**[Cite as *State v. Moultry*, 2010-Ohio-3010.]**

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

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| STATE OF OHIO | C.A. No. 25065 |
| Appellee | |
| v. | APPEAL FROM JUDGMENT ENTERED IN THE |
| KEVIN ANTHONY MOULTRY | COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO |
| Appellant | CASE No. CR 09 06 1866 |

DECISION AND JOURNAL ENTRY

Dated: June 30, 2010

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CARR, Presiding Judge.

**{¶1}** Appellant, Kevin Moultry, appeals his conviction out of the Summit County Court of Common Pleas. This affirms.

I.

**{¶2}** On June 25, 2009, Moultry was indicted on one count of robbery in violation of R.C. 2911.02(A)(3), a felony of the third degree, for an incident alleged to have occurred on June 1, 2009; and one count of petty theft in violation of R.C. 2913.02(A)(1), a misdemeanor of the first degree, for an incident alleged to have occurred on May 28, 2009. Moultry pleaded not guilty to the charges.

**{¶3}** On July 16, 2009, the trial court issued a journal entry permitting defense counsel to view the surveillance video tape of the incidents at the store involved in the case. Apparently defense counsel was unable to view the tape because the police returned it to the shopkeeper who allegedly accidentally taped over the alleged robbery. Prior to trial, Moultry moved to exclude

any testimony by law enforcement personnel who saw the tape prior to its destruction regarding the images on the tape. The trial court preliminarily denied the motion upon finding that there was no evidence of bad faith on the part of the police in returning the tape to the shopkeeper.

**{¶4}** At the conclusion of trial, the jury found Moultry guilty of robbery, but not guilty of theft. The trial court referred the matter to the Adult Probation Department for a pre-sentence investigation and report. The court sentenced Moultry to two years in prison, with such sentence to be served consecutively to another sentence he was serving in case number CR 07 04 1227, for a total of five years. Moultry filed a timely appeal, raising four assignments of error for review.

II.

**ASSIGNMENT OF ERROR I**

> "THE TRIAL COURT ERRED BY NOT DISMISSING THE ROBBERY INDICTMENT AND BY PERMITTING TESTIMONY REGARDING THE CONTENTS OF A SECURITY RECORDING THAT WAS HANDLED BY THE STATE IN A MANNER RESULTING IN THE RECORDING'S PREDICTABLE DESTRUCTION IN VIOLATION OF OHIO EVIDENCE RULE 1002 AND APPELLANT'S RIGHTS TO DUE PROCESS."

**{¶5}** Moultry argues that the trial court erred by allowing testimony regarding the contents of a security video recording which had been erased. He further argues that the trial court erred by failing to dismiss the indictment upon learning that the video recording had been destroyed after the police returned it to the victim-shopkeeper. This Court disagrees.

**{¶6}** Moultry correctly asserts that this Court reviews the trial court's denial of a motion to dismiss the indictment de novo. *State v. Whalen*, 9th Dist. No. 08CA009317, 2008-Ohio-6739, at ¶7. Moultry, however, never moved to dismiss the indictment. Rather, he raises this argument for the first time on appeal. This Court has long held that "an appellate court will not consider as error any issue a party was aware of but failed to bring to the trial court's

attention[]" at a time when the trial court might have corrected the error. *State v. Dent*, 9th Dist. No. 20907, 2002-Ohio-4522, at ¶6. By failing to move to dismiss the indictment below, Moultry has forfeited any such argument now. Nevertheless, had Moultry moved to dismiss the indictment, there was clearly no due process violation as a result of the admission of the challenged evidence.

**{¶7}** Moultry orally moved the trial court merely to exclude any testimony regarding the contents of the destroyed video recording of the June 1, 2009 incident. The decision whether to admit or exclude evidence lies in the sound discretion of the trial court. *State v. Brown*, 9th Dist. No. 04CA008510, 2005-Ohio-2141, at ¶4. This Court, therefore, reviews the trial court's decision regarding the admission or exclusion of evidence under an abuse of discretion standard of review. *State v. Arnott*, 9th Dist. No. 21989, 2005-Ohio-3, at ¶35. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. Id.

