[Cite as *State v. Sykes*, 2011-Ohio-293.]

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

STATE OF OHIO Appellee v. WILLIE F. SYKES Appellant	C.A. No. 25263 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 09 10 3145(B)

DECISION AND JOURNAL ENTRY

Dated: January 26, 2011

WHITMORE, Judge.

{¶1} Defendant-Appellant, Willie F. Sykes, appeals from his convictions in the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} On October 11, 2009, police responded to an emergency call that shots were fired and two armed men had forcefully entered a home on South Walnut Street in Akron. When police arrived, they found Sykes running from the area and ordered him to stop. Sykes ignored their request, continued to flee, and was later found on a nearby street crouched behind a storage shed. At trial, Sykes testified that, on the night in question, he was walking on South Walnut Street when he was attacked from behind and robbed at gunpoint. He fought with his attacker, then ran in search of help, at which point he was apprehended by police. Following trial, a jury found Sykes guilty of aggravated burglary, in violation of R.C. 2911.11(A)(1), and aggravated robbery, in violation of R.C. 2911.01(A)(1), and attendant firearm specifications to each count,

in violation of R.C. 2941.145. Both offenses were first-degree felonies and Sykes was sentenced to a total of nineteen years in prison.

{¶3} Sykes asserts four assignments of error for our review, some of which have been rearranged for purposes of analysis.

II

Assignment of Error Number Four

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING THE BATSON CHALLENGE SUBMITTED BY THE DEFENDANT-APPELLANT."

{¶4} In his fourth assignment of error, Sykes argues that the trial court erred in allowing the State to exclude an African-American juror from the case, because the State failed to establish that it had a race-neutral explanation for using a peremptory challenge. We disagree.

{¶5} In *Batson v. Kentucky* (1986), 476 U.S. 79, 89, the United States Supreme Court concluded that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race[.]" The Ohio Supreme Court has since explained, that:

> "A court adjudicates a *Batson* claim in three steps. First, the opponent of the peremptory challenge must make a prima facie case of racial discrimination. Second, if the trial court finds this requirement fulfilled, the proponent of the challenge must provide a racially neutral explanation for the challenge. However, the explanation need not rise to the level justifying exercise of a challenge for cause. Finally, the trial court must decide based on all the circumstances, whether the opponent has proved purposeful racial discrimination." (Internal citations and quotations omitted.) *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, at ¶106.

"To make a prima facie case of such purposeful discrimination, an accused must demonstrate: (a) that members of a recognized racial group were peremptorily challenged; and (b) that the facts and any other relevant circumstances raise an inference that the prosecutor used the peremptory challenges to exclude jurors on account of their race." (Internal citations and quotations omitted.) *State v. Hill* (1995), 73 Ohio St.3d 433, 444-45. A trial court's finding that there was a

lack of any discriminatory intent on behalf of the State will not be reversed on appeal unless it was clearly erroneous. *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, at ¶61.

{¶6} During voir dire, the State exercised its first peremptory challenge when it sought to excuse prospective Juror No. 7, who was an African American woman. The trial court acknowledged that, because it was the State's first challenge, there was not a pattern based on race. Nonetheless, the trial court inquired as to the State's race-neutral reason for excluding her. In response, the State indicated that it was concerned about the nature of her work, in that she was a social worker at a hospital, and further, that she stated she had served on a jury in a criminal trial in the past, but was unable to recall what the outcome of the trial was. Based on that explanation, the trial court overruled Sykes' objection. In doing so, the trial court further noted that Juror No. 8, an African-American male, was also seated as one of the first twelve jurors in the case. Based upon the arguments before the court, we cannot say that the trial court's decision to allow the removal of Juror No. 7 was clearly erroneous. Accordingly, Sykes' fourth assignment of error is overruled.

