[Cite as *State v. Ward-Douglas*, 2012-Ohio-4023.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-05-042
	:	O P I N I O N
- vs -		9/4/2012
	:	
SHARON WARD-DOUGLAS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 10CR26720

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Clyde Bennett, II, 119 East Court Street, Cincinnati, Ohio 45202, for defendant-appellant

POWELL, P.J.

{¶ 1} Defendant-appellant, Sharon Ward-Douglas, appeals her felony convictions for making or presenting forged prescriptions for painkillers at pharmacies in a three-county area by challenging the eyewitness identification, venue, the sufficiency and manifest weight of the evidence, and the effectiveness of her trial counsel. We affirm the judgment, finding none of these issues merits reversal.

{¶ 2} Appellant was charged in Warren County Common Pleas Court with numerous

drug offenses based on allegations she made or passed forged prescriptions to obtain schedule II or schedule III drugs. The state claimed that, as a course of conduct during 2008 and 2009, 15 false or fraudulent prescriptions for Percocet or Vicodin were written from one physician's prescription pad and presented to pharmacies in either Warren, Butler, or Hamilton counties on an almost monthly basis.

{¶ 3} Appellant filed a motion to suppress evidence, which was denied by the trial court. Appellant's case was tried to a jury, which returned a guilty verdict for 15 counts of R.C. 2925.23(B)(1), the illegal processing of drug documents, and one count of aggravated possession of drugs under R.C. 2925.11(A). After appellant was sentenced, she filed this appeal, raising five assignments of error for our review.

{¶ 4} Assignment of Error No.1:

{¶ 5} THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS EYEWITNESS IDENTIFICATION TESTIMONY BECAUSE THE IDENTIFICATION RESULTED FROM AN UNDULY SUGGESTIVE SHOW-UP IDENTIFICATION PROCEDURE THAT CREATED A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MIS-IDENTIFICATION.

{¶ 6} According to the record, there were four witnesses, two witnesses from a West Chester pharmacy in Butler County and two from a Parkside Drive pharmacy in Warren County, who could potentially provide identification testimony because they viewed the perpetrator and the vehicle she was driving at the respective pharmacy drive thru. At the suppression hearing, only three police officers testified. Appellant's assignment of error focuses on the circumstances surrounding her appearance in municipal court when the two Warren County pharmacy witnesses were in attendance and, therefore, we will concentrate our review on those issues.

{¶ 7} Appellate review of a ruling on a motion to suppress presents a mixed question

of law and fact. *State v. Cochran*, 12th Dist. No. CA2006-10-023, 2007-Ohio-3353, ¶ 12. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. *Id.* Therefore, when reviewing a trial court's decision regarding a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *Id.* An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether the facts satisfy the appropriate legal standard, as a matter of law. *Id.*

{¶ 8} After reviewing the record and the trial court's decision on the motion to suppress, we accept the trial court's findings of fact for the issues pertinent to this appeal. The factual findings from the trial court are as follows:

{¶ 9} Det. Dennis Luken of the Warren County Drug Task Force was investigating a report that a forged prescription was presented at a pharmacy on Parkside Drive in Warren County. Through his investigation, he learned that appellant was suspected of committing a similar offense at a Butler County pharmacy and the descriptions of appellant and her motor vehicle from Butler County were similar to the descriptions he was given.

{¶ 10} Describing in detail how the photo lineup was composed and presented, Det. Luken said he separately showed the two pharmacy employees a six-person photo lineup of African American women and that array included a driver's license photo of appellant that he obtained from the Bureau of Motor Vehicles.

{¶ 11} According to the trial court, Det. Luken testified that "Witness Stallo" identified appellant's photo as the perpetrator "with 50% certainty" and "Witness Hunt" identified appellant with "100% certainty." Det. Luken "pointed out the person who was the suspect" at the conclusion of the photo lineup process.

{¶ 12} Some six months after the photo lineup, a hearing was scheduled in Mason

Municipal Court. Det. Luken told both Stallo and Hunt that the person they picked from the photo lineup was going to be present at a preliminary hearing and "asked them to be present to see if they could make a better identification." Appellant was not in custody. The trial court noted that Det. Luken testified that both witnesses told him after the hearing that appellant was the individual involved.