**{¶8}** Moultry argues that the recording was exculpatory and that it was lost or destroyed as a result of bad faith by the State. The following facts are undisputed. The police took the video recording unit from the store where the robbery occurred and viewed the recording. The unit does not record on a videotape. The police were unable to make a copy of the recording. The victim-store owner requested that the recording unit be returned for store

security, and the police returned the unit. During subsequent use of the recording unit in the store, the recording of the June 1, 2009 incident was erased.

**{¶9}** This Court has recognized that the withholding by the State of material, exculpatory evidence results in a violation of a criminal defendant's due process right to a fair trial. *Whalen* at ¶8, citing *State v. Johnston* (1988), 39 Ohio St.3d 48, 60, and *Brady v. Maryland* (1963), 373 U.S. 83. However, "[i]t is Defendant's burden to establish that the evidence is both favorable and material and that there is [a] reasonable probability that the outcome would have been different if the evidence had been provided." *Whalen* at ¶8, citing *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, at ¶338-39.

**{¶10}** In this case, Moultry failed to establish that the images on the video recording were exculpatory and that the outcome of the trial would have been different by a reasonable probability had the recording been provided. Rather, he merely speculates that the only reason the police returned the recording unit to the store owner was that it evidenced Moultry's lack of the use of force during the commission of a theft. Officer Daniel Pastor of the Akron Police Department ("APD") testified, however, that he returned the recording unit to the store owner upon the owner's insistence and then only after the police were unsuccessful after a week in their efforts to copy or otherwise download images from the recording. On the other hand, Officer Pastor testified that he viewed the recording of the June 1, 2009 incident while the unit was still in the store. He testified that he saw a subject in the recording who was carrying merchandise while struggling with a store employee, ultimately knocking her off balance. The victim-employee, Saadieh Gheith, testified that she also watched the recording of the incident and saw Moultry's face in it. Accordingly, Moultry has not demonstrated that the State withheld exculpatory evidence.

**{¶11}** The Ohio Supreme Court has addressed the exclusion of evidence which is merely potentially useful to the defense, rather than exculpatory: "Unless a defendant can show that the state acted in bad faith, the state's failure to preserve potentially useful evidence does not violate a defendant's due process rights." *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, at syllabus; see, also, *Arizona v. Youngblood* (1988), 488 U.S. 51. This Court has stated:

> "Bad faith implies more than bad judgment or negligence; instead, it imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another. Bad faith on the part of the police must be evaluated from the knowledge of the police regarding the exculpatory value of evidence at the time of the alleged destructive act." (Internal quotations and citations omitted.) *State v. Dunn*, 9th Dist. No. 03CA0037, 2004-Ohio-2249, at ¶63.

**{¶12}** In this case, Officer Pastor testified that the store owner, Mostafa Gheith, insisted upon the return of the recording unit because the store was located in a "rough" neighborhood and the store had no security. The officer testified that he attempted to dissuade Mr. Gheith to no avail. Officer Pastor testified that Mr. Gheith had a property receipt for the recording unit, that it was his property, and that it is not a violation of police procedure to return evidence if the police cannot do anything with that evidence and the victim-owner requests its return. He emphasized that the police were unable to access and play the recording at the station, so that it could no longer be considered evidence. Officer Pastor testified that he followed up with Mr. Gheith, asking whether he was able to make a copy of the recorded June 1, 2009 incident. Mostafa Gheith confirmed that he requested the return of the recording unit to his store. He testified that the unit records on a loop for 30 days, and that he apparently recorded over the June 1, 2009 incident when he reinstalled the unit after its return. Based on a review of the evidence, this Court concludes that Moultry failed to establish that the police acted in bad faith when they returned the recording unit to the store, where the images of the June 1, 2009 incident were lost.

**{¶13}** Finally, Moultry argues that the trial court erred by allowing testimony regarding the contents of the recording in violation of Evid.R. 1002, the best evidence rule, which states: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio." However, Evid.R. 1004 establishes several exceptions to the best evidence rule. "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if[] [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith[.]" Evid.R. 1004(1). Other evidence includes the mere testimony of an officer regarding the contents of a surveillance tape. *State v. Patterson*, 4th Dist. No. 05CA34, 2006-Ohio-4439, at ¶7-11. This Court previously concluded that the State did not act in bad faith to cause or allow the loss or destruction of the recording of the June 1, 2009 incident. Accordingly, testimony regarding the contents of the recording was not precluded by Evid.R. 1002, and the trial court did not abuse its discretion by allowing such testimony.

