[Cite as *State v. Dickie*, 2009-Ohio-5443.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon: W. Scott Gwin, P.J.
	:	Hon: William B. Hoffman, J.
Plaintiff-Appellee	:	Hon: Julie A. Edwards, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-00029
BRETTAN DICKIE	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Licking County Court of Common Pleas, Case No. 08CR00553
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 8, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
EARL L. FROST Assistant Prosecuting Attorney 20 S. Second St., 4th Floor Newark, OH 43055	ROBERT D. ESSEX 1654 East Broad Street Suite 302 Columbus, OH 43203

Gwin, P.J.

{¶1} Defendant-appellant, Brettan Dickie, appeals from his sentence and conviction in the Licking County Court of Common Pleas on two counts of theft, felonies of the fifth degree, in violation of R.C. 2913.02(A)(1). Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} Kelly Barr testified that while walking her dog in July 2008 she discovered a purse that contained a wallet and cell phone. She called the police.

{¶3} Shelby Salvagna was the owner of that purse. She stated appellant was her neighbor. Ms. Salvagna testified that on July 22, 2008 sometime after 10:00 p.m. appellant called her and her boyfriend asking for a ride. Ms. Salvagna agreed to assist appellant. She took her purse containing a wallet, checkbook, a calendar, phone book, pictures, paperwork and two cell phones and left her home to meet appellant at a Speedway located on Cedar and Main. Upon arriving at the Speedway, appellant and another white male approached Ms. Salvagna's car. Appellant got into the front passenger seat and the other male got in the rear passenger seat. After directing Ms. Salvagna to turn onto Lawrence, appellant told Ms. Salvagna to stop in the middle of the road, touched a baseball bat that Ms. Salvagna kept in her car for her protection, grabbed Ms. Salvagna's purse, exited the car and ran. The unidentified male in the backseat also exited the car and fled. Ms. Salvagna returned to the Speedway where she called the police. Ms. Salvagna was able to give the police the suspect's first name, his description and a description of a tattoo. A few days later, Ms. Salvagna selected

appellant out of a photo array stating "[I]t looks like the person who stole my purse, but in the picture the officer showed me he was heavier than he is now."

{¶4} Patrol officer Bill Eberts responded to the scene and after some investigation prepared a photo array. He showed the array to Ms. Salvagna who made a tentative identification stating the picture showed a heavier person. Patrol officer Eberts also collected the purse and returned it to Ms. Salvagna. He submitted the bat for fingerprints but not the purse.

{¶5} The prosecution called Joshua Sawyers as a witness during appellant's trial. At the time of his testimony, Mr. Sawyers was incarcerated in the Licking County Jail for Unauthorized Use of Motor Vehicle, Driving under Suspension and Falsification. Mr. Sawyers testified that he was with appellant in July 2008, and had heard from around the neighborhood that appellant had stolen the purse. Further Mr. Sawyers testified that he had observed a brown checkbook and a driver's license with the picture of a heavyset woman with black hair. Mr. Sawyers further recalled seeing an address in Heath, Ohio on the driver license. Over objection, the prosecutor was allowed to impeach Mr. Sawyers with a statement he wrote for the police stating he heard appellant talking about stealing a woman's purse, and was threatened if he were to testify.

{¶6} The prosecutor then recalled patrol officer Bill Eberts. The prosecutor elicited numerous details regarding Joshua Sawyers out of court statement regarding Mr. Sawyers having seen a brown checkbook and a description of the ID card he saw in appellant's possession.

{¶7} Appellant testified that he and his girlfriend, Krysta Salyer, had been arguing about a trip to Cedar Point. He went to Danny Alexander's apartment sometime that morning. He stated he hung out with him all day before going to a grocery store where his mother picked him up and took him to Mt. Vernon.

{¶8} Appellant testified that he knew Shelby Salvagna and had a sexual relationship with her. After arriving at his mother's house in Mt. Vernon on the night of July 22, 2008, he called her and stated he was done with both her and Krysta and was not coming back to Newark. Appellant testified that after he made this call, Ms. Salvagna called him several times screaming and threatening him. He stated he did not call Ms. Salvagna for a ride nor did he take her purse. Appellant further testified that he told Officer Eberts about his alibi witnesses and that he could call them.