{¶ 13} When a witness identifies a defendant prior to trial, due process requires a court to suppress evidence of the witness's prior identification upon the defendant's motion if the confrontation was unduly suggestive of the defendant's guilt and the identification was unreliable under the totality of the circumstances. *State v. Murphy*, 91 Ohio St.3d 516, 534, 2001-Ohio-112, called into doubt by rule on other grounds, 98 Ohio St.3d 354, 2003-Ohio-1325.

{¶ 14} In other words, before identification testimony may be suppressed, the trial court must find that the procedure employed was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification. *Neil v. Biggers*, 409 U.S. 188, 198-199, 93 S.Ct. 375 (1972). It is this likelihood of misidentification that violates a defendant's right to due process. *Id*. at 198 (suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous).

{¶ 15} If a defendant meets her burden to show that the identification procedure was unduly suggestive, the court must then consider whether the identification, viewed under the totality of the circumstances, is reliable despite its suggestive character. *See State v. Andrews*, 12th Dist. No. CA2009-02-052, 2010-Ohio-108; *State v. Wills*, 120 Ohio App.3d 320, 324 (8th Dist.1997).

{¶ 16} If no impermissibly suggestive procedure has been employed by the state, however, a court need not reach the second step of the process regarding the reliability of

the identification. *Andrews*; *see Wills*, 120 Ohio App.3d at 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).

{¶ 17} Factors to be considered in evaluating reliability include the prior 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. *Biggers*, 409 U.S. at 199.

{¶ 18} The trial court in this case concluded that the manner in which the photo arrays or lineups were composed or presented was not "unnecessarily suggestive." Pertaining to the municipal court appearance, the trial court held that the "methodology of Detective Luken was not optimal, but the test is not perfection but whether or not it was 'so impermissibly suggestive.' The court cannot reach this conclusion. * * *."

{¶ 19} Reviewing the record without deference to conclusions of the trial court, we conclude that the photo array or lineup procedures outlined by law enforcement in this case were not impermissibly or unduly suggestive.

{¶ 20} With regard to the municipal court appearance, we are concerned about the manner in which this particular appearance was handled. However, we conclude that the identification previously provided by the witnesses possesses sufficient aspects of reliability, there appears to be no likelihood of misidentification under the totality of the circumstances, and no prejudice to appellant. *Andrews*, 12th Dist. No. CA2009-02-052, 2010-Ohio-108.

{¶ 21} Before appellant appeared in municipal court in front of the two Parkside Drive pharmacy witnesses, both of those witnesses observed the perpetrator sufficiently during the crime to provide a physical description to law enforcement and offered some degree of

identification at the photo lineup. *See State v. Camp*, 10th Dist. No. 82AP-575, 1982 WL 4592 (Dec. 23, 1982).

{¶ 22} Specifically, the record indicates that witness Hunt provided a description of the perpetrator, maintained that she was 100 percent certain that appellant was the person who presented the forged prescription at the pharmacy drive-thru, and identified appellant as such at trial. Witness Stallo continued to maintain at trial that she was only 50 percent certain of her identification of the person who presented the prescription. Stallo testified that appellant's municipal court appearance did not change her feelings about her level of certainty, and she was not asked to identify the perpetrator at trial. Accordingly, the witnesses' view of appellant at her municipal court appearance had no prejudicial impact as it did not alter the identification in any manner.

{¶ 23} We reviewed all of appellant's arguments with regard to this assignment of error and find them not well taken. The trial court did not err in denying her motion to suppress. Appellant's first assignment of error is overruled.

{¶ 24} Assignment of Error No. 2:

{¶ 25} APPELLANT WAS DENIED DUE PROCESS AND THE LIBERTIES SECURED BY OHIO CONSTITUTION ARTICLE [I], SECTIONS 1, 2, 10[,] AND 16 WHEN SHE WAS CONVICTED OF THE OFFENSES OF ILLEGAL PROCESSING OF DRUG DOCUMENTS AND AGGRAVATED POSSESSION OF DRUGS WITHOUT SUFFICIENT EVIDENCE.

