[Cite as *State v. Clayton*, 2015-Ohio-498.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. DUANE A. CLAYTON Appellant	C.A. No. 27352 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 2013-09-2620A

DECISION AND JOURNAL ENTRY

Dated: February 11, 2015

CANNON, Judge.

{¶1} Duane Clayton appeals from his conviction in the Summit County Court of Common Pleas. For the reasons set forth below, we affirm.

I.

{¶2} Two men robbed Game Rack, an electronics store, and took video-game consoles, controllers for the consoles, money, an iPhone belonging to Heath Bauer, the employee working in the store at the time, and other items. Mr. Bauer called the police, and, after a brief foot chase in the near-by neighborhood, the police apprehended Mr. Clayton and his cousin Myron Foster.

{¶3} Mr. Clayton was indicted on charges of disrupting public services and aggravated robbery with an underlying firearm specification. After the State rested at trial, Mr. Clayton's counsel moved to dismiss the charges pursuant to Crim.R. 29, which the trial court granted with respect to the disrupting public services count. The jury found Mr. Clayton guilty of aggravated

robbery and the accompanying firearm specification. The trial court sentenced Mr. Clayton to an aggregate prison term of 12 years.

{¶4} Mr. Clayton has appealed, raising three assignments of error for our review. For ease of discussion, we have rearranged his assignments of error.

II.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT ERRED AS A MATTER OF LAW BECAUSE THE STATE FAILED TO ESTABLISH ON THE RECORD SUFFICIENT EVIDENCE TO SUPPORT THE CHARGES LEVIED AGAINST MR. CLAYTON IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1, 10 & 16 OF THE OHIO CONSTITUTION.

{¶5} Mr. Clayton argues in his second assignment of error that his conviction is not supported by sufficient evidence. We disagree.

{¶6} Whether a conviction is based on sufficient evidence is a question of law that this Court reviews de novo. *State v. Williams*, 9th Dist. Summit No. 24731, 2009-Ohio-6955, ¶ 18, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997).

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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. Jenks, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶7} The jury found Mr. Clayton guilty of violating R.C. 2911.01(A)(1) by committing aggravated robbery and the underlying firearm specification. *See* R.C. 2941.145. Mr. Clayton does not dispute that the State presented sufficient evidence that an aggravated robbery occurred at the Game Rack; rather, Mr. Clayton argues that the State did not present sufficient evidence

that he was one of the men who had committed the robbery. *See State v. Flynn*, 9th Dist. Medina No. 06CA0096-M, 2007-Ohio-6210, ¶ 12 (Identity must be proven beyond a reasonable doubt.). Thus, we confine our analysis to the issue of identity. *See State v. Young*, 9th Dist. Summit No. 26725, 2014-Ohio-1715, ¶ 28.

{¶8} Mr. Bauer testified that he was working at the Game Rack when two men, dressed all in black, came into the store. One man, who remained in front of the counter, had his hooded sweatshirt pulled up over his mouth, partially obscuring his face. The other man came behind the counter and "had a black cloth tied around his mouth." At different points during the course of the robbery, however, the fabric covering each man's face slipped, allowing Mr. Bauer to see more of their faces. The man in front of the counter was taller than the other man and had a gun; the shorter man had a knife. The men forced Mr. Bauer to empty the register and to open the safe. The men filled two book bags with items from the store, including an XBOX 360 video-game console and controllers. The shorter man also took an XBOX 360 that was in its original box. When the men left, the man in front of the counter grabbed Mr. Bauer's iPhone and the store phone.

{¶9} According to Mr. Bauer, he called the police from a phone in the back of the store as soon as the men left. About 15 minutes after the robbery, the police requested Mr. Bauer to accompany them to view two men they had in custody to see if he could identify the men who had committed the robbery. Mr. Bauer identified both men as the men who had robbed him, indicating that he "was 100 percent certain." At trial, Mr. Bauer identified Mr. Clayton as one of the robbers.

