

**IN THE SUPREME COURT OF OHIO**

**12-1037**

**STATE OF OHIO,  
Appellee,**

**vs.**

**WILLIAM B. VORE,  
Appellant.**

**On Appeal From The Warren County  
Court of Appeals, Twelfth Appellate  
District**

**Court of Appeals No: CA 2011-08-093**

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT WILLIAM B. VORE**

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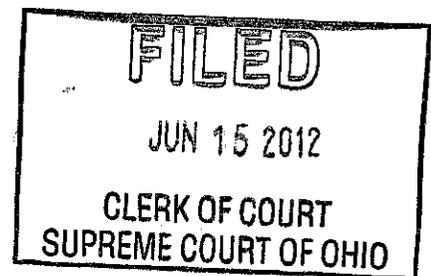


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**WHETHER THE COURT OF APPEALS ERRED WHEN THE COURT REJECTED APPELLANT'S CLAIM THAT THE TRIAL COURT ERRED WHEN THE LOWER COURT DENIED APPELLANT'S MOTION TO SUPPRESS ALL PRE-INDICTMENT AND PRE-TRIAL IDENTIFICATIONS OF THE APPELLANT WHEN THE RECORD DEMONSTRATED THE IDENTIFICATION PROCEDURES WERE UNNECESSARILY SUGGESTIVE AND UNRELIABLE THAT DENIED APPELLANT'S RIGHTS TO DUE PROCESS GUARANTTED UNDER THE FIFTH, AND FOURTEENTH AMENDMENT'S TO THE U.S. CONSTITUTION AND SECTIONS 5, 16, ARTICLE I, OF THE OHIO STATE CONSTITUTION**

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**I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case presents four critical issues of great general interest and involves substantial Constitutional questions. The questions before this Court are: (1) Whether the appellate Court erred when it rejected appellant's claim of error that the trial court erred when it refused to instruct the jury on the lesser-included offense of Theft as requested by the defense; (2) Whether the appellate Court erred when it rejected appellant's claim of error that the trial court erred when it denied the appellant's motion in limine to exclude prejudicial bad acts evidence; (3) Whether the appellate Court erred when it rejected the appellant's claim of error that the trial court erred when it denied appellant's request for funding to secure an identification expert witness; and (4) Whether the appellate Court erred when it denied appellant's claim of error that the trial court erred when it denied appellant's motion to suppress all pre-indictment and pretrial identifications of appellant.

This case presents critical questions of great general interest and involves a substantial deprivation of State and Federal Constitutional rights because all of the lower court's rulings, as well as the appellate Court's ruling, conflicts with State and Federal Supreme Court precedent. In this case all of the above issues were properly preserved for appellate review.

Furthermore, this case warrant's review because appellant is actually innocent in this case, and the trial court's erroneous rulings, and the jury verdict that was rendered in this case, represents a miscarriage of justice in this case. The lower court's rulings deprived the appellant of his fundamental Constitutional rights to a fair trial.

**II. STATEMENT OF THE CASE AND FACTS**

On December 20, 2010, appellant was indicted by a Warren County, Ohio, grand jury for Robbery in violation of R.C. 2911.02(A)(3), and Grand Theft in violation of R.C. 2913.02(A)(1).

These charges stemmed from the April 20, 2010, bank robbery of the Fifth/Third Bank at 5208 Fields Ertel Road, in Mason, Ohio. (See Indictment). On May 12, 2011, the trial court denied appellant's Motion to Suppress all Pre-indictment and Pretrial Identifications of appellant, and Motion in Limine to Exclude Other Bad Acts Evidence. The appellant was originally proceeding as his own attorney. (See Court Order/(B)).

On June 9, 2011, the trial court also denied appellant's Motion for Funding to Obtain an Identification Expert Witness for his defense. (See Court Order/(C)). On August 29, 2011, appellant's case proceeded to a jury trial. The appellant was never identified by the bank teller who was robbed. (Tr. R. pp. 33-34; 8/29/11). Furthermore, no weapon was used or threatened in this case, as the robber handed the teller a demand note. (Tr. R. pp. 22-23, 27, 31-37; 8/29/11). Furthermore, there was no evidence that appellant's fingerprints were found at the scene of the crime, or on the robbery demand note. (Tr. R. pp. 132-133, 155-158; 8/29/11). The evidence against appellant consisted of the assistant branch manager, Mr. Ryan Goodman, who was allowed to give his opinion that it was appellant who was depicted in the security video footage, even after admitting during cross-examination that he never actually seen the bank robbers face, and that he was shown appellant's single mugshot on at least two different occasions prior to the trial proceedings. (Tr. R. pp. 64-73, 79-86; 8/29/11).

Furthermore, another teller, Ms. Kristine Stemple, was allowed to make an in-court identification of appellant as the robber, even when she previously told the police she didn't see the robber, or robbery occurring. (Tr. R. pp. 92-93, 99-102; 8/29/11).

On August 30, 2011, the jury returned a verdict of guilty on both counts. At sentencing the lower court merged these convictions as an allied offense, and sentenced appellant to five years in prison. (See Journal Entry/(D)). A timely notice of appeal was filed and the Court of Appeals for the Twelfth District affirmed the appellant's conviction. (See Court of Appeals 12<sup>th</sup> Dist. Judgment/(1)).

This appeal has been timely filed within 45 days time from the decision of the appellate Court.

### III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

#### Proposition of Law No. 1

**WHETHER THE COURT OF APPEALS ERRED WHEN THE COURT REJECTED APPELLANT'S CLAIM THAT THE TRIAL COURT ERRED WHEN THE LOWER COURT REFUSED TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSE OF THEFT AND DENIED THE APPELLANT HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND RIGHTS TO A FAIR TRIAL GUARANTEED UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENT'S TO THE U.S. CONSTITUTION AND SECTIONS 5, 16, ARTICLE I, OF THE OHIO STATE CONSTITUTION**

**Discussion:** The record demonstrates the defense timely requested a lesser-included offense jury instruction of "Theft" under Count One. The trial court denied this request. (Tr. R. pp. 4-6; 8/30/11). This issue was raised on direct appeal and the appellate Court upheld the lower Court's ruling. (See Court of Appeals 12<sup>th</sup> Dist. Judgment/(1)). The appellate Court erred because there was sufficient evidence to warrant this instruction.

When reviewing a court's refusal to give a requested jury instruction, the appellate Court considers whether the court's refusal was an abuse of discretion under the facts and circumstances of the case. State v. Wolons, (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. The record in this case shows the suspect used a demand note that stated "this is a robbery, give me all your 100s, 50s, 20s, no dye packs, no alarms". (Tr. R. pp. 22-23; 8/29/11). Furthermore, the trial record demonstrates that no threats were made by the suspect, and the bank teller, Ms. Blackburn, testified that she never seen weapon at any point in time, as was just following her training *to do what they ask*. (Tr. R. pp. 27; 8/29/11).

There is no dispute that "Theft" is a lesser-included offense of robbery. State v. Davis, (1983), 6 Ohio St.3d 91, 94, Ohio B. 131, 451 N.E.2d 772; State v. Thomas, Cuyahoga, App. No. 88548, 2007 Ohio 3522, p. 28. When reviewing a court's refusal to give an instruction on a lesser-included offense, the appellate Court must determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction. Feterie v. Huettner, (1971), 28 Ohio St. 3d 630, 632-33, 590 N.E.2d 272.