{¶ 26} Appellant argues there was insufficient evidence to convict her for 12 of the 15 counts of illegal processing of drugs and for the one count of aggravated possession of drugs. The record shows that all of the prescriptions that form the basis of the charges in this case were written on a prescription pad from Dr. Elizabeth Clark. As previously noted, two counts of illegal processing drug documents related to the pharmacy in Butler County and the Parkside Drive pharmacy in Warren County, respectively. The other processing counts

resulted from the police investigations, when queries were entered into a database to trace Dr. Clark's "DEA" number [to prescribe drugs], or queries were entered for a particular patient's name or date of birth, etc., and additional fraudulent prescriptions from Dr. Clark were found.

{¶ 27} Under this assignment of error, appellant challenges the sufficiency of the evidence for the offenses discovered in the police investigations, i.e., the two Warren County pharmacies other than the Parkside Drive location and the prescriptions presented and filled at Hamilton County locations, with one exception that appellant may have inadvertently omitted.

{¶ 28} The elements of the illegal processing of drug documents, under R.C. 2925.23(B)(1) are: intentionally making, uttering, or selling, or knowingly possessing a prescription that is false or forged.

{¶ 29} "Utter" means to issue, publish, transfer, use, put or send into circulation, deliver, or display. *See* 2913.01(H). "Forge" means to fabricate or create, in whole or in part and by any means, any spurious writing, or to make, execute, alter, complete, reproduce, or otherwise purport to authenticate any writing, when the writing in fact is not authenticated by that conduct. R.C. 2913.01(G).

{¶ 30} A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature. R.C. 2901.22(A). A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature; a person has knowledge of circumstances when he is aware that such circumstances probably exist. R.C. 2901.22(B).

{¶ 31} Aggravated possession of drugs under R.C. 2925.11(A) states that no person

shall knowingly obtain, possess, or use a controlled substance, and if the controlled substance is contained within schedule I or II, with exceptions not applicable here, it is a felony of the fifth degree. *See also* R.C. 2925.11(C)(1); *see* R.C. 3719.41 ("Schedules of controlled substances").

{¶ 32} At the beginning of trial, the parties stipulated that Dr. Clark did not write or authorize any of the prescriptions at issue. They also stipulated that appellant, Harriet Ward, Sabrina Coleman, and Georgia Drummond were not patients of Dr. Clark, but Latrice Douglas was a patient of Dr. Clark. Ward, Coleman, Drummond, and Latrice Douglas are either related to appellant or have some connection to her. Ward, Coleman, and Drummond appear as the patient name on several prescriptions at issue.

{¶ 33} The following evidence is a summary of the evidence adduced in the state's case.

{¶ 34} West Chester Police Officer Jason Flick testified that he was called to a pharmacy in Butler County in January 2009 to investigate a report that a person was attempting to pick up Percocet on a fraudulent prescription at the pharmacy drive-thru. The perpetrator left before police arrived. Two witnesses told the officer that the woman at the drive-thru was an African American woman, darker complexion, late 20s or 30s, medium build, with corn-rows or braids or extentions or "something to that effect" in her hair.

{¶ 35} The woman was driving a black Cadillac Escalade with a specialty license plate. A partial plate number was provided. Officer Flick testified that a search revealed appellant as the registered owner of a vehicle matching the vehicle description and the partial specialty plate number.

{¶ 36} Another West Chester Police Officer compiled a photo array or photo lineup and Officer Flick presented it to the two witnesses who encountered the suspect. Eventually, the witnesses were asked to view two photo arrays, one that contained a driver's license

photo of appellant, and the other array, which contained a photo of Latrice Douglas, who the jury would learn was appellant's estranged "spouse." Officer Flick indicated that the two employees said appellant's photograph most resembled the perpetrator, but neither was certain. Neither employee chose Latrice Douglas' photo as depicting the perpetrator.

{¶ 37} Danielle West, a pharmacist at the West Chester pharmacy at issue, testified that she observed the suspect for about three to four minutes as the suspect sat in the driver's seat of a black Cadillac Escalade sport utility vehicle (SUV) at the pharmacy drive-thru. West testified that the pharmacy was aware the prescription was fraudulent and she was trying to stall for time after calling police.

{¶ 38} West provided a description of the suspect. She indicated that she picked two photos from the two photo lineups presented to her, but thought one of the photos, appellant's photo, most resembled the suspect.

