[Cite as *State v. Webb*, 2015-Ohio-2380.]

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

STATE OF OHIO Appellee v. VINCENT D. WEBB Appellant	C.A. No. 27424 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 13 12 3329 B

DECISION AND JOURNAL ENTRY

Dated: June 17, 2015

HENSAL, Presiding Judge.

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

I.

{¶2} On December 1, 2013, Christian Farmer was in his apartment with Jasmine Reynolds, Ms. Reynolds' sister-in-law, and Ms. Reynolds' niece when he heard a knock at the door. Mr. Farmer opened the door to find Darelle Norwood outside. Mr. Farmer was familiar with Mr. Norwood because they would smoke marijuana and play video games together so he allowed him to come into the apartment. However, while Mr. Farmer was walking back to where he had been sitting, the door to his apartment opened again, and a second man entered, holding a gun. The men ordered the occupants of the apartment to get on the floor and stole marijuana, a backpack, two laptops, and a camera.

{¶3} Officers apprehended Mr. Norwood a short time later at a nearby apartment complex after seeing him drop a firearm. Mr. Webb was arrested a few days later after Mr. Farmer had seen pictures of him on Facebook holding a firearm that appeared to be the one used in the robbery and noticed that he was friends with Mr. Norwood. Mr. Farmer eventually found his camera at a store named The Exchange, and the store's business records indicated that the camera had been sold to it the day after the robbery by Mr. Webb.

{¶4} Mr. Webb was indicted on two counts of aggravated burglary and aggravated robbery with underlying firearm specifications as well as one count each of having weapons while under disability and carrying concealed weapons. One of the aggravated burglary charges was dismissed prior to the commencement of trial, and the trial court dismissed the concealed weapons charge following a Criminal Rule 29 motion at the end of the State's case. A jury convicted Mr. Webb of the remaining charges. The trial court sentenced Mr. Webb to an aggregate term of 17 years in prison. The court also ordered that Mr. Webb, who was on post-release control at the time of the robbery, "be committed to the Ohio Department of Rehabilitation and Corrections * * * [p]ursuant to O.R.C. 2929.141(A)(1), for the remainder of his post[-]release control period from Summit County Case Number 2011 08 2068 * * *, which term takes into consideration the time [he] has spent on post-release control in said case number."

{¶5} Mr. Webb has appealed, raising five assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

MR. WEBB'S CONVICTIONS ARE NOT SUPPORTED BY SUFFICIENT EVIDENCE.

{¶6} Mr. Webb argues in his first assignment of error that his convictions for aggravated robbery and aggravated burglary are not supported by sufficient evidence. Specifically, Mr. Webb argues that there was insufficient evidence to prove that he was Mr. Norwood's accomplice in the robbery. He does not, however, dispute that the aggravated burglary and aggravated robbery occurred, and we, therefore, confine our analysis to the issue of identity.[1] S*ee State v. Young*, 9th Dist. Summit No. 26725, 2014-Ohio-1715, ¶ 28.

{¶7} Whether a conviction is supported by sufficient evidence is a question of law, which we review de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In making this determination, we must view the evidence in the light most favorable to the prosecution:

> 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.

{¶8} Mr. Webb was convicted of violating Revised Code Section 2911.01(A)(1) by committing aggravated robbery. Section 2911.01(A)(1) provides,

> No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall * * * [h]ave 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[.]

The jury also found Mr. Webb guilty of violating Section 2911.11(A)(2), which provides that

> [n]o person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure,

[1] Mr. Webb does not address his conviction for possessing a weapon under disability, and, therefore, neither do we. *See State v. Young*, 9th Dist. Summit No. 26725, 2014-Ohio-1715, ¶ 28.

> when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if * * * [t]he offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

{¶9} Mr. Farmer testified that, on December 1, 2013, he was in the apartment he occasionally shared with Ms. Reynolds. Ms. Reynolds, her sister-in-law, and her niece were also in the apartment. Mr. Farmer heard someone knock at the door and saw that it was Mr. Norwood, whom Mr. Farmer knew and with whom Mr. Farmer occasionally smoked marijuana. Mr. Farmer let Mr. Norwood into the apartment and was returning to where he had been sitting when the door opened a second time and a man with whom Mr. Farmer was not familiar burst into the apartment wielding a gun. The gun-wielding man was not wearing a mask, and Mr. Farmer testified that he was able to get a good look at the man's face as well as the firearm, which Mr. Farmer described as a small gun, likely a .22 caliber.