The appellate Court erred because the Court failed to recognize the trial court under the law, was required to consider the facts of the case, and evaluate the evidence in the light most favorable to the appellant. This is the law. *State v. Wilkins, (1980), 64 Ohio St.2d 382, 388, 415 N.E.2d 303.*

The trial court, and the appellate Court's error denied appellant's fundamental Constitutional rights to a fair trial and violated his rights to Due Process under the Fifth, Sixth, and Fourteenth Amendment's to the U.S. Constitution, and Sections 5, 16, Article I, of the Ohio State Constitution.

### **Proposition of Law No. 2**

**WHETHER THE COURT OF APPEALS ERRED WHEN THE COURT REJECTED APPELLANT'S CLAIM THAT THE TRIAL COURT ERRED WHEN THE LOWER COURT DENIED APPELLANT'S MOTION IN LIMINIE TO EXCLUDE OTHER BAD ACTS EVIDENCE AND DENIED THE APPELLANT HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL GUARANTEED UNDER THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION, AND SECTIONS 5, 16, ARTICLE I, OF THE OHIO STATE CONSTITUTION**

**Discussion:** On April 11, 2011, appellant timely moved in liminie, for the trial court to exclude other bad acts evidence in regards to his prior conviction, and his May 1, 2010, apprehension in Richmond, Kentucky. Appellant objected to the State's attempt to introduce the police pursuit of his 1994 Nissan, the U.S. Currency found in his vehicle, (\$548.00), and a weapon. He argued this evidence was not admissible under Ohio Evid. Rules 404(B), and 403(A). On May 12, 2011, the trial court denied said motion without explanation. (See Court Order/(B)). (See Partial R. Suppression Hearing, pp. 6-8; 5/12/11). The appellant lodged a standing objection to the introduction of this evidence.

Prior to trial appellant filed a motion for reconsideration of the trial court's May 12, 2011, order, and the trial court orally denied this motion on August 29, 2011, prior to jury selection proceedings. During the trial the State introduced this ~~damaging~~ and prejudicial evidence. (Tr. R. pp. 56-61; 8/29/11). On direct appeal appellant raised this issue, and the State argued this evidence was admissible to show identity. The appellate Court upheld the lower court's ruling. (See Court of Appeals 12<sup>th</sup> Dist. Judgment/(1)).

The appellate Court erred when rejecting this claim because the Court neglected to recognize

the State never introduced evidence that demonstrated appellant's vehicle was used in the Ohio bank robbery. The record demonstrated that when the suspect exited the bank he was observed walking in a southwest direction. (Tr. R. pp. 16-17, 137; 8/29/11). Furthermore, there was no clothing, or other evidence seized from appellant's vehicle linking him to the bank robbery. (See Partial R. Suppression Hearing, pp. 6-8; 5/12/11).

It's well settled other acts evidence may be admissible in situations where the "other acts" form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment, and which are "inextricably" related to the alleged criminal act. State v. Curry, (1975), 43 Ohio St.2d 66, 73 O.O.2d 37, 41, 330 N.E.2d 720, 725. Other acts may also prove identity by establishing a modus operandi, forming a unique, identifiable plan of criminal activity. State v. Jamison, (1990), 49 Ohio St.3d 182, 552 N.E.2d 180. Other acts may also be allowed to show similar crimes, and that a distinct, identifiable scheme, plan, or system was used in the offense. State v. Smith, (1990), 49 Ohio St.3d 137, 141, 551 N.E.2d 190, 194.

In this case appellant's activities of fleeing and eluding police in the State of Kentucky had no identifiable modus operandi applicable to the Ohio bank robbery. No description of getaway car was given to police, no weapon was used, and none of the \$548.00 seized from appellant's vehicle was linked to the Ohio bank robbery. The introduction of this evidence was clearly prejudicial and denied appellant's rights to a fair trial. State v. Hector, (1969), 19 Ohio St.2d 167, 174-175, 48 O.O.2d 199, 203-204, 249 N.E.2d 912, 916-17; State v. Williams, (1988), 55 Ohio App.3d 212, 563 N.E.2d 341; United States v. Mack, 258 F.3d 548 (6<sup>th</sup> Cir. 2001).

The appellate Court erred as the record demonstrates the trial Court failed to engage in any factual findings *whether there was any identifiable common features, or modus operandi*, related to the instant Ohio bank robbery. See, Huddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 71 (1988).

The appellate Court erred as the record conclusively demonstrated that this evidence was inadmissible as a matter of law. The appellant's fundamental Constitutional rights under the Sixth Amendment to the U.S. Constitution, and Sections 5, 16, Article I, of the Ohio State Constitution was violated in this case.

**Proposition of Law No. 3**

**WHETHER THE COURT OF APPEALS ERRED WHEN THE COURT REJECTED APPELLANT'S CLAIM THAT THE TRIAL COURT ERRED WHEN THE LOWER COURT DENIED APPELLANT'S REQUEST FOR FUNDING TO HIRE AN IDENTIFICATION EXPERT AND DENIED THE APPELLANT HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND RIGHTS TO A FAIR TRIAL GUARANTEED UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENT'S TO THE U.S. CONSTITUTION AND SECTIONS 5, 10, 16, ARTICLE I, OF THE OHIO STATE CONSTITUTION**

**Discussion:** On April 26, 2011, appellant filed a motion for funding to hire two experts, namely for a handwriting expert, and an identification expert. On June 2, and 9, 2011, the trial court granted funding to secure an identification expert, however denied his request for an identification expert. (See Court Order/(C)).

The appellant raised this issue on appeal. The appellate Court upheld the trial court's ruling. (See Court of Appeals 12<sup>th</sup> Dist. Judgment/(1)). The appellate Court erred because the evidence in this case clearly warranted the funding for this expert. In State v. Broom, (1988), 40 Ohio St.3d 277, 283, 533 N.E.2d 682, 691, the Court emphasized in order to demonstrate a violation of Due Process a defendant must show more than a mere possibility that an expert could assist the defense. Rather, he must show a reasonable probability that an expert would aid in his defense, and the denial would result in an unfair trial. Id. See, Ake v. Oklahoma, 470 U.S. 68, 77, 105 S.Ct. 1087, 1093, 84 L.Ed.2d 53 (1985).

The appellate Court neglected to recognize that the teller who was robbed could not identify the appellant as the robber. (Tr. R. pp. 33-34, 150; 8/29/11). Furthermore, the record shows that the robbery took less than one minute. (Tr. R. pp. 34; 8/29/11). The State used another teller, Ms.

Stemple, to make an in-court identification of the appellant as the robber. However, the appellate Court appears to have neglected to recognize, that Ms. Stemple had previously told the police on the same day of the robbery, *that she didn't see anything*. (Tr. R. pp. 92-93, 99-102; 8/29/11).

The State also used Ryan Goodman, assistant bank manager, to give his opinion that appellant was the suspect depicted in the bank robbery surveillance video, despite admitting that he only seen the back end of the suspect leaving the bank, and being shown the video footage, *and single mugshots, of the appellant, prior to the trial*. (Tr. R. pp. 64-73, 79-86; 8/29/11).

Furthermore, the State also used Freddy Woolwine, Jr., and Alexey Bogatyrev, both Motel #6 employee's, to testify that in their opinion it was appellant depicted in the bank robbery surveillance footage. However, Mr. Woolwine *failed to identify appellant in-court*. (Tr. R. pp. 47; 8/29/11). And Mr. Bogatyrev admitted to being *shown single mugshots of the appellant, and photographs of the surveillance footage prior to the trial*. Mr. Bogatyrev also admitted to *seeing appellant in the courtroom hallway previously while attending a pretrial hearing*. (Tr. R. pp.103-104, 114-115; 8/29/11).

