[Cite as *State v. Norman*, 2009-Ohio-5458.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

State of Ohio,	:	
Plaintiff-Appellee,	:	Case Nos. 08CA3059, 08CA3066
v.	:	
Brian M. Norman,	:	**DECISION AND JUDGMENT ENTRY**
Defendant-Appellant.	:	Filed-stamped date: 10-8-09

APPEARANCES:

Eric J. Allen, Columbus, Ohio, for appellant, and Brian M. Norman, pro se.

Michael M. Ater, Ross County Prosecutor, and Richard W. Clagg, Ross County Assistant Prosecutor, Chillicothe, Ohio, for appellee.

Kline, P.J.:

{¶1} Brian M. Norman (hereinafter "Norman") appeals the judgment of the Ross County Court of Common Pleas. The trial court found Norman guilty of Aggravated Robbery in violation of R.C. 2911.01(A). On appeal, Norman contends that his indictment is defective because it did not include the culpable mental state for the offense of aggravated robbery. We disagree. The offense of Aggravated Robbery requires no intent beyond that required for the theft offense. Therefore, Norman's indictment was not defective for failing to state an additional mens rea element. Next, Norman contends that the trial court erred by overruling his motion to suppress DNA evidence. Norman argues that there was no probable cause to support a search warrant for the collection of Norman's DNA.

We disagree. The affidavit submitted in support of the search warrant clearly supported a finding of probable cause. Next, Norman contends that the trial court erred by failing to grant his motion to replace counsel. We disagree. First, Norman based this motion, in part, on his attorney's failure to raise a meritless issue. And second, Norman did not meet his burden in establishing the need for new trial counsel. Therefore, the trial court did not abuse its discretion by denying Norman's motion to replace counsel. Next, Norman contends that the trial court erred in allowing the victim to testify about a photographic lineup. We disagree. The evidence was clearly relevant and not unfairly prejudicial to Norman. Next, Norman contends that the jury's verdict form is defective because it does not contain either the degree of the offense or any aggravating elements. We disagree. Aggravated Robbery under R.C. 2911.01 does not have multiple degrees of seriousness. Therefore, Norman's verdict form does not have to include the degree of the offense or any aggravating elements to justify a conviction for Aggravated Robbery. Next, Norman contends that he received ineffective assistance of counsel. We disagree because (1) Norman's counsel engaged in sound trial strategy and (2) the failure to raise meritless issues does not constitute ineffective assistance of counsel. Next, Norman contends that he did not have a fair and impartial jury. We disagree because the record does not support any of Norman's arguments. Next, Norman contends that the trial court erred by admitting evidence of a DNA match during the suppression hearing. We disagree. Norman's argument has no merit because the rules of evidence do not apply to suppression hearings. Finally, Norman contends that (1) that there was

insufficient evidence to support his conviction and (2) that his conviction was against the manifest weight of the evidence. We disagree. First, we believe that any rational trier of fact could have found the essential elements of aggravated robbery proven beyond a reasonable doubt. And second, we find substantial evidence upon which the jury could have reasonably concluded that all the elements of aggravated robbery were proven beyond a reasonable doubt. Accordingly, we overrule all of Norman's assignments of error and affirm the judgment of the trial court.

I.

{¶2} The victim worked as a shift manager at a Wendy's restaurant. On October 26, 2006, at approximately 2:30 a.m., the victim was at Ross County Bank to make the nightly deposit from her shift. She carried the nightly deposit in a moneybag, and an individual (hereinafter the "Assailant") approached her as she attempted to make the deposit. According to the victim, the Assailant was a large man with an awkward gait. The victim further testified that the Assailant was carrying a crowbar (actually a "tire iron") and wearing a Halloween mask that covered his face.

{¶3} The Assailant ran towards the victim and yelled, "Give me your money." At this point, the victim tried to get back inside her car, but the Assailant moved in between the car door and the seat. A struggle ensued between the victim and the Assailant. During the struggle, the victim removed the Assailant's mask. However, because the Assailant continued to cover his face with his

sweatshirt, the victim never saw the front of the Assailant's face. The Assailant fled the scene after gaining control of the moneybag.

{¶4} After the Assailant fled the scene, the victim got into her car, honked the horn, and screamed for help. The victim then ran into the middle of the street to try and flag somebody down. No cars drove by, so she returned to her car. At that time, the victim noticed the Assailant's tire iron lying on the ground. She used the Assailant's Halloween mask to pick up the tire iron and kept both the mask and the tire iron in her hand as she drove across the street to a gas station.

{¶5} Eventually, Chillicothe police officers arrived at the gas station, met with the victim, and took possession of the mask and tire iron. Shortly thereafter, the Chillicothe Police Department sent the mask and tire iron to the Ohio Attorney General's Bureau of Criminal Identification and Investigation (hereinafter "Ohio BCI" or "BCI") for testing. The tests revealed the presence of DNA evidence, but Ohio BCI could not match the DNA profiles to any specific individual. (Ohio BCI found only one DNA profile on the tire iron, but the Halloween mask contained DNA from multiple individuals.)

{¶6} After being convicted of an unrelated crime, Norman was incarcerated at the Ross County Correctional Institution and had to submit his DNA profile to the Combined DNA Index System (hereinafter "C.O.D.I.S."). In November 2007, somebody from Ohio BCI called Chillicothe Police Detective Shawn Rourke about a DNA match in the October 26, 2006 robbery. Detective

Rourke learned that C.O.D.I.S. had matched the DNA profile from the tire iron to the DNA profile of Norman.

{¶7} Detective Rourke obtained a search warrant and swabbed Norman's mouth for additional DNA evidence. Additional testing by Ohio BCI revealed that the DNA profile from Norman's swab matched the DNA profile from the tire iron and one of the DNA profiles from the Halloween mask.

{¶8} Around the same time that Detective Rourke obtained the search warrant, he also made contact with the victim. Detective Rourke showed the victim several photographs (hereinafter the "photo lineup"), including a photograph of Norman. The victim recognized Norman as a former Wendy's employee. The victim also remembered that Norman had the same build, hair color, and "awkward gait" as the Assailant.

