to suppress the pretrial identifications by Deyaila Freeman, Brandon Hurtt, Douglas Boyd, and Antoine Burrell. Latham does not argue that the lineups shown to Freeman and Hurtt were unduly suggestive. Instead, he contends the identifications were unreliable. Because the procedures were not suggestive, any unreliability went to the weight of the evidence. *State v. Neal*, 1st Dist. Hamilton No. C-140677, 2015-Ohio-4705, ¶ 28.

Latham contends the lineups shown to Boyd and Burrell did not follow the procedures required by R.C. 2933.83, because the administrator who conducted Boyd's lineup was not blind or blinded, and Burrell was shown all six photos at once instead of one-by-one. However, Latham has not alleged or proven that the procedures were so unduly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *See State v. Crutchfield*, 1st Dist. Hamilton No. C-100694, 2011-Ohio-5383, ¶ 26. Accordingly, we overrule his first assignment of error.

In his second assignment of error, Latham contends that the trial court erred in overruling his objections to the state's use of a peremptory challenge against Juror 11, and a challenge for cause against Juror 3, to exclude two African-American jurors from the jury panel. The state provided three race-neutral reasons for the challenge to Juror 11, and the trial court's finding that the state did not purposefully discriminate against the prospective juror is not clearly erroneous. *See State v. Williams*, 1st Dist. Hamilton No. C-130277, 2014-Ohio-1526, ¶ 44.

A trial court's ruling on a challenge for cause shall not be overturned on appeal if the decision is reasonably supported by the record. *State v. Lewis*, 7th Dist. Mahoning No. 03 MA 36, 2005-Ohio-2699, ¶ 64. Juror 3 made it clear that he did not want to hear testimony from his former student, a witness for Latham. Therefore, the ruling was reasonably supported by the record. *See id.*

Next, Latham argues that the prosecutor engaged in misconduct by making an unfairly prejudicial opening argument to the jury which deprived him of his right to a fair trial. The misconduct of a prosecuting attorney is not reversible error unless it deprives the defendant of a fair trial. *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984).

During its opening statement, the state mentioned several individuals who had been shot, but were not going to testify. Latham's three objections were sustained, and the jury was instructed several times that opening statements did not constitute evidence. Although the remarks were improper, they did not prejudicially affect Latham's substantial rights, and we overrule the third assignment of error.

In his fourth assignment of error, Latham argues that the trial court abused its discretion by admitting into evidence a gun found in his apartment, 911 calls, jail calls, and the testimony of a witness about a threat against the witness by Latham. The admission of prejudicial evidence is harmless if there is no reasonable possibility that the evidence contributed to the conviction. *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 27. Even assuming the admission of the gun and the jailhouse calls about the gun was error, any error was harmless because the remaining evidence of guilt is overwhelming. *See id.*

The evidence of the threats was admissible because it reflected a consciousness of guilt. *See State v. Richey*, 64 Ohio St.3d 353, 357, 595 N.E.2d 915 (1992). With respect to the 911 calls, Latham did not specify which calls or statements were inadmissible. Consequently, we disregard this error pursuant to App.R. 12(A)(2). The fourth assignment of error is overruled.

Latham next contends that the trial court abused its discretion by failing to order a mistrial due to the admission of the jail calls, testimony about the threats, and the prosecutorial misconduct. We have already determined that the improper opening statements and the playing of the jail calls were harmless error, and that the testimony was admissible. We cannot say that the errors so substantially affected Latham's rights that a mistrial was warranted. *See State v. Lukens*, 66 Ohio App.3d 794, 809, 586 N.E.2d 1099 (10th Dist.1990). The fifth assignment of error is overruled.

In his sixth and seventh assignments of error, Latham contends that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. Specifically, Latham argues that the eyewitness identifications by Freeman, Hurtt, Boyd, and Burrell were unreliable. However, “in deciding if the evidence was sufficient, an appellate court does not assess the credibility of the witnesses.” *State v. Jones*, 1st Dist. Hamilton Nos. C-120570 and C-120571, 2013-Ohio-4775, ¶ 33.

He also contends that no physical evidence connected him to the shooting. “But no rule of law exists that a witness's testimony must be corroborated by physical evidence.” *State v. Lukacs*, 188 Ohio App.3d 597, 2010-Ohio-2364, 936 N.E.2d 506, ¶ 58 (1st Dist.).

The trier of fact could have found all the elements proven beyond a reasonable doubt. *See State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Reviewing the entire record, we cannot hold that the jury lost its way and committed such a miscarriage of justice that the convictions must be reversed. *Id.* at 387. Accordingly, we overrule his sixth and seventh assignments of error.

In his eighth assignment of error, Latham asserts that his trial counsel was ineffective for failing to hire an expert in crime scene reconstruction. To establish a claim for ineffective assistance of counsel, the appellant has the burden of demonstrating that (1) the performance of defense counsel was seriously flawed and deficient, and (2) there is a reasonable probability that the result of the proceeding would have been different had defense counsel provided proper representation. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In general, “the failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel.” *State v. Chambers*, 1st Dist.

Hamilton Nos. C-060922 and C-061036, 2008-Ohio-470, ¶ 28, quoting *State v. Nicholas*, 66 Ohio St.3d 431, 436, 613 N.E.2d 225 (1993). The decision to utilize or forgo an expert falls within the realm of trial strategy. *Id.*

Latham has not demonstrated that he was prejudiced by the omission of testimony of an expert in crime scene reconstruction, and any testimony that may have been offered is purely speculative. Following our review of the record, we conclude that counsel's performance was not deficient and that Latham did not receive ineffective assistance. This assignment of error is not well taken.

Accordingly, we overrule the assignments of error and affirm the judgment of the trial court.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., ZAYAS and DETERS, JJ.

To the clerk:

Enter upon the journal of the court on September 5, 2018

per order of the court _____.

Presiding Judge