Clearly the appellate Court erred when rejecting this claim. Appellant's fundamental Federal and State Constitutional rights to Due Process and rights to a fair trial were violated in this case. See, *State v. Sargent*, (2006), 169 Ohio App.3d 679, 864 N.E.2d 155 (Ohio App.3d 1 Dist. 2006); *State v. Bradley*, (2009), 181 Ohio App. 3D 40, 907 N.E.2d 1205 (Ohio App. 8 Dist. 2009).

This Court should remand this case back to the lower court for a new trial. The trial court's ruling, and the appellant Court's ruling, clearly was contrary to state and federal Supreme Court precedent. The denial of appellant's request for funding to secure an identification expert clearly denied the defense with the means of challenging any of the above described State witnesses credibility. This case represents a miscarriage of justice and implicates the fundamental fairness of the proceedings in this case.

#### Proposition of Law No. 4

**WHETHER THE COURT OF APPEALS ERRED WHEN THE COURT REJECTED APPELLANT'S CLAIM THAT THE TRIAL COURT ERRED WHEN THE LOWER COURT DENIED APPELLANT'S MOTION TO SUPPRESS ALL PRE-INDICTMENT AND PRE-TRIAL IDENTIFICATIONS OF THE APPELLANT WHEN THE RECORD DEMONSTRATED THE IDENTIFICATION PROCEDURES WERE UNNECESSARILY SUGGESTIVE AND UNRELIABLE THAT DENIED APPELLANT'S RIGHTS TO DUE PROCESS GUARANTEED UNDER THE FIFTH, AND FOURTEENTH AMENDMENT'S TO THE U.S. CONSTITUTION AND SECTIONS 5, 16, ARTICLE I, OF THE OHIO STATE CONSTITUTION**

**Discussion:** On March 31, 2011, appellant filed a Motion to Suppress all pre-indictment and pre-trial identification of appellant based upon unlawful impermissible suggestive identification procedures used by police. On May 12, 2011, after holding a suppression hearing the trial court denied said motion. (See Court Order/(B)). On August 11, 2011, appellant filed a motion for reconsideration, he also lodged a standing objection to any in-court identifications of him made by any of the State witnesses. On November 2, 2011, the trial court denied his motion several months after appellant had been convicted. (See Court Order/(E)).

Appellant raised this issue on direct appeal and the appellate Court upheld the trial court's ruling. (See Court of Appeals 12<sup>th</sup> Dist. Judgment/(1)). Appellant contends the appellate Court erred because law enforcement's identification procedures were unlawful, and unduly suggestive, and created a substantial likelihood of irreparable misidentification in this case. In State v. Brown, (1988), 38 Ohio St.3d 305, 528 N.E.2d 523, the Court emphasized when a witness has been confronted with a suspect before trial, due process requires a court to suppress {his} identification if the confrontation was unnecessarily suggestive, and the identification was unreliable under all the circumstances. Id. Also See, State v. Murphy, (2001), 91 Ohio St.3d 516, 534, 747 N.E.2d 765.

The factors to be considered are; (1) the opportunity of the witness to view the suspect at the time of the crime; (2) the witnesses degree of attention; (3) the accuracy of the witnesses prior description; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. State v. Broom, (1988), 40 Ohio St.3d 277,

284, 533 N.E.2d 682, (citing), Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

In this case the State subjected all of the in-court identification witnesses to numerous unlawful unnecessarily suggestive viewings of the appellant prior to trial. For instance, Mr. Goodman, the assistant branch manager testified he never seen the bank robbers face. (Tr. R. pp. 64, 79, 84; 8/29/11). However, Mr. Goodman was allowed to give his opinion that it was appellant depicted in the bank robbery video footage, after he was shown the security footage, and admitted he *seen appellant in the courtroom hallway at a previous hearing*. (Tr. R. pp. 79, 82; 8/29/11). Mr. Goodman also admitted he was *shown a single mugshot of appellant on at least two different occasions*. (Tr. R. pp. 80-86; 8/29/11).

Another State witness, Ms. Stemple, a teller, was allowed to identify appellant as the person she allegedly seen walk into the bank, even though she previously told police on the day of the robbery, *that she didn't see anything*. (Tr. R. pp. 92-93, 95, 100-102; 8/29/11). Furthermore, Ms. Stemple also admitted that she was shown the *security footage on the day of the robbery, and one week prior to her trial testimony*. (Tr. R. pp. 94; 8/29/11).

As previously emphasized another State witness, Mr. Bogatyrev, who was employed at Motel #6, was allowed to testify and give his opinion that it was appellant who was depicted in the bank surveillance video footage. However, he admitted under cross-examination that he was *shown a single mugshot of appellant, and shown bank security footage, and had previously observed appellant in the courtroom hallway, prior to the trial*. (Tr. R. pp. 103-104, 114-115; 8/29/11).

The appellate Court clearly failed to recognize that under the totality of the circumstances that law enforcement's identification procedures were not only unduly suggestive, but in this case there was irreparable misidentification of the appellant. Telling, is the fact that the sole person, teller, Ms. Blackburn who seen the robber's face didn't identify appellant as the robber. (Tr. R. pp. 33-34; 8/29/11). Ms. Blackburn testified also that the robber had gray hair, and that appellant, Mr. Vore had

reddish blond hair. (Tr. R. pp. 34-36, 40-41; 8/29/11).

Clearly the appellate Court erred in this case. This case presented unique circumstances that warrant this Court's review. See, State v. Miles, (1988), 55 Ohio App.3d 210, 563 N.E.2d 344 (Ohio App. 1988); State v. Martin, (1998), 127 Ohio App.3d 272, 712 N.E.2d 795 (Ohio App. 2 Dist. 1998).

**CONCLUSION**

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant requests this Honorable Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

**RESPECTFULLY SUBMITTED,**

William B. Vore  
**WILLIAM B. VORE-3612862**  
**LOCI**  
**P.O. BOX-69**  
**LONDON, OHIO 43140**

**CERTIFICATE OF SERVICE**

I, William B. Vore, hereby certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. Mail to counsel for appellee, Mr. David P. Fornshell, Warren County Prosecuting Attorney, Assistant Prosecuting Attorney, Mr. Michael Greer #0084352, at 500 Justice Drive, Lebanon, Ohio 45036. A true copy was mailed on this 13<sup>th</sup> day of June, 2012.

William B. Vore

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO,  
Appellee,**

**On Appeal From The Warren County  
Court of Appeals, Twelfth Appellate  
District**

**vs.**

**WILLIAM B. VORE,  
Appellant.**

**Court of Appeals No: CA 2011-08-093**

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**APPENDIX IN SUPPORT OF MEMORANDUM IN SUPPORT  
OF JURISDICTION OF APPELLANT WILLIAM B. VORE**

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London, Ohio 43140**

**COURT OF APPEALS 12<sup>th</sup> Dist. OPINION AND JUDGMENT**

JUN 2012  
COURT OF APPEALS  
WARREN COUNTY  
FILED

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
WARREN COUNTY

JUN - 4 2012  
James L. Spaeth, Clerk  
LEBANON OHIO

STATE OF OHIO,

Plaintiff-Appellee,

CASE NO. CA2011-08-093

JUDGMENT ENTRY

- vs -

WILLIAM BERNARD VORE,

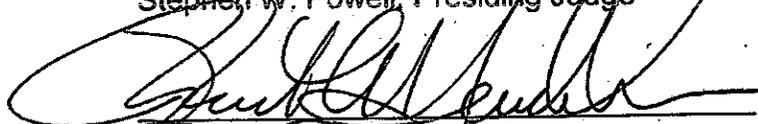
Defendant-Appellant.