{¶9} On February 29, 2008, a Ross County Grand Jury indicted Norman for Aggravated Robbery in violation of R.C. 2911.01(A). In relevant part, the indictment provides: "That Brian M. Norman, on or about the 26th day of October, 2006, in the County of Ross aforesaid did in attempting or committing a theft offense as defined in Section 2913.01 of the Ohio Revised Code or in fleeing immediately after the attempt or offense, have a deadly weapon as defined in Section 2923.11 of the Ohio Revised Code on or about his person or under his control and displayed the weapon, brandished it, indicated that he possessed it or used said weapon, in violation of Section 2911.01 of the Ohio Revised Code, and against the peace and dignity of the State of Ohio."

{¶10} The trial court appointed a public defender for Norman. Before trial, Norman wanted his attorney to file a motion to suppress the DNA evidence. However, Norman's attorney apparently thought that Norman's proposed motion to suppress was frivolous. As a result, Norman's attorney did not want to file the proposed motion. Because of this disagreement, Norman filed (1) his own pro se motion to suppress the DNA evidence and (2) a motion to replace his attorney and appoint new trial counsel.

{¶11} The trial court addressed both of Norman's pro se motions during a hearing conducted the morning of Norman's trial. At that hearing, the trial court first overruled Norman's motion to replace counsel. Norman's attorney then agreed to adopt the motion to suppress and, in arguing that motion, called Detective Rourke as a witness. Rourke testified that he received a call from Ohio BCI about the DNA match and, based on that phone call, obtained the search warrant the following day. However, Rourke could not remember the name of the Ohio BCI representative who called him with the information. Rourke further testified that he received a written C.O.D.I.S. report as a follow-up to the telephone call. At the close of the hearing, the trial court denied Norman's motion to suppress. Sometime thereafter, Norman agreed to proceed to trial with his appointed counsel.

{¶12} The prosecution called the victim, Detective Rourke, and several other witnesses to testify. One of those witnesses was the forensic scientist who performed the DNA testing on the mask, the tire iron, and Norman's oral swab. Norman presented no evidence in his own defense.

{¶13} The jury found Norman guilty of Aggravated Robbery in violation of R.C. 2911.01(A), and the trial court sentenced Norman to five years in prison.

{¶14} Norman appealed his guilty verdict, and Norman's appellate attorney filed a brief with six assignments of error. Subsequently, Norman filed a supplemental pro se brief with three additional assignments of error. Although not a common practice, we agreed to consider Norman's supplemental pro se brief in the interest of justice.

{¶15} In the brief submitted by his attorney, Norman asserts the following six assignments of error: I. "THE INDICTMENT IN THIS MATTER FAILS TO STATE A MENTAL STATE IN CONTRAVENTION OF THE OHIO STATE SUPREME COURT RULING IN STATE V COLON [sic] I AND II." II. "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO REPLACE COUNSEL." III. "THE TRIAL COURT ERRED IN OVERRULING APPELLANTS [sic] MOTION TO SUPPRESS." IV. "THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING TESTIMONY REGARDING AN IRRELEVANT POLICE LINEUP." V. "THE TRIAL COURT ERRED BY USING VERDICT FORMS THAT FAILED TO INCLUDE A MENTAL STATE." And, VI. "APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT TO THE FEDERAL CONSTITUTION APPLIED TO THE STATES BY THE FOURTEENTH AMENDMENT." In his supplemental pro se brief, Norman asserts the following three assignments of error: I. "THE TRIAL COURT ERRED BY DENYING THE APPELLANT HIS RIGHT TO A FAIR IMPARTIAL JURY, VIOLATING HIS 6TH

AMENDMENT RIGHT TO THE U.S. CONST. AND ART. 1 SEC. 5 OF THE OHIO CONST. TRIAL COURT ALSO VIOLATED APPELLANTS [sic] 5TH AND 14TH AMENDMENTS TO THE U.S. CONST. AND ART. 1 SEC. 16 OF THE OHIO CONST. DUE PROCESS OF LAW." II. "THE TRIAL COURT ABUSED IT'S [sic] DISCRETION WHEN THEY [sic] ADMITTED EVIDENCE THAT WAS INADMISSABLE PURSUANT TO THE RULES OF EVIDENCE AND THIS ADMISSION PREJUDICE [sic] THE APPELLANT DEPRIVING HIM OF HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL." And, III. "THE JURY VERDICT WAS AGAINST THE MANIFEST WEIGHT OF EVIDENCE AND WAS CONSTITUTIONALLY INSUFFICIENT TO SUSTAIN A GUILTY VERDICT, VIOLATING FEDERAL SUFFICIENTCY [sic] LAWS AND DUE PROCESS LAWS."

II.

{¶16} In his first assignment of error, Norman contends that his indictment is defective because it did not include the culpable mental state for the offense of aggravated robbery. In support of his argument, Norman cites *State v. Colon,* 118 Ohio St.3d 26, 2008-Ohio-1624. In *Colon*, the Supreme Court of Ohio held that "[w]hen an indictment fails to charge a mens rea element of a crime and the defendant fails to raise that defect in the trial court, the defendant has not waived the defect in the indictment." Id. at syllabus. However, we find no merit in Norman's argument because his indictment is not defective and, therefore, the holding in *Colon* does not apply to the present case.

{¶17} The Supreme Court of Ohio recently rejected Norman's exact argument in *State v. Lester*, Slip Opinion No. 2009-Ohio-4225. In *Lester*, "the First District Court of Appeals reversed [the defendant's] aggravated-robbery conviction based on its conclusion that [the defendant's] indictment was defective for failing to allege a mens rea element for the aggravated-robbery charge." Id. at ¶6. The parties in *Lester* "disagree[d] whether the state is required to charge any mens rea for the element of displaying, brandishing, indicating possession of, or using a deadly weapon in the aggravated-robbery statute. The state argue[d] that the statute imposes strict liability for that element, and thus no mens rea must be charged, while [the defendant] argue[d] that the state must charge that a defendant acted recklessly." Id. at ¶10.

