

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-997
Anthony L. Sullivan,	:	(C.P.C. No. 07CR-12-7225)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on December 13, 2011

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Clark Law Office, and *Toki Michelle Clark*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Defendant-appellant, Anthony L. Sullivan, appeals the judgment of the Franklin County Court of Common Pleas convicting him, following a jury trial, of two counts of robbery with repeat violent offender specifications.

{¶2} On December 3, 2009, appellant was indicted on two counts of robbery in violation of R.C. 2911.02(A)(2), felonies of the second degree, and two counts of robbery in violation of R.C. 2911.02(A)(3), felonies of the third degree. Each of the second-

degree felony counts included a repeat violent offender specification pursuant to R.C. 2941.19. The two third-degree felony counts were subsequently dismissed.

{¶3} The indictment arose out of the November 6 and November 11, 2009 robberies of the Cooper State Bank located at the corner of Como Avenue and High Street in Columbus, Ohio. According to the state's evidence, at approximately 4:15 p.m. on Friday, November 6, 2009, appellant walked into the bank through the High Street door, approached the sole teller working at the counter, Laurie Rupp, and slid a note to her that read: "BANK ROBBERY! ALL BIG BILLS 30 SECONDS OR DIE NO BANK BAGS." (State's Exhibit A22.) Rupp testified that appellant had a small mustache, was over six feet tall, and weighed approximately 200 pounds; he was dressed in blue pants, a light-colored zip up sweater, and a blue stocking cap. Rupp complied with appellant's demand, giving him large bills which included bait money. Appellant then exited the bank through the Como Avenue door.

{¶4} Laura Hanna was also working at the bank on November 6, 2009. She testified that, at approximately 4:15 p.m., she observed appellant enter the bank and approach Rupp. After retrieving some personal items from a nearby closet, Hanna returned to the teller area and noticed that Rupp's "body language was not what it normally is." (Tr. 216.) When she asked Rupp if she had been robbed, Rupp showed her the demand note. Hanna described appellant as an African-American male with a goatee, 20 to 30 years old, over six feet tall with a "[b]igger build," and wearing a blue hat and a tan or khaki colored jacket. (Tr. 217.)

{¶5} Melissa Vondran, the bank's branch manager, testified that, on November 6, 2009, she observed appellant enter the bank and proceed directly to Rupp's

teller station. Vondran testified that appellant walked right past her, so she was able to get a "good look" at him. (Tr. 312.) Vondran saw Rupp hand appellant cash; Rupp appeared to be "distraught" and "panic[ked]." (Tr. 311.) After appellant exited the bank, Rupp told Vondran she had been robbed.

{¶6} The bank's surveillance cameras captured images of appellant as he entered and exited the bank on November 6, 2009. One of the images depicts appellant touching the glass as he exited through the Como Avenue door. At trial, Rupp, Hanna, and Vondran all identified appellant as the person depicted in the surveillance photographs who robbed the bank on November 6, 2009. Rupp and Hanna also identified State's Exhibit J2, a light-colored beige sweater, as the one worn by appellant when he robbed the bank.

{¶7} Detective Richard Bair took photographs of the crime scene, including the demand note, and obtained seven fingerprint lifts from the Como Avenue door. Detective Bair submitted the fingerprint lifts and the demand note to the crime lab for analysis.

{¶8} On Wednesday, November 11, 2009, Hanna was again working as a teller at the bank. At approximately 11:15 a.m., she informed her fellow teller, Abby Sanker, that the bank had been robbed the previous Friday. During this discussion, Hanna showed Sanker the surveillance photograph of appellant. Moments later, Hanna observed appellant enter the bank through the High Street door and approach Sanker's teller station. Hanna, working at an adjacent teller station, saw Sanker "grabbing up bundles of money" from her drawer and hand them to appellant. (Tr. 225.) Appellant then exited the bank through the Como Avenue door. Hanna described appellant as an African-American male in his early 30s, with a mustache, wearing a dark blue or black

stocking cap and tan jacket. Hanna testified that immediately after the robbery, Sanker was "very shaken up, shaking, [and] crying." (Tr. 226.)

{¶9} Vondran testified that she was working in her office at the bank on November 11, 2009 when she noticed Sanker looking "distraught" and handing money over to appellant, who was standing at Sanker's teller station. (Tr. 319.) Vondran noted that appellant looked "very familiar." (Tr. 319.) Appellant ran past Vondran's office and out the Como Avenue door with the cash in his hand. As appellant passed her office, Vondran got a "good view" of his face (Tr. 324.) Vondran testified that she spoke to Sanker after the incident, and that Sanker was "very, very shaken up." (Tr. 320.) Vondran testified that Sanker told her she had just been robbed and that the robber looked like the picture of the person who had robbed the bank on November 6, 2009. Vondran testified that Sanker's drawer was \$1,912 short on November 11, 2009.

{¶10} The bank's surveillance cameras captured images of appellant as he entered and exited the bank on November 11, 2009. At trial, both Hanna and Vondran identified appellant as the person depicted in the surveillance photographs who robbed the bank on November 11, 2009. Vondran testified that she felt "[v]ery strongly" that appellant robbed the bank on both November 6 and 11, 2009. (Tr. 326.) Vondran based her opinion on "facial appearance, height, weight * * * the same [argyle patterned] sweater." (Tr. 326.) Vondran identified the sweater (State's Exhibit J2) as looking "very similar" to the one appellant wore on November 11, 2009. (Tr. 327.) Hanna also identified State's Exhibit J2 as the "jacket" appellant wore when he robbed the bank. Hanna testified that she "stare[d]" at appellant as Sanker handed him the money, and

later realized, when she examined the surveillance photographs, that he was the same man who robbed the bank on November 6, 2009. (Tr. 233.)

{¶11} Detective Janel Mead took photographs of the November 11, 2009 crime scene, collected a demand note from Sanker's teller station, which read, "IT'S A BANK ROBBERY!! YOU HAVE 30 SECONDS! DON'T DIE ALL BIG BILLS NO BAGS," and obtained fingerprints from the teller counter, the demand note, and both doors.

{¶12} On November 22, 2009, Detective Steve Billups received a telephone call from an anonymous female stating that appellant had committed the Cooper State Bank robberies and was staying at the Super 8 Motel on Brice Road in a room registered to a woman named Rachel Moore. Detective Billups arrived at the motel and obtained Moore's verbal and written consent to search the motel room. Thereafter, Detective Billups and Moore entered the motel room together. Detective Billups observed a beige sweater matching the description of the one worn by appellant during the November 6 and 11, 2009 robberies inside an open suitcase in the middle of the motel room floor. Billups retrieved the sweater and logged it as evidence. Appellant was subsequently arrested.

