[Cite as *State v. West*, 2015-Ohio-2936.]

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

STATE OF OHIO Appellee v. FREDERICK C. WEST Appellant	C.A. No. 27485 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 2013-12-3439

DECISION AND JOURNAL ENTRY

Dated: July 22, 2015

HENSAL, Presiding Judge.

{¶1} Defendant-Appellant, Frederick West, appeals from his convictions in the Summit County Court of Common Pleas. This Court affirms in part and reverses in part.

I.

{¶2} Harry Gehm is the owner of a business located at 802 South Arlington Street in Akron. At approximately 4:00 p.m. on December 11, 2013, Mr. Gehm began closing down his business for the night. Each night that he did so, he parked his pickup truck outside the door to his business and left the truck running while he walked inside and set the alarm. He also left his briefcase on his front passenger's seat. On that particular day, the briefcase contained a rubber-banded stack of money to which Mr. Gehm had attached a Post-It note bearing the number "490."

{¶3} When Mr. Gehm returned to his truck, he discovered that his briefcase was gone. He ultimately looked around the outside of his truck and saw another person's footprints in the

freshly fallen snow on the ground. He followed the footprints and soon came face to face with a man he identified as Mr. West. According to Mr. Gehm, when he demanded that Mr. West return his briefcase, Mr. West pulled out a knife, took a step towards him, and told him to leave. Mr. Gehm then retreated and used his cell phone to call 911.

{¶4} The police responded quickly to Mr. Gehm's call and immediately began patrolling the area. One officer found Mr. Gehm's briefcase discarded in an open trash can that was just southwest of the location where Mr. Gehm and Mr. West had been standing. Meanwhile, another officer chased down a fleeing suspect who was later identified as Mr. West. Mr. West was handcuffed and subjected to a pat down, at which point the police discovered a knife, a crack pipe, a crack rod, and a rubber-banded stack of money bearing Mr. Gehm's Post-It note. The police brought Mr. Gehm over to Mr. West and asked him: "Is this the guy?" Mr. Gehm then positively identified Mr. West as the man who had stolen his briefcase and brandished a knife at him.

{¶5} A grand jury indicted Mr. West on one count of aggravated robbery, two repeat violent offender specifications, one count of obstructing official business, and one count of the illegal use or possession of drug paraphernalia. The State later dismissed the count for obstructing official business, and the remaining counts were set for jury trial.

{¶6} Before trial, Mr. West filed a motion to dismiss on the basis of his speedy trial rights. The trial court denied his motion, and the matter proceeded to trial. The jury found Mr. West guilty on all counts. The court merged his repeat violent offender specifications for purposes of sentencing and sentenced him to a total of 12 years in prison.

{¶7} Mr. West now appeals from his convictions and raises five assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> FREDERICK WEST WAS DENIED HIS RIGHTS TO A SPEEDY TRIAL PURSUANT TO THE 6TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION; ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION; AND THE OHIO REVISED CODE, MERITING REVERSAL OF HIS CONVICTIONS.

{¶8} In his first assignment of error, Mr. West argues that the trial court erred by trying him in violation of his speedy trial rights. We do not agree that a violation of Mr. West's speedy trial rights occurred.

{¶9} "The right of an accused to a speedy trial is recognized by the Constitutions of both the United States and the state of Ohio." *State v. Pachay*, 64 Ohio St.2d 218, 219 (1980). Ohio's speedy trial statute provides that a person charged with a felony must be brought to trial within 270 days of his arrest. R.C. 2945.71(C)(2). Yet, "each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days." R.C. 2945.71(E). Accordingly, if a person charged with a felony remains in jail in lieu of posting bond, that person must be brought to trial within 90 days of his arrest. *Id.* "Time is calculated to run the day after the date of arrest." *State v. Browand*, 9th Dist. Lorain No. 06CA009053, 2007-Ohio-4342, ¶ 12.

