

[Cite as *State v. Porter*, 2010-Ohio-3980.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 24996

Appellee

v.

TERRY L. PORTER

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 08 09 2982

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 25, 2010

WHITMORE, Judge.

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

I

{¶2} Juan Richards met Porter on Friday, September 5, 2008, at the Haven of Rest (“the Haven”). When the two spoke briefly that day, Porter asked Richards for money. Richards indicated that he did not have any money, but planned on bringing money with him when he returned to the Haven after the weekend. Richards next saw Porter on Sunday afternoon, standing under a bridge on Market Street. Richards and another friend went down to speak with Porter after Porter called Richards over. Again, Porter asked for money. Although Richards had approximately \$170 with him, he stated that he did not have any money and then attempted to leave. Porter grabbed Richards from behind and began choking him. Another man repeatedly hit Richards in the face and eventually stabbed him in the leg. All the while, Porter continued to

choke Richards and told him to give up his money. Richards eventually lost consciousness. When he awoke, he was alone and his money was gone. Richards climbed back to the street and sought help. Police later identified Porter and arrested him.

{¶3} On September 22, 2008, a grand jury indicted Porter on one count of aggravated robbery, in violation of R.C. 2911.01(A)(1)/(3), and one count of felonious assault, in violation of R.C. 2903.11(A)(1)/(2). The matter proceeded to a jury trial on July 22, 2009, and the jury found Porter guilty on both counts. The trial court sentenced Porter to ten years in prison.

{¶4} Porter now appeals from his convictions and raises three assignments of error for our review.

II

Assignment of Error Number One

“THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED DEFENDANT-APPELLANT PORTER’S MOTION FOR JUDGMENT OF ACQUITTAL UNDER CRIM.R. 29.”

{¶5} In his first assignment of error, Porter argues that his convictions are based on insufficient evidence. We disagree.

{¶6} 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.

{¶7} R.C. 2911.01(A)(1)/(3) provides, in relevant part, that:

“No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, *** shall do any of the following:

“(1) Have a deadly weapon on or about the offender’s person or under the offender’s control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

“***

“(3) Inflict, or attempt to inflict, serious physical harm on another.”

Whoever violates R.C. 2911.01(A)(1)/(3) is guilty of aggravated robbery. R.C. 2911.01(C).

{¶8} R.C. 2903.11(A)(1)/(2) provides, in relevant part, that:

“No person shall knowingly *** [c]ause serious physical harm to another ***; [or] [c]ause or attempt to cause physical harm to another *** by means of a deadly weapon or dangerous ordnance.”

“A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.” R.C. 2901.22(B).

Whoever violates R.C. 2903.11(A)(1)/(2) is guilty of felonious assault. R.C. 2903.11(D)(1)(a).

{¶9} Porter does not set forth the elements of either of his two convictions and does not explain which elements he believes the State failed to prove. See App.R. 16(A)(7). He merely asserts that his convictions are based on insufficient evidence because “[t]he testimony of Richards stretches credibility.” Yet, a sufficiency challenge tests the State’s production of evidence, not the persuasiveness of the evidence produced. *State v. Moultry*, 9th Dist. No. 25065, 2010-Ohio-3010, at ¶20. Richards testified that when he turned to leave the area where Porter and three others were standing, someone grabbed him from behind and placed him in a choke hold. He specifically identified Porter as his assailant both at the hospital when he received treatment and at trial. He testified that Porter repeatedly told him to surrender his

money and choked him while another person hit him in the face and stabbed him in the leg. Richards lost consciousness, sustained serious facial injuries, and suffered a stab wound as a result of the attack. When Richards regained consciousness, he was alone and his money was gone. Based on the foregoing, the State presented sufficient evidence that Richards sustained serious physical harm as the victim of a theft offense and that Porter was one of his assailants. Porter's argument that his convictions are based on insufficient evidence lacks merit.

Assignment of Error Number Two

“DEFENDANT-APPELLANT’S CONVICTION WAS AGAINST THE
MANIFEST WEIGHT OF THE EVIDENCE.”

{¶10} In his second assignment of error, Porter argues that his convictions are against the manifest weight of the evidence. We disagree.

{¶11} When considering a manifest weight argument, the 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 339-40.

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.

{¶12} Porter seems to argue that the jury erred by convicting him because the evidence does not tend to show that he perpetrated the crimes against Richards. He challenges Richards' identification of him and seems to argue that another individual, Robert Hoard, could have committed the crimes.

{¶13} Richards testified that Porter asked him for money the first time they met. At that time, Richards only knew Porter by his first name. Richards specifically told Porter that he hoped to have money with him when he returned to the Haven after the weekend. On Saturday, September 6, 2008, Richards went to Cleveland and borrowed \$200 from a friend. He returned to the Haven on Sunday morning at about 8:30 a.m. and discovered that his personal effects were locked inside the building. Richards walked around outside and to the Speedway down the street. Upon his return, he joined a man from the Haven who he knew as Chris. The two stood at a bridge on Market Street for a short time and smoked a marijuana blunt. They then walked to a passageway next to the bridge that led down to railroad tracks. Richards saw Porter standing by the railroad tracks with two other men.