{¶13} On November 23, 2009, Rupp, Hannah, and Vondran were separately presented with identical photo arrays which included appellant's photograph in position No. 2. Rupp identified appellant as the individual who robbed the bank on November 6, 2009. In the "Viewer's Statement" portion of the accompanying procedure form, Rupp wrote, "Of the photos presented number 2 has the eyes I remember most vividly." (State's Exhibit L, Tr. 190.) Rupp testified that she made her selection "[b]ecause of the eyes. I remember the eyes distinctly from the day." (Tr. 180.)

{¶14} Neither Hannah nor Vondran identified appellant from the photo array as the individual who committed the bank robberies. In the "Viewer's Statement" section of the photo array form she was provided, Vondran wrote, "Person #3 looks similar to [the] suspect that robbed the bank both times mainly due to his goatee. But honestly, I am not certain." (Defendant's Exhibit D.) Hanna similarly noted in the "Viewer's Statement" section of the form she was provided that, "Photos #1 and #3 stuck out to me but photo #1 looks more like the suspect. I am not 100% sure though." (Defendant's Exhibit E.)

{¶15} Latent fingerprint examiner Kimberly Sharrock analyzed the fingerprints submitted by Detectives Bair and Mead and identified one of the lifts taken from the Como Avenue door following the November 6, 2009 robbery as the right palm print of appellant. She testified that none of the prints recovered following the November 11, 2009 robbery matched those of appellant and that the fingerprints recovered from both demand notes were inconclusive.

{¶16} Two witnesses testified on behalf of appellant. The first, Margaret Smith, appellant's sister, testified that she drove appellant to the Cooper State Bank on November 5, 2009. According to Smith, appellant entered and exited the bank through the Como Avenue door, and he withdrew some cash from his account. The second witness, Steven Lenhart, owner of Execu-Clean, the company that provides cleaning services for the bank, testified that Execu-Clean did not clean the bank on November 5, 2009.

{¶17} Upon this evidence, the jury returned verdicts finding appellant guilty of both second-degree felony robbery counts and further found that, in committing the offenses, appellant threatened to cause serious physical harm to the victims. The trial

court determined that appellant was a repeat violent offender. Based on the convictions and specifications, the trial court sentenced appellant to a prison term totaling 26 years.

Appellant appeals, advancing the following 11 assignments of error:

ASSIGNMENT OF ERROR NO. 1:

THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE DEFENDANT'S CRIM.R. 29 MOTION FOR ACQUITTAL WHERE THE EVIDENCE SUPPORTING THE CONVICTION IS LEGALLY INSUFFICIENT.

ASSIGNMENT OF ERROR NO. 2:

A TRIAL COURT ERRS WHEN IT DECLARES AN OUT OF COURT STATEMENT AN EXCITED UTTERANCE, IN EXCEPTION TO THE HEARSAY RULE, WHERE THE OUT OF COURT UTTERANCE BECOMES A SPEECH.

ASSIGNMENT OF ERROR NO. 3:

A TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR SEPARATE TRIALS.

ASSIGNMENT OF ERROR NO. 4:

A TRIAL COURT ERRS WHEN IT OVERRULES A MOTION TO SUPPRESS EVIDENCE WHERE THE POLICE FAIL TO OBTAIN VALID CONSENT TO SEARCH A MULTIPLE OCCUPIED MOTEL ROOM.

ASSIGNMENT OF ERROR NO. 5:

A CRIMINAL DEFENDANT FAILS TO GET EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS LEGAL REPRESENTATIVE FAILS TO MOVE FOR A MISTRIAL AFTER AN EXPERIENCED DEPUTY BLURTS OUT TO THE JURY THAT A NON-TESTIFYING DEFENDANT HAS A PROBATION VIOLATION.

ASSIGNMENT OF ERROR NO. 6:

A CRIMINAL DEFENDANT FAILS TO GET EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY

FAILS TO REQUEST FROM THE COURT THAT DEFENDANT BE PERMITTED TO SIT IN ANOTHER LOCATION [I]N THE COURTROOM, WHERE EYEWITNESSES WHO HAVE MISIDENTIFIED DEFENDANT IN A PHOTO ARRAY ARE TESTIFYING.

ASSIGNMENT OF ERROR NO. 7:

THE CONVICTION OF APPELLANT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 8:

THE TRIAL COURT ERRED WHEN IT FAILED TO SUPPRESS THE PHOTO ARRAY IN THIS CASE.

ASSIGNMENT OF ERROR NO. 9:

THE TRIAL COURT ERRED BY NOT DISMISSING THE REPEAT VIOLENT OFFENDER SPECIFICATION, AS IT IS UNCONSTITUTIONAL, AND WAS APPLIED BY THE TRIAL COURT IN AN UNCONSTITUTIONAL MANNER.

ASSIGNMENT OF ERROR NO. 10:

THE TRIAL COURT ERRED IN ACCEPTING "RECKLESS" AS THE CULPABLE MENTAL STATE OF THE OFFENSE OF ROBBERY.

ASSIGNMENT OF ERROR NO. 11:

THE TRIAL COURT ERRED IN ITS APPLICATION OF "SERIOUS PHYSICAL HARM" AS IT RELATES TO THE REPEAT VIOLENT OFFENDER SPECIFICATION.

{¶18} For ease of discussion, we will address appellant's assignments of error out of numerical order. In particular, because appellant's third, fourth and eighth assignments of error challenge the trial court's pre-trial rulings, we shall consider them first.

{¶19} Appellant's third assignment of error contends the trial court erred in denying his motion, made pursuant to Crim.R. 14, to sever the charges of which the

indictment was comprised. On June 22, 2010, appellant filed a motion to sever the indicted charges, contending that trying both offenses before the same jury would prejudice his right to a fair trial. More specifically, appellant maintained that, because the jury would be permitted to simultaneously consider evidence of both offenses with which he was charged, the jury would use the accumulated evidence to convict him of both charges. The trial court held a hearing on appellant's motion on July 19, 2010. Following argument, the trial court orally denied appellant's motion, stating, "[t]he court will not sever the cases and believes, that in the best interests of judicial economy, that we try both cases together. There is sufficient enough, close enough, nexus between the two; the witnesses; the evidence; the timing." (Tr. 119.)