{¶10} "Under certain conditions, * * * the time within which an accused must be brought to trial can be tolled." *State v. Stephens*, 9th Dist. Summit No. 26516, 2013-Ohio-2223, ¶ 7. "R.C. 2945.72 provides reasons for tolling time * * *." *State v. Fields*, 9th Dist. Wayne No. 12CA0045, 2013-Ohio-4970, ¶ 10. Relevant to this appeal, the statute provides that time may be tolled for:

> (E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused; [or]

> * * *
>
> (H) The period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion * * *.

R.C. 2945.72(E), (H). "[I]f a defendant is not brought to trial within the prescribed time period, the trial court must discharge the defendant upon motion for dismissal prior to or at the commencement of trial." *Browand* at ¶ 13.

{¶11} Mr. West remained incarcerated from the day of his arrest through the day that his trial began. Accordingly, absent any tolling events, the State had to bring him to trial within 90 days of his arrest. *See* R.C. 2945.71(E). Mr. West was arrested on December 11, 2013, so his speedy trial time began to accrue on December 12, 2013. *See Browand* at ¶ 12.

{¶12} On January 3, 2014, Mr. West filed a request for discovery and, on January 9, 2014, he requested a continuance until January 23, 2014. Further, on January 23, 2014, he requested another continuance that led the trial court to set the matter for a pretrial on February 13, 2014. All three of Mr. West's requests tolled his speedy trial time. *See* R.C. 2945.72(E), (H). *See also State v. Miller*, 9th Dist. Lorain Nos. 10CA009922 & 10CA009915, 2012-Ohio-1263, ¶ 10 (time tolled for discovery request); *State v. Stevens*, 9th Dist. Lorain No. 11CA009995, 2012-Ohio-4095, ¶ 9 (time tolled "as various pretrials were continued or set at [the defendant's] request"). Thus, Mr. West's speedy trial time ran from December 12, 2013, until January 3, 2014, before tolling as a result of the foregoing events. During that period of time, a total of 23 days accrued for purposes of his statutory speedy trial rights.

{¶13} At the February 13, 2014 pretrial, Mr. West requested another continuance so that he might consider the State's plea offer. The parties agreed to set the matter for a pretrial on March 27, 2014, and selected an April 14, 2014 trial date. The record does not contain a

transcript of any proceedings that occurred on March 27th, but does contain a transcript from a pretrial that took place on April 1, 2014.[1] At the April 1st pretrial, the parties discussed Mr. West's speedy trial rights with the court, and the court determined that the April 14, 2014 trial date did not fall outside of the speedy trial deadline. The court noted, however, that it had several cases scheduled for trial that day, including a murder case that predated Mr. West's case. The court notified Mr. West that, if the murder case failed to resolve, it would take priority and the court would have no choice but to continue Mr. West's trial to the next available date.

{¶14} On April 14, 2014, the parties came before the court for the scheduled trial. The court informed Mr. West that it would have to continue his trial because the older murder case that the court had scheduled for trial that same day was going forward. Mr. West filed a motion to dismiss on the basis of his speedy trial rights, but the court denied his motion. After reconciling the schedules of the court, the State, and defense counsel, the court determined that June 9, 2014, was the next available trial date. Accordingly, it rescheduled the trial for that day. The trial ultimately went forward as rescheduled.

{¶15} Mr. West does not dispute that his speedy trial time had not yet expired on April 14, 2014, his originally scheduled trial date. He also concedes that a period "of any reasonable continuance granted other than upon the accused's own motion" is a tolling event for purposes of the speedy trial statute. R.C. 2945.72(H). It is Mr. West's argument that, once the court decided sua sponte to continue his trial, it was obligated "to file its journal entry noting the continuance and the reasons for the continuance *before* April 15, 2014." (Emphasis sic.) According to Mr.

[1] At the April 1st pretrial, the prosecutor noted that he did, in fact, meet with a representative for Mr. West on March 27th. He specified that Mr. West's counsel of record was unable to attend that day and had a colleague attend on his behalf. Nevertheless, the record does not contain a transcript of their meeting.

