[Cite as *State v. Withrow*, 2012-Ohio-4887.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-A-0067**
- vs -	:	
CHRISTOPHER WITHROW,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2010 CR 308.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Michael A. Hiener, P.O. Box 1, Jefferson, OH 44047 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Christopher Withrow appeals from the jury verdict of the Ashtabula County Court of Common Pleas finding him guilty of one count of aggravated murder, two counts of murder, and two counts of aggravated robbery, in connection with the death of William Post on Christmas Day of 2009. He argues that the conviction is against the manifest weight of the evidence, and that the state failed to present sufficient evidence to support a conviction. Mr. Withrow further challenges the trial court's refusal to

suppress three photo-array identifications, and its failure to strike from the trial record certain statements by a police officer relating to Mr. Withrow's truthfulness during the investigative phase of the case.

{¶2} We find that the photo identification procedures were not impermissibly suggestive and thus the trial court properly admitted them. We further find that the jury verdict was supported by the manifest weight of the evidence and that the state presented sufficient evidence as to each element of the offense to withstand a motion for directed verdict. Lastly, although we find error in the admission of the police officer's testimony as to the veracity of Mr. Withrow's statements, Mr. Withrow sustained no prejudice as a result of this error given the overwhelming evidence against him. Therefore, we affirm the decision of the Ashtabula County Court of Common Pleas.

Substantive Facts and Procedural History

{¶3} The trial took place over nine days and included a jury view of the victim's home, where the murder occurred. The state presented over 90 pieces of evidence, and 23 witnesses; the defense presented close to 78 pieces of evidence, and 20 witnesses. The issue for the jury was whether Mr. Withrow was the killer. There was no eyewitness to the murder. It was undisputed that Mr. Withrow and the victim, William Post, spent time together in the early hours of Christmas Day, and that they got high together. Further, it was undisputed that that Mr. Post was killed by a knife and hammer found submerged under running water in his sink. The death was definitively ruled a homicide. It was also undisputed that no physical evidence directly tying Mr. Withrow to the crime was found; thus the conviction rests entirely on circumstantial and testimonial evidence.

{¶4} Mr. Withrow did not take the stand and his defense was unable to present a definitive alibi. His defense rested mainly on two assertions: 1) that various witnesses stated he was acting normal at the family function later in the day on Christmas and he did not seem like a man who had just killed his friend, and 2) that there was a lack of physical evidence connecting him to the crime.

{¶5} In the early hours of December 25, 2009, Mr. Withrow was socializing with Darlene Lister, Keri Dennison, and Joel Schick at Ms. Lister's apartment. The four got high on crack-cocaine provided by Mr. Withrow. When the crack-cocaine ran out, Mr. Withrow made a phone call to the victim, William Post, and set up a sex-for-money exchange so the partiers could purchase more drugs.

{¶6} Ms. Lister was led to believe she could obtain a substantial sum of money from Mr. Post because he had come into an inheritance, so she agreed to the arrangement, and she, Ms. Dennison, and Mr. Withrow drove to Mr. Post's home, located on Dickinson Road. They picked up Mr. Post and drove to First Merit Bank in Ashtabula, where Mr. Post withdrew $200 at 1:38 a.m. Mr. Post gave $100 to Ms. Lister, who made arrangements to meet a drug dealer to buy more crack-cocaine. The four returned to Mr. Post's home, but only Ms. Lister stayed, giving some of the crack-cocaine to Mr. Withrow.

{¶7} Ms. Lister and Mr. Post got high and talked, but never engaged in the sex acts for which he had supposedly given her the $100. At some point the crack-cocaine ran out and Ms. Lister asked Mr. Post for more money; he gave her an additional $60. She arranged the purchase of more drugs, and then returned to Mr. Post's home. When this additional crack-cocaine was gone, she again asked Mr. Post for money. He

told her he only had $20 left and that she could not have it. Ms. Lister was then picked up by Mr. Schick and Mr. Withrow around 5:00 a.m. and they returned to her apartment. Ms. Lister told Mr. Withrow and Mr. Schick that, although Mr. Post had more money, he had refused to give it to her.

