

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-120505
Plaintiff-Appellee,	:	TRIAL NO. B-1106605-B
vs.	:	<i>JUDGMENT ENTRY.</i>
SCOTT A. BROWN,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Scott A. Brown appeals from the judgment of the Hamilton County Court of Common Pleas convicting him of robbery in violation of R.C. 2911.02(A)(2) and receiving stolen property in violation of R.C. 2913.51(A).

In the early morning on September 23, 2011, Brown robbed the Speedway gas station in Anderson Township, threatening to harm the clerk with what appeared to be a black gun if he did not give him the money from the cash register. Although Brown concealed his identity with a blue bandana, he left behind an imprint of his shoe on the floor near the cash register. Mid-afternoon the next day, Brown was arrested while driving a stolen vehicle in Loudon City, Tennessee. He was wearing gym shoes that matched the shoe print left by the robber at the scene. Inside the vehicle, the police found

a blue bandana, a black plastic toy gun, and shorts that appeared to be those worn by the robber based on surveillance footage.

In his first assignment of error, Brown contends that trial counsel was ineffective. First, he argues that trial counsel failed to effectively question the experts in the case concerning the shoe-print analysis. But Brown's argument is purely speculative, and he has failed to overcome the presumption that counsel's conduct, under these circumstances, might be considered sound trial strategy. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Guidugli*, 157 Ohio App.3d 383, 2004-Ohio-2871, 811 N.E.2d 567, ¶ 22 (1st Dist.). Next, Brown argues that counsel's opening statement was too simple, that counsel's closing argument was belittling to the defendant, and that counsel asked questions of Sergeant Brian Stapleton that hurt his defense. But Brown again has failed to overcome the presumption that counsel's conduct might be considered sound trial strategy. *Id.*

In summary, Brown has failed to demonstrate that the challenged conduct constituted error so serious that counsel was not functioning as the "counsel" guaranteed under the Sixth Amendment. Moreover, Brown has failed to demonstrate that, were it not for the alleged omissions of trial counsel, the result of the trial would have been different. *Strickland* at 694; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. Accordingly, we overrule the first assignment of error.

We overrule the second assignment of error, in which Brown challenges the sufficiency and weight of the evidence to support his convictions. First, upon the evidence adduced at trial, reasonable minds could have reached different conclusions as to whether each element of the offenses had been proved beyond a reasonable doubt. *See State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

And second, we find nothing in the record of the proceedings below to suggest that the jury, in resolving the conflicts in the evidence adduced on the charged offenses, including Brown's defense, lost its way or created such a manifest miscarriage of justice as to warrant the reversal of Brown's convictions. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). We note that the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus.

In his third assignment of error, Brown argues that the trial court erred by sentencing him to a prison term for the receiving-stolen-property offense, a fourth-degree felony, without making the findings set forth in R.C. 2929.13(B)(1)(b). But Brown was also sentenced for a second-degree felony. Therefore, the provisions of R.C. 2929.13(B)(1)(b) did not apply. *See* R.C. 2929.13(B)(1)(a)(ii).

Brown also argues that the trial court did not consider the provisions of R.C. 2929.11 or 2929.12 before imposing the maximum sentence for the robbery offense. But the record demonstrates that the court considered those provisions.

Finally, Brown correctly notes that the trial court did not notify him that he may eligible to earn days of credit under R.C. 2967.193 while serving his prison term. But at the time of sentencing, the statute governing the notification provided that the trial court's failure to notify did not affect the offender's eligibility to earn the days of credit and did "not constitute grounds for setting aside the offender's conviction or sentence * * *." R.C. 2929.14(D)(3); *see* R.C. 2967.13(E). In light of this language, we will not set aside Brown's conviction or sentence, although the trial court erred by failing to give Brown the notification. Accordingly, we overrule the third assignment of error.

Therefore, we affirm the trial court's judgment.

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Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., CUNNINGHAM and FISCHER, JJ.

To the clerk:

Enter upon the journal of the court on September 27, 2013
per order of the court _____.
Presiding Judge