**{¶14}** Moultry's first assignment of error is overruled.

**ASSIGNMENT OF ERROR II**

"THE TRIAL COURT ERRED BY PERMITTING IRRELEVANT EVIDENCE TO BE PRESENTED BY THE STATE AND BY NOT COMPLYING WITH OHIO EVIDENCE RULE 403, WHICH DEPRIVED APPELLANT OF DUE PROCESS AND HIS RIGHTS TO A FAIR TRIAL."

**{¶15}** Moultry argues that the trial court erred by allowing testimony of other acts by the defendant, specifically "two previous, unrelated convictions against [] Moultry," in violation of Evid.R. 404(B). This Court disagrees.

**{¶16}** Evid.R. 404(B), which addresses other crimes, wrongs or acts, states:

> "Evidence of the other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

**{¶17}** Moultry challenges the admission of testimony regarding a 2007 robbery. Officer Jeffrey Edsall of the APD testified regarding the 2007 robbery. The trial court, however, upon finding that Officer Edsall did not have personal knowledge of the details, ordered that his testimony be stricken from the record and that the jury not consider it for any purpose. There is a presumption that the jury obeys the trial court's instructions. *State v. Brady*, 9th Dist. No. 22034, 2005-Ohio-593, at ¶7. Accordingly, Moultry's challenge to the admission of evidence regarding his involvement in 2007 in a robbery is not well taken.

**{¶18}** Moultry also challenges the admission of testimony regarding a 2002 robbery. He admits that his felony convictions were properly admitted when he testified in his own defense. He argues, however, that he "may not have needed to testify had the Trial Court not issued its improper evidentiary ruling." This argument is unpersuasive. Moultry was not obligated to testify. Moreover, he always retained the right to challenge any alleged erroneous admission of evidence on appeal. The trial court emphasized that he had the right to testify or not, and cautioned him that his decision to testify would result in the State's ability to enter into evidence his felony convictions from the past 10 years. He asserted his understanding and opted to testify in his own defense. Assuming, without deciding, that it was error to admit "prior acts" testimony regarding his previous robbery convictions, evidence of those convictions was properly admitted when he opted to testify. Accordingly, Moultry's second assignment of error is overruled.

**ASSIGNMENT OF ERROR III**

"THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A FINDING OF GUILT FOR ROBBERY."

**ASSIGNMENT OF ERROR IV**

"THE VERDICT OF GUILTY OF ROBBERY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

**{¶19}** Moultry argues that his conviction for robbery is not supported by sufficient evidence and is against the manifest weight of the evidence. This Court disagrees.

**{¶20}** A review of the sufficiency of the State's evidence and the manifest weight of the evidence adduced at trial are separate and legally distinct determinations. *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600. "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." Id., citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook J., concurring). When reviewing the sufficiency of the evidence, this Court must review the evidence in a light most favorable to the prosecution to determine whether the evidence before the trial court was sufficient to sustain a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259, 279.

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id. at paragraph two of the syllabus.

**{¶21}** A determination of whether a conviction is against the manifest weight of the evidence, however, does not permit this Court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

> "an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.
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> "Weight of the evidence concerns the tendency of a greater amount of credible evidence to support one side of the issue more than the other. *Thompkins*, 78 Ohio St.3d at 387. Further when reversing a conviction on the basis that it was against the manifest weight of the evidence, an appellate court sits as a 'thirteenth juror,' and disagrees with the factfinder's resolution of the conflicting testimony. Id." *State v. Tucker*, 9th Dist. No. 06CA0035-M, 2006-Ohio-6914, at ¶5.

This discretionary power should be exercised only in exceptional cases where the evidence presented weighs heavily in favor of the defendant and against conviction. *Thompkins*, 78 Ohio St.3d at 387.