{¶9} Danny Alexander testified on appellant's behalf. Mr. Alexander stated he remembered July 22, 2008 because appellant and Krysta were fighting. Mr. Alexander claimed that the appellant came over to his apartment around 10:30 a.m. They stayed at Mr. Alexander's apartment working on a car until they left about 6:30 p.m. The pair got something to eat, after which Mr. Alexander dropped appellant off at a Save-a-Lot around 8:30 p.m.

{¶10} Krysta Salyer testified that appellant and she were fighting on July 22, 2008, as well as the night before. She testified that she kicked appellant out of her home on July 22, 2008. Ms. Salyer claims appellant called her from his mother's home later that evening. The next day he came home from his mother's between 9:30 or 10:00 a.m.

{¶11} Appellant's sister Rachel Dickie and his mother Channa Jarrells also testified on appellant's behalf. They both stated appellant was at Ms. Jarrell's house in Mt. Vernon the night of July 22, 2008. Ms. Jarrells testified that she had to pick-up the appellant around 8:30 p.m. The pair arrived at Ms. Jarrells' home in Newark, Ohio around 9:15 p.m.

{¶12} On rebuttal, the state recalled Patrol officer Bill Eberts. In rebuttal, Officer Eberts stated appellant never gave him a list of alibi witnesses nor did he state he had a relationship with Shelby Salvagna.

{¶13} The state then recalled Joshua Sawyers. Mr. Sawyers testified that appellant told him he did not want him to testify against him. Mr. Sawyers testified he was in a room with appellant when he saw a brown checkbook and a driver's license. Upon viewing Shelby Salvagna, the witness stated she looked like the person on the driver license. Mr. Sawyers admitted that he told appellant's trial counsel that appellant had not threatened him.

{¶14} The state then recalled Shelby Salvagna, who denied that she ever had a romantic relationship with appellant.

{¶15} Finally, the state called Willard Goslin. Mr. Goslin was Ms. Salvagna's boyfriend. He stated that on July 22, 2008 appellant called after 10:00 p.m. to ask if they could give him a ride. Mr. Goslin testified it was not possible appellant could have been having an affair with his girlfriend.

{¶16} Appellant's jury trial commenced on January 7, 2008. The next day, the jury informed the Court they were unable to reach a verdict and a mistrial was declared. The matter was rescheduled for trial on February 18, 2009. On February 19, 2009, the

jury returned a guilty verdict on both counts as charged in the indictment. Appellant was sentenced to a total of 2 years of incarceration.

{¶17} It is from this conviction and sentence that appellant appeals, raising the following assignments of error:

{¶18} "I. THE COURT ERRED IN ALLOWING THE PROSECUTOR TO IMPEACH JOSHUA SAWYERS WITHOUT ANY SHOWING OF SURPRISE AND AFFIRMATIVE DAMAGE IN VIOLATION OF EVIDENCE RULE 607 AND WITHOUT ISSUING ANY LIMITING INSTRUCTION REGARDING THE PURPOSE FOR WHICH IT WAS ADMITTED.

I.

{¶19} In his sole assignment of error, appellant argues that the trial court erred when it allowed the appellee to confront its own witness, Joshua Sawyers, with his prior statements and by allowing the prosecuting attorney and Sawyers to read portions of those prior statements into the record. The State responds that Sawyers was not impeached with his own prior inconsistent statement but, rather, had his memory refreshed. In considering this issue, we find that even if appellant is correct that the exchange between the prosecuting attorney and Sawyers is best characterized as an impeachment, there was no reversible error.