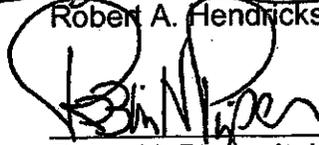
The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, reversed and remanded for the limited purpose of permitting the trial court to employ the postrelease control correction procedures of R.C. 2929.191. In all other respects, the judgment of the trial court is affirmed.

It is further ordered that a mandate be sent to the Warren County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed 75 percent to appellant and 25 percent to appellee.

  
Stephen W. Powell, Presiding Judge

  
Robert A. Hendrickson, Judge

  
Robin N. Piper, Judge

JUN 2012  
COURT OF APPEALS  
WARREN COUNTY  
FILED

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
WARREN COUNTY

JUN - 4 2012  
*James L. Spaeth*, Clerk  
LEBANON OHIO

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

WILLIAM BERNARD VORE,

Defendant-Appellant.

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CASE NO. CA2011-08-093

OPINION  
6/4/2012

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS  
Case No. 10CR27091

David Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive,  
Lebanon, Ohio 45036, for plaintiff-appellee

Stephan D. Madden, 810 Sycamore Street, 5th Floor, Cincinnati, Ohio 45202, for defendant-  
appellant

**POWELL, P.J.**

{¶ 1} A defendant seeks to overturn his bank robbery conviction by claiming he never  
threatened to use force or forced the teller to turn over cash from the bank drawer. We reject  
this argument and his additional claims that other-act evidence admitted at trial was  
prejudicial, he was entitled to an identification expert witness at the state's expense, and the  
trial court erred in overruling his suppression motion on eyewitness identification issues. We

sua sponte notice postrelease control notification errors and remand this case to the trial court to follow the procedures outlined in R.C. 2929.191.

{¶ 2} William Bernard Vore was indicted for robbery and grand theft after police allege he entered a Fifth Third Bank branch in Warren County, handed a demand note to the teller, took the \$9200 in bills she gave him, and left the bank. Vore's case was tried to a jury in Warren County Common Pleas Court. The jury returned guilty findings on both counts. The grand theft count was merged into the robbery count, a felony of the third degree, and Vore was sentenced to prison.

{¶ 3} Before we discuss Vore's four assignments of error in this appeal, we will summarize the evidence pertinent to the errors raised and elaborate on the evidence when necessary to address each specific assignment of error.

{¶ 4} According to the record, within an hour or so of the crime, law enforcement officers took a photo or photos from the bank surveillance video of the robbery and visited businesses around the bank to see if anyone recognized the man in the photo.

{¶ 5} Motel 6 employee Freddy Woolwine recognized the man as someone he believed was staying at the motel before the robbery. Woolwine said he saw the man the previous night exiting a dark blue or black car, "like a Nissan or ...I couldn't tell," with Iowa or Nebraska license tags. He also talked with the man briefly in the parking lot the morning of the robbery. The employee remembered the man was wearing a hat like the one the robber was wearing in the bank photo. When asked if he saw the man in the courtroom, Woolwine said, "No. He had a hat on so ... ."

{¶ 6} Motel 6 desk clerk Alexey Bogatyrev told police he recognized the man in the bank photo as a customer who had checked out of the motel that morning. Bogatyrev said he saw the man a few times during the last few days and when the man checked out, he was wearing some of the same clothing as the man in the robbery photo.

{¶ 7} Bogatyrev gave police the registration information Vore provided when he checked into the motel, including his name and an Iowa address. Bogatyrev said he remembered the name of the patron because it is a word in his native language. Vore paid cash for his three or four-day stay at the motel. Both Motel 6 employees recall the man was seeking repairs for his vehicle.

{¶ 8} Police showed the bank teller a photo array of six photos a few days after the robbery. The array included a photo that was taken from Vore's Iowa driver's license and forwarded to Warren County. The teller was unable to pick out a suspect.

{¶ 9} Even though the bank teller was unable to identify Vore as the man who gave her the demand note, a bank manager testified that he believed Vore was the man who robbed the bank based on his review of the surveillance video of the robbery.

{¶ 10} A second bank employee testified she was working next to the teller's station on the morning of the robbery and she remembered a man with a day planner walking up to the teller. She said the entire encounter with the teller probably lasted about a minute or so. She agreed that she told police she might not be able to identify the robber and wrote in her statement to police that she did not see anything. After describing for the jury what was depicted in the various photographs taken from the bank video, the bank employee testified she believed Vore was the individual she saw in the bank that day.

{¶ 11} Warren County authorities learned months after the robbery that Vore was in a Kentucky jail. He had reportedly been arrested less than two weeks after the robbery for unrelated charges that involved a police pursuit. A black pellet gun and \$558 in cash were found on Vore or in the black Nissan car he was driving.

{¶ 12} Two experts testified they obtained handwriting samples from Vore and compared them to the "questioned writing," which was the demand note given to the teller. A forensic scientist with the Ohio Bureau of Criminal Investigation opined that Vore wrote the

robbery demand note. A handwriting expert originally hired by Vore at state's expense also concluded that Vore wrote the demand note.

{¶ 13} Assignment of Error No. 1:

{¶ 14} THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSE OF THEFT THUS DENYING APPELLANT OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL. [sic]

{¶ 15} Vore argues that he never used or threatened the immediate use of force against the bank teller, and therefore, the trial court should have instructed the jury on the lesser-included offense of theft and erred in failing to do so.

{¶ 16} Vore's indictment contained both a robbery count and a separate grand theft count. According to the record, the grand theft count was based on depriving the owner of his or her property without the owner's consent. See R.C. 2913.02.

{¶ 17} The trial transcript reveals that during trial, the trial court and counsel discussed the jury instructions for the two counts of the indictment. Vore's counsel inquired about an instruction on a lesser-included charge of theft for the robbery offense, if the jury did not find the element of force or threat of force. The trial court said that it would explain to the jury the elements of the robbery count and if the jury did not "find any force or threat of force[,] they're going to be instructed to find him not guilty on robbery. They then move on to determine whether or not there is a theft." [sic]. Vore's trial attorney said: "Got you, all right."

{¶ 18} The record reflects no further discussion or objection to this portion of the jury instructions. Therefore, we review Vore's first assignment of error for plain error. Crim.R. 30; see Crim.R. 52(B).

{¶ 19} In order to prevail under a plain error analysis, Vore bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. *State v. Long*, 53 Ohio St.2d 91, 96-97 (1978), paragraph three of the syllabus (notice of

plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice).

{¶ 20} A party is not entitled to an instruction on a lesser included offense unless the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser included offense. *State v. Trimble*, 122 Ohio St. 3d 297, 2009-Ohio-2961, ¶ 192; *State v. Anderson*, 12th Dist. No. CA2005-06-156, 2006-Ohio-2714, ¶ 10. In making this determination, the court must view the evidence in the light most favorable to the defendant. *Trimble*.

{¶ 21} An instruction on a lesser included offense is not warranted every time some evidence is presented to support the inferior offense. *Id.* Rather, there must be sufficient evidence to allow a jury to reasonably reject the greater offense and find the defendant guilty on a lesser included (or inferior degree) offense. *Id.*

{¶ 22} Robbery, under the applicable version of R.C. 2911.02(A)(3), states that "[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following: Use or threaten the immediate use of force against another." "Force" means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing. R.C. 2901.01(A)(1).

