[Cite as *State v. Vance,* 2018-Ohio-5409.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

LANCE J. VANCE,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 CO 0015

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2015 CR 88

BEFORE:
Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. Robert Herron, Columbiana County Prosecutor and
Atty. Megan L. Bickerton, Assistant Prosecuting Attorney
105 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee

Atty. Timothy Young, Ohio Public Defender and
Atty. Allen Vender, Assistant State Public Defender, Office of the Ohio Public Defender,
250 E. Broad Street, Suite 1400, Columbus, Ohio 43215, for Defendant-Appellant.

Dated: December 21, 2018

WAITE, J.

{¶1} Appellant Lance J. Vance appeals a June 9, 2017 judgment entry convicting him of one count of aggravated robbery. Appellant argues that he received ineffective assistance of counsel in two instances: (1) his trial counsel failed to object to evidence of a prior bad act; and (2) his trial counsel failed to file a motion to suppress illegally seized tennis shoes. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On June 28, 2014, a man entered Gilkinson's Short Stop ("Gilkinson's") in East Liverpool wearing a three-holed ski mask, dark clothing, a cloth belt, gloves, and white Nike shoes with distinctive markings. The man brandished a firearm and ordered the store owner to lie on the floor. The owner told the robber to "get the hell out" and pushed him out the door. (Trial Tr. Vol., pp. 217-218.) The would-be robber ran out of the store and down the street without further incident. The owner was unharmed and nothing was taken from the store. The owner could not identify the robber, however, a surveillance camera captured the incident.

{¶3} On September 2, 2014, Appellant and a man named Greg Cummings robbed a Marathon gas station in Conway, Pennsylvania. Conway is located in Beaver Township. During that robbery, Appellant wore a three-holed ski mask, dark clothing, a cloth belt, gloves, and held a gun in his right hand.

{¶4} The Gilkinson robbery was unsolved until December of 2014 when the Conway Police Department received a tip that a man named Greg Cummings was the getaway driver in the Marathon robbery. Cummings admitted to his role in the robbery and also implicated Appellant. Investigators asked Cummings about another robbery in

Center Township, however, he had no knowledge of the incident. Investigators then asked him about the Gilkinson robbery and he implicated Appellant. According to Cummings, he recognized Appellant from a still frame photo of the robber in a local newspaper. He recognized Appellant due to his unique build (Appellant is 6'5" and approximately 180 pounds) and because he had frequently seen Appellant wearing the distinct shoes worn by the robber. Cummings told investigators that he asked Appellant about his involvement. Although Appellant initially denied involvement, he later admitted that it was him.

{¶5} At this time, Appellant lived in the basement of his mother's house. On December 13, 2014, the police obtained a search warrant for the house. As a result of the search, police seized a pair of white and black Nike shoes from the basement. The shoes are identical to the ones worn by the robber in the photo.

{¶6} On February 19, 2015, Appellant was indicted on one count of aggravated robbery, a felony of the first degree, in violation of R.C. 2911.01(A)(1). A jury trial commenced on May 30, 2017. The jury found Appellant guilty of the sole offense. On June 9, 2017, the trial court sentenced Appellant to seven years of incarceration. The court ordered the sentence to run consecutively to his sentence from the Pennsylvania court. Appellant timely appeals.

Ineffective Assistance

{¶7} In Appellant's assignments of error he alleges that he received ineffective assistance of counsel for various reasons. The test for an ineffective assistance of counsel claim is two-part: whether trial counsel's performance was deficient and, if so, whether the deficiency resulted in prejudice. *State v. White*, 7th Dist. No. 13 JE 33,

2014-Ohio-4153, ¶ 18, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 107. In order to prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Lyons*, 7th Dist. No. 14 BE 28, 2015-Ohio-3325, ¶ 11, citing *Strickland* at 694. The appellant must affirmatively prove the alleged prejudice occurred. *Id*. at 693.