{¶18} On appeal, the Supreme Court of Ohio reinstated the defendant's conviction and found "that the General Assembly, by not specifying a mens rea in R.C. 2911.01(A)(1), plainly indicated its purpose to impose strict liability as to the element of displaying, brandishing, indicating possession of, or using a deadly weapon." Id. at ¶32. As a result, the *Lester* Court held "that the state is not required to charge a mens rea for this element of the crime of aggravated robbery under R.C. 2911.01(A)(1)." Id. at ¶33. (Before *Lester*, this court rejected Norman's exact argument in *State v. Haney*, 180 Ohio App.3d 554, 2009-Ohio-149.)

{¶19} Because of the recent *Lester* decision, we find that Norman's indictment is not defective and, therefore, the holding in *Colon* does not apply to the present case. Accordingly, we overrule Norman's first assignment of error.

III.

{¶20} The resolution of Norman's third assignment of error affects our analysis of his second assignment of error. Therefore, we will address Norman's third assignment of error out of order. In his third assignment of error, Norman contends that the trial court erred by overruling his motion to suppress the DNA evidence. Essentially, Norman argues that Detective Rourke did not have probable cause to obtain the search warrant for the collection of Norman's DNA.

{¶21} At the trial court level, Norman argued that Detective Rourke falsified the search warrant's supporting affidavit. But on appeal, Norman for the first time argues that Detective Rourke did not have probable cause because he "can't say if it was the janitor or the scientist who provided the information to him and whether or not that person was authorized to give said information." Defendant-Appellant's Amended Merit Brief at 8. "Generally, a party cannot assert new legal theories for the first time on appeal." *State v. Landrum* (2000), 137 Ohio App.3d 718, 722, citing *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43; see, also, *State v. Smith*, Trumbull App. No. 2007-T-0076, 2008-Ohio-1501, at ¶16; *State v. Pigg,* Scioto App. No. 04CA2947, 2005-Ohio-2227, at ¶34; *State v. Kemper*, 158 Ohio App.3d 185, 2004-Ohio-4050, at ¶19; *State v. Perkins* (2001), 145 Ohio App.3d 583, 586. Therefore, except for plain error, Norman has forfeited his right to raise this issue for the first time here. See, e.g., *Pigg* at ¶34.

{¶22} Pursuant to Crim.R. 52(B), we may notice plain errors or defects affecting substantial rights. "Inherent in the rule are three limits placed on

reviewing courts for correcting plain error." *State v. Payne* (2007), 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶15. "First, there must be an error, *i.e.*, a deviation from the legal rule. * * * Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. * * * Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." Id. at ¶16, quoting *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, (omissions in original). We will notice plain error "only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of syllabus. And "[r]eversal is warranted only if the outcome of the trial clearly would have been different absent the error." *State v. Hill* (2001), 92 Ohio St.3d 191, 203.

{¶23} For the following reasons, we do not believe the trial court committed any error, let alone plain error, by denying Norman's motion to suppress.

{¶24} Appellate review of a decision on a motion to suppress evidence presents mixed questions of law and fact. See *State v. McNamara* (1997), 124 Ohio App.3d 706, 710, citing *United States v. Martinez* (C.A.11 1992), 949 F.2d 1117, 1119. See, also, *State v. Hurst*, Washington App. No. 08CA43, 2009-Ohio-3127, at ¶57. At a suppression hearing, the trial court assumes the role of trier of fact, and as such, is in the best position to resolve questions of fact and evaluate witness credibility. See *State v. Carter* (1995), 72 Ohio St.3d 545, 552. A reviewing court must accept a trial court's factual findings if they are supported

by some competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594; *Hurst* at ¶57. The reviewing court then applies the factual findings to the law regarding suppression of evidence. An appellate court reviews the trial court's application of the law de novo. *State v. Anderson* (1995), 100 Ohio App.3d 688, 691; *Hurst* at ¶57.

{¶25} The Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution provide the "[t]he right of the people to be secure * * * against unreasonable searches and seizures * * *." Both constitutional provisions further provide that "no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

{¶26} Probable cause is a lesser standard of proof than that required for a conviction, such as proof beyond a reasonable doubt or by a preponderance of the evidence. *State v. Young* (2001), 146 Ohio App.3d 245, 254, citing *State v. George* (1989), 45 Ohio St.3d 325, 329; *Illinois v. Gates* (1983), 462 U.S. 213, 235. Probable cause only requires the existence of circumstances that warrant suspicion. *Young* at 254. Thus, "the standard for probable cause requires only a showing that a probability of criminal activity exists, *not* a prima facie showing of criminal activity." Id., citing *George* at 329. "Hearsay may serve as the basis for the issuance of a warrant as long as there is a substantial basis for crediting the hearsay." *State v. Underwood,* Scioto App. No. 03CA2930, 2005-Ohio-2309, at ¶16, citing *United States v. Ventresca* (1965), 380 U.S. 102, 108.

{¶27} Crim.R. 41(C) provides the procedure for issuing a search warrant. In deciding whether to issue a search warrant, the issuing magistrate must scrutinize the affidavit in support of the warrant. Then the magistrate must make a practical, common sense decision, given all the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, whether "'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *George* at paragraph one of syllabus, quoting *Gates* at 238-239.

{¶28} "In deciding whether an affidavit submitted in support of a search warrant sufficiently supports a finding of probable cause, a reviewing court must give great deference to the issuing magistrate's determination." *State v. Oros*, Pickaway App. No. 07CA30, 2008-Ohio-3885, at ¶18, citing *George* at paragraph two of the syllabus. "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *Ventresca* at 109.

{¶29} Here, we find that Detective Rourke's affidavit supports a finding of probable cause. In relevant part, the affidavit states the following: "The tire tool and mask were collected as evidence and submitted to OHIO BCI for analysis. A DNA profiled was established from the tire tool and entered into CODIS, a DNA database. On 11/26/07 Ohio BCI notified detective that a hit was received on the profile to Brian M. Norman * * *, who is currently incarcerated at

Chillicothe Correctional Institute. Detective is seeking to personally obtain oral swabs from Brian Norman to confirm the DNA match."