{¶ 23} According to the record, the bank teller testified she was taking business receipts the morning of the robbery and was looking down at her computer when she noticed someone was "right up at the counter." When she asked how she could help him, the man handed her a piece of paper and said he needed to cash this check. The teller said the check was actually a handwritten note, which said: "This is A Robbery Give me All your 100s, 50s, 20s, Fast, no dye packs or alarms." [sic].

{¶ 24} The teller said she "froze" at first, "in shock just, you know, is this really happening?" The man asked her, "do you got it?" She said she "snapped out of it and then

the fear set in." The teller said, "Yeah I got it." She grabbed bills from her drawer and put them on the counter. The teller said the man put the money in a black "day planner" and walked out of the bank.

{¶ 25} After the man left, the teller said she "froze" until a bank manager walked by and asked her if something was wrong. The teller described the suspect as a white male in his 50s to 60s with a mustache. He was wearing a ball cap, jeans, and a shirt. She also indicated she told police the man had gray hair.

{¶ 26} The teller said she was trained to respond to a robbery by "do[ing] what they ask, get them out." She did not see a weapon, but when asked if she believed she would be harmed if she did not comply, she answered affirmatively. The teller said, "Because you never know. If they're unhappy, maybe he had a weapon and I just didn't see it. I was just scared." \* \* \* "I was scared. This is robbery. Most times robbers they have guns, they have weapons. And I was scared" [sic].

{¶ 27} The Ohio Supreme Court previously stated the "use or threat of immediate use of force against another" component of a robbery offense is satisfied "if the fear of the alleged victim was of such a nature as in reason and common experience is likely to induce a person to part with property against his will and temporarily suspend his power to exercise his will by virtue of the influence of the terror impressed." *State v. Davis*, 6 Ohio St.3d 91, 94 (1983).

{¶ 28} The question is whether the actions of the defendant, when objectively viewed, could reasonably be expected to create a fear in the victim sufficient to cause the victim to part with property against his or her will. *State v. Adkins*, 2nd Dist. No. 2895, 1992 WL 180142 (July 20, 1992). In *Adkins*, a man placed a note on the bank teller's counter that said, "Hi. This is a robbery. Put \$5,000 in a bag and don't push no buttons." *Id.* The man said it was not a joke and repeated that no buttons should be pushed. *Id.* When the teller

said she did not know what to do, the man repeated, "Give me \$5,000." The teller said the man stared at her, told her he was sorry about this, said he would not hurt her, and knew he was going to get caught. *Id.*

{¶ 29} In addressing whether the accused threatened the immediate use of force against the teller, the *Adkins* court stated that the use of the word "robbery" in the note must be considered in its entirety along with all of the evidence. *Id.* Using the word "robbery" objectively gave the impression of force, particularly for a bank teller. *Id.* The court noted the announcement of a "robbery" was accompanied by a demand to put \$5,000 in a bag, an instruction not to push any buttons, and was coupled with the teller's training to take a robbery note seriously because the robber might have a weapon. *Adkins*. Although the focus under R.C. 2911.02(A) is on the nature of the threat rather than on the victim's state of mind, the effect of the threat on the victim is a factor to be considered in evaluating the defendant's behavior. *Id.*

{¶ 30} In a case with facts similar to *Adkins*, a defendant handed a bank teller a note that said something to the effect that this was a "holdup" and demanded two stacks of fifties; no weapon was visible. *State v. Willis*, 10th Dist. 94APA04-554, 1994 WL 704388 (Dec. 15, 1994). In ruling on the manifest weight and sufficiency of the evidence, the *Willis* court said a weapon could reasonably be inferred in a hold up and, the evidence was sufficient for the jury to find beyond a reasonable doubt that the teller gave the defendant money because he was afraid that the defendant would harm him if he refused to comply with the note. *Id.* (teller's fear was reasonable and well founded based on common experience).

{¶ 31} Even though the cases cited above were dealing with the sufficiency and manifest weight of the evidence, we find the facts and conclusions in those cases useful for resolving the issue in the instant case. Vore gave a demand note to the teller telling her he was robbing the bank and demanding she act quickly and not activate any alarms or use die

packs. Based on the cases cited above, we find there was ample evidence that Vore used or threatened the immediate use of force.

{¶ 32} Viewing the evidence most favorably to Vore, we do not find the trial court erred in failing to provide a jury instruction on theft as the evidence did not reasonably support both an acquittal on the crime charged and a conviction on the lesser-included offense. See *Trimble*, 122 Ohio St. 3d 297, 2009-Ohio-2961, at ¶ 192. In addition, Vore received an instruction for theft separate from the robbery charge. Vore has not demonstrated plain error and his first assignment of error is overruled.

{¶ 33} Assignment of Error No. 2:

{¶ 34} THE TRIAL COURT ERRED WHEN ALLOWED THE STATE TO INTRODUCE EVIDENCE OF OTHER ACTS THAT WERE NOT SUFFICIENTLY RELATED TO DEFENDANT-APPELLANT. [sic]

{¶ 35} Vore contends that trial testimony from a Kentucky law enforcement officer about a police pursuit that led to his arrest and incarceration in Richmond, Kentucky presented improper other-acts evidence introduced for the purpose of showing he was the type of person who could and did commit a crime.

{¶ 36} According to the record, Vore filed a motion in limine to exclude the introduction of evidence about the Kentucky incident, among other issues. The motion was denied before trial. The record does not reflect that Vore renewed the motion at trial or objected before the officer testified.

{¶ 37} A motion in limine is a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of the evidentiary issue. *State v. Grubb*, 28 Ohio St.3d 199, 201-202 (1986). An appellate court need not review the propriety of such an order unless the claimed error is preserved by a timely objection when the issue is actually reached at trial. *Id.* Therefore, the admission of the testimony in the instant case will be reviewed for

plain error. See *State v. Frazier*, 115 Ohio St. 3d 139, 2007-Ohio-5048, ¶ 133.

{¶ 38} As we previously noted, in order to prevail under a plain error analysis, Vore bears the burden of demonstrating that the outcome of the trial clearly would have been different, but for the error. *Long*, 53 Ohio St.3d 91 at 96-97.

{¶ 39} Evid.R. 404(B) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith, but 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. *State v. Broom*, 40 Ohio St.3d 277, 282-283 (1988). The rule is in accord with R.C. 2945.59. *Id.* However, the issue of identity, although not listed in the statute, has been held to be included within the concept of scheme, plan, or system. *Id.*

{¶ 40} R.C. 2945.59 and Evid.R. 404(B) codify the common law with respect to evidence of other acts of wrongdoing, and are construed against admissibility. *State v. Lowe*, 69 Ohio St. 3d 527, 530, 1994-Ohio-345. The admission of other-acts evidence under Evid.R. 404(B) 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 has created material prejudice. *State v. Perez*, 124 Ohio St. 3d 122, 2009-Ohio-6179, ¶ 96. Relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. Evid.R. 403.

{¶ 41} The state argues the evidence was properly admitted to show identity, connecting Vore to the Ohio robbery. At trial, Vore's identity as a perpetrator of the robbery was disputed. His defense was built on the theory that he was not the person depicted in the bank surveillance video.

{¶ 42} Other acts can be evidence of identity (1) where other acts form part of the immediate background of the alleged act that forms the foundation of the crime charged in

the indictment, and are inextricably related to the alleged criminal act, and (2) where the identity of a perpetrator is established by showing he has committed similar crimes and that a distinct, identifiable scheme, plan, or system was used in the commission of the charged offense. *Lowe*, 69 Ohio St. 3d 527 at 531.

{¶ 43} Courts must be careful when considering evidence as proof of identity to recognize the distinction between evidence that shows that a defendant is the type of person who might commit a particular crime and evidence that shows that a defendant is the person who committed a particular crime. *Id.* at 530.