{¶10} According to Mr. Farmer, Mr. Norwood ordered him to the floor, and Mr. Farmer complied. Mr. Norwood then told the second man to get Mr. Farmer's book bag, which contained Mr. Farmer's camera, laptop, and PlayStation Vita. They also took Ms. Reynold's laptop and left the apartment. After the men left, Mr. Farmer ran to his vehicle and drove it to the exit of the apartment complex. On his way, he passed a Chevy Blazer that stopped as he passed it. Mr. Farmer drove to the exit and attempted to block it with his car before exiting his vehicle. The Blazer remained motionless for a period of time, and Mr. Farmer attempted to call the police before he realized that he did not have his cellular phone with him. The Blazer began to speed towards Mr. Farmer, prompting him to get in his car and move it out of the way.

{¶11} The Blazer pulled out of the apartment complex and proceeded onto Kelly Avenue towards the Rosemary Apartments complex. Mr. Farmer followed the vehicle and saw it

turn into Rosemary Apartments and then into the Tarson Terrace portion of the complex. Mr. Farmer then returned to his apartment and spoke with the officers who had arrived.

{¶12} Officer Brent Bauknecht testified that he and his partner Officer Jaskola[2] were in the Tarson Terrace parking lot of the Rosemary apartments on the afternoon of December 1, 2013, waiting in their patrol cruiser for a tow truck to arrive to take a stolen car they had found in the lot. Officer Bauknecht saw a man jogging through the parking lot and saw a small, black object fall out of his pocket. The man looked at the object but continued to jog towards the apartments. Believing that it was odd that the man did not stop to pick up an object that had fallen out of his pocket, the officers investigated, discovering that the object was a small, black gun. Officer Bauknecht jumped out of the vehicle and ordered the man who had dropped the gun to stop. The man began running, and Officer Bauknecht gave chase. Officer Bauknecht eventually found the man, later identified as Mr. Norwood, hiding beneath a SUV. Mr. Norwood was found in possession of a set of keys, a cell phone, and bags of marijuana. While Officers Bauknecht and Jaskola were tagging the items found on Mr. Norwood, Sergeant David Garro[3] asked for the cellular phone and the keys, indicating that he believed they were part of a robbery.

{¶13} Mr. Farmer testified that he went to the police station after the robbery and, while there, Sergeant Garro showed him a set of keys and a cellular phone and asked if they were his. Mr. Farmer demonstrated that they were by entering the security code on his phone. The police also went to Ms. Reynold's apartment to make sure the keys worked in the door. After returning home, Mr. Farmer and Ms. Reynolds went on Facebook to attempt to figure out the identity of the second man who had entered their apartment. They looked at Mr. Norwood's page to see if

[2] Officer Jaskola's first name does not appear in the record.

[3] Although Officer Baucknecht does not identify Sergeant Garro by name, it is clear from his testimony and trial record to whom he is referring.

they recognized any of his friends and also typed "'Free Rell'" into the search bar, which prompted Mr. Webb's name to come up because Mr. Webb had posted that phrase on his Facebook page. Mr. Farmer testified, "In the cover photo, I s[aw] it was the same gun that was used when he came over. And then * * * [I] just recognized his face." Mr. Farmer informed Sergeant Garro that Mr. Webb was the second man who had engaged in the robbery. After telling Sergeant Garro Mr. Webb's identity, Mr. Farmer began messaging Mr. Webb through Facebook, accusing him of committing the robbery and demanding the return of his items. Mr. Webb responded and denied that he had committed the robbery.