{¶20} Evid.R. 607 limits impeachment of a party's own witness with a prior inconsistent statement. It provides:

{¶21} "The credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a

prior inconsistent statement only upon a showing of surprise and affirmative damage. * * *"

{¶22} The existence of "surprise" concerning prior inconsistent statements is a decision within the sound discretion of the trial court. *State v. Diehl* (1981) 67 Ohio St.2d 389, 391, 423 N.E.2d 1112; *State v. Reed* (1981) 85 Ohio St.2d 117. Surprise exists if the witness's trial testimony is "materially inconsistent" with a prior statement, and counsel lacked an "express forewarning" from the witness of his or her intent to recant or repudiate the prior statement. *State v. Wisebaker* (Aug. 8, 1996), Pike App. No. 96CA567, citing *Reed* at 125; *State v. Blair* (1986) 34 Ohio App.3d 6, 516 N.E.2d 240. A trial court does not abuse its discretion in finding that the prosecution was surprised when it was aware of a possibility that its witness may change his story, but there is no express notice by the witness that he "would wholly deny his prior statement to the police officers", by the witnesses' testimony differing from his prior statement to police. *State v. Lewis* (1991), 75 Ohio App.3d 689, 696, 600 N.E.2d 764.

{¶23} "Affirmative damage" is explained in the Staff Note accompanying Evid.R. 607:

{¶24} "Requiring a showing of affirmative damage is intended to eliminate an 'I don't remember' answer or a neutral answer by the witness as a basis for impeachment by a prior inconsistent statement."

{¶25} The party's own witness must testify to facts that contradict, deny, or harm that party's trial position before the calling party can use the witness' prior inconsistent statement to impeach. *State v. Stearns* (1982), 7 Ohio App.3d 11, 15, 454 N.E.2d 139.

State v. Holmes (1987), 30 Ohio St.3d 20, 23; *State v. Cantlebarry* (1990), 69 Ohio App.3d 216, 222; *State v. Dillie*, Morgan App. No. 03 CA 003, 2004-Ohio-6367 at ¶ 18.

{¶26} The issue of "surprise" and "affirmative damage" is a factual one. *Moore,* supra*,* at 342; *State v. Lewis* (1991), 75 Ohio App.3d 689, 697*; State v. Blair* (1986), 34 Ohio App.3d 6*.* The issue of whether a party is taken by surprise by a witness it has called "is a decision that is entrusted to the broad, sound discretion of the trial court." *Lewis,* supra*,* at 696, quoting *State v. Diehl* (1981), 67 Ohio St.2d 389, 391.

{¶27} In his written statement, Mr. Sawyers told police that the appellant had bragged to him about stealing a purse. However, on the witness stand Sawyers denied appellant made such a statement and claimed that another person had made the statement. Thereafter, Sawyers continued to struggle against the prosecuting attorney's questions, at times, making statements inconsistent with his prior statement and at times, stating that he did not recall what was said nor what he told the police he had heard. As a result, the prosecuting attorney was permitted by the trial court to use Sawyers' prior statement in questioning Sawyers.

{¶28} A crucial factor in determining whether a party has been "surprised" for purposes of Evid.R. 607 is the quality of the warning a party has received that a witness may repudiate their prior statements on the stand. *State v. Parsons*, Wood App. No. WD-03-051, 2004-Ohio-2216 at ¶ 25.

{¶29} In the case at bar, the following occurred out of the hearing of the jury,

{¶30} "Defense Counsel: He's going to try to impeach him with his prior written statement, but I think he has to show surprise and in an affirmative defense. I don't think he can show that.

{¶31} "Prosecutor: I can show both, the last time I was – I talked to him, he was going to cooperate – this is the first time I've heard him say today he would sit there are say no.

{¶32} "Defense Counsel: I fax you off a new letter that he had written[1].

{¶33} "Prosecutor: He didn't deny anything he said.

{¶34} "Defense Counsel: He said he wasn't going to testify and he had taken the rap for Brett, so you knew he wasn't going to testify.

{¶35} "Court: I'll overrule your objection. You may proceed."

{¶36} (1T. at 156-157).