{¶30} This is not one of the difficult cases contemplated by *Ventresca*. On the contrary, it would be hard to find a more clear-cut case of an affidavit supporting probable case. In his affidavit, Detective Rourke stated that a division of the Ohio Attorney General's Office (Ohio BCI) notified him that Norman's DNA profile matched the DNA profile linked to the robbery. Therefore, the affidavit clearly establishes circumstances that warrant suspicion. And Norman's highly speculative arguments about BCI and Detective Rourke fall far short of demonstrating any error, let alone plain error, in the trial court's denial of Norman's motion to suppress.

{¶31} Accordingly, we overrule Norman's third assignment of error.

IV.

{¶32} We now address Norman's second assignment of error. Norman contends that the trial court erred by failing to grant his motion to replace counsel. Additionally, Norman argues that the trial court did not make any "real inquiry" into the reasons for Norman's motion.

{¶33} We will not reverse a trial court's decision to deny a criminal defendant's motion for new counsel absent an abuse of discretion. See *State v. Jones* (2001), 91 Ohio St.3d 335, at 343; *Harmon* at ¶33-35; *Perkins* at ¶18. "An abuse of discretion involves more than an error of judgment or law; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable." *State v. Voycik*, Washington App. Nos. 08CA33, 08CA34,

2009-Ohio-3669, at ¶13, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶34} "The Sixth Amendment to the United States Constitution, and Section 10, Article 1 of the Ohio Constitution guarantee the right to assistance of counsel in all criminal prosecutions that may result in jail sentences." *State v. Wilkerson*, Pike App. Nos. 06CA749, 06CA750, 06CA751, 2008-Ohio-398, at ¶9. However, "a defendant's right to retain counsel of his own choosing is not an unqualified right." *State v. Perkins*, Montgomery App. No. 21515, 2007-Ohio-136, at ¶18, citing *State v. Keenan* (1998), 81 Ohio St.3d 133, 137. "A defendant bears the burden to provide grounds for the appointment of new counsel." *State v. Harmon*, Pickaway App. No. 04CA22, 2005-Ohio-1974, at ¶33. And "[i]f a defendant alleges facts which, if true, would require relief, the trial court must inquire into the defendant's complaint and make that inquiry part of the record." Id., citing *State v. Bomar* (Oct. 23, 2000), Scioto App. No. 00CA2703, unreported.

{¶35} "Factors to consider in deciding whether a trial court erred in denying a defendant's motion to substitute counsel include the timeliness of the motion; the adequacy of the court's inquiry into the defendant's complaint; and whether the conflict between the attorney and client was so great that it resulted in a total lack of communication preventing an adequate defense. * * * In addition, courts should balanc[e] the accused's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice." *Jones* at 342-343 (citations omitted).

{¶36} Here, we cannot find that the trial court abused its discretion by denying Norman's motion to replace counsel. Norman wanted to replace his trial counsel because that attorney did not want to file the aforementioned motion to suppress. Furthermore, Norman believed that his trial counsel did not want to file the motion to suppress because that attorney had a bias in favor of the police. The trial court judge discussed these issues at the hearing conducted on the morning of Norman's trial.

{¶37} "Mr. Norman: * * * As you can see on my -- memorandum, I added a -- affidavit which clearly states that -- you know, that my counsel is in ineffective -- my counsel has been ineffective. He has refused to file a motion to suppress legally seized evidence in a search warrant, which I have filed pro se -- myself --

{¶38} * * *

{¶39} The Court: Okay. Well that's -- anything else other than his failure to -- alleged failure to file this motion to suppress.

{¶40} Mr. Norman: Well -- that right there is -- you know, makes him biased to my -- to my -- trial your honor.

{¶41} The Court: No. That's incorrect Mr. Norman. First of all under the laws of this state and attorney is not required to do a useless thing. * * *.

{¶42} * * *

{¶43} [Trial Counsel]: * * * I -- I should -- offer to the court on the record some information. Mr. Norman -- I -- I don't want to put words in his mouth, but he appears to be of the opinion that I have a bias in favor of police. He has –

{¶44} The Court: -- Well there is -- he --

{¶45} [Trial Counsel]: -- suggested to me --

{¶46} The Court: -- based on -- based on the motion to suppress, which you don't have to file anyway because there's no basis for it. * * *."

{¶47} Motions to Suppress and Appoint New Attorney Transcript at 5-7.

{¶48} Initially, based on the foregoing discussion, we find that the trial court adequately inquired into the reasons for Norman's motion to replace counsel. Moreover, we agree that a "defense attorney is not required to raise meritless issues." *State v. Alvarado*, Putnam App. No. 12-07-14, 2008-Ohio-4411, at ¶41 (internal quotation omitted). See, also, *State v. Hill* (1996), 75 Ohio St.3d 195, 211; *State v. Robinson* (1996), 108 Ohio App.3d 428, 433. We have already found that Norman's motion to suppress had no merit. Therefore, to the extent that Norman based his motion to replace counsel on his attorney's failure to file the motion to suppress, we cannot find that the trial court abused its discretion by denying Norman's motion to replace counsel. See, e.g., *State v. Loveless*, Jefferson App. No. 05-JE-60, 2007-Ohio-1560, at ¶51 (finding that "[t]rial counsel's failure to file these frivolous motions does not show a complete breakdown of communication between client and counsel"). Furthermore, at the trial court level, Norman based his motion to suppress on the wholly unsubstantiated claim that Detective Rourke had falsified his affidavit. We cannot infer any bias in favor of the police simply because Norman's trial counsel did not want to make reckless allegations against Detective Rourke. As such, in

regards to his attorney's alleged bias, Norman did not meet his burden in establishing the need for new trial counsel.

{¶49} Accordingly, for the foregoing reasons, we overrule Norman's second assignment of error.

V.

{¶50} In his fourth assignment of error, Norman contends that the trial court erred in allowing the victim to testify about the photo lineup. Initially, Norman argues that this evidence was irrelevant. Norman further argues that, even if the evidence was relevant, it was unfairly prejudicial.