{¶14} Sergeant Garro testified that he investigated the robbery at Ms. Reynolds' apartment. According to Sergeant Garro, he received a call from Mr. Farmer the day after the robbery and Mr. Farmer told him that he had identified the second man as Mr. Webb using Facebook. Sergeant Garro went on Facebook, pulled up Mr. Webb's profile, and printed out screenshots of the profile and printed the pictures in Mr. Webb's profile, including one of a small, black handgun. The printouts, which were made at approximately 4:36 p.m. on December 2, 2013, indicate that Mr. Webb had posted "'Free Rell" eight hours earlier. However, after Mr. Farmer contacted Mr. Webb and accused him of robbing him, Mr. Webb removed all references to "'Free Rell'" and deleted the picture of the gun. Sergeant Garro subsequently interviewed Mr. Webb on December 5, 2013. During the interview, Mr. Webb admitted to having held the gun a few days prior to the robbery. Mr. Webb also admitted to knowing Mr. Norwood after initially denying that he did. When Sergeant Garro asked Mr. Webb about the robbery, Mr. Webb told Sergeant Garro that "he knew all the details, but he wasn't involved." He also denied knowing anything about the computers or the cameras that were taken during the robbery. However, Mr.

Webb told Sergeant Garro that he was present at Tarson Terrace when Mr. Norwood was arrested but claimed that he had merely been there coincidentally.

{¶15} According to Sergeant Garro, after he finished interviewing Mr. Webb, he learned that a laptop that had been recovered at the home of Jeannine Webb was being held by the police. Ms. Webb testified that she was Mr. Webb's aunt and that Mr. Webb had come to her house during the evening of December 1, 2013. According to Ms. Webb, she discovered a laptop in her basement a day or so later and contacted the police because she knew that the laptop was not hers. Sergeant Garro testified that he examined the computer and suspected that it was Ms. Reynold's laptop. He contacted Ms. Reynolds and had her come down to the station to look at the laptop. Ms. Reynolds knew the password for the computer and, after she had unlocked the computer, Sergeant Garro saw pictures of Ms. Reynolds and her family on the hard drive, convincing him that it was Ms. Reynolds' laptop.

{¶16} Mr. Farmer testified that, in February 2014, he was looking for a replacement camera at The Exchange, which is a store that sells used items, when he saw a camera that he believed was his. Randall Law, the assistant manager at the store, testified that Mr. Webb had come into the store multiple times on December 2, 2013, to attempt to sell the camera to them. Mr. Law testified that he recognized Mr. Webb as the man who had sold the camera and that The Exchange, which requires state-issued identification when a person sells something, had business records indicating that Mr. Webb had been the person to sell the camera. Those business records were entered into evidence at the trial.

{¶17} Upon review, we conclude that the evidence presented at trial, when viewed in the light most favorable to the State, is sufficient to prove that Mr. Webb committed aggravated burglary and aggravated robbery against Mr. Farmer and Ms. Reynolds. Mr. Farmer identified

Mr. Webb as the gun-wielding man who had entered the apartment after Mr. Norwood. Despite Mr. Webb denying any knowledge of the items taken from the robbery, the evidence indicates that he sold the camera to The Exchange and left Ms. Reynolds' laptop at his aunt's home. Furthermore, the day after the robbery, Mr. Webb posted "'Free Rell'" on his Facebook profile but deleted it, along with a picture of a gun bearing a striking similarity to the one dropped by Mr. Norwood soon after the robbery, after Mr. Farmer confronted him about the robbery.

{¶18} Accordingly, Mr. Webb's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> MR. WEBB'S CONVICTIONS ARE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶19} In Mr. Webb's second assignment of error, he argues that his convictions are against the manifest weight of the evidence because the State failed to prove that he was the second man involved in the robbery of Mr. Farmer and Ms. Reynolds. As in Mr. Webb's first assignment of error, he confines his arguments regarding his convictions for aggravated burglary and aggravated robbery to the issue of identity and does not address his having a weapon under disability. We confine our analysis accordingly. *See Young*, 2014-Ohio-1715, at ¶ 28.

{¶20} When reviewing a manifest weight challenge, an appellate court must

> 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). Weight of the evidence pertains to the greater amount of credible evidence produced in a trial to support one side over the other side. *Thompkins*, 78 Ohio St.3d at 387. An appellate court should only exercise its power to reverse a

judgment as against the manifest weight of the evidence in exceptional cases. *State v. Carson*, 9th Dist. Summit No. 26900, 2013-Ohio-5785, ¶ 32, citing *Otten* at 340.