{¶ 44} The record indicates the Kentucky police officer testified that the Richmond, Kentucky incident with Vore occurred on May 1, 2010, which was 11 days after the Warren County robbery. The officer said Vore was the subject of a police pursuit, which was discontinued at one point for safety reasons, but resumed shortly thereafter when Vore was observed entering a neighborhood that "dead ends." Vore was arrested after the black Nissan car he was driving was disabled by stop sticks.

{¶ 45} The officer was asked on cross-examination why Vore was being pursued. The officer indicated another officer was responding to a reported theft at a parking lot when the alleged victim of the theft pointed out Vore, who was driving away from the scene. The Kentucky officer testified Vore appeared intoxicated when he was stopped and the \$558 recovered from Vore was eventually released to Vore's sister.

{¶ 46} While the testimony of the Kentucky police officer placed Vore with a car that matched the vehicle description provided by the Motel 6 employee, the connection for the Evid.R. 404(B) purpose of identity is tenuous.

{¶ 47} Nevertheless, nothing suggests the jury used the evidence presented by the state to convict Vore on the theory he was a bad person or had a propensity toward crime. See *State v. Grant*, 67 Ohio St. 3d 465, 472, 1993-Ohio-171. Based on the other evidence

admitted at trial, we find Vore was not prejudiced by the admission of the evidence and the outcome of Vore's trial clearly would not have been different. *State v. Johnson*, 5th Dist. No. 1997 CA 00247, 1998 WL 517852 (Aug. 3, 1998). Vore's second assignment of error is overruled.

{¶ 48} Assignment of Error No. 3:

{¶ 49} THE TRIAL COURT ERRED WHEN IT VIOLATED DEFENDANT-APPELLANT'S U.S. AND OHIO CONSTITUTIONAL RIGHTS BY FAILING TO PROVIDE ADEQUATE FUNDS FOR AN EYE WITNESS IDENTIFICATION EXPERT. [sic]

{¶ 50} Vore asked the trial court before trial to provide funds to hire expert witnesses in eyewitness identification and handwriting analysis. The trial court granted funds for the handwriting expert, but denied funds for an eyewitness identification expert.

{¶ 51} Vore argues his conviction turned on eyewitness identification and the denial of his request for an expert in this area was error.

{¶ 52} Due process requires that an indigent criminal defendant be provided funds to obtain expert assistance at state expense only where the trial court finds, in the exercise of a sound discretion, that the defendant has made a particularized showing of a reasonable probability that the requested expert would aid in his defense, and that denial of the requested expert assistance would result in an unfair trial. *State v. Mason*, 82 Ohio St.3d 144, 1998-Ohio-370, syllabus.

{¶ 53} In resolving a request for funding for expert fees, courts have reviewed the expert's value to the defendant's proper representation at trial and the availability of alternative devices that fulfill the same functions as the expert assistance sought. *State v. Weeks*, 64 Ohio App.3d 595 (12th Dist.1989); *State v. Bean*, 2nd Dist. No. 16438, 1998 WL 22061 (Jan. 23, 1998); *State v. Hurley*, 3rd Dist. No. 12-11-01, 2012-Ohio-310.

{¶ 54} Where a party seeks to admit expert testimony about the reliability of

eyewitnesses, there are a number of alternative devices through which a defendant can accomplish the same ends, including conducting rigorous cross-examination, pointing out inconsistencies or discrepancies in the testimony, alerting jurors to factors that may affect a witnesses' reliability, as well as ensuring pertinent instructions are given to the jury. See *State v. Buell*, 22 Ohio St.3d 124, 132-133 (1986); *Bean*.

{¶ 55} The record reveals that Vore's counsel rigorously cross examined the witnesses who identified Vore, pointed out inconsistencies or discrepancies in the testimony, and alerted jurors to factors affecting witnesses' reliability. The trial court provided an extensive instruction on identification issues to the jury. In other words, Vore accomplished the same ends as an expert witness through alternative devices. He failed to show the denial of the requested expert assistance resulted in an unfair trial. The trial court did not abuse its discretion in denying funds for the eyewitness identification expert. Vore's third assignment of error is overruled.

{¶ 56} Assignment of Error No. 4:

{¶ 57} THE TRIAL COURT ERRED AND VIOLATED DEFENDANT-APPELLANT'S DUE PROCESS RIGHTS WHEN IT OVERRULED THE SUPPRESSION MOTION AS TO IDENTIFICATION.

{¶ 58} Vore contends his suppression motion should have been sustained because the eyewitness identification testimony of a number of individuals was obtained through impermissibly suggestive procedures.

{¶ 59} When a witness is confronted with a suspect before trial, due process requires a court to consider whether the defendant demonstrated the identification procedure was unduly suggestive, and if so, whether the identification, viewed under the totality of the circumstances, is reliable despite its suggestive character. See *State v. Murphy*, 91 Ohio St.3d 516, 534, 2001-Ohio-112; *Neil v. Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375 (1972)

(examine the totality of the circumstances to determine whether the confrontation was so suggestive that there was "a very substantial likelihood of irreparable misidentification").

{¶ 60} The factors to be considered are (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Broom*, 40 Ohio St.3d 277 at 284, citing *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243 (1977).

{¶ 61} When a trial court rules on a suppression motion, it acts as the trier of fact and is best situated to determine the credibility of witnesses and resolve questions of fact. *State v. Williams*, 12th Dist. No. CA2009-08-014, 2010-Ohio-1523, ¶ 9. In reviewing a trial court's decision on suppression, the appellate court must accept the lower court's findings of fact if they are supported by competent, credible evidence. *Id.* The appellate court must then independently determine as a matter of law whether the facts satisfy the applicable legal standard. *Id.*

{¶ 62} First, we note that Vore now argues the identification testimony from four named witnesses should have been suppressed because they viewed Vore or Vore's photograph numerous times before they were either shown the photo array or identified Vore in court. After reviewing the record, however, we find the four witnesses listed in the appeal were not the witnesses mentioned and considered at the suppression hearing. In this assignment of error, Vore challenges the trial court's decision on the suppression motion and we will limit our review to the decision on the motion.

{¶ 63} Specifically, Vore's motion asked the trial court to suppress all pre-indictment and pre-trial identifications based upon an "impermissibly suggestive photo array procedure." The motion did not delineate how the photo array procedure was impermissibly suggestive.

Vore told the trial court at the motion hearing that the bank teller's identification was tainted because the detective pointed out Vore's photo after the teller was unable to choose the robbery suspect from the photo array. Vore also challenged the identification procedures utilized when the same detective indicated in his investigative report that he showed Vore's driver's license photo to employees of businesses near the bank.

{¶ 64} The record indicates Warren County Sheriff's Detective Roger Barnes testified at the suppression hearing that he gave the bank teller six separate folders that each contained a single photograph of a potential suspect. According to Barnes, the teller was unable to select from any of the six, but was debating between five and six. Det. Barnes told her photograph number six was the suspect.

{¶ 65} While the photo array itself appeared to be appropriate, the bank teller should not have been told which photograph was Vore's when she could not pick out the robbery suspect. This procedure was unduly suggestive. However, the bank teller never identified Vore as the robbery suspect. The trial court was told at the suppression hearing the bank teller was unable to identify Vore as the suspect. At trial, the bank teller did not identify a suspect. Therefore, the failure to suppress the identification procedure was harmless error. Crim.R. 52(A) (any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded).