{¶20} We note initially that appellant did not renew his objection to joinder of the charged offenses at the close of the state's evidence or all the evidence; accordingly, he has waived all but plain error. *State v. Williams*, 10th Dist. No. 02AP-730, 2003-Ohio-5204, ¶29, citing *State v. Saade*, 8th Dist. No. 80705, 2002-Ohio-5564, citing *State v. Walker* (1990), 66 Ohio App.3d 518, 522. Under the plain error test, a reviewing court must consider whether, "but for the existence of the error, the result of the trial would have been otherwise." *State v. Wiles* (1991), 59 Ohio St.3d 71, 86, citing *State v. Long* (1978), 53 Ohio St.3d 91, 97.

{¶21} Pursuant to Crim.R. 8(A), two or more offenses may be charged in the same indictment if they are of "the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." "The law favors joining multiple offenses in a single trial under Crim.R. 8(A) if

the offenses charged 'are of the same or similar character.' " *State v. Lott* (1990), 51 Ohio St.3d 160, 163, quoting *State v. Torres* (1981), 66 Ohio St.2d 340, fn.2. Joinder is generally favored because it " 'conserves judicial and prosecutorial time, lessens the not inconsiderable expenses of multiple trials, diminishes inconvenience to witnesses, and minimizes the possibility of incongruous results in successive trials before different juries.' " *State v. Walters*, 10th Dist. No. 06AP-693, 2007-Ohio-5554, ¶21, quoting *State v. Daniels* (1993), 92 Ohio App.3d 473, 484, quoting *State v. Thomas* (1980), 61 Ohio St.2d 223, 225. Notwithstanding the policy favoring joinder, an accused may move pursuant to Crim.R. 14 to sever counts of an indictment on the grounds that he or she will be prejudiced by the joinder of multiple offenses. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶49. "If it appears that a defendant * * * is prejudiced by a joinder of offenses * * * in an indictment * * * the court shall order * * * separate trials of counts * * * or provide such other relief as justice requires." Crim.R. 14.

{¶22} "When a defendant claims that joinder is improper, he must affirmatively show that his rights have been prejudiced." *State v. Quinones*, 11th Dist. No. 2003-L-015, 2005-Ohio-6576, ¶38, citing Crim.R. 14 and *State v. Roberts* (1980), 62 Ohio St.2d 170, 175. The defendant " 'must furnish the trial court with sufficient information so that it can weigh the considerations favoring joinder against the defendant's right to a fair trial.' " *Lott* at 163, quoting *Torres* at syllabus.

{¶23} "The state may negate the defendant's claim of prejudice by demonstrating either of the following: (1) that the evidence to be introduced relative to one offense would be admissible in the trial on the other, severed offense, pursuant to Evid.R. 404(B); or (2) that, regardless of the admissibility of such evidence, the evidence relating to each

charge is simple and direct." *Quinones* at ¶39, citing *State v. Franklin* (1991), 62 Ohio St.3d 118, 122. "The former is generally referred to as the 'other acts test,' while the latter is known as the 'joinder test.' " *Id.*, citing *Lott* at 163. The two tests are disjunctive, so that the satisfaction of one negates a defendant's claim of prejudice without consideration of the other. *State v. Gravely*, 188 Ohio App.3d 825, 2010-Ohio-3379, ¶38, citing *State v. Cameron*, 10th Dist. No. 09AP-56, 2009-Ohio-6479, ¶35.

{¶24} Trial courts are provided considerable latitude in determining whether severance is warranted, and an appellate court will not reverse a trial court's decision to deny severance absent an abuse of discretion. *State v. Wilkerson*, 10th Dist. No. 01AP-1127, 2002-Ohio-5416, ¶41, citing *State v. Johnson* (Mar. 4, 1997), 10th Dist. No. 96APA06-751. To find an abuse of discretion, a reviewing court must conclude that the trial court's ruling was " 'unreasonable, arbitrary, or unconscionable.' " *State v. Vasquez*, 10th Dist. No. 05AP-705, 2006-Ohio-4074, ¶6, quoting *State v. Adams* (1980), 6 Ohio St.2d 151, 157.

{¶25} As to the "other acts test," Evid.R. 404(B) permits evidence of "other crimes, wrongs, or acts * * * as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," so long as such evidence of other acts is not offered to show propensity. Evidence of crimes may be introduced to prove identity if the defendant " 'committed similar crimes within a period of time reasonably near to the offense on trial, and that a similar scheme, plan or system was utilized to commit both the offense at issue and the other crimes.' " *State v. Shedrick* (1991), 61 Ohio St.3d 331, 337, quoting *State v. Curry* (1975), 43 Ohio St.2d 66, 73.

{¶26} In *State v. Tipton*, 10th Dist. No. 04AP-1314, 2006-Ohio-2066, the defendant was charged in separate indictments with the robbery of two different gas stations robbed within ten minutes of each other. After the trial court granted the state's Crim.R. 13 motion to try the two indictments together, Tipton filed a motion to sever, which the trial court ultimately denied. On appeal, this court found that, because the gas stations were located only ten miles and one highway exit from one another and the robberies were committed within ten minutes of each other, the crimes were both geographically and temporally linked. We further found that the robberies followed a similar pattern, as Tipton "entered the store, brandished a handgun, and demanded money from the cash register and safe," such that the evidence of one robbery could have been introduced at the trial of the other under Evid.R. 404(B) to prove identity.

{¶27} As in *Tipton*, the evidence in the instant case as to one of the robberies would have been admissible in a trial on the other pursuant to Evid.R. 404(B). The robberies occurred at the same Cooper State Bank branch within five days of each other so as to be geographically and temporally linked. In both robberies, appellant wordlessly and without producing a weapon presented nearly identical demand notes to the bank teller. Both demand notes were written in all capital letters, both began by announcing the bank robbery, both demanded large bills and no bank bags, and both threatened death if the demands were not met within 30 seconds. Surveillance videos established that appellant wore the same light-colored, patterned sweater during both robberies. In both robberies, appellant entered through the High Street door and exited through the Como Avenue door. Hannah and Vondran were present during both robberies, and both identified appellant as the perpetrator of both crimes. We find the evidence here

demonstrates that the crimes followed a similar pattern and were geographically and temporally linked such that the evidence of one robbery would have been admissible at the trial of the other under Evid.R. 404(B) to establish appellant's identity.

{¶28} Because we have found the "other acts" test has been satisfied so as to rebut appellant's claim of prejudicial joinder, we are not required to consider the less stringent "joinder test." Nonetheless, we note that, in this case, the "joinder test" has been satisfied as well.

{¶29} Evidence is "simple and direct" if the jury is capable of segregating the proof required for each offense. *Cameron* at ¶40, citing *State v. Mills* (1992), 62 Ohio St.3d 357, 362. "The rule seeks to prevent juries from combining the evidence to convict the defendant, instead of carefully considering the proof offered for each separate offense." *Id.* In this case, the evidence presented as to each offense is simple and direct and not confusing or difficult to separate. Rupp was the teller in the first robbery; Sanker was the teller in the second. Although Hannah and Vondran were present during both robberies, their testimony about each robbery was clear and distinct. Further, although appellant's palm print was discovered at the scene of the first robbery and not at the second, such was made clear to the jury. Moreover, neither crime was so complex that the jury would have difficulty separating the proof required for each offense.