{¶21} Mr. Webb argues that his conviction was against the manifest weight of the evidence because the only evidence directly linking him to the robbery, the testimony of Mr. Farmer and Ms. Reynolds, was not credible. Specifically, he points to Ms. Reynolds' acknowledgement that, when the police showed her a photo array the day of the robbery, she indicated that she was "75[%]" sure that one of the individuals, who was not Mr. Webb, was the second man involved in the robbery. He also argues that Mr. Farmer's testimony was not credible because Mr. Farmer admitted that he only had the opportunity to see the second man for a short period of time, just a matter of seconds, and also wrote a message on Facebook indicating that he had made a mistake and that Mr. Webb was not the second robber.

{¶22} We initially note that Mr. Webb's trial counsel brought both of these issues to the jury's attention through cross-examination. However, Mr. Farmer testified that he had specifically looked at the face of the second man who robbed him so he was certain it was Mr. Webb. Mr. Farmer also explained that he had sent the message indicating that he had made a mistake in identifying Mr. Webb as the second robber in an attempt to get Mr. Webb to make an incriminating statement. However, Mr. Farmer never wavered in his testimony that Mr. Webb was the second robber.

{¶23} Regarding Ms. Reynolds' identification of potential suspects in the photo array, the photo array did not contain Mr. Webb's picture, and Ms. Reynolds never identified one of the men in the array as the second robber with absolute certainty. In fact, in addition to the man she indicated she was "75[%]" certain was the second robber, she identified another man in the array as possibly being the man who had entered the apartment after Mr. Norwood. While these facts

may render Ms. Reynolds' subsequent identification of Mr. Webb as the second man less believable, they do not completely undermine her testimony nor do they undermine Mr. Farmer's identification of Mr. Webb.

{¶24} As this Court has consistently noted, the jury, in its role of trier of fact, is in the best position to make credibility determinations. *See, e.g., State v. Brown*, 9th Dist. Summit No. 26490, 2013-Ohio-5112, ¶ 25. The jury was aware of the potential issues with Mr. Farmer's identification as well as Ms. Reynolds' identification. However, upon a thorough review of the record, we cannot conclude that the jury lost its way and committed a manifest miscarriage of justice when in found Mr. Webb guilty of aggravated burglary and aggravated robbery.

{¶25} Accordingly, Mr. Webb's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> IT WAS PLAIN ERROR AND A DENIAL OF DUE PROCESS TO MR. WEBB'S PREJUDICE TO NOT GIVE A JURY CHARGE AS TO IDENTIFICATION TESTIMONY.

{¶26} In Mr. Webb's third assignment of error, he argues that the trial court committed error by not giving a jury instruction regarding identification testimony. Because Mr. Webb's trial counsel did not request the identification instruction, he has forfeited all but plain error on appeal. *See State v. Burks*, 9th Dist. Summit No. 27423, 2015-Ohio-1246, ¶ 4. *See also* Crim.R. 30(A) ("[A] party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict * * *."). To establish plain error,

> "[f]irst, there must be an error, i.e., a deviation from the 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 [ ]' [to the extent that it] * * * affected the outcome of the trial."

State v. Hardges, 9th Dist. Summit No. 24175, 2008-Ohio-5567, ¶ 9, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). However, "[n]otice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

{¶27} Mr. Webb argues that, given the facts of this case, the trial court should have given a specific instruction about weighing the credibility of identification testimony. However, he does not develop any argument as to how the failure to give such an instruction affected the outcome of the trial. *See* App.R. 16(A)(7). Furthermore, the trial court gave a general instruction on the issue of credibility, and Mr. Webb's trial counsel emphasized the potential issues with identification on cross-examination. Accordingly, we overrule Mr. Webb's third assignment of error.

ASSIGNMENT OF ERROR IV

> THE SENTENCE IMPOSED IS CONTRARY TO LAW, IN PLAIN ERROR, AND IN VIOLATION OF DUE PROCESS AND DOUBLE JEOPARDY PROTECTIONS[.]