{¶14} Porter called Richards to him and asked if he could borrow some money. Richards told Porter he did not have any money. Subsequently, Richards indicated to Chris that the two should leave and turned to walk back up the passageway. Porter grabbed Richards by the neck when Richards' back was turned and placed him in a choke hold. Richards struggled against the hold as Porter cut off his air. While the two were struggling, one of the men who was with Porter began to hit Richards in the face with what Richards believed was a brick. Richards could only identify this individual as a "bald-headed guy." Porter and Richards fell over, and Porter continued to choke Richards while saying "[w]here's the money, give me the money." The bald-headed man pulled out a knife, and both he and Porter threatened to kill Richards if

Richards did not hand over his money. The bald-headed man stabbed Richards in the leg as Porter continued to choke him. Richards lost consciousness and later awoke alone, without any money. Richards slowly climbed back up to Market Street and called for help. A woman came to his aid and called for an ambulance. Richards could not remember exactly what he told the woman, but thought he told her that he had been attacked by a man from the Haven. He gave the woman a brief description of the man.

{¶15} Officer Donald Sears testified that he arrived at the scene while emergency personnel were attending to Richards' injuries. Officer Sears described Richards as "dazed" and noted that Richards was unable to give Officer Sears his own name. Emergency personnel transported Richards to the hospital, and Officer Sears interviewed the woman who had helped Richards. Based on his interview with the woman, Officer Sears learned that Richards had been attacked by "a black male with a dreadlocks hairstyle" who was a part of the Haven's program. A supervisor at the Haven was able to give Officer Sears the names of two individuals who might match the description Richards gave. One was Porter and the other was a man named Robert Hoard. Hoard wore his hair in tight braids instead of loose dreadlocks and had an alibi. Porter, however, had signed out from the Haven the previous day and never signed back in.

{¶16} Officer William Suggest interviewed Richards in the hospital. He brought along a photo array comprised of pictures from the Bureau of Motor Vehicles. The photo array included Porter's picture, and Richards immediately selected Porter as his assailant when he viewed the array. Richards also later identified Porter as his assailant at trial. Officer Suggest interviewed Porter during the investigation. Porter claimed that he was with his roommates Johnny Brooks and Sandra Palmer all day on the Sunday Richards was attacked.

{¶17} Brooks testified at trial that Porter came to his apartment on Monday, September 8, 2008, and told him that the police were looking for him. Porter asked Brooks to be his alibi and to tell the police that they were together all day on Sunday. When Brooks told Porter he would not lie for him, Porter became angry, punched Brooks, and left. Palmer testified that she witnessed Porter punch Brooks and then leave the apartment.

{¶18} Based on the record, we cannot conclude that the jury erred in convicting Porter. Richards identified Porter as his assailant by appearance shortly after the attack, by photograph when presented with a photo array at the hospital, and in person at trial. Moreover, Porter lied to police about his whereabouts on the day of Richards' attack. Porter's second assignment of error lacks merit.

Assignment of Error Number Three

“PORTER’S DUE PROCESS RIGHTS WERE VIOLATED WHEN HE WAS IDENTIFIED FOLLOWING AN IMPERMISSIVLY (sic) SUGGESTIVE PHOTO ARRAY, REQUIRING REVERSAL OF HIS CONVICTION.”

{¶19} In his third assignment of error, Porter argues that the trial court violated his constitutional rights by admitting evidence of an impermissibly suggestive photo array. He argues both that the photo array itself was defective and that the identification Richards made when viewing the array was unreliable.

{¶20} Porter neither filed a motion to suppress the photo array below, nor objected to the testimony about the photo array at trial. Accordingly, Porter forfeited any objection with regard to the photo array and only may argue plain error on appeal. See *State v. Rucker*, 9th Dist. No. 25081, 2010-Ohio-3005, at ¶52; *State v. Taylor*, 9th Dist. No. 22882, 2006-Ohio-2041, at ¶17. Yet, Porter has not argued plain error on appeal. “[T]his [C]ourt will not sua sponte

undertake a plain-error analysis if a defendant fails to do so.” *State v. Kleinfeld*, 9th Dist. No. 24736, 2010-Ohio-1372, at ¶10. Porter’s third assignment of error is overruled.

III

{¶21} Porter’s 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

MOORE, J.
CONCURS

DICKINSON, P. J.
CONCURS, SAYING:

{¶22} I concur in the majority’s judgment and all of its opinion except the statement that this Court “will not sua sponte undertake a plain-error analysis if a defendant fails to do so.” Assuming for purposes of this opinion that Mr. Porter’s failure to move before trial to suppress Mr. Richards’s identification of Mr. Porter was a forfeiture rather than a waiver, the photo-array was not unduly suggestive and the trial court did not commit plain error by failing to suppress testimony about it.

APPEARANCES:

DONALD R. HICKS, Attorney at Law, for Appellant.

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