Assignment of Error Number Three

> "THE COURT COMMITTED ERROR BY PERMITTING IN CERTAIN PROSECUTION EXHIBITS THAT WERE MORE PREJUDICIAL THAN PROBATIVE." (Sic.)

{¶7} In his third assignment of error, Sykes argues that the trial court erred in admitting several exhibits introduced by the prosecution because their prejudicial effect outweighed their probative value. He argues that the trial court erred in admitting into evidence a torn coat sleeve, a "do rag," and a garden glove that were found at the scene, as well as photographs of where those items were located, because the "items were never identified as being connected to [him.]" He also argues that the trial court erred in admitting the laboratory report from the Bureau of

Criminal Identification and Investigation ("BCI"), but does not articulate any specific basis for the alleged error. We disagree.

{¶8} Aside from the generalized and unsupported assertion that the foregoing items were inadmissible, Sykes erroneously asserts that these issues have been properly preserved for appeal. During trial, Sykes failed to object to the testimony of Sergeant John Mostar, who identified the items and the pictures he took of the items as they were found at the scene. The record demonstrates that the pictures were published to the jury, while Sergeant Mostar testified. Sykes did not object to the photographs or the items themselves until after the State rested. When a defendant fails to contemporaneously object to the testimony, identification, and publication of photographs to the jury, and only later objects, after the close of the State's evidence when the photographs are being admitted into evidence, he forfeits the matter for review on appeal. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, at ¶92 (noting that the defendant forfeited appellate review because he objected to the photographs only after the State concluded its case-in-chief, when the court was considering the admission of exhibits). *State v. Gray*, 9th Dist. No. 08CA0057, 2009-Ohio-3165, at ¶7. "By forfeiting the issue for appeal, [Sykes] has confined our analysis to an assertion of plain error." *Gray* at ¶7, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶23; Crim.R. 52(B). "While a defendant who forfeits such an argument still may argue plain error on appeal, this court will not sua sponte undertake a plain-error analysis if a defendant fails to do so[,]" which is the case here. *Akron v. Lewis*, 9th Dist. No. 24236, 2008-Ohio-6256, at ¶22.

{¶9} To the extent Sykes provides this Court with any argument relative to the BCI report, it appears to be based on his belief that the admission of the report constituted undue prejudice under Evid.R. 403(A), whereas, at trial, he argued the report was "repetitive" pursuant

to Evid.R. 403(B). Because Sykes did not object on the basis of undue prejudice, he has forfeited this issue for review on appeal and, as stated, has not provided a plain-error argument. See *Lewis*, supra. Accordingly, Sykes' third assignment of error is overruled.

Assignment of Error Number One

> "THERE WAS NOT SUFFICIENT CREDIBLE EVIDENCE PRESENTED AT TRIAL TO SUPPORT THE DEFENDANT-APPELLANT BEING CONVICTED."

{¶10} In his first assignment of error, Sykes argues that there was insufficient evidence to support his convictions. Sykes does not point to any specific issues related to either of his convictions, but merely states that "there was very little evidence to connect [Sykes] to the [a]ggravated [r]obbery and [a]ggravated [b]urglary" offenses and their attendant firearm specifications. We disagree.

{¶11} In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 274. Furthermore:

> "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; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

"In essence, sufficiency is a test of adequacy." *Thompkins*, 78 Ohio St.3d at 386.

{¶12} Under R.C. 2911.01(A)(1), "[n]o person, in attempting or committing a theft offense, *** or in fleeing immediately after the attempt or offense, shall *** [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, *** or use it[.]" A person found guilty of the foregoing offense has

committed a first-degree felony. R.C. 2911.01(C). R.C. 2911.11(A)(2) provides, in pertinent part, that:

> "No person, by force, stealth, or deception, shall trespass in an occupied structure *** when another person other than an accomplice of the offender is present, with purpose to commit *** any criminal offense, if *** [t]he offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control."