West, absent further tolling events, April 15, 2014, was the last day that his trial could begin without the speedy trial deadline having expired. Because the court did not issue its journal entry regarding the continuance until April 30, 2014, Mr. West argues that his speedy trial rights were violated.

{¶16} We do not agree that April 15, 2014, was the last day that the trial court could have brought Mr. West to trial without violating his statutory speedy trial rights. As previously noted, by February 13, 2014, only 23 days had elapsed for purposes of Mr. West's speedy trial time. Then, at the February 13th pretrial, defense counsel requested an additional continuance for purposes of considering the State's plea offer. Specifically, Mr. West's counsel stated:

> I do request a continuance so that I can discuss this offer in a contact visit with Mr. West at the Summit County Jail and thoroughly discuss the offer and perhaps fashion a counteroffer.
>
> But in the event we cannot resolve the case at the next pretrial, I would like to get a trial date.

Defense counsel agreed to set another pretrial for March 27, 2014.

{¶17} Defense counsel's request for an additional continuance and to set the matter for a pretrial on March 27, 2014, further tolled Mr. West's speedy trial time. *See Stevens*, 2012-Ohio-4095, at ¶ 12, citing R.C. 2945.72(E). The record does not contain a transcript of any proceedings that took place on March 27th, but we will assume for purposes of our analysis that Mr. West's speedy trial time began to run again as of that day. On April 30, 2014, the trial court issued its journal entry rescheduling Mr. West's trial date. Between March 27, 2014, and April 30, 2014, 35 days elapsed for purposes of Mr. West's speedy trial time.

{¶18} "When sua sponte granting a continuance under R.C. 2945.72(H), the trial court must enter the order of continuance and the reasons therefor by journal entry prior to the expiration of the time limit prescribed in R.C. 2945.71 for bringing a defendant to trial." *State v.*

Mincy, 2 Ohio St.3d 6 (1982), syllabus. At the point that the court issued its order of continuance here, only 58 days of Mr. West's speedy trial time had elapsed. Accordingly, the court entered its order of continuance prior to the expiration of his speedy trial time, *see id.*, and Mr. West's argument to the contrary lacks merit.

{¶19} The record does not support the conclusion that the court violated Mr. West's statutory speedy trial rights. A period "of any reasonable continuance granted other than upon the accused's own motion" is a tolling event for purposes of the speedy trial statute. *See* R.C. 2945.72(H). Having reviewed the record, we cannot say that it was unreasonable for the court to continue Mr. West's trial due to its crowded docket. The court rescheduled the trial for the first date that the court, the State, and defense counsel were available, and the trial went forward on that day. Accordingly, no violation of Mr. West's statutory speedy trial rights occurred. *See State v. Green*, 9th Dist. Summit No. 26323, 2012-Ohio-5648, ¶ 14.

{¶20} Mr. West also argues that the court violated his constitutional right to a speedy trial because the trial delay that occurred here was unreasonable. "The statutory speedy trial provisions of R.C. 2945.71 and the constitutional guarantees found in the Ohio and United States Constitutions are coextensive." *State v. Gaines*, 9th Dist. Lorain No. 00CA008298, 2004-Ohio-3407, ¶ 16. Accordingly, a defendant whose statutory speedy trial rights have not been violated may nevertheless seek a discharge on the basis that his constitutional right to a speedy trial has been violated. *See id.* In considering whether a defendant was deprived of his constitutional right to a speedy trial, a court must consider "the length of delay, reason for delay, assertion of the right, and resulting prejudice." *Id.*