{¶8} As both are necessary, if one prong of the *Strickland* test is not met, an appellate court need not address the remaining prong. *Id.* at 697. The appellant bears the burden of proof on the issue of counsel's effectiveness, and in Ohio, a licensed attorney is presumed competent. *State v. Carter*, 7th Dist. No. 2000-CO-32, 2001 WL 741571 (June 29, 2001), citing *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999).

ASSIGNMENT OF ERROR NO. 1

> Lance Vance received ineffective assistance of counsel because his attorney failed to contemporaneously object to evidence of other acts that was introduced in violation of Evid.R. 404(B) and Evid.R. 403(A). Sixth and Fourteenth Amendments to the United States Constitution; Article I, Sections 1 and 10 of the Ohio Constitution; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989); Evid.R. 404(B); Evid.R. 403(A); Tr. 267-68, 278, 314.

{¶9} Appellant argues that his trial counsel was ineffective for failing to object to evidence of a prior bad act, the Conway robbery. While Appellant concedes that his trial counsel filed a motion in limine regarding this evidence, counsel failed to renew his objection at trial. Appellant highlights the fact that the robberies were committed two months apart in different states. Appellant also argues that there are limited similarities between the robberies. Appellant argues that he suffered prejudice, as the evidence tended to convey to the jury that he is the type of person who commits robberies. Appellant also contends that there was little evidence to support his conviction for the Gilkinson robbery without evidence of the Conway robbery.

{¶10} In response, the state argues that the two robberies were committed in a similar fashion, in the same general locality, and within a close period of time. The state contends that the evidence shows *modus operandi* and identity based on the fact that the robber in both cases wore dark clothing, a cloth belt, a three holed ski mask, and gloves. The state notes that the robber held a gun in his right hand in both cases and demanded money from the cash register. Also, the state notes that both robberies targeted convenience stores in the late evening. The state urges that *modus operandi* evidence can be introduced even if there are some differences in the acts.

{¶11} Appellant concedes that he did not object to the introduction of the evidence at trial. Thus, he is limited to a plain error review on appeal. A three-part test is employed to determine whether plain error exists. *State v. Billman*, 7th Dist. Nos. 12 MO 3, 12 MO 5, 2013-Ohio-5774, ¶ 25, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).

> First, there must be an error, *i.e.* a deviation from a legal rule. Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. Third, the error must have affected "substantial rights." We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.

Billman at ¶ 25.

{¶12} On the first day of trial, the trial court denied Appellant's motion in limine to suppress any evidence regarding the Conway robbery. The trial court explained that the Gilkinson and Conway robberies were similar in that the robber wore dark clothing, a cloth belt, a three-holed black ski mask, gloves, and held a gun in his right hand. Evidence involving the similarities, including the ski mask and the description of the robber, were deemed admissible. However, the trial court did exclude several pieces of evidence related to the Conway robbery; clothing that was specific to that event and evidence of drug use.

{¶13} Pursuant to Evid.R. 404(B):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this rule shall provide reasonable notice in advance of trial,

> or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

{¶14} "The admission of such [other-acts] evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that created material prejudice." *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14.

{¶15} The Ohio Supreme Court created a three-step analysis when reviewing the admissibility of a prior bad:

> The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. *See* Evid.R 403.

State v. Williams, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20.

{¶16} The first prong reviews whether the evidence was relevant. There is no question that the evidence is relevant, here. The evidence provided information as to the identity of the robber, particularly his physical characteristics and his *modus operandi.*

{¶17} The second prong of the test looks to whether the evidence was introduced to prove the offender's character and that the defendant acted in conformity with that character. Although Appellant limits his arguments to the ski mask and gun, the state presented the Conway evidence as part of a larger picture. According to the state, the Conway robber was described as a tall white male with a slender build. He wore dark clothing, a cloth belt, gloves and a three-holed ski mask. The robber held a gun with his right hand and demanded money. The Gilkinson robber was also described as a tall white male with a slender build. He also wore dark clothing, a cloth belt, gloves, and a three-holed ski mask. The evidence was admitted to prove Appellant's identity as the robber, demonstrated by similarities in the physical description of the robber and similarities in the way the robberies were conducted. Thus, the evidence was presented to prove the robber's identity through his *modus operandi,* not to prove that Appellant acted in conformity with any past behavior.

