

[Cite as *State v. Jackson*, 2006-Ohio-1938.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86542

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	and
-vs-	:	
	:	OPINION
MARCUS JACKSON	:	
	:	
Defendant-Appellant	:	
	:	

DATE OF ANNOUNCEMENT	APRIL 20, 2006
OF DECISION:	

CHARACTER OF PROCEEDING:	Criminal appeal from Common Pleas Court Case No. CR-460949
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JUDGMENT:	Affirmed.
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DATE OF JOURNALIZATION:

APPEARANCE:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor JAMES D. MAY Assistant County Prosecutor 9 <sup>th</sup> Floor Justice Center 1200 Ontario Street Cleveland, Ohio 44113
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For Defendant-Appellant:	BRITTA M. BARTHOL P. O. Box 218 Northfield, Ohio 44067
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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Marcus Jackson appeals his conviction for aggravated robbery. Jackson assigns the following errors for our review:

"I. Appellant was denied his right to effective assistance of counsel guaranteed by Article I, Section 10 of the Ohio Constitution and by the United States Constitution when trial counsel's failure to file a motion to suppress identification evidence caused him prejudice."

"II. Appellant has been deprived of his liberty without due process of law by his conviction for aggravated robbery and the firearm specifications which were not supported by sufficient evidence to prove his guilt beyond a reasonable doubt."

"III. Appellant's convictions for aggravated robbery and the firearm enhancement specifications were against the manifest weight of the evidence."

{¶ 2} Having reviewed the record and pertinent law, we affirm Jackson's conviction. The apposite facts follow.

{¶ 3} On January 7, 2005, the Cuyahoga County Grand Jury indicted Jackson for two counts of aggravated robbery with one and three-year firearm specifications attached. The grand jury also indicted Jackson for one count of having a weapon while under a disability, which the State dismissed prior to trial. On April 6, 2005, Jackson waived his right to a jury trial and a bench trial ensued.

#### **Bench Trial**

{¶ 4} The State presented three witnesses including the victim, twenty-two year old Julia Pankhurst, who testified that she is an

employee of Coventry Cats in Cleveland Heights, Ohio. Pankhurst testified that on August 9, 2004, she was working the night shift from 4:00 p.m. to 8:00 p.m. at Coventry Cats when a black male entered the store. She inquired whether he needed assistance and the man indicated he was just looking around.

{¶ 5} Pankhurst testified that she stood at the cash register and watched him walk around the store. After about two minutes, the man approached the counter, placed a gun on the counter with his left hand, and with his right hand placed a plastic bag on the counter. Pankhurst pushed the panic button and then handed over the money. The man left the store and proceeded northbound on Coventry Road. Pankhurst stated that she immediately went next door to the adjoining store, Passport to Peru, and told them she had just been robbed.

{¶ 6} Pankhurst testified that she had a good opportunity to look at the robber as she was handing him the money. She stated the robber had braided hair that was fraying at the ends, a medium complexion, and a pocky face with a big spot on his cheek that might have been a scab. Pankhurst also stated that the robber's eyes did not focus directly on her.

{¶ 7} Pankhurst also testified that the gun was pointed at her the entire time it was on the counter. She stated the gun looked real and described it as a simple black gun, with silver chips that possibly resulted from being dropped several times.

{¶ 8} Pankhurst testified as follows regarding a subsequent encounter with the robber:

"Q. And please tell the Court what happened on that day in September.

A. My boss, Sheila, told me to go down to the mailbox to deliver some letters. My - - I just stopped in High Tide, which is a store down the street, just for a second, and when I was coming out, I had my dog with me, and she ran to the left, going back to the cat store, and I needed to go right, but I turned left to get her, and then right in front of me, about a few feet away, I saw him, saw the guy that had robbed me, because from before I recognized his face, and I got all panicked again.

Q. Okay. And when you say you got all panicked, describe for the Court exactly what happened to you, what you told the police, what you told me. Describe to the Court what happened to you when you saw this person who robbed you for the second time.

A. I got all panicked and freaked out, so I looked straight into his eyes, recognized him immediately. His hair was unbraided at the time. He was wearing a blue shirt that day. And immediately he kind of crossed diagonally across Coventry, and I kind of like walked back to the cat store, kind of quietly hoping he didn't recognize me immediately, and then I was looking which way he was going. He was heading in the direction of Medic Drug.

Q. Which direction on Coventry is that?

A. South.

Q. Okay.

A. I ran into the cat store, told Sheila to call the police because I just recognized the guy that robbed me, and he - - and she called the police immediately, and then they got him just a few seconds later."<sup>1</sup>

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<sup>1</sup>Tr. at 50-52.

{¶ 9} Finally, Pankhurst testified that shortly after the above encounter, Cleveland Heights police officers came to the store, indicated that they had apprehended the suspect, and asked her if she would accompany them to do a drive-by identification. Pankhurst was able to positively identify the suspect as the robber.