{¶51} A trial court has broad discretion in the admission or exclusion of evidence, and so long as such discretion is exercised in line with the rules of procedure and evidence, its judgment will not be reversed absent a clear showing of an abuse of discretion with attendant material prejudice to defendant. *State v. Powell,* 177 Ohio App.3d 825, 2008-Ohio-4171, at ¶33. When applying the abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶52} Here, we find that the trial court did not abuse its discretion by allowing the victim to testify about the photo lineup. Initially, we agree with the trial court and find that the victim's testimony about the photo lineup was relevant. "All relevant evidence is admissible, except as otherwise provided * * *. Evidence which is not relevant is not admissible." Evid.R. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any

fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. "Generally speaking, the question of whether evidence is relevant is ordinarily not one of law but rather one * * * based on common experience and logic." *State v. Lyles* (1989), 42 Ohio St.3d 98, 99.

{¶53} The victim testified that she did not see the front of the Assailant's face and, therefore, could not positively identify Norman as the Assailant. However, the victim testified that she recognized Norman as a former Wendy's employee. Moreover, the victim testified that she had worked with Norman on the night shift for nearly a year. After seeing the picture of Norman, the victim remembered that Norman and the Assailant had several physical traits in common. Specifically, the victim testified that her Assailant had the same build, hair color, and "awkward gait" as Norman. Clearly, evidence that Norman had many of the same characteristics as the Assailant made it more probable that Norman was indeed the Assailant. Therefore, the evidence was relevant pursuant to Evid.R. 401.

{¶54} We further believe that Norman was not unfairly prejudiced by the victim's testimony regarding the photo lineup. 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(A). However, "it is fair to say that all relevant evidence is prejudicial. That is, evidence that tends to disprove a party's rendition of the facts necessarily harms that party's case. Accordingly, the rules of evidence do not attempt to bar

all prejudicial evidence-to do so would make reaching any result extremely difficult. Rather, only evidence that is *unfairly* prejudicial is excludable." *State v. Crotts,* 104 Ohio St.3d 432, 2004-Ohio-6550, at ¶23 (emphasis sic). "Unfair prejudice is that quality of evidence which might result in an improper basis for a jury decision. Consequently, if the evidence arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence may be unfairly prejudicial." Id. at ¶24, quoting *Oberlin v. Akron Gen. Med. Ctr.* (2001), 91 Ohio St.3d 169, 172.

{¶55} We believe that the victim's testimony about the photo lineup certainly prejudiced Norman, but there was no unfair prejudice. Norman argues that "[t]he prosecutor was using this police method to give the appearance that the fact [Norman] worked at Wendy's was proof positive he was the thief." Defendant-Appellant's Amended Merit Brief at 11. We disagree with Norman's characterization of the photo lineup. Based on her own firsthand knowledge, the victim merely testified that she recognized Norman from Wendy's and that Norman shared several physical traits with the Assailant. The victim's testimony did not call Norman's character into question, inflame the passion of the jury, or even positively identify Norman as the Assailant. Furthermore, Norman has not demonstrated how the disputed evidence could have caused an improper basis for Norman's guilty verdict.

{¶56} Therefore, for the foregoing reasons, we find that the trial court did not abuse its discretion by allowing the victim to testify about the photo lineup. Accordingly, we overrule Norman's fourth assignment of error.

VI.

{¶57} In his fifth assignment of error, Norman contends that the verdict form is defective because it does not conform to the requirements of R.C. 2945.75. Although his brief is not entirely clear on this point, Norman apparently argues that the verdict does not contain either (1) the degree of the offense or (2) any aggravating elements that would justify a conviction under R.C. 2911.01(A)(1). Because of the insufficient verdict form, Norman argues that he may only be convicted of the lowest form of the offense; that is, Robbery in violation of R.C. 2911.02. However, we find that R.C. 2945.75(A)(2) does not apply to the present case because there is only one degree of seriousness to the offense of Aggravated Robbery under R.C. 2911.01(A)(1).

{¶58} Norman "failed to object to the verdict form. However, the Supreme Court of Ohio has recognized error, even in the absence of an objection at trial, when a verdict form fails to comply with R.C. 2945.75(A)(2)." *Portsmouth v. Wrage*, Scioto App. No. 08CA3237, 2009-Ohio-3390, at ¶42, citing *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256.

{¶59} R.C. 2945.75(A)(2) provides: "When the presence of one or more additional elements makes an offense one of more serious degree: * * * A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged." And "[p]ursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the

defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense." *Pelfrey,* syllabus.

{¶60} In this case, the verdict form reads: "WE, THE JURY IN THIS CASE, DULY IMPANELED AND SWORN AND AFFIRMED, FIND THE DEFENDANT, BRIAN M. NORMAN, GUILTY OF AGGRAVATED ROBBERY, O.R.C. SECTION 2911.01(A)(1) AS HE STANDS CHARGED." Norman relies on *Pelfrey* and argues that the verdict form does not satisfy the requirements of R.C. 2945.75(A)(2).

{¶61} However, R.C. 2945.75(A)(2) and *Pelfrey* apply only to criminal offenses with multiple degrees of seriousness. For example, in *Pelfrey*, the defendant was found guilty of tampering with records in violation of R.C. 2913.42. Depending on the seriousness of the conduct, tampering with records under R.C. 2913.42 may be a misdemeanor of the first degree, a felony of the fifth degree, a felony of the fourth degree, or a felony of the third degree. See RC. 2913.42(B)(1)-(4). The verdict form in *Pelfrey* did not list the aggravating element (tampering with government records) or the degree of the offense (a third degree felony pursuant to R.C. 2913.42(B)(4)). *Pelfrey* at ¶13. As a result, the defendant could "be convicted only of a misdemeanor offense, which is the least degree under R.C. 2913.42(B) of the offense of tampering with records." Id. Other criminal offenses with multiple degrees of seriousness include (1) possession of drugs under R.C. 2925.11, see *State v. New*, Gallia App. No. 08CA9, 2009-Ohio-2632, at ¶23-26, and (2) trafficking in drugs under R.C.

2925.03, see *State v. Huckleberry*, Scioto App. No. 07CA3142, 2008-Ohio-1007, at ¶19-25.