{¶30} Finally, we note that the trial court instructed the jury to consider each count separately, as follows:

Defendant has been charged with two crimes. The number of charges is no evidence of guilt, and this should not influence your decision in any way. It is your duty to separately consider the evidence that relates to each charge and to return a separate verdict for each charge. You must decide whether

the state has presented proof beyond a reasonable doubt that the defendant is guilty of that particular charge.

Your decision on one charge, whether it is guilty or not guilty, should not influence your decision on any of the other charges.

(Tr. 573.)

{¶31} A jury is presumed to follow the trial court's instructions. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶86. Nothing in the record indicates that the jury failed to do so here.

{¶32} For the foregoing reasons, we find that the trial court committed no error, plain or otherwise, in denying appellant's Crim.R. 14 motion for severance. The third assignment of error is overruled.

{¶33} Appellant contends in his fourth and eighth assignments of error that the trial court erred in denying his motions to suppress. As both assignments challenge the trial court's rulings on motions to suppress, we initially set forth the applicable standard to be used in considering these rulings.

{¶34} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. "When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *Id.*, citing *Mills* at 366. As a consequence, "an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Burnside* at ¶8, citing *State v. Fanning* (1982), 1 Ohio St.3d 19. An "appellate court must then independently determine, without deference to the conclusion of the trial court,

whether the facts satisfy the applicable legal standard." *Id.*, citing *State v. McNamara* (1997), 124 Ohio App.3d 706.

{¶35} Appellant argues in the fourth assignment of error that the trial court erred in failing to suppress the sweater recovered from appellant's suitcase found inside the Super 8 motel room. Appellant contends that Detective Billups obtained this evidence in violation of appellant's Fourth Amendment rights under the United States Constitution by searching the suitcase without a warrant or the requisite consent.

{¶36} On June 17, 2010, appellant filed a motion to suppress the sweater. The trial court held a hearing on the motion on July 19, 2010. According to the evidence presented by the state at that hearing, on November 22, 2009, Detective Billups received a telephone call from an anonymous female stating that appellant had committed the Cooper State Bank robberies and was staying at the Super 8 Motel on Brice Road in a room registered to a woman named Rachel Moore. Detective Billups dispatched nearby patrol officers to the motel to verify the information provided by the caller. According to Detective Billups, the patrol officers obtained Moore's room number and knocked on the door. When Moore answered, the officers observed appellant inside the room. The officers ultimately ordered Moore and appellant to exit the room.

{¶37} Detective Billups arrived at the motel a short time later and observed appellant and Moore seated in separate police cruisers. Detective Billups verified with Moore that the room was registered in her name. He explained to her that appellant was a suspect in two bank robberies and that he was looking for evidence that may have been used during the robberies. Thereafter, Detective Billups obtained Moore's verbal and written consent to search the motel room. The state offered into evidence State's Exhibit

1, a "Consent to Search Without a Warrant," signed by Moore on November 22, 2009. Thereafter, Detective Billups, accompanied by Moore, entered the motel room. Detective Billups observed a beige sweater matching the description of the one worn by the robber during the November 6 and 11, 2009 robberies inside an open suitcase on the floor in the motel room. Photographs taken by Detective Billups depict a beige sweater inside an open suitcase in the middle of the motel room floor. Detective Billups retrieved the sweater and logged it as evidence.

{¶38} According to Moore's testimony offered on behalf of appellant, when she exited the motel room in compliance with police orders, the suitcase containing appellant's sweater was closed, zipped, and sitting by the door. Moore averred that the photographs of the suitcase taken by Detective Billups do not accurately depict either the location or the condition of the suitcase when she exited the room. She testified that from her vantage point in the police cruiser, she could see several police officers entering and exiting the motel room prior to the time Detective Billups arrived at the scene. Although Moore admitted that Detective Billups obtained both her verbal and written consent to search the motel room, she insisted that she did not immediately accompany Detective Billups into the motel room and that he was inside the room for approximately ten minutes before she re-entered. According to Moore, when she re-entered the motel room, the suitcase was open and Detective Billups was holding the sweater in his hand; Detective Billups then put the sweater inside the suitcase and took a photograph of it.

{¶39} Following this testimony and argument by counsel, the trial court orally denied appellant's motion. The trial court determined that Moore unequivocally gave Detective Billups consent to search the motel room, and that Detective Billups' testimony

regarding the condition of the suitcase and the location of the sweater within the suitcase was more credible than that of Moore.

{¶40} The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. "Where persons hold a subjective expectation of privacy, a valid warrantless search must fall within a judicially recognized exception of the warrant requirement." *Gahanna v. Duty* (Nov. 12, 1999), 10th Dist. No. 98AP-1528, citing *Ohio State Dept. of Liquor Control v. Fraternal Order of Eagles Aerie 2293* (1996), 112 Ohio App.3d 94, 97, citing *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507. In *State v. Penn* (1991), 61 Ohio St.3d 720, 723-24, the Supreme Court of Ohio recognized the warrant requirement exceptions as " '(a) * * * search incident to a lawful arrest; (b) consent signifying waiver of constitutional rights; (c) the stop-and-frisk doctrine; (d) hot pursuit; (e) probable cause to search, and the presence of exigent circumstances; or (f) the plain view doctrine.' " *Id.*, quoting *State v. Akron Airport Post No. 8975* (1985), 19 Ohio St.3d 49, 51. As a result, the warrantless search Detective Billups conducted was reasonable, and thus permissible, only if it satisfied one of the only two exceptions potentially applicable here – consent and plain view. At the hearing, the state argued that Moore consented to Detective Billups' entering the motel room, and, once lawfully inside the room, the sweater came within Detective Billups' plain view.

{¶41} Pursuant to the plain-view exception, investigating authorities may seize items in plain view, discovered and recognized during the course of lawful activity. *BPOE Lodge 0170 Gallipolis v. Ohio Liquor Control Comm.* (1991), 72 Ohio App.3d 811, 814, citing *Harris v. United States* (1968), 390 U.S. 234, 88 S.Ct. 992. To fall within the plain-view exception, the item seized must (1) be in the plain view of authorities lawfully on the

premises, (2) readily exhibit its criminal nature, and (3) be located in a place to which authorities lawfully have access. *BPOE* at 815, citing *State v. Ragan* (Aug. 1, 1990), 1st Dist. No. C-890137.