{¶28} Mr. Webb argues in support of his fourth assignment of error that the trial court should have merged his convictions for aggravated robbery with each other and also argues that his conviction for having a weapon under disability should merge with his aggravated robbery convictions. Mr. Webb further argues that, even if the aggravated robbery convictions do not merge, the underlying firearm specifications should. Mr. Webb also argues that the trial court erred when it imposed a sentence pursuant to Section 2929.141 regarding the remaining time for his post-release control in a separate case.

Merger

{¶29} Revised Code Section 2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution, which prohibits multiple punishments for the same offense. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 23. It provides:

> (A) [If] the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) [If] the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

R.C. 2941.25.

{¶30} The Ohio Supreme Court has recently clarified the test courts must apply when determining whether offenses are allied offenses of similar import. In *State v. Ruff*, ___ Ohio St.3d ___, 2015-Ohio-995, it held that "courts must evaluate three separate factors—the conduct, the animus, and the import." *Id*. at paragraph one of the syllabus. "[A] defendant whose conduct supports multiple offenses may be convicted of all the offenses if * * * the conduct constitutes offenses of dissimilar import[.]" *Id*. at paragraph three of the syllabus. In summary, it held:

> If any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, and (3) the offenses were committed with separate animus or motivation.

Id. at ¶ 25.

{¶31} Mr. Webb argues that his aggravated robbery convictions should merge because "[i]t appears that only [Mr.] Farmer's property was taken * * *[, and m]ost importantly the trial cout found that the facts did support concurrent sentences." However, the record is clear that, in

addition to Mr. Farmer's laptop and camera, Mr. Webb also took Ms. Reynolds' laptop, which was the laptop recovered from the home of Mr. Webb's aunt. Therefore, the aggravated robbery offenses are of dissimilar import and should not merge. *See id.* at paragraph two of the syllabus ("Two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims * * *.").

{¶32} Mr. Webb also argues that his conviction for having a weapon under disability should have merged with his convictions for aggravated robbery. However, during closing arguments, the prosecutor stated that it was Mr. Webb's admission to Sergeant Garro that he had held the gun prior to the robbery that formed the basis for the charge of possessing a weapon while under disability. Beyond pointing out that possessing the gun during the robbery could have *also* been the basis for convicting him of possessing a weapon under disability, Mr. Webb does not develop any argument to demonstrate that the robbery *was* the basis for the conviction. It is a defendant's burden to demonstrate that he or she is entitled to have two offenses merge. *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, ¶ 18. To do so, the defendant must show that the State relied upon the same conduct to support both offenses. *Id.* We cannot conclude that Mr. Webb met his burden here.

Firearm Specifications

{¶33} Mr. Webb argues that the trial court should not have sentenced him on both of his firearm specifications because the related aggravated robbery convictions merge. *See State v. Roper*, 9th Dist. Summit Nos. 26631, 26632, 2013-Ohio-2176, ¶ 11 (concluding "it is impermissible to sentence an offender for a specification when the underlying offense upon which the specification is predicated has merged with another allied offense"). However, as discussed above, Mr. Webb's aggravated robbery convictions are not allied offenses of similar

import and, therefore, do not merge. Thus, the trial court did not err in imposing a sentence for the firearm specifications.

{¶34} Mr. Webb also argues that the trial court should have not run the sentences for his firearm specifications consecutive to one another because it failed to make the findings required by Section 2929.14(C)(4). Mr. Webb asserts that "[i]t appears that from the outset of this case the trial court believed it had to impose consecutive sentences on the two gun specifications." However, Mr. Webb does not cite any authority that supports the conclusion that the trial court was incorrect in that belief. *See* App.R. 16(A)(7).