**{¶22}** Moultry was charged with robbery in violation of R.C. 2911.02(A)(3), which states: "No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall *** [u]se or threaten the immediate use of force against another." "Force" is defined as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A). At the conclusion of the State's case in chief, upon Crim.R. 29 motion by the defense, the trial court struck the language in the indictment concerning the threat of the immediate use of force.

**{¶23}** At trial, Mostafa Gheith testified that he is the owner of MJG Clothing in Akron. He testified that the store has a DVR unit which records continuously throughout the store. He testified that he was working on May 28, 2009, when the store was robbed, but not on June 1, 2009, when it was robbed again. Mostafa testified that he was informed by others on June 12, 2009, that the thief was in the area, so he drove around the neighborhood, located him, and called

the police. He identified Moultry as the man who robbed his store on May 28, 2009. Mostafa gave the police the DVR unit from the store.

**{¶24}** Sammi Gheith is Mostafa's 17-year-old brother who works on occasion in the clothing store. Sammi testified that he was working in the store on June 1, 2009, with his mother, when a man entered, looked around, picked up a stack of jeans, and ran out of the store. Sammi testified that his mother tried to stop the thief by grabbing him, and that the thief pushed her away, causing her to stumble. Sammi identified Moultry as the person who pushed his mother before running away with merchandise from the store.

**{¶25}** Saadieh Gheith is Mostafa's and Sammi's mother. She testified that she was helping out in MJG Clothing on June 1, 2009, when Moultry entered the store. She testified that he looked around and grabbed some jeans. Saadieh testified that she left the counter area, approached Moultry from behind and asked him what he was doing. When he did not respond, Saadieh testified that she tried to take the jeans from Moultry who resisted and pushed her several times before she lost her balance and he fled. She testified that she screamed and flagged down a police car. She testified that people on the street who witnessed Moultry fleeing the scene identified him by name to her. Saadieh testified that she watched the recording of the incident on the store's DVR and that she saw Moultry's face on the recording.

**{¶26}** Hithem Judeh testified that he owns the drive-through store across the street from MJG Clothing. He testified that he was working on June 1, 2009, when he heard Saadieh scream for help. He testified that he saw a man running from the store with a stack of jeans in his hands. Mr. Judeh testified that he and another man chased the man, retrieved the jeans, and told the man to leave. He testified that other people on the street identified the man with the jeans as Kevin Moultry.

**{¶27}** Officer Daniel Pastor of the APD testified that he was working on June 12, 2009, when he received a call regarding the location of a man thought to have stolen merchandise from a clothing store on two recent occasions. Officer Pastor testified that other officers brought the alleged perpetrator to the store, where Mostafa and Saadieh identified him as the thief. The officer identified Moultry as the perpetrator. He testified that he took the statements of Mostafa, Saadieh, and Sammi regarding the two incidents. He testified that Saadieh reported that Moultry grabbed her, pushed her aside, then ran out of the store with merchandise.

**{¶28}** Officer Pastor testified that he noticed security cameras throughout the store. He testified that he watched the recording of the June 1, 2009 incident, during which he saw a subject, with merchandise in his hands, struggle with Saadieh and knock her off balance. The officer testified that the images on the recording matched Saadieh's report of the incident on June 1, 2009.

**{¶29}** Reviewing the evidence in a light most favorable to the State, this Court concludes that any rational trier of fact could have found the essential elements of the charge of robbery were proved beyond a reasonable doubt. See *Jenks* at paragraph two of the syllabus. The State presented evidence that Moultry entered MJG Clothing on June 1, 2009, took merchandise from a shelf, struggled with Saadieh Gheith, and fled without paying. Accordingly, the State presented sufficient evidence of the crime. Moultry's third assignment of error is overruled.

**{¶30}** Moultry argues that his conviction for robbery is against the manifest weight of the evidence. This Court disagrees.

**{¶31}** The State presented the testimony of two eye witnesses to the June 1, 2009 incident. Both Sammi and Saadieh Gheith testified that Moultry entered the clothing store,

looked around, took a stack of jeans, struggled with Saadieh when she attempted to stop him, and fled with the merchandise without paying. Both Saadieh and Officer Pastor testified that a recording on the store's security camera system of the June 1, 2009 incident showed a man struggling with Saadieh before fleeing the store with merchandise.