{¶18} Again, we review Appellant's arguments for plain error. It may be true that many robberies involve a perpetrator dressed in dark clothing, however, this case presents unique facts. While the mask and clothing could be considered typical of most robberies, the state also presented evidence that both robberies were close in geographic proximity. Although the robberies were in different states, both locations are near the Ohio/Pennsylvania border. The robberies were also close in time, just over two months apart. Additionally, the targeted locations were convenience stores. The overall effect of the evidence tended to show that the robberies were committed by the same individual with a similar *modus operandi*. Further, defense counsel was able to

elicit testimony from Officer Mike Priolo from the Conway Police Department that about fifty percent of robberies involve a ski mask and gun.

{¶19} In the third, and final, prong of the test, we must determine whether the probative value of the evidence was outweighed by the prejudice suffered by Appellant. Appellant argues that there is limited evidence of his involvement without introduction of the evidence of the Conway robbery. Appellant concedes that trial court properly instructed the jury. A trial court's instruction that "other acts" evidence can only be considered as to the issue of identity minimizes prejudice. *State v. Ash*, 2018-Ohio-1139, 108 N.E.3d 1115, ¶ 69 (7th Dist.). Regardless, "[w]here there is no reasonable possibility that unlawful testimony contributed to a conviction, the error is harmless and therefore will not be grounds for reversal." *State v. Howard-Ross,* 2015-Ohio-4810, 44 N.E.3d 304, ¶ 22 (7th Dist.), citing *State v. Lytle*, 48 Ohio St.2d 391, 358 N.E.2d 623 (1976), paragraph three of the syllabus, vacated on other grounds in *State v. Lytle*, 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154 (1978).

{¶20} Here, Nike shoes matching those worn by the Gilkinson robber were discovered during a search of Appellant's residence and were presented to the jury. When the robber jumped over the rail, his shoes are clearly visible to the camera. The shoes are solid white with a black Nike "swoosh" symbol with the same distinct black, white, and red pattern on the sole. Also, Appellant's physical description matched that of the robber in the surveillance video and given by the victim. Even without the Conway link, the Gilkinson robber wore a three-holed black ski mask like the one introduced at trial. Additionally, Cummings told investigators Appellant told him that he had to abort the Gilkinson robbery because a man had pushed him and it was easier to

back out than to move forward with the robbery. Appellant described the man as an older man, which fits the owner's general description. Thus, there is competent credible evidence of Appellant's involvement in the Gilkinson robbery even without the Conway robbery evidence.

{¶21} As such, Appellant cannot demonstrate that introduction of evidence from the Conway robbery was plain error. His counsel cannot be ineffective for failing to object to the trial court's decision, as the decision was proper. See *State v. Dawson,* 7th Dist. No. 17 MA 0007, 2018-Ohio-340, ¶ 40 (counsel not ineffective for failing to object to joinder where proper.)

{¶22} Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> Lance Vance received ineffective assistance of counsel because his attorney failed to file a motion to suppress the tennis shoes that were seized illegally, in violation of Vance's rights under the Fourth, Sixth, and Fourteenth Amendments to the United States Constitution; Article I, Sections 1 and 10 of the Ohio Constitution; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989); *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed. 231 (1927); *State v. Hill*, 75 Ohio St.3d 195, 203, 661 N.E.2d 1068 (1996). Tr. 163-65, 178-79.

{¶23} Appellant argues that his counsel was ineffective for failing to file a motion to suppress introduction of the white Nike shoes. Appellant argues that among the

items specified in the search warrant were grey cloth skater-style shoes, not white Nike shoes. Because the Nike shoes were not specifically listed in the search warrant, Appellant argues that the officers had no authority to seize them. As to prejudice, Appellant essentially repeats his argument from his first assignment of error that there was a lack of evidence absent the evidence from the Conway robbery and the Nike shoes. But for the admission of the shoes, he contends that he would not have been convicted. Appellant concedes that counsel objected at trial to the admission of the Nike shoes.