{¶35} Furthermore, Mr. Webb was found guilty of a firearm specification for each count of aggravated robbery. Revised Code Section 2929.14(B)(1)(b) only permits a court to impose one prison term for "felonies committed as part of the same act or transaction." However, Section 2929.14(B)(1)(g) contains an exception, providing that, if an offender is found guilty of two or more felonies with specifications and one of those felonies is aggravated robbery, "the sentencing court shall impose on the offender the prison term specified under division (B)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted * * *." Thus, the trial court was required to sentence Mr. Webb to two, three-year prison terms related to the specifications. *See* R.C. 2929.14(B)(1)(a)(ii). Pursuant to Section 2929.14(C)(1)(a),

> * * * if a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony, if a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(c) of this section for committing a felony specified in that division by discharging a firearm from a motor vehicle, or if both types of mandatory prison terms are imposed, the offender shall serve any mandatory prison term imposed under either division consecutively to any other mandatory prison term imposed under either division or under division (B)(1)(d) of this section, consecutively to and prior to any prison term imposed for the underlying felony pursuant to division (A), (B)(2), or (B)(3)

> of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

In other words, Section 2929.14(C)(1)(a) appears to require the specification prison terms to be served consecutively. Given that Mr. Webb does not explain why this section is not applicable or otherwise explain why the trial court was incorrect that it was required to run the specification prison terms consecutively, we cannot conclude that reversible error occurred.

Post-Release Control Sentence

{¶36} Mr. Webb also argues that "there was no direct evidence offered that Mr. Webb was even on post[-]release control[]" and that the trial court should have given him a definite sentence rather than ordering he "be committed to the Ohio Department of Rehabilitation and Corrections * * * [p]ursuant to O.R.C. 2929.141(A)(1), for the remainder of his post[-]release control period from Summit County Case Number 2011 08 2068 * * *, which term takes into consideration the time [he] has spent on post-release control in said case number."

{¶37} We initially note that the trial court also appeared to be aware prior to engaging in any conversation with Mr. Webb that he was on post-release control when the robberies in this case occurred. We also note that it appears from the record that the trial court had a post-sentence investigation report before it at the time of sentencing, which could well have contained information regarding Mr. Webb's post-release control status. However, without the report, we are unable to know for certain. In light of the incomplete record, we must presume regularity in the proceedings below. *See State v. McDowell*, 9th Dist. Summit No. 26697, 2014-Ohio-3900, ¶ 22. Accordingly, we cannot conclude that the trial court did not have evidence before it that Mr. Webb had been on post-release control at the time of the robberies.

{¶38} Turning to the actual prison sentence, the trial court sentenced Mr. Webb pursuant to Revised Code Section 2929.141, which permits a trial court to sentence an offender convicted of a felony while on post-release control to a period of imprisonment of "the greater of twelve months or the period of post-release control for the earlier felony minus any time the person has spent under post-release control for the earlier felony." R.C. 2929.141(A)(1). The trial court did order Mr. Webb serve the remainder of his post-release control but did not calculate how much time remained. Mr. Webb argues that this was improper, citing Section 2929.14(A), which he suggests "impliedly directs that a definite term be imposed." However, Section 2929.14(A) sets forth the sentences for felonies; it does not address the same issue as Section 2929.141.

{¶39} Mr. Webb does not cite any authority in his brief that would indicate that the trial court was required to expressly state how many days he had remaining on post-release control when it ordered he serve the remainder of the time in prison. *Compare with* R.C. 2929.19(B)(2)(g) (requiring the court "[d]etermine, notify the offender of, and include in the sentencing entry" the number of days of jail-time credit). Our own research has not uncovered any authority indicating that a similar requirement exists for a sentence imposed pursuant to Section 2929.141(A), although appellate courts have corrected sentencing entries when the trial court had incorrectly made such a calculation. *See State v. Martin*, 5th Dist. Delaware No. 09CAA020017, 2009-Ohio-3698, ¶ 28-30. Given Mr. Webb's limited appellate argument and that Section 2929.141(A) does not require a trial court to make a calculation, we cannot conclude that the trial court's language in the sentencing entry, mirroring the language in the statute, constitutes reversible error.

{¶40} In light of the foregoing, Mr. Webb's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

MR. WEBB WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

{¶41} Mr. Webb argues in his fifth assignment of error that his trial counsel was ineffective because counsel did not move to suppress the identification of Mr. Webb as the second robber by Mr. Farmer and Ms. Reynolds, failed to procure an expert witness to testify about potential problems with eye-witness identifications, failed to object to the trial testimony identifying Mr. Webb as the second robber, and failed to request the identification jury instruction.