{¶37} Although Mr. Sawyers may have expressed his reluctance to testify against appellant, he did not indicate that what he told the police was untrue. Nor did Sawyers indicate that he intended to recant the statements at trial. Further, he did not indicate he would testify that his statement to the police was not true.

{¶38} Although, the prosecution should have been aware that there was a possibility that Sawyers might change his story, the prosecutor had not been put on notice that he "would wholly deny his prior statement to the police officers." *State v. Lewis,* supra, 75 Ohio App.3d at 689, 696, 600 N.E.2d 764; *State v. Smith*, Highland App. No. 01CA13, 2002-Ohio-3402 at ¶ 59. In this case, the trial judge was justified in concluding that the prosecutor was surprised by testimony varying from the witnesses' prior written statement.

[1] Appellant refers to a letter that was written by the witness, in which appellant asserts Mr. Sawyers told his cousin that he was not going to testify at trial. The letter was not admitted in evidence during appellant's trial. However, a copy of the letter was provided in supplemental discovery by the defense faxed to the Prosecutor's Office on February 10, 2009.

{¶39} We note that impeachment evidence, such as Sawyers' prior statement, generally should be admitted only for the limited purpose of determining the witness's credibility. See *State v. Dacons* (1982), 5 Ohio App.3d 112, 449 N.E.2d 507, 510-11. The trial court did not issue an instruction so limiting the jury's consideration in this case. Furthermore, in the case at bar, the trial court did not make an express finding of "affirmative damage" before allowing the prosecution to utilize Sawyers' prior statement.

{¶40} Nevertheless, allowing the prosecutor to utilize Sawyers' prior statement, even if in error, was not so egregious as to deny appellant a fundamentally fair trial. *McAdoo v. Elo* (6th Cir 2004), 365 F.3d 487, 494 *cert. denied,* 543 U.S. 892, 125 S.Ct. 168, 160 L.Ed.2d 156 (2004). Reviewing courts, in determining whether the state could impeach its own witnesses, have turned their analysis towards harmless error after they have found that the state did not prove both the surprise and affirmative-damage elements. *State v. Hubbard*, 150 Ohio App.3d 623, 631-632, 2002-Ohio-6904 at ¶ 15, 782 N.E.2d 674; *State v. Lewis,* supra, 75 Ohio App.3d at 697, 600 N.E.2d 764.

{¶41} In the case at bar, Sawyers' testimony prior to the use of the statement he had given to the police was that he, Sawyers, had heard from around the neighborhood that appellant had stolen the purse. (1T. at 158). Further, Sawyers testified that he had observed a brown checkbook and a driver's license with the picture of a heavyset woman with black hair. (Id. at 159-160; 250 -251). Sawyers further remembered seeing an address in Heath, Ohio on the driver license. (1T. at 162). Appellant, as well as others, were in the room at the time Sawyers observed the items. (Id. at 160; 252).

{¶42} In the case at bar, Selby Salvagna testified that appellant, whom she knew, was the person who had stolen her purse. Ms. Salvagna gave the police

appellant's first name, his description and a description of the tattoo on appellant's stomach. (1T. at 102). Further, while she was under oath, she positively identified appellant as the man who had stolen her purse. (1T. at 105). This evidence alone, if believed by the jury, was sufficient evidence to support appellant's conviction even without considering Sawyers' prior statement.

{¶43} The result of the trial was not unreliable nor was the proceedings fundamentally unfair because the appellee was permitted to confront its own witness, Joshua Sawyers, with his prior statements or by allowing the prosecuting attorney and Sawyers to read portions of those prior statements into the record.

{¶44} Appellant's sole assignment of error is overruled.

{¶45} The judgment of the Licking County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Edwards, J., concur

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HON. W. SCOTT GWIN

_____

HON. WILLIAM B. HOFFMAN

_____

HON. JULIE A. EDWARDS

[Cite as *State v. Dickie*, 2009-Ohio-5443.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
BRETTAN DICKIE	:	
Defendant-Appellant	:	CASE NO. 2009-CA-00029

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Court of Common Pleas is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

_____
HON. JULIE A. EDWARDS