{¶21} Mr. West was incarcerated for 180 days before his trial commenced. As set forth above, however, large periods of that delay were attributable to Mr. West. Mr. West received

multiple continuances at his request and did not assert his speedy trial rights until April 2014, just two months before his trial commenced. The remainder of the delay was attributable to the trial court, and we have already determined that the delay caused by the court's scheduling difficulties was reasonable. Finally, with regard to prejudice, Mr. West has not argued that his defense was impaired by the delay. His only argument is that the amount of time he spent in jail was "itself oppressive and prejudicial." When balancing the factors outlined above in light of the circumstances, however, we cannot conclude that Mr. West was denied his constitutional right to a speedy trial. *See id.* at ¶ 17-20. As such, Mr. West's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> WEST'S AGGRAVATED ROBBERY CONVICTION WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE, WHICH VIOLATED HIS RIGHTS TO DUE PROCESS UNDER THE 14TH AMENDMENT TO THE U.S[.] CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION, AND THEREFORE HIS CONVICTION ON THAT COUNT AND THE ATTACHED REPEAT VIOLENT OFFENDER SPECIFICATION MUST BE VACATED.

{¶22} In his second assignment of error, Mr. West argues that his aggravated robbery conviction is based on insufficient evidence. Specifically, he argues that the State failed to prove that he was still in the process of fleeing from a theft offense when he allegedly displayed, brandished, used, or threatened to use a deadly weapon. We disagree.

{¶23} Whether a conviction is supported by sufficient evidence is a question of law, which this Court reviews de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In making this determination, we must view the evidence in the light most favorable to the prosecution:

> 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.

State v. Jenks, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶24} "No 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 * * * and either display the weapon, brandish it, indicate that the offender possesses it, or use it * * *." R.C. 2911.01(A)(1). Whoever commits the foregoing offense is guilty of aggravated robbery. R.C. 2911.01(C).

{¶25} Mr. Gehm testified that he owned a business on South Arlington Street and that his business consisted of two buildings: one at 825 South Arlington and one at 802 South Arlington. At approximately 4:00 p.m. on the day in question, Mr. Gehm began closing down his business for the night. He testified that it was his habit to close down his business in the same manner each day. Specifically, he would drive his truck to 825 South Arlington, secure it, and then drive his truck to 802 South Arlington. Mr. Gehm testified that he always parked his truck facing north when he arrived at the second building so as to position his driver's side door directly next to the door of the building. He would then leave his truck running and his briefcase on the front passenger's seat while he went inside the building and set the alarm. He testified that his briefcase contained his billfold, as well as a rubber-banded stack of money. On the day in question, Mr. Gehm's stack of money had a Post-It note affixed to its corner with the figure "490" written on it.

{¶26} Mr. Gehm estimated that he was inside 802 South Arlington for less than one minute. When he finished securing the building, he came back outside and got into his truck. At that point, he realized that his briefcase was no longer on his front passenger's seat. Mr. Gehm

looked around inside his truck, wondering if the briefcase had fallen. When he failed to find it, however, he exited the truck and walked around to the passenger's side. Mr. Gehm then saw that his passenger's side door was slightly ajar. He also saw a set of footprints on the ground. Mr. Gehm explained that it had started snowing earlier that afternoon and approximately half an inch of snow had accumulated on the ground. Because he only observed one set of footprints in the snow other than his own, Mr. Gehm decided to follow them. He turned off the engine in his truck and began walking in the direction of the footprints.

{¶27} As Mr. Gehm walked south on South Arlington, he observed a lone individual about 150 feet away from him. He testified that the individual had already crossed Hunt Street when he saw him, was walking rather than running, and was wearing a dark jacket. Mr. Gehm hastened his pace as he watched the individual turn right and walk behind the southeast corner of a building located at the corner of Hunt Street and South Arlington. When Mr. Gehm reached the same corner of the building, he saw the figure turn right again at the southwest corner of the building. Mr. Gehm continued to follow until he emerged at the southwest corner of the building.

{¶28} When Mr. Gehm reached the corner of the building and looked to his right, he saw the individual he had followed standing between two vehicles on the southwest side of the building. Mr. Gehm described the vehicles as being parallel parked approximately three feet apart with their rear bumpers facing the wall of the building. The man he observed was standing in the space between the two vehicles next to their rear bumpers and the wall of the building. Seeking to confront the man, Mr. Gehm walked over to the parked cars and stood at their front bumpers. He testified that he could not see his briefcase anywhere, but that the man appeared to be focused on something between the rear bumper of one of the vehicles and the wall of the

building. Mr. Gehm specified that the man was turned sideways and was partially bent over. Because the man did not notice that Mr. Gehm was standing there, Mr. Gehm called out to him.