{¶ 66} Det. Barnes also testified at the motion hearing that he showed a driver's license photo to some of the employees from businesses near the bank and acknowledged that one of those employees was Motel 6 employee Woolwine. According to the detective, after he took the bank surveillance photo to nearby businesses and Vore was recognized and identified as the Motel 6 patron, he obtained a copy of the picture used for Vore's Iowa driver's license and returned to the businesses to show some of the employees that picture.

{¶ 67} When asked why he did not show a photo array, the detective responded that,

"[w]ell, I think it's pretty much the same issue as before, showed a single picture and say, 'was this person in your store?' The person didn't know you, wouldn't be able to pick you out of a lineup. It's a technique that I have used."

{¶ 68} While showing one photograph – in this case the driver's license photo – can, in some situations, be an impermissibly suggestive procedure, the testimony indicated that this photograph was obtained and used only after Vore was recognized from images taken during the crime. We find that Vore failed to demonstrate that the identification procedure was unduly suggestive of his guilt and any identification made was unreliable under the totality of the circumstances.

{¶ 69} Vore's arguments are not well taken and his fourth assignment of error is overruled.

{¶ 70} After reviewing the record to consider Vore's four assignments of error, we notice and raise, sua sponte, errors in the imposition of postrelease control (PRC) for the third-degree felony.

{¶ 71} R.C. 2967.28(B) calls for a mandatory term of postrelease control for first and second-degree felonies, for felony sex offenses, and for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person.

{¶ 72} A period of postrelease control required by this division for an offender shall be of one of the following periods:

- (1) For a felony of the first degree or for a felony sex offense, five years;
- (2) For a felony of the second degree that is not a felony sex offense, three years;
- (3) For a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, three years.

R.C. 2967.28(B).

{¶ 73} Under R.C. 2967.28(C), a term of postrelease control for felonies of the third, fourth and fifth degree that are not subject to (B)(1) or (B)(3) above shall be up to three years if the parole board determines that a period of postrelease control is necessary for that offender.

{¶ 74} In the case at bar, Vore was told at his sentencing hearing that his term of postrelease control was "five years of post-release control, it's optional. That means the adult parole authority will supervise you or could supervise you for a period up to five years." The sentencing entry states that Vore's supervision is "mandatory," and the control period "will be a maximum term of up to 3 years."

{¶ 75} There are errors in both the oral notification at the sentencing hearing and the sentencing entry. R.C. 2967.28(B)(C); *see also State v. Addis*, 12th Dist. No. CA2009-05-019, 2010-Ohio-1008 (entry stating "up to" when dealing with mandatory PRC term is error).

{¶ 76} We reverse and remand this case only for the limited purpose of permitting the trial court to employ the PRC correction procedures of R.C. 2929.191. In all other respects, the judgment of the trial court is affirmed.

HENDRICKSON and PIPER, JJ., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

**COMMON PLEAS COURT ORDER RULING ON MOTION TO SUPPRESS  
AND MOTION IN LIMINIE  
May 12, 2011**

**B**

COMMON PLEAS COURT  
WARREN COUNTY, OHIO  
2011 MAY 12 PM 3:14  
CLERK OF COURTS

STATE OF OHIO, WARREN COUNTY  
COMMON PLEAS COURT  
CRIMINAL DIVISION

STATE OF OHIO,  
Plaintiff,

vs.

WILLIAM B. VORE,  
Defendant.

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CASE NO. 10CR27091

ENTRY

This matter came before the Court, on May 10, 2011 and May 12, 2011 for argument and hearing on numerous motions filed by the Defendant herein. Base upon the pleadings, the arguments of the Defendant and counsel, as well as the testimony and evidence introduced, the Court rules as follows:

1. The Defendant's Ex-Parte Application of Subpoena, filed on or about May 9, 2011, was voluntarily withdrawn by the Defendant in open Court;
2. The Defendant's Motion to Suppress all Pre-Indictment and Pre-Trial Identification of the Defendant, filed on or about March 31, 2011 is DENIED;
3. The Defendant's Motion in Limine to preclude the State's Introduction of Expert and Scientific Evidence, filed on or about March 31, 2011 is DENIED;
4. The Defendant's Motion to Dismiss the Indictment, filed on April 8, 2011, is DENIED;

5. The Defendant's Motion to Dismiss Count 2 of the Indictment, filed April 11, 2011, is DENIED
6. The Defendant's Motion in Limine to Preclude and Suppress the State's Introduction of Prior Bad Acts Evidence and Prior Convictions, filed on or about April 11, 2011 and the Defendant's Supplemental Motion in Limine filed on or about April 22, 2011 are DENIED;
7. The Defendant's Ex Parte Motion for Funding to Hire Two Expert Witnesses, filed on or about April 26, 2011 will be held in abeyance, pending further ruling by the Court;
8. The Defendant's Motion to Preclude the Use of Handcuffs or Shackles in the Presence of the Jury filed on May 4, 2011, is DENIED, at this time;
9. The Defendant's Motion to Require the State to Provide Civilian Clothing , filed on May 4, 2011, will be held in abeyance, pending further ruling by the Court; and
10. The Defendant's Ex-Parte Motion for Funding to Hire Two Expert witnesses, filed on April 26, 2011 will be held in abeyance, pending further ruling by the Court.

IT IS SO ORDERED.

*John P. O'Connor* 5/12/11  
\_\_\_\_\_  
JUDGE JOHN P. O'CONNOR  
Visiting Judge by Assignment  
Warren County Common Pleas Court

*By Assignment*

dist:

Prosecutor's Office  
Defendant  
Attorney for Defendant

**COMMON PLEAS COURT ORDER DENYING MOTION FOR  
FUNDING FOR IDENTIFICATION EXPERT**

**June 9, 2011**

**C**

2011 JUN -9 PM 2:05

JAMES L. SPALTH  
CLERK OF COURTS

STATE OF OHIO, WARREN COUNTY  
COMMON PLEAS COURT  
CRIMINAL DIVISION

STATE OF OHIO,  
Plaintiff,

vs.

WILLIAM B. VORE,  
Defendant.

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CASE NO. 10CR27091

ENTRY

This matter came before the Court, on this 2nd day of June, 2011 for a pretrial conference.

The court finds that the Defendant, who had previously moved this Court to proceed *PRO SE*, now wishes to be represented by counsel. Accordingly, it is the order of the Court that attorney Louis Rubenstein is appointed to represent the Defendant in this matter.

The Court further considered the Motion of the Defendant, previously filed, for funding to hire two expert witnesses. The Court finds that Defendant's Motion for an Expert witness in the field of eye witness identification is not well taken.

The Court finds that the Defendant's Motion for a handwriting expert is well taken and the Court hereby grants the Motion.

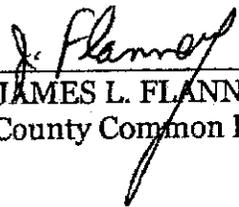


\* WC 119 - 10CR27091 \*  
06/09/11 ENTRY FILED

The Court orders the funds, not to exceed the sum \$1000.00, be approved for the use by the Defendant to employ an expert witness in the field of handwriting analysis. The expert shall provide a written report, in compliance with Criminal Rule 16(K).

The Defendant requested that the current trial date be vacated and the trial be continued at the Defendant's request and agreed to waive the provisions of Section 2945.71 et seq., Revised Code, and all other applicable provisions and law, regarding the time within which he must be brought to trial in this within matter. The Court grants the Defendant's request to continue the trial date.

IT IS SO ORDERED.