{¶24} The state responds by arguing that the shoes were properly seized and admitted into evidence pursuant to the plain view doctrine.

{¶25} "[F]ailure to file a suppression motion does not constitute per se ineffective assistance of counsel." *State v. Schwartz,* 7th Dist. No. 13 MA 79, 2014-Ohio-4418, ¶ 12, citing *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52; *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). An appellant must show that the motion "would have had a reasonable probability of success." *Schwartz* at ¶ 12, citing *State v. Nields*, 93 Ohio St.3d 6, 34, 2001-Ohio-1291, 752 N.E.2d 859. A 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, 797 N.E.2d 71, ¶ 8.

{¶26} The Ohio Supreme Court has held that:

> In essence, the plain view doctrine allows police officers, under particular circumstances, to seize an "article of incriminating character" which is not described in their search warrant. The doctrine "is grounded on the

> proposition that once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost * * *."

State v. Halczyszak, 25 Ohio St.3d 301, 303, 496 N.E.2d 925, citing *Illinois v. Andreas*, 463 U.S. 765, 771, 103 S.Ct. 3319 (1983). The plain view doctrine test is three part: "First, the initial intrusion that brought the police into a position to view the object must have been legitimate. Second, the police must have inadvertently discovered the object. Third, the incriminating nature of the object must have been immediately apparent." *Halczyszak* at 303.

{¶27} Here, the police were legally inside the residence pursuant to an unchallenged and valid search warrant. Thus, the first part of the test is met.

{¶28} The search warrant was obtained by the Conway Police Department and sought evidence related to the Conway robbery. Among the items specifically listed were shoes described as light grey skater-styled shoes. However, officers seized white Nike shoes with a black Nike "swoosh" symbol and black, white, and red marking on the soles. The Conway police officers had seen the photograph of the Gilkinson robber's shoes, and would have been able to immediately discern the incriminating nature of the shoes found during their search. In fact, Officer Priolo testified that the officers immediately recognized the Nike shoes from the photograph as the ones worn by the Gilkinson robber. (Trial Tr. Vol II, pp. 323-326.) Because the officers found the Nike shoes inadvertently, while conducting a legitimate search pursuant to warrant, the second prong is satisfied. And because police recognized these shoes on sight as those worn in another crime, the third part is likewise met.

{¶29} Appellant admits that the Nike shoes were found in the basement where he resided. However, he now argues that other family members stored their belongings in storage bins located in the basement. Even if Appellant's claim is true, the thrust of his assignment of error challenges the ability of the Conway Police Department to seize the shoes because they were not specifically listed in the search warrant. Any argument as to whether or not Appellant owned the shoes is irrelevant to this issue. Regardless, Appellant's mother testified that he wore a size 12 or 13 shoe. The seized Nike shoes were a size 13. Appellant later testified that he wears a size 14 shoe but conceded that the Nike shoes would likely fit him. He declined to try the shoes on in court. The shoes were also located in an area Appellant was using as his own. Hence, ownership of the shoes involves a question of credibility.

{¶30} We note that defense counsel did make an oral motion in limine to suppress the shoes just before trial commenced. The trial court heard arguments from both sides and denied the motion. Counsel also objected to the admission of the shoes at trial. However, the shoes were admissible pursuant to the plain view doctrine and counsel was not ineffective for failing to file a motion to suppress.

{¶31} Accordingly, Appellant's second assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 3

> The cumulative effects of Vance's first two assignments of error denied him a fair trial. *State v. Irwin*, 7th Dist. Columbiana No. 07 CO 22, 2009-Ohio-5271, 922 N.E.2d 981; *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987).

{¶32} Appellant argues that he was denied a fair trial based on the cumulative nature of the errors. However, since neither of his first two assignments has merit, his third assignment is also meritless and is overruled.

Conclusion

{¶33} Appellant argues that his trial counsel failed to object to evidence of a prior bad act and failed to file a motion to suppress illegally seized tennis shoes, and rendered him ineffective assistance. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.