Withrow and Schick Return to the Victim's Home

{¶8} Mr. Withrow and Mr. Schick then left the apartment in search of more money. Although Mr. Withrow indicated he was going to procure the money from his mother, according to Mr. Schick, they returned to Mr. Post's home. Mr. Withrow told Mr. Schick to stay in the car, which he did. After approximately 15 minutes of knocking and two exchanges of words with an individual on the second floor, the door was opened for Mr. Withrow.

{¶9} After a "period" of time; he then left the home, closing the door behind him. Mr. Schick observed that Mr. Withrow was no longer wearing the hoodie he wore when he entered, and he was carrying a black garbage bag that he did not have with him when he entered the home. Mr. Schick also observed blood on Mr. Withrow's wrist and that his shoelaces were stained a pink color when he returned to the car. Mr. Schick asked Mr. Withrow what had happened, and Mr. Withrow responded that he "had killed the guy inside."

{¶10} Mr. Withrow and Mr. Schick returned to Ms. Lister's apartment, where Mr. Withrow retrieved two $20 bills from the black garbage bag and handed them to Ms. Lister. Mr. Schick observed blood on one of the bills. Ms. Lister used the money to buy more crack-cocaine, and the three proceeded to get high.

Withrow and Schick Visit an Acquaintance of Withrow's

{¶11} When the drugs were gone, Mr. Withrow and Mr. Schick went to the home of James Dyer, off of 48th Street. Mr. Withrow removed his hoodie from the garbage bag and took the garbage bag into the house with him. Mr. Dyer testified that this was Mr. Withrow's second visit to the home that day; he had visited the home around 7:00 a.m., offering to sell Mr. Dyer an AR-15 rifle. On this second visit, at approximately 10:00 a.m., Mr. Withrow sold Mr. Dyer some marijuana and left a gun with him. This gun was not the AR-15, but was a pistol that Mr. Dyer later gave to his girlfriend's mother, who lived in Michigan. Detective Sean Ward of the Ashtabula County Sheriff's Office collected a black powder pistol from the Pontiac, Michigan Police Department in mid-January 2010, which had been taken from William Post's residence and was the same type of gun Mr. Withrow left in Mr. Dyer's possession.

{¶12} When Mr. Withrow left the Dyer residence and returned to the car, he asked Mr. Schick to return to Mr. Post's home with him to clean it up. They drove toward Mr. Post's home and Mr. Withrow said he wanted to burn the house down. Mr. Schick talked him out of it. They parked in the J.D. Byrider parking lot at the corner of U.S. Route 20 and Dickinson Road, and Mr. Withrow continued to ask Mr. Schick for assistance in cleaning up Mr. Post's home, but Mr. Schick refused. Mr. Withrow then put on his hoodie and walked down Dickinson Road to Mr. Post's home.

Neighbors See Activity at the Victim's House

{¶13} At approximately 12:30 p.m., Phyllis Bish, Mr. Post's neighbor directly across the street, observed Mr. Post's door open. She stuck her head out the window, waiting to see Mr. Post in order to wish him a "Merry Christmas." Instead of Mr. Post, she observed a man, whom she later identified in a photo-array as Mr. Withrow, leave

Mr. Post's home. She wished him a "Merry Christmas," and he nodded at her, gave her a long drawn-out stare and then proceeded on foot up the road toward U.S. Route 20.

{¶14} Around the same time, Robert Rought, a resident of Dickinson Road, was traveling in his car on Dickinson Road when he observed someone walking near Mr. Post's home. Driving within six feet of the man, he made eye contact with him and nodded. The man had his hood up and it was raining, but Mr. Rought reported getting a good look at his face, and described him as wearing jeans and a "two colored" fleece jacket. Mr. Rought later identified the man he saw as Mr. Withrow, picking him out of a photo-array.

The Victim's Father Discovers the Body

{¶15} Between 3:15 and 3:30 p.m., Jerry Post, William Post's father, arrived at Mr. Post's home to pick him up for Christmas dinner. When Mr. Post did not come out of the house, Jerry Post went into the home and discovered his son laying in the kitchen doorway, his face covered and his throat cut. Jerry Post called the sheriff's department, and then stumbled across the street to Phyllis Bish's home for assistance. Bradley Bish, Mrs. Bish's husband, went over to Mr. Post's home and observed Mr. Post lying on the floor, surrounded by blood.