{¶10} A security camera video was played for the jury. In the video, two men can be seen entering the Game Rack. A man wearing a black hooded sweatshirt, clear gloves, and a

brown backpack went behind the counter and gestured at Mr. Bauer with a knife. The man behind the counter also picked out numerous items from under the counter, including two XBOX 360s, one of which was still in its box.

{¶11} Officer Jeffrey Edsall testified that he was near the Game Rack when he heard the dispatch that a robbery had just occurred and that the suspects were two African-Americans dressed in all black. According to Officer Edsall, he was coming down the road where the Game Rack was located when he received the dispatch and arrived in the area within 20 seconds. He turned left onto Brittain Road and looked for suspects. He observed the driver of a tan minivan ahead of him pointing left down Ottawa Avenue. Officer Edsall turned onto Ottawa Avenue and saw "a man in all black clothing. He [wa]s kind of jogging, but as soon as he hear[d] my cruiser, he look[ed] back and immediately sprint[ed] and turn[ed] southbound on Mohawk [Avenue]."

{¶12} Officer Edsall pulled up to the intersection of Ottawa and Mohawk Avenues and stopped his cruiser. He could not see the man, but he did observe a backpack and a gun on the sidewalk. Officer Edsall took his canine partner Bronson out of the cruiser and gave him the apprehend command. Bronson began wandering in a nearby yard attempting to locate a scent while Officer Edsall remained in a position to observe the entire street. While Bronson moved into the back yard of the house, Officer Edsall observed "a male wearing a white T[-]shirt and black pants run out, start of kind of sneak out, looking around in between two houses." Officer Edsall began running towards the man and called Bronson to him. The man saw Officer Edsall and sprinted away from the officer.

{¶13} Bronson gave chase, and Officer Edsall proceeded down Mohawk Avenue to make sure the suspect did not double back. When he reached Chippewa Avenue, which was the next street from Ottawa Avenue, he saw the suspect again. The suspect, upon seeing Officer

Edsall, turned and ran towards the back of the house at 1466 Chippewa. Officer Edsall continued to chase the man as did Bronson. When Officer Edsall entered the yard of 1466 Chippewa, he heard the sound of a door closing. Officer Edsall observed Bronson searching the back yard, and Bronson proceeded to run into the cellar of the house, pushing open the door, which closed behind him.

{¶14} Officer Edsall called for back-up at his location and waited until more officers arrived before entering the cellar. Officer Edsall testified that he was surprised that, while he was waiting, he did not hear any sound from inside the cellar because Bronson would usually bark if he had found a suspect or there would be sounds of a struggle if Bronson bit the suspect in order to hold him or her. When Officer Edsall and the other officers entered the cellar, they found Bronson biting a shoeless man, later identified as Mr. Clayton, wearing a white T-shirt and blue pants. On the floor of the cellar were a pair of boots and black pants. Officer Edsall was emphatic that the suspect he had been chasing had been wearing shoes and black pants during the chase.

{¶15} Officer Edsall also testified that he learned that Mr. Clayton did not live at 1466 Chippewa Avenue and that Mr. Clayton's cousin, Mr. Foster, had also been apprehended in the area. According to Officer Edsall, Mr. Foster was four inches taller than Mr. Clayton.

{¶16} Following Mr. Clayton's arrest, the officers discovered some of the items stolen from the Game Rack and some clothing discarded on the other side of a fence that ran next to the yard of the house where Mr. Clayton had been hiding. Detective Donald Frost testified that he took pictures of the items recovered following the arrest of Mr. Clayton and his cousin Mr. Foster. According to Detective Frost, a hooded sweatshirt was recovered near 1466 Chippewa Avenue and, "[i]nside the black hoody was a black shirt that was tied together[]" in a way "that it

could be worn around something." There was also a latex glove inside the sweatshirt and a second glove was next to the sweatshirt. Also near the sweatshirt were a brown backpack and a box containing an XBOX 360. Detective Frost also testified that a fingerprint that was matched with Mr. Foster was recovered from the Game Rack counter.