{¶62} However, Aggravated Robbery under R.C. 2911.01 does not have multiple degrees of seriousness. For this reason, R.C. 2911.01 differs from the statutes addressed in *Pelfrey*, *New*, and *Huckleberry*; namely, the seriousness of the conduct does not determine the penalty for Aggravated Robbery under R.C. 2911.01. All offenses under R.C 2911.01 are felonies of the first degree. See R.C. 2911.01(C). Therefore, we find the following: (1) R.C. 2945.75(A)(2) and *Pelfrey* do not apply to the present case; and (2) the verdict form did not have to include the degree of the offense or any aggravating elements to justify a conviction for Aggravated Robbery.

{¶63} Accordingly, we overrule Norman's fifth assignment of error.

VII.

{¶64} In his sixth assignment of error, Norman contends that he received ineffective assistance of counsel. Norman claims that his counsel was ineffective for the following reasons: (1) counsel failed to request independent testing of the DNA sample; (2) counsel failed to object to the chain of custody of the DNA evidence; and (3) counsel failed to make a Crim.R. 29 motion for acquittal at the close of the state's evidence.

{¶65} "'In Ohio, a properly licensed attorney is presumed competent and the appellant bears the burden to establish counsel's ineffectiveness.'" *State v. Countryman*, Washington App. No. 08CA12, 2008-Ohio-6700, at ¶20, quoting *State v. Wright,* Washington App. No. 00CA39, 2001-Ohio-2473, unreported;

State v. Hamblin (1988), 37 Ohio St.3d 153, 155-56, cert. den. *Hamblin v. Ohio* (1988) 488 U.S. 975. To secure reversal for the ineffective assistance of counsel, one must show two things: (1) "that counsel's performance was deficient* * * " which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[;]" and (2) "that the deficient performance prejudiced the defense* * *[,]" which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. See, also, *Countryman* at ¶20. "Failure to satisfy either prong is fatal as the accused's burden requires proof of both elements." *State v. Hall*, Adams App. No. 07CA837, 2007-Ohio-6091, at ¶11, citing *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, at ¶205.

A. Independent Testing of the DNA Sample

{¶66} We cannot find ineffective assistance of counsel based on trial counsel's failure to have the DNA sample independently tested. "This court 'when addressing an ineffective assistance of counsel claim, should not consider what, in hindsight, may have been a more appropriate course of action.'" *Countryman* at ¶21, quoting *State v. Wright,* Washington App. No. 00CA39, 2001-Ohio-2473. Instead, this court "must be highly deferential." *Wright*, citing *Strickland* at 689. Further, "a reviewing court: 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound

trial strategy.'" *Wright,* quoting *Strickland* at 689 (other citations omitted). *Countryman* at ¶21.

{¶67} Here, Norman's counsel vigorously cross-examined the forensic scientist who conducted the DNA testing in this case. In particular, Norman's counsel questioned the forensic scientist about (1) the collection of the DNA samples from the mask and the tire iron; (2) the procedures used for DNA testing; and (3) the length of time that DNA evidence may remain on an object. Therefore, Norman's counsel may have reasonably concluded that it was sound trial strategy to attack the credibility of the DNA evidence as opposed to having the samples independently tested. Therefore, after affording Norman's trial counsel the appropriate level of deference, we cannot find ineffective assistance of counsel based on the failure to request independent testing of the DNA evidence.

B. Failure to Object to the Chain of Custody of the DNA Evidence

{¶68} Further, we cannot find ineffective assistance of counsel based on trial counsel's failure to object to the "chain of custody" of the DNA evidence. "While authentication of evidence is a condition precedent to its admission, the condition is satisfied when the evidence is 'sufficient to support a finding that the matter in question is what its proponent claims.'" *State v. Hunter*, 169 Ohio App.3d 65, 2006-Ohio-5113, at ¶16, quoting Evid.R. 901(A). "The possibility of contamination goes to weight, not admissibility. A strict chain of evidence is not always necessary for the admission of physical evidence." *Hunter* at ¶16, citing *State v. Richey* (1992), 64 Ohio St.3d 353, 356. "The standard to authenticate is

not rigorous and its low threshold reflects an orientation of the rules toward favoring the admission of evidence." *State v. Aliff* (Apr. 12, 2000), Lawrence App. No. 99CA8, unreported. "Evidence of a process or system to produce an accurate result is sufficient to satisfy the rule." *Hunter* at ¶16; Evid.R. 901(B)(9).

{¶69} Here, the State presented more than adequate evidence about the chain of custody of the DNA samples. The State called three police officers as witnesses, and all of them testified about the chain of custody. An employee from the police evidence room testified about chain-of-custody issues, too. And finally, the forensic scientist testified about both (1) the chain of custody and (2) the procedures at BCI. Therefore, we believe that objecting to the DNA evidence on chain-of-custody grounds would have proven fruitless. "Defense counsel's failure to raise meritless issues does not constitute ineffective assistance of counsel." *State v. Ross*, Ross. App. No. 04CA2780, 2005-Ohio-1888, at ¶9. See, also, *State v. Close,* Washington App. No. 03CA30, 2004-Ohio-1764, at ¶34.

{¶70} Under his ineffective assistance of counsel argument, Norman also contends that he "should have had a *Crawford* objection as he had no way to cross examine the person who took the DNA off of the [mask and tire iron]." Defendant-Appellant's Amended Merit Brief at 14. In *Crawford v. Washington* (2004), 541 U.S. 36, "the Supreme Court of the United States held that the Confrontation Clause bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had

had a prior opportunity for cross-examination.'" *State v. Rinehart*, Ross App. No. 07CA2983, 2008-Ohio-5770, at ¶21, quoting *Crawford* at 53-54.

{¶71} Here, Norman did indeed cross-examine the forensic scientist who performed the DNA tests and prepared the laboratory report.[1] Therefore, Norman had no grounds for a *Crawford* objection at trial. Furthermore, the BCI employee who actually collected the DNA samples from the mask and tire iron did not prepare the reports or perform any of the tests used in Norman's prosecution. Therefore, that BCI employee did not make any testimonial statements as contemplated by *Crawford* and the Confrontation Clause. The mere act of handling evidence, by itself, is not a testimonial statement.