{¶16} On Christmas Day, Benjamin Moisio was visiting his mother-in-law at the house next door to Mr. Post's residence. He told investigators that he observed a man leaving the Post residence around 3:30 p.m. He described the man at between 5'8" and 6' tall, 200 to 230 pounds, with no facial hair and wearing a baseball cap. He observed a blue, four-door sedan missing a hub-cap parked in the driveway. When shown the photo-array he chose number one (who was not Mr. Withrow), and stated that he was

75 to 80 percent sure it was the man he saw leaving the Post house. Although he denied seeing Jerry Post that day, it was pointed out to him that Jerry Post had called the police at 3:28 p.m. that afternoon, after discovering his son's body.

{¶17} The sheriff's deputies and fire department personnel arrived and began the process of assessing the scene, collecting evidence, and investigating the matter. Bloody footsteps were observed throughout the home, leading up the stairs to the bedroom and a gun rack, then across the hall to another bedroom, and finally down the steps through the living room and into the kitchen. The faucet was running in the kitchen, and the sink contained a bottle of dish soap, a hammer, and two knives. The sheriff's deputies observed Mr. Post lying face up, with a towel over his face. Mr. Post had sustained multiple stab wounds to the neck, chest, left hand, and fingers, and substantial and repeated blunt force trauma to his head.

Investigation Leads to Mr. Withrow

{¶18} Detective George Taylor Cleveland of the Ashtabula County Sheriff's Department headed up the investigation, which initially led the authorities to Mr. Post's good friend, Jonathan Lindgren. Mr. Lindgren told the authorities that he had received a call from Mr. Post on Christmas Eve, sometime between 7:30 and 9:30 p.m. Mr. Post put Mr. Withrow on the phone with Mr. Lindgren, who asked if Mr. Lindgren wanted to buy cocaine. Mr. Lindgren declined, and stated to police that this was the last contact he had with Mr. Post before his death.

{¶19} Armed with this information, the detectives went to Mr. Withrow's mother's home to speak to him, but he was not there. They later received a call from Mr. Withrow and returned to Mrs. Withrow's residence. Mr. Withrow stated that he had not

seen Mr. Post in a couple of days and had not spoken to him since Christmas Eve. When asked where he was Christmas Day, Mr. Withrow stated that he was at his mother's home between 1:00 and 3:00 p.m. The detectives did not observe any blood or injuries on Mr. Withrow at that time.

{¶20} Upon learning from another witness that Mr. Withrow had been at Mr. Post's home early Christmas morning with Kari Dennison and Darlene Lister, Detective Cleveland re-interviewed Mr. Withrow. Mr. Withrow continued to claim that he had last seen Mr. Post a few days prior to Christmas, and that he had last called him on Christmas Eve. However, when Detective Cleveland returned to Mr. Post's home, he listened to a message on the answering machine from Mr. Withrow, which was left at 6:45 a.m. on Christmas Day. The message stated that he hoped Mr. Post had fun with the girls last night. Detective Cleveland called Mr. Withrow and asked him to identify the girls he had referenced in the message, but Mr. Withrow told him he was unable to do so.

{¶21} Detective Cleveland returned to the Withrow residence to ask Mr. Withrow about the various inconsistencies. Mr. Withrow again stated that he had not been to Mr. Post's house in several days and had not called him since Christmas Eve. He told the detective that he used Kari Dennison's phone to place that call. Mr. Withrow was asked to call Ms. Dennison and see if she was home, but was instructed not to mention that the police were inquiring or planning to come to her home. As soon as Mr. Withrow got on the line, he stated, "It's Chris. Bill's dead. The police are here. I'm a suspect, and they want to talk to you about me being with you all last night." Detective Cleveland

grabbed the phone away, and testified that he believed Mr. Withrow was trying to establish an alibi with that statement to Ms. Dennison.