{¶29} Mr. Gehm testified that he asked the man if he could have his briefcase back. In response, the man told Mr. Gehm: "I don't have your f***ing briefcase." As the man did so, he straightened and faced Mr. Gehm, such that Mr. Gehm had a clear view of his face. Mr. Gehm identified the individual as Mr. West. He testified that he demanded that Mr. West give him back his briefcase, and Mr. West again replied "I don't have your f***ing briefcase." When Mr. Gehm repeated himself a third time, Mr. West removed a knife from his pocket, snapped it open, took a step towards Mr. Gehm, and stated: "I don't have your f***ing briefcase, man. Get the f*** out of here." Mr. Gehm then backed away and retreated until he felt it was safe to use his cell phone to call the police. Mr. Gehm estimated that approximately three to four minutes elapsed from the point in time that he initially left his truck to follow the footprints and the point in time that he confronted Mr. West. He further estimated that the police arrived within 30 seconds of his phone call.

{¶30} Officer Andrew Moss was the first to arrive on scene and asked Mr. Gehm to lead him back to the place where Mr. West had confronted him. Mr. West was no longer there when they arrived, but Officer Moss observed a footprint trail in the snow. He, therefore, asked Mr. West to return to his truck and followed the footprints alone on foot. Officer Moss testified that the footprints led further west before turning south at the point where several residences were located. As he walked further south, Officer Moss discovered a briefcase and multiple items discarded in an open trash can behind the garage of one of the residences. Officer Moss observed that the briefcase appeared to have been rifled through, so he grabbed the briefcase and the loose items that he believed had come from inside it. He continued to follow the footprints

towards Eva Avenue and then east back towards South Arlington. Officer Moss testified that he lost track of the footprints at South Arlington, but, by that point in time, his fellow officers were already apprehending Mr. West.

{¶31} Officer Douglas Matson also responded to Mr. Gehm's 911 call and arrived while Mr. Gehm was speaking with Officer Moss. After learning that the man who had threatened Mr. Gehm might still be nearby, Officer Matson began driving around the surrounding area in search of him. He drove south on South Arlington before turning west onto Eva Avenue. While driving west on Eva Avenue, Officer Matson saw a man standing near the rear of a car at one of the residences. He testified that he initially dismissed the man, but became suspicious when he drove further down the road, looked in his rearview mirror, and saw the man emerge on Eva Avenue. Officer Matson decided to speak with the man, so he executed a U-turn. As a result of the U-turn, Officer Matson briefly lost sight of the man. Once he drove farther down Eva Avenue, however, he spotted the man running across South Arlington in the direction of Forbes Avenue. Officer Matson ultimately had to stop his car and chase down the man on foot before he was able to apprehend him. Officer Matson identified the man he apprehended as Mr. West. He testified that, when he performed a pat down on Mr. West, he found a knife, a rubber-banded stack of money, a crack pipe, and a crack rod. The stack of money had Mr. Gehm's Post-It note affixed to its corner.

{¶32} Mr. West argues that the State failed to prove the "fleeing" element of aggravated robbery because there was no evidence that he showed Mr. Gehm a deadly weapon while he was "fleeing" from a theft offense. According to Mr. West, any theft offense that occurred had terminated by the time Mr. Gehm approached him. He argues that the theft and the brandishing

of the knife constituted two separate offenses such that, at most, the State only set forth evidence of misdemeanor theft and aggravated menacing.

{¶33} Initially, we note that Mr. West assumes for purposes of his argument that he had already completed his theft offense when he brandished a knife at Mr. Gehm. Because he assumes his theft offense was already complete, he focuses strictly on the issue of flight. Likewise, the State only addresses the issue of flight. There is no argument before this Court that, at the time Mr. West brandished his knife, he was still in the process of committing a theft offense. Accordingly, this Court will not address that issue. We will assume for purposes of our review that the only issue is whether Mr. West was fleeing from a theft offense at the time he brandished a knife at Mr. Gehm.