C. Failure to Make a Crim.R. 29 Motion for Acquittal

{¶72} Norman asserts that his trial counsel should have made a Crim.R. 29 motion for acquittal at the close of the State's evidence. As we discuss later in the resolution of Norman's third pro se assignment of error, the State presented sufficient evidence to sustain Norman's conviction for Aggravated Robbery. See, infra, Section X(A) of this Opinion (discussing Norman's sufficiency of the evidence argument). Therefore, a Crim.R. 29 motion for acquittal would have been fruitless in this case. And as a result, trial counsel's failure to move for acquittal under Crim.R. 29 did not constitute ineffective assistance of counsel. See *State v. Murphy*, Washington App. No. 03CA12, 2003-Ohio-4939, at ¶21; *State v. Payne*, Ashtabula App. No. 2008-A-0035, 2009-

[1] In applying *Crawford*, the United States Supreme Court recently held that a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the demands of the Confrontation Clause. See *Melendez-Diaz v. Massachusetts* (2009), 557 U.S. ---, 129 S.Ct. 2527.

Ohio-1485, at ¶36; *State v. Reading,* Licking App. No. 07-CA-83, 2008-Ohio-2748, at ¶42; *State v. Collier*, Clark App. Nos. 2006 CA 102 and 2006 CA 104, 2007-Ohio-6349, at ¶60.

{¶73} Accordingly, for the foregoing reasons, we overrule Norman's sixth assignment of error.

VIII.

{¶74} In his first pro se assignment of error, Norman makes several arguments that he did not have a fair and impartial jury. First, Norman contends that his jury was not impartial because, during voir dire, one of the jurors supposedly claimed to be good friends with the trial court judge. Norman further contends that he was prejudiced because (1) the jury could see that he was handcuffed with some type of "shocker box" apparatus and (2) the jury could see deputy sheriffs escorting Norman to-and-from court. According to Norman, these actions supposedly gave the jury an "impression of guilt" from the start of the trial.

{¶75} After reviewing the record, we cannot find that Norman objected to any of these issues at the trial level. Thus, he has forfeited all but a plain error review. *State v. Slagle* (1992), 65 Ohio St.3d 597, 604; Crim.R. 52(B). See, supra, Section III. of this Opinion (discussing plain error review).

{¶76} Here, we cannot find plain error as to the composition of the jury because Norman did not provide a transcript of the voir dire proceedings. "The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by

reference to matters in the record. * * * When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edwards Labs.* (1980), 61 Ohio St.2d 197, 199. Norman claims that, during voir dire, one of the jurors "stated on the record that he was a close friend of the judges [sic] and was often a guest at the judges [sic] home." Norman's Pro Se Brief at 3. However, without the voir dire transcript, we must presume the validity of the jury selection process. Therefore, we cannot find plain error in the composition of Norman's jury.

{¶77} Norman further claims that the jury was prejudiced against him because they saw Norman (1) handcuffed with some type of shocker box apparatus and (2) escorted by deputy sheriffs. However, Norman has not referred to any facts in the record to support these arguments. "It is the duty of the appellant, not this court, to demonstrate his assigned error through an argument that is supported by citations to legal authority and facts in the record." *State v. Gulley*, Stark App. No. 2006CA00114, 2008-Ohio-887, at ¶12 (internal quotation omitted). Because Norman has failed to make appropriate references to the record, we may disregard his arguments regarding the shocker box apparatus and the deputy sheriff escorts. See App.R. 12(A)(2). Regardless, after reviewing the record, we can find no support for Norman's arguments. Therefore, we cannot find plain error.

{¶78} Accordingly, for the foregoing reasons, we overrule Norman's first pro se assignment of error.

IX.

{¶79} In his second pro se assignment of error, Norman apparently contends that the trial court erred by admitting evidence of the C.O.D.I.S. hit during the suppression hearing. In our resolution of Norman's third assignment of error, we found that the trial court did not err in denying Norman's motion to suppress the DNA evidence. Arguably, this finding renders Norman's second pro se assignment of error moot. See App.R. 12(A)(1)(c). However, because Norman's second pro se assignment of error raises different issues, we will address it.

{¶80} Again, Norman did not raise this issue at the trial level. Thus, he has forfeited all but a plain error review.

{¶81} Norman argues that the evidence of the C.O.D.I.S. hit was "inadmissible pursuant to the rules of evidence." However, we find that Norman's argument has no merit because (1) the rules of evidence do not apply to suppression hearings and (2) Norman has mischaracterized what actually happened in the proceedings below.

{¶82} First, we note that "the Rules of Evidence do not apply to suppression hearings." *State v. Bozcar*, 113 Ohio St.3d 148, 2007-Ohio-1251, at ¶17, citing Evid.R. 101(C)(1) & 104(A). Therefore, "'[a]t a suppression hearing, the court may rely on * * * evidence, even though that evidence would not be admissible at trial.'" *Maumee v. Weisner*, 87 Ohio St.3d 295, 298, 1999-Ohio-68,

quoting *United States v. Raddatz* (1980), 447 U.S. 667, 679. Accordingly, Norman's argument fails as a matter of law.

{¶83} Further, Norman bases his argument on incorrect facts. In his pro se brief, Norman states that "[t]he prosecutor produced evidence of a state offender hit notification at the suppression hearing that was never in the discovery of evidence, and never before seen until that day by the defendant and his counsel." Norman's Pro Se Brief at 4. Norman appears to be referring to the written C.O.D.I.S. report that Detective Rourke received after being notified by telephone of the DNA hit. However, the prosecution did *not* produce the written C.O.D.I.S. report as evidence during the suppression hearing. In contrast, Detective Rourke mentioned the written C.O.D.I.S. report during defense counsel's direct examination.

{¶84} "Q. Did you receive any documents to follow up on that hit.

{¶85} A. I received a written report to a follow up [sic] on the telephone notification. Yes.

{¶86} Q. I haven't seen that. Did you have a copy of that.

{¶87} A. Yes.

{¶88} Q. May I see it please." Motions to Suppress and Appoint New Attorney Transcript at 16.