To do so constitutes a first-degree felony. R.C. 2911.11(B). Both of the foregoing offenses were accompanied by firearm specifications under R.C. 2941.145, which requires the court to impose an additional three year prison term upon any offender who, "had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense." R.C. 2941.145(A).

{¶13} At trial, Sierra Sanders testified that she rented an apartment in a house on South Walnut Street, which she shared with her cousin, Cassianna Bell. The two had returned to their home at approximately 10:00 p.m. after going to pick up a pizza with their friends, Damon Jackson, Jordan Summerville, and Harvey Bryant, Sander's boyfriend. When they returned home, everyone went into the house except Bryant, who remained in the car in the nearby parking lot area while he was looking for something. Sanders testified she immediately headed into the bathroom, and shortly thereafter heard what she thought was a gunshot come from outside the house. She heard one or two more shots before she exited the bathroom. When she opened the bathroom door, she saw Sykes standing in front of her, and another man, Christopher Mitchell, standing near her bedroom. Both men had thin masks or "do rags" over their faces, but she was able to recognize them. Sykes, whom she recognized, shut the bathroom door in her face. When she tried to reopen the door, she was unable to do so and the next thing she recalled

was her boyfriend, Bryant, opening the door for her. Sanders testified she had known Sykes for seven or eight years and that the two were on friendly terms, but that she had not invited him over that night. Sanders also confirmed that the kitchen door was undamaged when she returned home with her friends.

{¶14} Bryant testified that when the friends returned to the house after getting their pizza, he remained in the car for a minute while the others went inside. According to Bryant, two men approached him with guns, telling him to give them everything he had with him. In response, Bryant turned over his wallet, money, and cell phone. Bryant recognized Sykes, having met him before. Sykes then struck Bryant in the face with a black revolver and fired a shot or two near him, "trying to scare [Bryant]." Sykes then led Bryant to the house where Sykes tried kicking in the door. While doing so, Sykes fell, dropping some of his own items, as well as Bryant's wallet, onto the porch. Once the door was kicked in, Sykes entered the house through the kitchen area, bringing Bryant with him. Sykes fired a shot in the kitchen, then went into one of the bedrooms and fired a second shot. Sykes went into a third room and did not fire, but instead, left the house through the kitchen door, about the time Bryant recalled hearing sirens nearby. Bryant stated that the men did not see anyone in the house until Sanders exited the bathroom.

{¶15} Bell testified that she went inside with Sanders and once in the house, heard a gunshot from outside. Bell stated that Jackson and Summerville went to the door and started to head outside, but closed the door and returned to the house once they saw two men with guns outside holding Bryant against his trunk. Bell then called 911 and while doing so, heard another gunshot, so she went and locked the kitchen door that they had just entered through. While on the phone with 911, Bell heard someone kicking at the door, attempting to get in the house.

Once the door was kicked in, Bell hung up the phone and hid in a closet, where she thought she heard three more shots being fired in the home.

{¶16} Two neighbors, Tammy Beasley and her daughter, T.B., also testified at trial. T.B. stated she was asleep in her second story bedroom next to Sanders' house when she awoke to the sound of a gunshot outside. She looked out her window and saw two men with guns walking a third man up to the house next door. According to T.B., one of the men had braids in his hair and a thin black mask covering half of his face, and the other was wearing a hat. T.B.'s bedroom window was open, and she heard the man who was holding a gun to the victim's head tell him "you dying tonight." She ran to get her mother, and then called 911, while watching the two armed men force their way in to the house with the victim in tow. Tammy testified that shortly after she heard the gunshot outside, her daughter came into her bedroom to get her. The two returned to her daughter's room and watched the men from the window, while staying close to the floor. Tammy saw a "taller black guy" with "braids in his hair" holding a gun to the victim's head while having the victim kick in the door to the house. She testified that she heard the taller man tell the victim "[i]f you don't give me what I want, you are going to die." She saw the men go into the house, then heard one or two more gunshots before seeing one of the men run away through the yard next to her house.