{¶34} "Neither 'fleeing' nor 'immediately' is defined in the Revised Code." *State v. Thomas*, 106 Ohio St.3d 133, 2005-Ohio-4106, ¶ 15. Because neither is defined, the Ohio Supreme Court has looked to the dictionary definition of both terms in applying the robbery statute. *See id. Accord In re J.H.*, 9th Dist. Summit No. 24221, 2008-Ohio-6621, ¶ 13. "To 'flee' is '[t]o run away from,' 'to try to escape,' '[t]o hasten for safety,' or '[t]o withdraw hastily.'" *Thomas* at ¶ 15, quoting V Oxford English Dictionary 1037 (2d Ed.1989). "'Immediately' means '[w]ith no person, thing, or distance, intervening in time, space, order, or succession,' or '[w]ithout any delay or lapse of time.'" *Thomas* at ¶ 15, quoting VII Oxford English Dictionary at 682. "Black's Law Dictionary does not define the word 'flee.' It defines 'immediate' as '[o]ccurring without delay.'" *Thomas* at ¶ 15, quoting *Black's Law Dictionary* 764 (8th Ed.2004). The question of whether a defendant was "fleeing immediately" after a theft is a fact specific inquiry. *Thomas* at ¶ 16.

{¶35} In *State v. Thomas*, Mr. Thomas was seen leaving a store with two bags of merchandise for which he had not paid. Shortly after leaving the store, Mr. Thomas dropped the bags and continued to walk away. A security officer from the store followed him into a nearby laundry mat and told him to step outside. Mr. Thomas complied, and the two walked back to the store. At the front door of the store, however, Mr. Thomas tried to run away and struck the security guard as a result of the struggle that ensued. He was convicted of robbery on the basis that he struck the security guard while fleeing immediately after committing a theft offense. *Id.* at ¶ 2-3.

{¶36} The Ohio Supreme Court overturned Mr. Thomas' robbery conviction because it determined that he was not "fleeing immediately" from a theft offense when he struck the security guard. *Id.* at ¶ 16. The Supreme Court noted that Mr. Thomas was no longer actively committing a theft offense at the time that he struck the guard because he had dropped the stolen merchandise outside the store before walking away. *Id.* at ¶ 14. Moreover, the "delay or lapse of time [that had occurred] between the theft offense and the attempt to flee" showed that Mr. Thomas was no longer "fleeing immediately" from the theft offense at the time he struck the guard. *Id.* at ¶ 16. The Supreme Court noted that its decision might well have been different if the evidence had been such that Mr. Thomas struck the guard "in an attempt to flee immediately after [he] left the store, or after he dropped the stolen goods, or after being forced by [the guard] to return to the store." *Id.*

{¶37} This case is readily distinguishable from *Thomas*. Although a delay occurred between the time Mr. Gehm first noticed that his briefcase was missing and the time Mr. West brandished a knife at him, the delay was minimal. Mr. Gehm estimated that only minutes had elapsed, and there was testimony that he was able to see Mr. West walking in front of him

shortly after he began to follow the footprints in the snow. More importantly, at the time that Mr. West brandished the knife at Mr. Gehm, he had not yet discarded Mr. Gehm's briefcase or the money inside it. Officer Moss later found the briefcase in a garbage can southwest of the location where Mr. West confronted Mr. Gehm. Thus, unlike Mr. Thomas, Mr. West was still in possession of the items he had stolen when he brandished a knife at Mr. Gehm. *Compare id.* at ¶ 14.