{¶ 39} As previously mentioned in discussing appellant's first assignment of error, there were two witnesses who worked at the Parkside Drive pharmacy in Warren County who provided a description of a suspect who presented a prescription for Percocet at their pharmacy drive-thru. Both witnesses were asked to view a photo lineup presented by Det. Luken.

{¶ 40} Stallo testified that she could only be 50 percent certain that the photo she chose—appellant's driver's license photo—depicted the person who presented the prescription. Stallo remained only 50 percent certain at trial and was not asked to identify whether the suspect was in court.

{¶ 41} Hunt maintained that she was certain the photo she chose from the photo array was the person who presented the prescription. In court, Hunt identified appellant as the person who presented the prescription.

{¶ 42} Julia Bowling, formerly a document examiner and forensic scientist with Miami

Valley Regional Crime Laboratory, conducted a handwriting analysis on 13 of the 15 prescriptions at issue in this case and compared them with a number of examples produced by appellant and other examples known to have been written by appellant.

{¶ 43} Bowling indicated that she believed appellant was attempting to disguise her handwriting on the handwriting examples appellant was asked to produce for law enforcement. Bowling acknowledged that "it's not a full identification," but opined that it was "probable" that the 13 prescriptions and the "known" writings were written by the same person.

{¶ 44} As previously noted, the evidence reveals that after Det. Luken learned of the similarities between the Parkside Drive pharmacy and the Butler County pharmacy offenses, a database was used to locate additional filled, fraudulent prescriptions written on Dr. Clark's prescription pad. No pharmacy witnesses were presented for these additional prescriptions.

{¶ 45} Det. Luken identified each of the other prescriptions written from Dr. Clark's prescription pad that he discovered through a database search of filled prescriptions for controlled substances, and which he retrieved from the respective pharmacies. He indicated that each of those prescriptions had characteristics that he believed provided a link to appellant because the identifying information on the patient was linked to appellant or was similar to or a slight variation on the identifying information contained in the other fraudulent prescriptions and most, if not all, of the pharmacies used were close to appellant's home or work.

{¶ 46} Seven of the prescriptions were written for Harriet Ward as the patient. Ward is appellant's mother. The prescriptions had Ward's date of birth and address, or a close variation on Ward's address. At trial, Ward denied presenting the prescriptions or receiving drugs from the prescriptions. She confirmed that appellant was a nurse practitioner.

{¶ 47} Two prescriptions were written for Sabrina Coleman. Coleman testified that

she is appellant's former "spouse." Coleman denied presenting either of the fraudulent prescriptions. She acknowledged that the phone number listed on the two prescriptions was part of her old phone number and the date of birth listed on the prescriptions differed by one year from her date of birth.

{¶ 48} Three prescriptions were written for Georgia Drummond, who is acquainted with appellant as she attends the same church and reportedly "mentored" appellant and Latrice Douglas. Drummond admitted at trial that she previously said appellant wrote her two prescriptions to treat her chronic pain, but she recanted the statements.

{¶ 49} Drummond told the jury that Latrice Douglas previously gave her pain medication and Latrice Douglas recently threatened that Drummond would go to jail for receiving the pain medication unless she told authorities it was appellant who provided the fraudulent prescriptions for her.

{¶ 50} Latrice Douglas, appellant's estranged "spouse," testified that she did not write or present any of the prescriptions at issue in this case. She acknowledged that Dr. Clark was one of her physicians in a medical group providing her pregnancy care. She said appellant attended one, if not more, of her medical appointments with her. Douglas said appellant obtained a restraining order against her in August 2008 and she was limited in her access to the residence. She denied driving the Escalade after the restraining order was imposed, but acknowledged moving it once when it had been left in the wrong driveway.

{¶ 51} Douglas indicated that she thought the handwriting on some of the prescriptions looked like appellant's handwriting, and she denied threatening Georgia Drummond to force her to lie about appellant's culpability.

{¶ 52} As previously noted, appellant challenges the sufficiency of the evidence for the counts involving prescriptions not associated with the Parkside Drive pharmacy or the West Chester pharmacy. When reviewing a challenge to the sufficiency of the evidence to support

a criminal conviction, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶34.

