

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF SUMMIT    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.     27387

Appellee

v.

THEODORE A. MCCRAE

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.    CR 13 11 3060

Appellant

DECISION AND JOURNAL ENTRY

Dated: May 13, 2015

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SCHAFFER, Judge.

{¶1} Defendant-Appellant, Theodore McCrae, appeals the judgment of the Summit County Court of Common Pleas convicting him of felonious assault with a firearm specification and sentencing him to a six-year prison term. For the reasons that follow, we affirm the trial court’s judgment.

I.

{¶2} After a jury trial, McCrae was found guilty of one count of felonious assault in violation of R.C. 2903.11(A)(2) with a firearm specification as outlined in R.C. 2941.145. The conviction arose from an incident in which McCrae allegedly fired two shots into an automobile’s passenger side as it was being operated by an individual sitting in the driver’s seat. At trial, the State offered the expert testimony of Jonathan Gardner, a forensic scientist with the Ohio Bureau of Criminal Investigation. He testified that he performed tool mark analysis on a

bullet recovered from the crime scene and that his test results indicated a match between the recovered bullet and the gun alleged to be in McCrae's possession the evening of the shooting.

{¶3} On the morning of the third day of trial, immediately before Mr. Gardner's testimony, McCrae's counsel filed a motion in limine asking the trial court to exclude expert testimony regarding tool mark analysis. Outside the presence of the jury, the trial court heard oral arguments from both the State and McCrae's counsel on the motion in limine. The court denied as untimely the motion in limine before Mr. Gardner's testimony. During the course of Mr. Gardner's testimony, including when he recounted his finding that the bullet matched the gun in McCrae's possession, McCrae's counsel did not assert an objection. Rather than renewing his objection during the testimony, McCrae's counsel cross-examined Mr. Gardner about the tool mark analysis he performed.

{¶4} McCrae filed this timely appeal, presenting one assignment of error for our review.

## II.

### ASSIGNMENT OF ERROR

#### THE TRIAL COURT ERRED WHEN IT DID NOT EXCLUDE EXPERT TESTIMONY ON TOOL MARK ANALYSIS.

{¶5} In his sole assignment of error, McCrae argues that the trial court erred in excluding Mr. Gardner's expert testimony regarding tool mark analysis. Since McCrae forfeited this issue for appellate review and has failed to argue plain error in the admission of this testimony, we disagree.

{¶6} The court's ruling on a motion in limine is provisional. "The failure of a defendant to contemporaneously object to the introduction of evidence to the jury 'forfeits the matter for review on appeal.' " *State v. Miller*, 9th Dist. Lorain Nos. 10CA009922 and

10CA009915, 2012-Ohio-1263, ¶ 46, quoting *State v. Sykes*, 9th Dist. Summit No. 25263, 2011-Ohio-293, ¶ 8. Forfeiture arises even when the defendant files a motion in limine since such a motion “does not preserve issues related to evidentiary rulings on appeal.” *State v. Garfield*, 9th Dist. Lorain No. 09CA009741, 2011-Ohio-2606, ¶ 55.

{¶7} In criminal cases, the forfeiture of an evidentiary issue waives all but plain error. *State v. Ricks*, 9th Dist. Medina No. 09CA0094-M, 2010-Ohio-4659, ¶ 13. The plain error doctrine, as it is outlined in Crim.R. 52(B), may only be invoked where the following three elements apply:

First, there must be an error, i.e., a deviation from the legal rule. \* \* \* Second, the error must be plain. To be “plain” within the meaning of Crim.R. 52(B), an error must be an “obvious” defect in the trial proceedings. \* \* \* Third, the error must have affected “substantial rights” \* \* \* [and] affected the outcome of the trial.

*State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). We are cautioned that notice of plain error “is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

{¶8} McCrae filed a motion in limine to exclude the firearm tool mark analysis on the third day of trial. The trial court received oral arguments on the motion outside the presence of the jury. After the expert analysis was offered, McCrae never renewed his objection, which operates as a forfeiture of all but plain error. *See, e.g., State v. Martinez*, 9th Dist. Summit No. 27243, 2015-Ohio-1123, ¶ 13; *Miller* at ¶ 48. Although McCrae has only preserved plain error under Crim.R. 52(B), he does not argue the existence of plain error on appeal. Indeed, his appellate brief does not mention plain error. Due to this failure to raise a plain error argument, we decline to sua sponte fashion one and then address it. *See App.R. 16(A)(7)* (requiring briefs to have “[a]n argument containing the contentions of the appellant with respect to each

assignment of error \* \* \* with citations to the authorities \* \* \* on which appellant relies.”); *State v. Cross*, 9th Dist. Summit No. 25487, 2011-Ohio-3250, ¶ 41 (“While a defendant who forfeits such an argument may still argue plain error on appeal, this court will not sua sponte undertake a plain-error analysis if a defendant fails to do so.”), citing *State v. Hairston*, 9th Dist. Lorain No. 05CA008768, 2006-Ohio-4925, ¶ 11 (“Accordingly, as Appellant failed to develop his plain error argument, we do not reach the merits and decline to address this argument.”).

{¶9} Accordingly, we overrule McCrae’s sole assignment of error.<sup>1</sup>

### III.

{¶10} Since McCrae’s sole assignment of error is overruled, we affirm the judgment of the Summit County Court of Common Pleas.

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.

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<sup>1</sup> Even if we were to reach the merits and find that the trial court should have excluded the expert testimony regarding tool mark analysis, we would not reverse McCrae’s conviction since the admission of the testimony would merely constitute harmless error. *See State v. Turner*, 9th Dist. Summit No. 26591, 2013-Ohio-2433, ¶ 23 (“The application of the harmless error rule is simple; if, in the absence of all erroneously admitted evidence there remains overwhelming evidence of guilt, then the error was harmless.”), citing *State v. Williams*, 6 Ohio St.3d 281, 290 (1983). After reviewing the record, we determine that the State offered overwhelming evidence to prove McCrae’s guilt, including the testimonies of two witnesses who were present at the time of the shooting and identified McCrae as the shooter.

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 to Appellant.

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JULIE SCHAFER  
FOR THE COURT

HENSAL, P. J.  
MOORE, J.  
CONCUR.

APPEARANCES:

WALTER T. MADISON, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.