{¶ 10} At the close of the State's evidence, defense counsel requested that the Court take a good look at Jackson's features, and the Court obliged.

{¶ 11} The Court found Jackson guilty of aggravated robbery with the one and three-year firearm specifications. On May 16, 2005, the Court sentenced Jackson to a term of three years on the aggravated robbery charge and three years for the firearm specification for a total period of six years of incarceration.

#### **Ineffective Assistance of Counsel**

{¶ 12} In the first assigned error, Jackson argues his trial counsel was ineffective for failing to file a motion to suppress the victim's identification. We disagree.

{¶ 13} In a claim of ineffective assistance of counsel, the burden is on the defendant to establish that counsel's performance fell below an objective standard of reasonable representation and prejudiced the defense.<sup>2</sup> To reverse a conviction for ineffective

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<sup>2</sup>*Strickland v. Washington* (1984), 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052.

assistance of counsel, the defendant must prove "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding."<sup>3</sup>

{¶ 14} In evaluating whether a petitioner has been denied effective assistance of counsel, the Ohio Supreme Court held that the test is whether the accused, under all the circumstances, had a fair trial and substantial justice was done.<sup>4</sup> When making that evaluation, a court must determine whether there has been a substantial violation of any of defense counsel's essential duties to his client and whether the defense was prejudiced by counsel's ineffectiveness.<sup>5</sup>

{¶ 15} As to the second element of the test, the defendant must establish that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.<sup>6</sup> The failure to prove either prong of the *Strickland*

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<sup>3</sup>*State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 2000-Ohio-448, citing *Strickland*, supra, at 687-688.

<sup>4</sup>*State v. Hester* (1976), 45 Ohio St.2d 71, paragraph four of the syllabus.

<sup>5</sup>*State v. Lytle* (1976), 48 Ohio St.2d 391, vacated on other grounds (1978), 438 U.S. 910, 57 L.Ed.2d 1154, 98 S.Ct. 3135; *State v. Calhoun*, 86 Ohio St.3d 279, 289, 1999-Ohio-102.

<sup>6</sup>*State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus; *Strickland*, supra, at 686.

two-part test makes it unnecessary for a court to consider the other prong.<sup>7</sup>

{¶ 16} In the instant case, Jackson claims Pankhurst's identification was unduly suggestive, therefore, his trial counsel was ineffective for failing to file a motion to suppress the identification.

{¶ 17} Trial counsel's failure to file a motion to suppress does not per se constitute ineffective assistance of counsel.<sup>8</sup> A criminal defendant asserting a claim of ineffective assistance on this basis must show that the failure to file the motion to suppress caused him prejudice.<sup>9</sup> Thus, the burden is on the appellant to point to evidence in the record supporting the suppression of evidence.

{¶ 18} A failure to file a motion to suppress may constitute ineffective assistance of counsel where there is a solid possibility that the court would have suppressed the evidence.<sup>10</sup> However, even when some evidence in the record supports a motion to suppress, we presume that defense counsel was effective if defense

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<sup>7</sup>*Madrigal*, supra, at 389, citing *Strickland*, supra, at 697.

<sup>8</sup>*State v. Pimental*, Cuyahoga App. No. 84034, 2005-Ohio-384, citing *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384, 91 L.Ed.2d 305, 106 S.Ct. 2574; *State v. Nields*, 93 Ohio St.3d 6, 34, 2001-Ohio-1291.

<sup>9</sup>*State v. Robinson* (1996), 108 Ohio App.3d 428, 433.

<sup>10</sup>*Pimental*, citing *State v. Garrett* (1991), 76 Ohio App.3d 57.

counsel could reasonably have decided that the filing of a motion to suppress would have been a futile act.<sup>11</sup>

{¶ 19} Here, filing a motion to suppress would have been a futile act because it was Pankhurst's recognition of Jackson that directly led to him being apprehended. The record reveals that Pankhurst instantly recognized Jackson as she walked on the street several weeks after the robbery. At trial, she described with particularity the panic she felt when she saw Jackson, and also described Jackson's diversionary behavior, that of immediately crossing the street upon being recognized. Pankhurst had the police notified and they apprehended Jackson within minutes. Thus, when Pankhurst accompanied the police to do the drive-by, it was purely to confirm that they had the right person in custody.

{¶ 20} Further, Pankhurst's trial testimony indicates that she had ample opportunity to observe Jackson at the time of the robbery. Pankhurst testified that she observed him for about two minutes as he walked around the store, and also that she had the opportunity to look directly at his face when she was handing him the money. The record reveals that Pankhurst described Jackson's facial features with particularity, both at trial and in a previous statement to the police.

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<sup>11</sup>*State v. Edwards* (July 11, 1996), Cuyahoga Co. App. No. 69077, citing *State v. Martin* (1983), 20 Ohio App.3d 172. See, also, *Strickland*, supra, at 689 and *State v. Dotson* (Mar. 27, 1998), 4<sup>th</sup> Dist. No. 97 CA 9.