{¶38} Assuming without deciding that Mr. West had already completed his theft offense at the time that he brandished a knife at Mr. Gehm, a rational trier of fact could have concluded that the State set forth sufficient evidence that Mr. West was still in the process of fleeing immediately after a theft offense when he brandished the knife. *Jenks*, 61 Ohio St.3d 259 at paragraph two of the syllabus. There was evidence that Mr. West had taken Mr. Gehm's briefcase only minutes before and was still in possession of the briefcase when Mr. Gehm confronted him. Mr. Gehm discovered Mr. West secreted between two parked cars on the side of a building, and Mr. West immediately straightened and became hostile toward Mr. Gehm when Mr. Gehm spoke to him. No intervening events occurred, and, viewing the evidence in a light most favorable to the State, a rational trier of fact could have concluded that Mr. West was still in the process of fleeing from the theft he had committed when he brandished his knife at Mr. Gehm. Thus, we cannot conclude that Mr. West's aggravated robbery conviction is based on insufficient evidence.

{¶39} Mr. West also argues that once his aggravated robbery conviction is overturned the repeat violent offender specifications linked to that conviction also must be vacated. Because we are upholding his aggravated robbery conviction, however, we need not vacate his repeat violent offender specifications. Mr. West's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> WEST'S AGGRAVATED ROBBERY CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND MUST BE REVERSED.

{¶40} In his third assignment of error, Mr. West argues that his aggravated robbery conviction is against the manifest weight of the evidence. Specifically, he argues that the jury lost its way when it found that he was still in the process of fleeing from a theft offense when he allegedly displayed, brandished, used, or threatened to use a deadly weapon. We disagree.

{¶41} If a defendant asserts that his conviction is against the manifest weight of the evidence:

> [A]n 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, 33 Ohio App.3d 339, 340 (9th Dist.1986). Weight of the evidence pertains to the greater amount of credible evidence produced in a trial to support one side over the other side. *Thompkins*, 78 Ohio St.3d at 387. An appellate court should only exercise its power to reverse a judgment as against the manifest weight of the evidence in exceptional cases. *State v. Carson*, 9th Dist. Summit No. 26900, 2013-Ohio-5785, ¶ 32, citing *Otten* at 340.

{¶42} Mr. West did not present any witnesses in his defense, so the evidence pertinent to this assignment of error is outlined above. Mr. West asks this Court to review the same evidence for weight rather than sufficiency. He argues that the jury lost its way when it chose to believe that he brandished a knife at Mr. Gehm while "fleeing immediately" from a theft offense.

{¶43} Assuming without deciding that Mr. West has actually set forth a weight argument here, we do not agree that his aggravated robbery conviction is against the manifest weight of the evidence. Although Mr. West did not run from the scene of the crime, he did walk

away at a steady pace before secreting himself in between two cars that abutted the side of a building. The position of his body at the time Mr. Gehm confronted him suggested that he was in the process of looking through Mr. Gehm's briefcase. When Mr. Gehm demanded his briefcase back, Mr. West removed the knife from his pocket, took a step towards Mr. Gehm, and told him to "[g]et the f*** out of here." The police later discovered Mr. Gehm's discarded briefcase at a location southwest of the location where Mr. West confronted Mr. Gehm and found Mr. Gehm's money on Mr. West's person. Thus, the jury could have concluded that Mr. Gehm interrupted Mr. West while he was immediately fleeing from the theft he had committed.

{¶44} Having carefully reviewed the record, we cannot conclude that this is the exceptional case where the jury clearly lost its way and created a manifest miscarriage of justice by convicting Mr. West. *See Otten*, 33 Ohio App.3d at 340. Consequently, his third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> THE INTRODUCTION OF EVIDENCE OF A SUGGESTIVE AND UNRELIABLE "SHOW UP" IDENTIFICATION VIOLATED WEST'S DUE PROCESS RIGHTS UNDER THE 14TH AMENDMENT, MERITING REVERSAL OF HIS CONVICTIONS.

{¶45} In his fourth assignment of error, Mr. West argues that the trial court erred when it allowed the State to introduce evidence of a suggestive and unreliable show-up identification. He acknowledges that he did not move to suppress the identification before trial and failed to object to its admission at trial. Nevertheless, he asserts that the admission of the identification was plain error.