{¶22} Mr. Withrow was taken to the sheriff's department, where he was read his *Miranda* rights. On the way, Mr. Withrow admitted that he had lied about the last time he had contact with Mr. Post, fearing that he would be charged with a probation violation as a result of the drug use. Once *Mirandized*, Mr. Withrow stated that he and Kari Dennison had seen Mr. Post on Christmas Eve, but said that he left Mr. Post's home and went to Ms. Lister's apartment in order to arrange a sex for money agreement between her and Mr. Post. He confirmed that he, Ms. Lister, and Ms. Dennison did return to Mr. Post's house and took him to the bank.

{¶23} Mr. Withrow also told Detective Cleveland that he had spent Christmas Day at his mother's house, arriving at the mother of his children, Kelly Estep's, home around 11:00 a.m. He stated that they all went to his mother's home around 2:00 or 2:30 p.m. In his previous statements to the police, he had indicated that he arrived at his mother's home between 8:00 and 9:00 a.m. Further, Mr. Withrow told investigators that he had not changed his clothes or showered at Ms. Estep's prior to going to his mothers; however, a wet sweatshirt and pair of jeans belonging to Mr. Withrow were recovered from Ms. Estep's bedroom floor on the evening of December 25 when investigators searched her home. Although the wet clothing appeared to have stains resembling blood spatter on them, the Bureau of Criminal Investigations was unable to find Mr. Post's DNA.

{¶24} As a result of the investigation, the state filed an indictment in September 2010, charging Mr. Withrow with two counts of Aggravated Murder in violation of R.C.

2903.01, two counts of Murder in violation of 2903.02, and two counts of Aggravated Robbery in violation of R.C. 2911.01. Mr. Withrow pleaded not guilty to all charges, and filed a motion to suppress the photo-array identifications of Mrs. Bish, Mr. Rought, and Mr. Moisio, alleging that the procedures used were impermissibly suggestive. This motion to suppress was overruled in March 2011.

{¶25} The case was tried to a jury in September 2011, and Mr. Withrow was found guilty of one count of Aggravated Murder, two counts of Murder, and two counts of Aggravated Robbery. The parties stipulated that the offenses were allied offenses of similar import and would be merged for the purposes of sentencing. The trial court sentenced Mr. Withrow to life in prison with the possibility of parole after 30 years. Mr. Withrow timely filed an appeal and now brings the following assignments of error:

{¶26} "[1.] The Trial Court erred in not suppressing the pretrial identifications of Appellant."

{¶27} "[2.] The Trial Court Erred in allowing a member of law enforcement to render his opinion of the Appellant's truthfulness."

{¶28} "[3.] The verdict is against the manifest weight of the evidence and the sufficiency of the evidence."

Photo Identifications

{¶29} In his first assignment of error, Mr. Withrow argues that the trial court erred when it denied suppression of Mrs. Bish and Mr. Rought's photo identifications of Mr. Withrow. Because we find nothing impermissibly suggestive in the procedure used, the first assignment of error is without merit.

Standard of Review

{¶30} "At a hearing on a motion to suppress, the trial court functions as the trier of fact, and, therefore, is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of any witnesses." *State v. McGary*, 11th Dist. No. 2006-T-0127, 2007-Ohio-4766, ¶20, quoting *State v. Molek*, 11th Dist. No. 2001-P-0147, 2002-Ohio-7159, ¶24, citing *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). Thus, "[a]n appellate court must accept the findings of fact of the trial court as long as those findings are supported by competent, credible evidence." *Id.*, quoting *Molek* at ¶24, citing *State v. Retherford*, 93 Ohio App.3d 586, 592 (2d Dist.1994). *See also City of Ravenna v. Nethken*, 11th Dist. No. 2001-P-0040, 2002-Ohio-3129, ¶13. "After accepting such factual findings as true, the reviewing court must then independently determine, as a matter of law, whether or not the applicable legal standard has been met." *Id*.

Identifications Properly Admitted

{¶31} Identification testimony will be suppressed if a defendant demonstrates that the identification procedure used was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Manson v. Brathwaite*, 432 U.S. 98, 105, fn. 8, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), quoting *Simmons* v. *United States,* 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968). A suggestive or improper identification would be admissible, however, if the trial court finds it reliable after consideration of the totality of the circumstances. *Neil v. Biggers*, 409 U.S. 188, 197, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

{¶32} Once the defendant demonstrates, and the trial court finds, that the procedure used was both suggestive and unnecessary, then the trial court considers

Biggers' totality of the circumstances test. *State v. Brown*, 1st Dist. No. C-930217, 1994 Ohio App. LEXIS 3560 (Aug. 17, 1994).