{¶42} Appellant concedes that Detective Billups obtained Moore's consent to enter the motel room; as such, there is no dispute that Detective Billups was lawfully on the premises. Appellant maintains, however, that Detective Billups exceeded that consent when he opened appellant's suitcase and removed the sweater. Appellant maintains that Detective Billups was required to obtain either a valid search warrant or appellant's consent before searching the suitcase. In support of this contention, appellant relies on Moore's testimony that appellant's suitcase was closed and zipped when she left the motel room. As noted above, the trial court expressly found Detective Billups' testimony more credible than that of Moore regarding the condition of the suitcase and location of the sweater inside the suitcase. As Detective Billups was lawfully inside the motel room pursuant to Moore's consent, the plain-view doctrine allowed him to observe the conditions and content of at least the main portion of the motel room. According to Detective Billups, the sweater was readily visible inside an open suitcase in the middle of the motel room floor. Appellant concedes that the sweater was similar to the one worn by the bank robber; thus, it "readily exhibit[ed] its criminal nature." The trial court, as the trier of fact at the motion hearing, was not required to believe Moore's testimony that the suitcase was closed, zipped, and sitting by the door. *Burnside* at ¶8. Nor was the trial court required to accept appellant's intimations that other police officers searched the suitcase, found the sweater, and left it on top of the suitcase before Detective Billups obtained Moore's consent to enter the room or that Detective Billups opened the closed

suitcase, removed the sweater, and staged the scene. Upon review of the evidence presented at the hearing, we find that the trial court did not err in denying appellant's motion to suppress the sweater. The fourth assignment of error is overruled.

{¶43} Appellant asserts in his eighth assignment of error that the trial court erred in denying his motion to suppress Rupp's identification of appellant as the perpetrator of the robberies. Appellant maintains that the photo array assembled by the state was unduly suggestive and created a substantial likelihood of misidentification.

{¶44} On June 28, 2010, appellant filed a motion to suppress Rupp's identification of appellant from the photo array. The trial court held a hearing on the motion on July 19, 2010, at which the state presented the following evidence. After appellant was identified as a suspect in the robberies, Detective Brenda Walker obtained a photograph of appellant from the police identification system. Detective Walker then prepared a photo array which included appellant's photograph along with those of five other men randomly selected by computer as exhibiting similar physical characteristics to those of appellant, including race, age, build, and length of hair. According to Detective Walker, one of the physical characteristics she included in the data she entered into the computer was that the suspect was either "shaved bald" or "[s]haved close." (Tr. 92.) Detective Walker acknowledged that the three photographs at the top of the photo array (which included appellant in position No. 2) depicted African-American men with shaved bald heads, while the three photographs at the bottom of the photo array depicted African-American men with closely shaved heads.

{¶45} According to Detective Walker, she presented the photo array to Rupp on November 23, 2009 following the procedures identified in the accompanying

"Investigative Photo Array Procedure" form. Rupp identified appellant's photograph as depicting the person who robbed the bank on November 6, 2009. Detective Walker further testified that Rupp wrote on the procedure form, "Of the photos presented, number 2 has the eyes I remember most vividly." (Tr. 86, State's Hearing Exhibit 1.)

{¶46} Following this testimony and argument by counsel, the trial court orally denied appellant's motion. The trial court concluded that the photo array "was not unduly suggestive * * * or influential just based upon the description, the photos, the complexions, the cuts, bald, entirely bald, or shaved. It's all within reason there and that it does not create an unconscionable or unduly suggestive photo array." (Tr. 110.)

{¶47} " 'The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution prohibit the admission of unreliable identification testimony derived from suggestive identifications procedures.' " *State v. Horton*, 10th Dist. No. 06AP-311, 2007-Ohio-4309, ¶15, quoting *State v. Brust* (May 28, 2000), 10th Dist. No. 99AP-509. "Before out-of-court identification testimony may be suppressed, the trial court must first find that the procedure employed was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification." *State v. Lee*, 10th Dist. No. 06AP-226, 2007-Ohio-1594, ¶13. Whether an identification is unduly suggestive depends upon factors such as the size of the array, the manner in which the array is presented, and the contents of the array. *State v. Merriman*, 10th Dist. No. 04AP-463, 2005-Ohio-3376, ¶17, citing *Reese v. Fulcomer* (C.A.3, 1991), 946 F.2d 247, 260. A photo array is impermissibly suggestive if the " 'picture of the accused, matching the descriptions given by the witness, so stood out from all of the other photographs as to 'suggest to an identifying witness that [that person] was more likely to be the culprit.' " ' " *Id.*, quoting

Jarret v. Headly (C.A.2, 1986), 802 F.2d 34, 41. An accused bears the burden of proving that an identification procedure was impermissibly suggestive. *State v. Sharp*, 10th Dist. No. 09AP-408, 2009-Ohio-6847, ¶14.

{¶48} Appellant argues that the photo array presented to Rupp was impermissibly suggestive because appellant's photograph was one of only three depicting men with shaved bald heads similar to his. Appellant contends that the inclusion of only three photographs of men with shaved bald heads "narrow[ed] the chances for selecting defendant fifty percent." (Appellant's brief at 16.)

{¶49} In a similar case, *State v. Browner*, 4th Dist. No. 99CA2688, 2001-Ohio-2518, the defendant argued that the photo array was unduly suggestive because only one or two of the other subjects in the photo array were bald like the defendant. The court held that the police were not required to insert photographs of only bald men into the photo array, reasoning that hairstyles can change and a person may be bald one week and have at least some hair the next week. *Id.*

{¶50} Moreover, "[a] defendant in a lineup need not be surrounded by people nearly identical in appearance." *State v. Davis*, 76 Ohio St.3d 107, 112, 1996-Ohio-414, citing *People v. Chipp* (1990), 75 N.Y.2d 327, 336. " '[E]ven * * * significant dissimilarities of appearance or dress' will not necessarily deny due process." *Id.*, quoting 1 LaFave & Israel, *Criminal Procedure* (1984) 587, Section 7.4.

{¶51} The photo array at issue here includes black and white photographs of six African-American males and was computer generated based upon parameters such as race, age, build, and length of hair. Our review of the photo array reveals nothing outstanding about appellant's photograph suggesting that he was the suspect. Indeed,

the photographs of the other five men are all reasonably close to appellant's photograph in appearance, showing no significant variations in hair length, age, facial features, build, dress or complexion. Absent any significant variation in physical characteristics, including hair length, appellant's claim that the photo array was impermissibly suggestive is unconvincing.