{¶17} Viewing the evidence in the light most favorable to the State, a reasonable trier of fact could have determined that Mr. Clayton was one of the two men involved in the robbery. When Officer Edsall first saw Mr. Clayton, Mr. Clayton ran away from him. *See State v. Brady*, 9th Dist. Summit No. 22034, 2005-Ohio-593, ¶ 9 (Flight may be evidence of consciousness of guilt.). Mr. Clayton was then found in the cellar of a house, where he did not live, and appeared to be attempting to change, having taken his boots and black pants off and put on blue pants. In the next yard from where police found Mr. Clayton, there was a hooded sweatshirt and a shirt tied in such a way that it could be worn almost as a bandanna to obscure a person's face. Mr. Bauer had described the man who came behind the counter as wearing a piece of cloth over his face, and the shirt found with the hooded sweatshirt would be consistent with that testimony. Furthermore, latex gloves, a brown backpack, and the XBOX 360 box were also found with the hooded sweatshirt. The camera in the store clearly shows the man who came behind the counter was wearing clear gloves on his hands, wearing a brown backpack, and then carried an XBOX 360 box out of the store when he left. Finally, Mr. Clayton's cousin Mr. Foster's fingerprints were found at the Game Rack, Mr. Foster was apprehended near where Mr. Clayton was found, and Mr. Foster was taller than Mr. Clayton, which would be consistent with Mr. Bauer's testimony about the height of the men who had robbed him.

{¶18} All this evidence, when viewed in the light most favorable to the State, would support a conclusion that, beyond a reasonable doubt, Mr. Clayton had participated in the

robbery of the Game Rack. Thus, the State presented sufficient evidence of Mr. Clayton's guilt, and his second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> MR. CLAYTON'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE POSSESSION [(SIC)] IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE US. CONSTITUTION AND ARTICLE I, SECTIONS 1, 10, & 16 OF THE OHIO CONSTITUTION.

{¶19} Mr. Clayton argues in his third assignment of error that his conviction for aggravated robbery is against the manifest weight of the evidence. Specifically, he argues that the jury's conclusion that he was one of the two men that robbed the Game Rack was against the manifest weight of the evidence.

{¶20} In reviewing a challenge to the weight of the evidence, the appellate court

> [m]ust 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 miscarriage of justice that the conviction must be reversed and a new trial ordered.

State v. Otten, 33 Ohio App.3d 339, 340 (9th Dist.1986).

{¶21} Mr. Clayton argues that his conviction is against the manifest weight because "there was no evidence that [he] was the other man in the store other than the tainted identification."[1] However, Mr. Clayton's argument ignores all of the circumstantial evidence produced at trial and recounted above that would indicate his involvement in the robbery. *See Flynn*, 2007-Ohio-6210, at ¶ 12 ("The identity of a perpetrator may be established using direct or circumstantial evidence.").

[1] The identification Mr. Clayton refers to is the subject of his first assignment of error.

{¶22} As recounted above, there was evidence that Mr. Clayton fled when he saw Officer Edsall, hid in a house that was not his residence, and attempted to alter his appearance. Mr. Clayton was found near clothing that matched the description given by Mr. Bauer of the clothing worn by the shorter man during the robbery; it is also similar to the clothing visible in the video. Furthermore, items from the robbery were found near the clothing, including the XBOX 360 box that the shorter man carried out of the store. Finally, Mr. Clayton's cousin Mr. Foster, who is taller than Mr. Clayton, was also found hiding in the area, and Mr. Foster's fingerprints were found at the scene.