{¶46} Assuming that plain error applies to this situation, Mr. West has not shown that it was plain error for the court to allow the testimony about Mr. Gehm's out-of-court identification of Mr. West. *See State v. Reives-Bay*, 9th Dist. Summit No. 25138, 2011-Ohio-1778, ¶ 10

(reviewing similar argument for plain error, but noting Criminal Rule 12's mandate that such arguments be raised before trial). Under Criminal Rule 52(B), "a plain error or defect that affects a substantial right may be noticed although it was not brought to the attention of the trial court." *State v. Horton*, 9th Dist. Summit No. 26407, 2013-Ohio-3902, ¶ 50. "A plain error must be obvious on the record, such that it should have been apparent to the trial court without objection." *Id.*, quoting *State v. Kobelka*, 9th Dist. Lorain No. 01CA007808, 2001 WL 1379440, *2 (Nov. 7, 2001). "As notice of plain error is to be taken with utmost caution and only to prevent a manifest miscarriage of justice, the decision of a trial court will not be reversed due to plain error unless the defendant has established that the outcome of the trial clearly would have been different but for the alleged error." *Horton* at ¶ 50.

{¶47} Even assuming that the show-up identification that occurred here was improper, Mr. West has not shown that the outcome of his trial would have been different, but for the admission of the testimony about the identification. *See State v. Beeler*, 9th Dist. Summit No. 27309, 2015-Ohio-275, ¶ 9. Mr. Gehm identified Mr. West in court as the person who stole his briefcase. He was able to follow Mr. West's footprints to the spot where he confronted him, and later directed the police to the same location. One officer was then able to continue following a footprint trail that led him to Mr. Gehm's briefcase. Additionally, upon his arrest, Mr. West was found to be in possession of a knife and Mr. Gehm's money.

{¶48} Mr. West has failed to establish that the outcome of his trial was affected by the admission of the testimony about the show-up identification that took place here. Accordingly, he has not shown that the court committed plain error by allowing that testimony. *See Beeler* at ¶ 9. Mr. West's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

DURING WEST'S SENTENCING HEARING, THE TRIAL COURT DID NOT ENUNCIATE ANY SENTENCE FOR WEST'S MISDEMEANOR DRUG PARAPHERNALIA CHARGE, MANDATING REVERSAL AND A NEW SENTENCING HEARING.

{¶49} In his fifth assignment of error, Mr. West argues that the trial court erred by sentencing him on his drug paraphernalia charge after failing to set forth a sentence for that charge at his sentencing hearing. We agree.

{¶50} At Mr. West's sentencing hearing, the court failed to impose a sentence on his drug paraphernalia charge. In its sentencing entry, however, the court sentenced Mr. West to serve 30 days in jail on that count. Mr. West argues that the court erred by sentencing him to jail time on his drug paraphernalia count when it failed to address that count at his sentencing hearing. The State concedes the error and asks that we remand this matter for resentencing.

{¶51} "[A] criminal defendant must be present at every stage of his trial, including sentencing." *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, ¶ 22, citing Crim.R. 43(A). Thus, "a trial court errs when it issues a judgment entry imposing a sentence that differs from the sentence pronounced in the defendant[']s presence." *State v. Aliane*, 10th Dist. Franklin No. 03AP-840, 2004-Ohio-3730, ¶ 8. *Accord State v. Bakhshi*, 2d Dist. Montgomery No. 25585, 2014-Ohio-1268, ¶ 56. The remedy for such an error is a remand for a resentencing hearing. *See Alaine* at ¶ 9.

{¶52} The trial court here erred by sentencing Mr. West to serve 30 days in jail on his drug paraphernalia count after the court failed to address that count in open court. As such, this matter must be remanded for a resentencing hearing. Mr. West's fifth assignment of error is sustained.

III.

{¶53} Mr. West's fifth assignment of error is sustained. His remaining assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and remanded for further proceedings consistent with the foregoing opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

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(C). 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 equally to both parties.

JENNIFER HENSAL
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR.

APPEARANCES:

JACQUENETTE S. CORGAN, Attorney at Law, for Appellant.

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