{¶33} *"[R]eliability* is the linchpin in determining the admissibility of identification testimony * * *. The factors to be considered are set out in [*Biggers*]," and those factors are to be weighed against "the corrupting effect of the suggestive identification itself." (Emphasis added.) *Manson* at 114.

{¶34} In *Biggers,* the court gave five factors to be considered in determining whether the identification was reliable in light of a suggestive identification procedure: 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. *Biggers* at 199-200.

Burden of Proof

{¶35} It is well established that a defendant making an application to the trial court for an order pursuant to Crim. R. 47 ("Motion") has the initial burden which must be satisfied before the state's burden is invoked. *State v. Kuzma*, 11th Dist. No. 93-P-0019, 1993 Ohio App. LEXIS 5768, *4 (Dec. 3, 1993), citing *Xenia v. Wallace*, 37 Ohio St.3d 216 (1988).

{¶36} In *Xenia*, the Supreme Court of Ohio discussed the shifting of burdens as it relates to a challenge to a warrantless search or seizure. In that case, after the defendant was stopped by the police for speeding, he was asked to submit to a breathalyzer test. Even though the arrest report noted his strong odor of alcohol and failed sobriety test, the arresting officer did not testify to anything unusual or erratic

about the defendant's driving, nor the events recorded in the arrest report. On appeal, the defendant alleged a lack of probable cause for the administration of the test. The issue before the court was which party had the burden of going forward with evidence to show probable cause, or lack thereof, for the alleged warrantless search and seizure. As noted by the court, burden of proof includes the burden of going forward with evidence (or burden of production), and the burden of persuasion, and it was the first of these burdens the court addressed in the case. *Xenia* at 219.

{¶37} The Supreme Court of Ohio allocated the burden of proof between the defendant and the state in a motion to suppress evidence obtained pursuant to a warrantless search or seizure. The defendant assumes the initial burden to "(1) demonstrate the lack of a warrant, and (2) raise the grounds upon which the validity of the search or seizure is challenged in such a manner as to give the prosecutor notice of the basis for the challenge." *Xenia* at paragraph one of syllabus. Once a defendant has met that burden, the prosecutor then "bears the burden of proof, including the burden of going forward with evidence, on the issue of whether probable cause existed for the search or seizure." *Xenia* at paragraph two of syllabus.

{¶38} Although *Xenia* is an illegal search and seizure case, and not a challenged identification case, the manner of burden allocation should remain the same because the procedure for challenging admission of the evidence is the same. The existence of probable cause in a search case is rather analogous to the existence of reliability in an identification case (although the initial burden of establishing that a search was conducted without a warrant is easier to meet than establishing that a showup was impermissibly suggestive). Both provide for the admissibility of evidence that is

otherwise tainted. In a search case, pursuant to *Xenia*, if the defendant meets the burden of demonstrating that a search was performed without a warrant, the burden of proof then shifts to the state to establish probable cause and legitimize the evidence. Applying the same burden-shifting principle to an identification case, if the defendant meets the burden of demonstrating the identification was impermissibly suggestive, then the state bears the burden of demonstrating its reliability, despite the suggestive nature.

{¶39} Indeed, this court has recognized such a shift of burden in identification cases. In *State v. Perry*, 11th Dist. No. 2002-T-0035, 2003-Ohio-7204, our court applied the *Xenia* principle of burden shifting, without expressly stating so, in the context of a challenge to an identification procedure. In *Perry*, we began with the recognition that the burden is on the defendant, as the party raising the challenge, to prove the inadmissibility of the identification evidence under the two-part *Biggers* test. *Perry* at ¶15. Without expressly stating so, we then applied the *Xenia* principle to the two-part *Biggers* test: "[i]f the defendant fails to satisfy the first part of this burden, neither the trial court nor an appellate court need consider the totality of the circumstances. However, if the defendant satisfies his initial burden of proof, the burden of persuasion falls upon the state to show that the evidence is valid." *Id.*, citing *Kuzma* at *5, quoting *State v. Hensley*, 75 Ohio App.3d 822, 829 (3d Dist.1992), citing *Xenia*. We reaffirmed the burden shifting in a subsequent identification case, *State v. Elersic*, 11th Dist. No. 2002-L-172, 2004-Ohio-5301, ¶88-90.