{¶42} To prevail on a claim of ineffective assistance of counsel, Mr. Webb must establish (1) that his counsel's performance was deficient to the extent that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) that counsel's deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984), quoting Sixth Amendment to the United States Constitution. A deficient performance is one that falls below an objective standard of reasonable representation. *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus. A court, however, "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland* at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955). In addition, to establish prejudice, Mr. Webb must show that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Id*. at 694.

Suppression Motion

{¶43} Mr. Webb argues that his trial counsel was ineffective for not moving to suppress the identification of him as the second robber by Mr. Farmer and Ms. Reynolds because they identified him based on a Facebook photograph. However, Mr. Webb cites no support for the proposition that a witness' independent identification of a suspect is subject to suppression. Instead, he relies upon cases in which officers showed a witness a picture of a suspect. To be sure, "[w]hen a witness *has been confronted with a suspect before trial*, due process requires a court to suppress an identification of the suspect if the confrontation was *unnecessarily suggestive* of the suspect's guilt and the identification was unreliable under all the circumstances." (Emphasis added.) *State v. Davis*, 76 Ohio St.3d 107, 112 (1996). "The rationale for excluding a tainted pretrial identification is to protect the defendant from misconduct by the state." *State v. Brown*, 38 Ohio St.3d 305, 310 (1988). Unlike the cases where officers show a witness a picture or present a suspect to the witness for identification, Mr. Farmer and Ms. Reynolds identified Mr. Webb completely on their own. Thus, the identifications were not subject to suppression and, therefore, Mr. Webb's trial counsel was not deficient for not moving to suppress them. *See id.* at 310-311.

Expert Witness

{¶44} Mr. Webb also argues that his trial counsel was deficient for not retaining an expert witness to speak to the jury about eyewitness identification. However, Mr. Webb's argument is purely speculative as there is nothing in the record that indicates what testimony an expert witness would have provided in this case, and, therefore, no way for this court to determine whether Mr. Webb was prejudiced by the expert not testifying. Thus, given the record in this case, Mr. Webb's argument is one more appropriately raised in a postconviction relief

motion. *See State v. West*, 9th Dist. Summit No. 25434, 2011-Ohio-5476, ¶ 23 (noting that a petition for postconviction relief is the appropriate avenue for seeking relief when the evidence to support an argument is not in the record). Accordingly, we cannot conclude that he has demonstrated ineffective assistance of counsel on this issue.

Failure to Object

{¶45} Mr. Webb also contends that his trial counsel was ineffective because he did not object to the testimony of Mr. Farmer and Ms. Reynolds identifying him as the second robber. However, he does not identify upon what grounds the testimony was inadmissible. As discussed above, the identification was made independent of any action by the State or any third-party. To the extent Mr. Webb is arguing about the reliability of the identification, "the reliability of the identification is a matter of weight of the evidence, not admissibility." *State v. Reed*, 9th Dist. Wayne No. 12CA0051, 2013-Ohio-3970, ¶ 43, citing *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, ¶ 22. Accordingly, Mr. Webb has not demonstrated that his counsel was ineffective for not objecting to the admission of the testimony.

Failure to Request Jury Instruction

{¶46} Finally, Mr. Webb argues that his trial counsel was ineffective for not requesting the additional identification jury instruction discussed in his third assignment of error. While the identification instruction may have well have been appropriate in this case, the trial court did give the general instruction related to credibility. Thus, as in our analysis of Mr. Webb's third assignment of error, we cannot conclude that there is a reasonable probability that the outcome of the trial would have been different had the instruction been given.

{¶47} Accordingly, Mr. Webb's fifth assignment of error is overruled.

III.

{¶48} Mr. Webb's assignments of error are overruled. 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.

JENNIFER HENSAL
FOR THE COURT

WHITMORE, J.
SCHAFER, J.
CONCUR.

APPEARANCES:

MARK H. LUDWIG, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.