{¶ 21} Finally, after all the evidence was presented to the trial court as the fact finder, it stated, "So I don't have evidence that shakes the Court's confidence in the accuracy and reliability of Miss Pankhurst's identification of Mr. Jackson."<sup>12</sup> Because the trial court was confident that Pankhurst's identification was reliable, any motion to suppress would have had little likelihood of success. Thus, filing a motion to suppress would have been futile. As such, Jackson suffered no prejudice from trial counsel's decision not to file a motion to suppress Pankhurst's identification. Accordingly, we overrule the first assigned error.

#### **Sufficiency of Evidence**

{¶ 22} In the second assigned error, Jackson argues the evidence was insufficient to support his conviction for aggravated robbery. We disagree.

{¶ 23} A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the State has met its burden of production at trial.<sup>13</sup> On review for sufficiency, courts are to assess not whether the State's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.<sup>14</sup> The relevant inquiry is

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<sup>12</sup>Tr. at 178.

<sup>13</sup>*State v. Thompkins* (1997), 78 Ohio St.3d 380, 390, 1997-Ohio-52.

<sup>14</sup>*Id.*

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.<sup>15</sup> The weight and credibility of the evidence are left to the trier of fact.<sup>16</sup>

{¶ 24} R.C. 2911.01(A), defines the offense of aggravated robbery, in pertinent part as follows:

**"No person, in attempting or committing a theft offense \*\*\* or in fleeing immediately after the attempt or offense, shall do any of the following:**

**(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it \*\*\*."**

{¶ 25} Jackson contends the State failed to prove beyond a reasonable doubt that he was using a firearm. This argument is without merit.

{¶ 26} As set forth above, the test regarding the sufficiency of evidence is not whether the testimony is to be believed, but whether, if believed, the evidence would support a conviction. Here, Pankhurst testified that Jackson put the gun on the counter and pointed it at her. Pankhurst further stated that Jackson kept the gun pointed at her throughout the robbery. Finally, Pankhurst

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<sup>15</sup>*State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

<sup>16</sup>*State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

stated that the gun looked real, described it with particularity, and even drew a picture of the gun.

{¶ 27} Pankhurst's testimony, if believed, was sufficient to demonstrate that Jackson committed aggravated robbery. Moreover, viewing the evidence in a light most favorable to the prosecution, it is apparent that the State presented sufficient evidence to support Jackson's convictions on the firearm specifications. Accordingly, we overrule the second assigned error.

#### **Manifest Weight of Evidence**

{¶ 28} In the third assigned error, Jackson argues his convictions were against the manifest weight of the evidence. We disagree.

{¶ 29} While the test for sufficiency requires a determination of whether the State has met its burden of production at trial, a manifest weight challenge questions whether the State has met its burden of persuasion.<sup>17</sup> When a defendant asserts that his conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest

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<sup>17</sup>*Thompkins, supra.*

miscarriage of justice that the conviction must be reversed and a new trial ordered<sup>18</sup>

{¶ 30} In the instant case, Pankhurst provided significant, descriptive and testimonial evidence that Jackson was the person who entered the store and placed a gun on the counter, which remained pointed at her throughout the robbery. Pankhurst gave detailed testimony of the robbery and described Jackson's features with particularity. Further, Pankhurst's chance second encounter with Jackson directly led to his apprehension.

{¶ 31} Finally, the trial court found significant Pankhurst's description of Jackson's reaction when she recognized him on the street several weeks later. The trial court stated the following:

**"And in human experience, we know what that's like, to recognize someone, and it was telling and convincing to the Court that she described the person as immediately turning to cross the street. And the Court had no evidence there was a crosswalk there, so the picture that was painted to the Court was that we are mid-block, and she looks up into the face of a person she identifies as her assailant, and the assailant turns and crosses the street. So we have behavior on the part of the person there on September 21<sup>st</sup> that strongly corroborates her description of her reaction, and that this person is taking diversionary movement away from Miss Pankhurst."**<sup>19</sup>

{¶ 32} After reviewing the entire record, weighing the evidence and considering the credibility of the witnesses, we are not

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<sup>18</sup>*State v. Glass* (Feb. 27, 2003), Cuyahoga App. No. 81607, 2003-Ohio-879, citing *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

<sup>19</sup>Tr. at 176-177.

persuaded that the fact finder clearly lost its way or created such a miscarriage of justice that Jackson's convictions must be reversed.

{¶ 33} Accordingly, we overrule the third assigned error.

Judgment affirmed.

[Cite as *State v. Jackson*, 2006-Ohio-1938.]

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENETH A. ROCCO, P.J., and

MICHAEL J. CORRIGAN, J., CONCUR.

PATRICIA ANN BLACKMON  
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).