{¶40} In keeping with this general procedural framework for consideration of Crim. R. 47 suppression motions, and the doctrine of burden of proof, other courts have also articulated this burden shift in the context of identifications. The Sixth District, in

State v. Mominee, 6th Dist. No. OT-84-14, 1984 Ohio App. LEXIS 11418 (Nov. 9, 1984), explained, "[o]nly if a due process violation is first shown, does the burden of proof with respect to the identification procedure shift to the prosecution to demonstrate by clear and convincing evidence that the witness' identification is an untainted, independent recollection of the perpetrator." *Id*. at *2, citing *United State v. Wade*, 388 U.S. 218, 240, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

{¶41} As a result, we clarified our position in *State v. Stetz*, 11th Dist. No. 2011-A-0008, 2011-Ohio-6516, holding that "in a challenge to identification evidence, the initial burden is on the defendant to demonstrate that the [procedure] was impermissibly suggestive and unnecessary. If the defendant fails to satisfy the first part of this burden, neither the trial court nor an appellate court need consider the totality of the circumstances. However, if the defendant satisfies his initial burden of proof, the burden of proof shifts to the state to demonstrate that, under the totality of the circumstances set forth in *Biggers*, the identification was reliable even though the confrontation procedure was suggestive." *Id.* at ¶24

Identification Procedures Were Not Impermissibly Suggestive

{¶42} During the suppression hearing and now before this court, Mr. Withrow has been unable to demonstrate how the photo identification procedures used by the Ashtabula County Sheriff's Department were impermissibly suggestive. A review of the record reveals that each witness provided a prior description to the police before participating in the photo-array process. Furthermore, each photo-array consisted of photographs selected based on their similarity to Mr. Withrow's appearance, reducing the likelihood the witnesses would choose Mr. Withrow's picture because it was the only

one that even remotely resembled their descriptions and his actual appearance. Lastly, Mr. Moisio's identification was not used by the state at trial, and, based upon the description and timing of Mr. Moisio's observations, it is apparent he was describing Jerry Post and not Mr. Withrow.

{¶43} The only argument Mr. Withrow makes regarding the initial impermissible suggestiveness of the procedure is that the state did not follow the requirements of R.C. 2933.83. He suggests that although this statute was not in effect at the time of the identifications in his place, the state should have utilized such procedures. He argues that because the legislature passed R.C. 2933.83 specifically to combat the previous prevalence of impermissibly suggestive identification procedures, any identifications not conducted in compliance with the statute are inherently suggestive.

{¶44} R.C. 2933.83 became effective on July 6, 2010, after the identifications in this case were completed. Because R.C. 2933.83 did not control identification procedures at the time, we cannot hold the Ashtabula County Sheriff's Department accountable for failing to follow procedures which were not yet in effect. *See State v. Humberto*, 196 Ohio App.3d 230, 2011-Ohio-3080 (10th Dist.). Furthermore, Mr. Withrow is unable to direct us to a specific example, supported by case law, of how the identifications in his case were conducted in a suggestive manner.

{¶45} Because we find that the identification procedures were not conducted in an impermissibly suggestive manner, our analysis ends and we do not continue on to the *Biggers* factors. Assignment of error one is without merit.

Law Enforcement Testimony as to Mr. Withrow's Truthfulness

{¶46} In his second assignment of error, Mr. Withrow argues that the trial court erred when it permitted Detective Cleveland to give his opinion of Mr. Withrow's truthfulness, compounding the error by failing to strike the statement from the record and issue a curative instruction. Although we agree that the Detective's opinion testimony as to Mr. Withrow's truthfulness should not have been permitted, we find no prejudice as a result and, therefore, find the second assignment of error is without merit.