{¶ 53} A conviction can be sustained based on circumstantial evidence alone. *State v. Shannon*, 191 Ohio App. 3d 8, 2010-Ohio-6079, ¶ 10 (12th Dist). Circumstantial evidence is proof of certain facts and circumstances in a given case, from which the jury may infer other, connected facts which usually and reasonably follow according to the common experience of mankind. *State v. Ortiz-Bajeca*, 12th Dist. No. CA2010-07-181, 2011-Ohio-3137.

{¶ 54} Circumstantial evidence and direct evidence inherently possess the same probative value. *Id.* In some cases, certain facts can only be established by circumstantial evidence, and a conviction based thereon is no less sound than one based on direct evidence. *Shannon*. In fact, circumstantial evidence may be more certain, satisfying and persuasive than direct evidence. *State v. Ballew*, 76 Ohio St. 3d 244, 249 (1996).

{¶ 55} Reviewing the evidence for the challenged counts under the applicable standard of review, we find that any rational trier of fact could have found the essential elements of the crime of processing illegal drug documents beyond a reasonable doubt.

{¶ 56} Sufficient circumstantial evidence was presented to show, beyond a reasonable doubt, that fraudulent prescriptions on Dr. Clark's prescription pad were presented at the various pharmacies at issue and subsequently retrieved by Det. Luken, that all the prescriptions were for either Percocet or Vicodin, that many of these fraudulent prescriptions were similar in patient name or identifying information, and the patient names or some identifying information used on the prescriptions could be linked to appellant, a nurse practitioner by occupation.

{¶ 57} Further, appellant's physical description and the vehicle registered in her name

were similar to that of the suspect and the suspect's vehicle for the Parkside Drive and West Chester incidents, and most, if not all, of the pharmacies in question were reasonably close to appellant's home or work. And, finally, evidence was presented that it was probable that it was appellant's handwriting on 13 prescriptions reviewed by a forensic scientist.

{¶ 58} In contesting her conviction for aggravated possession of drugs, appellant argues that the only evidence presented that she obtained Percocet illegally from the Parkside Drive pharmacy did not involve the date listed in the indictment.

{¶ 59} Witness Stallo, a pharmacist, identified Percocet as the schedule II drug she dispensed on the pertinent fraudulent prescription. The prosecutor asked the witness if she filled the prescription and delivered the substance to the suspect on "January 6, 2009." The witness agreed.

{¶ 60} However, the record indicates the charge against appellant listed March 24, 2009, as the applicable date. Witness Stallo confirmed that she was working in the pharmacy when someone presented the fraudulent prescription at issue on March 24, 2009. Stallo identified the prescription and indicated that it was her signature, which was just above the date of "3/24/09," in the upper right corner of the prescription.

{¶ 61} Therefore, in applying the applicable standard of review by construing the evidence most favorably for the prosecution, we find that any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime of aggravated possession of drugs and that the crime was committed on March 24, 2009.

{¶ 62} We have considered all of the arguments set forth by appellant under this assignment of error and find none of them well taken. Appellant's second assignment of error is overruled.

{¶ 63} Assignment of Error No. 3:

{¶ 64} APPELLANT'S CONVICTIONS AND PRISON SENTENCE VIOLATE U.S.

CONST. AMEND. VIII AND XIV AND OHIO CONSTITUTION ARTICLE I, SECTIONS 1, 2, 9[,] AND 16 BECAUSE THEY ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 65} A court considering whether a conviction was against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses. *Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, at ¶ 39. The question is 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. *Id*. 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. *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). We must be mindful that the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts. *See State v. DeHass*, 10 Ohio St.2d 230, 231 (1967). A unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required to reverse a judgment on the weight of the evidence in a jury trial. *Thompkins* at 389.

{¶ 66} We have previously listed much of the evidence adduced at trial for the state's case in chief and incorporate that discussion for this assignment of error.

{¶ 67} Appellant presented evidence through witnesses, either directly or by cross-examination, that Latrice Douglas was Dr. Clark's patient, that Latrice Douglas would be familiar with the address of Harriet Ward, appellant's mother, and familiar with Ward's social security number, and some of the birthdates listed on the various prescriptions. Douglas also was reportedly familiar with Sabrina Coleman and Coleman's former phone number. As we previously noted, Georgia Drummond said Latrice Douglas gave her pain medication and threatened Drummond to implicate appellant. Appellant maintained that Douglas had access to and drove the black Escalade SUV.