{¶52} Further, Detective Walker testified that she followed the procedures listed on the form accompanying the photo array, which instructed Rupp that the photographs were arranged in no particular order of importance, that appellant might or might not be included in the photo array, and that Rupp was not required to select any of the photographs. In addition, Rupp wrote on the form that she selected appellant because he "has the eyes I remember most vividly." (State's Hearing Exhibit 1.) Rupp's statement demonstrates that Rupp did not base her identification strictly upon the fact that appellant's photograph was only one of three depicting men with shaved bald heads.

{¶53} Having carefully considered the record, we conclude that the photo array was not unduly suggestive, and the trial court did not err in denying appellant's motion to suppress. The eighth assignment of error is overruled.

{¶54} We turn now to consideration of appellant's assignments of error pertaining to trial issues. Again, for ease of discussion we will address these assignments of error out of numerical order.

{¶55} Appellant contends in his second assignment of error that the trial court erred in admitting hearsay testimony from Hanna and Vondran regarding the November 11, 2009 robbery. "Hearsay" is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the

truth of the matter asserted." Evid.R. 801(C). Although Evid.R. 802 provides that hearsay generally is not admissible, Evid.R. 803(2) sets forth an exception for excited utterances, or "statement[s] relating to a startling event or condition made while the declarant [is] under the stress of excitement caused by the event or condition."

{¶56} The admission or exclusion of evidence, including the determination of whether a hearsay declaration should be admitted as an excited utterance, rests within the sound discretion of the trial court. *State v. Holloway*, 10th Dist. No. 02AP-984, 2003-Ohio-3298, ¶14, 24, citing *State v. Sage* (1987), 31 Ohio St.3d 173, 180, and *Roach v. Roach* (1992), 79 Ohio App.3d 194, 205. Absent an abuse of that discretion and a showing of material prejudice, an appellate court will not overturn a trial court's ruling.

{¶57} In *State v. Taylor* (1993), 66 Ohio St.3d 295, the Supreme Court of Ohio set forth a four-part test to determine the admissibility of an excited utterance:

(a) [T]hat there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement or declaration spontaneous and unreflective, (b) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties, so that such domination *continued* to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, (c) that the statement or declaration related to such startling occurrence or the circumstances of such startling occurrence, and (d) that the declarant had an opportunity to observe personally the matters asserted in his statement or declaration.

(Emphasis sic.) *Id.* at 300-01, quoting *Potter v. Baker* (1955), 162 Ohio St. 488, paragraph two of the syllabus.

{¶58} In general, cases that invoke the excited utterance exception to the hearsay rule involve assaults, automobile accidents, and similarly impactful events, such as witnessing a robbery. *State v. Ducey*, 10th Dist. No. 03AP-944, 2004-Ohio-3833, citing *Osborne v. Kroger Co.*, 10th Dist. No. 02AP-1422, 2003-Ohio-4368, ¶43, citing *State v. Moorman* (1982), 7 Ohio App.3d 251.

{¶59} Hanna testified that, just before the robbery on November 11, 2009, she told Sanker that the bank had been robbed the previous Friday and showed her a photograph of appellant. Moments later, Hanna observed appellant enter the bank and approach Sanker's teller station; she then saw Sanker "making a scooping motion, taking money out of her drawer and passing it over the teller line." (Tr. 223.) Hanna testified that, after appellant left the bank, Sanker "was very shaken up, shaking, [and] crying." (Tr. 226.) Following this testimony, the prosecutor asked Hanna if Sanker told her she had been robbed. Defense counsel objected on hearsay grounds. The prosecutor argued that Sanker's statement constituted an excited utterance, and the trial court overruled the objection. (Tr. 228.) The prosecutor reasserted the question, and Hanna responded, "I believe so, but I can't remember fully." (Tr. 228.)

{¶60} Vondran testified that, on November 11, 2009, she observed Sanker looking "distraught" and handing money to appellant across the teller counter. (Tr. 319.) Vondran spoke to Sanker shortly after appellant left the bank. According to Vondran, Sanker was "very, very shaken up." (Tr. 320.) Following this testimony, the prosecutor asked Vondran if she asked Sanker what had happened, and Vondran replied, "Um-hmm." (Tr. 320.) When the prosecutor asked Vondran what Sanker told her, defense counsel objected on hearsay grounds. The prosecutor argued that Sanker was

unavailable to testify and that her statement constituted an excited utterance. Following a brief discussion, the trial court overruled the objection. Vondran thereafter testified that Sanker told her she had just been robbed and that the robber looked like the picture of the person who had robbed the bank on November 6, 2009.

{¶61} After a thorough review of the record, we conclude that all four prongs of the *Taylor* test have been met, rendering proper the trial court's admission of Sanker's out-of-court statements. Under the first prong, Sanker's reflective faculties were arguably stilled by the fact that she had just been robbed by a man who produced a note threatening to kill her if she did not comply with his demands within 30 seconds. Indeed, according to Hanna and Vondran, Sanker was visibly shaken and crying following the robbery.

{¶62} Regarding the second prong, Sanker's statements were made before her nervous excitement lost domination over her reflective capabilities. With excited utterances, "[t]here is no *per se* amount of time after which a statement can no longer be considered to be an excited utterance. The central requirements are that the statement must be made while the declarant is still under the stress of the event and the statement may *not* be a result of reflective thought. * * * Therefore, the passage of time between the statement and the event is relevant but not dispositive of the question." (Emphasis sic.) *Taylor* at 303. " 'Relevant factors in ascertaining whether the declarant was in a sufficient state of excitement or stress include outward indicia of emotional state such as tone of voice, accompanying actions, and general demeanor.' " *Ducey* at ¶22, citing *Osborne* at ¶46. Contrary to appellant's assertion, the testimony of both Hanna and Vondran suggests that very little time transpired between the robbery and Sanker's statements.

Further, both testified that Sanker was visibly shaken by the event; Hanna noted that Sanker was crying.

{¶63} Lastly, under the third and fourth prongs, Sanker's out-of-court statements related to the incident, and Sanker personally observed the matters about which she spoke. Sanker's statements, which Hanna and Vondran communicated to the court at trial, were limited in scope to what happened to Sanker during the robbery and the identification of appellant as the robber.

{¶64} The four prongs of the *Taylor* test having been met, we conclude that the trial court did not abuse its discretion in admitting the hearsay testimony of Hanna and Vondran under the excited utterance exception to the hearsay rule. The second assignment of error is overruled.