**{¶32}** Moultry testified in his own defense. He testified that he and Mostafa "get high" together and asserted that family will lie for one another. He admitted that he was going to steal a stack of clothing on June 1, 2009, when Saadieh was behind him in the store. However, he denied struggling, pushing, or otherwise touching Saadieh.

**{¶33}** This Court will not overturn the trial court's verdict on a manifest weight of the evidence challenge only because the trier of fact chose to believe certain witness' testimony over the testimony of others. *State v. Crowe*, 9th Dist. No. 04CA0098-M, 2005-Ohio-4082, at ¶22.

**{¶34}** A review of the record indicates that this is not the exceptional case, where the evidence weighs heavily in favor of Moultry. A thorough review of the record compels this Court to find no indication that the trial court lost its way and committed a manifest miscarriage of justice in convicting Moultry of robbery. The weight of the evidence supports the conclusion that Moultry used force against Saadieh Gheith to allow him to flee the clothing store with merchandise for which he had not paid. In addition, the jury was in the best position to judge the credibility of the witnesses and could, therefore, discount as incredible Moultry's testimony that he did not push or otherwise touch Saadieh to facilitate his escape after admittedly stealing merchandise from the store. Accordingly, Moultry's conviction for robbery is not against the manifest weight of the evidence. Moultry's fourth assignment of error is overruled.

III.

**{¶35}** Moultry's assignments of error are overruled. His conviction out of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

MOORE, J.
CONCURS

WHITMORE, J.
CONCURS IN JUDGMENT ONLY, SAYING:

**{¶36}** I concur in the majority's judgment. I write separately, however, to address and clarify some issues.

**{¶37}** In regard to the first assignment of error, I note that Moultry improperly raises two distinct challenges in one assignment of error. He first argues that the trial court erred by failing to dismiss the indictment. Secondly, he argues that the trial court erred by admitting testimony regarding the contents of a security video which had been destroyed. I agree with the majority that Moultry has forfeited his first argument because he failed to move the trial court for dismissal of the indictment. "[F]orfeiture is a failure to preserve an objection[.] *** [A] mere forfeiture does not extinguish a claim of plain error under Crim.R. 52(B)." (Internal citations omitted.) *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶23. By failing to raise the issue below, Moultry has forfeited his challenge regarding the trial court's failure to dismiss the indictment. Further, as Moultry has failed to argue plain error on appeal, I would not consider its applicability. See *State v. Knight*, 9th Dist. No. 03CA008239, 2004-Ohio-1227, at ¶10.

**{¶38}** To the extent that Moultry challenges the admissibility of testimony regarding the security video, I agree with the majority's reasoning and conclusion.

**{¶39}** In regard to the second assignment of error, I would analyze the admissibility of the evidence of his 2007 conviction for robbery. I agree with Moultry that admission of the underlying facts of that conviction was improper pursuant to Evid.R. 404(B) because it did not serve to prove motive, opportunity, or plan in relation to the instant robbery. Specifically, there was no evidence to indicate that Moultry pretended to have a weapon during the commission of this offense, as he did in 2007. I agree, however, that the trial court properly struck the officer's testimony regarding the 2007 conviction and that the trial court gave an appropriate curative instruction.

**{¶40}** Moultry failed to present any argument on appeal in regard to the admission of evidence regarding the 2002 conviction. He failed to cite to the record or otherwise argue how

the admission of that evidence violated Evid.R. 404(B). We have repeatedly stated that "an appellant's assignment of error provides this Court with a roadmap to guide our review." *Taylor v. Hamlin-Scanlon*, 9th Dist. No. 23873, 2008-Ohio-1912, at ¶12, citing App.R. 16(A). "This Court declines to chart its own course when, as in this case, an appellant fails to provide any guidance." *Young v. Slusser*, 9th Dist. No. 08CA0019, 2008-Ohio-4650, at ¶7, citing App.R. 12(A)(2). Accordingly, I would not address the 2002 conviction for that reason.

APPEARANCES:

JAMES W. ARMSTRONG, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.