{¶89} After reviewing the record, it is apparent that the prosecutor did not introduce the written C.O.D.I.S. report during the suppression hearing. In fact, during the suppression hearing, the prosecutor explicitly said that he did not plan to use evidence of the C.O.D.I.S. hit in the case. Therefore, not only does

Norman's argument fail as a matter of law, but it also fails because Norman's account of the suppression hearing is factually incorrect.

{¶90} Accordingly, for the foregoing reasons, we overrule Norman's second pro se assignment of error.

X.

{¶91} In his third pro se assignment of error, Norman makes many arguments about the supposed irregularities in his trial below. Most of these arguments do not flow from Norman's third pro se assignment of error. Instead, Norman has used this section of his pro se brief to rehash many of his previous arguments and make baseless accusations against the victim. Regardless, Norman's third pro se assignment of error contends (1) that there was insufficient evidence to support his conviction and (2) that his conviction was against the manifest weight of the evidence. We will address these two issues in the subsequent discussion.

A. Sufficiency of the Evidence

{¶92} As we discussed above, Norman's trial attorney failed to make a Crim.R. 29 motion for acquittal. Nevertheless, we will review Norman's sufficiency of the evidence challenge. See, e.g., *State v. Cooper* (2007), 170 Ohio App.3d 418, 2007-Ohio-1186, at ¶13 ("[A] defendant preserves his right to object to the alleged insufficiency of the evidence when he enters his 'not guilty' plea."); *State v. Burton*, Gallia App. No. 05CA3, 2007-Ohio-1660, at ¶31-32.

{¶93} When reviewing a case to determine if the record contains sufficient evidence to support a criminal conviction, we must "examine the

evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Smith,* Pickaway App. No. 06CA7, 2007-Ohio-502, at ¶33, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 319.

{¶94} The sufficiency of the evidence test "raises a question of law and does not allow us to weigh the evidence." *Smith* at ¶34, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Instead, the sufficiency of the evidence test "'gives full play to the responsibility of the trier of fact [to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Smith* at ¶34, quoting *Jackson* at 319. This court will "reserve the issues of the weight given to the evidence and the credibility of witnesses for the trier of fact." *Smith* at ¶34, citing *State v. Thomas* (1982), 70 Ohio St.2d 79, 79-80; *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶95} Here, we find sufficient evidence to support Norman's conviction. First, the victim saw the Assailant approach her while wearing a mask and carrying a tire iron. R.C. 2923.11(A) defines a "deadly weapon" as "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon." A

tire iron may be a deadly weapon within the meaning of R.C. 2923.11(A). See, e.g., *State v. Thornton*, Montgomery App. No. Civ.A. 20652, 2005-Ohio-3744, at ¶17-18; *State v. Lewis* (Feb. 06, 1992), Cuyahoga App. No. 59860, unreported. Second, the victim testified that the Assailant did the following: approached her; demanded the money in her possession; and, after a struggle, left the scene with the bag of money. Third, the state presented evidence that Norman's DNA was found on both the Assailant's mask and the tire iron. And finally, during the photo lineup, the victim recognized Norman as a former Wendy's employee. The victim could not identify Norman as the Assailant because the victim did not actually see the front of the Assailant's face. But as the testimony reveals, Norman's picture triggered other memories for the victim.

{¶96} "Q. Okay. Now Donna, again, you say that you recognized him in this photo because you had worked with him before. Once you recognized him -- did it trigger anything else for you.

{¶97} A. Yes. His -- his -- the way he walks, his build, the hair it's -- it -- all made sense.

{¶98} Q. Okay. What do you mean by 'it all made sense'.

{¶99} A. The person that robbed me, it was the same build that -- the same type of awkwardness, the same hair color * * *." Trial Transcript at 56.

{¶100} Therefore, the victim testified that her Assailant had the same build, hair color, and awkward gait as Norman.

{¶101} Consequently, after viewing the foregoing evidence in a light most favorable to the State, we believe that any rational trier of fact could have

found the essential elements of aggravated robbery proven beyond a reasonable doubt. Accordingly, we find sufficient evidence to support Norman's conviction.

B. Manifest Weight of the Evidence

{¶102} "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency is a test of the adequacy of the evidence, while "[w]eight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other[.]'" *State v. Sudderth,* Lawrence App. No. 07CA38, 2008-Ohio-5115, at ¶27, quoting *Thompkins* at 387.

{¶103} "Even when sufficient evidence supports a verdict, we may conclude that the verdict is against the manifest weight of the evidence, because the test under the manifest weight standard is much broader than that for sufficiency of the evidence." *Smith* at ¶41. When determining whether a criminal conviction is against the manifest weight of the evidence, we "will not reverse a conviction where there is substantial evidence upon which the [trier of fact] could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." *State v. Eskridge* (1988), 38 Ohio St.3d 56, paragraph two of the syllabus. See, also, *Smith* at ¶41. We "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial

granted." *Smith* at ¶41, citing *State v. Garrow* (1995), 103 Ohio App.3d 368, 370-371; *State v. Martin* (1983), 20 Ohio App.3d 172, 175. However, "[o]n the trial of a case, * * * the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶104} Here, we find that Norman's conviction is not against the manifest weight of the evidence. In making this finding, we considered the same evidence that we discussed in our resolution of Norman's sufficiency of the evidence challenge. Most importantly, the DNA evidence links Norman to the crime, and the victim testified that Norman has the same gait, build, and hair color as the Assailant. Although we believe that Norman's counsel performed more than adequately in the trial below (especially considering the weight of the State's evidence), Norman's defense did nothing to discredit either the DNA evidence or the credibility of the State's witnesses. Accordingly, we cannot find that the jury, as the trier of fact, clearly lost its way and created such a manifest miscarriage of justice that Norman's conviction must be reversed and a new trial granted. We find substantial evidence upon which the jury could have reasonably concluded that all the elements of aggravated robbery were proven beyond a reasonable doubt. Therefore, we find that Norman's aggravated robbery conviction is not against the manifest weight of the evidence.

{¶105} Accordingly, we overrule Norman's third pro se assignment of error. Having overruled all of Norman's assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and Appellant pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Harsha, J.: Not Participating.
Abele, J.: Concurs in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.