{¶47} "A police officer's opinion that an accused is being untruthful is inadmissible. See *State v. Potter,* Cuyahoga App. No. 81037, 2003 Ohio 1338, P 39 (officer's testimony that defendant's version of events was untruthful was improper); *State v. Miller* (Jan. 26, 2001), Montgomery App. No. 18102, 2001 Ohio App. LEXIS 230, 2001 WL 62793, *5; see also *State v. Boston* (1989), 46 Ohio St.3d 108, 129, 545 N.E.2d 1220 (an expert may not express opinion of a child declarant's veracity)." *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶122. Because "'jurors are likely to perceive police officers as expert witnesses, especially when such officers are giving opinions about the present case based upon their perceived experiences with other cases,' an officer may not testify regarding the veracity of a witness' statement." *State v. Root*, 11th Dist. No. 2003-A-0043, 2004-Ohio-2439, ¶31, quoting *Potter* at ¶38-39.

{¶48} If overwhelming evidence exists to support the defendant's conviction, however, then the error shall be deemed harmless. CrimR. 52(A). "Under Evid.R. 103(A) and Crim.R. 52(A), error is harmless unless substantial rights of the defendant are affected." *State v. Hutson*, 11th Dist. No. 2007-P-0026, 2008-Ohio-2315, ¶19, citing *State v. Hicks*, 6th Dist. No. L-83-074, 1991 Ohio App. LEXIS 3856, *13 (Aug. 16, 1991).

{¶49} The test is whether "there is substantial evidence to support the guilty verdict even after the tainted evidence is cast aside." *Id*. at ¶20, quoting *State v. Cowans*, 10 Ohio St.2d 96, 104 (1967).

{¶50} "The Ohio test * * * for determining whether admission of * * * erroneous evidence is harmless non-constitutional error requires the reviewing court to look at the whole record, leaving out the disputed evidence, and then to decide whether there is other substantial evidence to support the guilty verdict. If there is substantial evidence, the conviction should be affirmed, but if there is no other substantial evidence, then the error is not harmless and a reversal is mandated." *Id*. at ¶21, quoting *State v. Davis*, 44 Ohio App.2d 335, 347 (8th Dist.1975).

{¶51} A review of the record reveals that, even without Detective Cleveland's statements regarding Mr. Withrow's truthfulness, more than enough evidence exists to support the jury's conviction. The evidence in support of conviction will be discussed in more detail below in conjunction with the third assignment of error. Because the trial court's error was harmless and did not affect the outcome of Mr. Withrow's case, we find the second assignment of error to be without merit.

Sufficiency and Manifest Weight of the Evidence

{¶52} In his third assignment of error, Mr. Withrow challenges the sufficiency and manifest weight of the evidence against him. Because we find that the jury's conviction was supported by the evidence, the third assignment of error is without merit.

Standard of Review

{¶53} A trial court shall grant a motion for acquittal when there is insufficient evidence to sustain a conviction. Crim.R. 29(A). When reviewing a challenge of the

sufficiency of the evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, (1991), paragraph two of the syllabus. "The pertinent 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." *Id*.

{¶54} A sufficiency challenge requires this court to review the record to determine whether the state presented evidence on each of the elements of the offense. This test involves a question of law and does not permit us to weigh the evidence. *State v. Martin*, 20 Ohio App.3d 172, 175 (1983).

{¶55} "Unlike sufficiency of the evidence**,** manifest weight of the evidence raises a factual issue. 'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the jury 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. Higgins*, 11th Dist. No. 2005-L-215, 2006-Ohio-5372, ¶35, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997).

{¶56} "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Fritts*, 11th Dist. No. 2003-L-026, 2004-Ohio-3690, ¶23, citing *Martin* at 175.

{¶57} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. When examining witness credibility, "the choice

between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan*, 22 Ohio St.3d 120, 123 (1986). A fact finder is "free to believe all, some, or none of the testimony of each witness appearing before it." *State v. Thomas*, 11th Dist. No. 2004-L-176, 2005-Ohio-6570, ¶29.

{¶58} "When reviewing a judgment under a manifest-weight-of-the-evidence standard, a court has an obligation to presume that the findings of the trier of fact are correct. * * * This presumption arises because the trial judge had an opportunity to view the witnesses and observe their demeanor in weighing the credibility of the witnesses." *State v. Reeves*, 11th Dist. No. 2006-T-0099, 2007-Ohio-4765, ¶14, citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 79-81 (1984).