{¶17} Sergeant John Mostar from the Akron Police Department's Crime Scene Unit testified that police recovered a .38 Special revolver containing four spent shell casings and one remaining bullet. The gun was recovered in the grass next to Sanders' home and a gardening glove was found on the hill behind her house, near the area where police ultimately arrested Sykes. Testing by BCI revealed that the gun was operable. Police identified two bullet holes in the home, one in the kitchen floor and one in the bedroom wall. Additionally, police found

Bryant's wallet and Sykes' Ohio Identification card lying on the porch in front of the door that was forced open.

{¶18} When viewing the foregoing evidence in the light most favorable to the State, we conclude that there was sufficient evidence to support Sykes' convictions for aggravated robbery and aggravated burglary, with firearm specifications on both counts. Despite Sykes' claim that there was "very little evidence" connecting him to both offenses, Bryant, the victim, recognized Sykes when he approached him at gunpoint, demanded his valuables, struck him in the face with his gun, then fired at least one shot to scare Bryant into compliance. Upon forcibly entering Sanders' home and firing more shots inside, Sanders recognized Sykes as the perpetrator as well. Moreover, police recovered a gun from the yard behind the house, which contained four spent shell casings, and found Sykes' identification on the porch adjacent to the door that was forced open. Accordingly, Sykes' assertion that there was insufficient evidence to support his convictions lacks merit, and his first assignment of error is overruled.

Assignment of Error Number Two

"THE CONVICTIONS OF THE DEFENDANT-APPELLANT ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶19} In his second assignment of error, Sykes argues that his convictions are against the manifest weight of the evidence because the identification of the gun that was used was flawed and not credible. He points to the testimony of Bell and Bryant, both of whom stated they had heard five gunshots, as inconsistent with the evidence found by police at the scene, which included a gun that had only four shots fired from it. Sykes also points to the neighbor's testimony that the gun was in the hands of "the taller guy" as demonstrating his evidence weighs heavily against his conviction. We disagree.

{¶20} In determining whether a conviction is against the manifest weight of the evidence, an appellate court:

> "[M]ust 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.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Id. Therefore, this Court's "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. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶21} Sykes essentially argues that the inconsistency between the testimony of the witnesses and the evidence recovered at the scene as to the number of shots fired requires we reverse his convictions. This Court has previously noted that "[it] is the jury's province to take note of [such] inconsistencies and resolve or discount them accordingly. Likewise, it is the jury's role to evaluate the credibility of the witnesses, and to determine what weight to give to any inconsistencies in the[ir] testimony." *State v. Gooden*, 9th Dist. No. 24896, 2010-Ohio-1961, at ¶30. Moreover, we note that both Bryant and Bell's testimony reflected some uncertainty as to the number of shots fired outside of the house. It is not unusual, however, in the stress of such an event where parties are approached by armed gunmen, for their recollection of the events to be somewhat less than precise. See, e.g., *State v. Singfield*, 9th Dist. No. 24576,

2009-Ohio-5945, at ¶19 (acknowledging that the witnesses "varied in their exact description of the events and the physical description of their assailant" when approached by an armed man in a parking lot, but concluding that such differences in testimony did not cause the jury to lose its way in convicting the defendant).