{¶ 68} In addition, Det. Luken testified that he was made aware of an email purportedly from Latrice Douglas that acknowledged responsibility for the prescriptions. The email account used to send the email was created the day the email was sent and had an account name similar to the name on Latrice Douglas' account. Det. Luken said his investigation revealed that the "IP address" for the new account came from Renee Marzette in Mason.

{¶ 69} Marzette testified that she is appellant's current partner. She indicated that appellant's relationship with Latrice Douglas was contentious and Marzette called the police when Latrice Douglas pulled a gun on her and threatened to shoot her. Marzette said that Latrice Douglas was driving the Escalade during the first few days of January 2009 because appellant was out of town. Det. Luken was also told that another person could have used the Escalade that first week of January because other individuals had access to the vehicle.

{¶ 70} Marzette denied creating the email account and sending the email, which purportedly was from Latrice Douglas and was admitting responsibility for the prescriptions. Marzette indicated that she "build[s] software." She told the jury that her IP address was "non secured" during the time the new email account was created and, therefore, someone else could have used her IP address to create the account.

{¶ 71} Patrice Morales testified that she is appellant's niece and appellant was visiting her in Massachusetts during the time in which the fraudulent prescription was presented at the Parkside Drive pharmacy on the evening of March 24, 2009. Morales identified photographs that were taken of appellant, a friend, and Morales at a tourist attraction in Massachusetts. Appearing on most of the photographs was the date stamp of "3/24/09." Morales recalled that appellant had forgotten her purse and, therefore, did not have her cell phone or wallet for the trip, which explained why there would be no credit charges or cell phone records of the Massachusetts trip.

{¶ 72} Harriet Ward testified that appellant had driven her to Pennsylvania during the time when one of the prescriptions was presented in May 2008, and she was babysitting appellant's children and had appellant's cell phone when appellant visited her niece in Massachusetts in March 2009.

{¶ 73} Dr. Solomon Fulero testified as an expert witness in eyewitness identification and the collection of such evidence. He indicated that research shows that misidentification by eyewitnesses occurs more often than expected.

{¶ 74} Dr. Fulero said that he reviewed the motion to suppress transcript and the photo lineups presented to the witnesses in this case. He opined that the procedure wherein witnesses view a group of photos simultaneously, which was the procedure employed by police in this case, allows a witness to "narrow[ ] down" the photos or choose by process of elimination. He said the sequential presentation of individual photos in a photo lineup has more accurate results.

{¶ 75} Dr. Fulero also opined that the person administrating the photo lineup should not know which photo belongs to the suspect to avoid inadvertent clues. Officer Flick could not recall whether he knew which photo was his suspect. Det. Luken knew which photo depicted his suspect and indicated that he usually places that photo in a particular location in the grouping.

{¶ 76} Dr. Fulero also testified that eyewitnesses should not talk to each other and should not be exposed to views of suspects they previously identified. Dr. Fulero said this "post-event information" can erroneously bolster a witness' confidence in her identification because the subsequent viewing can replace or rewrite the initial memory.

{¶ 77} Dr. Fulero also indicated that cross-racial identification, where a member of one race is attempting to identify a person of another race, is less accurate than same race identification, particularly where a Caucasian witness is identifying an African American

suspect, as in this case.

{¶ 78} Testifying on her own behalf, appellant confirmed that Latrice Douglas moved out of their marital residence in August 2008 when the restraining order was filed. She said they co-owned and continued to share use of the Escalade. Appellant said the circumstances surrounding Latrice Douglas' pregnancy caused friction in their relationship, and, therefore, she denied ever visiting Dr. Clark's office with Latrice. Appellant said she was legally able to write prescriptions as a nurse practitioner, but not for Percocet. She denied taking Dr. Clark's prescription pad or writing or presenting any of the fraudulent prescriptions.