{¶23} Mr. Clayton has not explained how, in light of this significant amount of evidence, the jury lost its way when it determined that he was one of the two men that robbed the Game Rack, and it is not this Court's duty to create Mr. Clayton's argument for him. *See* App.R. 16(A)(7); *State v. Harmon*, 9th Dist. Summit No. 26426, 2013-Ohio-2319, ¶ 6. In any case, after a thorough review of the record, we cannot conclude that the jury lost its way and committed a manifest miscarriage of justice when it determined that Mr. Clayton was one of the two men who robbed the Game Rack. Accordingly, Mr. Clayton's third assignment of error is overruled.

ASSIGNMENT OF ERROR I

> MR. CLAYTON WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED UNDER THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1, 10, & 16 OF THE OHIO CONSTITUTION.

{¶24} In his first assignment of error, Mr. Clayton argues that his trial counsel was ineffective because he had failed to move to suppress Mr. Bauer's identification of Mr. Clayton.

{¶25} In order to prevail on a claim of ineffective assistance of counsel, a defendant "must show (1) deficient performance by counsel, i.e., performance falling below an objective

standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that but for counsel's errors, the proceeding's result would have been different." *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, ¶ 62, citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 694 (1984). "A defendant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other." *State v. Madrigal*, 87 Ohio St.3d 378, 389 (2000).

{¶26} Mr. Clayton argues that his counsel was ineffective for failing to file a motion to suppress Mr. Bauer's identification of him as one of the two men who robbed the Game Rack. The "'[f]ailure to file a suppression motion does not constitute per se ineffective assistance of counsel.'" *Id.*, quoting *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). "To establish ineffective assistance of counsel for failure to file a motion to suppress, a defendant must prove that there was a basis to suppress the evidence in question." *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, ¶ 65. However, "[e]ven if there is a reasonable probability that the motion would have been granted, the failure to pursue it cannot be prejudicial unless there is also a reasonable probability that, without the excluded evidence, the defendant would have been acquitted." *State v. Rucker*, 9th Dist. Summit No. 25081, 2010-Ohio-3005, ¶ 46. *See also Young*, 2014-Ohio-1715, at ¶ 33.

{¶27} Mr. Clayton's entire appellate argument focuses upon the alleged deficiency of his trial counsel. However, he does not elaborate on how the outcome of his trial would have been different had Mr. Bauer's identification of him as one of the culprits been suppressed. *See* App.R. 16(A)(7); *Harmon*, 2013-Ohio-2319, at ¶ 6. *See also Rucker* at ¶ 46. As recounted above, there was significant circumstantial evidence that could support the conclusion that Mr. Clayton had participated in the robbery of the Game Rack. *See Flynn*, 2007-Ohio-6210, at ¶ 12. Mr. Clayton was in the vicinity of the store a short time after the robbery occurred and fled when

he saw Officer Edsall. He was then found hiding in a cellar of a house that was not his residence and appeared to have been attempting to change his clothes, which could further support the conclusion that he was attempting to elude the police officers. Furthermore, items from the robbery, including clothing similar to that worn by the man wielding the knife and the XBOX 360 console that the man had carried out of the store, were found just over a fence from the property where Mr. Clayton was hiding. All of this evidence supports the determination that Mr. Clayton participated in the robbery and was gathered prior to the identification by Mr. Bauer. We cannot say there was a reasonable probability that suppressing Mr. Bauer's testimony would have affected the outcome of his trial in light of this significant evidence. *See Rucker* at ¶ 46; *Madrigal* at 389.

{¶28} Given the substantial evidence produced at trial and the limited appellate argument, we cannot conclude that there was a reasonable probability that, if Mr. Bauer's initial identification of him had been suppressed, the outcome of the proceedings would have been different. Accordingly, Mr. Clayton's first assignment of error is overruled.

III.

{¶29} Mr. Clayton's assignments of error are overruled, and the judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

TIMOTHY P. CANNON
FOR THE COURT

HENSAL, P. J.
WHITMORE, J.
CONCUR.

(Cannon, J., of the Eleventh District Court of Appeals, sitting by assignment.)

APPEARANCES:

PAUL GRANT, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.