{¶59} In his brief, Mr. Withrow only appears to argue that the manifest weight of the evidence does not support a conviction. He fails to articulate in any significant way a sufficiency of the evidence argument, and is unable to identify any element of the offense for which the state failed to submit evidence to the jury. Therefore, we only review the record under a manifest weight standard.

The Jury's Verdict is Supported by the Manifest Weight of the Evidence

{¶60} A review of the sizeable record reveals that the state presented competent and credible evidence to support the jury's conviction. Although no physical evidence exists to tie Mr. Withrow to Mr. Post's murder, substantial testimonial and circumstantial evidence exists to justify the jury's verdict.

{¶61} In addition to evidence from various crime scene investigators, evidence technicians, sheriff's deputies regarding the crime scene, the state of Mr. Post's body,

and the causes of death (which was ruled a homicide), and Mr. Schick's testimony regarding Mr. Withrow's admission to him upon exiting Mr. Post's home that he had killed Mr. Post, the blood he observed on Mr. Withrow's wrist and one of the two $20 bills Mr. Withrow passed on to Ms. Lister, and Mr. Withrow's expression of interest in burning the house down or cleaning up the scene, the state presented a number of other witnesses to support conviction.

{¶62} Mr. Rought and Mrs. Bish both took the stand and identified Mr. Withrow as the man they saw at Mr. Post's house around 12:00 or 12:30 p.m. on Christmas Day. Both of their in-court identifications were supported by prior identifications of Mr. Withrow from photo-arrays.

{¶63} In addition, the state presented testimony from Cary Dent, a fellow inmate of Mr. Withrow at the Ashtabula County Jail. Mr. Dent testified that he had been involved in a number of discussions with Mr. Withrow regarding fingerprint evidence and the death penalty. Mr. Withrow's cell-mate at Lorain Correctional Institution, John Tichenor, testified that he observed Mr. Withrow repeatedly experiment to see if fingerprints would wash off various surfaces with water. This testimony complimented testimony by detectives and crime scene investigators that a knife and hammer consistent with the injuries inflicted upon Mr. Post were submerged under running water in the sink. The Bureau of Crime Scene Investigation was unable to retrieve adequate fingerprints from the knife or hammer in order to make an identification.

{¶64} The state also offered Mr. Dyer's testimony regarding the gun Mr. Withrow had left with him, which he then passed off to his girlfriend's mother in Michigan. Detective Ward of the Ashtabula County Sheriff's Office testified that he recovered a

gun from the Pontiac, Michigan police department that was discovered to have been taken from Mr. Post's residence and believed to be the same gun Mr. Withrow delivered to Mr. Dyer.

{¶65} All of the state's evidence was coupled with substantial inconsistencies in Mr. Withrow's statements to the authorities, and his eventual admission that he had lied to them regarding the last time he had had contact with Mr. Post.

{¶66} Although Mr. Withrow offered up a number of witnesses in his defense, including friends and family who testified that he appeared and acted quite normal throughout Christmas Day, or that they had been with him at the time Mr. Rought and Mrs. Bish observed a man resembling him in the vicinity of Mr. Post's home, and emphasized the lack of any physical evidence tying him to the crime, it is clear that the jury found the state's evidence overwhelmingly convincing and its witnesses more credible.

{¶67} Mr. Withrow emphasizes in his brief the lack of physical evidence connecting him to the crime. The state, however, presented substantial testimony to explain why physical evidence was unobtainable. This included testimony by Lisa Przepyszny, a forensic scientist at the Cuyahoga County Coroner's office, who testified that the material on the handle of the knife found in Mr. Post's sink was not a good surface for retrieving fingerprints. She also stated that washing clothing would degrade any DNA present on them. This was coupled with evidence from the investigators that they had retrieved sopping wet clothing of Mr. Withrow's from Ms. Estep's floor that appeared to have blood spatter on them.

{¶68} Despite the circumstantial nature of much of the evidence against Mr. Withrow, the state presented substantial evidence to support his conviction. We cannot say that the jury lost its way in finding Mr. Withrow guilty of the murder of Mr. Post. Thus, we affirm the judgment of the Ashtabula County Court of Common Pleas.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.