{¶65} Appellant contends in his first assignment of error that the trial court erred in denying his Crim.R. 29 motion for acquittal as to the November 11, 2009 robbery. A Crim.R. 29(A) motion for acquittal tests the sufficiency of the evidence. *State v. Reddy*, 10th Dist. No. 09AP-868, 2010-Ohio-3892, ¶12, citing *State v. Knipp*, 4th Dist. No. 06CA641, 2006-Ohio-4704, ¶11. Accordingly, we review the trial court's denial of appellant's motion for acquittal using the same standard applicable to a sufficiency of the evidence review. *Reddy*, citing *State v. Darrington*, 10th Dist. No. 06AP-160, 2006-Ohio-5042, ¶15.

{¶66} In reviewing a sufficiency of the evidence claim, " '[t]he relevant inquiry 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 proven beyond a reasonable doubt.' " *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶34, quoting

State v. Jenks (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Whether the evidence is legally sufficient to sustain a verdict is a question of law, not fact. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. On review for sufficiency, courts do not assess whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Id.* at 390 (Cook, J., concurring.) In determining the sufficiency of the evidence, an appellate court must give " 'full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " *State v. Gordon*, 10th Dist. No. 10AP-1174, 2011-Ohio-4208, ¶5, quoting *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. Consequently, a verdict will not be disturbed based upon insufficient evidence unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4.

{¶67} R.C. 2911.02(A)(2) provides, in pertinent part, that "[n]o person, in * * * committing a theft offense * * * shall * * * [t]hreaten to inflict physical harm on another." Appellant argues that because Sanker, the victim of the November 11, 2009 robbery, did not testify at trial, the evidence was insufficient to establish that he threatened her with physical harm.

{¶68} Even without Sanker's testimony, sufficient circumstantial and direct evidence established that appellant threatened Sanker with physical harm. The demand note, recovered from Sanker's teller station, was admitted into evidence and provides direct evidence of a threat of physical harm. Indeed, the note threatened death if Sanker

did not comply with appellant's demands within 30 seconds. In addition, both Hanna and Vondran testified that they observed Sanker handing appellant large sums of money, and Vondran averred that Sanker looked "distraught" when doing so. Hanna and Vondran also testified that Sanker was visibly shaken and crying after the robbery. From this evidence, the jury could reasonably conclude that appellant threatened Sanker with physical harm during the commission of the robbery. The first assignment of error is overruled.

{¶69} In his seventh assignment of error, appellant contends his convictions were against the manifest weight of the evidence. In determining whether a verdict is against the manifest weight of the evidence, an appellate court sits as a "thirteenth juror." *Thompkins* at 387. Accordingly, we review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. *Id.*, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Additionally, we 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.' " *Id.*, quoting *Martin*. We reverse a conviction on manifest weight grounds for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Id.* Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶70} Appellant's argument does not expressly indicate whether his manifest weight challenge applies to the November 6, 2009 robbery, the November 11, 2009 robbery, or both. Regardless, the weight of the evidence supports appellant's convictions for both robberies.

{¶71} As to the November 6, 2009 robbery, Rupp testified that appellant entered the bank and gave her a note threatening death if she did not promptly provide him with cash from her teller drawer. The demand note corroborating Rupp's testimony was admitted into evidence. Vondran testified that she observed Rupp hand over cash to appellant, and that Rupp reported she had been robbed. Hanna testified that Rupp showed her the demand note immediately after the robbery. Both Rupp and Hanna testified that appellant was wearing a light-colored sweater during the robbery, and the surveillance video confirms that testimony. A light-colored sweater was later recovered from appellant's suitcase, and Rupp and Hanna identified it as the one appellant wore when he robbed the bank. Appellant's palm print was recovered from the door through which appellant exited. Seventeen days after the robbery, Rupp identified appellant from a photo array, noting that she expressly remembered appellant's eyes. At trial, Rupp, Hanna, and Vondran all identified appellant as the individual who robbed the bank on November 6, 2009.

{¶72} As to the November 11, 2009 robbery, Hanna and Vondran testified that they observed Sanker hand appellant large sums of money from her teller drawer. After appellant left the bank, Sanker told Vondran she had been robbed and that the robber resembled the surveillance photograph of appellant taken after the November 6, 2009 robbery. A note threatening death if Sanker did not comply with appellant's demand for

cash was recovered from Sanker's teller station; the note was admitted into evidence. Vondran testified that \$1,912 was missing from Sanker's teller drawer after the robbery. Both Hanna and Vondran testified that appellant was wearing a light-colored sweater during the robbery, and the surveillance video confirms that testimony. A light-colored sweater was recovered from appellant's suitcase, and Hanna and Vondran identified the sweater as the one appellant wore when he robbed the bank. At trial, Hanna and Vondran identified appellant as the individual who robbed the bank on November 11, 2009.

{¶73} Appellant emphasizes that the bait money was never recovered from his suitcase or his person, that he had legitimately been in the bank on November 5, 2009, accounting for his palm print being on the door, and neither Hanna nor Vondran identified him from the photo array. This evidence was presented to the jury, and the jury was free to resolve or discount it accordingly. After reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of witnesses, we conclude that a reasonable jury could have found that appellant was the perpetrator of the robberies of Cooper State Bank on November 6, 2009 and November 11, 2009, and that the jury did not lose its way and create a manifest miscarriage of justice in so finding. Accordingly, we find that appellant's convictions are not against the manifest weight of the evidence. The seventh assignment of error is overruled.

{¶74} Appellant's fifth and sixth assignments of error are interrelated and will be addressed together. In both assignments appellant argues he received ineffective assistance of counsel at trial.

{¶75} "The Sixth Amendment to the United States Constitution guarantees a criminal defendant the effective assistance of counsel." *State v. Belmonte*, 10th Dist. No. 10AP-373, 2011-Ohio-1334, ¶8, citing *McMann v. Richardson* (1970), 397 U.S. 759, 771, 90 S.Ct. 1441, 1449. Courts utilize a two-step analysis in determining whether the right to effective assistance of counsel has been violated. *Belmonte* at ¶8, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064. First, the defendant must demonstrate that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must demonstrate that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Belmonte*, citing *Strickland*.

{¶76} "An attorney properly licensed in the state of Ohio is presumed competent." *Belmonte* at ¶9, citing *Lott* at 174. The defendant bears the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy. *Belmonte*, citing *State v. Smith* (1985), 17 Ohio St.3d 98, 100. In demonstrating prejudice the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Belmonte*, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus.

{¶77} Appellant in his fifth assignment of error contends that trial counsel was ineffective in failing to move for a mistrial following Detective Billups' testimony that a warrant had been issued against appellant pursuant to a probation violation. Appellant

contends that this testimony inappropriately confirmed that appellant had a criminal record, warranting a mistrial.