{¶ 79} We have reviewed the record, mindful of the applicable standard of review for a challenge to the manifest weight of the evidence on all of the offenses for which appellant was convicted. We find that the jury did not clearly lose its way and create such a manifest miscarriage of justice that the conviction must be reversed.

{¶ 80} It is well-established that when conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the trier of fact believed the prosecution testimony. *See State v. White*, 12th Dist. No. CA2003-09-240, 2004-Ohio-3914, ¶ 28. Further, "[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." *State v. Lundsford*, 12th Dist. No. CA2010-10-021, 2011-Ohio-6529, ¶ 17.

{¶ 81} Appellant's third assignment of error is overruled.

{¶ 82} Assignment of Error No. 4:

{¶ 83} APPELLANT SHOULD HAVE BEEN ACQUITTED OF COUNTS 7, 13, 21, 23[,] AND 26 OF THE INDICTMENT BECAUSE THE STATE OF OHIO FAILED TO PRESENT EVIDENCE TO ESTABLISH VENUE.

{¶ 84} In support of her assignment of error, appellant states that the indictment

indicated all of the counts were committed in Warren County when, in addition to the Warren County counts, four of the counts were committed in Hamilton County and one count in Butler County. Without further explanation, appellant argues that she did not waive the venue requirement and "[v]enue was clearly not proven with respect to these counts."

{¶ 85} Although venue must be established, it is not a material element of an offense and need not be expressly proven as long as it is established by all the facts and circumstances in the case. *State v. Headley*, 6 Ohio St.3d 475, 477 (1983); *see State v. Draggo*, 65 Ohio St.2d 88, 90 (1981).

{¶ 86} The relevant statute, R.C. 2901.12, provides in relevant part, that when an offender commits offenses in different jurisdictions as part of a course of criminal conduct, venue lies for all the offenses in any jurisdiction in which the offender committed one of the offenses or any element thereof. R.C. 2901.12(H); *State v. Beuke*, 38 Ohio St. 3d 29, 41-42 (1988).

{¶ 87} According to R.C. 2901.12(H):

> Without limitation on the evidence that may be used to establish the course of criminal conduct, any of the following is prima-facie evidence of a course of criminal conduct:
>
> (1) The offenses involved the same victim, or victims of the same type or from the same group.
>
> (2) * * *.
>
> (3) The offenses were committed as part of the same transaction or chain of events, or in furtherance of the same purpose or objective.
>
> (4) The offenses were committed in furtherance of the same conspiracy.
>
> (5) The offenses involved the same or a similar modus operandi.
>
> (6) * * *.

{¶ 88} R.C. 2901.12(H) is a statutory reflection of the modern mobility of criminals to perform unlawful deeds over vast geographical boundaries. *See Draggo*, 65 Ohio St.2d at 90. The above-noted statutory provision "effectuate[s] a sensible, efficient approach to justice by permitting one court to hear a matter which has roots in several court jurisdictions." *See Id*.

{¶ 89} The record indicates that the bill of particulars identified the specific counts at issue to involve pharmacies in Cincinnati and West Chester, respectively. A West Chester police officer testified that the pharmacy in that township was in Butler County and the detective from the Warren County Drug Task Force told the jury the pharmacies at issue on Colerain Avenue and W. Galbraith Road were in Hamilton County.

{¶ 90} Further, evidence was presented that established a course of criminal conduct, in that all of the offenses involved false or fraudulent prescriptions written on Dr. Clark's prescription pad for either Percocet or Vicodin and were presented on a monthly basis over a one-year period. Further, the patient name or identifying information on most of the prescriptions was linked to the same suspect, and a person with similar physical characteristics and similar vehicle was observed presenting two of the prescriptions.

{¶ 91} Where an indictment indicated all offenses occurred in one county, venue would be appropriate in that county on each related charge if the prosecution established that defendant engaged in a course of criminal conduct. *See State v. Jackson*, 9th Dist. No. 2754, 1994 WL 162338 (May 4, 1994); *see also Beuke*, 38 Ohio St. 3d 29, 41-42.