{¶22} To the extent Sykes appears to claim that his conviction was against the manifest weight of the evidence because he was misidentified by neighbors as "the taller guy" who was holding Bryant at gunpoint on the porch, we note that the evidence supports a conclusion otherwise. In addition to the testimony previously recounted, Officer Eric Wagner testified that, upon arriving at the scene less than a minute after learning of the 911 call, he saw a man in dark clothing running from between two houses. He pursued the man toward the dead end portion of South Walnut Street and then up a nearby driveway while in his cruiser with the lights activated. Officer Wagner then exited the car, repeatedly yelling "Stop, police." When he was approximately ten feet from the suspect, the suspect jumped a fence located at the end of the road. Officer Wagner approached the fence and realized there was a cliff-like drop off with trees beyond it. He heard sounds from below him, at which point he saw the same man leaving the wooded area heading to the right on the road below, while holding his head and limping. Officer Wagner relayed to back-up officers on their way to the scene that the suspect was walking on Glendale Road, at the bottom of the hill below South Walnut Street. Officer Drew Reed testified that, upon hearing where the suspect was last seen, he headed directly to Glendale Road. He initially passed the suspect, who was running. Upon stopping and turning around, he saw Sykes crouched beside a storage shed next to the road. Sykes failed to cooperate when police found him and was treated by paramedics for the wound on his head. Officer Wagner later went down

to the area and confirmed that Sykes was the same man he was pursing on South Walnut Street when he first arrived.

{¶23} Sykes testified on his own behalf, stating that he, in fact, was the victim of an armed robbery that night, while in the area, near Sanders' house. He testified that he had walked to Sanders' house hoping to get a ride to the house of one of their mutual friends, because it was her birthday. While in the neighborhood, a man approached him from behind, struck him on the head with an object, pointed a gun at him, and demanded everything he had. The two men fought for a period of minutes, and Sykes ultimately fled from the area. He stated he headed down the steps located on the hill between South Walnut Street and Glendale Avenue and was on his way to look for help when police found him behind the shed. Upon cross-examination, the State questioned Sykes about a conversation he had with his sister from jail, after his arrest, in which he failed to share any of the foregoing events with her, and instead, told her he hurt his head when he fell down a hill in the area. Sykes claimed he was "confused" at the time of the call and did not tell her what had happened to him because "[he] wanted [his] story to come out in court[.]"

{¶24} Despite Sykes' claims that he was misidentified at the scene as the assailant, instead of a victim, we have repeatedly stated that "[a] verdict is not against the manifest weight of the evidence because the jury chose to believe the State's witnesses rather than the defense witnesses." *State v. Andrews*, 9th Dist. No. 25114, 2010-Ohio-6126, at ¶28, citing *State v. Fallon*, 9th Dist. No. 23002, 2007-Ohio-1478, at ¶22. Based on the evidence adduced at trial, the jury could have reasonably believed that Sykes robbed Bryant at gunpoint and forced his way into Sanders' house where he continued to fire shots, while rejecting his claim that he was a victim of crime. Hence, we do not consider this case to be one in which the weight of the

evidence requires that we reverse Sykes' convictions and order a new trial. Accordingly, his second assignment of error is overruled.

III

{¶25} Sykes' four assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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.

BETH WHITMORE
FOR THE COURT

BELFANCE, J.
CONCURS IN JUDGMENT ONLY

DICKINSON, P. J.
CONCURS, SAYING:

{¶26} I concur with the majority's judgment and most of its opinion. For the reasons stated in my concurring opinion in *State v. Bowden*, 9th Dist. No. 24767, 2010-Ohio-758, however, I do not agree with the majority's erroneous application of a federal standard of review to Mr. Sykes's fourth assignment of error. I agree that his fourth assignment of error should be overruled, but based on the fact that the trial court's determination that the State properly exercised its first peremptory challenge was supported by sufficient evidence and was not against the manifest weight of the evidence. I also would not refuse to consider whether the trial court committed plain error by admitting certain exhibits. To require the presence of the magic modifier "plain" in front of the word "error" in an assignment of error before this Court will undertake a plain error analysis does nothing but embarrass lawyers who practice before us. See *State v. Feliciano*, 9th Dist. No. 09CA009595, 2010-Ohio-2809, at ¶74 (Dickinson, P.J., concurring). I would overrule Mr. Sykes's third assignment of error because the trial court did not commit plain error by admitting the exhibits at issue.

APPEARANCES:

KERRY O'BRIEN, Attorney at Law, for Appellant.

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