{¶78} A mistrial need not be ordered in a criminal case merely because some irregularity has intervened. *State v. Nichols* (1993), 85 Ohio App.3d 65, 69. "Mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible." *Franklin* at 127, citing *Illinois v. Somerville* (1973), 410 U.S. 458, 462-63, 93 S.Ct. 1066, 1069-70.

{¶79} Evidence of an accused's prior bad act is not admissible to demonstrate that the accused has a disposition or propensity toward committing crimes. *State v. Mobley*, 2d Dist. No. 18878, 2002-Ohio-1792, citing *State v. Hector* (1969), 19 Ohio St.2d 167, 174. A trial court may not admit evidence that tends to demonstrate that the defendant committed a crime completely independent of the offense for which the defendant currently stands trial. *Mobley*, citing *State v. Breedlove* (1971), 26 Ohio St.2d 178, 183.

{¶80} Detective Billups testified that, after he received the anonymous tip regarding appellant's presence at the Super 8 motel, he discovered through investigative police channels that an arrest warrant had been issued against appellant for a probation violation. Although defense counsel did not immediately object to the testimony, he requested a sidebar shortly thereafter, arguing that the testimony was improper and should be stricken from the record. The trial court offered to provide a curative instruction, and both the prosecutor and defense counsel agreed to that resolution. The trial court thereafter instructed the jury as follows: "Ladies and gentlemen of the jury, there was a comment made by the witness regarding probation or a warrant that was out

regarding the defendant. I am instructing you to disregard that information. All right?" (Tr. 378.)

{¶81} In *Mobley*, the court concluded that a trial court did not err in denying a defendant's motion for mistrial after an investigating detective testified that he obtained a mug shot of the defendant from a prior arrest. The court noted that the trial court sustained an objection to the detective's comment and gave a curative instruction admonishing the jury to disregard the comment and not use it during deliberations. In upholding the trial court's decision to deny the defendant's motion for mistrial, the court concluded that the trial court's instruction successfully cured any error stemming from the detective's reference to the defendant's arrest for a previous crime.

{¶82} Here, as in *Mobley*, the trial court issued a curative instruction after Detective Billups commented that appellant had an outstanding warrant for a probation violation. We find that the instruction effectively cured any error stemming from Detective Billups' testimony, noting that we presume that jurors follow the trial court's instructions. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, ¶39. Consequently, a defense motion for mistrial would have been futile because the trial court would not have been required to grant it, having effectively cured error from Detective Billups' testimony through the instruction. " ' "Failure to do a futile act cannot be the basis for claims of ineffective assistance of counsel, nor could such a failure be prejudicial." ' " *State v. Cassell*, 10th Dist. No. 08AP-1093, 2010-Ohio-1881, ¶54, quoting *State v. Henderson*, 8th Dist. No. 88185, 2007-Ohio-2372, ¶42, quoting *State v. Shannon* (June 16, 1982), 9th Dist. No. 10505. Thus, we find that trial counsel was not ineffective in failing to move for a mistrial. The fifth assignment of error is overruled.

{¶83} Appellant in his sixth assignment of error contends that defense counsel was ineffective in failing to request that appellant be permitted to sit in the courtroom somewhere other than at the defense table. Appellant argues that the in-court identifications of appellant by Hanna and Vondran resulted solely from his presence at the defense table, as neither had identified him from the photo array.

{¶84} Appellant's argument is without merit. Although defense counsel did not request alternative seating for appellant, appellant has failed to establish that the trial court would have granted such a request. "The seating of a defendant at a place other than the trial table is clearly within the discretion of the [c]ourt." *State v. Petti* (Oct. 21, 1976), 8th Dist. No. 35213.

{¶85} Moreover, defense counsel effectively called into question the reliability of the in-court identifications provided by Hanna and Vondran. Indeed, defense counsel questioned Hanna and Vondran extensively regarding their inability to identify appellant from the photo array presented within days of the robberies. In addition, defense counsel elicited agreement from Hanna that it would be "fairly easy" to deduce that the person seated with defense counsel was the person who had robbed the bank. (Tr. 237.) "A cross-examination of an identifying witness can be used 'to test [an] identification before it harden[s].'" *State v. Johnson*, 163 Ohio App.3d 132, 2005-Ohio-4243, ¶56, quoting *Moore v. Illinois* (1977), 434 U.S. 220, 230, 98 S.Ct. 458, 465, fn.5. Because defense counsel thoroughly questioned Hanna and Vondran about their in-court identifications of appellant, we cannot find that defense counsel was deficient in failing to request alternative seating for appellant.

{¶86} Moreover, appellant cannot demonstrate prejudice resulting from defense counsel's failure to request alternative seating for appellant. The inability of Hanna and Vondran to identify appellant from the black-and-white photo array did not discredit their in-court identification of appellant at trial. *Johnson* at ¶57, citing *State v. Satterwhite*, 10th Dist. No. 04AP-964, 2005-Ohio-2823, ¶38. Both Hanna and Vondran made their identifications under oath, and, as noted above, both were subject to cross-examination. Moreover, Hanna testified that she based her in-court identification of appellant on the fact that she recognized him as the person who committed the November 6 and 11, 2009 bank robberies, not because he was seated at the defense table. (Tr. 243.) Vondran noted that the photo array included only head shots and did not depict attributes that can be viewed during an in-person identification, such as profile, height or weight, and she unequivocally identified appellant as the person who twice robbed the Cooper State Bank in November 2009. Appellant's contention that trial counsel was ineffective in failing to request alternative seating for appellant is without merit. The sixth assignment of error is overruled.

{¶87} Appellant's ninth, tenth, and eleventh assignments of error will be addressed jointly. In his ninth and eleventh assignments of error, appellant contends, respectively, that the trial court erred in failing to dismiss the repeat violent offender specifications and in its application of "serious physical harm" to those specifications. Appellant in his tenth assignment of error contends that the trial court erred in "accepting 'reckless' as the culpable mental state" for the second-degree robbery counts. (Appellant's brief at 18.) On appeal, appellant has the burden of affirmatively demonstrating error by the trial court. Appellant has failed to provide citations to relevant

authority or develop a legal argument in support of these assigned errors as required by App.R. 16(A)(7). Accordingly, we overrule the ninth, tenth, and eleventh assignments of error pursuant to App.R. 12(A)(2). See *Pearn v. DaimlerChrysler Corp*, 148 Ohio App.3d 228, 2002-Ohio-3197, ¶35, quoting *Cardone v. Cardone* (May 6, 1998), 9th Dist. No. 18349. (" '[i]f an argument exists that can support this assignment of error, it is not this court's duty to root it out.' ").

{¶88} Having overruled appellant's eleven assignments of error, we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH and DORRIAN, JJ., concur.