{¶ 92} The record in the case at bar indicates appellant was adequately informed of the charges, there was testimony about the location of the pharmacies, and the prosecution produced evidence to show a course of criminal conduct. *See also State v. Adams*, 6th Dist. No. E-03-042; 2004-Ohio-4673, ¶ 26 (whether venue exists by virtue of proof of a course of conduct need not be submitted to a jury absent a conflict of testimony about the location of

the criminal acts; absent such conflicting testimony, there is no question of fact for the jury to determine). Therefore, we find appellant's fourth assignment of error not well taken and overrule it.

{¶ 93} Assignment of Error No. 5:

{¶ 94} APPELLANT WAS DEPRIVED OF HER RIGHT TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN CONTRAVENTION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10 OR ARTICLE [I] OF THE OHIO CONSTITUTION.

{¶ 95} Appellant was represented by two attorneys at trial; therefore, we assume appellant is arguing that both attorneys were ineffective. Specifically, appellant argues that her trial counsel were ineffective when they offered the testimony of Dr. Fulero, and failed to effectively cross-examine the state's handwriting expert or obtain a handwriting expert to counter the state's witness.

{¶ 96} To prevail on an ineffective assistance of counsel claim, appellant must show her trial counsel's performance fell below an objective standard of reasonableness and she was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 693, 104 S.Ct. 2052; *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, ¶ 6;*State v. Zielinski*, 12th Dist. No. CA2010-12-121, 2011-Ohio-6535, ¶ 49.

{¶ 97} In order to demonstrate prejudice, appellant must establish, but for counsel's errors, a reasonable probability exists that the result of her trial would have been different; a "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Burke* at ¶ 6. The failure to make an adequate showing on either prong is fatal to an ineffective assistance of counsel claim. *Zielinski* at ¶ 50.

{¶ 98} Appellant argues that her expert witness in eyewitness identification "strongly and effectively bolstered the State of Ohio's identification of [appellant] as the person who

presented the false prescriptions to the pharmacies." Until Dr. Fulero testified, appellant contends, there was reasonable doubt as to whether appellant was properly identified by the eyewitnesses.

{¶ 99} Appellant cites to all of Dr. Fulero's testimony in support of her contention. After reviewing the record, we disagree that counsel's offer of Dr. Fulero's testimony fell below an objective standard of reasonableness.

{¶ 100} As we previously noted, Dr. Fulero testified that certain methods used for the photo lineups, which were employed in this case, did not insure accuracy as much as other suggested methods, that exposing the eyewitness to subsequent viewings of the suspect could adversely affect the accuracy of the identification, and that cross-racial identification is particularly fraught with the potential for misidentification. Dr. Fulero also indicated that the confidence a witness has in his or her identification is not related to accuracy. Dr. Fulero said, "It's not that all confident witnesses are wrong or that unconfident witnesses are – it's just that you can't use one to predict the other with any degree of accuracy or reliability."

{¶ 101} Because of the difficulties inherent in making an evaluation of the ineffective assistance of counsel, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland* at 689. There are countless ways to provide effective assistance in any given case, and even the best criminal defense attorneys would not defend a particular client in the same way. *Id*. Therefore, we find not well taken appellant's argument regarding the offer of Dr. Fulero's testimony.

{¶ 102} Appellant further argues that counsel should have offered a handwriting expert to counter the state's handwriting expert and should have more effectively cross-examined the state's expert.

{¶ 103} The failure to call an expert and instead rely on cross-examination generally does not constitute ineffective assistance of counsel. *State v. Nicholas*, 66 Ohio St.3d 431, 436 (1993). Moreover, defense counsel not only sufficiently cross-examined the state's handwriting expert, but the record contains no evidence that another handwriting expert would have benefited appellant's case and caused the outcome of the trial court to be different. *State v. Coleman*, 45 Ohio St. 3d 298, 307-08 (1989). In many criminal cases, the decision not to use one's own expert witness is unquestionably tactical because such an expert might uncover evidence that further inculpates the defendant. *State v. Glover*, 12th Dist. No. CA2001-12-102, 2002-Ohio-6392, ¶ 25.

{¶ 104} Accordingly, we find that appellant failed to show that her trial attorneys were ineffective for failing to call an expert in handwriting analysis, and we do not find that the cross-examination of the state's handwriting expert fell below an objective standard of reasonableness. Appellant's fifth assignment of error is overruled.

{¶ 105} Judgment affirmed.

HENDRICKSON and PIPER, JJ., concur.