  
\_\_\_\_\_  
JUDGE JAMES L. FLANNERY  
Warren County Common Pleas Court

dist:

Prosecutor's Office  
Attorney for Defendant

**COMMON PLEAS JOURNAL ENTRY OF CONVICTION AND SENTENCE**  
**August 30, 2011**

**D**

2011 AUG 31 PM 2:23

WILLIAM L. DEAL III  
CLERK OF COURTS

STATE OF OHIO, WARREN COUNTY  
COMMON PLEAS COURT

STATE OF OHIO,

Plaintiff,

vs.

WILLIAM BERNARD VORE,

Defendant.

\* CASE NO. 10CR27091

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\* (Judge Peeler)

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JUDGMENT ENTRY OF SENTENCE

(Prison)

721 356 JT

On August 30, 2011 the Defendant appeared in Court with his attorney, LOUIS RUBENSTEIN, to be sentenced for the following offense(s): COUNT 1, ROBBERY, RC 2911.02(A)(3), a felony of the 3rd Degree; and COUNT 2, THEFT, RC 2913.02(A)(1), a felony of the 4th Degree .

The Defendant was previously found guilty pursuant to a trial by jury.

The Court inquired if the Defendant had anything to say in mitigation regarding the sentence. The Court has considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under R.C. §2929.11, and has balanced the seriousness and recidivism factors under R.C. §2929.12.

The Court further finds the Defendant is not amenable to an available community control sanction and that prison is consistent with the purposes and principles of R.C. §2929.11.

It is hereby ORDERED that Defendant serve a term of FIVE (5) YEARS ON COUNT 1 in prison, of which N/A years is a mandatory term pursuant to R.C. §2929.13(F), §2929.14(D)(3) or Chapter 2925.

- A.  a fine of \$ \_\_\_\_\_ (\$ \_\_\_\_\_ is mandatory)
- B.  a license suspension of \_\_\_\_\_
- C.  Restitution \$9,281.00 to 5/3 Bank
- D.  Other Count 2 merges with Count 1 for sentencing. Defendant advised of Appellate Rights

The Defendant shall submit a DNA sample pursuant to R.C. §2901.07. Any Temporary Protection Order issued in this case is hereby terminated.

Defendant is therefore ORDERED conveyed by the Warren County Sheriff to the custody of the Ohio Department of Rehabilitation and Corrections forthwith. Credit for 105 day(s) is granted as of



\* WC 164 - 10CR27091 \*  
09/31/11 JUDGMENT ENTRY OF SENTENCE - FIVE (5)

APPENDIX A

this date along with future custody days while Defendant awaits transportation to the appropriate State institution. Defendant is ordered to pay any restitution, all prosecution costs, court appointed counsel costs and any fees permitted pursuant to R.C. §2929.18(A)(4), for which execution is hereby ordered.

(Check if applicable) The Court finds that the defendant has or is reasonably expected to have the means to pay the financial sanctions, fines, and court appointed attorney fees imposed herein.

In addition a period of control or supervision by the Adult Parole Authority after release from prison is **mandatory** in this case. The control period will be a maximum term of **up to 3** years. The Defendant **DID** cause or threaten to cause physical harm to a person. A violation of any post-release control rule or condition can result in a more restrictive sanction while released, an increased duration of supervision or control, up to the maximum set out above and/or re-imprisonment even though you have served the entire stated prison sentence imposed upon you by this court for all offenses set out above. Re-imprisonment can be imposed in segments of up to 9 months but cannot exceed a maximum of  $\frac{1}{2}$  of the total term imposed for all of the offenses set out above.

If you commit another felony while subject to this period of control or supervision you may be subject to an additional prison term consisting of the maximum period of unserved time remaining on post-release control as set out above or 12 months whichever is greater. This prison term must be served consecutively to any term imposed for the new felony you are convicted of committing.

The sentence imposed by the Court automatically includes any extension of the stated prison term by the Parole Board.

  
JUDGE PEELER  
Warren County Common Pleas Court

**COMMON PLEAS COURT ORDER DENYING MOTION  
FOR RECONSIDERATION  
November 2, 2011**

**E**

2011 NOV -2 AM 11:26

JAMES L. STAATH  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS  
STATE OF OHIO, COUNTY OF WARREN  
GENERAL DIVISION

STATE OF OHIO, : CASE NO. 10 CR 27091  
 :  
 Plaintiff, : JUDGE PEELER  
 :  
 v. :  
 : ENTRY DISMISSING  
 WILLIAM B. VORE, : DEFENDANT'S MOTION FOR  
 : A NEW TRIAL AND MOTION  
 : FOR RECONSIDERATION  
 Defendant. :

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Pending before the Court are the Motions of Defendant, William B. Vore, to Reconsider a Motion to Suppress and for a New Trial pursuant to Crim.R. 33(A). For the reasons set forth below, both motions are denied.

Motion to Reconsider

On August 11, 2011, Defendant filed a Motion to Reconsider the Motion to Suppress Identifications. Specifically, Defendant asked the Court to suppress a witness's identification of Defendant because she did not initially identify him in a photo line-up and was later told by a detective which individual was the suspect in the case. The witness then stated she would have identified Defendant had he been shown with grey hair. Defendant moved to suppress this statement regarding the grey hair from trial as well as any identification of him at trial.

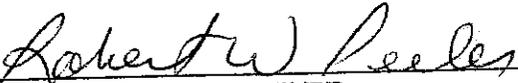
As the case has already gone to trial, and this Court agrees with its initial ruling to allow the witness's identification while allowing the defense to point out that the witness initially misidentified Defendant, this Court declines to reconsider the motion. As such, the motion to suppress remains denied.

**Motion for New Trial**

Defendant's Motion for a New Trial was filed September 1, 2011. However, on August 31, 2011, prior to the filing of the motion, Defendant filed a Notice of Appeal appealing the judgment of the trial court.

"When a defendant has filed a direct appeal, the trial court retains all jurisdiction not inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment."<sup>1</sup> "A motion for a new trial is inconsistent with a notice of appeal of the judgment sought to be retried."<sup>2</sup> Therefore, Defendant's August 31, 2011 notice of a direct appeal divested this Court of jurisdiction to consider his motion for a new trial and, thus, Defendant's Motion for a New Trial is dismissed for lack of jurisdiction.

It is so ordered.

  
\_\_\_\_\_  
JUDGE ROBERT W. PEELER

DIST: John Arnold, Esq.  
William Vonn

<sup>1</sup> *State v. Harmon*, Summit App. No. 21465, 2003-Ohio-5052, ¶ 9, citing *Majnarić v. Majnarić* (1975), 46 Ohio App.2d 157, 158-159, 347 N.E.2d 552; *State v. Marshall*, 9th Dist. No. 02CA008024, 2002-Ohio-5037, at ¶ 8, quoting *Howard v. Catholic Social Serv. of Cuyahoga Cty., Inc.* (1994), 70 Ohio St.3d 141, 146-147, 637 N.E.2d 890.

<sup>2</sup> *Id.*, quoting *State v. Loper*, 8th Dist. Nos. 81297, 81400, and 81878, 2003-Ohio-3213, at ¶ 104; see *Karson v. Ficke*, 9th Dist. No. 01 CA 3252-M, 2002-Ohio-4528, at ¶ 7, citing *Harkai v. Scherba* (2000), 136 Ohio App.3d 211, 215, 736 N.E.2d 101.

**CERTIFICATE OF SERVICE**

I, William B. Vore, hereby certify that a true copy of this Appendix was sent by U.S. Mail, to counsel for appellee, David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer #0084352, Assistant Prosecuting Attorney, 500 Justice Drive, Lebanon, Ohio 45036 (513) 695-2962.

A true copy was mailed on this 3<sup>rd</sup>, day of June, 2012.

William B. Vore  
William B. Vore-#612862